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Welfare Entitlements in the Era of Devolution

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Court: *"And, indeed they could cutoff anyone they want with no due process whatsoever because there's no entitlement, right?"*

State Government: *"They can."*

Court: *"[T]he bottom line is, it's your position that the State and the counties can deprive a person of TANF benefits without due process of law."*

State Government: *"Yes."*[1]

INTRODUCTION

In 1996, a Republican Congress and a Democratic President enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"),[2] ushering in a new era of public benefits. The Act's fundamental change to the administration and substance of public benefits called into question the applicability of a substantial body of procedural due process doctrine. As a result, unanswered questions remain regarding the applicability of established due process doctrine in the welfare reform context. This Article examines the due process implications of welfare reform implementation.

Procedural due process jurisprudence currently bases its conceptual framework upon the finding of a constitutionally protected life, liberty, or property interest.[3] In the area of public benefits, this analysis inquires into the

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1. Reporter's Transcript at 22, Weston v. Hammons, No. 99-CV-412 (1999).

2. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.).

3. Bd. of Regents v. Roth, 408 U.S. 564, 571-78 (1972) (rejecting the previous "rights/privilege" approach to assessing the applicability of procedural due process protections and articulating the "liberty/property" approach). *See infra* Part II for a discussion of the historical evolution of procedural due process during the development of the administrative state.

existence of a requisite property interest.[4] Courts traditionally have held that the existence of a legitimate expectation, typically referred to as an entitlement, provides the basis for finding a property interest.[5] Since the Supreme Court stated in *Goldberg v. Kelly* that welfare benefits "are a matter of statutory entitlement for persons qualified to receive them,"[6] states have been required to provide evidentiary hearings to welfare recipients prior to terminating their benefits.[7] Given the changes enacted with the passage of PRWORA, however, the Court's finding in *Goldberg* may no longer resolve the question of whether procedural due process applies to the administration of public assistance.

Under PRWORA, Congress devolved considerable policymaking authority to the states, first order devolution, and specified that the statute should not be interpreted to entitle any person to welfare assistance.[8] This express statutory disclaimer of entitlement has reopened the question of whether procedural due process protects a welfare recipient's interest in the receipt of benefits. Moreover, some states are experimenting with a second order devolution in which policymaking authority is devolved from the state to county or local governments.[9] The confluence of devolution with the statutory "no entitlement" disclaimer leaves welfare recipients more vulnerable to arbitrary and unchecked government action. In one state that operates under a system of

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4. This Article, similar to most cases in this area, focuses exclusively on a property interest analysis. *See* Goldberg v. Kelly, 397 U.S. 254, 262 n. 8 (1970) (finding that "welfare entitlements" are more analogous to property than they are to a "gratuity"); *see also* 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); 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). Some scholars, however, have argued that the denial of public benefits may also, or alternatively, involve a liberty interest. *See, e.g.*, William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 477 (1977); Kristin Connelly McAdams, *On Requiring Responsibility: The Constitutionality of Conditioning AFDC Benefits upon the Insertion of the Norplant Contraceptive*, 19 OKLA. CITY U. L. REV. 309, 320 (1994).

5. *Roth*, 408 U.S. at 577 (explaining that before an individual will be deemed to have a property interest in a benefit, he must show "more than an abstract need or desire for it. . . . He must, instead, [show] a legitimate claim of entitlement to it.").

6. *Goldberg*, 397 U.S. at 261-62 (1970).

7. *Id.* at 267 (reasoning that a pre-termination hearing is justified when the hearing requirement does not impose more than rudimentary due process requirements upon the state or federal governments). The hearing has "one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits." *Id.*

8. PRWORA, 42 U.S.C. § 601(b) (1996).

9. *See infra* Part IV.

second order devolution,[10] for example, some counties distribute government monies without any written standards.[11] This Article analyzes whether due process protects welfare recipients from such arbitrary government action in this era of devolution.

The question of whether recipients retain Fourteenth Amendment procedural due process rights under welfare reform implicates significant constitutional and practical considerations. Constitutionally, the arena of public benefits and the legal concept of entitlements within procedural due process doctrine have been tightly interwoven. Since the passage of PRWORA in 1996, however, the precedential utility of the analytical concept of a welfare entitlement is uncertain. Pragmatically, application of procedural due process determines a public benefit recipient's right to contest the termination of benefits as well as the manner and forum in which any challenge will be heard.[12] Further, constitutional procedural due process more securely protects an eligible recipient's stream of benefits, regardless of whether a state or local law provides some right to process.[13]

This Article analyzes whether public law entitlements exist in the context of PRWORA's first order devolution from the federal to state governments, as well as some states' second order devolution from state to county or local governments. It concludes that while the application of established procedural due process requirements to PRWORA may differ from pre-reform welfare programs, the result remains the same: governments cannot distribute cash assistance without adhering to basic notions of due process. In Part I, this Article briefly summarizes the development of welfare policy from its initial federalization in 1932 to the devolution of federal authority to the states in 1996. It then juxtaposes the history of welfare policy with the current statutory scheme to illustrate how the statutory changes implicate procedural due process. Part II traces the evolution of Fourteenth Amendment procedural due process jurisprudence during the emergence of the welfare state and provides the framework necessary to analyze the procedural due process implications of PRWORA.

With this analytical framework established, Part III examines the procedural due process questions raised by PRWORA's changes. It suggests that the statutory "no entitlement" declaration does not determine conclusively whether recipients retain constitutional procedural due process protections. Applying a public law analysis, this part then postulates that PRWORA creates legitimate expectations to the receipt of benefits in two ways. First, the federal statutory

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10. COLO. REV. STAT. § 26-2-705(c) (2000) (devolving authority to local county governments); COLO. REV. STAT. § 26-2-714 (2000) (establishing county block grant formula). *See infra* Part IV (containing a detailed discussion of Colorado's implementation of TANF).

11. *See infra* Part IV.B (discussing Colorado counties operating without written policies).

12. *See Goldberg*, 397 U.S. at 267; *see also* Mathews v. Eldridge, 424 U.S. 319, 319 (1976).

13. A statutory right to process guaranteed only by state statute is a fragile basis upon which to rest a right since the legislature could alter or terminate such protections altogether. As such, in the absence of legislative elimination of the property interest altogether, the constitutional protections assure recipients a level of procedural protections that are more secure.

mandates of "objective criteria" and "fair and equitable treatment" create a legitimate expectation in the receipt of benefits and, therefore, a property interest. Second, the concept and nature of the contractual agreements entered into between recipients and governments also form the basis of legitimate expectations in recipients and, therefore, a property interest.[14] In addition to the legitimate expectations analysis, Part III reasons that the prohibition against arbitrary government action provides recipients with basic procedural fairness protections.

After analyzing the implications of PRWORA's federal-to-state devolution, Part IV of this Article explores the procedural due process implications of second order devolution from the state to county or local governments. An examination of one state's devolution to county government illustrates the dangers that accompany unchecked agency discretion and highlights the continued, and arguably heightened, importance of procedural due process protections. This section then analyzes recent litigation that raises the issue of recipients' due process rights in the context of both first and second order devolution.

The Article concludes that whether one focuses on the concept of property interests, entitlements, and/or legitimate expectations, or on the fundamental requirement that government adhere to the rule of law, states remain accountable to welfare recipients when they offer benefits with conditions that impact the lives of their most impoverished residents.

I. Relevant Changes In Welfare Policy

Contemporary welfare policy has evolved from its initial federalization in 1935 to the devolution of policymaking authority to states in 1996. The pattern of this evolution reveals the underlying public conceptions of poverty and concomitant government policies of different historical periods. In short, between 1935 and 1996, federal assistance programs expanded and contracted, but remained within the purview of the federal government. In 1996, however, PRWORA made monumental changes to public assistance administration by creating a state-controlled block grant program, Temporary Assistance to Needy Families ("TANF"), and abolishing the previous federally controlled Aid to Families with Dependent Children ("AFDC"). The devolution of administrative authority to state and local governments under PRWORA was accompanied by statutory provisions claiming to abolish the federal entitlement to public

14. This paper constitutes part one of a two-part series. In part two, I apply a private law contractual analysis to the PRWORA statutory scheme by analyzing the express and implied "contracts" existing between the government and the recipient of public assistance. Christine N. Cimini, *The New Contract: Welfare, Devolution and Due Process*, 61 Md. L. Rev. (forthcoming March-April 2002). The second part of this series explores the concept of contracts between recipients and government actors on both micro and macro levels. The micro-contractual analysis explores the implications of express contracts entered into between recipients and the government. The macro-contractual analysis explores the implications of implied contracts between the government and those in need through the use of a social contract theory.

assistance benefits and encouraging a contractual relationship between the government and recipients.

A. Historical Background

Prior to the passage of the Social Security Act ("SSA") in 1935, public assistance programs, where they existed, were created and administered at the state or local level.[15] In the absence of an overall federal program, the types of assistance provided by localities varied and comprised a complicated administrative structure.[16] Consistent with the then-existing anti-poverty paradigm, assistance programs were designed to distinguish the "worthy poor," those deemed unable to work, such as the blind or disabled, from the "unworthy poor," those considered able to work.[17] The worthy poor were deemed eligible for assistance while the unworthy poor were denied assistance.[18]

The structure of local administration changed in 1935. After failed attempts to address the hardships of the Great Depression through private charity and local action, Congress passed the SSA, which federalized government public assis-

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15. For descriptions of the local provision of welfare at the turn of the twentieth century, see MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 217 (1996) ("[D]espite nearly two decades of centralization, public welfare remained an overwhelming local responsibility, and the local boards that dispensed poor-relief still composed a confused, bewildering administrative pattern."); see also JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 21, 22 (1995) ("At the close of the nineteenth century. . . , and just before the enactment of the present categories, the great mass of the poor were helped, if at all, through outdoor relief at the local levels."); FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR 45-48 (1971) (describing the maintenance of local poverty assistance programs from colonial times through the beginning of the Great Depression).

16. *See* KATZ, *supra* note 15, at 217; PIVEN & CLOWARD, *supra* note 15, at 46 n.2.

17. *See* HANDLER, *supra* note 15, at 10-20; *see also* Joel F. Handler, *"Ending Welfare As We Know It"—Wrong For Welfare, Wrong For Poverty*, 2 GEO. J. ON FIGHTING POVERTY 3, 4-5 (1995); THEODORE R. MARMOR, ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE 23-24 (1990) (describing the behaviorist conception of social welfare policy, which views the role of welfare as "inducing the poor to behave in a more socially acceptable manner").

18. *See* HANDLER, *supra* note 15, at 11 ("It was recognized that certain categories of the poor were outside the labor market—the aged, the impotent, the sick, feeble and lame. For this class, the work ethic, or moral behavior, was not at issue. At first, the 'worthy poor' were given licenses to beg in designated locations; then publicly gathered alms were provided so that they would not have to beg. [In contrast,] [t]he able-bodied received very different treatment. Idleness was [considered to be] the 'mother and root of all vices.' "). One drawback to the moralistic approach of pre-federalized public assistance was the subjectivity of the classification of "worthy" or "unworthy" poor. For example, until the early 1900s, localities uniformly considered single mothers with children "unworthy poor," and refused to provide them cash assistance. *See* HANDLER, *supra* note 15, at 22 (citing ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES (1982)). Not until between 1910 and 1925 did this classification begin to change and allow for government policies designed to assist single parents and children. *See* Handler, *supra* note 17, at 5 (citing WINNIFRED BELL, AID TO DEPENDENT CHILDREN (1965)) (explaining that by 1925 similar ADC statutes were enacted in almost all states); Mark Leff, *Consensus For Reform: The Mothers' Pension Movement in the Progressive Era*, 47 SOC. SERV. REV. 397, 401-02 (1983) (listing various states' eligibility requirements for assistance programs instituted after 1910).

tance grants.[19] The 1935 SSA was broad in scope and created a variety of different social service programs, including old age insurance, public assistance to the aged, unemployment compensation for the jobless, public assistance to disabled children, and federal money for public health work.[20] The SSA also included the first federal public assistance program for dependent children in single-parent families, titled Aid to Dependent Children ("ADC").[21] Under ADC, the federal government provided money to state governments in order for states to supervise and expand upon existing "mothers' aid programs" that were being dismantled due to a lack of funding.[22] Until the devolution of authority for public assistance administration in 1996, the 1935 SSA's model of federalized assistance for those in poverty remained the assumed model of administration.[23]

By 1950, the demographics of the country, and of those individuals receiving ADC, had changed and the number of dependent children in single-parent families receiving grants outnumbered individuals on other types of public assistance.[24] In addition to a large increase in the number of recipients, the racial makeup of those on assistance also changed. What previously had been a pool of recipients largely comprised of white widowed women was now shifting to a pool dominated by single black women with children.[25]

Concurrent with this period of demographic change, ADC policy also changed. In 1950, Congress amended the SSA to provide cash assistance grants to "caretaker" mothers with dependent children, changing the name from Aid to Dependent Children to Aid to Families with Dependent Children.[26] This change permitted the single parent, in addition to the child, to receive assistance and thereby increased the amount of overall family benefits. While the amount of cash assistance provided to individual families may have increased, however, a number of states instituted punitive administrative policies designed to decrease the number of recipients of AFDC.[27]

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19. *See* WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 273-99 (1999); KATZ, *supra* note 15, at 220-42.

20. Social Security Act of 1935, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§1301-1397ii (2000)) ("SSA").

21. *See* TRATTNER, *supra* note 19, at 290.

22. *Id.*

23. *See, e.g.*, Leonard Weiser-Varon, *Injunctive Relief From State Violations of Federal Funding Conditions*, 82 COLUM. L. REV. 1236, 1236-37 (1982) (describing the cooperative federalism model of administration used to administer public assistance programs).

24. *See* TRATTNER, *supra* note 19, at 309.

25. *See id; see also* PIVEN & CLOWARD, *supra* note 15, at 135-36.

26. *See* TRATTNER, *supra* note 19, at 309. The administration of public assistance on the federal level also changed in 1953 when the government created the Department of Health Education and Welfare to oversee implementation of the SSA. *See id.* at 295.

27. *See id.* at 309. For example, states created residency requirements designed to deny assistance to new residents migrating from other areas and investigated recipients to ensure they met certain fitness requirements. These requirements were later found to be unconstitutional. *See* Saenz v. Roe, 526 U.S. 489, 506-07 (1999) (reaffirming the invalidation of residency requirements); Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (invalidating residency requirements); Parrish v. Civil Serv. Comm'n, 425 P.2d 223,

During the 1960s and 1970s, the federal program underwent another period of dramatic expansion. Technological innovations decreased the need for agricultural workers in rural areas, and large numbers of persons migrated to urban centers.[28] The need for unskilled labor was declining in urban areas, however, and those unable to obtain suitable employment sought public assistance.[29] Between 1960 and 1970, the number of individuals on public assistance increased from six million to more than twelve million.[30]

At the same time, government policy regarding the appropriate role of welfare programs in the eradication of poverty underwent a transformation. In 1962, President Kennedy signed into law the Social Services Amendments, which increased the federal government's financial support to the states for welfare programs from fifty percent to seventy-five percent.[31] In 1964, President Johnson augmented the late President Kennedy's "War on Poverty" with a thirteen-point program, followed seven months later by the passage of the Economic Opportunity Act.[32] These programs not only broadened the scope of assistance, but also expanded aid beyond cash assistance, adding supportive services such as counseling and job search assistance.[33] Thus, the 1960s and 1970s served as a period of expanding federal anti-poverty programs in both the number of recipients served and the actual services provided.[34]

In stark contrast to the prior two decades, the years between 1980 and 1990 marked a period of constriction of the federal public assistance system. Public opinion embraced rhetoric characterizing AFDC and food stamps as tending to undermine individual responsibility and create a state of dependency.[35] Likewise, the Reagan era saw a significant reduction of government spending on some

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225 (1967) (finding that midnight raids by welfare workers to uncover men in the home constituted an invasion of privacy).

