

# Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform

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## I. INTRODUCTION

Welfare reform in 1996 occurred at the intersection of two narratives: a substantive debate on the systematic restructuring of a failed welfare agenda and a tactical discussion on the means of implementation. By most accounts, scholars have treated these two narratives—and the reform legislation they propagated—as internally consistent, if not altogether harmonious. The chosen process-based theories of devolution of social service provision (through local governments, private corporations, and churches) have been viewed as inseparably linked with the substantive objectives of the anti-dependency, pro-work agenda. After all, as conventional wisdom goes, we need to harness the dynamism and flexibility of state and local government in order to end dependency and promote work. The intuition that often follows is that devolution is our panacea. But this intuition is wrong.

Our almost blithe acceptance of the marriage between means (devolution) and ends (reducing dependency) has limited occasions to evaluate critically the compatibility between procedural devolution and substantive welfare reform.<sup>1</sup> Yet such an evaluation is needed.<sup>2</sup> Despite the assumed political and ideological connection between devolution and substantive reform, this purportedly natural alliance<sup>3</sup>

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<sup>1</sup> Among the major contributions to the understanding of welfare reform and policy since the 1996 reform, some of the most insightful analyses tend to posit holistic critiques and, accordingly, devote comparatively less attention to the separate and separable conceptions of welfare reform as system (i.e., substantive reform) and as process (i.e., means and loci of implementation). See, e.g., Matthew Diller, *The New Localism in Welfare Advocacy*, 19 ST. LOUIS U. PUB. L. REV. 413 (2000) [hereinafter Diller, *Localism*]; Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000) [hereinafter Diller, *Revolution*]; David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231 (1998); Sylvia A. Law, *Ending Welfare as We Know It*, 49 STAN. L. REV. 471 (1997); Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 DUKE L.J. 493 (1999); Peter Edelman, *The Worst Thing Bill Clinton Had Done*, ATLANTIC MONTHLY, Mar. 1997, at 43.

<sup>2</sup> See, e.g., Diller, *Revolution*, *supra* note 1, at 1126 (“Observers of the welfare system long have recognized the central importance of administration in the operation of assistance programs. The structure of the bureaucracy and administrators’ conceptions of their missions have a vital impact on the accessibility of benefits and on the social messages that are communicated by benefit programs. . . . Many states explicitly have targeted the organization and culture of welfare offices for reform.”).

<sup>3</sup> Professor Cashin has recognized that a number of welfare reform’s supporters in Congress believed that federalism “would enhance the likelihood of meeting the Act’s core substantive goals. They believed that states were best suited to design programs that would end welfare dependency.” Sheryll Cashin, *Federalism, Welfare Reform, and the Minority Poor*, 99 COLUM. L. REV. 552, 554 (1999); see also *id.* at

spawns unnatural and unintended side effects that threaten the long-term success of welfare reform. In truth, significant problems emerge when the federal government, ostensibly insistent on meeting certain objective goals, nevertheless abdicates its authority and responsibility for overseeing the implementation and for securing the success of the biggest restructuring of American welfare policy in generations.<sup>4</sup>

Simply put, in abdicating this responsibility, Congress has actually allowed one narrative to dominate the other. It has privileged the aims of devolution and privatization—at the expense of ensuring fidelity to the policy aims and objectives of welfare reform and, importantly, at the expense of ensuring fidelity to the concept of federalism itself. This capitulation to the forces of devolution, I need not add, may be politically expedient,<sup>5</sup> but otherwise incongruous from the perspective of prudent policymaking.<sup>6</sup> State and local governments, as well as private and faith-based providers, could be quite effective *partners* in designing and implementing welfare reform. But left to their own devices, they lack the institutional capacity and, oftentimes, the proper incentives to bear primary

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553 (“One major strain of political rhetoric animating the passage of the [Welfare Reform] Act was that of political federalism—an a priori presumption that . . . states are the natural situs of all policy authority.”).

<sup>4</sup> See, e.g., Larry Cata Backer, *Poor Relief, Welfare Paralysis, and Assimilation*, 1996 UTAH L. REV. 1, 11 (describing PRWORA as representing a “substantial change in locus for poor relief from AFDC and related programs, the pattern for which began in the 1960s”); Christopher Ogden, *Clinton and Congress Agree To End Six Decades of New Deal Protections*, TIME (Int’l Ed.), Aug. 12, 1996, at 17; Robert Pear, *Clinton To Sign Welfare Bill that Ends U.S. Aid Guarantee and Gives States Broad Power*, N.Y. TIMES, Aug. 1, 1996, at A1; *The Roosevelt Legacy*, ECONOMIST, Sept. 28, 1996, at 38 (describing the “repeal of the 60-year-old federal guarantee of welfare for the poor” as heralding the “unraveling of the New Deal”).

<sup>5</sup> See, e.g., William Claiborne, *Governors Push for Greater Power*, WASH. POST, Aug. 29, 1994, at A19 (describing a bipartisan movement among some of America’s governors to draft constitutional amendments aimed at promoting states’ rights and to press for the need for a constitutional convention); Roger Pilon, Editorial, *A Matter for the States*, WASH. POST, June 18, 1996, at A13 (describing candidate Bob Dole as having “put the 10th Amendment and a call for returning power to the states and the people at the center of his presidential campaign”); see also Richard L. Berke, *A Conservative Sure His Time Has Come*, N.Y. TIMES, May 30, 1995, at A1 (describing presidential candidate Pat Buchanan’s self-proclaimed successes in shifting the mood toward greater state autonomy: “I’ve won that battle. . . . Jack Kemp’s talking about shutting down HUD. Richard Lugar is talking about abolishing the I.R.S. Pete Wilson is talking about illegal immigration.”); Keith Bradsher, *States’ Rights Lose Some of Their High*, N.Y. TIMES, Jan. 5, 1997, at D6 (describing advocates’ efforts to devolve affirmative action policy and drug policy and quoting them as comparing federal control in those realms to “Soviet repression”).

<sup>6</sup> See John D. Donahue, *The Devil in Devolution*, AM. PROSPECT, May/June 1997, at 42.

responsibility for ensuring the successful transition of America's dependent, welfare population to the world of work and personal responsibility. The shrinking of the federal government's responsibilities over social welfare, moreover, creates civic harms as well.<sup>7</sup> To abandon our national commitment to assist some of the most vulnerable among us, is to rend the very fabric of our collective identity.

For Congress to conflate welfare reform with *devolved* welfare reform<sup>8</sup> is to ensure that it left itself without the necessary tools to make that fabric whole again. At stake in this inquiry, therefore, is an understanding that the substantive objectives of 1996 welfare reform may be all but overridden or subverted by the very process by which that reform has been implemented. This Article's ambition is three-fold. First, I identify the existence of discordant narratives embedded in the story of welfare reform. Then, I detail the distortions and unintended harms that are engendered in the process of implementing welfare reform. And, finally, I propose a rough blueprint for reform.

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Accordingly, this Article begins in Part II by seeking to

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<sup>7</sup> See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1229 (2003) ("The new versions of privatization . . . jeopardize public purposes by pressing for market-style competition, by sidestepping norms that apply to public programs, and by eradicating the public identity of social efforts to meet human needs."); see also Matthew Diller, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization: Introduction*, 28 FORDHAM URB. L.J. 1307 (2001) (characterizing concerns with privatization, including how greater privatization leads to less public accountability and how privatization leads to a shrinking of opportunities for meaningful public engagement).

<sup>8</sup> Indeed, critics of devolved welfare tend to see the process as intimately and intuitively linked to the substantive agenda. They see PRWORA as an effort to make cash assistance less generous and less accessible, and they see the states as effective agents in furthering those aims. For example, Professor Cashin has recently argued that states are more frugal with respect to social welfare spending and more likely to succumb to racial biases in policymaking and appropriations spending than is the federal government. See Cashin, *supra* note 3. Prior to 1996, economic arguments concerning the dangers of devolving social welfare programs were raised by, among others, Paul Kantor and Paul Peterson. See, e.g., PAUL KANTOR, THE DEPENDENT CITY REVISITED 5-14, 95-99 (1988) (arguing that municipalities have limited control over their political economies and thus aggressively compete with one another to entice business development, often at the expense of social welfare spending); PAUL E. PETERSON, CITY LIMITS 69-72 (1981) (suggesting state and local governments must expend on economic development projects and are reluctant to redistribute any incoming wealth); Paul E. Peterson, *Devolution's Price*, 14 YALE L. & POL'Y REV. 111, 114-21 (1995) (cataloguing the secular decline in state allocations for welfare benefits from the early 1970s to the early 1990s). In other words, many observers believe that the substantive (understood as harsher) revisions that are part of welfare reform are furthered via devolution.

disaggregate the “intuitive” connection between the aims of ending dependency and the means of accomplishing those aims. Part II further seeks to describe how Congress distorted and undermined its own, stated policy aims by acceding to the forces of devolution and privatization. For the most part, scholars’ critiques of welfare reform have voiced concerns that the legislation is too harsh, does not sufficiently preserve legal avenues for redress, grants states too much control, and gives too much power to private and sectarian providers. And, because many of the scholars critical of welfare reform believe it to be uniformly or holistically misguided—or, worse, mean-spirited—they have not focused their energy on examining the legislation’s internal inconsistencies.<sup>9</sup> Thus, few have systematically undertaken

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<sup>9</sup> Notable works in the field have begun this conversation by challenging the assumptions underlying this allegedly natural alliance between welfare reform and devolution, contending that there is no a priori fit between local governance and effective social welfare provision. See Cashin, *supra* note 3, at 583-86 (describing, in fact, the opposite trend that states are inherently averse to generous social welfare spending and subject to greater political pressure to be fiscally conservative than the federal government would otherwise be); see also Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739 (2002) (describing how privatization of welfare administration weakens government oversight and limits public control and contending that privatization initiatives may, counterintuitively, not even be efficient).

Scholars have, moreover, decried the lack of due process protections that accompany the shift to devolution and have focused their criticism on the discretionary powers that flow from the termination of the federal entitlement, discretion that leaves the client population of welfare recipients susceptible to the (potentially arbitrary) vagaries of the administrative system. See Diller, *Revolution*, *supra* note 1, at 1127-28 (describing the change in implementation strategy that flows from the abandonment of a federal entitlement to welfare); *id.* at 1180 (“[T]he principles reflected in the APA have created a framework that is in effect throughout our legal system and has become the dominant means of ensuring administrative accountability.”); Kennedy, *supra* note 1, at 231.

Other scholars, of course, have raised similar concerns. See, e.g., Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559, 1564 (2001) (“It is not obvious which new mechanisms will permit citizens to hold state and local governments accountable in their performance of these new roles and responsibilities.”). Professor Bezdek complicates the analysis of welfare reform by inquiring into the procedural limitations of contracting with private vendors in a way that marks an effort to bridge the many components of welfare reform: devolution, privatization, its substantive aims, and its procedural tools. Her study richly conveys the attenuated control over the programmatic agenda of corporate providers. See *generally id.* at 1603 (“[P]rivatization of government service delivery presents a paradox: it is said repeatedly that citizens believe government should contract out for services, and yet, government must be very competent to design, let, and monitor effective service contracts.”).

R. Kent Weaver, moreover, mentions the federalism trap: granting states additional discretion will lead them to do things the politicians do not like. See R. KENT WEAVER, *ENDING WELFARE AS WE KNOW IT* 123 (2000). But even Weaver, who

an internal analysis of how welfare reform is itself undermined by its own methods of implementation. Part II aims to commence just such an exploration.

Next, in the middle parts of the Article, I turn to the implementation of welfare reform at devolved and sub-devolved<sup>10</sup> levels of authority and administration. I argue that these new loci of devolved welfare policy inevitably and inescapably distort the substantive aims of the federal wave of reform; these distortions, which occur in varying degrees of severity at each level of devolved administration, take three forms. There are (1) *institutional* harms that occur because the (devolved) institutional actor in charge of welfare policy lacks the requisite tools, jurisdictional reach, and overall capabilities to meet the objective policy aims of federal welfare reform. These mismatches between aims and capacity create macro-inefficiencies in the overall implementation of welfare policy. Moreover, there are (2) *managerial* or *bureaucratic* harms that limit the effective design and dispersal of social service welfare provisions because the welfare providers themselves possess sets of incentives that may lead them to stray from the federal welfare reform agenda. Finally, there are (3) *civic-citizenship* harms. The devolved and privatized loci of welfare administration may prove particularly ill-equipped or ill-disposed to promote public accountability, democratic transparency, and due process remediation. These harms may engender greater senses of alienation and social exclusion from public governance in ways that directly undermine the ideals of social integration implicit in the federal welfare agenda.

Thus, in Parts III, IV, and V, I examine how states, for-profit corporations, and sectarian faith-based organizations, respectively, are all authorized to act as the providers of choice, responsible for implementing the federal legislation. I assess the degree to which these providers are able (and willing) to meet the stated substantive aims set forth in the federal mandate. And, I ultimately conclude that America's poor may be ill-served, not necessarily by the objective ambitions of Congress's welfare reform per se, but by the structural

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points to this possibility only in passing, fails to suggest that devolved welfare reform is internally inconsistent; instead, he simply posits that tinkering with the system becomes increasingly difficult as states define themselves in opposition to Congress. *See id.* at 123.

<sup>10</sup> See Christine N. Cimini, *Welfare Reform Ends in 2002: What's Ahead for Low-Income and No-Income Families*, 61 MD. L. REV. 246, 250-51 (2002) (describing the practice of states instituting "second-order devolution" to counties); *see also* Thomas L. Gais & Cathy M. Johnson, *The Implication of Welfare Reform for Children*, 60 OHIO ST. L.J. 1327, 1346 (1999) (describing state practice of sub-delegating administrative and policymaking authority over welfare services).

design of the legislation; the legislation opens the door to policymaking by devolved and privatized providers while closing the door to effective federal participation, coordination, and stewardship.

Finally, in Part VI, I propose an alternative architectural framework that might better meet the dual goals of effective *and* decentralized welfare reform. I thus attempt to reconcile the currently discordant narratives (and the inconsistencies between means and ends) by positing a vision of a reconceptualized welfare agenda that acknowledges the imperatives for more local and flexible authority but respects the substantive aims of federal welfare reform. By forging multiple socioeconomic development partnerships centering on federal-state, federal-municipality, and federal-private cooperatives, welfare reform presents an opportunity not only to promote the day-to-day needs of America's poor, but also to harness the forces of federalism constructively to design the intergovernmental and public-private partnerships that are necessary to tackle the massive responsibility of combating poverty. It is these partnerships that could both reaffirm the federal government's relevance and dynamism with respect to solving socio-economic ills and re-connect Washington with local governments and community organizations, breeding greater civic consciousness and public engagement.

Simply put, federalism is not devolution per se, and thus I need to dust off a more authentic understanding of federalism and return it to its rightful place at the center of American legal architecture. I reject the wholesale "farming out" of social services and see the need and opportunity instead to promote new communitarian connections, to draw Washington and Peoria closer together as well as to foster ties between Peoria and, say, Indianapolis. Multiple layers of civic partnerships will help communities seize upon the appropriate economies of scale, encourage greater public engagement and discourse on the proper relations of the actors, and allow the federal government an opportunity not only to monitor what goes on with county social services, private vendors, and faith-based organizations, but also to develop and construct policy along side of them. One way to attack Washington for being out-of-touch is to shut it out of the process entirely. Another way to register the same complaint more constructively is to invite Washington to participate in the *decentralized* process at the ground level. It is, after all, the difference between devolution and federalism.

II. A TALE OF TWO NARRATIVES:  
THE BUILDUP TO WELFARE REFORM

Welfare reform is not devolution; nor is it privatization. Yet in the mêlée to overhaul American welfare policy in 1996, these obviously discrete and different concepts tended to lose their distinctiveness. Conflating systems with processes, substantive aims with logistical means, the architects of welfare reform designed legislation in response to the wishes of the public. Substantively, the American people demanded welfare recipients get their lives together and go out and find work (like everyone else); Congress accordingly ended the long-standing, means-tested federal entitlement to cash assistance and, instead, conditioned temporary, transitional cash assistance on proof that recipients were actively seeking work.<sup>11</sup> Procedurally, the American people signaled their preference for more locally devised social service provision over federal management and administration; Congress accordingly—but perhaps paradoxically—devolved to the states nearly complete authority and discretion in implementing the federal objectives.<sup>12</sup>

This Article challenges the neatness and coherence of these two narratives that were made to converge into one story. The instant inquiry is not simply my pointing out an interesting “quirk” in the legislative design—namely, that states, churches, and corporations may not follow the federal directives to a tee. Rather, I argue these ersatz agents are institutionally incapable of satisfying the federal aims. Accordingly, the forces of devolution and privatization, distinct from any criticisms of the substantive aims of welfare reform per se, may actually constitute a serious threat to the long-term success of welfare reform. And, perhaps most importantly, this Article suggests Congress’s understanding of federalism as devolution may signal a drastic shift in federal-state relations (as well as in public-private sphere relations) that will influence not only how resources are allocated to America’s poor, but also how we as a community collectively embrace (or shed) the responsibility of promoting the common welfare.<sup>13</sup> Thus bluntly, I challenge Congress’s desiccated

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<sup>11</sup> See 42 U.S.C. § 601(b) (2000) (ending the federal entitlement to AFDC assistance and replacing it with discretionary, temporary assistance grants); Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. ON POVERTY L. & POL’Y 89 (2002); Jason DeParle, *U.S. Welfare System Dies as State Programs Emerge*, N.Y. TIMES, June 30, 1997, at A1.

<sup>12</sup> See 42 U.S.C. §§ 601-02, 604 (2000) (ending the federal entitlement to AFDC assistance and replacing it with discretionary, temporary assistance grants); DeParle, *supra* note 11.

<sup>13</sup> See Bezdek, *supra* note 9, at 1565 (“[N]ational governments are [ostensibly]

view of federalism *qua* devolution and offer a more faithful understanding of this delicate federal-state balance that could vastly improve welfare reform. Once it becomes clear that the substantive aims of welfare reform may not be best met through the procedural means established in 1996, it will become imperative for us to rethink this seemingly natural connection. This imperative begins to take shape presently.

A. *Clamoring for Reform*

In this Section, I briefly describe the two sets of converging narratives that ultimately gave the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),<sup>14</sup> its distinctive characteristics. I discuss the rising influence in the 1980s and early 1990s of conservative thinkers and activists who challenged and ultimately helped de-legitimize the extant AFDC welfare system,<sup>15</sup>

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trying to reduce their roles, lower public spending, trim the direct provision of services, and rely more on private markets. The anti-big government movement is a general retreat from collectivism [that] emphasizes private property and freedom of contract. Although often cast in economic terms of costs, benefits, efficiency, and program management, this is really a watershed about governance, the uses of power in society, and the boundaries between public action and private concerns.”) (footnote omitted). Solomon and Vlissides characterize this transformation in attitudes by comparing Franklin Roosevelt’s rhetoric during the New Deal with President Clinton’s at the signing of PRWORA. Clinton called for “all of us—States and cities, the Federal Government, businesses and ordinary citizens—to work together to make the promise of this new day real.” By contrast, Roosevelt, in conveying the newfound sense of community empowerment via government, had proclaimed: “where heretofore men had turned to neighbors for help and advice, they now turned to Government.” Lewis D. Solomon & Matthew J. Vlissides, Jr., *Faith-Based Charities and the Quest to Solve America’s Social Ills: A Legal and Policy Analysis*, 10 CORNELL J.L. & PUB. POL’Y 265, 271 (2001). For a discussion of constitutional (and congressional) imperatives to take seriously the responsibility of providing for the general welfare, see Jon D. Michaels, *To Promote the General Welfare: The Republican Imperative To Enhance Citizenship Welfare Rights*, 111 YALE L.J. 1457 (2002).

<sup>14</sup> Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of Titles 7, 8, 26, and 42 of the United States Code).

<sup>15</sup> Aid to Families with Dependent Children (“AFDC”), or its predecessor, Aid to Families with Children (“AFC”), was the foundational cash welfare assistance program in the United States from the New Deal through 1996. See, e.g., WEAVER, *supra* note 9, at 16, 28, 244-45; Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America’s Public Income Transfer Programs*, 14 YALE J. ON REG. 123, 143-44 (1996); Jonathan Zasloff, *Children, Families, and Bureaucrats: A Prehistory of Welfare Reform*, 14 J.L. & POL. 225, 266-69 (1998). The cornerstone of this program was the federal guarantee of cash assistance, which was endorsed by the Supreme Court in *King v. Smith*, 392 U.S. 309 (1968). There, the Court reversed the governing presumption that states were free to change and modify any eligibility rules unless they were expressly forbidden. After *King*, the states were not permitted unilaterally to change the standards of eligibility if they were to frustrate the federal aims of cash assistance. See Zasloff, *supra*, at 269-70.

which they considered morally bankrupt and programmatically ineffective. I also describe—again, quite briefly—the revitalized challenge to federal hegemony in the realm of domestic policymaking writ large. Advocates for greater states' rights and/or greater privatization gained considerable momentum at the same time these welfare critics were demanding substantive reform. These “smaller government” advocates championed wholesale devolution and deregulation in the name of greater democracy, authenticity, choice, and efficiency; and, they succeeded in making devolution and privatization priorities in policymaking circles, the courts, and on the campaign trail. I will show, later, that both this chronological overlap and the political alliance between these two movements actually belie a real tension: that devolution serves to undermine the substantive aims of welfare reform.

### 1. *Substantive Reform: Combating Dependency*

Some policymakers in the 1980s, fed up with the unsuccessfully waged War on Poverty, began rethinking America's anti-poverty policy and challenging some sacred tenets of the modern welfare state.<sup>16</sup> Among them was Ronald Reagan, whose rhetorical attack on welfare helped drastically to shift the terms of the debate.<sup>17</sup> Reagan directed his indignation at the poor, whose benefits, he argued,

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<sup>16</sup> See Jason DeParle, *Debris of Past Failures Impedes Poverty Policy*, N.Y. TIMES, Nov. 7, 1993, at D3 (describing the saliency of President Reagan's quip “we fought a war on poverty and poverty won”); see also GEORGE GILDER, *WEALTH AND POVERTY* (1981); MICKEY KAUS, *THE END OF EQUALITY* (1992); LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* (1993); CHARLES MURRAY, *LOSING GROUND* (1984).

<sup>17</sup> Among the most memorable rhetorical attacks with sustained resonance is the conservative attack on the alleged “welfare queen.” See, e.g., Editorial, *And Now, Ronald Reagan*, WASH. POST, Nov. 13, 1979, at A18 (depicting Reagan as campaigning against welfare provisions in California because of flagrant abuses by welfare queens who wear “designer jeans”); Paul Krugman, Editorial, *Wag the Dog*, N.Y. TIMES, Sept. 24, 2000, at D15 (describing Ronald Reagan's constant attack against Cadillac-driving welfare queens as “mean-spirited”); Herbert Mitgang, *The Problem that Won't Go Away*, N.Y. TIMES, Apr. 1, 1992, at C19 (discussing Reagan's insistence on the existence of Cadillac-driving welfare queens as a way of diverting middle-class concerns away from the plight of the underclass); Steven V. Roberts, *Food Stamps Program, How It Grew and How Reagan Wants to Cut It Back*, N.Y. TIMES, Apr. 4, 1981, at A1 (describing the saliency of the conservative “legend of the so-called ‘welfare queen,’ a heavy woman driving a big white Cadillac and paying for thick steaks with wads of food stamps, became a rhetorical staple for conservative politicians, including Ronald Reagan”); see also KATHERINE S. NEWMAN, *NO SHAME IN MY GAME* 230 (2000) (recalling Reagan holding up the want-ad section of the Washington Post to suggest jobs are available and that the dependent poor must be lazy); Steven V. Roberts, Editorial, *Reagan and His “Golden Oldies,”* N.Y. TIMES, July 16, 1987, at A24 (recalling President Reagan's frequent attacks on “welfare queens”).

drained needed resources away from the market economy and from otherwise more productive enterprises. Reagan's attack on what he memorably referred to as the "welfare queen" took on an iconography that had an effect domestically akin to what his depiction of the Soviet Union as an Evil Empire had on international relations.<sup>18</sup> At the Reagan Revolution's zenith, the very existence of the modern welfare state seemed threatened.<sup>19</sup>

Though little by way of actual policy *transformations* occurred during the 1980s, attitudes did take on a new hue.<sup>20</sup> Conservatives, ranging from Margaret Thatcher to Charles Murray, continually pressed their case against government support for "undeserving" (non-working) poor.<sup>21</sup> They lamented the declining significance

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<sup>18</sup> See Richard Cohen, Editorial, *Evil*, WASH. POST, Sept. 8, 1983, at C1 (describing the "I-told-you-so" quality of Reagan's "Evil Empire" appellation as particularly resonant in light of the Soviet downing of a Korean airplane); Hendrik Hertzberg, *Grinding Axis*, NEW YORKER, Feb. 11, 2002, at 23 (suggesting that "Ronald Reagan's most famous phrase[,] '[e]vil empire[,]'" is now chiselled on history's wall next to 'iron curtain' as an example of prescient moral clarity"); Stephen S. Rosenfeld, Editorial, *The Moral Edge*, WASH. POST, Dec. 28, 1984, at A17 (characterizing the moral force of Reagan's declaration).

<sup>19</sup> See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 120 (1987) (describing how the New Deal Coalition "collapsed when Reagan was elected" and how this Republican resurgence represented a particular attack on means-tested social services, such as welfare, rather than a general attack, say, on Social Security). The sentiments of Senator William Armstrong in the early 1980s resonated with those of the White House. Armstrong argued that "[p]eople on welfare ought to work, work, work because it is good for the soul, because it is fair to the taxpayers, because it rankles people who are paying taxes to support these programs to see people who are recipients not get out and work." MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE* 306 (1996); see also *id.* at 295 (describing the central role the Reagan administration played as "[t]he [f]ederal [g]overnment [w]ages [w]ar on [w]elfare").