28. *See* TRATTNER, *supra* note 19, at 313-14.

29. *See id.* at 314.

30. *See id.* at 314 n.5 (explaining that of the six million individuals that began receiving public assistance between 1960 and 1970, approximately five million had been receiving AFDC); *see also* PIVEN & CLOWARD, *supra* note 15, at 197-98 (challenging the conclusion that the increase in the welfare roles resulted from urban migration and increased poverty and arguing that the welfare policies of the times were a political response to political disorder).

31. TRATTNER, *supra* note 19, at 320.

32. 42 U.S.C. § 2701 (1964). *See also* TRATTNER, *supra* note 19, at 322; Peter B. Edelman, *Toward a Comprehensive Anti-Poverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1710 (1993); TRATTNER, *supra* note 19, at 322-23 (describing the Office of Economic Opportunity, VISTA, Job Corps, Operation Headstart, and the Community Act Program and the reasons they were created).

33. *See* TRATTNER, *supra* note 19, at 322-23 (explaining that the basis of the policy was to provide not only financial assistance, but also counseling, instruction, assistance building self-esteem, and other supports to encourage individuals to get jobs).

34. In fact, the vastest expansion of the welfare state occurred during Richard Nixon's presidency. *See* TRATTNER, *supra* note 19, at 350.

35. *See* CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980, at 196-236 (1984); *see also* LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA 59 (1992) ("People say that many recipients do not really need welfare, that it promotes dependency, and that too much is being spent on it.").

social service programs and the complete dismantling of other social service programs.[36] The policy toward public assistance shifted from a grant-based program to an increased work-based program.[37] In addition to the policy restrictions, because of inflation, the real money value of recipients' monthly cash assistance grant declined by forty percent between early 1970 and 1988.[38]

In preparation for the 1992 presidential election, then-President George H. W. Bush expressly invited states to submit waivers[39] requesting exemption from various federal regulatory requirements and permitting programmatic experimentation.[40] In light of the broad range of waivers applied for by states and granted by the federal government,[41] state administration of the SSA underwent fundamental restructuring even prior to the 1992 election and the ensuing debates over national "welfare reform."

B. The Personal Responsibility and Work Opportunity Reconciliation Act: Constriction of Benefits and Access and Devolution of Authority

The 1992 Presidential campaign brought the issue of welfare reform into the

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36. HANDLER, *supra* note 15, at 61-62 (1995).

37. In 1988, the Family Support Act created the Job Opportunity and Basic Skills (JOBS) Program, under which any recipient of welfare with a child over three years of age had to work in order to receive assistance. Family Support Act of 1988, Pub. L. No. 100-485, § 201, 102 Stat. 2343 (1988) (codified as amended in scattered sections of 42 U.S.C.). Further, federal law allowed states to require recipients with children over one year of age to work in order to obtain assistance. The law also required recipients who could not get work in the public or private sector to enroll in education or job training as a condition of benefits. Under JOBS, federal administrative officials were authorized to grant waivers allowing for state enactment of various punitive measures. *Id.*

38. *See* TRATTNER, *supra* note 19, at 377.

39. *See* President George H.W. Bush, *State of the Union Message*, N.Y. TIMES, Jan. 29, 1992, at A16.

40. In 1962, the SSA was amended to allow the Secretary of the Department of Health and Human Services ("HHS") to grant waivers from statutory requirements for "experimental, pilot, or demonstration project[s]" that would support the underlying objectives of the SSA. *See* 42 U.S.C. § 1315 (2001). AFDC was administered by each state and, within the federal framework set out in the SSA and the HHS regulations, states had substantial implementation authority. The federal government oversaw state implementation through the submission of state plans. For a detailed discussion of the waiver process, see Susan Bennett & Kathleen Sullivan, *Disentitling the Poor: Waivers and Welfare Reform*, 26 U. MICH. J.L. REFORM 741 (1993).

41. Wisconsin and New Jersey provide examples of how states used federal waivers to create new programs. Wisconsin received a federal waiver to implement Learnfare, a program that cut AFDC benefits for welfare families whose teenage children missed a set number of school days. *See* Lucy A. Williams, *The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard,* 12 YALE L. & POL'Y REV. 8, 17-18 (1994) [hereinafter Williams, *Section 1115 Waivers*] (describing Wisconsin's Learnfare as one of the first waivers processed under the board established during the Reagan administration to oversee federal waivers); *see also* Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 726-36 (1992) (detailing the ways in which the Learnfare program failed to meet its explicit goals). New Jersey implemented a program designed to deny additional cash assistance to unmarried women who had children while on AFDC. *See* Williams, *Section 1115 Waivers* at 26 n.99 (stating that New Jersey's request to implement its Family Development Program was submitted to the federal government on June 5, 1992, and approved July 20, 1992).

national spotlight. With presidential candidate Bill Clinton campaigning on a promise to "end welfare as we know it" and President George Bush addressing the current welfare system as a national problem in need of repair, either candidate's successful election promised some fundamental restructuring of welfare policy.[42] After Clinton's election, he immediately set out to make good on his promise of reforming the welfare system by continuing the pattern of granting federal waivers to states seeking exception from the federal regulatory requirements of welfare administration.[43] In 1994, after the Republicans gained control of Congress, the White House received proposed welfare reform bills from both houses of Congress.[44] Despite public support for welfare reform, Clinton vetoed both bills, claiming the measures were too punitive.[45] In 1996, Congress sent Clinton a third welfare reform bill, softening some of the harsher aspects of the previous bill, and on August 22, 1996 the President signed PRWORA into law.[46]

PRWORA fundamentally altered the previously long-standing cash assistance program to adults with dependent children by abolishing AFDC and creating a new program entitled Temporary Assistance to Needy Families.[47] What had previously been a program of cooperative federalism with unlimited assistance for all who met the requisite eligibility criteria became a block grant program that devolved authority to state governments to run a time-limited assistance program designed to make people self-sufficient through employment. This devolution ofauthority meant that individual states, rather than the federal

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42. *See, e.g.*, Jason DeParle, *From Pledge to Plan: The Campaign to End Welfare*, N.Y. TIMES, July 15, 1994, at A1. Bill Clinton promised, "In a Clinton Administration, we're going to put an end to welfare as we know it . . . . We'll give them all the help they need for up to two years. But after that, if they're able to work, they'll have to take a job in the private sector, or start earning their way through community service." *Id.* at A10. As President, Bill Clinton proposed his own Welfare Reform bill designed to limit welfare eligibility to a maximum of two years, during which time the recipient would receive education and training. *See* Press Release, U.S. Department of Health and Human Services, The Work and Responsibility Act of 1994 (June 1994), *at* http://www.hhs.gov/news/press/pre1995pres/ 940601a.txt. For the text of the bill as introduced, see The Work and Responsibility Act of 1994, H.R. 4605, 103d Cong. (2d Sess. 1994).

43. Any state can apply to the federal government for an exemption from specific federal regulatory requirements. This exemption is known as a waiver. Once a state obtains a waiver, it is permitted to administer its welfare program without regard to the federal requirement from which it has been exempted. *See* Williams, *Section 1115 Waivers, supra* note 41, at 8. For critiques of the waiver process, see, for example, *id.* at 13-24; Vernellia Randall et al., *Section 1115 Medicaid Waivers: Critiquing the State Applications*, 26 SETON HALL L.REV. 1069, 1096-1108 (1996); Bennett & Sullivan, *supra* note 40, at 758-80.

44. H.R. 3500, 103d Cong. §101 (2d Sess. 1994); S. 1795, 103d Cong. (2d Sess. 1994).

45. *See* Judith Havemann, *Clinton Vetoes Welfare Measure That Would Have Shifted Power To The States*, WASH. POST, Jan. 10, 1996, at A4. For a good description of competing Congressional proposals and President Clinton's ability to veto both while still standing behind his pledge to "end welfare as we know it," see Peter Edelman, *The Worst Thing Bill Clinton Has Done*, THE ATLANTIC MONTHLY, Mar. 1997, at 43.

46. PRWORA, 42 U.S.C. § 1305 (1996).

47. 42 U.S.C. §§ 601-619.

government, established eligibility criteria and administered the cash assistance program.

Constriction of Benefits and Access

Through a series of time limits, prohibitions and affirmative obligations, PRWORA changed how long, to whom, and under what conditions recipients could obtain and retain assistance. In place of the previously unlimited term of assistance, TANF imposed a sixty-month lifetime limit.[48] TANF also restricted recipient eligibility and prohibited states from providing assistance to particular groups of otherwise eligible recipients.[49] Federal work requirements were strengthened, mandating that recipients of TANF be involved in a "work-related activity" within two years of receipt of assistance.[50] In addition, unless a state opted out, recipients had to be involved in volunteer community service within two months of receipt of assistance.[51] To assure compliance with the work obligations, PRWORA required states to have a specific number of single and two-parent families participating in work activities within a specified time or risk fiscal sanctions.[52]

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48. 42 U.S.C. §§ 608(a)(7)(A), (C)(ii). 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. 42 U.S.C. § 608(a)(7)(C)(i), (iii). The statute permits states to exempt only twenty percent of their caseload. 42 U.S.C. § 608(a)(7)(C)(ii). *See also* 45 C.F.R. 264.1-264.3 (2002), 64 Fed. Reg. 17845-49 (Apr.12, 1999) (preamble discussion).

49. 42 U.S.C. §§ 601-603. In fact, the statute prohibits states from providing assistance to families without minor children, § 408(a)(1); families that do not assign certain support rights to the state, § 408(a)(3); teenage parents who do not attend high school or other equivalent training programs, § 408(a)(4); teenage parents not living in adult-supervised settings, § 408(a)(5); families that have received TANF funds for sixty months, § 408(a)(7); fugitive felons and probation and parole violators, § 408(a)(9); or parents on behalf of minor children who are absent from the home for a significant period of time (forty-five consecutive days, or, at the option of the state, such period of not less than thirty and not more than 180 consecutive days), § 408(a)(10).

50. 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 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.* at § 607(d). While the statute lists these activities, states are permitted to further define each category. 45 C.F.R. §§ 261.30-261.36 (2001).

51. 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).

52. *See* 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, at 37-42 (Aug. 1996), *available at* http://www.clasp.org/pubs/TANF/detail.pdf (comparing the participation rates for all families with those for two-parent families).

Federal Devolution and State Implementation

In addition to constricting benefits and access to public assistance, the federal government devolved authority to set eligibility criteria and administer TANF to the states, changing the public assistance landscape in several fundamental ways. First, TANF dismantled the previous federal eligibility criteria and replaced them with a system of state responsibility for development of eligibility criteria, with only minimal federal guidelines.[53] Second, federal funding was awarded through block grants to the states, rather than through AFDC's model of direct federal funding.[54] Third, while PRWORA devolved authority to state and local governments, the federal government retained only limited ability to enforce statutory requirements against the states.[55] Fourth, the new statutory scheme permitted states to require recipients to enter into agreements with the government in order to receive benefits. Some form of these agreements was required in each state and the District of Columbia.[56] Finally, the statute contained an express "no entitlement" provision.[57] This section examines the changes precipitated by enactment of PRWORA on the federal level and its implementation on the state level, all of which raise questions regarding the continued existence of statutory entitlement that has been a fundamental component of federal public assistance since 1970.

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53. Under the SSA, "all eligible individuals" were entitled to receive assistance. Social Security Act Amendments of 1950, 42 U.S.C. § 602(a)(10)(A)(1990). PRWORA, in contrast, expressly states, "nothing in the statute shall be interpreted to entitle any individual or family to assistance under any state program." 42 U.S.C. § 601(b).

54. In partisan terms, Democrats have historically favored "entitlements" or "categorical eligibility," while Republicans have favored "block grants." *See* Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL'Y REV. 297, 301-02 (1996) (Symposium Issue) (contesting the idea that "entitlements" and "block grants" are exclusive). "The real constraints on state power seem to be in the categorical nature and detailed criteria of the program to which entitlements adhere. The true enemy of state discretion would seem to be the narrow programmatic scope and multiple requirements, not the existence of a Federal statutory entitlement." *Id. See also* Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs*, 14 YALE J. ON REG. 123, 146 (1996) (exploring the issue of whether block grants are truly "rooted in federalism"). While the author concedes that the concept of block grants might be rooted in part in the desire for smaller government and increased freedom of state and local governments, he contests the assumption that block grants are justified by either efficiency or experimentation. *Id.*

55. *See* 42 U.S.C. § 617 (detailing limited enforcement); *see also* JULIE A. NICE & LOUISE G. TRUBEK, POVERTY LAW: THEORY AND PRACTICE 193 (Supp. 1999) (explaining limited enforcement provisions); GREENBERG & SAVNER, *supra* note 52, at 47 (same).

56. *See* 42 U.S.C. § 608(b); *see also Hearing on Welfare Reform Before the Senate Comm. on Finance*, 104th Cong. 1 (1995) (statement of Sen. Tom Harkin) ("Welfare must be changed from a hand out to a hand up. Receipt of AFDC benefits must be conditioned on a signed contract between the recipient and the state which outlines the steps the recipient will take to become self-sufficient and a date by which they will be off welfare.").

57. 42 U.S.C. § 601(b) (1996).

a. Devolution Under the Federal Statute

PRWORA abolished the federal mandate of assistance as well as the federal eligibility criteria that were hallmarks of AFDC. Under federal AFDC law, states were required to provide assistance to all families who applied and met the eligibility criteria established under federal and state law.[58] This statutory provision assuring benefits to all eligible families formed the basis of the federal statutory entitlement. Unlike AFDC, TANF does not require that federally funded benefits be provided to "all eligible individuals"[59] nor does the statute impose federally mandated eligibility criteria. Instead, states may use block grant monies in any manner reasonably calculated to accomplish the purpose of the act.[60] Though the statute mandates that states use "objective criteria for the delivery of benefits and determination of eligibility and for fair and equitable treatment" of recipients, states are free to create their own programs within those broad parameters.[61] Thus, as compared with AFDC, TANF reduced the federal government's previously comprehensive oversight of welfare programs.[62]

TANF also made significant changes in the areas of funding and enforcement. While AFDC employed a cooperative federalism model, in which joint funding by the federal and state governments was coupled with administration by the states under federal guidelines,[63] PRWORA provided for a fixed lump sum

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58. Social Security Act Amendments of 1950, 42 U.S.C. § 602(a)(10)(A) (1990).

59. *See* PRWORA, 42 U.S.C. § 608(a) (2001).

60. 42 U.S.C. § 604(a)(1) (providing that states can use the grant "in any manner reasonably calculated to accomplish the purpose of this part."). The purpose of the block grant is "to provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; end the dependence of needy parents on government benefits by promoting job preparation, work and marriage; 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 encourage the formation and maintenance of two-parent families." 42 U.S.C. §§ 601(a)(1)-(4). Some states have interpreted this as meaning that states could use TANF monies in ways that indirectly serve the purposes of the legislation rather than directly providing individual cash assistance. *See, e.g.*, Sewell Chan, *D.C. Welfare Funds To Go To Children; Critics Say $12 Million Shift Irresponsible*, WASH. POST, Aug. 10, 2000, at B1 (explaining that twelve million dollars in federal TANF funds were used to create early childhood, after-school, and youth entrepreneurship programs); Jim McLean and Chris Grenz, *Use of Welfare Grant Debated*, TOPEKA CAPITAL-JOURNAL, Aug. 30, 2000, at A7 (alleging that Kansas used nearly half of the $101.9 million annual federal TANF grant to provide foster care for abused and neglected children); Jim Myers, *Money for Poor Unspent*, TULSA WORLD, Jan. 16, 2000, at 1 (detailing that in Fiscal Year 1999, Oklahoma had $61.4 million in unspent TANF funds).

61. 42 U.S.C. § 602(a)(1)(B)(iii) (mandating that each state submit "a plan that includes a document that sets forth objective criteria for delivery of benefits and fair and equitable treatment").

62. 42 U.S.C. § 617. *See also* GREENBERG & SAVNER, *supra* note 52, at 5 (explaining that the TANF state plans differ from those required under AFDC). Under TANF, "1) the State plan provisions of the Act seek very little information from the State; 2) HHS must determine that a State's plan is complete, but does not otherwise have authority to approve or disapprove a plan; and 3) it is not clear whether there is any consequence if a State fails to follow its State plan." *Id.*

63. 42 U.S.C. §§ 602-603. *See also* King v. Smith, 392 U.S. 309, 316 (1968) (articulating for the first time the term "cooperative federalism," which describes government programs that are run with concurrent federal and state oversight).

payment[64] to states with significantly reduced federal authority to regulate state conduct.[65]

Also distinct from AFDC, TANF utilizes express agreements between the government and each recipient.[66] PRWORA requires the state agency responsible for administering TANF to undertake an initial assessment of a potential recipient's skills, prior work experience, and employability as the basis for the formulation of a work plan between the agency and the recipient.[67] The AFDC statute lacked a comparable assessment and subsequent agreement provision between the government and recipients.[68]

Finally, while courts had long recognized receipt of AFDC as an entitlement, PRWORA explicitly states that the statute "shall not be interpreted to entitle any individual or family to assistance under any state program funded under this part."[69] These new statutory provisions raise new procedural due process questions that this Article analyzes in Part III.

b. State Implementation of the Federal Statute

Because PRWORA provides flexibility to states, actual implementation varies among states. Though not mandated to do so, each state and the District of Columbia currently accept federal monies and participate in the TANF block

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64. 42 U.S.C. § 603. *See also* GREENBERG & SAVNER, *supra* note 52, at 10-19 (detailing the manner in which the family assistance grant amount is calculated including supplemental grants, penalties, bonuses and loans).

65. 42 U.S.C. § 617 ("No officer or employee of the federal government may regulate the conduct of the states under this part or enforce any provisions of this part, except to the extent expressly provided in this part."). *See also* NICE & TRUBEK, *supra* note 55, at 193 (detailing how the federal statute explicitly limits authority of HHS to regulate state implementation of TANF and explaining that PRWORA requires HHS to enforce the conditions Congress placed on state receipt of federal funds); Mary R. Mannix et al., *Implementation of the TANF Block Grant: An Overview*, 30 CLEARINGHOUSE REV. 868, 871 n.8 (1997) (same); GREENBERG & SAVNER, *supra* note 52, at 8-9 ("It is clear that HHS does not have the authority to 'approve' or 'disapprove' a State plan, but HHS does have the responsibility to determine that the plan provides the information required by law. Presumably, if a State plan fails to provide information required by law, e.g. it does not set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment, the plan will be legally insufficient. However, it is not yet clear what process will be followed if the federal and state governments disagree about the legal sufficiency of the plan or what time frames apply. It appears that it is envisioned that the Secretary will notify the State of an adverse action, and that the State can appeal initially to HHS' Department Appeals Board, and ultimately to the courts.").

66. *Hearing on Welfare Reform Before the Senate Comm. on Finance*, *supra* note 66.

67. 42 U.S.C. § 608(b)(1). "[T]he State program funded under this part shall make an initial assessment of the skills, prior work experience, and employability of each recipient of assistance under the program who:

(A) has attained 18 years of age; or
(B) has not completed high school or obtained a certificate of high school equivalency, and is not attending secondary school."

Id.

68. *See* 42 U.S.C. § 601 (1995).

69. 42 U.S.C. § 601(b) (2001).

grant program.[70] Forty-six states administer the program at the statewide level and five states have devolved nearly complete authority for TANF administration to the county or local governments.[71] Many of the fundamental changes precipitated by devolution from the federal government to states are magnified by second order devolution from state to county government.[72]

Similarly, in the absence of federally mandated eligibility criteria, each state is allowed to create its own eligibility criteria. Within the parameters of basic "maintenance of effort" requirements,[73] a state may use TANF funds in any manner reasonably calculated to meet the general purposes of the act.[74] As a corollary, each state may statutorily define limited or broad regulatory authority over the local government officials who administer the program.[75]

States differ in the actual implementation of their agreements with recipients. As required by federal statute, all states and the District of Columbia conduct assessments of applicants to determine their employability and require recipients to sign agreements with the government prior to receipt of benefits.[76] States vary in the required content of the agreement, though two general types have been created. Sixteen states require recipients to sign "employability contracts," which focus exclusively on employment-related issues.[77] Another eighteen states

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70. STATE POLICY DOCUMENTATION PROJECT, NOTES ON THE TANF DATA, *at* http://spdp.org/tanf/tanfdatnote.htm (last modified Mar. 3, 2000).

71. *See* Matthew Diller, *The Revolution In Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1179-80 (2000) (describing California, North Carolina, Ohio, Colorado, and Wisconsin as states that have devolved authority to local county governments).

72. *See infra* Part IV.

73. *See* GREENBERG & SAVNER, *supra* note 52, at 10. In order for states to receive a full family assistance grant, a state is required to meet a basic maintenance of effort requirement. If the state fails to meet the maintenance of effort requirements, the state funding will be frozen through FY 2002, except for adjustments due to other penalties, bonuses for "high performance states," bonuses for reducing out-of-wedlock birth, or to qualify for additional funding through contingency funds. *Id.* A state's grant will be reduced on a dollar-for-dollar basis if the state fails to spend eighty percent of its "historic state expenditures" for "qualified state expenditures." *Id.* The required maintenance of effort amount is reduced to seventy-five percent if the state satisfies the Act's work participation rate. *See id.* at 11; *see also* 42 U.S.C. § 609(a)(7)(A).

74. *See* 42 U.S.C. §§ 601(a)(1)-(4) (listing goals of TANF program).

75. See *supra,* notes 209 to 213 and accompanying text for a description of Colorado's limited regulatory oversight of the local governmental entities actually administering the TANF program.

76. Though the federal statute refers to the agreements between the government agency and the individual as "individual responsibility plans," this Article will refer to these agreements as either "employability contracts" or "responsibility contracts," both because the author believes these terms more accurately reflect the nature of the legal relationship between the parties and because seventeen states, including Colorado, have adopted the "contract" terminology. STATE POLICY DOCUMENTATION PROJECT, TANF APPLICATIONS, DIVERSION PROGRAMS, EMERGENCY ASSISTANCE, *at* http://www.spdp.org/tanf/tanfapps.htm#div (last modified Mar. 3, 2000). The term "employability contract" will be used to refer to those agreements between the government and recipients that focus exclusively on employment-related issues. The term "responsibility contract" is used to refer to agreements between the government and recipients that include employment-related obligations as well as a broad spectrum of other obligations.

77. The following states require individuals to sign "employability contracts" only: California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Kansas, Louisiana, Massachusetts,

require individuals to sign "responsibility contracts,"[78] requiring work activities and mandating conduct in matters such as child or minor parent school attendance, cooperation with child support enforcement, child immunization or preventive health measures, or life and parenting skills training.[79] Seventeen states require recipients to sign both "employability contracts" and "responsibility contracts."[80] The statutory language and the agreements between recipients and the government play important roles in a due process analysis of the TANF statute.

Despite the federal statute's "no entitlement" prohibition, ambiguity exists as to whether a statutory entitlement to benefits exists. Five states have explicit statutory provisions creating an entitlement to cash assistance.[81] Seventeen states have statutory provisions that deny the existence of a state entitlement to assistance,[82] and the remaining twenty-nine states lack any explicit statutory language regarding entitlement.[83] Notwithstanding such express provisions, some ambiguity still exists as to whether states explicitly denying a statutory entitlement have created state statutory entitlements to assistance. For example, a majority of states include explicit statutory or regulatory language that cash assistance benefits will be provided to all families who meet statutory eligibility requirements.[84] This may make state welfare benefits "a matter of statutory

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Minnesota, New Hampshire, New Mexico, New York, Rhode Island, Vermont, and Virginia. *See* STATE POLICY DOCUMENTATION PROJECT, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES, *at* http://www.spdp.org/tanf.htm (last modified Jan. 11, 2001) [hereinafter SPDP, TANF].

78. The eighteen states that require individuals to sign "responsibility contracts" are: Alabama, Alaska, Delaware, Idaho, Illinois, Iowa, Kentucky, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, Ohio, Pennsylvania, South Carolina, Tennessee, and Texas. *See id.*

79. Federal law requires all recipients to participate in work activities; states must impose financial sanctions on families that refuse to participate without "good cause." 42 U.S.C. § 607(e)(1). Because of this requirement, those states that only have "responsibility contracts" include work requirements in the contract. *See* STATE POLICY DOCUMENTATION PROJECT, FINDINGS IN BRIEF: TANF APPLICATIONS, *at* http://www.spdp.org/tanf/applications/ appsumm.htm (last modified June 19, 2000) [hereinafter SPDP, FINDINGS].

80. The following seventeen states require applicants to sign both an employability contract and a responsibility contract: Arizona, Arkansas, Georgia, Indiana, Maine, Maryland, Mississippi, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, West Virginia, Wisconsin, and Wyoming. *See* SPDP, TANF, *supra* note 77.

81. *See id.* The five states with express entitlement provisions are: Alaska, Hawaii, Maryland, Rhode Island, and Vermont. Also, while New York does not declare an explicit entitlement in the state statute, the state constitution includes a provision that guarantees assistance to poor families and individuals. *See id.*

82. The following seventeen states expressly deny the existence of an entitlement: Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Illinois, Michigan, Montana, North Carolina, North Dakota, Pennsylvania, South Dakota, Tennessee, Washington, West Virginia, and Wisconsin. *See id.*

83. The following twenty-nine states have no explicit language regarding entitlement: Alabama, California, Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, Virginia, and Wyoming. *See id.*

84. The following thirty-three states have express language in their statutes or regulations that benefits will be provided to all eligible families: Alabama, Alaska, Arizona, Arkansas, California, Delaware,

entitlement for persons qualified to receive them."[85] Conversely, twenty-three of the thirty-three states that have such statutory provisions also contain explicit language in state policy that benefit payments are subject to state appropriation or funding.[86] These "subject to available funds" provisions may indicate the lack of an entitlement. Whether the mandatory language and the subject to available funds language create a statutory ambiguity, and the manner in which such statutory conflicts would be construed, is open to interpretation.[87]

The summary of the development of welfare policy set out in this Part illustrates the changes made by PRWORA on both the federal and state levels. This provides a historical foundation for the next Part's analysis of the procedural due process implications of the new act.

II. PROCEDURAL DUE PROCESS IN THE ADMINISTRATIVE STATE

The evolution of Fourteenth Amendment procedural due process doctrine, similar to the history of welfare policy, adapted as the scope and authority of the administrative state changed, in large part due to public assistance lawsuits. In fact, the relationship between welfare policy, public benefits litigation, and the development of the procedural due process doctrine can be described as co-constitutive, each shaping the development of the other.[88] After detailing the doctrinal evolution of procedural due process as it applies to public assistance, this Part concludes with an analysis of the Court's current approach to procedural due process questions.

Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin. *See id.*

85. Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

86. The following twenty-three states have explicit statutory language that benefits are subject to available appropriation: Alaska, Arizona, Colorado, Delaware, Florida, Illinois, Iowa, Kentucky, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Vermont, and Washington. *See* SPDP, TANF, *supra*, note 77.

87. The state requirement that all eligible recipients receive aid and the state contingency that grants be subject to available funds might create an internal statutory conflict. For a discussion of how courts might resolve such a conflict, see ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 41-46 (1997) (explaining that, at times, judges are left to resolve statutory conflicts when the conflict cannot be resolved through reference to other provisions of the statute, traditional canons, or legislative history); see also WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 49 (1994) (rejecting more traditional modes of statutory interpretation and arguing that statutory interpretation is necessarily dynamic as a result of many factors, including politics, individual perspectives of interpreters, and changes in society).

88. For a discussion of co-constitutive theory, see Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392 (2000); Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 99 U. ILL. L. REV. 1209 (1999).

A. Brief History of the Procedural Due Process Doctrine

In the early 1900s, prior to enactment of a federal welfare program, judicial application of procedural due process was limited and relatively uncontroversial.[89] During this period, instead of applying procedural due process, courts responded to burgeoning agency authority by requiring government agencies to adopt strict procedural standards and limiting the substantive areas in which agencies had decisionmaking authority.[90]

In the 1930s, however, with the creation of a national relief system under the SSA and the expansion of the federal administrative state, reliance upon the procedural due process doctrine in challenging government action increased and the procedural due process distinction between "rights" and "privileges" evolved. This rights/privilege distinction enabled the differentiation between government regulation of private property or "rights," which were closely supervised by the court, and government disbursement of benefits or "privileges," which were not closely supervised.[91] Though the rights/privilege doctrine provided the analytical structure for deciding procedural due process questions between 1940 and 1950, subsequent use of the doctrine declined and was, in most respects, dormant.

As government fear of subversive and leftist activity flourished, government agencies implemented programs attempting to actively identify and expunge

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89. *See* Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1044 (1984) ("Although great controversy arose about the applicability of due process to nonprocedural or substantive matters, procedural due process doctrine evolved quietly and steadily. . . . "); Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CAL. L. REV. 146, 147 (1983) ("Before World War II, the provisions of the due process clauses imposed few restraints—either substantive or procedural—upon the government in its dispensation of benefits."); Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 435 (1977) ("[I]n the first half of the twentieth century . . . the Court accepted the state court's determination as to whether certain interests had been created by state law, as long as that determination had a 'fair and substantial' basis in state law."); *see also, e.g.*, McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (1892) (finding that government benefits are not property under the Fourteenth Amendment, so "while petitioner may have a constitutional right to talk politics, he has no constitutional right to be a policeman").

90. *See* Rubin, *supra* note 89, at 1049; *see also, e.g.*, Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 302 (1937) (finding that the utility company could not determine the value of property without presenting the underlying evidence upon which the valuation depends); ICC v. Louisville & N. Ry., 227 U.S. 99, 100 (1913) (describing the Interstate Commerce Commission's power to set railway rates, so long as decision is supported by substantial evidence).

91. As a result of this distinction, courts afforded more Fourteenth Amendment procedural due process protections to private property "rights" than to government benefit "privileges." Simon, *supra* note 89, at 148 (arguing that there are two reasons courts articulated and accepted the rights/privilege distinction). "First, when the Supreme Court construed the Fourteenth Amendment's due process guarantee, it was considerably more concerned with protecting traditional property rights than with protecting [petitioners'] dignitary and political rights. . . . Second, government benefits were much less important then than they are now." *Id. But see* Van Alstyne, *supra* note 4, at 476 (1977) ("Neither this nor the previously considered palliatives and placebos will prove very useful in overcoming the intrinsic conceptual problem of linking the right to due process with the right of property."); Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir 1964) (finding that merely calling a liquor license a privilege does not free the municipal authorities from basic requirements of due process and permit the exercise of uncontrolled discretion).

these perceived threats. In this context, application of the rights/privilege due process analysis proved an inadequate device for limiting often arbitrary agency action or the utilization of vague and subjective agency standards.[92] In the absence of a procedural due process doctrine to adequately address these problems, three other due process doctrines emerged. First, the non-delegation doctrine limited administrative authority to the scope and terms of the legislative delegation.[93] Second, the arbitrariness doctrine applied due process constraints to all adjudicatory administrative actions,[94] requiring agencies to abide by basic notions of fairness when they were involved in adjudication regardless of whether the interest is a right or a privilege.[95] Finally, the unconstitutional conditions doctrine limited an agency's ability to condition the receipt of a benefit on the individual's non-assertion of their existing right.[96] Throughout the 1960s, each of these doctrines had implications for due process analysis.