<sup>20</sup> See KATZ, *supra* note 19, at 300 (describing how little impact the rhetoric of reform had on welfare policy under Reagan and George H.W. Bush). *But see* Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as 42 U.S.C. § 666 (2000)). For discussions of the Family Support Act, see KATZ, *supra* note 19, at 307-09; WEAVER, *supra* note 9, at 70-76; Bezdek, *supra* note 9, at 1577; Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457 (1987-1988); and Zasloff, *supra* note 15, at 289-94.

<sup>21</sup> Though America never had a "full welfare state" akin to what European nations had (both in terms of coverage and generosity), see Joel F. Handler, *Questions About Social Europe by an American Observer*, 18 WIS. INT'L L.J. 437 (2000), as early as the mid-1960s welfare benefits in the United States were quite substantial. See, e.g., KATZ, *supra* note 19, at 259-82; JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY, 1900-1994*, at 157-84 (1994); see also FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR* (1993) (describing dissatisfaction with degrading policies leading up to and during the 1960s); LINDA GORDON, *PITIED BUT NOT ENTITLED* (1994); NICHOLAS LEMANN, *THE PROMISED LAND* (1991) (describing the expansive Great Society policies); WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE*

(and resonance) of the Anglo-American ideals of the Protestant Work Ethic and rugged individualism. Instead, as Thatcher famously put it, we have abandoned self-reliance and are instead left with a “Nanny State.”<sup>22</sup> Charles Murray, for his part, argued persuasively that the welfare state infrastructure, built to alleviate poverty, has only reinforced the social pathologies that placed families in this precarious position in the first place.<sup>23</sup> Murray

insisted that handouts had demoralized the urban ghettos, leading young blacks to cling to welfare rather than work for a living. His view of these people reflected an ironic departure from nineteenth-century visions of the downtrodden in the slums. Then conservatives had often depicted slum dwellers as intemperate, shiftless, and immoral. To Murray these poor people were crassly rational calculators of their own self-interest: the benefits of welfare, Murray thought, induced them to quit work and live off the public trough.<sup>24</sup>

And, while cogent liberal and moderate responses were forthcoming,<sup>25</sup> the conservative attack ultimately carried the day. Conservatives successfully shifted the entire discourse away from fighting poverty and toward combating dependency. For them, the evil to be eradicated was not poverty per se; rather, it took both the form of a willingness to accept government support indefinitely and the form of a behavioral pathology acutely felt by the intergenerational underclass.<sup>26</sup>

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STATE 304-31 (1999) (describing the expansion of welfare policies and the increase in welfare spending); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985) (describing the legal-procedural underpinnings of the modern welfare state).

<sup>22</sup> See PATTERSON, *supra* note 21, at 213; see also Jo Thomas, *Britain Proposes Broad Overhaul of Almost All Welfare Programs*, N.Y. TIMES, June 4, 1985, at A1; Mortimer B. Zuckerman, Editorial, *The Nanny State of the Nation*, U.S. NEWS & WORLD REP., Apr. 3, 1995, at 72; *The Immortal Remains of Margaret Thatcher*, ECONOMIST (U.K. Ed.), Oct. 2, 1993, at 37.

<sup>23</sup> See MURRAY, *supra* note 16.

<sup>24</sup> PATTERSON, *supra* note 21, at 213.

<sup>25</sup> See, e.g., THEODORE R. MARMOR, JERRY L. MASHAW, & PHILIP L. HARVEY, AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 104-14 (1990); WILSON, *supra* note 19, at 93-95; see also MARY JO BANE & DAVID T. ELLWOOD, WELFARE REALITIES: FROM RHETORIC TO REFORM (1994); CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY 70-91 (1992).

<sup>26</sup> See PATTERSON, *supra* note 21, at 213-19 (describing such underclass “lifestyle choices” to include out-of-wedlock children and joblessness). For early formulations of this cultural phenomenon, see Oscar Lewis, *The Culture of Poverty*, in ON UNDERSTANDING POVERTY: PERSPECTIVES FROM THE SOCIAL SCIENCES 187 (Daniel P. Moynihan ed., 1968); Daniel P. Moynihan, *The Negro Family: The Case for National Action*, reprinted in LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY: A TRANS-ACTION SOCIAL SCIENCE AND PUBLIC POLICY

What was devastating about the conservative attack was that it was bilingual: It spoke the language of morality and the language of economics. If you were someone concerned with culture of poverty arguments, the conservatives could tell you why welfare policy was contributing to the social deviancy of the underclass by subsidizing dependency and promoting unstable family patterns; if you were someone more persuaded by rational-actor models, then the conservatives had an answer there, too: Under AFDC, it actually made more economic sense to remain dependent than it did to find a low-end job.<sup>27</sup>

Thus, entering the 1990s, ending dependency was the central theme in social policy—and not just among conservatives.<sup>28</sup> Both major political parties were operating, for the first time in a long while, under the same assumptions about federal welfare policy goals: Anti-poverty programs that support the dependent class are ineffective, and temporary assistance coupled with greater workforce participation should replace the status quo. President Clinton's 1992 campaign platform focused heavily on reforming welfare in this direction.<sup>29</sup> And, with only minor differences in levels and degrees of support, both parties during the Clinton years wanted desperately to condition welfare benefits on participation in the job market. Hence, there existed considerable bipartisan support for many of the substantive aims of 1996 welfare reform.<sup>30</sup>

## 2. *Procedural Reform:*

### *The Devolution and Privatization Revolution*

This period of backlash against guaranteed welfare provisions and federal entitlements under the New Deal and Great Society

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REPORT 40-125 (1967) [hereinafter Moynihan, *The Negro Family*].

<sup>27</sup> See MURRAY, *supra* note 16, at 154-77 (illustrating this point by using his seminal hypothetical working couple, Harold and Phyllis).

<sup>28</sup> See, e.g., BANE & ELLWOOD, *supra* note 25, at 144-54 (describing the “make work pay” agenda of changing the relative reservation wage for current welfare recipients to enter the labor market); Mickey Kaus, *The Work Ethic State*, NEW REPUBLIC, July 7, 1986, at 22 (describing the civic virtues of work that underlie full citizenship and social engagement).

<sup>29</sup> See, e.g., WEAVER, *supra* note 9, at 223-27; Richard L. Berke, *Clinton: Getting People off Welfare*, N.Y. TIMES, Sept. 10, 1992, at A20; Gwen Ifill, *Clinton Presses Welfare Overhaul, Stressing Job Training and Work*, N.Y. TIMES, Sept. 10, 1992, at A1.

<sup>30</sup> It is beyond the scope and interest of this Article to describe and compare the different welfare bills proposed during Clinton's first term. Though the Clinton proposals, which were never enacted, had greater safeguards in terms of guaranteeing jobs to those transitioning into the world of work, the substantive aims of those bills were relatively similar to PRWORA's. See, e.g., WEAVER, *supra* note 9, at 316-27.

coincided, chronologically, with an across-the-board revolt against the federal government's alleged dominance in domestic policymaking. In spite of the fact that welfare was actually administered in accordance with models of cooperative federalism since its creation,<sup>31</sup> critics nevertheless wanted to circumscribe further the size, scope, and authority of the federal government.<sup>32</sup> Their broad calls for greater transfers of authority to state and local governments were well-received.<sup>33</sup> Underlying this movement was a theory of better, more responsive government. As Justice O'Connor noted in *Gregory v. Ashcroft*, federalism in the direction of devolution (1) enhances citizenship participation, (2) stimulates innovation, and (3) increases administrative efficiency.<sup>34</sup> Indeed, proponents of devolution have championed the "bottom-up tradition that celebrates interlocal variation and emphasizes local decision-making autonomy, local responsibility for services delivered locally, and local political accountability to the electorate."<sup>35</sup> Among the most vocal and effective of the lobbyists promoting devolution in the 1980s and 1990s has been the National Governors Association, which has successfully secured for the states greater responsibility in, inter alia, the areas of environmental<sup>36</sup> and social service policymaking.<sup>37</sup>

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<sup>31</sup> See Joel F. Handler, "Constructing the Political Spectacle": Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History, 56 BROOK. L. REV. 899, 949-50 (1990) (describing state and local government as policymaking loci for welfare services); Sugarman, *supra* note 15, at 144-46 (same); see also *infra* note 79 and accompanying text.

<sup>32</sup> See Sugarman, *supra* note 15, at 143-46 (noting the federal guarantees that were in place prior to passage of PRWORA and identifying places where rolling back federal protections would be possible under devolved welfare reform).

<sup>33</sup> See *supra* note 5.

<sup>34</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

<sup>35</sup> Bezdek, *supra* note 9, at 1607; see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); see also ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993) (arguing that the "genius" of federalism is its ability to generate competition among states); John D. Donahue, *Tiebout? Or Not Tiebout? The Market Metaphor and America's Devolution Debate*, 11 J. ECON. PERSP. 73, 74 (1997); Richard Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987). Moreover, some suggest the structural design of our constitutional system makes a commitment to federalism an institutional imperative. See, e.g., Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 217 (1997).

<sup>36</sup> See, e.g., Editorial, *Environmental Defiance*, N.Y. TIMES, Dec. 20, 1996, at A38 (describing the strong support in Congress and state capitols for giving states greater autonomy on environmental regulation policy). The efforts by the National Governors Association to gain control over low-level radioactive waste provide an excellent example of states wresting power from Washington. See William F. Newberry, *The Rise and Fall and Rise and Fall of American Public Policy on Disposal of Low-Level Radioactive Waste*, 3 S.C. ENVTL. L.J. 43, 56 (1993); see also Low-Level Radioactive

This devolution revolution,<sup>38</sup> which ushered in a process-oriented movement for locating legislative and regulatory authority at lower levels of government regardless of the substantive content of the policies in question, was complemented by calls for greater privatization—at every level of government. What, the argument went, would be more efficient than harnessing the productive capacities of the private sector? Tired and dissatisfied with a large, unwieldy, and inefficient bureaucracy,<sup>39</sup> privatization advocates have

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Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1980); *New York v. United States*, 505 U.S. 144 (1992) (describing state efforts to manage and share the burden of low-level waste disposal).

<sup>37</sup> The National Governors Association was critical in putting devolution at the forefront of the welfare reform agenda. See WEAVER, *supra* note 9, at 207-21. Under the pre-existing AFDC framework, states in the mid 1990s liberally used their regulatory right to experiment with and restructure the design of welfare policy within their jurisdictional boundaries; and, they did so in creative and commendable ways. See Susan Bennett & Kathleen A. Sullivan, *Disentangling the Poor: Waivers and Welfare "Reform,"* 26 U. MICH. J.L. REFORM 741 (1993) (describing a system in which waivers were summarily granted and states were given wide latitude to experiment in the crafting of welfare packages); Cimini, *supra* note 11, at 96. Under President Clinton, the U.S. Department of Health and Human Services granted nearly seventy waivers to forty states experimenting with welfare reform. Todd S. Purdham, *Clinton in a Box as Welfare Bill Edges Closer*, N.Y. TIMES, July 26, 1996, at A1; see also Cashin, *supra* note 3, at 620-21.

Of note, however, it must be remembered that welfare policy in America has never really been programmatically centralized. For most of the history of AFDC, states have had considerable flexibility in determining eligibility and shaping the size and scope of welfare packages. See *supra* notes 31-32 and accompanying text. As will be discussed below, however, see *infra* Section III.B-V.C, the 1996 reforms permit a seismic shift toward qualitatively greater state autonomy and away from federal guideposts and oversight.

<sup>38</sup> See Daniel Patrick Moynihan, Editorial, *The Devolution Revolution*, N.Y. TIMES, Aug. 6, 1995, at D15 (describing devolution as the "next stage in the long, alternative history of federalism"); see also Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE J. ON REG. 227, 228 (1996) (describing Senator Bob Dole's declaration that "America's historical detour into bureaucracy and centralization is over"); Peter H. Schuck, *Some Reflections on the Federalism Debate*, 14 YALE J. ON REG. 1, 5 (1996) ("The pressure to devolve power from the center to the periphery is a nearly universal phenomenon in contemporary society."); Richard L. Berke, *Forget Washington*, N.Y. TIMES, Oct. 19, 1997, at D5 (describing the consensus supporting devolution); Charles Murray, Editorial, *Welfare Hysteria*, N.Y. TIMES, Nov. 14, 1995, at A25 ("The heart of the American project was that government's powers should be limited and exercised as close to home as possible. The federalization of American life in the last half-century, not the prospect of devolution in 1995, is the historical aberration.").

<sup>39</sup> For instance, current leaders in government have embraced the management style of businesses over the governance structures of bureaucracy. See John Solomon, *Bush, Harvard Business School and the Makings of a President*, N.Y. TIMES, June 18, 2000, at C17 (describing how the management styles of business are only now being recognized as applicable in government settings); see also Bradley Graham, *White-Rumsfeld Dispute, Round 2*, WASH. POST, Sept. 19, 2003, at A23 ("[The

sought to slash the federal workforce, circumvent the procedural red tape characteristic of the modern administrative state, and embrace competitive market dynamics that lead to lower operating and management costs.<sup>40</sup> Indeed, America's current wholesale embrace of privatization as the cornerstone of good government *as efficient government* is a relatively new, but significant phenomenon<sup>41</sup> that has garnered bipartisan attention and support.<sup>42</sup> The massive movement

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appointment [of former Enron executive Thomas White] as Army secretary in 2001 reflected a broad push by Rumsfeld to place corporate executives at the top of the military services. James G. Roche, a Northrop Grumman vice president, was tapped to head the Air Force, and Gordon R. England, a General Dynamics executive vice president, took charge of the Navy. Together, the three were to form a kind of board of directors with Rumsfeld as chairman . . . ."); Richard A. Oppel Jr. & Thom Shanker, *Army Secretary Steps Down*, N.Y. TIMES, Apr. 26, 2003, at A17 (characterizing the appointment of Secretary White as "a way to bring business efficiency to the Pentagon's sometimes bureaucratic culture").

<sup>40</sup> Proponents of privatization think private actors and agencies perform more efficiently than government in providing social services, in (self-)regulating and monitoring industrial health and environmental standards, and in building consensus on proposed rules and regulations. See Ronald A. Cass, *Privatization: Politics, Law and Theory*, 71 MARQ. L. REV. 449, 449 (1988).

Besides market-based efficiencies, privatization tends to lower costs due to lower labor expenses. See Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1523-24 (2001) (describing savings costs associated with hiring private employees who lack the job security and civil service status that government employees enjoy); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 602-03 (2001) (characterizing some of the savings costs associated with privatization in terms of enlarging the proportion of unionized, unprotected labor).

Moreover, many bureaucratic agencies are perceived as being "captured" by special interests; this knowledge makes the leap to privatization increasingly sensible and attractive. Thomas Merrill describes the public choice theorists' concerns with political institutions. Public choice theorists, he argues, suggest that the "public interest will best be served by transferring decisional authority away from the political institutions altogether." Thomas Merrill, *Capture Theory and the Courts, 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1054 (1997); see also JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 23-24 (1997).

<sup>41</sup> For general discussions on the rise in privatization in America, see JOHN D. DONAHUE, *THE PRIVATIZATION DECISION* (1989); JOEL F. HANDLER, *DOWN FROM BUREAUCRACY* (1996); *PRIVATIZATION AND THE WELFARE STATE* (Shelia B. Kamerman & Alfred J. Kahn eds., 1989); E.S. SAVAS, *PRIVATIZING THE PUBLIC SECTOR* (1982); John J. DiIulio, Jr., *Response Government by Proxy*, 116 HARV. L. REV. 1271 (2003); and Martha Minow, *Public and Private Partnerships, Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003). See also Cass R. Sunstein, *Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 249-50 (1996) (characterizing the 104th Congress as "signal[ing] the transformation of America into a genuinely post-New Deal regulatory state" intent of rethinking the regulatory state and the problems of overregulation and centralization).

<sup>42</sup> See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1292-94 (2003); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 27 (2001). The two Presidents Bush as well as President Clinton have all suggested that

to allow the private sector to perform traditional government services, including prison management,<sup>43</sup> environmental enforcement,<sup>44</sup> and, increasingly, even military and national security functions<sup>45</sup> suggests

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downsizing and privatization are key features of their efforts to reinvent government. The first President Bush assigned Dan Quayle primary responsibility over the Council on Competitiveness, a task force dedicated to deregulating and privatizing governmental responsibilities. Ann Devroy, *Quayle Panel Takes First Step with Murky Mandate*, WASH. POST, June 21, 1989, at A21 (describing the Quayle council as promoting an agenda of smaller government through deregulation); Philip J. Hiltz, *Questions on the Role of Quayle Council*, N.Y. TIMES, Nov. 19, 1991, at B12 (characterizing the council as promoting deregulation). More recently, Vice President Al Gore adopted a comparable role as he stewarded the Clinton administration's efforts to "reinvent government." See Gwen Ifill, *Gore Jumps into the Job of Cutting U.S. Waste*, N.Y. TIMES, Aug. 20, 1993, at A20; see also E.S. SAVAS, *PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS* 222 (2000). Gore also touted his exploits in this area when he ran for president. See Kevin Sack, *For Limited Government? That's Me, Gore Says*, N.Y. TIMES, Oct. 25, 2000, at A23 (describing the presidential candidate's avowed commitment to smaller federal government). And, most recently, President George W. Bush has promised to slash the federal workforce in half, contracting out to private entities many governmental responsibilities. See Richard Stevenson, *Government May Make Private Nearly Half of Its Civilian Jobs*, N.Y. TIMES, Nov. 15, 2002, at A1; see also Peter Finn, *With Lawrenceville Facility, Va. Enters World of Privately Run Prisons*, WASH. POST, Jan. 18, 1998, at B1; William J. Henderson, Editorial, *I Ran the Postal Service; It Should Be Privatized*, WASH. POST, Sept. 2, 2001, at B1.

<sup>43</sup> See Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 267 (2001); E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 895 (1987) (describing in the early years of prison outsourcing that many scholars viewed the introduction of privatization into the world of prisons as a "natural and inevitable development"); see also Martin E. Gold, *The Privatization of Prisons*, 28 URB. LAW. 359 (1996); Anne Larason Schneider, *Public-Private Partnerships in the U.S. Prison System*, in PUBLIC-PRIVATE POLICY PARTNERSHIPS 199 (Pauline Vaillancourt Rosenau ed., 2000); Developments in the Law, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868 (2002).

<sup>44</sup> See 42 U.S.C. § 7401-7671 (2000); 42 U.S.C. § 7410(a)(1) (2000) (leaving to the states the authority for creating plans for "implementation, maintenance, and enforcement" of the Clean Air Act); see also David A. Dana, *Innovations in Environmental Policy: The New "Contractarian" Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35, 36 (describing how policymakers avoid the administrative and political burdens of traditional forms of governance by revising legislation and regulations and striking deals with the regulated community in which "regulators contractually commit not to enforce some requirements that are formally applicable to the regulated entities in return for the regulated [corporate] entities' contractual commitments to take measures not required under existing formal law"). Professor Dana further describes how private regulation has been a response to the common understanding that market-based decisions promote efficiency and compliance in ways that often-inflexible government regulations do not. See *id.* at 37. For broader efforts aimed at de-emphasizing command-and-control type regulations, see Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 574 (2000). See also Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 561-70 (2000)).

<sup>45</sup> Recent reports indicate an alarming new trend in privatization of traditional armed service functions. See, e.g., P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF*

that core policymaking functions do not necessarily have to come from state capitols or from Washington.

*B. Coalescing Around Welfare Reform: Systems and Processes*

Since the New Deal and up until 1996, the federal government had been increasingly serving as the guarantor of poor relief.<sup>46</sup> Though welfare has always been a federal-state partnership, the “procedural revolution” of the late 1960s and early 1970s curtailed state agencies’ ability to reject classes of applicants and terminate individuals for “improper” behavior.<sup>47</sup> But, in 1996, Congress

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THE PRIVATIZED MILITARY INDUSTRY (2003); James Dao, *U.S. Company to Take Over Karzai Safety*, N.Y. TIMES, Sept. 19, 2002, at A24; Jonathan D. Tepperman, *Out of Service*, NEW REPUBLIC, Nov. 25, 2002, at 10; Leslie Wayne, *America’s For-Profit Secret Army*, N.Y. TIMES, Oct. 13, 2002, at C1; see also Maureen Dowd, Editorial, *Perle’s Plunder Blunder*, N.Y. TIMES, Mar. 23, 2003, at D13 (describing how a key member of private board of advisors to Secretary Rumsfeld was being compensated by technology firms with a financial interest in U.S. national security policy); Stephen Labaton, *Pentagon Adviser Is also Advising Global Crossing*, N.Y. TIMES, Mar. 21, 2003, at C1 (same). For analysis of military privatization’s normative and legal departures from conventional, domestic privatization, see Jon D. Michaels, *Privatizing War: Big Government’s Last Stand and the Rise of a New Privatization Paradigm*, work in progress, (on file with author).

<sup>46</sup> See, e.g., Sugarman, *supra* note 15, at 125 (describing the pre-New Deal state programs of assistance for the aged poor and for poor widows with children).

<sup>47</sup> See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring states to continue paying welfare benefits to those terminated from the rolls until after a proper hearing is conducted); *King v. Smith*, 392 U.S. 309 (1968) (rejecting state man-of-the-house midnight inspections by state caseworkers as inconsistent with federal welfare laws); see also Cimini, *supra* note 10, at 249 (noting that since the late 1960s under AFDC, “the statutory criteria and absence of caseworker discretion created a legitimate expectation in the receipt of benefits for qualified applicants”); Simon, *supra* note 21.

Indeed, Professor Zasloff has argued that class action lawsuits of the late 1960s and early 1970s

fundamentally transformed the nature of the AFDC program . . . [and] changed the previous presumption of the Social Security Act, viz. that states were free to adopt any eligibility rules unless they were expressly forbidden. In *King v. Smith*, the Court unanimously struck down Alabama’s “substitute father” rule as violative of the statute. Broadly speaking, that rule denied AFDC benefits to children in otherwise-eligible households if a man “cohabited” with the children’s mother—regardless of whether the man was obligated to support the children or whether he in fact did so. The definition of “cohabit” was intentionally vague, and states often used it to deny benefits to African-Americans.

Overtuning several decades of deference to federal administrative constructions that supported such rules, the Court relied heavily upon the notion that “protection of children is the paramount goal of AFDC,” and interpreted the statute in light of this overarching background rule. . . . “[F]ederal public welfare policy,” [the Court] stated, “now rests on a basis considerably more sophisticated and enlightened than the ‘worthy-person’ concept of earlier times.” In

changed America's bargain with the poor. Welfare, understood as cash assistance, would no longer be considered an entitlement; rather, cash assistance for individuals could now be conditioned on meeting work (or job-seeking) requirements and adhering to personal responsibility codes or contracts.<sup>48</sup> Indeed, federal moneys would no longer *have* to go to cash assistance; states would have greater discretion to use federal dollars as they see fit.<sup>49</sup>

More broadly, PRWORA was a declaratory manifesto describing both Congress's abdication of its commitment to welfare as an entitlement and its refusal to subsidize the nonworking (undeserving) poor.<sup>50</sup> Its intentions and goals were quite clear:

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keeping with this belief, the Court moved ahead with sharply curtailing states' control over the program: by 1971, it could state matter-of-factly that "in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." Lower courts followed suit throughout the late 60's and early 70's, and invalidated a host of state regulations, greatly expanding the program and leaving it unrecognizable from the small state-driven scheme that had existed ten years before.

Finally, federal officials cowed by previous Congressional antipathy now felt emboldened to pressure states to serve more clients. In 1966 the . . . central administrator for AFDC in 1962, ordered that state plans for eligibility "respect the rights of individuals . . . and not result in practices that violate the individual's privacy or personal dignity, or harass him, or violate his constitutional rights." In the wake of the Civil Rights movement, and protected by a liberal administration, the federal bureaucracy set states on notice that it now had the upper hand. States that wanted to get critical federal matching funds had little choice but to comply.

Zasloff, *supra* note 15 at 269-71 (footnotes omitted).

<sup>48</sup> See, e.g., Cimini, *supra* note 10, at 257-58 (detailing the contractual symbolism of welfare reform); Zasloff, *supra* note 15, at 228 ("[PRWORA] destroyed the previous welfare law's formal guarantee of child-care subsidies that enabled recipients to maintain employment.").

<sup>49</sup> See, e.g., Greg J. Duncan & Gretchen Caspary, *Welfare Dynamics and the 1996 Welfare Reform*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 605, 609-10 (1997) (describing how PRWORA permits states to lower their total spending on the poor and to reallocate that reduced spending away from cash assistance); Martha C. Nguyen, Note, *Welfare Reauthorization: President Bush's Agenda*, 9 GEO. J. ON POVERTY L. & POL'Y 489, 489-90 (2002) (describing the loose federal guidelines imposed on states vis-à-vis how states use welfare block grant money); Robert Pear, *Welfare Spending Shows Huge Shift*, N.Y. TIMES, Oct. 13, 2003, at A1 (describing the dramatic reallocation of welfare money away from cash assistance and toward transportation subsidies, substance abuse programs, and child care and noting that much of this reallocated money is not targeted at those families "who do not receive welfare in the traditional sense").