The year 1970 marked a historic shift in procedural due process as the

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92. *See, e.g.,* Wieman v. Updegraff, 344 U.S. 183, 191 (1952) (invalidating under the Due Process Clause of the Fourteenth Amendment an Oklahoma statute that required employees of a state college to swear that they were not affiliated with certain proscribed organizations).

93. The improper delegation doctrine stands for the principle that while Congress may delegate certain broad powers to administrative agencies, the agencies must then be held to the scope and terms of the specific delegation. *See, e.g.,* Greene v. McElroy, 360 U.S. 474, 508 (1959) (finding that the Department of Defense was not authorized to deprive petitioner of a security clearance absent a trial-type hearing); Kent v. Dulles, 357 U.S. 116, 130 (1958) (denying the Secretary of State unbridled discretion to grant or withhold citizen passports).

94. *See* Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 816 n.260 (1986) (discussing the evolution of the arbitrariness doctrine).

95. *See* Rubin, *supra* note 89, at 1060.

96. The Supreme Court has applied the general principle that the government cannot deny individual benefits on a basis that infringes upon a constitutionally protected interest in a number of contexts. *See, e.g.,* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 680-81 (1996) (finding that independent contractors are protected from termination or prevention of automatic renewal of at-will government contracts when exercising right of free speech); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969) (stating that "[a] constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right' "), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (rejecting the notion that "teachers may constitutionally be compelled to relinquish the First Amendment right they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work"); Speiser v. Randall, 357 U.S. 513, 528-29 (1958) (invalidating a California law requiring individuals who received veterans' property tax exemption to execute a written oath that they did not advocate the overthrow of the United States government); *Updegraff,* 344 U.S. at 192 (finding that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory"); United Public Workers v. Mitchell, 330 U.S. 75, 100 (1949) ("Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed."). *But see* Rust v. Sullivan, 500 U.S. 173, 191 (1991) (upholding a federal regulation that prohibited recipients of federal funds for family planning services from providing counseling on abortion as a method of family planning or providing referral for abortion); Regan v. Taxation with Representation, 461 U.S. 540, 550 (1983) (upholding a provision of the federal tax law that conditions tax exempt status on the requirement that the organization not participate in lobbying or partisan political activities). For an insightful analysis of the unconstitutional conditions doctrine, see Kathleen Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413 (1989).

Supreme Court broke with the previous rights/privilege distinction in the landmark welfare benefits case of *Goldberg v. Kelly*.[97] The Court in *Goldberg* affirmatively rejected the rights/privilege distinction, stating that "[t]he constitutional challenge cannot be answered by an argument that public assistance benefits are 'a privilege and not a right.' "[98] Rather, the Court focused due process analysis upon the question of whether the recipient's interest in avoiding the loss of his benefits outweighed the government's interest in summarily adjudicating eligibility.[99] The Court concluded that, in the welfare context at issue, the importance of the benefit to the recipient outweighed the agency's interest in summary adjudication.[100] Thus, *Goldberg* recognized public assistance as a statutory entitlement as opposed to a gratuity.[101]

Goldberg transformed and consolidated procedural due process doctrine, though the implications of the doctrinal shift were far from certain. For the brief period between *Goldberg* and the 1972 decision in *Board of Regents v. Roth*,[102] the analysis set forth in *Goldberg* was referred to as the "interest approach"[103] or the "importance of the benefit"[104] approach. Just a short time later, however, the Court clarified its new doctrine.

B. Development of the Liberty/Property Doctrine

In 1972, the Supreme Court modified the *Goldberg* approach and focused on the nature, rather than the weight, of the particular interest in determining whether a property interest existed.[105] In *Roth*, the Court drew a distinction between legitimate property, entitling one to procedural due process protection,

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97. 397 U.S. 254 (1970).

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

99. *Goldberg*, 397 U.S. at 262-63. The *Goldberg* Court did not address in its holding, however, the initial question of whether welfare benefits merit constitutional protections because the state conceded that due process protections extended to welfare benefits. *See id.* at 261.

100. *Id.* at 266.

101. *Id.* at 262 n.8.

102. 408 U.S. 564 (1972).

103. Simon, *supra* note 89, at 168; Rubin, *supra* note 89, at 1062.

104. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (laying the groundwork for the more restrictive approach toward what constitutes liberty or property); Bell v. Burson, 402 U.S. 535, 539 (1971) (finding that suspension of issued licenses involves state action that adjudicates important interests and requires due process protections). While the Court in *Morrissey* mentioned the importance of the individual interest, the Court also indicated that "the question is not merely the 'weight' of the individual's interest, but whether the 'nature' of the interest is one within" the liberty/property language of the due process clause. *Id. See also* Monaghan, *supra* note 89, at 407 (reasoning that *Bell* "represented the high-water mark of [the] approach [that] whether an interest deserved due process clause protections involved a simple pragmatic assessment of its 'importance' to the individual").

105. *See* 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). The *Roth* decision is frequently compared with *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).

and a "mere expectation," not rising to the level of constitutionally protected property.[106]

Referred to as the liberty/property doctrine, this approach to procedural due process has survived the last thirty years and remains the dominant procedural due process approach applied by courts.[107] Under the liberty/property doctrine, three elements are required to implicate the due process clause: state action, the existence of a liberty or property interest, and a deprivation of the liberty or property interest.[108] In the context of welfare benefits, the existence of state action is not typically at issue because the government generally grants or terminates assistance directly.[109] Though some questions may arise when the government assigns its obligations to a private entity, courts have frequently found such action to be state action for purposes of due process analysis.[110] Similarly, no question generally exists as to whether a deprivation of property has occurred since cases have consistently held that a deprivation merely requires

106. Under *Roth*, an individual must first show that she has been deprived of an interest in life, liberty or property. *Roth*, 408 U.S. at 569-70. Only if the state deprives an individual of a constitutional interest will a court question the fairness of the procedural protections afforded to the complainant. *Id.* at 569. While this Article focuses exclusively on the existence of a property interest, some authors have argued that the receipt of welfare benefits should be viewed as a "liberty interest." *See, e.g.*, Van Alstyne, *supra* note 4, at 487-90 (arguing that the response to the rights/privilege distinction turned on the protection of well-defined liberty, rather than a new conception of property); McAdams, *supra* note 4, at 318 (describing the possible liberty interests at stake in statutes conditioning receipt of AFDC benefits on a female applicant's use of contraceptives).

107. The liberty/property approach is not without criticism, however. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 19 (1980) (noting that the requirement that an injured party must first show the deprivation of a liberty or property interest has resulted in unreasoned distinctions). "What has ensued has been a disaster, in both practical and theoretical terms. Not only has the number of occasions on which one is entitled to any procedural protections at all been steadily constricted, but the Court had made itself look quite silly in the process—drawing distinctions it is flattering to call attenuated and engaging in disguised premature judgments on the merits of the case before it. It turns out, you see, that whether it's a property interest is a function of whether you're entitled to it, which means the Court has to decide whether you're entitled to it before it can decide whether you get a hearing on the question whether you're entitled to it." *Id.*

108. Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (supporting the principle that the Fourteenth Amendment is designed to protect against unconstitutional action by a state); Perry v. McDonald, No. 00-7869, 2001 WL 1295061 at *10 (2d Cir. Oct. 17, 2001) (explaining that the threshold issue in evaluating a due process claim is whether the plaintiff has a property interest and, subsequently, whether the government deprived the plaintiff of that interest without due process); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 422-29, 431-36 (1996) (explaining that in order for there to be a procedural due process claim, there must be both a property interest and a deprivation of that interest by the state).

109. *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970). *Cf. Shelley*, 334 U.S. at 20 (finding that state action includes "exertions of state power in all forms").

110. Under the state action doctrine there are two exceptions that permit courts to hold private entities to constitutional mandates. The first exception is the "public function exception" under which constitutional limitations apply if the private entity is performing a task that traditionally has been done exclusively by the government. *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (citing cases applying public function exception). The second exception is the entanglement exception, under which constitutional limitations apply if the government has authorized, encouraged, or facilitated the unconstitutional conduct. *See Shelley*, 334 U.S. at 19.

that the action adversely affect the individual's interest.[111]

The more complex issue, however, is whether public assistance is a property interest in the context of welfare reform. Traditionally, due process analysis provides for two categories of property interests. The first type is "legally cognizable" property including real and personal property.[112] The second category includes property defined as legal entitlements, including various government benefits, licenses to engage in a trade or profession and certain explicit and implicit employment contracts.[113] This Article focuses on this second category of property interest.

To constitute a legal entitlement, an individual must have a "legitimate expectation" to receive the benefit.[114] This legitimate expectation must be based upon reasonable and objective grounds, the existence of which are determined by analyzing the legislation creating the benefit.[115] Thus, if the statute contains mandatory, substantive criteria limiting the government's discretion, then the expectation is more likely to be classified as reasonable and subject to procedural due process protections.[116] In the absence of mandatory, substantive criteria, or where government discretion is unfettered, the interest is more likely to be interpreted as a mere expectation not subject to procedural due process protections.[117]

Once it is determined that the government has deprived an individual of a property interest, the Due Process Clause requires an inquiry into the process due the individual.[118] This inquiry balances the importance of the private interest involved against the risk of error or the likelihood of avoiding government error

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111. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 84-85 (1972) (stating that "it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment").

112. *See* Cimini, *supra* note 14 (describing "legally cognizable" property interests).

113. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430-31 (1982) (finding the types of interests protected as property under the entitlement prong "are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact' ") (quoting Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949)).

114. *See Logan*, 455 U.S. at 430 ("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 and Water Div. v. Craft, 436 U.S. 1, 11-12 (1978)).

115. *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests . . . are created and their dimensions 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.").

116. *Cf.* Gardner v. Mayor of Balt., 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).

117. *See id.* at 68 (4th Cir. 1992) (limiting a cognizable property interest to those instances where "the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured") (quoting RRI Realty Corp. v. Inc. Vill. of Southampton, 870 F.2d 911, 918 (2d Cir. 1989)).

118. *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

and the magnitude of the government interest.[119] Through this balancing, the court determines the type of process afforded to the property holder. The court also determines whether the process must be provided prior or subsequent to government deprivation.[120] In the context of public assistance under the previous AFDC program, procedural due process required notice and an opportunity to be heard prior to the deprivation of benefits.[121] The notice and opportunity to be heard necessitated a hearing at which the individual had the right to confront witnesses, present evidence, hire an attorney and have a decision made by a neutral fact finder.[122]

Between the 1970 Supreme Court decision in *Goldberg* and the passage of PRWORA in 1996, the process due to recipients of public benefits seemed a settled question.[123] *Goldberg*, *Roth*, and their progeny relied upon the concept of an entitlement in finding the existence of procedural due process rights. As a result of the fundamental restructuring of public benefits, and because PRWORA expressly denies the existence of a federal entitlement, the procedural due process rights of recipients is now an open question.

III. Due Process Rights Under PRWORA

This Part analyzes whether recipients retain due process rights under PRWORA and concludes that despite PRWORA's express "no entitlement" provision and devolution of administrative authority to state and local governments, recipients of TANF still retain procedural due process protections. After assessing the import of the "no entitlement" provision and concluding that the provision is not determinative, this Part employs two distinct analyses of PRWORA. First, when applying a traditional public law analysis of property interests, recipients retain legitimate expectations in the receipt of benefits through the statutory mandates of "objective criteria" and "fair and equitable treatment" as well as the rights and obligations that arise from the agreements

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119. *Id.* at 334-35 (concluding that due process is not a fixed concept, but rather requires an analysis of the government and private interests affected).

120. The Supreme Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. *See* Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974).

121. *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

122. *Id.* at 267-68 (concluding that due process requires that "a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"). *See also* LaChance v. Erickson 522 U.S. 262, 266 (1988) ("The core of due process is the right to notice and a meaningful opportunity to be heard.").

123. *See* Morel v. Giuliani, 927 F. Supp. 622, 627 (S.D.N.Y. 1995) (stating that "[r]ecipients [of AFDC] have a constitutionally guaranteed right to have an administrative due process hearing to review an agency action affecting their benefits."); Atkins v. Parker, 472 U.S. 115 (1985) (holding that food stamps can be considered "property" under the Due Process Clause); Mathews v. Eldridge, 424 U.S. 319 (1976) (holding that recipients have a property interest in disability benefits for purposes of the Due Process Clause).

entered into between recipients and government entities. Recipients' legitimate expectations support the finding of a property interest. Second, even if state or local governments were to ignore federal mandates and implement PRWORA without legislative standards or contractual agreements, the doctrine of arbitrary action protects recipients from program administration without standards. While this new analysis results in the same conclusion that courts reached when evaluating the AFDC program—namely, that governments are required to abide by procedural due process when distributing government benefits—the manner of reaching this conclusion is distinct.

A. Disclaiming Entitlement

Section 601(b) of PRWORA states that the statute "shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part."[124] On its face, this provision may appear to be a legislative attempt to deny recipients the property interest that affords them procedural due process protections. An analysis regarding the meaning of this statutory language proves more complex. The plain language of the statute is inconclusive because the "no entitlement" provision is subject to various interpretations. Other portions of the statute do not resolve the uncertain meaning because the statute itself contains provisions supporting the existence of an entitlement, thereby creating internal contradictions. Further, assuming that Congress intended the "no entitlement" provisions to strip recipients of their procedural due process protections, such an attempt to legislate constitutional conclusions would be impermissible.

The plain meaning of the "no entitlement" provision is ambiguous because its precise meaning is subject to multiple interpretations, none of which expressly involve the existence or non-existence of a property interest and subsequent procedural due process protections. For example, since a TANF recipient is only eligible to receive benefits for sixty months, one plausible interpretation is that the "no entitlement" language is intended to refer to the time-limited nature of the TANF program, as opposed to the unlimited nature of the AFDC program.[125] The provision could also mean that, as opposed to the AFDC system where funding was ensured for all eligible recipients, when the block grant money awarded to a particular state is depleted, the recipient is no longer entitled to a benefit.[126] Or

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124. PRWORA, 42 U.S.C. § 601(b) (1996).

125. *See* 141 CONG. REC. S13,343 (1995) (statement of Sen. Santorum) ("What this amendment does is continue the entitlement to welfare benefits albeit in a different form. It is not cash, it is vouchers, still an entitlement, Federal dollars to families on welfare in perpetuity. There is no time limit.").

126. 141 CONG. REC. S12,780 (1995) (statement of Sen. Nickels) ("Again, I want to underline 'entitlements.' The Republican package says we want to end welfare as an entitlement; people will not be entitled to receive welfare. We will have a block-grant approach. We will say, '[t]his is how much we will spend.' It will not be an open-ended entitlement."). *See also* Edelman, *supra* note 45, at 43. (" 'Entitlement' has become a dirty word, but it is actually a term of art. It meant two different things in

perhaps the "no entitlement" provision is intended to address the fact that under PRWORA, each state may determine its own criteria for the receipt of assistance.[127] Finally, the "no entitlement" provision could mean that a recipient is ineligible for assistance unless she complies with work requirements or other obligations.[128] Thus, given that the "no entitlement" provision is susceptible to a multitude of interpretations, the provision is itself ambiguous.