<sup>50</sup> See Thomas W. Ross, *The Faith-Based Initiative: Anti-Poverty or Anti-Poor?*, 9 GEO.

replace AFDC with a temporary, time-limited assistance program (TANF) and insist those receiving transitional benefits begin the process of finding work.<sup>51</sup>

In passing PRWORA, Congress's substantive anti-dependency narrative would be eclipsed (and ultimately undermined) by the seemingly complementary narrative of devolution. Congress not only changed the substantive content of welfare policy, but also revolutionized the means of design and delivery; indeed, as suggested above, it relinquished unprecedented programmatic responsibility over welfare to the states, which in turn, have been authorized to contract out their administration of welfare to, inter alia, for-profit corporations and sectarian religious organizations. Thus, among the inheritors of the federal responsibility for public assistance are Lockheed Martin and Catholic Charities.

Given the dominant systematic and process-oriented narratives of the 1980s and 1990s, it is not shocking that they would converge as they did in PRWORA.<sup>52</sup> The ambitions of budget hawks, opponents of a soft welfare state, and states' rights advocates aligned in their antagonism toward big, central government.<sup>53</sup> Antagonism toward big, central government does accommodate these two narratives quite well; and, though these narratives have been incorporated into one widely supported legislative agenda,<sup>54</sup> it does not necessarily follow that we should equate this apparent "coherence" with any type

J. ON POVERTY L. & POL'Y 167, 184 (2000) (contending that privatization and Charitable Choice "justifies and facilitates the federal government's abdication of responsibility for the poor").

<sup>51</sup> See 42 U.S.C. § 608(a) (2000); see also Diller, *Revolution*, *supra* note 1, at 1150 (describing time limits as a significant change in formal welfare policy); Joel F. Handler, "Ending Welfare As We Know It": *The Win/Win Spin or the Stench of Victory*, 5 J. GENDER RACE & JUST. 131, 132 (2001) ("The most significant change introduced by PRWORA are the time limits.").

<sup>52</sup> See Cashin, *supra* note 3, at 554 (emphasizing the recent prioritization of devolutionary trends and the influence of this devolution agenda on public policy decisionmaking); Garry Wills, Editorial, *Washington Is Not Where It's At*, N.Y. TIMES, Jan. 25, 1998, at G26 (describing the confluence of welfare reform and devolution).

<sup>53</sup> See, e.g., Bezdek, *supra* note 9, at 1565. It is worth noting that states have had considerable influence in their efforts to tie welfare reform to greater state authority. The waiver efforts of the 1990s, in which HHS granted states the opportunity to experiment with AFDC programs, illustrate the already strong linkages between welfare reform and devolution. See *supra* note 37.

<sup>54</sup> Robert Pear, *Many Subtleties Shaped Members' Welfare Votes*, N.Y. TIMES, Aug. 4, 1996, at A22 (characterizing a number of liberal Democrats who were running for reelection in 1996 as feeling compelled to support PRWORA and indicating that the Clinton White House was divided, with policy staffers recommending a veto and the political advisors insisting the president support the bill). The public in general also favored welfare reform. See Richard L. Berke, *Public Favors the Democrats*, N.Y. TIMES, Aug. 7, 1996, at A1.

of internal harmony or consistency once we move past the criticism stage and embrace the responsibilities of affirmative, constructive policymaking.

Consider, for instance, the waiver movement that represented a recent, pre-PRWORA attempt at reform. Throughout the early and mid 1990s, the United States Department of Health and Human Services (HHS) allowed states to propose experimental reforms within the framework of the existing AFDC system. Most state requests for waivers were summarily granted, which gave governors relatively broad discretion to modify the substance of AFDC.<sup>55</sup> For example, quite a large number of states began experimenting with family caps and more stringent work requirements.<sup>56</sup>

But in these instances, it was very clear that welfare *qua* process was the very means by which welfare *qua* system was being subverted. These narratives converged in a moment of destructive policymaking. Trapped within the AFDC paradigm, the HHS decision to transfer greater discretion to the states was a way for reform to be undertaken in the shadow of true legislative reform. Given that the relative support to dismantle AFDC was always much greater than any coalition rallying behind any one particular affirmative vision of constructive reform, the waiver system allowed for substantive reform under the rubric of process-based changes.<sup>57</sup> The ostensible federal purpose for granting waivers liberally was to stimulate (or simulate) substantive legal and policy reforms—to put band-aids on a broken system.

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<sup>55</sup> Weaver provides a helpful, succinct summary. He notes that though waivers were statutorily allowable under section 1115 of the Social Security Act of 1962, they were seldom applied for by states even during the Reagan-New Federalism years. WEAVER, *supra* note 9, at 131. “Before the late 1980s, waiver provisions were narrowly interpreted and seldom used. By 1995, however, most states had obtained waivers from Washington . . . .” *Id.*; see also *supra* note 37; *infra* notes 56, 57, 80 and accompanying text.

<sup>56</sup> See JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 56-62 (1995) (describing state waiver programs generally); PATTERSON, *supra* note 21, at 239-40 (describing waiver programs in Maryland, New Jersey, New York, Ohio, and Wisconsin); WEAVER, *supra* note 9, at 131 (characterizing states as experimenting with family caps and time limits); Law, *supra* note 1, at 479-80 (describing the pre-1996 workfare program in Riverside, California, as a “model for federal reform”).

<sup>57</sup> See WEAVER, *supra* note 9, at 131 (describing the waivers as allowing states to “test dramatic reforms . . . without any legislative change at all by Congress”) (emphasis added); see also *The Fickle Finger of Welfare Policy; Why the Governors Can’t Decide What Reforms They Really Want*, WASH. POST, Mar. 26, 1995, at C5 (describing the lack of consensus within the context of the waiver system).

C. *The Nuts and Bolts of PRWORA*

But PRWORA, for better or worse, represented the fulfillment of just such a galvanizing legislative moment so sorely lacking in the years of dissatisfaction with the old welfare system.<sup>58</sup> By 1996, HHS and the states no longer had to conspire to circumvent a failed program; instead, the country was ready to tear down the legal and substantive foundation of that system—AFDC entitlements—and institute a new welfare policy regime. As suggested earlier, at no time in recent memory has there been as strong a national, bipartisan commitment to transforming welfare policy as the one that coalesced around PRWORA.<sup>59</sup> In the years since the legislation's enactment, that consensus has only grown broader and deeper.<sup>60</sup> Specifically, the widespread support for this programmatic change speaks to a national commitment to ending dependency through emphasizing work and family values—to shift the terms of public assistance away from a rights-oriented entitlement to a more social contractarian model insisting on duties and obligations as a condition of assistance.<sup>61</sup>

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<sup>58</sup> *But see* Zasloff, *supra* note 15, at 227 (chronicling the reform measures that have been enacted over the last thirty years).

<sup>59</sup> Fifty-three Republicans and twenty-five Democrats, including Senators Feingold, Kerry, Kohl, Biden, and Lieberman, all supported the legislation. *See How Senate Voted on Welfare*, N.Y. TIMES, Aug. 3, 1996, at A10; *see also* Joe Klein, *The End of the Tide: If Even Clinton Says the Era of Big Government Is Over, What Do the Republicans Do Next?*, NEWSWEEK, Aug. 19, 1996, at 51 (describing the national consensus surrounding the welfare legislation); Joseph I. Lieberman, Editorial, *Welfare As We Know It*, N.Y. TIMES, July 25, 1996, at A23 (offering a Democratic defense of the 1996 rendition of welfare reform).

<sup>60</sup> Indeed, in the 2000 Democratic presidential primary season, former Senator Bill Bradley was considered vulnerable if he were to run as the nominee in the general election because he voted against welfare reform. *See, e.g.*, Mickey Kaus, Editorial, *Who's the Real Beltway Candidate*, N.Y. TIMES, Jan. 14, 2000, at A25 (recognizing that Bradley's opposition to welfare reform in 1996 would hurt his chances in the Democratic primaries); Martin Peretz, *War of Words*, NEW REPUBLIC, Sept. 6, 1999, at 46 (calling Bill Bradley's vote against the 1996 welfare reform proposal "wildly out of step with public opinion").

<sup>61</sup> Lawrence Mead, who characterizes this shift in policy as an ushering in of an era of "New Paternalism," explicitly describes the previous, traditional programs as largely "compensatory." He sees the new programs as emphasizing duties and obligations. *See* Lawrence M. Mead, *The Rise of Paternalism*, in THE NEW PATERNALISM 1-38 (1997) [hereinafter Mead, *The Rise of Paternalism*]; Lawrence M. Mead, *Telling the Poor What to Do*, PUB. INT., June 22, 1998, at 97; *see also* Bezdek, *supra* note 9, at 1560 (describing 1996 welfare reform as establishing a new contractual regime: the "Contractual Welfare State"); Cimini, *supra* note 10, at 254-58 (discussing obligations and responsibilities under TANF); Judith Havemann, *New York's Workfare Picks Up City and Lifts Mayor's Image*, WASH. POST., Aug. 13, 1997, at A1 (quoting a senior advisor to Mayor Giuliani as saying that "if the government is going to provide a benefit, it has the right and obligation to ask for something in return").

In PRWORA,<sup>62</sup> Congress ended the federal entitlement to welfare.<sup>63</sup> Federal cash assistance (TANF) is now capped at five years over a recipient's lifetime,<sup>64</sup> and those time-limited benefits would further be conditioned on meeting work requirements and/or on adhering to a particular set of moral and family values.<sup>65</sup> Congress required states to move one-half of its recipient families into work-related activities by 2002.<sup>66</sup>

While retaining these limited goal-setting powers,<sup>67</sup> Congress also gave the states unprecedented discretion over policymaking and administration.<sup>68</sup> States are not only afforded great latitude in how

<sup>62</sup> Throughout this discussion, I deliberately oversimplify. There are select loopholes that allow states to make exceptions and other loopholes that states have themselves found to further skirt the federal imperatives. Thus, some of the statements proffered may seem to lack some nuance, which I readily concede and accept for the purposes of describing clearly the broader contours of the new law without getting bogged down in the intricacies. For a handy summary of PRWORA, see WEAVER, *supra* note 9, at 330-34.

<sup>63</sup> See 42 U.S.C. § 601(b) (2000).

<sup>64</sup> See 42 U.S.C. § 603 (2000).

<sup>65</sup> See *id.*

<sup>66</sup> See 42 U.S.C. § 607 (2000). In 2002, the Bush administration and the House of Representatives proposed raising the minimum work requirements for state recipients of public assistance. See, e.g., Nina Bernstein, *Bloomberg Steps Up to the Plate on Welfare Reform*, N.Y. TIMES, Apr. 19, 2002 (describing local administrators' dissatisfaction with congressional mandates regarding the level of work requirements); Editorial, *Reforming Welfare Reform*, N.Y. TIMES, Apr. 8, 2002, at A18 (describing the mismatch between federal goals and the limitation of state policies).

<sup>67</sup> Professor Law provides a succinct summary of how Congress's statutory guidelines explicitly promoted a substantive vision of welfare reform. Specifically:

TANF funds . . . must be used for enumerated TANF purposes: providing cash assistance to needy families with children, promoting work, preventing nonmarital births, and promoting the formation and maintenance of two-parent families. . . . Federal TANF funds may not be used to provide cash assistance to a family that "includes an adult who has received [TANF] assistance . . . for 60 months." States must require all parents or caretakers receiving assistance to engage in work "once the State determines the parent or caretaker is ready to engage in work, or once the parent or caretaker has received assistance under the program for 24 months (whether or not consecutive), whichever is earlier." Parents who are not working must participate in community service within two months of receiving aid. Strict limits prevent states from counting as "working" people who are attending school or vocational education programs. Federal grants to the state will be reduced if the state fails to meet the mandatory job participation rates set in the federal statute.

Law, *supra* note 1, at 488-89 (footnotes omitted); see Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115, 118-20 (1998) (describing the "burdensome and expensive" federal requirements that PRWORA contains).

<sup>68</sup> See Law, *supra* note 1; Minow, *supra* note 1; Jonathan Alter et al., *Washington*

they themselves design welfare policy, but they are also allowed to sub-devolve that authority and responsibility to municipalities, private corporations, and faith-based organizations. Thus, the coherent message<sup>69</sup> from Washington is, I argue, undermined, since PRWORA is not just aimed at prioritizing personal responsibility and anti-dependency: Along with the substantive objectives of welfare reform is the process-oriented goal of increased devolution and privatization. Congress drafted legislation that not only aimed at fighting dependency, but that also reduced federal oversight, maximized opportunities for state and local experimentation, and permitted states and localities to rely on churches and corporations in carrying out their social service responsibilities.<sup>70</sup>

In contending that Congress did not foresee the distortions that devolution and privatization may bring about, I do not have to decide whether Congress was misguided or myopic. The conventional story is that, politically speaking, Congress either intended or had no choice but to cede considerable power to the states. Judith Havemann and Barbara Vobejda of the *Washington Post* have weighed in on the myopia side of the debate. They have described some state proposals to sub-devolve welfare policy as being “hardly envisioned by many of the federal lawmakers who voted for revolutionary welfare changes.”<sup>71</sup> In either event, the point remains: Whether Congress knew it would be undermining its own substantive vision or not, the dominant narrative of devolution and privatization has compromised

*Washes Its Hands*, NEWSWEEK, Aug. 12, 1996, at 42; see also Michele L. Wiggeren, *Experimenting with Block Grants and Temporary Assistance: The Attempt To Transform Welfare by Altering Federal-State Relations and Recipients' Due Process Rights*, 46 EMORY L.J. 1327, 1340, 1342 (1997) (describing Congress's significantly greater power under the AFDC system of “cooperative federalism”).

<sup>69</sup> See Cashin, *supra* note 3, at 558-59 (“The legislation does not abandon those Americans who truly need a helping hand. It retains protections for those who experience genuine and intractable hardship. Above all, it recognizes the vulnerability of America's children. It guarantees that they will continue to receive the support they need.”) (quoting H.R. Conf. Rep. No. 104-725, at 261 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2649). But see MARMOR ET AL., *supra* note 25, at 222 (cautioning against any naïve belief that legislators' reasons for endorsing particular pieces of legislation are unitary). Marmor and his co-authors “chasti[ze] critics for the mistaken assumption that social welfare programs are designed to pursue a single purpose and are ‘failures’ to the degree they fail to achieve that purpose.” *Id.*

<sup>70</sup> Cf. 42 U.S.C. § 604(f) (2000). While PRWORA does not explicitly and affirmatively authorize privatization, § 604(f) does so in a limited respect. More directly, PRWORA effectively repeals the old AFDC legislation that specifically prohibited privatization. See 7 U.S.C. § 2020(e)(6) (2000); 42 U.S.C. § 1396a(a)(4) (2000).

<sup>71</sup> Judith Havemann & Barbara Vobejda, *After Getting Responsibility for Welfare, States May Pass It Down*, WASH. POST, Jan. 28, 1997, at A1.

the effective realization of the federal objectives of welfare reform.

### III. WELFARE REFORM AS WE (NOW) KNOW IT: AN INQUIRY INTO IMPLEMENTATION

These next three parts evaluate how devolution and privatization—welfare reform’s procedural imperatives—compromise the substantive and rhetorical aims of PRWORA.<sup>72</sup> I argue that state, church, and private welfare vendors may exploit their discretionary authority and under-provide services in ways that leave hundreds of thousands of individuals materially far worse off than even a fiscally conservative Congress might have intended. Moreover, the federal government’s willingness to throw its (the nation’s) hands up and concede defeat engenders significant psychic harms as well.<sup>73</sup> This federal abandonment, magnified by a hot-potato phenomenon of states themselves (1) passing down responsibility to cities and counties by way of second-order devolution and (2) passing along responsibility to sister states through diversionary tactics and races-to-the-bottom, reveals to the recipients and to the general body of citizens alike that the plight of America’s poor is either beyond the technical and economic grasp of the world’s superpower or—more plausibly—simply not that important.<sup>74</sup>

I begin my analysis in Section A at the simplest and least problematic level of devolution: state autonomy and discretion over welfare policy. I start from the generous premise, that devolution completely comports with—rather than undermines—the substantive and rhetorical aims momentarily outlined in 1996. Within the context of this counterfactual, I suggest that the states are dedicated to the same vision of welfare reform as Congress, and thus there is *perfect-mapping* such that discretion is confined within the bounded contours of the federal agenda and distortions are minimized.

In Section B, I hold the counterfactual presumptions of the

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<sup>72</sup> See Wills, *supra* note 52 (describing lone voices of concern that devolution will limit the federal government’s ability to tackle dependency and quoting William Bennett as saying that devolution “has often meant reducing the Federal Government’s capacity to monitor and correct”).

<sup>73</sup> See, e.g., Bezdek, *supra* note 9, at 1578 (describing the enactment of 1996 welfare reform as a return to the pre-New Deal conception of the poor as personally weak, lazy, or morally deficient).

<sup>74</sup> Cf. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000); PHILIP A. KLINKNER WITH ROGERS M. SMITH, THE UNSTEADY MARCH (1999). Dudziak as well as Klinkner and Smith focus on how the Soviet criticism of American race relations during the Cold War challenged the United States to propel the civil rights agenda forward. Their scholarship reveals the American ability to progress and transform society in the face of external criticism.

previous section up to the light and offer a more critical account of how states really do differ individually and collectively from the federal government in the design and implementation of welfare policy. I argue that states may possess structural *incentives* that dampen their eagerness to implement the federal aims of welfare reform, and that states in general may be limited *institutionally* in their ability to promote and coordinate the work opportunities that ostensibly make it possible for the dependent poor to leave welfare en masse. Aspects of these arguments have been ably made elsewhere by others;<sup>75</sup> but those studies have stopped short of articulating what is fully at stake when states not only administer welfare reform themselves, but also when they farm it out, engaging in second-order or sub-devolution to for-profit corporations and faith-based organizations. The reconciliation of dual sovereignty with welfare privatization has, from my vantage point, yet to be fully explained.

Accordingly, in the next two parts, I identify how this connection between federal policy goals and the realities of devolution *cum* privatization as implemented becomes even more attenuated once the states decide to outsource welfare services, leaving the responsibility for policy development and administration in the hands of for-profit and religious providers. As detailed below in Part IV and Part V, respectively, these providers may lack public accountability, may possess competing (economic, fiduciary, and/or theological) incentives, and may readily acknowledge and concede they do not and cannot represent the will and interests of the American people writ large.

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Devolution's harms<sup>76</sup> at any and all of these levels of administration can be categorized along three axes: institutional, managerial, and civic-citizenship. Institutional harms, as I define them, arise out of structural mismatches. Specifically, the institution in which authority and discretion is vested is ill-equipped, either in terms of resources or disposition, to carry out the core functions and imperatives of federal welfare reform. In such instances, devolution proves to be counterproductive, if not affirmatively harmful.

Managerial, or bureaucratic harms arise as devolved agents of

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<sup>75</sup> See *supra* notes 1, 2, 9, 10.

<sup>76</sup> More precisely, I should say "distortions" rather than "harms" because states, cities, or private actors, in truth, could improve upon the federal agenda. Because this inquiry principally concerns itself with the adverse effects of such distortions, I employ the term "harm" as shorthand.

welfare provision have incentives to distort federal welfare policy, or simply under-provide for the client population. Many of these managerial harms are extensions of the institutional mismatch, and examples of these kinds of harms abound. State administrators forced to meet federal work requirements may simply deter beneficiaries from remaining on welfare, a poor substitute for actually helping individuals find meaningful work and otherwise easing the transition into the labor market.<sup>77</sup> Corporate providers may contractually be permitted to keep, as profits, all of the allocated funding that is not dispersed to the citizenry; accordingly, they too might be tempted to dissuade and divert clients, approaches which are much less expensive than having to provide job-training and child-care services. And, sectarian providers may interject and impose an ethos of faith into the otherwise neutral provision of social services and may focus too many resources on moral or spiritual uplift at the expense of education and skills-training programs.

Finally, the civic-citizenship harms are visited on recipients (and sometimes even members of the civic community broadly defined) when devolution and privatization undermine democratic responsiveness and accountability, core values of American public and political engagement. Whether in the form of localities' highly parochial governments, corporations' lack of due process and APA-like obligations, or faith-based organizations' exclusionary (and thus potentially alienating) religious messages, devolution and privatization may make individuals feel less empowered and less connected to the organs of government.

In what follows, mapping these categories of harm onto the different levels of devolved and privatized governance will help illustrate the nature and severity of the distortions currently undermining and threatening to undo PRWORA.

A. *Perfect Mapping: Non-distorting State Implementation of Federal Policy*

Let us commence by assuming the best-case scenario: The substantive and rhetorical federal objectives of welfare reform can be met through state implementation. Essentially most states and municipalities support the aims of federal welfare reform,<sup>78</sup> and, after

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<sup>77</sup> See David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. (forthcoming 2004).

<sup>78</sup> In 1996, the National Governors Association endorsed PRWORA. See *National Governors Association Welfare Reform Bulletin*, available at [http://nga.org/nga/lobbyIssues/1,1169,D\\_4940,00.html](http://nga.org/nga/lobbyIssues/1,1169,D_4940,00.html) (last visited Dec. 28, 2003). New York City, once

decades of jointly administering AFDC with the federal government, these states will craft their welfare policies in ways quite congruous with Congress's intentions.<sup>79</sup> States, we must remember, helped transform the world of welfare through their extensive use of waivers in the early 1990s as well as through their advocacy for passage of PRWORA. And, before that, states under the AFDC model of cooperative federalism, have long occupied a pivotal role in welfare policy and administration.<sup>80</sup> Having invested a good deal of political

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considered a hotbed of liberal social policy and welfare advocacy, is a great case study. Lawyers from Columbia's Center on Social Welfare Policy and Law brought the landmark case, *Goldberg v. Kelly*, against New York. The named plaintiff, John Kelly, did not even have children and was not receiving AFDC benefits. Instead, he was receiving more expansive, generous "Home Relief" benefits offered to New York residents. See *Goldberg v. Kelly*, 397 U.S. 254 (1970); PIVEN & CLOWARD, *supra* note 21, at 373. For general discussions on the strength of the welfare rights movement at that time, see MARTHA F. DAVIS, *BRUTAL NEED* 10-21 (1993); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 264-359 (1977); JACK KATZ, *POOR PEOPLE'S LAWYERS IN TRANSITION* 79-81 (1982); and Edward V. Sparer, *The Right to Welfare*, in *THE RIGHTS OF AMERICANS* 65, 71-72 (Norman Dorsen ed., 1971).

The attitude among political elites in New York during the PRWORA revolution is much changed. New York City was on the forefront of "workfare," a means of helping reduce dependency and facilitate work even before the passage of the federal reform bill. See, e.g., Douglas Martin, *New York Workfare Expansion Fuels Debate*, N.Y. TIMES, Sept. 1, 1995, at A1 (discussing the growth of the program from essentially a pilot program in the early 1990s to a major initiative by the mid 1990s). But see Betsy Gotbaum, Editorial, *When Workfare Is Just Make-Work*, N.Y. TIMES, Sept. 4, 1993, at A19 (describing the program as a fruitless endeavor that does not prepare individuals for work). Indeed, Mayor Giuliani hired Jason Turner, Wisconsin's architect of many of the welfare reform waiver-initiatives under Governor Tommy Thompson. Journalist Jason DeParle describes how the city administration introduced an anti-dependency welfare initiative to its caseworkers in Harlem. In response to a caseworker's question regarding the city's harsh termination policies under PRWORA, Commissioner Turner responded that the real way to end dependency is: "live on what you get, and if you run out, figure out what to do until your next paycheck." Jason DeParle, *What Welfare-to-Work Really Means*, N.Y. TIMES, Dec. 20, 1998, at F11. DeParle sums up the scene as follows:

The city's new Welfare Commissioner—this Ivy-League-educated, Republican white man—had just traveled to the heart of Harlem and proclaimed it morally instructive for the poor to face empty cupboards. *Once upon a time, there might have been a riot. In the end-welfare age, the stunned silence [instead] leads to applause.*

*Id.* (emphasis added).

<sup>79</sup> For some general discussions of cooperative federalism in the post-War era and into the more recent period marked by greater devolutionary trends, see TIMOTHY CONLAN, *FROM NEW FEDERALISM TO DEVOLUTION* (1998); JON C. TEAFORD, *THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT* (2002); and Scheiber, *supra* note 38.

<sup>80</sup> As described above, see *supra* notes 56-57 and accompanying text, even before the 1996 legislation, state and federal administrators were actively experimenting with workfare reforms. Between 1993 and 1996 alone, Clinton's HHS approved seventy waivers in over forty states. Many of these waivers sought to condition

capital in the design (and success) of this brand of welfare reform, states moreover have incentives to fulfill its mandate accordingly.<sup>81</sup>

The explicit substantive federal goals of reducing dependency and increasing personal responsibility can hardly be disregarded by states implementing PRWORA; political, legal, and economic expediency converge to limit the horizon of possible variations or distortions within the paradigm of federal welfare reform. Simply put, states must begin the process of facilitating the transition from welfare to work and take steps to root out long-term dependency by preparing individuals, both materially and psychologically, for the onset of TANF's stringent time limits. Thus, ostensibly there is little room and incentive for states to undertake any frolics or detours when they are hard at work complying with and thus furthering the federal aims.

Discretion, under this scenario, is limited to ways that comport with popular impressions of cooperative federalism: States are given leeway and flexibility to determine how best to carry out these federal imperatives.<sup>82</sup> Indeed, under what I consider to be these *idealized* circumstances, the dual narratives of anti-dependency and greater local responsibility and authority can actually be reconciled. To reduce dependency, states can experiment with policies to address particular needs; they can, for instance, institute family caps, require drug testing and counseling, promote marriage, and/or offer child-care allowances. States can tailor the relative mix of carrots and sticks to suit the local needs (and treat pathologies) that prevail in particular communities.<sup>83</sup> Given welfare reform's imminent time limits,<sup>84</sup> strict work requirements,<sup>85</sup> and conditional benefit

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benefits on participation in the workforce. See The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, HHS Fact Sheet (U.S. Dep't of Health and Human Servs.), Aug. 22, 1996, at 5 [hereinafter *HHS Fact Sheet*]; see also Bennett & Sullivan, *supra* note 37; Purdham, *supra* note 37.

<sup>81</sup> See *supra* notes 78-79 and accompanying text.

<sup>82</sup> There are a good number of ways in which PRWORA allows states significant maneuvering room to circumvent the direct federal aims. I will briefly refer to those "loopholes" in subsequent sections; for now, however, I will adhere to a more stylized set of facts, in keeping with the counterfactual nature of the present discussion.

<sup>83</sup> Havemann, *supra* note 61; see also Mead, *The Rise of Paternalism*, *supra* note 61. There can be greater variance here with regard to what types of services and obligations are mandatory. They can involve any combination of parenting/fatherhood classes, money management classes, and drug rehabilitation, job training, or workfare programs, and may have to make themselves available to intrusive home visits. This of course does make the programs quite distinct. See, e.g., *id.*; DeParle, *supra* note 78.

<sup>84</sup> See 42 U.S.C. § 608(a)(7) (2000).

<sup>85</sup> See 42 U.S.C. § 607 (2000) (requiring that a state insist that fifty percent of its

structures,<sup>86</sup> *all* welfare agencies have little choice but to become more demanding and intrusive.<sup>87</sup> Thus, an argument can easily be made that the federal goal that caseworkers closely monitor recipients of public assistance to ensure they attend training workshops and actively seek work will be achieved through local administration.<sup>88</sup>

Additionally, besides the failure-to-comply sanctions imposed on states, Congress gave states other incentives to reduce dependency. For example, states are allowed to keep the unspent money ostensibly earmarked for welfare and dedicate it to other needs of their own choosing.<sup>89</sup> Moreover, there is the self-evident political windfall for

recipient families include an adult working at least thirty hours a week by 2002).

<sup>86</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 815-19, 824, 829, 110 Stat. 2105, 2315-20, 2323, 2327 (imposing a host of behavioral requirements and sanctions).

<sup>87</sup> See Mead, *The Rise of Paternalism*, *supra* note 61. The anti-dependency federal imperative—coupled with the statutory time limits—relies, in part, on more aggressive monitoring (and counseling). The investigative work will not only help reduce fraud and encourage work, but it will also help agencies determine how best to allocate resources—and to which recipients. The investigative power allows states to experiment more creatively and place different recipients on different tracks toward self-sufficiency.

This transformation in our conception of welfare has changed, again ostensibly uniformly, the complexion of the welfare worker: “[e]ligibility specialists whose jobs [under AFDC] were viewed as clerical, are being replaced by case managers with broad authority to advise, assist, and supervise clients. . . . [T]he case manager is intended to serve as a ‘teacher, preacher, friend, and cop—an all-purpose partner to guide poor parents into jobs.’” Diller, *Localism*, *supra* note 1, at 421 (quoting Jason DeParle, *For Caseworker, Helping Is a Frustrating Struggle*, N.Y. TIMES, Dec. 10, 1999, at A1). Indeed, “the imposition of work requirements and time limits, the creation of diversion programs, the strengthening of sanctions, and the reorganization of staff functions all have one consequence in common: They increase the authority and discretion of caseworkers.” Diller, *Revolution*, *supra* note 1, at 1164; see also William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1201-04, 1214-18 (1983) (describing the advent of detached, clerical welfare administrators in the late 1960s as a response to the intrusive social workers who were a hallmark of the older welfare system believed to be fraught with arbitrary and discriminatory case management).

<sup>88</sup> PRWORA, however, permits caseload reduction credits that can, if properly leveraged by state agencies, reduce workforce participation requirements to negligible numbers. The credits are given in a 1 to 1 ratio; thus, for every one recipient who is turned off the welfare rolls, the state agency actually has to help find two *fewer* jobs: the one who was pushed off the rolls, and an additional individual, who benefits from the caseload reduction credit. Again, this will be presented more fully below in how reform can be distorted. Here, this Article assumes that workforce participation is unquestionably in line with the interests of the state and local administrators.

<sup>89</sup> 42 U.S.C. § 604 (2000); see Law, *supra* note 1 (describing how states could use up to twenty percent of the entire welfare block grant for any other purpose they so choose); see also *supra* note 49 and accompanying text.

governors who can proudly claim major reductions in caseloads—in line with federal aims. Under this stylized scenario, states’ political, legal, and economic incentives to reduce dependency, create work opportunities, and promote personal responsibility, directly align under the federal architecture of reform.

*B. Inevitable State Distortions of the Federal Agenda*

Unfortunately, this stylized “perfect mapping” in Section A is overly sanguine. However rigidly constrained they are by political and budgetary concerns and however closely in-sync they are with the ambitions of federal welfare reform, state governments (1) have considerable *institutional* trouble meeting Congress’s substantive policy objectives; (2) have competing incentives that may steer them off course; and finally, (3) may engender civic harms insofar as they act in a discriminatory or unjust manner. At times, state “distortions” of policy aims will be deliberate, and at others, they will be inadvertent, if not completely unavoidable.<sup>90</sup> These “distortions,” it should be noted at the outset, are understood as policy deviations *outside the bounded discretion* explicitly given to states as laboratories of democracy to tinker with welfare reform.<sup>91</sup>

Focusing on harms stemming from the unbounded discretion, this Section proceeds in three steps. Below, I suggest why the states may not be reliable partners (of the federal government) as agents implementing the “national” reforms. This discussion does not prove, of course, that the federal government, acting unilaterally, would be infallible in implementing welfare reform. Rather, my aim is simply to describe the harms that arise given the inescapable structural differences between the federal government and its constituent states, differences that hinder national efforts to *use* states to serve federal aims and that undermine efforts to retain a truly national commitment to reform.

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<sup>90</sup> As suggested earlier, these distortions may not compromise the federal goal of reducing welfare dependency, but may cause unintended adverse consequences in the process of reducing the rolls.

<sup>91</sup> While it is often difficult to disaggregate the substantive (anti-dependency) and procedural (via devolution) aims of federal welfare reform, it is important to distinguish in the course of this inquiry the category of authorized discretion understood as consistent with federal welfare reform from the type of (undesirable and possibly *arbitrary*) discretion that threatens to distort welfare reform. While the former category enhances the aims of welfare reform by way of more refined tailoring of programs, the latter should be carefully monitored.

### 1. Institutional Harms

Implicit in the aims of federal welfare legislation is a commitment on the part of government to promote economic development and create jobs. Though Congress did not explicitly identify these goals in the text of PRWORA, it was only able to enact the welfare reform agenda with an understanding that it has the ability (and responsibility) to draft additional, complementary legislation that, if need be, can soften the shock of the transition to work.<sup>92</sup> Indeed President Clinton, ostensibly, only signed PRWORA with this understanding in mind.<sup>93</sup> Most notably, the federal government can change and recalibrate macro and microeconomic fiscal and monetary policy to stimulate growth and lower unemployment, and it can create jobs and design tax incentives to finance the retraining and retooling of the American workforce. The states, when implementing the federal government's welfare policies, lack many of these collateral tools of economic growth and expansion that the federal government uniquely possesses. Although states can promote work opportunities by stimulating the supply side (via training and child care), they individually have far less control over the aggregate demand side (job creation) than the federal

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<sup>92</sup> Linda McClain has written:

As legislators, executives, and policy analysts take stock of welfare reform thus far and articulate the next steps . . . many articulate a model of "mutual responsibility"—or of personal responsibility *and governmental provision of opportunity*. This was, of course, a central theme in the Clinton-Gore administration's pledge to "end welfare as we know it"; and it was the gloss put by that administration on the implementation of PRWORA. . . . This model assumes that government should play a role in supporting work . . . .

Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI-KENT L. REV. 1673, 1675-76 (2001) (emphasis added).

<sup>93</sup> Almost immediately after signing PRWORA, President Clinton began campaigning for ways to soften some of the harsher elements of the welfare bill and to work to accommodate those about to be forced to transition from welfare to work. See Peter T. Kilborn & Sam Howe Verhovek, *Clinton's Welfare Shift Ends Tortuous Journey*, N.Y. TIMES, Aug. 2, 1996, at A1; Robert Pear, *Clinton To Sign Welfare Bill that Ends U.S. Aid Guarantee and Gives States Broad Powers*, N.Y. TIMES, Aug. 1, 1996, at A1; Todd S. Purdum, *Clinton Recalls His Promise, Weighs History, and Decides*, N.Y. TIMES, Aug. 1, 1996, at A1; *The Roosevelt Legacy*, supra note 4; *The Text of President Clinton's Announcement on Welfare Legislation*, N.Y. TIMES, Aug. 1, 1996, at A24; Barbara Vobejda & Dan Balz, *President Seeks Balm for Anger over Welfare Bill*, WASH. POST, Aug. 22, 1996, at A1; see also James Bennet, *Clinton Seeks Business Help on Proposal over Welfare*, N.Y. TIMES, Jan. 11, 1997, at A8; James Bennet, *Clinton Urges More Companies To Hire People on Welfare Roll*, N.Y. TIMES, Nov. 18, 1997, at A21; Irvin Molotsky, *President Says the Government Will Hire 10,000 Off Welfare*, N.Y. TIMES, Apr. 11, 1997, at A26; Editorial, *Tax Credits for Welfare Hires*, N.Y. TIMES, Jan. 30, 1997, at A20.

government does.<sup>94</sup> Thus, the state is an incomplete engine of welfare reform.<sup>95</sup>

In fact, the institutional mismatch is greater now than under AFDC's cooperative federalism, not simply because the states enjoy even greater discretion than before, but also because the imperatives of welfare reform require more active engagement on the part of social service administrators.<sup>96</sup> Today's statutory insistence on time limits and work requirements and today's political and rhetorical intolerance toward dependency place unprecedented burdens on states to act more proactively and innovatively, burdens which underscore the fact that states have only a limited ability to stimulate the economy.<sup>97</sup>

Taking a step back, we might suppose there are three categories of hurdles to work. The first is motivational—the recipient feels no pressure or obligation to work. Part of the problem of dependency can be boiled down to motivation.<sup>98</sup> If you are going to get dropped from public assistance unless you work, you go out and get a job; this assertion, if it were to stand alone, presumes that current welfare recipients have some set of skills commensurate with the demand for labor, that no overriding personal or familial obligations compel them to stay at home, and that *jobs are available*. In short, this

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<sup>94</sup> See *infra* note 103 and accompanying text; see also Jeff Madrick, *Let's Hear From Those Who Feel Government Has a Role in Stabilizing the Economy*, N.Y. TIMES, Aug. 8, 2002, at C2 (describing the importance of the federal government's use of "automatic stabilizers" to steward the economy).

<sup>95</sup> See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 276 (1998) (suggesting that the size and scope of the modern political economy "so disrupted the preceding local and regional economies" that it became necessary to rely on the federal government to engage in meaningful economic policymaking).

<sup>96</sup> See *supra* note 87 and accompanying text.

<sup>97</sup> An analogy can, briefly, be drawn to welfare policy in the European Union. Under the Maastricht Treaty, Brussels controls monetary and trade policy for the entire membership—and limits the size of a nation-state's fiscal deficit to a negligible sum. Social welfare policy remains localized at the nation-state level. With strict limitations on fiscal and monetary policy, the nation-state is hamstrung in effectuating a coherent social welfare agenda—since it may not necessarily be able to coordinate its programs with those of the Union's. See, e.g., MARK KLEINMAN, *A EUROPEAN WELFARE STATE?* (2002); Denis Bouget, *The Maastricht Treaty and Social Quality: A Divorce?*, in *THE SOCIAL QUALITY OF EUROPE* 35 (Wolfgang Beck et al. eds., 1997); Ray Hudson & Allan M. Williams, *Re-shaping Europe, The Challenge of New Divisions Within a Homogenized Political-Economic Space*, in *RETHINKING EUROPEAN WELFARE* 33, 46 (Janet Fink et al. eds., 2001); Daniele Meulders & Robert Plasman, *European Economic Policies and Social Quality*, in *THE SOCIAL QUALITY OF EUROPE*, *supra*, at 16, 32.

<sup>98</sup> See MURRAY, *supra* note 16 (arguing that patterns of dependency and social pathologies more generally are heavily shaped by motivational incentives).

presumes too much: If this were all that were required to end dependency, there would be no institutional distortion in states and cities administering welfare policy.

But, indeed, dependency is not simply a function of a lack of motivation.<sup>99</sup> Thus, a second category of obstacles relates to a lack of skills, baseline support (such as child care and health care), and know-how on the part of the welfare recipient. Even if threatened with the prospect of being cut-off from assistance if you do not work, you still might need business preparation classes or possibly skills or educational training to command economic remuneration in the labor market.<sup>100</sup> Or, you may have family obligations. You may have a child and the high cost of child care effectively makes working in a low-wage job an untenable option. This second set of hurdles, too, may be overcome with the assistance of state government programs. States have the capacity and earmarked resources to train workers to reintegrate them into the workforce—and, of course, to offer child-care services.<sup>101</sup>

But what America's cities and states do not have as much of, however, is the ability to shape structural dynamics in the economy, for a major part of the problem for those out of work is that there are not any jobs. This is the third hurdle: a lack of demand for workers

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<sup>99</sup> It is worth quoting Professor Bezdek at length:  
A wealth of social science data indicates that, in important respects, a significant portion of the welfare-reliant population may not be “able” to take the job to which they are directed by the local welfare office. This inability stems not only from a lack of “skills,” but also from deficiencies that the simple language of “work ethic” fails to capture . . . .

Bezdek, *supra* note 9, at 1572. *But see* Sewell Chan, *Working Hard To Create Hard Workers*, WASH. POST, Aug. 9, 2001, at T08 (describing the program STRIVE, a boot-camp style job-training program that focuses heavily on attitude adjustments); *see also* 144 Cong. Rec. 512686 (daily ed. Oct. 20, 1998) (statement of Sen. Ashcroft) (asserting that faith is the missing element to improving the lives of America's poor); MARVIN OLASKY, RENEWING AMERICAN COMPASSION 138 (1996) (declaring that the absence of spiritual instruction contributed to the ineffectiveness of the War on Poverty).

<sup>100</sup> *See, e.g.*, Michael M. Weinstein, *When Work is Not Enough; Without Training, Success of Welfare Overhaul May Falter*, N.Y. TIMES, Aug. 26, 1999, at C1.

<sup>101</sup> Indeed, Professor Bezdek also recognizes that parent[s] also must face significant factors outside of [their] personal control. Insufficient analysis has been trained on these externalities. The employment infrastructure entails existing labor market opportunities, including job availability . . . the availability of day care services, the availability of transit options between home/job/childcare, access to welfare benefits, and neighborhood resources.

Bezdek, *supra* note 9, at 1572-73.

in the aggregate labor market.<sup>102</sup> States and municipalities often lack the economic and political power to create new jobs.<sup>103</sup> Given their limited ability to stimulate aggregate demand, states often focus their energy and resources, instead, on attracting jobs by enticing businesses to move from one part of the country to theirs. This movement does not actually create new jobs; it just shifts them from one state to another.<sup>104</sup>

We must remember that welfare reform emerged at a time of unprecedented economic growth in America.<sup>105</sup> But, even when unemployment was quite low, jobs for poor, unskilled Americans were hardly abundant.<sup>106</sup> While the mismatch between loci of welfare policy and of national economic policy might not have posed problems in the booming 1990s, the troubles stemming from that mismatch may be increasingly acute when the economy is less robust.<sup>107</sup>

Moreover, the jobs that are available are often beyond the

<sup>102</sup> See, e.g., NEWMAN, *supra* note 17; WILSON, *supra* note 19; WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* (1996).

<sup>103</sup> The dynamics of interstate commerce, the realities of managing a national political economy, and the legal strictures of the Dormant Commerce Clause and interstate compact jurisprudence all limit state power over the macroeconomy. See, e.g., Schreiber, *supra* note 38, at 259-60 (describing the centralization of the modern American economy through regulations, laws, constitutional interpretations, and the realities of commercial patterns and practices). Thus, often states' economic impact is of a smaller (and possibly zero-sum) scale, displacing jobs from another region by enticing businesses to relocate or expand in a given area based on subsidies or other incentives. See, e.g., Mike Allen, *Stock Exchange On Wall Street Offered a Home in New Jersey*, N.Y. TIMES, May 8, 1998, at B1 (describing state competition over the same jobs and taxable industry); Brett Pulley, *Exchange Delays Vote to Move as New York Adds Incentives*, N.Y. TIMES, Oct. 12, 1995, at B5 (describing similar pitched battle between New Jersey and New York over the Stock Exchange). For discussions on how the national economy can better regulate (even local) economies, see, for example, Richard Munson, *Is Government Shortchanging the Sun Belt?*, N.Y. TIMES, Aug. 16, 1987, at C2; Jay Rockefeller & Richard D. Lamm, Editorial, *Balanced U.S. Growth*, N.Y. TIMES, Mar. 7, 1981, at A2.

<sup>104</sup> For insight into the legal-constitutional limits on state policies on economic growth, see, for example, Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379 (1998).

<sup>105</sup> See *infra* notes 123-24 and accompanying text.

<sup>106</sup> See NEWMAN, *supra* note 17.

<sup>107</sup> See, e.g., Daniel Altman, *308,000 Jobs Lost in February, the Most Since Post-9/11 Period*, N.Y. TIMES, Mar. 8, 2003, at A1; Lynette Clemetson, *More Americans in Poverty in 2002, Census Study Says*, N.Y. TIMES, Sept. 27, 2003, at A1; Sam Dillon, *Report Finds Deep Poverty Is on the Rise*, N.Y. TIMES, Apr. 30, 2003, at A18; Peter T. Kilborn, *Jobs Are Scarce in the Newest Economy*, N.Y. TIMES, Oct. 9, 2001, at A14; David Leonhardt, *Payroll Drops as Economy Seems To Be at Standstill*, N.Y. TIMES, Oct. 5, 2002, at C1; David Leonhardt, *Unemployment Rate Rises to a 9-year High of 6.1%*, N.Y. TIMES, June 7, 2003, at A1; see also *More People on Welfare After Years of Declines*, N.Y. TIMES, Dec. 31, 2002, at A16.

boundaries of the inner cities where many dependent poor reside.<sup>108</sup> Myopic state and municipal policies may confine the scope of formal job search initiatives within the geographic bounds of their political jurisdiction. But more importantly, even when individuals are aware of available but physically remote jobs, transportation difficulties may make those opportunities all but unattainable. The lack of comprehensive public transportation networks, especially in suburbs, makes it difficult for job-aspirants who live in central cities to get to and from work.

The problem of limited coverage of suburban transit routes is only exacerbated, for welfare-to-work purposes, in an era of devolved and sub-devolved welfare when each county is focused on winnowing down its own welfare rolls. Why would a suburban county spend money on expanding public transportation to ease the commute of city dwellers seeking jobs in the county when it must devote its energies and resources to facilitate work for its own clientele—more of whom might have access to private vehicles in the first place (simply as a function of living in the suburbs)?<sup>109</sup>

Consider, for example, the State of Colorado's welfare reform experience. Colorado has devolved the authority to administer TANF to each of its sixty-three counties. In effect, each of those sixty-three counties can design individual, discrete programs.<sup>110</sup> Imagine the overlap of services, the loss of economies of scale, and the overall myopia of administering sixty-three county transportation programs and sixty-three county job programs! What effect could one tiny county have on job growth and economic stimuli?<sup>111</sup> How many lost

<sup>108</sup> See WILSON, *supra* note 102, at 18-50 (describing the geographic mismatch between where many poor live and where decent jobs exist); Nicole Stelle Garnett, *The Road from Welfare to Work: Informal Transportation and the Urban Poor*, 38 HARV. J. ON LEGIS. 173, 177-86 (2001) (characterizing the spatial and transportation mismatch between those in need of jobs and the location of available jobs); Jane Gross, *Poor Without Cars Find Trek to Work Is Now a Job*, N.Y. TIMES, Nov. 18, 1997, at A1 (describing inadequate public transportation in suburban areas where low-skilled jobs exist); see also Alice Reid, *For Many New Hires, Getting There Is Half the Battle*, WASH. POST, Dec. 23, 1996, at B1.

<sup>109</sup> See, e.g., Robyn Meredith, *Jobs Out of Reach for Detroiters Without Wheels*, N.Y. TIMES, May 26, 1998, at A12 (describing immense difficulty for city dwelling poor to get to jobs in the suburbs in part because the city and suburban transportation authorities are not linked and do not act cooperatively).

<sup>110</sup> See Cimini, *supra* note 10, at 262-63. Moreover, Professor Cimini notes that more than half of those counties operate welfare programs without written rules or guidelines to govern the decisionmaking process of caseworkers. See *id.*

<sup>111</sup> Indeed, Professor Cimini reports that of the sixty-three counties, thirty-four of them operate totally without written rules or regulations to govern caseworker decisionmaking. Not only does such an egregious breach of due process and democratic transparency redound in concerns of arbitrary behavior toward

job opportunities exist when the horizon of opportunities does not extend past the county borders? Indeed, as Professor Bezdek has aptly noted:

Labor markets do not begin and end at jurisdictional boundaries, and most of the growth in economic activity is regional, not merely local. Yet the structures adopted by states and counties to implement the [welfare reform] [a]ct are so bound. Public job training and workforce development programs are fragmented by jurisdiction. . . . This territorial character shreds what otherwise might stitch together a patchwork of family-support services for poor women transitioning from welfare reliance to workplace reliance by imposing still more hurdles as a condition of reaching opportunities outside their neighborhoods.<sup>112</sup>

Not surprisingly, the federal government is better equipped and more responsible for internalizing the costs of cross-border employment searches.<sup>113</sup>

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The social contract implicit in PRWORA creates a new bargain: transitional assistance by the government in exchange for endeavoring to find work on the part of recipients.<sup>114</sup> Thus, for those seeking work, there should be a credible belief that jobs exist—or else the guarantor should not expect or demand work when and where jobs are unavailable. For instance, America's governors—chief proponents of devolved welfare reform—have been at loggerheads with the Bush administration's call for more stringent work requirements. President Bush has recently proposed mandating that seventy percent of a state's welfare population engage in at least thirty hours of work (or work-related activities) per week. The original goal set by PRWORA required only a fifty percent work-participation rate by 2002.<sup>115</sup> The states, justifiably, have argued that they cannot create the necessary number of jobs required to place the recipients in work.<sup>116</sup> Thus, here is an instance when the goals of federal welfare

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individual recipients, but it also complicates considerably efforts to coordinate tasks among the counties. *See id.*

<sup>112</sup> Bezdek, *supra* note 9, at 1576-77 (footnotes omitted).

<sup>113</sup> Judith Evans, *HUD Grants to Pay For City-to-Suburbs Work Transportation*, WASH. POST, Sept. 27, 1996, at A23 (describing the imperative for HUD to intervene to internalize these costs by offering pilot grants providing vouchers for welfare recipients in the inner-cities to seek employment opportunities in the suburbs).

<sup>114</sup> This point has been referenced throughout the Article. *See supra* Part II; *see also, e.g.,* Cimini, *supra* note 10, at 266-68.

<sup>115</sup> *See* Robert Pear & Robin Toner, *Republicans Rally Behind Welfare Proposals That States Oppose*, N.Y. TIMES, Apr. 11, 2002, at A29.

<sup>116</sup> *See, e.g.,* Bernstein, *supra* note 66; Robert Pear, *Governors Want Congress To Ease*

policy may not be able to be met by the state and municipal administrators.

Having control over certain aspects of welfare reform policy (the supply side of labor), but not others (such as demand for labor), state and county welfare officers may, in turn, be devoting too many resources to job training (because states and counties *can* offer training sessions), when in fact those funds should be going toward economic development projects on a larger scale.<sup>117</sup> Consider, as a representative example, Milwaukee County, where welfare recipients are repeatedly told there are no impediments to work. There are no child-care impediments, no training impediments, no transportation impediments. Nothing should stand in the way of work.<sup>118</sup> Yet Milwaukee County cannot ensure the aggregate creation of new jobs—especially in a region of the country relatively hard-hit by the federal government’s economic trade liberalization policies.<sup>119</sup>

This mismatch between federal policy and state administration is not simply a design flaw in the legislation, but rather a larger, structural axiom in federal-state relations.<sup>120</sup> Part of the ethos of

*Welfare Work Rule*, N.Y. TIMES, Feb. 24, 2002, at A27; Robert Pear, *Study by Governors Calls Bush Welfare Plan Unworkable*, N.Y. TIMES, Apr. 4, 2002, at A18.

<sup>117</sup> See *The Muddled Maths of Welfare-to-Work*, ECONOMIST (U.S. Ed.), Mar. 8, 1997, at 25 (noting that considerable economic growth would have to take place on a national level to generate sufficient labor demand to absorb America’s welfare recipients).

<sup>118</sup> *NewsHour: The State of Workfare* (PBS television broadcast, Sept. 2, 1997) (transcript available at [http://www.pbs.org/newshour/bb/welfare/july-dec97/workfare\\_9-2.html](http://www.pbs.org/newshour/bb/welfare/july-dec97/workfare_9-2.html)) (describing Milwaukee County welfare recipients as being told there are no impediments to work because job-training, transportation, and child care is being subsidized by the state and county) [hereinafter *NewsHour*]; see also Sharon Dietrich et al., *Work Reform: The Other Side of Welfare Reform: Our Policymakers Must Face the Reality that Failures of Employment Law Policies Are a Major Reason for Welfare Dependency*, 9 STAN. L. & POL’Y REV. 53, 53-55 (1998) (recognizing that significant barriers to work need to be overcome to achieve the objectives of PRWORA).