In addition to the provision's internal ambiguity, PRWORA as a whole contains provisions that conflict with the "no entitlement" language. For example, the statute requires that states implementing TANF programs "set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment."[129] This provision is in tension with the "no entitlement" provision because the requirement that states develop objective criteria and provide for fair and equitable treatment creates a legitimate expectation that recipients who meet the criteria are entitled to receipt of the benefit.[130] Further adding to a recipient's legitimate expectation, each state has adopted the explicitly authorized option of creating express agreements between the recipient and the government that detail what the recipient must do to receive the benefit.[131] It is reasonable for a recipient to expect that if she performs the required obligations, she will receive the benefit,[132] thus creating a legitimate expectation. Since multiple provisions within the statutory scheme tend to indicate that Congress intended an eligible recipient legitimately to expect benefits, Congress might also have intended to create an entitlement for due process purposes.

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the AFDC program: a federally defined guarantee of assistance to families with children who met the statutory definition of need and complied with the conditions of the law and a federal guarantee to the states of a matching share of the monies needed to help everyone in the state who qualified for help.").

127. 141 CONG. REC. S11,739 (1995) (statement of Sen. Packwood) ("Most [Governors] like what we have done because we have said to the States, this is no longer a Federal entitlement program as we call the words 'entitlement,' which means we determine who is eligible for welfare. We are saying to the states, 'Here's the money; you determine who is eligible, but you have to put a certain percentage of those you determine as welfare-eligible to work. That is basically all we are requiring of you.' ").

While this interpretation could preclude the existence of a federal entitlement, a state entitlement might still exist. *See* Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403 (1999) [hereinafter Hershkoff, *Welfare Devolution*]; Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) [hereinafter Hershkoff, *Positive Rights*]; 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 (1996).

128. 141 CONG. REC. S11,778 (1995) (statement of Sen. Ashcroft) ("I believe we must end welfare as an entitlement, the notion that people should receive federal benefits even if they do not work, even if they abuse their children, even if they are more and more irresponsible. It is a pernicious notion. It is a notion that reinforces the wrong values and underscores the wrong commitments. Real reform would end welfare's entitlement status.").

129. PRWORA, 42 U.S.C. § 602(a)(1)(B)(ii) (1996).

130. *See infra* section IV.B(1).

131. *See* SPDP, FINDINGS, *supra* note 79.

132. *See infra* section IV.B(2).

Even if the statutory language unambiguously indicates that Congress intended the "no entitlement" provision to deny recipients procedural due process rights, it is likely that such a legislative mandate would be construed by the judiciary as constitutionally impermissible.[133] According to well-established standards regarding the separation of powers doctrine, though legislatures enact statutes, courts remain entrusted with the obligation to ascertain their constitutional implications.[134] Thus, federal and state law may set forth the basis of a property interest, but the constitutional due process implications of such statutory provisions are questions reserved for the judiciary.[135]

Consistent with this reasoning, those courts that have addressed the meaning of the "no entitlement" provision under PRWORA have found that the provision does not determine whether recipients retain procedural due process protections.[136] Instead, courts have reasoned that while the government has no obligation to provide assistance to needy citizens, once they decide to adopt and

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133. *See* Cleveland v. Loudermill, 470 U.S. 532, 541 (1985) ("While the legislature may elect not to confer a property interest. . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.") (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974)); Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (finding that Congress or a state legislature may declare there is no right to a specific benefit, yet once it grants the benefit it may not do so in a way that denies due process); *see also* Nancy Morawetz, *A Due Process Primer: Litigating Government Benefit Cases in the Block Grant Era*, 30 CLEARINGHOUSE REV. 97, 107 (June 1996) ("Since *Loudermill* precludes states from defining away procedural rights, it should prevent efforts to avoid due process guarantees through 'no entitlement' language."); Sylvia A. Law, *Ending Welfare As We Know It*, 49 STAN. L. REV. 471, 487 (1997) (arguing that while Congress has abolished entitlements at the federal level, it is not clear what due process now means). Procedural due process still applies to state created entitlements; thus, when a state creates its own welfare programs, it may create constitutionally protected entitlements. *See* Helen Hershkoff, *Welfare Devolution*, *supra* note 127, at 1403-04.

134. *See* Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591, 598-99 (1998) (explaining that once a statute is enacted, the question of whether there is a constitutionally protected interest is a question for the judiciary).

135. Marbury v. Madison, 5 U.S. 1 (Cranch) 137, 177 (1803) (stating principle of judicial review). *See also* Griffeth v. Detrich, 603 F.2d 118, 122 (9th Cir. 1979); Pfenninger v. Exempla, Inc., 116 F. Supp. 2d 1184, 1195 (D. Colo. 2000) (stating that a property interest subject to due process protection is an individual entitlement grounded in state law, which cannot be removed except for cause).

136. Wash. Legal Clinic for the Homeless v. Barry, 107 F.3d 32, 38 (D.C. Cir. 1997) (doubting that "the blanket 'no entitlement' disclaimer can by itself strip entitlements from individual in the face of regulations or statutes unequivocally conferring them."). *See also* Weston v. Hammons, No. 99-CV-0412, at 19 (D. Colo. Nov. 5, 1999) (Findings of Fact and Conclusions of Law) ("Defendants contend 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 . . . The Court rejects that interpretation for two reasons. First, it is inconsistent with the mandatory nature of the program. . . Second, 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 provision 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").

administer a program, the program is susceptible to procedural due process scrutiny.[137] Thus, because the "no entitlement" provision does not determine whether recipients retain procedural due process protections under PRWORA, the new statute must be analyzed within applicable procedural due process doctrine.

B. Creating Legitimate Expectations

While PRWORA specifically denies the existence of an entitlement, there are two statutory components of the Act that support the finding of legitimate expectations, which in turn suggests the existence of property interests. First, the statutory requirements that agencies adopt objective standards and apply them impartially create a legitimate expectation on the part of the recipients that if they meet the program requirements, they are entitled to benefits. These legitimate and reasonable expectations constitute an entitlement that creates the property interest necessary for procedural due process purposes. Second, the statutorily created agreements between recipients and the government allow recipients to legitimately expect that, if they comply with the terms of the agreement, they are entitled to benefits. This understanding, as set forth in the agreement between the recipient and the government, also supports the existence of a property interest.

The "Objective Criteria" and "Fair and Equitable Treatment" Mandates

According to *Roth* and its progeny, the protections afforded under the due process clause are applicable when an individual has been deprived of a liberty or property interest.[138] A determination as to the existence of a property interest in public benefits requires a court to examine the legislation creating the benefit.[139] Courts analyze the legislation to determine whether the recipient of a given benefit has a legitimate claim of entitlement to the benefit, as opposed to an

137. *See* Burton v. Thornburgh, 541 F. Supp. 168, 174 (E.D. Pa. 1982) (determining that while courts have never held that individuals have a constitutional right to receive welfare, "[o]nce provided for by a state statute . . . an individual can claim an entitlement to these benefits if he is within the class of eligible recipients [and] [t]his entitlement triggers due process and equal protection").

138. In addition to protections afforded under the Constitution, state constitutions may provide additional protections for welfare recipients. *See* Hershkoff, *Welfare Devolution, supra* note 127, at 1403-33; Hershkoff, *Positive Rights, supra* note 127, at 1147-53; Zietlow, *supra* note 127, at 1141-43; HELEN HERSHKOFF & STEPHEN LOFFREDO, THE RIGHTS OF THE POOR (1997) (arguing that more than a dozen state constitutions provide explicit protections for the poor).

139. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests . . . 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.").

abstract need or desire for it.[140]

In the context of public benefits, courts use two related factors to analyze whether a legitimate expectation to a particular benefit exists. First, courts find that individuals may have legitimate expectations when statutorily defined objective criteria create standards for eligibility.[141] Second, courts are likely to find a property interest when limits constrain the discretion of government actors.[142] PRWORA's statutory scheme requires the development of objective criteria and contains provisions that limit caseworker discretion.

The statutory mandate of objective criteria requires that states and local governments implement their programs based on express standards that can be objectively assessed.[143] In addition, the requirement of "fair and equitable treatment" mandates that caseworkers apply the adopted criteria fairly and equitably in the decisionmaking process. Both the requirement of objective criteria itself and the requirement that the criteria be fairly and equitably applied reduce the discretion of caseworkers and create parity among recipients.[144] Since standards must be applied in a fair and equitable manner, all recipients in similar situations should be treated similarly.

States or counties in compliance with federal and state mandates may create a legitimate expectation that recipients who meet the criteria are entitled to assistance. For example, Colorado's statute and corresponding regulations set forth a few statewide provisions, including basic minimum cash assistance[145] and

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140. *Id. See also* Slochower v. Bd. of Educ., 350 U.S. 551, 559 (1956) (finding that interests in continued public employment can be protected by due process provisions); Elizondo v. State, 570 P.2d 518, 522 (Colo. 1977) (determining that due process protections apply to probationary drivers licenses because "[t]he use of motor vehicles on the public highways of this state is an adjunct of the constitutional right to acquire, possess, and use property which cannot be taken away without due process of law.").

141. Griffeth v. Detrich, 603 F.2d 118, 121 (9th Cir. 1979) (determining that applicants for general assistance in San Diego County had a protected property interest because the regulations adopted by the agency set forth objective criteria for the receipt of assistance). *But see* Wash. Legal Clinic for the Homeless v. Barry, 107 F.3d 32, 36-38 (D.C. Cir. 1997) (reasoning that despite a statutory mandate requiring the provision of shelter to all eligible families, no claim of entitlement existed because of insufficient space for all eligible recipients).

142. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 11-16 (1979); Meachum v. Fano, 427 U.S. 215, 227-29 (1976); Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 679 (3rd Cir. 1991) ("[A]n entitlement may exist for a benefit sought but not yet obtained if state law limits the exercise of discretion by the state official responsible for conferring the benefit.").

143. *See, e.g.*, Wilson v. Dept. of Health & Human Servs, 770 F.2d 1048, 1052 (Fed. Cir. 1985) (holding that the Civil Service Reform Act's requirement of objective standards must permit accurate measurement and invoke a consensus as to meaning and content).

144. The requirement that recipients be treated fairly and equitably raises questions of possible equal protection claims. While equal protection claims may be a way to protect recipients, courts typically apply only rational basis review to the category of wealth. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (applying rational basis review in a welfare equal protection context); *see, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) (applying rational basis analysis to a Texas school district's property tax system that created large funding disparities between rich and poor schools); Nachtwey v. Doi, 583 P.2d 955, 961 (Haw. 1978) (holding that indigents are not a suspect class). Based on these standards, it is likely that such government action would be upheld.

145. COLO. REV. STAT. § 26-2-709 (2000); 9 COLO. CODE REGS. § 2503-1 (2001).

the right to an administrative hearing.[146] The statute contains clear and mandatory language that a person who complies with the eligibility requirements of the state's program "shall receive a basic assistance grant in the amount of the AFDC cash grant that such participant would have received . . . on July 16, 1996."[147] Similarly, the regulations specify that any person who meets the eligibility criteria "shall receive" the amount of cash assistance specified by the rules.[148] According to the state's statutes and regulations, a person is eligible for cash assistance if she is (1) a U.S. citizen or qualifying legal alien; (2) a state resident; and (3) a caretaker of a dependent child(ren) with a family unit that meets the income and resource criteria of the program.[149] These state-mandated objective standards mean that a U.S. citizen or qualifying legal alien who resides in the state and meets the income and resource guidelines may have a reasonable and legitimate expectation in the receipt of assistance. Further, the state's regulations bar counties from reducing or restricting a person's cash assistance in any manner "inconsistent with state and federal laws."[150] Both federal and state statutes require that the program be implemented using fair and equitable treatment, thereby limiting caseworker discretion in program administration. The combination of federal and state mandates that set forth objective criteria and require fair and equitable application of criteria may create a reasonable and objective belief that recipients who meet the specified criteria are entitled to receive assistance.[151] Once it is found that the expectation is reasonable and legitimate, courts will likely find that the recipient retains a property interest.[152]

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146. COLO. REV. STAT. §§ 26-2-127, 26-2-710 (2000). While recipients of TANF in Colorado are provided the right to an administrative hearing under the state statute, these statutory protections are not as secure a basis for due process rights as are constitutional due process protections. *Id.*

147. COLO. REV. STAT. § 26-2-709(1)(a) (2000). Additionally, the general public assistance statute in Colorado states, "public assistance shall be furnished with reasonable promptness to each eligible individual in accordance with rules of the state department." *Id.* § 26-2-106(1).

148. 9 COLO. CODE REGS. § 2503-1 at 3.600.1 (2001).

149. *Id.* at 3.600.12. The income criteria vary depending upon the number of individuals in the family unit. *Id.* at 3.615.7. The resource criteria permits a family unit to maintain resources valued at two thousand dollars or below and exempts certain tangible goods including a homestead and one vehicle. 9 COLO. CODE REGS. § 2503-1 at 3.612.2. *See also* REBECCA A. LONDON ET AL., BERKELEY PLANNING ASSOCIATES, EVALUATION OF THE COLORADO WORKS PROGRAM, FIRST ANNUAL REPORT, xiv (1999). "Eligibility for Colorado Works is determined using a statewide standard laid out in program rules (9 COLO. CODE REGS. § 2503-1 at 3.600). Counties have no discretion in this area of program operations." *Id.*

150. 9 COLO. CODE REGS. § 2503-1 at 19.

151. Prior to TANF, several courts made similar arguments about the federal/state intersection in other government benefit programs. *See, e.g.*, Daniels v. Woodbury County, Iowa, 742 F.2d 1128, 1132 (8th Cir. 1984) (analyzing Iowa's general assistance program, which was run separately by each county, and, based upon the mandatory nature of the state and county statutes and rules, finding a legitimate expectation in the receipt of general assistance for all eligible people); Griffeth v. Detrich, 603 F.2d 118, 121 (9th Cir. 1979) (holding that "the authorizing statute coupled with the implementing regulations of the county creates a legitimate claim of entitlement and expectancy of benefits in persons who claim to meet the eligibility requirements").

152. *See, e.g.*, Brady v. Gebbie, 859 F.2d 1543, 1547 (9th Cir. 1988) (applying *Roth*'s "legitimate claim of entitlement" analysis).

The statutory mandates of "objective criteria" and "fair and equitable treatment" require that governments create actual, express standards and apply them fairly. These requirements create legitimate expectations that form the basis of a property interest. Thus, these statutory provisions create the first basis for a finding of legitimate expectations.

Contractual Agreements Between the Government and Recipients

This section explores whether a due process property interest can arise from an agreement that creates legitimate expectations that upon compliance with the terms of the agreement the recipient is entitled to receive the benefit. To analyze this question, this section builds upon the property rights analysis previously discussed and employs elements of PRWORA's statutory scheme to explore the implications of contractual agreements between recipients and government entities.[153]

There are several ways in which these agreements may create legitimate expectations in the receipt of benefits. The components analyzed include the creation of the agreement, its structure and substance, and the discretionary limitations on termination of assistance. The agreement's nature, structure, and limitations on termination create expectations in the recipient that she is entitled to benefits if she complies with the requirements set forth in the document. This expectation in the receipt of benefits may indicate the existence of a property interest.[154]

According to procedural due process doctrine, in determining whether a recipient has a property interest in a government benefit, courts analyze "existing rules or understandings that stem from an independent source such as state law."[155] Pursuant to this principle, courts have found property interests arising from implied contracts, legally binding rules or regulations, municipal ordinances, oral and written policies regarding the distribution of benefits, or mutually explicit understandings regarding the receipt of benefits.[156] In the

153. Various scholars have explored the use of the private doctrine of contracts in traditionally public arenas. *See* Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 33-37 (1998); *see also* Patricia J. Williams, *Commercial Rights and Constitutional Wrongs*, 49 MD. L. REV. 293 (1990).