<sup>119</sup> See, e.g., David E. Bonior, Editorial, *I Told You So*, N.Y. TIMES, July 13, 1997, at D17 (decrying the economic trade liberalization policies of the 1990s as harming American jobs and workers); John Holusha, *Squeezing the Textile Workers: Trade and Technology Force a New Wave of Job Cuts*, N.Y. TIMES, Feb. 21, 1996, at D1 (characterizing the job-loss effects associated with lowering international trade barriers); James Sterngold, *NAFTA Trade-Off: Some Jobs Lost, Others Gained*, N.Y. TIMES, Oct. 9, 1995, at A1 (describing the regional differences in terms of the impact felt from greater economic liberalization); see also Adam Nagourney, *Democrats Largely Endorse Labor’s Views*, N.Y. TIMES, May 6, 2003, at A14 (describing the 2004 Democratic presidential candidates’ support for restrictions on free trade policies); Editorial, *Trading Memories*, N.Y. TIMES, Sept. 30, 2003, at A28 (describing Democratic presidential candidates backing away from their earlier support for free trade and NAFTA).

<sup>120</sup> See Jerry L. Mashaw & Susan Rose-Ackerman, *Federalism and Regulation*, in THE

welfare reform is to raise expectations among welfare recipients that work is indeed attainable and that, ultimately, those on assistance will be integrated into the national economy.<sup>121</sup> While states can secure job training and provide child care, they are comparatively ill-equipped to create new jobs.<sup>122</sup> The fact that the economy has been so strong and the labor market so tight during the first four or five years of welfare reform has taken pressure off of states to do the heavy lifting.<sup>123</sup> Yet as the economy has cooled considerably, states have again been required to bear the burden of responsibility—and their current array of workfare tools may be insufficient to meet the task at hand.<sup>124</sup>

Finally, it bears mentioning that states can simply disagree with federal aims—and frustrate them. Sovereign states are not just administrative branch offices,<sup>125</sup> and states have a good deal of ability to undermine aims, or selectively enforce federal imperatives. A state that finds some federal mandates unwise or unproductive can work

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REAGAN REGULATORY STRATEGY 111, 116-18 (George C. Eads & Michael Fix eds., 1984) (describing how one cannot necessarily expect states generally to be entirely desirous, or even capable, of effectuating the substantive and rhetorical goals of federal policy).

<sup>121</sup> See Robert Pear, *Most States Meet Work Requirement of Welfare Law*, N.Y. TIMES, Dec. 30, 1998, at A1; Katharine Q. Seelye, *Recipients of Welfare Are Fewest Since 1969*, N.Y. TIMES, Apr. 11, 1999, at A22; Michael M. Weinstein, *Welfare to Work Partnerships: Promises that Might Be Kept*, N.Y. TIMES Nov. 26, 1998, at C1; *NewsHour*, *supra* note 118.

<sup>122</sup> New York City's and New York State's recent request for billions in aid to redevelop lower Manhattan and revitalize the regional economy is, fortunately, an extreme example, but illustrates the limited taxing and bond-raising power of local government relative to the federal government, with its huge revenue intakes, ability to raise money, and its ability to spread costs and benefits over a much greater and more diverse population and geography. See James C. McKinley Jr., *Pataki Defends \$54 Billion Aid Request*, N.Y. TIMES, Oct. 11, 2001, at D5; see generally Robert Pear, *Governors Get Sympathy from Bush but No More Money*, N.Y. TIMES, Feb. 25, 2003, at A22 (describing states' frustration at their inability to stimulate their economies without federal assistance).

<sup>123</sup> See, e.g., Nina Bernstein, *Uncertainties Loom As New Yorkers Hit Welfare Time Limit*, N.Y. TIMES, Nov. 30, 2001, at A1 (describing how the booming economy of the late 1990s was central in easing the transition from welfare to work).

<sup>124</sup> See Stephanie Flanders, *Influential Connecticut Welfare Plan Is Tested in Hard Times*, N.Y. TIMES, Aug. 13, 2001, at B1 (suggesting that since the economy was so strong during the initial years of TANF, the real work of welfare reform only has begun); William Julius Wilson & Andrew J. Cherlin, Editorial, *The Real Test of Welfare Reform Still Lies Ahead*, N.Y. TIMES, July 13, 1999, at A21 (describing the work of state welfare agencies that lies ahead); see also *supra* note 107.

<sup>125</sup> See *Morrison v. United States*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (recognizing the sovereign identities of state legislatures that impeded any effort by Congress to make them functionaries of the federal government).

around them. If a state objects, for example, to requirements that single, teenage mothers must live with their parents to be eligible for welfare, state administrators may simply choose not to ask questions pertaining to that matter. Or, on the other hand, they could completely impoverish welfare programs by failing to provide any affirmative assistance in the form of training and educational opportunities.<sup>126</sup> States can simply raise eligibility standards and end dependency by minimizing services. These disparate realities are institutional incidents of state sovereignty.

## 2. *Managerial Harms*

In this Subsection, I locate three related sets of managerial, or bureaucratic harms, which stem from a mismatch between federal and state *incentives*. First, there is the potential for prisoners' dilemmas: States race-to-the-bottom to provide minimal welfare benefits to discourage would-be new residents from entering as well as to encourage current residents to seek greener pastures elsewhere. This practice leads to a reduction of overall benefits presumably below that envisioned by the federal government, if only because the level of generosity by a given state has to be objectively low in order to create credible disincentives for recipients to remain in residence. Thus, unlike the federal government, states may try to displace the poor to other states—so they can lower their administrative costs and dispense with their welfare obligations, without actually reducing dependency in America.<sup>127</sup>

Second, states have a political and economic incentive to reallocate federal welfare funding to other public projects. They may use their legally granted discretion to free up federal dollars ostensibly earmarked for welfare provisions to support more popular projects.<sup>128</sup> This prioritization of other state interests indicates a

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<sup>126</sup> See Joshua Green,  *Holding Out, in MAKING WORK PAY* 38, 38-39 (Robert Kuttner ed., 2002) (describing Idaho as having spent only twenty percent of its total federal allocation for welfare programs and provisions); Karen Czapanskiy, Editorial, *Welfare on the Cheap*, WASH. POST, Dec. 5, 1999, at B8 (describing Maryland's re-allocation of federal welfare moneys into the general state coffers); see also *infra* note 151 and accompanying text.

<sup>127</sup> See, e.g., Bezdek, *supra* note 9, at 1562-63.

<sup>128</sup> Professor Cashin is especially attuned to this phenomenon. She speaks to a particularly fiercely pitched battle between the lower classes and the middle class fought in state capitals across the nation. See Cashin, *supra* note 3, at 562. Moreover, [g]iven the competition engendered by the [welfare reform a]ct between welfare recipients and middle income voters, and the conflictual nature of redistributive politics, there are considerable risks to the poor of submitting such broad discretion to state majoritarian politics. . . . [S]tate governors and legislatures will be hard-pressed to

shrinking of public responsibilities and commitments to the poor. Thus, this “Us versus Them” (when it is, say, New York versus Connecticut) prisoners’ dilemma paradigm is only one aspect of the dislocation of the concern for the poor. There is also the “Us versus Them” (when *we* are the middle class, and *they* are the poor) that makes it financially attractive to under-provide for the poor.<sup>129</sup>

Third, states may take advantage of the federal work requirements and create workfare projects that help serve state interests, but do little to facilitate the actual transition from welfare to work.

*a. Diversion to Other States*

I begin by discussing the prisoners’ dilemma scenario.<sup>130</sup> Moving a family from Wisconsin to Minnesota is easier than moving an American family to Canada. America, conceived of as a singular community, cannot fully evade its commitment to the poor that discrete communities and regions within the United States could readily shirk. The federal government, by design, internalizes all of these concerns—and blame. A state, in contrast, can (and often does) let others do the heavy lifting.<sup>131</sup>

resist the full rigors of state budgetary and cultural politics.

*Id.* at 564-65.

Cashin takes the strong view that states are inherently more likely to exploit lower-class Americans than the federal government, especially if there is a racial dimension added to the mix. *Id.* at 568. Lacking overwhelming empirical support for that assertion, I personally adopt a weaker version of the Cashin thesis and simply recognize that states, like any other political body given too much discretion and lacking real oversight, spend unearmarked money in ways that will most support their respective political agendas. Often, generosity to the poor does not make the short list.

<sup>129</sup> For an appreciation of the latter dynamic at the state level, see *id.* at 554-57. Recently, a Mississippi director of social services affirmed the existence of this latter, inter-class tension when he said his responsibilities are to the Mississippi taxpayers, not just those on the dole. Governor Fordice appointed Colonel Don Taylor, who said his “clients” were the “taxpayers he was dedicated to protecting from those who were attempting to exploit them and their hard earned money.” See David A. Breaux et al., *To Privatization and Back: Welfare Reform Implementation in Mississippi*, in *MANAGING WELFARE REFORM IN FIVE STATES: THE CHALLENGE OF DEVOLUTION* 43, 51 (Sarah F. Liebschutz ed., 2000).

<sup>130</sup> See, e.g., ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); Jonathan Bender, *In Good Times and Bad: Reciprocity in an Uncertain World*, 31 *AM. J. POL. SCI.* 531 (1987).

<sup>131</sup> See, e.g., Jonathan Chait, *Rogue State: The Case Against Delaware*, *NEW REPUBLIC*, Aug. 19, 2002, at 20 (describing the “selfish” me-first policies of Delaware, which enrich its citizens by imposing an array of financial burdens on non-residents). Economist and columnist Paul Krugman describes recent short-sighted, selfish political decisions by states that have caused economic troubles. Only the backing of

Conceptually, states try to farm their problems out, in the classical free-rider, prisoners' dilemma way.<sup>132</sup> Professors Mashaw and Rose-Ackerman highlight the problems with the states acting in lieu of the federal government when externalities are present. They argue: "when interjurisdictional externalities or prisoner's dilemmas [such as the welfare magnet effect] are present, the possibly greater administrative capacity of low-level governments must be balanced against the danger that the federal purpose may be undermined if too much authority is delegated."<sup>133</sup> Their discussion of regulatory policy maps neatly onto the present inquiry. Devolution creates the very real threat of the "welfare magnet."<sup>134</sup> No state, anxious to reduce its welfare rolls, wants to attract citizens of other states to establish residency in order to take advantage of more generous welfare packages; thus, there is a virtual race-to-the-bottom,<sup>135</sup> with each state and municipality low-balling one another so as to seem less attractive both to poor people looking to relocate to the place with the best welfare package and to its own impoverished.<sup>136</sup> Though this

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the U.S. government, to smooth over those bumps, prevents, in Krugman's words, Tennessee from looking like Argentina. See Paul Krugman, Editorial, *Our Banana Republics*, N.Y. TIMES, July 30, 2002, at A19.

<sup>132</sup> Professors Mashaw and Rose-Ackerman describe states as competing against each other to entice businesses by offering lower levels of taxes and environmental regulations. See Mashaw & Rose-Ackerman, *supra* note 120, at 117. Judge (then Professor) Michael McConnell signals out the race-to-the-bottom incentives in federalized welfare policy as "the most important example" of the downsides to interstate competition, which he otherwise endorses as promoting innovation. He argues:

In most cases, immigration of investment and of middle-to-upper income persons is perceived as desirable, while immigration of persons dependent on public assistance is viewed as a drain on a community's finances. Yet generous welfare benefits paid by higher taxes will lead the rich to leave and the poor to come. This creates an incentive, other things being equal, against redistributive policies. Indeed, it can be shown that the level of redistribution in a decentralized system is likely to be lower even if there is virtually unanimous agreement among the citizens that higher levels would be desirable. Where redistribution is the objective, therefore, advocates should and do press for federal programs, or at least for minimum federal standards.

McConnell, *supra* note 35, at 1499-1500 (footnotes omitted).

<sup>133</sup> Mashaw & Rose-Ackerman, *supra* note 120, at 118.

<sup>134</sup> See PAUL E. PETERSON & MARK C. ROM, WELFARE MAGNETS: A NEW CASE FOR NATIONAL STANDARDS 47-49 (1990); Bennett & Sullivan, *supra* note 37, at 757.

<sup>135</sup> See WALLACE E. OATES, FISCAL FEDERALISM 6-8 (1972) (describing the competition among states that leads to a lower overall provision of social welfare services); PETERSON, *supra* note 8 (describing race-to-the-bottom potentialities).

<sup>136</sup> There are notable cases in which states have tried to dissuade newcomers from receiving what they perceived to be generous benefits. See *Saenz v. Roe*, 526 U.S. 489 (1999) (characterizing a state as trying to limit benefits to newcomers under

race-to-the-bottom mentality may seem to comport with the general spirit of getting tough on dependency, it quite possibly could lead to more excessive and short-sighted cutbacks than Congress contemplated.

Moreover, not only do states signal they do not want new entrants, but they also encourage the departure of those on their rolls. At the extreme, some public welfare offices have boldly advertised their willingness to buy recipients "one-way tickets" out-of-town. For example, in Tulare County, California, the county welfare agency has paid more than 750 welfare-receiving families an average of \$1600, essentially just to leave the state.<sup>137</sup> And, as of 2001, Kentucky has paid \$1.5 million in moving expenses to 2000 families to leave the state; the state pays for a moving truck and/or the cost of one month's rent in the new locale.<sup>138</sup>

*b. Shifting Resources from Welfare to General Coffers*

Second, the opportunity to implement welfare reform gives

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PRWORA); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (describing a state's efforts to deter out-of-state poor people from moving in by requiring a full year of residency before authorizing their eligibility for welfare). *But see* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001) (offering empirical and conceptual counterarguments to the proposition that states inevitably look to free-ride and slack).

Indeed, there is a growing body of empirical research that seeks to downplay this race-to-the-bottom concern. Studies have shown that most welfare recipients do not relocate across state lines to reap the marginal benefits from more generous welfare assistance in another state. *See, e.g.*, F.H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race to the Top*, 5 S. CT. ECON. REV. 141 (1997); Phillip B. Levine & David Zimmerman, *An Empirical Analysis of the Welfare Magnet Debate Using the NLSY* 20-33 (Institute for Research on Poverty, Univ. of Wis.-Madison Discussion Paper No. 1098-96, 1996); *see also* Shauhun A. Talush, Note, *Welfare Migration To Capture Higher Benefits: Fact or Fiction?*, 32 CONN. L. REV. 675, 696-97 (2000). But this revised appreciation of the strength of the race-to-the-bottom may not influence decisionmakers, who may cling to their beliefs that welfare magnets still exist. *See, e.g.*, Jason DeParle, *What About Mississippi?*, N.Y. TIMES, Oct. 16, 1997, at A1 (describing Mississippi's desire to lower services so as not to attract welfare seekers from neighboring states); Judith Havemann, *District Could Become Welfare Oasis as Neighbors' Benefits Dry Up*, WASH. POST, Sept. 15, 1996, at A13 (describing worries that Washington, D.C. will turn "itself into the welfare magnet of the mid-Atlantic" and citing general concerns of races-to-the-bottom across the country); Robert Pear, *Judge Rules States Can't Cut Welfare for New Residents*, N.Y. TIMES, Oct. 14, 1997, at A1 (describing Pennsylvania's attempt to provide lower levels of assistance to new residents as grounded in the state's desire not to become a welfare magnet).

<sup>137</sup> Evelyn Nieves, *A Fertile Farm Region Pays Its Jobless To Quit California*, N.Y. TIMES, June 18, 2001, at A1; *see also* Havemann & Vobjeda, *supra* note 71 (citing the fear of states reducing their rolls by exporting their poor).

<sup>138</sup> *See* Roger Alford, *State Programs Pay To Relocate Job Seekers on Welfare*, WASH. POST, July 1, 2001, at A10.

states the discretion to shift funds to alternative programs, possibly altogether unrelated to the provision of social welfare services. In 1998, Wisconsin spent \$98 million less than it was given that year by the federal government. It kept the money and dispersed it around the state for, inter alia, drug-treatment programs, education, and tax relief.<sup>139</sup> Other states have decided to keep that unspent federal money in savings for a rainy day.<sup>140</sup>

For a variety of reasons, only one of which is cost-savings, states notoriously engage in tactics known as diversion.<sup>141</sup> They try to discourage would-be welfare recipients from obtaining assistance by making it difficult to schedule appointments; thus fewer would-be recipients actually have the tenacity (and resources) to follow through and successfully enroll.<sup>142</sup> As they return to the pre-*Goldberg* world without federal entitlements, states possess greater discretion in decisionmaking and can easily reject an individual applying for benefits, or effectively make it nearly impossible for that individual to maintain her eligibility.<sup>143</sup> For example, states can deny benefits to those who arrive at the welfare office after 11 a.m.,<sup>144</sup> conduct invasive home visits,<sup>145</sup> move their offices beyond the reach of public

<sup>139</sup> Thomas Kaplan, *Wisconsin Works*, in *MANAGING WELFARE REFORM IN FIVE STATES* 103, 108 (Sarah F. Liebshutz ed., 2000).

<sup>140</sup> Robert Pear, *States Declining to Draw Billions in Welfare Money*, N.Y. TIMES, Feb. 8, 1999, at A1 (“States see the [windfall] money as a reserve for future economic downturns.”).

<sup>141</sup> Kennedy, *supra* note 1, at 249-50; see Rebecca Gordon, *Cruel and Usual: How Welfare “Reform” Punishes Poor People* 26 (2001), available at <http://www.arc.org/downloads/arc010201.pdf> (last visited Dec. 28, 2003); Super, *supra* note 77.

<sup>142</sup> Diversionary tactics are widespread. See, e.g., Breaux, *supra* note 129, at 43 (describing the stages of eligibility and casework interviews built into the system); DeParle, *supra* note 78 (describing diversionary practices in New York); Peter Edelman, Editorial, *Making Welfare Work*, N.Y. TIMES, July 8, 1997, at A27 (describing diversion tactics).

<sup>143</sup> See Cimini, *supra* note 10, at 250.

<sup>144</sup> See, e.g., Rachel L. Swarns, *New York City Admits Turning Away Poor*, N.Y. TIMES, Jan. 22, 1999, at B3.

<sup>145</sup> PRWORA relaxed many of cash-based welfare’s legal-procedural requirements and thus created new opportunities for state and county welfare agencies not only to reduce benefits to deter welfare seekers, but also to become more broadly intrusive in the lives of the poor. Punitive welfare policing has been reported, among other places, in the State of Utah. There, intrusive home visits revealed egregious examples of arbitrary discretionary power. During an unannounced home visit, a welfare agent removed children from one home because she caught the family in the middle of piling up their clothes for the mother to take to the laundromat. Her report indicated that there was a pile of dirty clothes beside the front door. Another woman, who had left a violent domestic situation, was similarly sanctioned for “permitting her children to watch her get beat up.” Gordon, *supra* note 141. This broad, unprincipled discretion seems beyond the

transportation,<sup>146</sup> use disabled children's SSI payments as proof that the family is not poor,<sup>147</sup> or require weeks of job searches before allowing individuals to apply for welfare.<sup>148</sup> In this environment, welfare is intended to be understood as a last resort. This situation may work to motivate individuals to wake up early, secure day care, perhaps marry, and otherwise remain diligent with job searches. But it also represents the danger of diversion *qua* moneymaking—a windfall for states.

Of course, diversion, as suggested above, comports moderately well with congressional intent; but states may take it too far.<sup>149</sup> There is a high—possibly exceedingly high—state interest in diversion because states may want to reallocate the resources they save on welfare to other projects. While the financial incentive to divert would-be clients is built into the system, there are many cases in which diversion takes on an overwhelming passion, which may not reflect, again, the intent of the federal government.<sup>150</sup>

Diversion, from an *idealized* federal perspective, is a stick to encourage those most able to go to work—freeing up money to invest

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contemplation of many of those in Congress supporting tougher work requirements.

<sup>146</sup> See Kennedy, *supra* note 1, at 290 (describing the practice of relocating welfare offices further from public transportation routes); see also Barbara Ehrenreich, *Spinning the Poor into Gold: How Corporations Seek To Profit from Welfare Reform*, HARPER'S MAG., Aug. 1997, at 44.

<sup>147</sup> See Michael Janofsky, *West Virginia Pares Welfare, But Poor Remain*, N.Y. TIMES, Mar. 7, 1999, at A20.

<sup>148</sup> See Barbara Vobejda & Judith Havemann, *States' Welfare Shift: Stop It Before It Starts*, WASH. POST, Aug. 12, 1998, at A1 (describing Florida's policy). In Missouri, the application process required candidates for TANF to contact ten prospective employers each week for four weeks. Only then, if unsuccessful in securing employment, an applicant may be deemed eligible. *Id.*

<sup>149</sup> See, e.g., Editorial, *Deflecting Welfare Applicants*, WASH POST, Aug. 17, 1998, at A17 ("The question is whether the deflections are a good thing or bad. They're good if the families being turned away were really not that needy, bad if the genuinely needy are being denied. The answer, which seems likely to blur and plague evaluations of welfare 'reform' generally in the years ahead, is that no one knows. The families turned away aren't generally tracked. Some doubtless do all right; that has to be particularly true in an economy that continues to expand. Others don't but, at least in the short run, disappear from official view."); see also Super, *supra* note 77.

<sup>150</sup> It might be counterintuitive for transitional assistance not to be continued for those who are completing their educational training. See Karen Houppert, *You're Not Entitled!: Welfare Reform is Leading to Government Lawlessness*, NATION, Oct. 25, 1999, at 11 (describing egregious examples of state diversion tactics and asserting that "whether out of willful disregard or real misunderstanding, states are failing to fulfill their . . . obligations to the poor"). Yet refusing to offer waivers from work for college students allows states to save money in the short term, even though it comes at the cost of losing future, highly skilled labor participants who now may have to quit school and find jobs immediately. See *infra* notes 164-66.

in those harder-to-move cases. Yet the fact that there are insufficient requirements to ensure welfare grant money is spent on moving individuals into work opportunities suggests diversion may be used by some states, for instance, to help improve highways and stem beach erosion.<sup>151</sup>

*c. Putting Recipients to Work—for States*

Sometimes, states use federal mandates for self-serving ends, such as to create a workfare system that helps the states themselves, but does little to facilitate the transition to actual work. Typically of course, states and cities create public sector workfare jobs in order to give those outside of the labor market work experience (since the market demand for low-skilled labor is not sufficient to absorb the numbers required all at once).<sup>152</sup> Abstractly, these workfare programs reflect the best traditions of the New Deal's WPA (Works Progress Administration) and CCC (Civilian Conservation Corps) that instilled in participants a sense of self-worth and an attachment to the labor force in troubling times.<sup>153</sup> Similarly, modern workfare's intended

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<sup>151</sup> For a recent example of states violating the spirit of congressional funding allocations by diverting resources away from their intended destination, see, for example, Joshua Green, *The Welfare Shell Game*, in MAKING WORK PAY 46, 46-47 (Robert Kuttner ed., 2002), describing Texas's aim to substitute federal funds for states' funds and thus "launder[] federal welfare dollars to finance more politically popular programs," and Robert Pear, *A Study Finds Children's Aid Goes to Adults*, N.Y. TIMES, Aug. 8, 2002, at A1. See also U.S. GENERAL ACCOUNTING OFFICE, WELFARE REFORM: CHALLENGES IN MAINTAINING A FEDERAL-STATE FISCAL PARTNERSHIP (GAO-01-828 Aug. 10, 2001); Sewell Chan, *D.C. Welfare Funds To Go To Children; Critics Say \$12 Million Shift Irresponsible*, WASH. POST, Aug. 10, 2000, at B1 (describing the re-allocation of TANF funds to less specifically targeted children's programs); Jim McLean & Chris Grenz, *Use of Welfare Grant Debated*, TOPEKA CAPITAL-J., Aug. 30, 2000, at A7 (characterizing Kansas's re-direction of nearly half its TANF money to foster care programs); *supra* note 126.

<sup>152</sup> See, e.g., NEWMAN, *supra* note 17; Alan Finder, *Welfare Clients Outnumber Jobs They Might Fill*, N.Y. TIMES, Aug. 25, 1996, at A1; Mickey Kaus, Editorial, *Welfare Reform Made Difficult; President Clinton and Congress Can't Possibly Reduce Dependency Without Funding Public Jobs*, PITTSBURGH POST-GAZETTE, July 5, 1995, at A9.

<sup>153</sup> See, e.g., Editorial, *Pact Keeps Workfare on Right Track*, DAILY NEWS (N.Y.), Aug. 11, 1997, at 22 (referring to WEP as the "most successful welfare-to-work program in the nation"); Editorial, *Job Link to Welfare Reform*, DAILY NEWS, Jan. 14, 1996, at 46 (referring to the great success in transforming welfare recipients into workers).

For discussions of those New Deal programs mentioned in the text, see PATTERSON, *supra* note 21. The Civilian Conservation Corps employed young men in a variety of forestry and conservation projects. *Id.* at 57. The Works Progress Administration employed manual and professional labor in a host of government projects. *Id.* at 63. These programs conserved the human spirit by allowing family heads to "earn" their relief. *Id.* at 59 (citing New Dealer Harry Hopkins as saying "Give a man a dole, and you save his body and destroy his spirit. Give him a job and pay him an assured wage and you save both the body and the spirit").

purpose is to create an ethos of work and to acculturate individuals into mainstream society.<sup>154</sup>

Yet there is a more problematic side to welfare-to-work, and I will rely on New York City's Work Experience Program (WEP) in the late 1990s and early years of this decade as a case study. My purpose here is not to levy any global criticism so much as it is to indicate ways in which even cosmopolitan local governments might distort welfare policy to suit their own needs. Welfare-to-work programs may, in such circumstances, re-create the rigid class boundaries that have always existed between the working class and non-working poor.

The City of New York employs many municipal workers who are unionized, decently compensated civil servants. It also "employs" workfare participants, many of whom work side-by-side these civil servants, doing the same job without the benefits, job security, union protection, or a living wage.<sup>155</sup> Despite the occupational similarities between some civil service and workfare jobs, there is surprisingly little upward mobility from workfare to regular civil service jobs; this immobility widens not only the economic gap, but also the psychological and sociological gaps between "real" workers and WEP workers that make it difficult for the latter to make the transition to gainful employment.<sup>156</sup>

Indeed, this dual-class system of labor, this reification of class within the workfare system, runs counter to the goals and ideals of moving people from welfare to work.<sup>157</sup> Stigmatizing workfare participants, by denying them protective equipment and uniforms, health coverage, and economic security, signals a failure on the part

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<sup>154</sup> Former Wisconsin and New York City welfare administrator Jason Turner considers workfare to be better than any other training program. He has stated: "[t]he best preparation for work is working." And, when asked about those who cannot speak English, he responded: "The best way to learn English is to interact with English-speaking people in the workplace." DeParle, *supra* note 78.

<sup>155</sup> Havemann, *supra* note 61; see also Matthew Diller, *The Social Message of the New Workfare: Work Programs Are Deliberately Structured so that They Are Virtually Never Comparable to Holding an Actual Job*, 9 STAN. L. & POL'Y REV. 19 (1998); Mary J. O'Connell, *Municipal Labor Perspectives on the Public Sector Welfare Workforce in New York City*, 73 ST. JOHN'S L. REV. 805, 805-06 (1999).

<sup>156</sup> See David L. Gregory, *Br(e)aking the Exploitation of Labor?: Tensions Regarding the Welfare Workforce*, 25 FORDHAM URB. L.J. 1 (1997); Nina Bernstein, *City Fires 35,000 Former Welfare Recipients*, N.Y. TIMES, Jan. 5, 2002, at B3.

<sup>157</sup> Havemann, *supra* note 61 ("If welfare recipients are doing the work for the city . . . shouldn't they be able to work their way onto the city payroll and receive employee benefits and protections like any other municipal worker?"). For a broad philosophical critique of New York's WEP program, see Anthony Bertelli, *Impoverished Liberalism: Does the New York Workfare Program Violate Human Rights?*, 5 BUFF. HUM. RTS. L. REV. 175 (1999).

of government to take seriously its charge of promoting welfare to work.<sup>158</sup> The WEP worker's hourly wage is below the federal minimum and, alone, will not permit her family to climb out of poverty.<sup>159</sup> To stigmatize workers who are poor, but who work, seems antithetical to the spirit of the program designed to link work with dignity, self-respect, and improvement.<sup>160</sup> To do so for the purposes, perhaps, of reducing the city payroll and appeasing the public sector unions contravenes the spirit of welfare reform.<sup>161</sup> Hence, here an incentive-based, managerial harm produces civic-citizenship harms as well. It is demoralizing to create this second (or third?) class of worker-citizens, who are not afforded basic respect at the workplace and are forced to accept substandard equipment and facilities.

Nothing dramatizes this antithetical vision of workfare as welfare reform more than New York City's early policy on welfare recipients who attended college. Prior to PRWORA, only three states did not allow welfare recipients to satisfy their work requirements through

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<sup>158</sup> See Mark Greenberg, *Bush's Blunder*, AM. PROSPECT, Summer 2002, at A2 (describing New York City's workfare program as an initiative that displaces other workers, "requires people to work without the dignity of a paycheck or the rights of other workers," and that has been shown to be largely ineffective in transitioning welfare recipients into unsubsidized employment). I have attempted to avoid discussing the more sensational tidbits about New York City workfare. See, e.g., Tara George, *Workfare Blamed for Heart Death*, DAILY NEWS (N.Y.), June 25, 1997, at 1 (describing the conditions under which an older woman with a known heart condition was sent out to a manual labor, outdoor work assignment); Jessica Graham, *Workfare Women Rip Harassment*, N.Y. POST, Oct. 1, 1999, at 24 (describing a number of sexual harassment instances by supervisors that have gone unpunished).

<sup>159</sup> A WEP worker gets "none of the perks . . . of her unionized colleagues. She doesn't get sick leave or vacations . . . and she doesn't have automatic access to the federal labor, civil rights, disability and sexual harassment protections of other workers." Havemann, *supra* note 61.

<sup>160</sup> See Annette Fuentes, *Slaves of New York*, IN THESE TIMES, Dec. 23, 1996, at 14 (describing the caste hierarchy among public laborers). Fuentes describes WEP in the following way:

WEP creates a pool of contingent workers, doing the same work as city employees and often working shoulder to shoulder with them, but for a fraction of their pay. With no sick leave, no vacations, no pensions or other benefits, WEP workers are a constant and not-so-subtle threat by management to workplace standards. . . . For example, WEP workers doing street cleaning get no gloves or uniforms or footwear, and have no locker facilities to change clothing so they must go home wearing whatever filth the day brings. In the parks, WEP workers are forced to climb higher than union contracts allow in pruning trees. . . . At the sanitation depot in Brooklyn where they meet before being driven by van to work sites, union workers wrote on the bathroom door, "No WEP workers."

*Id.*

<sup>161</sup> See *id.*; Havemann, *supra* note 61; Editorial, *Welfare, Workfare and Workers*, N.Y. TIMES, Sept. 26, 1996, at A32.

post-secondary education.<sup>162</sup> After passage, more than half the states refused to count college education as work participation.<sup>163</sup> New York City, for example, did not give “work experience credit” to those public assistance recipients attending college. Twenty-one thousand students from the City University of New York alone had to withdraw from classes in the wake of welfare reform because the terms of welfare required them to pick up trash in the city streets and parks for up to thirty hours a week. The WEP program’s insistence on manual labor, even for these college students, is economically shortsighted.<sup>164</sup> Research has shown that within two years of getting into college, seventy-five percent of those students receiving public assistance during their schooling move off welfare; and, eighty-seven percent of women on welfare who then earn a college degree move into jobs that pay a living wage—and never to return to the welfare rolls.<sup>165</sup> This myopic policy decision not to excuse these students from work assignments illustrates how local agents can distort the message of independence and self-sufficiency.<sup>166</sup>

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<sup>162</sup> See Andrew S. Gruber, Comment, *Promoting Long-Term Self-Sufficiency for Welfare Recipients: Post-Secondary Education and the Welfare Work Requirement*, 93 NW. L. REV. 247, 256 (1998).

<sup>163</sup> See *id.*

<sup>164</sup> See, e.g., Karen W. Arenson, *Workfare Rules Cause Enrollment to Fall, CUNY Says*, N.Y. TIMES, June 1, 1996, at A1; David Firestone, *Mayor Defends Workfare for Students*, N.Y. TIMES, Mar. 14, 1997, at B3.

<sup>165</sup> Applied Research Center, *Worthwhile Welfare Reforms 1* (Feb. 2001), available at <http://www.arc.org/downloads/worthwhilepolicies.pdf> (last visited Dec. 28, 2003); see also Gruber, *supra* note 162, at 275-76, 281-83 (describing the increased likelihood of success and self-sufficiency as a result of post-secondary education). Other studies have shown that “postsecondary education increases wages enough to radically decrease the need for families to rely on welfare.” Indeed, women who finish high school or pursue post-secondary education are much less likely to return to the welfare rolls. See Rebekah J. Smith et al., *The Miseducation of Welfare Reform: Denying the Promise of Postsecondary Education*, 55 ME. L. REV. 211, 220-22 (2003).

Of note, the New York State Legislature modified its policy and allowed students to count college internships or work-study toward their TANF work requirements. See Raymond Hernandez, *Legislature Passes Bill Letting Internships Count Toward Workfare*, N.Y. TIMES, June 16, 2000, at B9.

<sup>166</sup> In fairness, President Bush recently decried a bill originating in the Senate that would allow a certain number of welfare recipients to remain enrolled in college, exempt from work requirements. President Bush said: “Some welfare recipients . . . could spend five years going to college, not holding a job. Now that’s not my view of helping people become independent.” Thus, states and cities are not alone in believing education is an unacceptable substitute for work. See Elisabeth Bumiller, *Bush Criticizes Senate’s Version of Welfare Bill as Harmful*, N.Y. TIMES, July 30, 2002, at A14.

### 3. Civic Harms

Though not a major problem given the political legitimacy and responsiveness of state government vis-à-vis the federal government, I do pause here to flag one civic concern: the legacy of oppression and discrimination that particular minority communities associate with their state governments has not yet, unfortunately, been relegated to the annals of ancient history. Not only do segregationist policies, denial of the franchise, and ruthless state-sponsored violence come to mind for many poor black southerners when they think about their relationship to the state government; they may also have salient memories of *King v. Smith* types of intrusive, humiliating home visits related directly to welfare administration.<sup>167</sup> In light of PRWORA's abandonment of federal welfare entitlements, the oppressive and discriminatory policies and attitudes of the 1950s and 1960s, which had been reined in by the federal protections afforded by way of *Goldberg* and *King*, may potentially be revived.

Indeed, institutional racism at the state and local level is alarmingly enduring. Professor Cashin, for one, devotes considerable attention to how states profoundly discriminate against their African-American welfare populations.<sup>168</sup> And another, Professor Susan Gooden, presents a particularly salient case study of Virginia welfare services. In her study, she documents and contrasts state administrators' disparaging and ungenerous treatment of black welfare recipients with their treatment of similarly situated white clients who were always given first notice of new jobs, offered the "newest" work clothes, and given access to automobiles.<sup>169</sup>

Understanding discrimination is not just an academic exercise, but also a visceral part of the welfare experience. The civic harms associated with returning power to the states cannot be disregarded as historically contingent. Such harms persist today.

### 4. Summary

In the above discussions, I traced a few important ways that states

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<sup>167</sup> See *King v. Smith*, 392 U.S. 309 (1968) (describing the practice of caseworkers' midnight "raid" inspections aimed at ascertaining whether any employable men were residing in the home of welfare recipients).

<sup>168</sup> Indeed, Professor Cashin makes this concern a focal point of her critique of PRWORA. Her analysis of systematic discrimination by state governments leads her to conclude that state-administered welfare policy is quite threatening to already highly disadvantaged, minority communities. See Cashin, *supra* note 3.

<sup>169</sup> See Susan T. Gooden, *All Things Not Being Equal: Differences in Caseworker Support Toward Black and White Welfare Clients*, 4 HARV. J. OF AFR. AM. PUB. POL'Y 23 (1998).

can—and (both deliberately and unwittingly) have—threatened to undermine a true model of welfare reform. Specifically, because of the limitations of state governments to effectuate macroeconomic growth, it may be difficult for states to design policies to achieve federal goals. Moreover, the scope of state power aside, states may lack the incentives to comply fully with the federal directive. There may be reasons to let other states bear a disproportionate burden in terms of servicing the American welfare population, there may be opportunities to use welfare reform to achieve alternative state objectives (possibly completely outside of the social welfare context), and there may be a general reluctance to take ownership over the problems of dependency. In all, the current legal model of devolution allows states to reshape welfare policy in ways that may depart considerably from Congress's substantive objectives.

#### IV. ONE STEP FURTHER I: STATE EXPERIMENTATION WITH FOR-PROFIT CORPORATE CONTRACTORS

The attenuation of the line connecting federal objectives to state policy initiatives described in Section III.B merits concern. But our discussion of the federal-state mismatch reveals only the tip of the iceberg. Once we recognize that states, themselves, can and have turned around and sub-devolved *and privatized* welfare design and implementation, our concerns about maintaining fidelity to federal objectives should mature into full-blown fears. In enacting PRWORA, Congress lifted the prohibition against wholesale privatization, which had existed under AFDC.<sup>170</sup> But, as I have suggested earlier, there was no preternatural link between privatization and the actual substantive agenda of welfare reform; the narratives may have followed common trajectories, i.e., two sides of the anti-big government coin, but they did not necessarily speak to one another. Whether specific welfare goals would be distorted by privatization was, most likely, an ancillary consideration of those whose primary agenda was reducing the size and scope of the government while enlarging that of the private sector.<sup>171</sup>

PRWORA gave for-profit corporations unparalleled and previously un contemplated opportunities to participate in social service programs.<sup>172</sup> Prior to 1996, for-profit entities had been

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<sup>170</sup> See *supra* note 70 and accompanying text.

<sup>171</sup> See Havemann & Vobjeda, *supra* note 71.

<sup>172</sup> Of course, opportunities were also extended to private non-profits. I choose not to devote an entire section to non-profits because all of their traits, both positive

involved in social service provision; but that provision had been largely confined to information management and data processing.<sup>173</sup> Notably, for instance, the early success of Ross Perot's Electronic Data Systems in the 1960s came by way of designing and implementing the computer networking programs for the State of Texas's Medicaid system.<sup>174</sup> Private corporations, however, had not been allowed to bid to administer interpersonal, policymaking aspects of welfare, such as eligibility determination and case management.<sup>175</sup> Then, PRWORA opened the proverbial floodgates.<sup>176</sup> As Professor Bezdek notes: "for the first time the Act authorizes states to employ private entities to conduct intake and make eligibility determinations—traditional gate-

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and deleterious, are exemplified by way of my discussions of state actors, private corporate actors, and private sectarian actors.

<sup>173</sup> See Gilman, *supra* note 40, at 591.

<sup>174</sup> Bill Berkowitz, *Prospecting Among the Poor: Welfare Privatization* 4 (2001), available at <http://www.arc.org/downloads/prospecting.pdf> (last visited Dec. 28, 2003).

<sup>175</sup> See LESTER M. SALAMON, PARTNERS IN PUBLIC SERVICE 236-37 (1995) (describing the rise in for-profit social service provision since the 1960s).

<sup>176</sup> Kennedy, *supra* note 1, at 257-58. Forty-nine states have already introduced some level of privatization into their welfare social service provision. Mark Dunlea, *The Poverty Profiteers Privatize Welfare*, 59 COVERT ACTION Q. 6 (Winter 1996-1997).

Private corporations have embraced the opportunity to compete for welfare contracts. Their enthusiasm alone signals an awareness of the new, lucrative opportunities that heretofore have been unavailable. See, e.g., Ehrenreich, *supra* note 146 (describing the frenzy of activity among private corporations to take advantage of the privatized welfare regime); Merrill Goozner, *Welfare's Gold Rush*, CHI. TRIB., June 29, 1997, at C1 (recounting a similar tale of private activity).

One has to look no further than the business announcements of some of the corporate providers. Corporations and their investment bankers proudly proclaim that privatized welfare has translated into \$28 billion in annual contracts. See Dunlea, *supra*. Commentators, for instance, estimate the winning bid to privatize welfare in the State of Texas would be \$2-3 billion. See William D. Hartung & Jennifer Washburn, *Lockheed Martin: From Warfare to Welfare*, NATION, Mar. 2, 1998, at 11.

From these and future contracts, corporations expect financial windfalls. Maximus, a leading private provider of welfare services, witnessed its stock rise fifty percent in 1997, its first year public and the first full year of American welfare governed by PRWORA. Its chief executive officer made, in that first year, \$18.8 million in cash and received stock worth \$110 million. Adam Cohen, *When Wall Street Runs Welfare*, TIME, Mar. 23, 1998, at 64; see also Hartung & Washburn, *supra*.

Corporations are, furthermore, hiring talented public administrators to help them with contract procurement. Lockheed hired Gerald Miller, the head of Michigan's welfare agency and architect of Governor Engler's welfare-to-work program. Maximus, in turn, attracted George Leutermann, who had formerly run Milwaukee's public job placement center, to run its Milwaukee operation. See Goozner, *supra* ("It's the welfare system's equivalent of the Pentagon's revolving door, where procurement officials fly out the door to make big bucks with the contractors, while denuding the government of the management talent needed to monitor what's going on.").

keeping functions [that are] . . . most often identified with the legal [Goldberg] protections under AFDC.”<sup>177</sup>

A. *Introduction*

How does privatization work? A state, county, or municipality contracts out some or all of its welfare responsibilities. It may contract out simply the billing and accounting work, which raise few welfare-specific concerns; or, it may request bids for vendors to provide aspects of job training and job search responsibilities. More dramatically, states may contract out all the social services, including casework and eligibility determinations.<sup>178</sup> Effectively, then, welfare seekers or recipients might never see the inside of a government building or interact with actual, bona fide civil servants.<sup>179</sup>

Opportunities to reap efficiency gains motivate privatization.<sup>180</sup> States, counties, and municipalities can reduce the size (and payroll) of government and allow the market to function in its stead.<sup>181</sup> The private sector claims the experience, flexibility, and profit motives to make welfare provisions less wasteful. Indeed, its claims are so persuasive that state and local governments are willing to allow corporate providers to walk away with excess rents in order to promote streamlined welfare governance.<sup>182</sup> The lure of slashing the size of government and the seduction of efficiency gains through private-sector competition supply the one-two combination that the

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<sup>177</sup> Bezdek, *supra* note 9, at 1566.

<sup>178</sup> See, e.g., Breaux et al., *supra* note 129, at 46-47 (describing Mississippi's experimentation with the privatization of most social welfare services); Jonathan Walters, *The Welfare Bonanza*, GOVERNING, Jan. 2000, at 34. For a broader examination of state welfare privatization initiatives, see Gilman, *supra* note 40; and Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83 (2003).

<sup>179</sup> See *Welfare, Inc.*, ECONOMIST, Jan. 25, 1997, at 55 (“Texans who claim state-financed income support, health care and food coupons, or who take part in job-training, drug rehabilitation and pregnancy-prevention [programs], may never see a civil servant.”).

<sup>180</sup> See SALAMON, *supra* note 175, at 223-25; SAVAS, *supra* note 42, at 118-20; Richard W. Bauman, *Public Perspectives on Privatization: Foreword*, 63 LAW & CONTEMP. PROBS. 1, 3 (2000); Minow, *supra* note 7; Schuck, *supra* note 38, at 6.

<sup>181</sup> Cohen, *supra* note 176 (suggesting that hiring private contractors to run state welfare programs is believed to hold the promise of unleashing the efficiency and flexibility of the market on dysfunctional state bureaucracies).

<sup>182</sup> For discussions of this compromise whereby rent-seeking is permitted because the efficiency gains are so considerable, see Thomas Kaplan, *supra* note 139, at 108; Kennedy, *supra* note 1, at 259; Nina Bernstein, *Giant Companies Entering Race to Run State Welfare Programs*, N.Y. TIMES, Sept. 15, 1996, at A1; and Walters, *supra* note 178, at 36.

cost-conscious legislator finds so attractive.<sup>183</sup>

Corporations often can outperform state and municipal government through savings in labor costs; they can employ a lower-wage, more flexible (i.e., less secure) labor force that can be augmented or reduced with an ease the public sector could not begin to approach.<sup>184</sup> Of course, corporations may also possess sophisticated delivery and monitoring technologies that give firms such as Andersen Consulting and Lockheed Martin comparative advantages in bidding for contracts.<sup>185</sup> But it also should be appreciated that further cost-savings gains, unrelated to efficiency per se, can be accrued because corporations serve shareholders, not welfare clients, and thus decisions that boil down to a question of serving the shareholders or the clients will be resolved in a manner consistent with the fiduciary duty to the former.<sup>186</sup>

Before commencing this Section's inquiry, I would like to offer a few brief notes. First, any policy distortions that may occur under the framework of state administration apply in instances of privatization, too (and, later, under Charitable Choice). Certainly, a corporation lacks the tools, mandate, and wherewithal to affect the demand side of the labor market. Also, corporations' interests, too, may diverge from the federal objectives (and to a much greater extent). Moreover, concerns regarding the corporation's legitimacy and accountability may affect how individuals and communities of recipients feel about themselves and their relationship to government and society.<sup>187</sup> Stipulating to these similarities between state

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<sup>183</sup> See, e.g., Bauman, *supra* note 180, at 3 (describing legislators who support privatization initiatives as frequently extolling the virtues of efficiency and private-sector competition).

<sup>184</sup> See ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS 98 (1997) (noting the lower wages and benefits offered in the private sector as reasons why governments outsource); SAVAS, *supra* note 42, at 34-35, 287 (suggesting the degree to which non-executive civil servants are paid significantly more than similarly situated workers in the private sector); Kennedy, *supra* note 1, at 264 (describing the transition from public to private sector as one in which unionized, secure jobs with pensions are replaced by nonunionized, often part-time or casual labor); Minow, *supra* note 1, at 500 (describing the expectation of cost-saving gains from harnessing the resources and flexibility of the private sector).

<sup>185</sup> See *infra* note 207 and accompanying text.

<sup>186</sup> Kennedy, *supra* note 1, at 302 (“[B]ecause a publicly traded company has a fiduciary duty to maximize shareholder profits, the private provider will seek to maximize profits even if it means harming the needy.”). For a detailed discussion on fiduciary duties in the government contracting context, see Michele Estrin Gilman, *Charitable Choice and the Accountability Challenge*, 55 VAND. L. REV. 799, 826-27, 837-39 (2002), in which for-profit corporate fiduciary duties are discussed, and *id.*, at 837-39, in which religious corporations' fiduciary duties are discussed.

<sup>187</sup> Professor Minow notes:

devolution and privatization,<sup>188</sup> I will move quickly to discuss the distorting qualities unique to for-profit provision. Issues regarding a corporation's distinct and disparate interest in welfare reform as well as those regarding its status as a non-state entity will be discussed in turn.

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Privatization's distortions fall into the categories of harm established at the beginning of this Article, but are replete with spillovers across categories. Some of the institutional harms reach into the civic realm as do some of the incentive-based, managerial harms. In what follows, I describe the three categories of harm in order. First, the institutional harms take a number of forms. The corporate enterprise itself creates *prima facie* concerns. Important institutional concerns include the fiduciary *duty* to promote shareholder wealth, which goes well beyond a state or city's *incentive* to under-provide services. Another institutional concern is that corporate enterprises are not equipped to resolve due process concerns, conduct APA-like hearings, or hold notice and comment fora. Second, managerial concerns include the possibility that corporate providers have incentives to provide selectively to those they can help most inexpensively, as well as, counterintuitively, to be less flexible vehicles of welfare policy and to be less local than otherwise contemplated. I note here that it is somewhat ironic that though states and municipalities lobbied so fervently to take over the reins of welfare policy, a good number of them quickly turned those

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Privatization of public services [has] soared precisely when major corporations engaged in unfettered private self-dealing and one major religious group reeled from scandals, cover-ups, and mounting distrust among the faithful. This coincidence in timing should be all the reminder anyone needs of the vital role of public oversight and checks and balances.

Minow, *supra* note 7, at 1259-60 (footnote omitted).

The extent of the public distrust of corporate America, today, in the wake of high profile scandals, cannot be overstated. See, e.g., Alex Berenson, *Oversight: The Biggest Casualty of Enron's Collapse*, N.Y. TIMES, Feb. 10, 2002, at D1; David Callahan, Editorial, *Private Sector, Public Doubts*, N.Y. TIMES, Jan. 15, 2002, at A21 (suggesting the Enron scandal may mark a turning point in America's trust in deregulated corporate enterprise); Janny Scott, *Once Bitten, Twice Shy: A World of Eroding Trust*, N.Y. TIMES, Apr. 21, 2002, at D5 (describing the public's waning trust in American business).

Note, further, that the distrust of corporate America coincides with a rising distrust of organized religion in light of the sexual abuse scandals "roiling the Roman Catholic Church." Scott, *supra*. This, of course, will be relevant in the subsequent Part. See *infra* Part V.

<sup>188</sup> It is, in part, due to these similarities that I also skip over private non-profits altogether, for they have attributes that are fully discernible from a study that spans public and private, for-profit actors.

reins over to private corporations.<sup>189</sup> Finally, civic harms can be recorded in the form of recipients feeling as if their concerns are not important enough for government to handle itself and in the form of recipients feeling that the loci of provision are unaccountable and undemocratic.

*B. Privatization's Distortions*

*1. Institutional Harms*

Besides having even less of an impact on national economic policy than sovereign states possess, corporations are constituted in ways that inevitably and inescapably engender actual harms. Corporations have a preexisting fiduciary commitment to shareholders that they are duty-bound to prioritize over any commitment to government service.<sup>190</sup> As Nina Bernstein of the *New York Times* notes: “[n]o company can be expected to protect the interests of the needy at the expense of its bottom line, least of all a publicly traded company with a fiduciary duty to maximize shareholder profits.”<sup>191</sup>

This core institutional characteristic far exceeds any discretionary motivation among public bureaucrats to cut costs. It is the *raison d'être* of the corporate enterprise. A private-sector caseworker and her directors employed by private firms thus operate under an entirely different system of responsibilities than would a public outfit. Most obviously, a civil servant is charged with fulfilling the mandate to serve the designated clientele. Her secure position and her organization's (i.e., the state's) ability, if so inclined, to bend and flex a budget to ensure adequate support for recipients<sup>192</sup> simply cannot be replicated easily in the private sector. Indeed, a private sector caseworker has a contrary obligation to the shareholders—and to the terms of the contract.<sup>193</sup> Professor Diller highlights this

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<sup>189</sup> Kennedy, *supra* note 1, at 232 (“After fighting so hard for greater authority over the welfare system, states seem strangely eager to pass the prize to private corporations.”); Ehrenreich, *supra* note 146.