154. Additional private law analogies exist, including tort. For a discussion of how the tort analogy reconciles American individualist tradition with the needs-based government redistribution program more effectively than property or contracts see Allison Moore, *"From Opportunity to Entitlement" and Back Again . . . or Beyond*, 106 YALE L.J. 923, 927-28 (1996) (reviewing GARETH DAVIES, FROM OPPORTUNITY TO ENTITLEMENT: THE TRANSFORMATION AND DECLINE OF GREAT SOCIETY LIBERALISM (1996)).

155. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

156. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 539-41 (1985) (concluding that a civil service employee was entitled to procedural protections before being fired because state law specified that an employee could be terminated only "for cause," which created an entitlement in continued employment); Perry v. Sindermann, 408 U.S. 593, 601 (1972) (concluding that a legitimate expectation

context of PRWORA, the statutory and regulatory scheme and the mutually explicit understandings derived from the agreements themselves may provide a recipient with a legitimate expectation in the receipt of benefits.

As set forth above, PRWORA created a statutory and regulatory system of distribution of benefits whereby the government and recipients enter into written agreements, recipients receive benefits if they comply with the terms of the agreement, the agreement sets forth the obligations of both parties, and the benefit cannot be removed unless the recipient violates the agreement in the absence of good cause. This agreement between government entities and recipients, as well as attendant circumstances surrounding the creation and termination of the agreement, shape the mutual understandings of the parties and support a finding that recipients have legitimate expectations in the receipt of benefits.

According to the federal statute, an individual's eligibility must be assessed by the state to determine his or her skills, prior work experience, and employability.[157] 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 the services the state will provide to the recipient.[158] Based on this permissive provision of the federal statute, all fifty states and the District of Columbia require some type of written agreement that is signed by the recipient.[159]

While all states require a written agreement signed by the recipient, states vary on other components of the agreement including the timing of the required signature,[160]

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of entitlement can arise from an unstated but mutually held understanding that a de facto tenure system existed).

157. PRWORA, 42 U.S.C. § 608(b)(1) (1996).

158. Under the federal statute, if a state adopts this requirement, the agreement shall include employment goals for the individuals, affirmative obligations placed upon the recipient, a plan to move the recipient into private sector employment, and the services the state will provide to the individual. 42 U.S.C. § 608(b)(2)(A)(i)-(v).

159. Sixteen states require recipients to sign only "employability contracts," only which focus exclusively on employment-related issues. Eighteen states require "responsibility contracts," which proscribe conduct in certain matters, in addition to employment obligations. 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 contracts and responsibility contracts. *See supra* notes 76-80 and accompanying text.

160. Of the thirty-five states that require recipients to sign responsibility contracts, two states require the recipient to sign the agreement prior to the application: Arkansas and South Dakota. Twenty states require the recipient to sign the agreement while the application is pending: Alaska, Arizona, Delaware, Georgia, Idaho, Illinois, Maine, Maryland, Mississippi, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming. Ten states require the recipient to sign after eligibility is determined: Alabama, Indiana, Iowa, Missouri, Montana, Nebraska, Nevada, North Dakota, South Carolina, and Washington. Three states require the recipient to sign at different points throughout their specific state process; two of these states, Kentucky and New Jersey, require the recipient to sign with the filing of the application and one state, Michigan, requires the recipient to sign at or after their orientation process. Of the

the contents of the agreement,[161] and the promises the governmental entity makes to the recipient. In a majority of states, the written agreement includes a provision detailing the specific services the state or county government agrees to provide the recipient.[162] In those states that mandate employability contracts, eleven out of the sixteen require a written agreement that the state or county government will provide services to the recipient.[163] In those states that mandate responsibility contracts, seventeen out of eighteen states require a written agreement that the state or county government will provide services to the recipient.[164] In those states that require recipients to sign both types of contracts, there is a split based on the type of contract. Thirteen out of

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thirty-three states that require recipients to sign employment contracts, five states require the applicant to sign the agreement when the application is pending: District of Columbia, Oregon, Utah, West Virginia, and Wyoming. Eighteen states require the applicant to sign the agreement after eligibility is determined: Arizona, California, Connecticut, Florida, Hawaii, Indiana, Kansas, Louisiana, Massachusetts, Mississippi, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, Vermont, Virginia, and Washington. Ten states require the applicant to sign the agreement at varying times during the states' specific application process. In Arkansas, the employability plan may be developed and signed during the application interview, at any time while the application is pending, or after the application is approved. In Colorado, counties have thirty days from the date of the application to complete an assessment and an additional thirty days to complete the contract. Counties have the option of developing the contract prior to the assessment. In Georgia, the applicant must sign the employability plan while the application is pending or after eligibility is determined, depending on whether TANF and Employment Services are the same or different workers. In Maine, the applicant signs the employability plan either while the application is pending or after eligibility is determined, depending when the applicant meets with the ASPIRE worker after orientation. In Maryland, the state has a two-part work activity agreement: the first part is signed while the application is pending, and the second part is signed after eligibility is determined. In Minnesota, the county has the option of requiring the employability signature within six months of the application. In New Hampshire, the applicant has to sign two different plans. The first plan must be signed while the application is pending, prior to four weeks of job search. The second plan is a more detailed plan that occurs after the four weeks of job search. In North Carolina, counties have discretion over the timing of the signature. In South Dakota, the applicant has the option of signing the employability plan prior to filing an application or while the application is pending. Finally, in Wisconsin, the employability plan must be signed when the applicant is assigned to up-front job search or after they obtain a W-2 employment position. *See* SPDP, TANF, *supra* note 77.

161. *See id.*

162. In those states where the governmental entity has specifically promised certain services, the recipient will have a stronger argument that the agreement created legitimate expectations. In those states where the agreement did not include a specific promise of services, the argument that the recipient has a legitimate expectation is weaker. *Cf.* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 539-41 (1985); Perry v. Sindermann, 408 U.S. 593, 601 (1972) (concluding that a legitimate expectation of entitlement can arise from an unstated but mutually held understanding that a de facto tenure system existed).

163. The following states require a section detailing state or county obligations: California, Colorado, Florida, Hawaii, Kansas, Louisiana, Massachusetts, Minnesota, New Hampshire, New York, and Rhode Island. The following states do not include an acknowledgment of state or county obligations: Connecticut, District of Columbia, New Mexico, Vermont, and Virginia. *See* SPDP, TANF, *supra* note 77. In the five states that do not have this requirement, it would be more difficult for a recipient to argue a legitimate expectation in the receipt of benefits.

164. The following states require a written agreement that the state or county government will provide services to the recipient: Alabama, Alaska, Delaware, Idaho, Illinois, Iowa, Kentucky, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, Pennsylvania, South Carolina, Tennessee, and Texas. Nevada is the one state with responsibility contracts that does not require a written agreement that the government will provide services to the recipient. *Id.*

seventeen states that require both contracts mandate that the employability contract include an agreement that the state or county government will provide services to the recipient.[165] Only ten of the seventeen states that require both contracts mandate that the responsibility contract contain a provision that the state or county government will provide services to the recipient.[166]

In accordance with statutory requirements, the government's limited ability to terminate benefits in turn limits caseworker discretion. Under PRWORA, states must require recipients of TANF to participate in work activities,[167] and states are required to impose sanctions or financial penalties on recipients who do not provide good cause for failure to comply with their work obligations.[168] Good cause and other exemptions are established and defined by individual states, except for one federal prohibition involving inability to find child care for children six years old or younger.[169] Most states have a set of additional criteria that qualify as good cause for non-compliance with work obligations. Aside from the federally mandated good cause exemption based on inability to find child care, thirty-eight states consider disability or illness good cause for non-compliance with work activities.[170] Various states have also found that the following reasons constitute good cause: caring for an ill or disabled household member,[171] family emergencies,[172] or lack of transportation.[173]

Courts will assess the circumstances surrounding the agreement to determine whether the recipient's expectations were reasonable and legiti-

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165. The following states do not require the state/county provision of services as part of the agreement: Maryland, West Virginia, Wisconsin, and Wyoming. The following states all require a provision in the "employability contract" that the state or county will provide services to the recipient: Arizona, Arkansas, Georgia, Indiana, Maine, Mississippi, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, and Washington. *Id.*

166. The following states require a provision that the state or county provide services to the recipient: Arizona, Mississippi, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and West Virginia. The following states have no such requirement: Arkansas, Georgia, Indiana, Maine, Maryland, Wisconsin, and Wyoming. *Id.*

167. PRWORA, 42 U.S.C. § 607(e)(1) (2001); 45 C.F.R. § 261.14 (2001). 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, 42 U.S.C. § 607(e)(2); 45 C.F.R. §§ 261.15, 261.56(a)(1), 261.57.

168. 42 U.S.C. § 607; 45 C.F.R. § 261.14. For a detailed description of sanctions and good cause, see GREENBERG & SAVNER, *supra* note 52, at 37-42; see also HEIDE GOLDBERG AND LIZ SCHOTT, CENTER ON BUDGET AND POLICY PRIORITIES, A COMPLIANCE ORIENTED APPROACH TO SANCTIONS IN STATE AND COUNTY TANF PROGRAMS, apps. A and B (October 2000).

169. 42 U.S.C. § 607(e)(1). Under federal law, a state is prohibited from sanctioning single custodial parents who do not comply with work obligations because they cannot find childcare for children less than six years of age. *Id.* § 607(e)(2); 45 C.F.R. §§ 261.15(a), 261.56(a).

170. *See* STATE POLICY DOCUMENTATION PROJECT, STATE POLICIES REGARDING TANF WORK ACTIVITIES AND REQUIREMENTS, *at* http://www.spdp.org/tanf/work/worksumm.htm (last modified Jan. 2, 2001).

171. Thirty-seven states regard caring for an ill or disabled household member as good cause for non-compliance. *See id.*

172. Thirty-seven states regard family emergencies as good cause for non-compliance. *See id.*

173. Thirty-six states regard transportation problems as good cause for non-compliance. *See id.*

mate.[174] The reduction of the agreement into a written form that is signed by the recipient and, in the majority of states, signed by the government, creates expectations that the agreement is binding. The formality of the writing and signature also creates an understanding that the parties entered into a binding agreement. The structure of the agreement that sets forth the rights and obligations of both parties creates expectations in recipients that if they comply with their obligations, they are entitled to benefits. The combination of these factors support a finding that recipients have legitimate expectations that they are entitled to benefits so long as they abide by the agreement.

Further, courts have consistently found that when a benefit cannot be removed without cause, the recipient of the benefit has a legitimate expectation in the receipt of that benefit.[175] As a corollary, courts reason that when caseworker discretion regarding the removal of a benefit is limited, recipients retain a legitimate expectation in the receipt of those benefits.[176] Both of these principles apply in the context of TANF sanctions for non-compliance with the terms of the agreement. First, prior to the imposition of a sanction, the government must have cause, namely that the recipient violated the terms of the agreement.[177] Even if a caseworker finds that the terms of the agreement have been violated, the caseworker must additionally assess whether the violation was based on good cause.[178] If there was good cause, the recipient cannot be sanctioned.[179] The requirements that the caseworker first find a violation of the agreement and subsequently determine whether the recipient had good cause for non-compliance limits the scope of the caseworker's discretion. The requirement that there be a violation of the agreement, absent good cause, supports the recipient's legitimate expectation that if she abides by the agreement she is entitled to assistance.

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174. Bd. of Regents v. Roth, 408 U.S. 564, 576-79 (1972) (reasoning that the purpose of finding a property interest is to protect those claims that individuals rely upon in their daily lives).

175. *See* Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 11-12 (1978) (because termination of services by public utility is not permitted in absence of "cause," individuals have come to have a 'legitimate claim of entitlement' protected by the Due Process Clause); *see also, e.g.*, Connell v. Higginbotham, 403 U.S. 207, 207 (1971) (per curiam) (stating that due process requires hearing or inquiry before state employee may be discharged).

176. Alexander v. Polk, 750 F.2d 250, 260-61 (3d Cir. 1984) (holding that where discretion to deny benefits is absent, a recipient has a valid property interest in her continuing eligibility to receive funds); Hyde Park Co. v. Santa Fe City Council, 226 F.3d 1207, 1210 (10th Cir. 2000) (explaining that where a city council has limited discretion to deny zoning applications, the applicant has a valid expectation in having a particular plat approved); Chu Drua Cha v. Noot, 696 F.2d 594, 607 (8th Cir. 1984) (8th Cir. 1984) (holding that recipients of refugee assistance had a proprietary interest in the continuation of their benefits where they had a reasonable expectation that the benefits would continue); Klein v. Califano, 586 F.2d 250, 258-59 (3d Cir. 1978) (stating that Medicaid recipient patients were entitled to remain in their current nursing home because administrators did not have the power to arbitrarily transfer them).

177. *See* PRWORA, 42 U.S.C. § 608(b)(3) (1996); COLO. REV. STAT. § 26-2-711(1)(a)(I) (1999).

178. *See* 42 U.S.C. § 608(b)(3); § 26-2-711(1)(a)(I).

179. *See* § 26-2-711(5)(b).

An illustration of one state's TANF program further demonstrates that the agreement itself can form the basis of a legitimate expectation. In Colorado, the written agreement between the government and the recipient is titled an Individual Responsibility Contract ("IRC") and is consistently referred to as a "contract."[180] Counties have thirty days from the date of application to complete an assessment of the recipient[181] and thirty additional days to complete the IRC.[182] Recipients sign the IRC once the county worker completes the form. The IRC contains a provision stating that the contract between the participant and the county government contains the terms and conditions of receipt of assistance.[183] In addition to the title, the written document is structured to delineate the rights and responsibilities of each party.[184] The contract states that the recipient's responsibilities include the following requirements: keep all appointments with her case manager; respond to any requests from the county department or participating agency regarding her employment status; participate in assessments to determine her level of job readiness; report for and participate in any employment or education activity agreed to by the recipient and her case manager; notify her case manager of various changes, and accept and maintain appropriate employment.[185] The IRC is executed by signature of both the recipient and the government with the government's signature line expressly stating that the signer "acknowledge[s] the responsibilities of the agency."[186] The IRC document also expressly states that failure to comply with the IRC results in sanction,[187] and as in the federal statute, the state statute mandates that an otherwise eligible individual can only be sanctioned upon a finding that the participant does not have good cause for non-compliance.[188] Each county separately determines what constitutes good cause.[189] This good cause requirement significantly limits an agency's ability to terminate assistance for any impermissible reason or for no reason at all.

The creation, structure, and limited discretion create a legitimate expectation that if the recipient meets the terms of the agreement she will receive benefits. The agreement is a written document that sets forth the obligations of both parties and is subsequently acknowledged by both parties. The government cannot

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180. *Id.* § 26-2-703(12), § 26-2-708.
181. *Id.* § 26-2-708(1).
182. *Id.* § 26-2-708(2).
183. *See* Figure 1, Sample Individual Responsibility Contract.
184. COLO. REV. STAT. § 26-2-708(3)(b).
185. *Id.*
186. *Id.* These responsibilities, though acknowledged, are not specified in the IRC itself.
187. *Id.* § 26-2-708(3)(b) (describing Colorado's sanction policy, which consists of a progressive system so that each subsequent violation leads to harsher sanctions). The first sanction can be no less than a twenty-five percent reduction in the cash benefit, the second sanction can be no less than a fifty percent reduction in the cash benefit, and the third sanction leads to termination of the entire cash assistance grant. *Id.*
188. *Id.* § 26-2-711(1)(a)(I).
189. *Id.*

sanction the recipient unless it finds that the recipient violated the terms of the agreement.[190] Further, the government must determine whether the recipient had good cause for non-compliance prior to imposing a sanction.[191] Thus, the combination of a required written agreement containing mutual obligations of the recipient and the government that can only be terminated after a finding of non-compliance in the absence of good cause supports a recipient's legitimate expectation that if she meets the terms of the agreement she will receive benefits.[192]

Thus, as set forth in the preceding sections, requiring objective criteria and fair and equitable treatment, in combination with the form and substance of the agreements entered into between the recipient and the government, create legitimate expectations in the recipient that if the recipient is eligible and complies with the terms of the agreement, she is entitled to benefits. This legitimate expectation is the basis of a property interest in the receipt of benefits.