<sup>190</sup> See Kennedy, *supra* note 1, at 302.

<sup>191</sup> Bernstein, *supra* note 182.

<sup>192</sup> See, e.g., Raymond Hernandez, *U.S. Welfare Limit May Put Thousands in Albany's Care*, N.Y. TIMES, Mar. 21, 2000, at A1 (describing New York's sense of obligation to support with its own funds those welfare recipients summarily dropped from TANF due to the stringent time limits).

<sup>193</sup> One is reminded of the economic argument regarding the winner's curse. The winning firm in a bidding proceeding inevitably outbids all other firms, thus suggesting that there is a good chance the firm mistakenly overvalued and miscalculated the contract's worth. See RICHARD H. THALER, *THE WINNER'S CURSE*:

caseworker distinction succinctly: Professional civil servants “are accorded trust because they are viewed as part of a social institution that operates according to a larger set of norms and principles.” For those working for private firms, in contrast, that larger set of norms and principles boils down to profits.<sup>194</sup>

Private firms are also institutionally ill-equipped to be transparent institutions of public policy. First, it is difficult to fathom the corporate form proving hospitable to public input either in the process of the corporation designing its bid or once that bid has been accepted. A notice-and-comment paradigm too would be institutionally anathema. Indeed, the design and development of a competitive bid, of course, would need to be afforded at least a modicum of secrecy.<sup>195</sup> And, in the absence of competitive bidding, there is no institutional corporate ethos regarding soliciting public opinion—outside, perhaps, the use of focus groups to maximize profits.<sup>196</sup> In truth, these institutional opacities spill over greatly into the civic-citizenship column; but I discuss them here because they are inescapably a function of the corporation.

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PARADOXES AND ANOMALIES OF ECONOMIC LIFE 50-51 (1992). But in the welfare context, a private firm (assuming competitive bidding) may win a contract only if it underestimates its costs of provision, and thus the winner will have to cut services below that which the contract may specify. See *infra* notes 198-206 and accompanying text.

<sup>194</sup> Diller, *Revolution*, *supra* note 1, at 1194-95. It is further asserted that [y]ou really need the individuals who are making decisions about who receives government benefits to be held accountable to the taxpayers, not to some private company whose main concern is its profit margin. A public employee is more likely to be concerned about moving a welfare participant into a long-term employment situation. . . . A worker for a private company is going to focus on how to get individuals off welfare in the shortest time . . . since that is what increases their company’s profits and keeps the worker employed.

Dunlea, *supra* note 176, at 7 (quoting a representative of the Texas State Employees Union); see also Bezdek, *supra* note 9, at 1606 (expressing concern that “private vendors may lack the norms of public service and of professionalism, which characterize many public bureaucracies”).

<sup>195</sup> See 5 U.S.C. § 552(b)(4) (2000) (excluding trade secrets and other proprietary information from public disclosure under the Freedom of Information Act).

<sup>196</sup> See, e.g., BRUCE ACKERMAN & JAMES FISHKIN, *DELIBERATION DAY* (forthcoming 2004) (describing the heavy reliance in contemporary America on focus group research and its adverse effect on the quality of democratic debate and policymaking)

## 2. *Managerial Harms*

### *a. Profits over Service*

Corporations have incentives to underprovide services. The incentive for state welfare agencies to divert recipients for the sake of padding the general coffers is not to be understated; yet it does not rise to the level we would customarily associate with rent-seeking private corporations. Corporations can and do actually design their contract proposals with this aim in mind. Again, I consider corporate provision as a more extreme version of a managerial distortion via devolution because most of the “diverted” money under state-administered PRWORA at least ends up being used either indirectly for the benefit of the state’s poor or, at the very least, to support the general good of the state, which represents a distinctly broader segment of the population than equity investors in a private corporation. With corporations, the incentive is to pocket the change.

Corporations can tender bids with payments based on (1) how many individuals are “serviced” by the vendor, (2) how many individuals are placed in jobs, or simply, (3) a flat fee. In different contexts, each of these three schemes may make most sense (either for the corporation or for the government agency). However, for a corporation, there is great incentive to churn or divert clients in the first instance (and offer few substantive services), and to dump them in the third. If one gets paid for “servicing” a client, the less effort (cost) that is expended in the process, the greater the marginal return. Moreover, if the only incentive is to place people in jobs, a skimming effect will occur whereby firms will devote much of their resources to those (already) likely to get jobs, while cutting its losses on those harder to place. This, of course, is no different than the incentives facing state agencies under conditions of federal work mandates, but once again a corporation’s institutional and motivational disposition represents a more acute example—once the possibility of profits are infused into the equation.<sup>197</sup> For those flat fee

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<sup>197</sup> In its contracts, the private welfare firm, America Works, gets between \$6 and \$9 for its placements. The dual fear with this system is that, first, America Works will only devote resources to those it can actually place; and second, with those it tries to place, it will view a good match as less important than an immediate match. Getting the job is all that counts in terms of collecting a bonus. Berkowitz, *supra* note 174. A Lockheed contract in which the government gives Lockheed a bonus for placing a welfare recipient in a job for six months reduces the incidence of the latter problem (haphazard placements), but possibly at the expense of exacerbating the former. If it is estimated that only a quarter of all recipients can probably hold jobs for six

contracts, it makes sense for the corporation to lie low and turn away as many as possible.<sup>198</sup> These corporations, after all, boast not how many people they have helped over the past year, but how much profit they have made.<sup>199</sup>

One might suggest I am prematurely marching out the parade of horrors; but a shocking number of contracts already have been subject to abuse of discretion by corporations that have managed to achieve these super-profitable ends—under the noses of government contracting agents. For example, in New York, Wisconsin, and California, judges and investigators have voided welfare contracts with private vendors for reasons ranging from a failure to comply with the terms of the contract, the violation of federal laws, or the finding of corrupt bidding processes.<sup>200</sup> Moreover, in Connecticut, Maximus failed miserably to comply with the terms of its welfare contract; yet, inexplicably, its contract was renewed.<sup>201</sup> Professor

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months, the remainder may be offered de minimis services. See Hartung & Washburn, *supra* note 176. Some advocates fear that if a company's profits are tied to reducing the number of people on welfare, the firms will work to manipulate the system to keep poor women from signing up in the first place and force recipients into jobs lasting long enough so that the firms can collect their money (for successful placement). See Judith Havemann, *Welfare Reform Incorporated*, WASH. POST, Mar. 7, 1997, at A1.

<sup>198</sup> This is the incentive structure for one of Wisconsin's early privatization efforts as part of its Wisconsin Works (W-2) program. Private welfare leader Maximus was given \$58 million to operate a welfare program in Milwaukee. It gets to keep whatever it does not spend. Thus, "Maximus makes money only if it saves some of the \$58 million it has been given by the state to run TANF for two and a half years[:] the Milwaukee County setup would arguably be a textbook case of a for-profit having every incentive in the world to find as few clients and provide as little service as it could get away with." Walters, *supra* note 178, at 36.

<sup>199</sup> See, e.g., Nina Bernstein, *Squabble Puts Welfare Deals Under Spotlight in New York*, N.Y. TIMES, Feb. 22, 2000, at B1 (describing Maximus as employing "more 'greeters' and others promoting the company than case managers, who were floundering under large caseloads that violated its contract" with Wisconsin). The for-profit provider websites are revealing. See, e.g., <http://www.maximus.com> (last visited Dec. 28, 2003); <http://www.lockheedmartin.com> (last visited Dec. 28, 2003). Their profits are impressive. See Lorraine Woellert, *Maximus Inc.*, BUS. WK., May 31, 1999, at 96 (describing that between 1996 and 1999, Maximus sales grew an average of 60.4% a year, its earnings grew at an average of 21.3% a year, and its stock prices soared sixty percent); see also Cohen, *supra* note 176.

<sup>200</sup> See, e.g., Nina Bernstein, *Federal Agency Finds Workfare Contractor Violated Wage Law*, N.Y. TIMES, Sept. 1, 2000, at B6; Christopher Drew, *Wisconsin To Audit Welfare Contractor*, N.Y. TIMES, May 11, 2000, at B14; David S. Hilzenrath, *NY Judge Shelves Welfare Contracts Won by Maximus*, WASH. POST, Apr. 22, 2000, at D13; Cindy Loose, *Disputes Snarl D.C. Welfare Plan; City Revokes Contract of Job Placement Firm*, WASH. POST, Aug. 11, 1999, at B1; Caitlin Rother, *Judge Orders Privatized Welfare Contracts Ended*, SAN DIEGO UNION-TRIB., Sept. 9, 2000, at B5.

<sup>201</sup> See Liz Halloran, *State Delays Contractor Payment*, HARTFORD COURANT, Oct. 9, 1997, at A3; Liz Halloran, *State Privatized Program Without Analyzing the Cost*, HARTFORD

Bezdek has chronicled some of these contracts without effective oversight in Baltimore, Maryland:

The [Baltimore] contracts provide a discouraging portrait of the city's commitments to its neediest citizens' employment needs, and raise large questions about the value added by the vendor contracts. The contracts [often] propose service for too few, aim for quite limited employment outcomes, and . . . engage in creaming. . . . Thus, most of Baltimore's expenditures for welfare-to-work services is made without the apparent expectation that referral to vendors will lead most welfare recipients to employment success and independence from welfare.<sup>202</sup>

Professor Bezdek further describes a series of private vendor contracts that secured the right to manage social services without specifying what they will provide.<sup>203</sup> One provider in particular promised to offer a selection of training programs, but did not disclose which ones.<sup>204</sup> Another successful bidder only vaguely "pledged to help recipients conduct meaningful career planning and job search . . . in a field that could provide employment."<sup>205</sup> Providers also can be quite selective in who they decide to cover and are especially motivated to be selective if their contracts are performance based. A "good" program may only accept those recipients who can attest to having no child-care needs, who have a high school diploma, and/or who can pass a physical endurance test. Essentially, providers may be able to service only those *least* needy.<sup>206</sup>

These favorable (or unfavorable, depending on one's vantage point) contracts are not incidents of an institutional harm, because there is nothing intrinsic about the corporate form that enables it to elude effective government monitoring. Rather, their incentives to elude oversight may, on occasion, simply exceed those of procurement officers to rein in contractors.

*b. Local Authenticity at Odds with Corporate Efficiency*

We must also remember, as we proceed, that there is a

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COURANT, Mar. 6, 1998, at A1.

<sup>202</sup> See Bezdek, *supra* note 9, at 1598. Professor Bezdek further notes that surveying all of Baltimore's welfare agreements, "[d]espite the modest promise of the RFPs [requests for proposals], the contracts themselves reveal no meaningful benchmarks, outcomes, or central mechanisms . . . [and] [t]here were no control provisions whatsoever in any of the contracts." *Id.* at 1603.

<sup>203</sup> See *id.* at 1600-01.

<sup>204</sup> See *id.* One might also, in fairness, blame municipal officials for accepting such vague promises.

<sup>205</sup> *Id.* at 1601.

<sup>206</sup> See *id.*

difference between decentralized design of programs and full-out devolution of authority. This distinction has been described in earlier parts and will be a focal point of discussion again in Part VI. But for now, it is important to understand that the narrative of local implementation and experimentation is a salient feature of PRWORA and welfare reform more generally. Ironically the unbounded discretion co-opted by the states via the narrative of devolution has actually created incentives to frustrate the localism that appeared so important to welfare reform. Corporate providers have great incentives not to be truly local agents of policy development and implementation. Many of the most successful bidders are national, if not multinational corporate providers—and thus hardly embody the localism that welfare reform sought to harness.<sup>207</sup> The reason these national or global firms are comparatively successful is that their competitive edge is directly connected to (1) an efficiency that only arises from the economies of scale associated with producing (and replicating) generic welfare programs across the country and to (2) a proven track record that, too, only experienced providers can boast. Thus, instead of promoting locally tailored solutions that fit within the federal framework, corporations may end up creating McWelfare.<sup>208</sup> For instance, some of the biggest providers include Lockheed Martin, Andersen Consulting (Accenture), and Maximus, Inc., a giant social service corporation also known for building and managing prisons.<sup>209</sup> These major, multinational corporations may have little particular, let alone intimate, knowledge of a given community's needs (and every incentive to keep it that way).

*c. Walling Off the Laboratories of Democracy*

Another hallmark tradition of decentralization is that, over time, one can safely anticipate that good ideas that develop out of individual laboratories of democracy will rise to prominence and, then, be shared with other locales. But unlike states, corporations have incentives to hoard information. Whatever I may argue about

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<sup>207</sup> See, e.g., Diller, *supra* note 9; Gilman, *supra* note 40, at 599 (describing the most successful bidders for government contracts as some of the biggest in the industry and suggesting that this outcome is “inconsistent with privatization’s goal of returning control over welfare policies to communities”). I am indebted to Josh Civin for our discussions on this point.

<sup>208</sup> Cf. Elizabeth Kolbert, *Unchartered Territory*, NEW YORKER, Oct. 9, 2000, at 34 (describing pre-packaged, for-profit education centers in terms evocative of a McDonald’s franchising manual).

<sup>209</sup> Maximus’s Internet website details its many projects. See <http://www.maximus.com/corporate/pages/index> (last visited Dec. 28, 2003).

the paradox of devolution, I have not argued that decentralization is not important in achieving a flexible innovative approach to welfare reform. Corporations will not share their innovations with other institutions—public or private—because that reduces their competitive advantage; at the same time, however, the hoarding of good ideas elongates the learning curve and undermines the constructive dynamics undergirding a decentralized vision of welfare reform.

*d. Flexibility at Odds with Corporate Efficiency*

Corporate providers, moreover, have great incentives to insist on long-term contracts, creating a tradeoff for government procurement agencies between more flexible, short-term contracts and less flexible, long-term contracts.<sup>210</sup> All things being equal, government might prefer the former. But, short-term contracts create uncertainties for bidders, and thus firms vying for those contracts will ask for more money (to compensate them for the uncertainty factor). By contrast, corporations take comfort in the stability and security of a long-term contract and can thus bid a lower price for the vending rights. Thus, surprisingly, privatization may produce a procurement dilemma between flexibility and efficiency, the core values motivating desires to outsource in the first place.<sup>211</sup> In many geographic regions and in some social service fields that have never before been open to market competition for government services, private corporations have minimal existing infrastructure or, possibly, institutional knowledge. In these areas, the fixed, start-up costs of establishing a welfare system may be quite high.<sup>212</sup> Corporations encouraged to bid

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<sup>210</sup> Cf. David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473 (1999) (raising concerns in general about the binding qualities of government contracts that frustrate opportunities for democratic input and policy modifications); Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129 (1996) (describing the economic efficiencies associated with long-term contracts). The Dana/Koniak and Logue articles represent part of a richer debate on the tradeoffs between more responsive, democratic control-retaining contracts and the economic cost efficiencies associated with locking-in contracts that provide long-term stability for the government and contractor alike.

<sup>211</sup> The intuitive, conventional wisdom, of course, suggests privatization enhances organizational flexibility. See JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 45 (1990) (describing the market efficiencies that privatization can introduce). My intent is not to refute this position, but rather, it is to acknowledge some problems with that model.

<sup>212</sup> Though any more elaborate discussion is beyond the scope of this Article, we should recognize that the conventional wisdom that private is always more efficient may not hold up in all circumstances.

might seek (or insist on) long-term contracts to ensure their initial investment and outlay pays off. Corporations may not, for instance, want to build a facility, design programs, research local economic patterns, and hire and train employees, for a one-year trial run.<sup>213</sup> If privatization were to promise efficiency gains in the long-run (and thus a corporation would only agree to enter as a provider if it were guaranteed a long-term deal), there are serious accountability and monitoring concerns that would arise. Once a state or county commits itself to a long-term contract, it is essentially limited in its ability to hold those providers accountable.<sup>214</sup> These corporate providers may be less likely or able to shift policy abruptly than might a government agency (less concerned about making profits). Thus, though the private sector is heralded as being dynamic, there are distinct possibilities that long-term contracts may encourage performance behavior that is quite the opposite of dynamic; accordingly, inflexibility poses direct harms to service provision in the form of more staid, less innovative administration and services.

### 3. *Civic Harms*

The nature of private contracting does not necessarily sit well with our conceptions of public governance. In many cases and contexts, however, we have come to accept the benefits of privatized outsourcing. But, while corporations may be designated as acceptable welfare provision providers, there is something truly disruptive about this move, which neither our desire to enhance efficiency or to reduce the size of government fully captures. Indeed, while many other social service provisions have gone the way of corporate outsourcing,<sup>215</sup> there is something particularly troubling about taking welfare in that direction. We have fewer problems with a Laidlaw Bus Company taking our children to public schools or a

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<sup>213</sup> See DONAHUE, *supra* note 41.

<sup>214</sup> In fairness, some private social service providers have been fired, but this usually happens only in cases of abject failure or malfeasance. See *supra* note 200. Maryland canceled a Lockheed Martin contract for failure to meet child support collection objectives, and California cancelled a contract with Lockheed Martin when the company's cost expenditures suddenly tripled. See, e.g., Gilman, *supra* note 40, at 572-73; Greg Garland, *Collections of Child Aid Questioned*, BALT. SUN, Jan. 10, 1999, at 1B; Greg Garland, *Lockheed Called Failure on Child Support Goals*, BALT. SUN, Mar. 4, 1999, at 1B.

<sup>215</sup> See DONAHUE, *supra* note 41; Janna J. Hansen, Note, *Limits of Competition: Accountability in Government Contracting*, 112 YALE L.J. 2465 (2003); Steven Lee Myers, *Giuliani Moves on "Privatization" Pledge*, N.Y. TIMES, Dec. 26, 1993, at A33; Rachel L. Swarns, *Giuliani Will Put Foster Care to Bid*, N.Y. TIMES, June 3, 1998, at A1; see also *supra* note 43.

Waste Management removing our garbage. But we measure—or should measure—(and value) welfare reform in ways much more complicated than how we determine whether a bus driver is competent or trash is removed punctually.

From the outset, we must resist a natural trend. Once we place welfare provision in the hands of private corporations, entrusted to act as vendors precisely because we want to maximize efficiency, we inevitably bind ourselves to evaluating welfare reform on efficiency's terms: the lingua franca of the corporate paradigm. In the process of assessing the costs and benefits of the privatization decision, we may deprive ourselves of a richer analytical framework within which to measure our commitment to the poor and our humane, respectful, and dignified treatment of them.

These concerns of non-economic harm center precisely on a private corporation's lack of public accountability and responsiveness. It is a source of concern that the lines of accountability between the government and the private welfare provider may be seriously attenuated. Once we establish that welfare reform should be guided, *in part*, by local influences, we are after all privileging the know-how of communities.

While I do not want to overstate or conflate the discrete concepts of localism and democracy, it must be conceded that often the forces pushing for localism tend to base their arguments on a desire for more democracy.<sup>216</sup> If a national corporation is running a local welfare program, concerns should be raised regarding how *local* (and *locally* tailored) the policy really is and how accountable its administrators are to that local polity.<sup>217</sup>

Indeed, Professor Diller argues that this new privatization regime has the potential to render existing mechanisms for establishing public accountability largely ineffective or irrelevant. [Privatization engenders a] system that, when fully operative, largely may be closed to outside input and oversight and in which key decisions may be made through obscure processes of which the public is largely unaware.<sup>218</sup>

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<sup>216</sup> See Dorf & Sabel, *supra* note 95; McConnell, *supra* note 35; Andrzej Rapacznski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341; see also Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213-15 (1998) (describing the "federalist revival" endorsing greater political autonomy at the state level).

<sup>217</sup> Indeed, corporate providers need not abide by APA guidelines or offer a notice and comment proceeding. See Bezdek, *supra* note 9, at 1569; Cimini, *supra* note 10, at 263; Gilman, *supra* note 186, at 818-19.

<sup>218</sup> Diller, *Revolution*, *supra* note 1, at 1187.

Instead, if the administration of policy resides in corporate headquarters, which may sit thousands of miles away from the locus of actual implementation, we are faced with a direct affront to the logic of experimental tinkering; this kind of privatized service closes the door to constructive dialogue among community members, welfare recipients, and policymakers. The Vice President of Social Services for Maximus is less likely than a state legislator or city alderman to run into welfare recipients—or ordinary taxpayers, for that matter—in the local supermarket and get an earful.<sup>219</sup>

The theory of privatized welfare is a theory of efficiency. But more troubling, it is also a theory of abandonment. Essentially, in devolving to the states, and the states turning around and themselves outsourcing, government has demonstrated an inability and an unwillingness to deal with the problems of welfare policy; and, by extension, it has signaled a faltering commitment to the social contract known as federal welfare reform.<sup>220</sup> With private corporations as the ersatz guarantor, the poor just become one strand of a web of interrelated sources of profits.

Privatization, moreover, alters the symbolic and “contractual” terms of welfare among those in the beneficiary population. Essentially, corporate control may blur the avenues of legislative and judicial access. Without the central presence of, say, a city agency, without a defined set of transparent political actors and administrative proceedings, welfare recipients may be at (more of) a loss.<sup>221</sup> Given the end of entitlements, and the federal protection that

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<sup>219</sup> Large-scale government contractors simply contradict the stylized belief that privatization is a “democratizing force that returns power from the government to local communities and their mediating institutions.” Gilman, *supra* note 40, at 596 (describing what many conservative supporters of privatization consider to be a considerable asset of the movement away from government provision).

<sup>220</sup> *But see* Cimini, *supra* note 10, at 259-60. Professor Cimini points to a number of states that have individual responsibility plans that are “entered into” by caseworkers and clients. Thirty-five states require responsibility contracts, “which prescribe conduct in both employment and other matters such as child school attendance, child immunization, child support enforcement cooperation, parent training, and agreements to achieve self-sufficiency.” *Id.* at 259. Cimini contends a new contractarian infrastructure—a shift to mutual obligations—has replaced the *Goldberg* entitlements, but the evidence she offers indicates that although contractual relations exist, they are highly privatized. No longer is a state committed to a community of poor families, but a caseworker may be committed to a particular individual. This commitment, I should hasten to add, may have little, if any, legal import. *See* Kennedy, *supra* note 1.

<sup>221</sup> *See* JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985) (describing the dignitary values associated with individuals having the opportunity to voice their legal grievances and believing those grievances are taken seriously). Professor Cimini, however, argues that welfare reform creates a new paradigm of

had accompanied those entitlements, there should be, it would seem, a premium on ensuring channels of communication remain open and clear when procedural problems arise.<sup>222</sup> Barbara Ehrenreich captures this sense of exacerbated helplessness when individuals are left alone to comprehend and navigate the web of welfare service provisions and providers. In characterizing her own, personal confusion with the new privatized system, she anticipates the difficulty that lies ahead for welfare recipients: “[If] diffused responsibilities are frustrating to journalists, imagine their effect on a welfare recipient . . . when she goes to her Lockheed-operated ATM, presents a fingertip for identification, and finds herself rejected. Whom is she going to call?”<sup>223</sup> And, even if she happened to know whom to call, it is not entirely clear what obligations private providers have to the client population in the form of due process.<sup>224</sup>

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private rights that are readily enforceable. As suggested, she describes the welfare reform movement as ushering in a new era of social contractarian rhetoric and responsibility. See Cimini, *supra* note 10, at 257-58 (describing politicians at both the national and state levels as having clearly used contractual rhetoric when discussing welfare reform). More concretely, she contends that states and other providers have created thousands of agreements with individual welfare recipients that “are legally cognizable contracts between government and each recipient. As such, these contracts constitute ‘property’ requiring the application of procedural due process protections pursuant to the Fourteenth Amendment.” *Id.* at 253.

<sup>222</sup> See, e.g., Hartung & Washburn, *supra* note 176 (“Contracting out garbage collection, computer upgrades and other routine public functions is one thing. But what Lockheed is proposing would allow private companies to run entire government programs; in the case of welfare and Medicaid, moreover, these are essential government services, affecting the most disfranchised members of the population, who are least able to defend their rights.”).

<sup>223</sup> See Ehrenreich, *supra* note 146. But see Kennedy, *supra* note 1, at 283-84. Professor Kennedy argues that there may be greater due process protection afforded under privatization, because the state interest in efficient governance, as articulated as one of the prongs in the *Mathews v. Eldridge* test, 424 U.S. 319 (1976), has declined considerably. Compelling state interests in government keeping costs and burdens low have decreased in an “era of privatization.” “Where most states have chosen to privatize their welfare systems, the countervailing interest must be measured in terms of the burden on a private corporation. In most cases, the cost of due process will come out of the private company’s profit margin.” Kennedy, *supra* note 1, at 284; see also Cimini, *supra* note 10, at 282-83 (describing common-law rights to due process even in private contractual proceedings).

<sup>224</sup> The Supreme Court recently rejected the extension of *Bivens* protections to beneficiaries of privatized government programs. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001). As for 42 U.S.C. § 1983 suits, the test to measure whether a private actor is acting under color of state law is one of assessing how traditionally “public” that function is. See Gilman, *supra* note 186, at 816. The paradigm example is private prisons, where employees have been held to be operating under the color of state law and thus subject to § 1983 suits. See *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 941-42 (1982); see also Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1192 (1995); Gilman, *supra* note 40, at 573 (“[I]t is questionable whether a private entity such as Lockheed Martin will be

C. *Summary*

Ultimately, I contend that the architecture of privatization in toto may be less conducive to flexibility, political accountability, and responsiveness—and hence, may run contrary to the purposes of experimentation, localism, and innovation that are at the heart of the decentralization goals. Efficiency may run up against democratic accountability and responsiveness in this respect.