C. The Arbitrariness Doctrine

Even if a state or county does not utilize standards to implement PRWORA, recipients may still maintain due process protections. Though the absence of standards might tend to indicate a lack of reasonable expectation in the receipt of benefits, the doctrine of arbitrary action offers some due process protections to recipients.

The arbitrary action doctrine requires an agency acting in an adjudicatory manner to comport with basic notions of due process.[193] An agency acts in an adjudicatory capacity when it makes a determination of factual issues and applies legal criteria to the facts.[194] Welfare agencies act in an adjudicatory role when they determine an applicant's eligibility for assistance, assess and create recipients' work obligations as a condition of assistance, and sanction or

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190. *Id.* § 26-2-708(3)(b).

191. *Id.* § 26-2-711(1)(a)(I).

192. *See* Leary v. Daeschner, 228 F.3d 729, 743 (6th Cir. 2000) (holding that the "good cause" for termination section of a teacher's collective bargaining agreement created a property interest).

193. Hornsby v. Allen, 326 F.2d 605, 608 (1964) (finding that the basic requirements of due process apply to licenses because licensing consists of a determination of factual issues and application of legal criteria to them). The arbitrary and capricious standard under the Federal Administrative Procedures Act ("Fed. APA") requires a court to overturn any agency decision if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accord with law." 5 U.S.C. § 706(2) (2001). For a discussion of the Federal and State Administrative Procedures Acts as they apply to federal block grants, see Janet Varon, *Passing the Bucks: Procedural Protections under Federal Block Grants*, 18 HARV. C.R.-C.L. L. REV. 231 (1983).

194. *See Hornsby*, 326 F.2d at 608 ("Since licensing consists in the determination of factual issues and the applications of legal criteria to them—a judicial act—the fundamental requirements of due process are applicable to it."); *see also* Laura C. Conway, *Will Procedural Due Process Survive After Aid to Families with Dependent Children is Gone?*, 4 GEO. J. ON FIGHTING POVERTY 209, 219-20 (1996) (arguing that advocates can use state administrative procedure acts to argue that states must specify eligibility criteria as well as a method of choosing among applicants if funds are limited).

terminate recipients for non-compliance.[195] In each of these instances, the caseworker makes a determination of factual issues as to whether the applicant meets the requisite income requirements, the applicant's education and work history, or whether the recipient violated the rules. It seems reasonable to assume that the worker must then apply the facts to legal criteria to determine for example whether the applicant is ineligible for assistance because her income is above the limit permitted by regulation, whether the applicant has not received her high school diploma and is therefore required to get her GED as a condition of assistance, or whether the recipient should be sanctioned because she failed unjustifiably to complete the twenty hours of required work related activities. In order for a government actor acting in an adjudicatory role to meet the minimum due process requirements prohibiting arbitrary action, the agency must have some discernable written standards.[196] In the absence of such standards, action taken by the agency would likely be considered arbitrary.[197]

Serious dangers arise when government actors dispense government funds without ascertainable written standards.[198] First, allowing caseworkers to administer the program without written standards increases the likelihood of impermissible decisions based upon the workers' own biases and beliefs.[199] Second, absent published standards, there is no way to effectuate meaningful

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195. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); *see also* Rivera v. Blum, 420 N.Y.S.2d 304, 308 (N.Y. Sup. Ct. 1978) (holding that "where an administrative agency makes binding determinations which directly affect the legal rights of individuals, the function is adjudicatory"); Kelly v. Wyman, 294 F. Supp. 893, 903 (S.D.N.Y. 1968) (noting that "a hearing on the proposed termination of welfare benefits is . . . a classic instance of the determination of . . . 'adjudicative facts . . .' ").

196. *See, e.g.*, Carey v. Quern, 588 F.2d 230, 232 (7th Cir. 1978) (concluding that due process requires the adoption and implementation of ascertainable standards); White v. Roughton, 530 F.2d 750, 753-54 (7th Cir. 1976) (determining that the Champaign, Illinois general assistance program, administered without published standards, violated due process because it vested unfettered discretion in county officials); Sears v. Baca, 682 P.2d 11, 18 (Colo. 1984) (finding that the absence of rules and regulations defining eligibility under worker's compensation Subsequent Injury Fund violates due process).

In addition, without published standards, recipients could argue that there has been an unconstitutional delegation of legislative authority. *See, e.g.*, State Farm v. City of Lakewood, 788 P.2d 808, 815 (Colo. 1990) (finding that the non-delegation doctrine requires legislatures to adopt sufficient statutory and administrative "standards and safeguards, in combination, to protect against unnecessary and uncontrolled exercise of discretionary power") (quoting Cottrell v. City and County of Denver, 636 P.2d 703, 709 (Colo. 1981)).

197. *See* Holmes v. N.Y. City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) (finding that the existence of an absolute and uncontrolled discretion in any agency of government vested with the administration of a government program would be an intolerable invitation to abuse); Arkansas Dept. of Human Servs. v. Kistler, 898 S.W.2d 32, 36 (Ark. 1995) (holding that appellee's termination from participation in developmental disabilities services program was arbitrary because no discernable standards existed.); Boaz v. Bartholomew Consol. Sch. Corp., 654 N.E.2d 320, 323 (Tax Court Indiana 1995) (holding that "[u]nder Indiana's ascertainable standards rule, all administrative decisions must be in accord with previously stated, ascertainable standards").

198. *See infra* Part IV.B.

199. *See Holmes,* 398 F.2d at 265 (finding that the existence of absolute and uncontrolled discretion in an administrative agency would be an intolerable invitation to abuse); Daniels v. Woodbury County, Iowa, 742 F.2d 1128, 1135 (8th Cir. 1984) ("[W]here the defendants have already established a category of eligible applicants, such as the category of 'poor' persons here, the County may not arbitrarily and

hearings and judicial review.[200] Further, the lack of standards will impair a recipient's ability to present relevant evidence to a fact finder.[201] Without standards, the recipient challenging the government action will not be able to identify which factors were influential in a decision.[202] Finally, in the absence of standards, judicial review lacks credibility because without standards, the fact finder is unable to judge the adequacy of the prior decision.[203]

At a minimum, basic notions of fairness require that government action be open to judicial monitoring. Inherent in the due process clause is the deeply rooted concept that government must be accountable for the manner in which it makes decisions, and must not act in a wholly arbitrary manner.[204] In order to provide assistance in a rational manner, the government must follow criteria established to guide administrative decisions. In the absence of such criteria, there are no protections against the arbitrary provision of assistance.

V. Implementation of TANF and Second Order Devolution to County and Local Governments

This Part details the problems that emerge when states devolve policymaking authority to county and local governments.[205] Exploration of this second order devolution serves several purposes. First, it serves to highlight the potential dangers that accompany the unchecked disbursement of government monies.

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capriciously deny the availability of that category by lodging unlimited discretion in the hands of the decisionmaker.").

200. County Dept. of Pub. Welfare v. Deaconess Hosp. Inc., 588 N.E.2d 1322, 1327 (Ind. Ct. App. 1992) ("Judicial review is hindered when agencies operate in the absence of established guidelines.").

201. *Id.* at 1327 ("[P]arties are entitled to fair notice of the criteria by which their petitions will be judged by an agency.").

202. *See* Hide-A-Way Parlor v. Adams County, 597 P.2d 564, 566 (Colo. 1979) (determining that in the absence of adequately defined standards, neither the public nor the courts have any means of knowing in advance what evidence is material); Elizondo v. State, 570 P.2d 518, 521 (Colo. 1977) (finding that in the absence of rules and regulations to govern the suspension of licenses, hearing officers may use differing standards and types of evidence in decisionmaking).

203. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 231 (1974) (reasoning that an agency must, at a minimum, allow standards to be published so as to assure that they are applied consistently to avoid both the reality and the appearance of arbitrary denial of benefits); Sears v. Baca, 682 P.2d 11, 19 (Colo. 1984) (holding that the adoption of regulations would provide guidance to a fact finder and assist in reviewing those decisions).

204. *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 322-23 (1993) ("Substantive due process law defies reduction to any elegant set of controlling substantive principles. Its 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.").

205. One question raised by the exploration of second order devolution is whether it is distinct from first order devolution and, if so, how. Given the limited experience of second order devolution in the TANF context, it is not yet clear if the problems identified with second order devolution are necessarily different in kind, but the example used in this Article shows that, at the very least, they are different in degree. In other words, given the experience with second order devolution in Colorado thus far, it appears that the problems of unchecked government action have increased at the local level.

Second, given such dangers, it illustrates the importance of enforcing procedural due process protections for recipients. Finally, examining TANF implementation in states that have further devolved authority to local governments provides an opportunity to analyze the implications of devolution taken to the next level.[206] In light of the fact that this Congress's reauthorization of TANF will have a significant impact on the program's future in that it may determine whether additional states will follow the county devolution model,[207] this analysis sounds a timely and relevant alarm.[208]

A. Implementation of Second Order Devolution

At least five states have adopted some form of second level devolution.[209] This Article focuses on one of only a few states that have devolved almost entire authority to the county governments. In Colorado, following the passage of PRWORA, the General Assembly enacted the Colorado Works Program Act ("Colorado Works") to implement the disbursal of TANF block grant funds.[210] The Act devolves authority for administration of TANF to each of the state's sixty-three counties.[211] The statute provides only minimal guidance—most notably a minimum statewide basic assistance amount—to the counties.[212] Pursuant to the statute, the state retains specific, albeit minimal, statutory oversight duties, including the creation of uniform county reporting forms, training of caseworkers, monitoring of interstate/intrastate migration and administration of a state waiver process.[213]

Like the federal statute, Colorado Works mandates an assessment of all potential recipients within thirty days after the application for assistance is filed[214] and requires each county to enter into a contractual agreement with the

206. Among other implications of devolution of authority to local governments is the fact that county or local governments do not benefit from Eleventh Amendment governmental immunity. *See* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 369 (2001) ("[T]he Eleventh Amendment does not extend its immunity to units of local government.").

207. *See* H.R. 3113, 107th Cong. (2001).

208. *See* MARK GREENBERG ET AL., CENTER FOR LAW AND SOCIAL POLICY, WELFARE REAUTHORIZATION: AN EARLY GUIDE TO THE ISSUES (July 2000) http://www.clasp.org/pubs/TANF/packa.htm (detailing many of the potential reauthorization issues which include the scope of state flexibility in program administration under TANF).

209. *See* Diller, *supra* note 71, at 1179 (describing Maryland, North Carolina, Ohio, Colorado, and Wisconsin as states that have devolved authority to local county governments).

210. COLO. REV. STAT. §§ 26-2-701(23); 26-2-705(1) (2000) (stating that one of the express purposes of Colorado Works Program is to allow counties increased discretion).

211. For a detailed compilation of the sixty-three Colorado county caseloads and assistance payments see LONDON, *supra* note 149, 109-14.

212. COLO. REV. STAT. § 26-2-714 (1997) (setting out the county block grant formula and providing guidance for the use of money).

213. *Id.* §§ 26-2-712(5)-(9).

214. *See id.* § 26-2-708(1).

applicant.[215] The statute contemplates that the information obtained in the assessment will be used to design the IRC and to assist the individual in securing and maintaining training, education, or work.[216] Further, the statute mandates that this agreement contain provisions in bold print notifying the participant that it is a contract that contains terms and conditions governing the participant's receipt of assistance.[217] The consequences of a participant's failure to comply with the terms and conditions of the agreement may result in sanctions, including termination of any cash assistance.[218]

Colorado is one of the seventeen states whose statute contains a provision stating that nothing in the state statute creates a legal entitlement to assistance.[219] The statute also explicitly prohibits any county administering TANF with block grant monies from creating an entitlement on the county level.[220] This "no entitlement" provision must also be written in bold on the recipient's IRC.[221] At the same time, however, the statute also requires that counties utilize fair and objective criteria in the eligibility determination and administration of benefits.[222] The counties expressly agree to comply with PRWORA's mandate in their annual performance contracts with the state.[223]

B. Unchecked County Discretion

In Colorado, the actual implementation of PRWORA illustrates the dangers of unchecked agency discretion in the allocation of benefits. With only minimal statewide provisions, counties are permitted to create their own programs and corresponding local policies. In order to comply with federal reporting requirements, the state requires that each of its sixty-three counties sign annual performance contracts with the state[224] and submit an annual plan

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215. *See id.* § 26-2-708(2). Even though the Colorado statute refers to this agreement as an IRC, the contents of the agreement are intended to be limited to employment related issues. *Id.*

216. *Id.* ("A county department shall develop an individual responsibility contract (IRC) for a new participant . . . within thirty days after completing the assessment of the participant. . . . The IRC shall be limited in scope to matters relating to securing and maintaining training, education, or work.").

217. *Id.* § 26-2-708(3)(b).

218. *Id.* § 26-2-708(3)(b)-(c).

219. *Id.* § 26-2-704(1).

220. *Id.* § 26-2-704(2).

221. *Id.* § 26-2-708(3)(b).

222. *Id.* § 26-2-715(1)(a)(I) (requiring counties to administer and implement the Colorado Works Program using fair and objective criteria).

223. *Id.* § 26-2-715 (detailing annual performance contract); *Id.* § 26-2-715(1)(a)(I) (requiring that the performance contract entered into between the state and the counties include provisions detailing the county's "duty to administer and implement the works program . . . using fair and objective criteria").

224. The statute requires each state to enter into an annual performance contract with the State Department of Human Services. The state permits counties to submit standardized Memoranda of Understandings ("MOU") to the Department. These MOUs fulfill the statutory requirement of annual performance contracts. As of February 1999, only forty-four of the sixty-three counties had submitted the requisite MOUs. As of March 1999, the Department had received MOUs from fifty-four of the sixty-three counties. It was not until three years after implementation of the Colorado Works Program that all

to the state.[225] County plans submitted to the state consist of a series of yes/no questions regarding optional program choices in each of the counties, but do not include specific county policies.[226]

A survey of all sixty-three counties[227] illustrates the dangers of second level devolution of welfare administration to local governments. Of the sixty-three counties, thirty-six operate without specific local policies or procedures.[228] 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.[229] There are two counties that have no written policies, no flow charts, no graphs, nor any inter-office memoranda to guide workers in the administration of the program.[230] Five counties are using old AFDC policies to administer the new TANF program.[231]

In response to researchers' inquiries regarding the lack of county policies and procedures, workers had a range of explanations. Some workers explained that local policies were unnecessary because "it is just something [they] do;"[232] or

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counties were in compliance with the annual reporting requirement. *See* LONDON, *supra* note 149, at V-VI.

225. Four of the sixty-three counties have not submitted annual state plans. These counties are Arapahoe, Costilla, El Paso, and Pitkin. A compilation of the data is on file with the author.

226. Colorado Works Program Plans, on file with author.

227. The survey, which was conducted by the author, began with an Open Records Act request provided to each county. Only a small number of the sixty-three counties responded to this request. When a large percentage of the counties failed to comply with the Open Records Act request, the author, along with several research assistants, requested information of each county via telephone in an effort to obtain copies of TANF policies for each county. After contact was made with each county, a research assistant scheduled an appointment with many of the counties that had not complied with the request. In addition, the research assistants met with an employee of the State Department of Human Services whose job it was to collect plans from each county. Information previously obtained by the author and her team was compared with the information collected by the state. A compilation of the data is on file with the author.

228. The following counties operate without specific local policies: Adams, Alamosa, Arapahoe, Archuleta, Bent, Boulder, Conejos, Clear Creek, Custer, Dolores, Douglas, Elbert, Garfield, Gilpin, Grand, Gunnison, Hinsdale, Huerfano, Jackson, Lake, Las Animas, Mineral, Moffat, Morgan, Montezuma, Otero, Park, Phillips, Pitkin, Routt, Saguache, Sedgwick, Summit, Teller, Washington, and Yuma. In addition to these thirty-six counties, two counties did not comply with our requests and refused to provide information. These two counties are Baca and Prowers. These two counties may also be operating without specific county policies. A compilation of the data is on file with the author.

229. Adams, Alamosa, Arapahoe, Bent, Boulder, Conejos, Clear Creek, Custer, Dolores, Douglas, Elbert, Garfield, Gilpin, Grand, Gunnison, Hinsdale, Jackson, Lake, Las Animas, Mineral, Moffat, Morgan, Montezuma, Otero, Park, Phillips, Pitkin, Routt, Saguache, Sedgwick, Summit, Teller, Washington, and Yuma. A compilation of the data is on file with the author.

230. The two counties operating without any policies, memoranda, or state plans are Archuleta and Huerfano. A compilation of the data is on file with the author.

231. The five counties operating under old AFDC state regulations are Adams, Arapahoe, Douglas, Pueblo, and Mineral. A compilation of the data is on file with the author. In an interview with a TANF supervisor in Mineral County, the supervisor acknowledged that while they are "still using the old AFDC rules, they have to get rid of them." Telephone Interview by Jessica Carter with Rosanne Pacheco, Mineral County caseworker (Sept. 4, 2000).

232. Telephone interview by Libby Hilton with Sandy Knight, Custer County caseworker (July 24, 2000).

because "it is common knowledge;"[233] or because "workers have been doing it so long there is no need to tell them what to do."[234] Other county workers explained that written policies are unnecessary "because everyone is treated the same."[235]

One factor that appeared relevant to determining whether county caseworkers considered written policies necessary was the size of the program. For example, two counties with relatively small populations explained that they have minimal policies "because the county is so small."[236] In another small county one worker explained that, when you are "doing the same thing over and over again," there is no need for policies.[237] Another rationale for the lack of county policies, offered by a department director, was that there was no need to "do extra work when it doesn't end up in better help."[238]

Thus, in Colorado, it appears that many county workers have virtually unfettered discretion in administering the cash assistance program. While local discretion in itself is not problematic, and may even have some benefits,[239] impartial program administration requires that the agencies have policies and standards to guide administrative decisions and ensure the fair and objective program administration required by both federal and state statutes. As detailed in Part III, counties operating without standards may be in violation of constitutional prohibitions against arbitrariness.

C. Challenging Unchecked County Discretion

Colorado's system of unchecked county discretion has led to a state court class action lawsuit regarding the sufficiency of sanction notices that decreased, and in some instances terminated, recipients' cash assistance. The lawsuit was filed against the state and two counties,[240] alleging that welfare recipients in the class

233. Telephone interview by Libby Hilton with Las Animas County caseworker/receptionist (July 24, 2000).

234. Telephone interview by Libby Hilton with Debbie Evans, Teller County caseworker (July 24, 2000).

235. Telephone interview by Libby Hilton with Lauri Biscado, Cheyenne County caseworker (July 24, 2000).

236. Telephone interview by Libby Hilton with Pat Carr, Gilpin County Director of Social Services (July 24, 2000).

237. Telephone interview by Libby Hilton with Shirley Thompson, Philips County caseworker (July 24, 2000).

238. Telephone interview by Libby Hilton with Kevin Richards, Clear Creek County Director of Department of Social Services (July 24, 2000).

239. *See* THOMAS R. BARTON & VIJAYAN K. PILLAIS, WELFARE AS WE KNOW IT 136-45 (1997) (comparing two Wisconsin counties under a state program similar to the JOBS program).

240. The lawsuit was filed against the Colorado Department of Human Services, Adams County Department of Social Services, and Denver Department of Social Services. Weston v. Hammons, No. 99-CV-0412, slip op. at 1 (1999); *aff'd sub nom.* Weston v. Cassata, P.3d 469 (Colo. Ct. App. July 5, 2001), *cert. denied*, 01SC565 (Jan. 14, 2002).

were sanctioned[241] on the basis of defective notices.[242] The complaint alleged that the sanction notices violated federal and state due process requirements and state statutory and regulatory requirements governing adequate notice.[243]

In essence, the suit arose out of the insufficiency of sanction notices sent by the county to TANF recipients. The state statute requires that the state department of human services develop standard forms for counties to use in the process of administering the TANF program.[244] To meet this statutory obligation, the state had in place a computer system that generated form notices to be completed by the counties.[245] Though neither required nor prohibited from doing so, at least one county used these computer-generated notices to sanction TANF clients.[246] The state statute also requires that the state government establish the circumstances under which a sanction will be issued, when the sanction will begin or end, and what constitutes good cause for a sanction.[247] The plaintiffs' lawsuit alleged that the notices used by the county did not meet minimum standards of due process because they did not provide the TANF recipients with notice of the reasons for the sanctions, the duration of the sanctions, or the proper appeal rights.[248]

In order to assess the constitutional due process arguments made by the plaintiffs, the court first addressed the question of whether TANF benefits constitute a protected property interest.[249] The plaintiff welfare recipients argued that eligible recipients were statutorily entitled to receive TANF benefits and therefore retained a property interest in the receipt of benefits.[250] The government defendants argued that, based upon the provisions in both the federal and state

241. *Hammons*, No. 99-CV-0412, slip op. at 1. The court explained that under state law there are three levels of sanctions that counties can impose upon recipients of welfare. The first sanction must be a twenty-five percent reduction in cash assistance for up to one month. *Id.* at 8 (citing COLO. REV. STAT. § 26-2-711(1)(a)(II) (2000)). If the problem is not cured during the first sanction period, the state regulations require a county to impose a second level sanction amounting to a fifty percent reduction in cash assistance that can last for up to three months at county discretion. *Id.* at 8 (citing 9 COLO. CODE REG. § 2503-1 at 24.02 [sic] and CDHS Manual § 3.621.2(A)-(C)). If the problem is not cured during the second sanction period, the state regulations require a one hundred percent reduction in cash assistance to the family for not less than three months and not more than six months, but "a sanction that is not cured at the end of this time period shall remain in effect until cured." *Id.* at 8 (citing 9 COLO. CODE REG. § 2503-1 at 24.02 [sic] and CDHS Manual § 3.621.2(A)-(C)).

242. *Hammons*, No. 99-CV-0412, slip op. at 1.

243. *Id.* at 23.

244. COLO. REV. STAT. § 26-2-712(5)(a) (1997) (requiring states to "develop standardized forms . . . for the counties' use in streamlining the application process, delivery of services, and tracking of participants").

245. *Hammons*, No. 99-CV-0412, slip op. at 5, 9-10.

246. *Id.*

247. COLO. REV. STAT. § 26-2-711 (1999). *See also* CDHS Manual § 3.621.14(c) (promulgating regulations per COLO. REV. STAT. § 26-2-711).

248. *See Hammons*, No. 99-CV-0412, slip op. at 22-24 (ruling that as a matter of law in the post-*Goldberg* era, the notices did not meet minimum requirements of due process).

249. *Id.* at 17-18.

250. *See id.*

statutes specifying that benefits are not an entitlement, recipients had no right to due process.[251]

The trial court reached its decision using what it referred to as a "functional analysis."[252] First, the court found that under the federal and state statutory scheme, payment of cash assistance to eligible individuals was mandatory so long as the funds were available and the participant was in compliance with TANF obligations.[253] Second, the court rejected the defendants' argument that the "no entitlement" provision precluded application of due process protections.[254] Rather, the court determined that such an interpretation would be inconsistent with the mandatory nature of the program.[255] In addition, the court found that the determination of the existence of a property interest is a judicial, rather than a legislative, function and therefore, legislating a denial of due process would be constitutionally impermissible.[256] The court concluded that the notices were "inadequate as a matter of law"[257] because they failed to provide an explanation of the specific circumstances and reasons for the sanctions.[258] As a remedy, the court ordered the county to locate all individuals who were unlawfully terminated and provide them with

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251. *Hammons*, No. 99-CV-0412, slip op. at 17. The defendants also specifically argued that Congress enacted the "no entitlement" provision with the intention of preventing the creation of a property interest, thereby denying due process to recipients. *Id.* at 19. In oral argument on a Motion to Dismiss filed by both the State and Adams County, the assistant attorney general stated that, in her opinion, the state and the counties can deprive a person of TANF benefits without due process of law. Reporter's Transcript at 22, Weston v. Hammons, No. 99-CV-0412 (1999). The assistant attorney general argued, "If we agree that a property interest must be based on an independent source, such as a statute, a legal rule, or mutually-explicit understanding, there can't be a property interest in this case, as those independent sources herein expressly state that there is no such interest." *Id.* at 24.

252. *Hammons*, No. 99-CV-0412, slip op. at 18.

253. *Id.*

254. *Id.* at 18-20.

255. *Id.* at 19.

256. *Id.* During the hearing on the motion to dismiss, the Court addressed whether Congress can legislate away due process rights. The court stated:

> So let me address the issue of there being an express provision in the statute that there's no entitlement. And I think I have to decide what that means, and I think there are two possibilities. The first is that it simply means that Congress and the state legislature determined that there should be no due process rights, and in the statutory scheme and [in that] particular statement, that's what was intended. I would start by saying that if that's the case, I don't think it's permissible for them to state that. They essentially would be creating a scheme of requirements saying that if you meet these requirements, that you have the right to receive benefits, and then state that you have no due process rights, well, that's trying to take away exactly what the Fourteenth Amendment guarantees, that if you create [a system] that says, if you meet requirements, you get something, that it cannot be taken away with[out] due process. So, to that extent that that's what they intended, I think that's unconstitutional and impermissible . . . . But, in any event, [it appears] to me to be clear that if you meet the requirements, you get benefits. That being the case, they [can't be taken] away without due process.

Reporter's Transcript at 109-10, Weston v. Hammons, No. 99-CV-0412 (1999).

257. *Hammons*, No. 99-CV-0412, slip op. at 24.

258. *Id.* at 24-29. The court, however, failed to enjoin the state computer generated notice forms despite a finding that the state notice forms were deficient on their face. *Id.* at 31. The court reasoned that

notice of their right to reinstatement at the level enjoyed prior to issuance of the sanction; reverse all sanctions based on inadequate notice and remove any reference to such sanctions from the recipient's file; and pay restitution to each member of the class in an amount equal to the benefits he or she would have received but for the improper sanction, plus interest.[259] This litigation provides one example of the manner in which the due process rights of welfare recipients under TANF and second level devolution might be formulated, litigated, and decided. In the context of devolution under PRWORA, it seems likely that the problems found in Colorado's experience with second order devolution are likely to resurface throughout the country.

CONCLUSION

Scholars and courts have only begun to analyze the implications of the fundamental changes wrought by the 1996 passage of PRWORA. Among the most pressing questions for eligible recipients of cash assistance subsidies is the extent to which they retain due process protections. As state and county agencies exercise their authority to administer TANF, unbridled caseworker discretion presents a real risk of inconsistent application, bias, and inequity in the administration of benefits. In many respects, the devolution of authority for the administration of public benefits highlights the importance of these procedural due process protections.

This Article postulates that, despite devolution, a traditional public law entitlement analysis demonstrates that eligible recipients retain a legally cognizable property interest in the receipt of public benefits and are, therefore, entitled to procedural due process protections. Even in the face of a statutory "no entitlement" declaration, courts, rather than Congress, will determine whether welfare recipients retain these constitutional protections. Application of current due process analysis reveals that the statutory requirements of objective criteria and fair and equitable treatment, as well as the written agreements entered into between recipients and the government, entitle qualified welfare recipients legitimately to expect receipt of the benefits for which they are eligible. In fact, even in the absence of contracts or statutory mandates, the prohibition against arbitrary government action places limits on caseworker discretion. Thus, while application of established procedural due process requirements to PRWORA may differ from application to pre-reform welfare programs, devolution has not altered the end result: any government agency distributing cash assistance must adhere to basic notions of due process.

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while the state can prescribe a form, only the counties can provide specific information in each case to make the notice sufficiently detailed. *Id.*

259. *Id.* at 32-34.

COLORADO WORKS

☐ Mandatory
☐ Volunteer

INDIVIDUAL RESPONSIBILITY CONTRACT (IRC)

Name	Sale ID#	Social Security Number	Telephone Number

PROVISIONS

1. This IRC is to be considered as a contract between the participant and the _____ County Department of Social Services that contains Terms and Conditions governing the participant's receipt of assistance under the Colorado Works Programs.
2. No individual is legally entitled to any form of assistance under the Colorado Works Program.
3. Failure to comply with the terms and conditions of this IRC may result in sanctions, including but not limited to termination of any cash assistance.
4. This IRC shall be limited in scope to matters relating to securing and maintaining training, education or work.

RESPONSIBILITIES

As a JOBS participant, your participation and cooperation are required. You are responsible to notify your case manager if any changes occur in your circumstances which might affect your cash assistance. As a JOBS participant, you are required to:

- Keep all appointments with your case manager;
- Respond to any request from the country department or participating agency regarding your employment status;
- Participate in assessments to determine your level of job readiness;
- Report for and participate in any employment or education activity agreed to by you and your case manager;
- Notify your case manager immediately of any or all of the following:
  - A change in your employment status.
  - Being out of town and not available for work, job referral, JOBS appointment, or training sessions.
  - Emergency situations which prevent you from participating in JOBS activities.
  - Absence from any scheduled classes or JOBS-related activities, and
- Accept and maintain appropriate employment.

RIGHTS

You have the right to file a grievance or complaint if you believe that you have been discriminated against on the basis of your age, race, color, creed, sex, or previous national origin, or if you disagree with your case manager's assignment or decisions. Your case manager will assist you to file a grievance or complaint.

You have the right to look for work on your own, and accept a job if offered.

You have the right to participate in the development of your IRC with your case manager.

You have the right to dispute resolution at the county department if you are not satisfied with actions affecting your assistance or JOBS participation. You have the right to appeal to the state department if the dispute is not resolved. Your case manager will assist you to file a request for dispute resolution or state appeal.

My rights and responsibilities have been explained to me and I understand my participation requirements in the JOBS Program as outlined above. I understand that I am required to participate in the activities listed and for the number of hours per week designated in my IRC. I also understand that if I move to another county, this IRC may be voided.

_____
JOBS Participant Signature and Date

As a representative of this agency, I have carefully explained the participant's rights and responsibilities and acknowledge the responsibilities of the agency. A signed copy of the IRC has been provided to the participant.

_____
JOBS Case Manager Signature and Date

FIGURE 1. Sample Individual Responsibility Contract

Work Activity: ______________	
PLAN:	Begin/End Dates ________ to ________
CLIENT WILL:	Schedules Hours/Week ________________
AGENCY WILL:	Revision of Dates ________________
COMMENTS:	Initials/Date ________________
Work Activity: Completion Date:___ Case Managers Initials ___ Participant's Initials___	

Work Activity: ______________	
PLAN:	Begin/End Dates ________ to ________
CLIENT WILL:	Schedules Hours/Week ________________
AGENCY WILL:	Revision of Dates ________________
COMMENTS:	Initials/Date ________________
Work Activity: Completion Date:___ Case Managers Initials ___ Participant's Initials___	

Work Activity: ______________	
PLAN:	Begin/End Dates ________ to ________
CLIENT WILL:	Schedules Hours/Week ________________
AGENCY WILL:	Revision of Dates ________________
COMMENTS:	Initials/Date ________________
Work Activity: Completion Date:___ Case Managers Initials ___ Participant's Initials___	

FIGURE 1. *(Continued)*