Accordingly, privatization narrows not only the size and scope of the public sphere, but also the range of our public consciousness. Our national commitment to the poor did not hinge historically on cost-cutting decisions of a *private* bidder. No longer can we talk broadly about normative ideals and non-measurable aspirations. The language of private, for-profit provision is the language of efficiency, which does not necessarily understand the vocabulary of justice and fairness.

V. ONE STEP FURTHER II:  
CHARITABLE CHOICE AND FAITH-BASED INITIATIVES

Along with the market-centered privatization agenda, another strong current in American politics and policy is the faith-based movement, ardently championed by President Bush and his newly fashioned White House Office of Faith-Based Initiatives.<sup>225</sup> Faith-based social welfare initiatives, however, antedate the Bush administration and the 2000 campaign more generally (where candidate Al Gore also strongly endorsed faith-based initiatives)<sup>226</sup>

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deemed a state actor to whom constitutional guarantees apply.”) (footnote omitted); *id.* at 611. Incarceration, of course, is held to be a much more “public” function than welfare; in fact, with the passage of PRWORA in 1996, the federal government has argued it has dispensed with welfare entitlements, ostensibly indicating that welfare may not be as core a state function as are prisons. Thus, while private welfare services would probably be covered under § 1983, the attenuated connection is worth noting. See *Blum v. Yaretsky*, 457 U.S. 991, 1006-09 (1982) (suggesting that though Medicaid paid most of the nursing home expenses, private nursing home providers are not state actors); see also David J. DelFiandra, *The Growth of Prison Privatization and the Threat Posed by 42 U.S.C. § 1983*, 38 DUQ. L. REV. 591 (2000); *supra* note 43.

<sup>225</sup> *Bush on the Creation of a White House Office Tied to Religion*, N.Y. TIMES, Jan. 30, 2001, at A18 (reprinting the president’s remarks).

<sup>226</sup> See, e.g., Solomon & Vlissides, *supra* note 13, at 265 (describing Bush’s campaign pledge); Sara Mosle, *The Vanity of Volunteerism*, N.Y. TIMES, July 2, 2000, at F22 (describing the support of both Gore and Bush for faith-based social services); Jeffrey Rosen, *Is Nothing Sacred?*, N.Y. TIMES, Jan. 30, 2000, at F40 (“Bush and Gore have enthusiastically endorsed a provision of the 1996 welfare-reform bill called charitable choice, which allows faith-based organizations to administer welfare programs with public funds.”); Kevin Sack, *Gore Backs Federal Money for Church Social Service Programs*, N.Y. TIMES, May 25, 1999, at A23.

and were explicitly included as part of the 1996 welfare reform legislation.<sup>227</sup> “Charitable Choice,” as it is called, permits religious, sectarian organizations to bid for welfare service contracts at no disadvantage relative to private, secular contractors.<sup>228</sup> To suggest that the genesis of church-state social service partnerships can only be traced back to the summer of 1996, however, is quite misleading. Since the early years of the Republic, faith-based organizations have played an active and central role in social services, both in private, charitable capacities and working within the framework of government grants.<sup>229</sup> But when entering partnerships with the government, these religious organizations, at least since the advent of the modern Establishment Clause doctrine,<sup>230</sup> were required to separate—and totally wall-off—their sectarian philosophy from their government-funded, social service activities.<sup>231</sup>

Today, however, these religious organizations need not abandon

<sup>227</sup> 42 U.S.C. § 604 (2000).

<sup>228</sup> See *id.* For discussions of the legality of faith-based social services, see Minow, *supra* note 1; Elbert Lin, Jon D. Michaels, Rajesh Nayak, Katherine Tang Newberger, Nikhil Shanbhag, & Jake Sullivan, Note, *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 YALE L. & POL’Y REV. 183, 188 (2002). See also Ehrenreich, *supra* note 146.

<sup>229</sup> See STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 1-28 (1996).

<sup>230</sup> In truth, I am talking mostly about the post-World War II period. See *infra* note 231.

<sup>231</sup> See MONSMA, *supra* note 229, at 1-28; Gilman, *supra* note 186, at 811; see also Solomon & Vlissides, *supra* note 13, at 266-68 (describing America’s increasing willingness to lower the wall between church and state); Jonathan Friedman, Student Research, *Charitable Choice and the Establishment Clause*, 5 GEO. J. ON FIGHTING POVERTY 103, 104 (1997); Lin et al., *supra* note 228, at 188.

A series of recent Supreme Court cases has increasingly permitted this lowering of the wall between church and state. In *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947), the Court offered what became gospel in Establishment Clause jurisprudence for decades to come. It held that the “First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.” *Id.* at 18; see also *Engel v. Vitale*, 370 U.S. 421 (1962). The Court reaffirmed that sentiment in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), when it struck down a state law providing salary supplements to teachers in sectarian schools. The Court barred the public financing of programs that advance or involve religion. *Id.* at 612-13; see also *Aguliar v. Felton*, 473 U.S. 402 (1985) (affirming this line of cases). Yet a new set of cases, beginning in 1988, has effectively permitted the breaching of the *Everson* wall. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988) (permitting government to award grants to sectarian organizations if the requirements set out for awarding the grant are neutral with respect to religion); see also *Mitchell v. Helms*, 530 U.S. 793 (2000); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Most recently, the Court upheld school vouchers that awarded a disproportionate number of state dollars to students intending to use the funds at parochial schools. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

their core spiritual messages as a condition of eligibility to bid for and administer social services.<sup>232</sup> Under Charitable Choice, faith-based providers can retain control over how they define and express their religious beliefs. They do not have to alter their internal form of governance as a condition of bidding for or receiving a government contract. This means these organizations cannot be required to change or tone down their message of faith or open up their personnel hiring practices to fit some secular, neutral conception of government-like propriety.<sup>233</sup>

#### A. Introduction

In tangible ways, Charitable Choice—as compared simply to market privatization of the kind discussed in Part IV—represents a truer departure from government provision. Though they ostensibly operate just like private corporations bidding for contracts to supply state and local welfare services, Charitable Choice organizations do not simply offer, as an advantage, market-based efficiencies; rather, they promise an altogether different model or methodology to promote personal success and improvement.<sup>234</sup> Faith is trumpeted as the missing element in the welfare reform puzzle.<sup>235</sup> Underlying the impetus for Charitable Choice is the belief that a spiritual awakening can give individuals the moral impetus to succeed in ways that job training and employment preparation alone simply cannot.<sup>236</sup>

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<sup>232</sup> See 42 U.S.C. §§ 604a(d)(1), 604a(d)(2)(A), 604a(d)(2)(B) (2000); David Saperstein, *Public Accountability and Faith-based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353 (2003).

<sup>233</sup> 42 U.S.C. § 604a(f) (2000); see Peter Edelman, *Poverty & Welfare: Does Compassionate Conservatism Have a Heart?*, 64 ALB. L. REV. 1073, 1080 (2001); Center for Public Justice, *A Guide to Charitable Choice*, available at <http://www.cpjustice.org/charitablechoice/guide/analysis> (last visited Dec. 28, 2003) [hereinafter *A Guide To Charitable Choice*]; see also CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE* 107-08 (2000). Importantly, though, faith-based providers cannot discriminate against clients based on their religious allegiances or lack of such allegiances. *A Guide To Charitable Choice*, *supra*.

<sup>234</sup> Michael J. Joyce, *Gotta Have Faith?*, MILWAUKEE J. SENTINEL, June 17, 2001, at 1J. For discussions of non-economic motivations behind decisions to privatize, see Michaels, *supra* note 45.

<sup>235</sup> Some have directly blamed the government's insistence on secular neutrality for the lack of progress in the War on Poverty. See, e.g., OLASKY, *supra* note 99, at 138 (suggesting that welfare programs in the past "declared a war on poverty that was actually a war on God, since the Bible was excluded . . . from governmental antipoverty work"); Solomon & Vlissides, *supra* note 13, at 267.

<sup>236</sup> See DiIulio, *supra* note 41; see also Minow, *supra* note 1, at 505 (describing the Charitable Choice lobby as offering the spiritual renewal that can be more important than meeting material need); Rick Santorum, *A Compassionate Conservative Agenda: Addressing Poverty for the Next Millennium*, 26 J. LEGIS. 93 (2000) (outlining the

Charitable Choice's conceptual framework, which has morphed into the larger ideological and political framework popularly known today as "Compassionate Conservatism," was formulated in part by Marvin Olasky, who has for years written that religious groups outperform the government precisely because the former serve the spiritual and moral needs of individuals.<sup>237</sup> President Bush, of course, warmly embraced Olasky's platform in his 2000 campaign.<sup>238</sup>

In its best light, religion can break through the procedural sterility of the post-*King v. Smith*, post-*Goldberg* world of entitlements and offer warmth and neighborly authenticity to assist those in need.<sup>239</sup> Since Tocqueville's famous visit, religious institutions in America have been seen as essential mediating social institutions connecting individuals and communities, often in apolitical—but culturally and morally thick—ways.<sup>240</sup> Thus, without having these mediating social institutions "integrated into the political to make policy more meaningful, the political order becomes detached from

senator's support for religiously oriented welfare services).

<sup>237</sup> See, e.g., OLASKY, *supra* note 99; MARVIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION* 204-33 (1992).

<sup>238</sup> See, e.g., Alison Mitchell, *Bush Draws Campaign Theme from More Than "the Heart,"* N.Y. TIMES, June 11, 2000, at A1; Frank Rich, Editorial, *Everybody into the Mudfight!*, N.Y. TIMES, Feb. 26, 2000, at A15; William Safire, Editorial, *Political "God's World,"* N.Y. TIMES, Feb. 17, 2000, at A29 (describing Olasky as "the revered intellectual guru of Governor [George W.] Bush").

<sup>239</sup> See Martin Davis, *Faith, Hope, and Charity*, 33 NAT'L J. 1228 (2001) (characterizing the spiritual passion among faith-based workers as an advantage Charitable Choice may have over secular alternatives); *Faith-Based Social Work: With Help from a Hidden Hand*, ECONOMIST (U.S. Ed.), Feb. 12, 2000, at 28 (describing some early studies pointing to the higher success rate among faith-based social service providers than their secular counterparts); Joyce, *supra* note 234 ("[The recipient] gets help—not from top-down government, but from a neighbor who knows his name. . . . Such an approach will restore the human link between the recipient and the giver, meeting the needs of the soul, as well as the immediate social concern."); cf. Simon, *supra* note 87 (recognizing the modern, pre-PRWORA era of welfare administration eschewed the social worker model of case management).

<sup>240</sup> See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 292 (J.P. Mayer ed. & George Lawrence trans., Harper & Row 1988) (1835) ("Religion, which never intervenes directly in the government of American society, should . . . be considered as the first of their political institutions . . ."). Indeed, Solomon & Vlissides report that the rise in support for faith-based social services is not wholly related to the evangelization of America and American politics. They argue that the

[p]ublic interest in [faith-based organizations] is not a product of heightened religiosity, rather, it is derivative of the public discrediting of government social service provision. . . . [T]he public is willing to accept some level of religious involvement in heretofore-secular government programs because there is a general belief that they work.

Solomon & Vlissides, *supra* note 13, at 267-68; see also Eyal Press, *Lead Us Not unto Temptation*, AM. PROSPECT, Apr. 9, 2001, at 20 (describing the critical importance of churches and ministers in inner-city communities).

the values and realities of . . . life. Deprived of its moral foundation, the political order is delegitimized.”<sup>241</sup> Concomitantly, however, with that level of intimacy comes the possibility (or opportunity) to judge and degrade.<sup>242</sup> Faith-based providers can decry a practice or behavior as immoral. As another architect of Compassionate Conservatism recently asserted:

government should stop doing all the things it currently does to normalize illegitimacy. It should stop setting up nurseries in high schools, which give the message that having babies is perfectly normal for unmarried teens. It should give married couples preference in allocating scarce public housing units, and it shouldn't penalize them by taxing them more heavily than if they remained cohabitating singles.<sup>243</sup>

Charitable Choice is more than government-funded *supplemental* service provisions with a religious or sectarian characteristic. Its goals are more expansive as it seeks, explicitly, to provide services *in lieu* of the government.<sup>244</sup> Charitable Choice in America already includes alcohol treatment centers, prison rehabilitation services, job training, GED classes, money management classes, domestic abuse clinics, child-care provisions, and family support;<sup>245</sup> supporters of Compassionate Conservatism argue that their programs outperform secular counterparts.<sup>246</sup> Though the successes of these programs are celebrated,<sup>247</sup> doubts regarding the accuracy of any empirical

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<sup>241</sup> GLENN, *supra* note 233, at 3.

<sup>242</sup> *See id.* at 17-19 (raising concerns with service providers' ambitions to impose perfectionist models of improvement on susceptible client populations).

<sup>243</sup> Myron Magnet, Editorial, "Compassionate Conservatism" Will Guide Domestic Policy, SAN DIEGO UNION-TRIB., Jan. 21, 2001, at G1.

<sup>244</sup> The legislation does require governments to offer secular alternatives to religious welfare provisions. Yet cities, counties, and municipalities are only required to provide them upon request. *See* 42 U.S.C. § 604a(e)(1) (2000); *see also* Gilman, *supra* note 186, at 808; Julie A. Segal, *Welfare for Churches: Buyers and Beneficiaries Beware*, 5 GEO. J. ON FIGHTING POVERTY 71, 71-73 (1997); Kenneth Roe, Editorial, *Faith-Based Groups Need Safeguards*, DALLAS MORNING NEWS, Feb. 10, 2001, at 29A.

<sup>245</sup> A 2002 survey found Charitable Choice providing more than forty services in over fifteen states. Amy L. Sherman, *Collaborations Catalogue: A Report on Charitable Choice Implementation in 15 States* (2002); *see also* Davis, *supra* note 239; Press, *supra* note 240.

<sup>246</sup> *See* Davis, *supra* note 239; Ronald J. Sider, Editorial, *Can Faith Help Solve Our Tough Social Problems?*, BOSTON GLOBE, Jan. 30, 2001, at A11; Governor's Advisory Task Force on Faith-Based Community Service Groups, *Faith in Action . . . A New Vision for Church-State Cooperation in Texas* 16 (Dec. 1996), available at <http://www.twc.state.tx.us/svcs/charchoice/faithful.pdf> (last visited Dec. 28, 2003) [hereinafter Governor's Advisory Task Force].

<sup>247</sup> Commentator Stephen Monsma has noted: "My wide examination of the relevant literature has yet to reveal a single study that has shown secular programs outperforming similar or parallel faith-based programs." *See* Stephen V. Monsma, *Are*

evaluations linger since it is almost universally conceded that those who have availed themselves of sectarian services tend to be a self-selecting group more likely to be willing to be helped and reformed.<sup>248</sup> But, as mentioned throughout this discussion, my argument is not conditioned on the relative successes of devolved or privatized welfare. My inquiry is confined to an exploration of how the institutional and motivational characteristics of the service providers affect the promulgation of the substantive and rhetorical objectives of federal welfare reform.

It may be worthwhile to offer some brief thoughts on the advent of faith-based initiatives, which admittedly are still in their nascency.<sup>249</sup> Disclaiming any attempt at comprehensiveness, I offer merely some description and analysis of faith-based social service provision. For starters, it may be helpful to focus on Texas, which has embraced Charitable Choice more extensively and enthusiastically than have most other states.<sup>250</sup> As Governor of Texas, President Bush commissioned a major study focusing on the impact of Charitable Choice in Texas. The Governor's Advisory Task Force recommended embracing Charitable Choice opportunities because they, uniquely,

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*Faith-Based Programs More Effective?*, PUB. JUST. REP., 2d Quarter 2001, available at [http://www.cjjustice.org/stories/storyReader\\$545](http://www.cjjustice.org/stories/storyReader$545) (last visited Dec. 28, 2003).

<sup>248</sup> The methodological evaluations are very difficult to test. The problem of self-selection complicates the process by which one goes about measuring the success of faith-based providers versus government programs. "People who turn to faith-based charities are likely to be particularly receptive to the message they deliver." Jacob S. Hacker, *Should Churches Take Over Social Policy?*, NEW REPUBLIC, June 28, 1999, at 16; see Press, *supra* note 240.

<sup>249</sup> See Laurie Goodstein, *Religious Groups Slow to Accept Government Money to Help the Poor*, N.Y. TIMES, Oct. 17, 2000, at A22; Laurie Goodstein, *States Steer Religious Charities Toward Aid*, N.Y. TIMES, July 21, 2001, at A1 (suggesting states had just begun, in the summer of 2001, to develop offices to cultivate religious-based social service partners) [hereinafter Goodstein, *States*]; Abraham McLaughlin, *Few Recruits for the "Armies of Compassion,"* CHRISTIAN SCI. MONITOR, June 27, 2001, at 2 (suggesting the "vast battalions of faith-inspired workers Mr. Bush envisions may turn out to be more like a few scattered squadrons").

<sup>250</sup> While Texas may be an outlier in its extremely warm embrace of Charitable Choice, it remains the most significant state to study in the wake of welfare reform given both its advanced faith-based programs and that its then-governor is now president of the United States and quite desirous of extending faith-based initiatives. See, e.g., Goodstein, *States*, *supra* note 249 ("[Until the 2000 presidential election,] most states had virtually ignored the charitable-choice laws. . . . Mr. Bush, one of few governors who actively directed state agencies to finance religious programs, made expanding charitable choice a priority."); Hanna Rosin, *George W. Bush: The Record in Texas; Putting Faith in a Social Service Role; Church-based Providers Freed from Many Rules*, WASH. POST, May 5, 2000, at A1; see also Carolyn Barta, *Texas Tops List for Faith-Based Aid Efforts*, DALLAS MORNING NEWS, Feb. 8, 2001, at 1A (noting that the Center for Public Justice gave Texas the highest grade among states for its Charitable Choice initiatives).

can instill values, alter behavior, and “assert the essential connection between responsibility and human dignity by requiring changed behavior in return for help.”<sup>251</sup>

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Faith-based providers, quite frankly, could at times be superior agents of welfare reform. It is often argued that churches and communities of faith can better meet the policy goals and objectives of welfare reform than the government itself could. This *thickening* of the connection between the stated goals of welfare and their on-the-ground implementation should not be overlooked.

The argument in favor of Charitable Choice is three-fold. First, those who work for religious organizations may be ultra-motivated in their work by a “higher calling.” Their commitment as caseworkers, contra those doing the work in the private sector, may more likely seem to them an act of faith; these religiously affiliated caseworkers often serve without the political and fiscal guile found among those operating in the ranks of government and corporate employment. Thus, the religious component may lead caseworkers to go that extra mile for those in need.<sup>252</sup>

Second, the packaging of Charitable Choice provisions is more spiritual and thus may offer those attempting to make the transition the requisite boost of faith or inspiration needed to persevere in the job search and/or reform pathological behavior—especially if the job market is less than accommodating. The added spirituality may provide the proper complement to material benefits and training programs necessary to transform lives. Transforming lives, after all, is the goal of welfare reform.<sup>253</sup> Indeed, it has been argued that “no bureaucracy, and no amount of money, can buy the reformation of

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<sup>251</sup> Governor’s Advisory Task Force, *supra* note 246, at vii; *see also id.* at i. Notably, the Report decidedly recommends moving beyond “devolution,” and instead encouraging Texans to embrace “genuine reform.” *Id.* at viii.

<sup>252</sup> *See, e.g.,* GLENN, *supra* note 233, at 186-89 (describing instances in which the greater passion and commitment among church-based providers is apparent); Joseph P. Shapiro & Andrea R. Wright, *Can Churches Save America?*, U.S. NEWS & WORLD REP., Sept. 9, 1996, at 46 (describing Mississippi church groups as “adopting” needy families by not just assisting them financially, but offering them friendship and community); *see also* Davis, *supra* note 239 (emphasizing the importance of a religiously committed and driven community of welfare administrators and social service providers).

<sup>253</sup> Professor James Q. Wilson has held up Alcoholics Anonymous as the “single most important organized example of personal transformation we have.” James Q. Wilson, *Religion and Public Life*, BROOKINGS REV., Spring 1999, at 36. Building on that model, Wilson understands the potential for faith to spark the personal transformation necessary for success. He thus advocates Charitable Choice to combat an array of social ills. *See id.*

morals that is desperately needed by many of those served by social service agencies. Religiously motivated organizations can press the demand for such reformation in ways that government agencies . . . cannot.”<sup>254</sup>

The Governor’s Advisory Task Force in Texas echoed this point: “Religious ministries aim for inner conversion and inject spiritual and moral resources *that are beyond government’s know-how.*”<sup>255</sup> The Task Force questioned the secular sector’s ability to achieve the stated goals of welfare reform. “[C]ivil society needs guardrails, some moral consensus that dissuades deviant behavior. Religion, unlike government transfer payments, provides it. Transforming people from the inside out . . . [r]eligion fills man’s moral vacuum.”<sup>256</sup>

Third, the church as an institution may resonate more with at-risk communities than would the city social service department that is perceived to have failed them for years. The church may be able to provide a more comfortable, less adversarial setting for caseworker-client contact, thus satisfying a key aim of the federal legislation.<sup>257</sup> Professor John DiIulio, the first director of President Bush’s Office of Faith-Based Initiatives,<sup>258</sup> has emphasized these pragmatic benefits of using church providers. Spirituality notwithstanding, DiIulio sees church organizations as the most important social structure in many

<sup>254</sup> GLENN, *supra* note 233, at 34 (footnote and internal quotation marks omitted) (quoting OLASKY, *supra* note 237, at 24). It should not be too surprising that faith-based institutions, bolstered by a religious American polity, speak about a cultural impediment to personal success and independence in ways more salient than those who previously guised similar calls for reformation in class and even racial terms. The most notable sociological description of a community in need of reformation—that spoke outside the boundaries of an economic empowerment vocabulary—was Daniel Patrick Moynihan’s. See Moynihan, *The Negro Family*, *supra* note 26, at 39, 43, 51-60. For a more direct “critique” of the underclass’s “culture of poverty,” see Lewis, *supra* note 26, at 188. Moynihan was criticized and some even labeled him a racist for suggesting that there is something morally deficient about a particular segment of America’s underclass. Though today’s calls for moral transformation are ostensibly race-neutral, they nevertheless smack of a similar paternalistic repudiation of contemporary behavioral patterns among America’s poor.

<sup>255</sup> Governor’s Advisory Task Force, *supra* note 246, at ix (emphasis omitted and added).

<sup>256</sup> *Id.* at 21.

<sup>257</sup> See GLENN, *supra* note 233, at 187-88.

<sup>258</sup> See Frank Bruni & Laurie Goodstein, *New Bush Office Seeks Closer Ties to Church Groups*, N.Y. TIMES, Jan. 29, 2001, at A1 (announcing the creation of the Office and the appointment of DiIulio as its head). Professor DiIulio resigned before the end of a year in office. See Elizabeth Becker, *Head of Religion-Based Initiative Resigns*, N.Y. TIMES, Aug. 17, 2001, at A17 (describing his resignation); see also Towey Leads “Faith – Based” Effort, ASSOC. PRESS, May 3, 2002 (describing the nomination of Jim Towey to replace DiIulio).

blighted communities and, as such, should be acknowledged as an institutional standard bearer dedicated to the public good.<sup>259</sup> Thus, it simply makes good common sense to subsidize the work these churches already do.<sup>260</sup> In some inner cities, the black ministry remains one of the few standing social institutions of support and connection:

Day-by-day, clergy, volunteers, and people of faith monitor, mentor, and minister to the daily needs of the inner-city black children, who, through absolutely no fault of their own, live in neighborhoods where opportunities are few and drugs, crime, and failed public schools are common. There, faith-driven community activists strive against the odds to help these children . . . avoid physical violence, achieve literacy, gain jobs, and otherwise reach adulthood physically, educationally, and economically whole.<sup>261</sup>

From this perspective, churches may be seen as a better guarantor of promoting the objectives of the federal legislation than the bureaucracy itself could be. And, they may be a better center for civic engagement.<sup>262</sup> Whereas the public, as I argued in Part IV, does not have opportunities to engage in meaningful dialogue with privatized providers, church-group welfare organizations may provide extensive opportunities for the general public to get involved in the shape and direction of welfare provisions—more so than, perhaps, in the case of government providers.<sup>263</sup> Given my explicit criticism of private providers for their role in sharpening the separation between the general public and the work of helping low-income people, it is only fair for me to recognize this countervailing trend here.

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<sup>259</sup> See John J. DiIulio, Jr., *Supporting Black Churches*, BROOKINGS REV., Spring 1999, at 42; see also Shapiro & Wright, *supra* note 252.

<sup>260</sup> See DiIulio, *supra* note 259. For illustrations of inner-city ministries working to keep impoverished neighborhoods together, see, for example, Jodie T. Allen, *Ministers Test the Limits of Faith*, U.S. NEWS & WORLD REP., Jan. 3, 2000, at 20; John Leland with Claudia Kalb, *Savior of the Streets*, NEWSWEEK, June 1, 1998, at 20; and Robert Worth, *Amazing Grace*, WASH. MONTHLY, Jan. 11, 1998, at 28.

<sup>261</sup> DiIulio, *supra* note 259, at 42.

<sup>262</sup> See Benjamin R. Barber, Editorial, *Where We Learn Democracy*, N.Y. TIMES, Mar. 9, 1986, at G15 (recognizing black churches as traditional loci of civic and political community); Richard L. Berke, *At Church, Sermon Is Often How You Vote*, N.Y. TIMES, Nov. 7, 1994, at B9 (noting the political activism among church congregations); see also Eric Lipton, *In Churches, Candidates Call for Black Voters To Respond*, N.Y. TIMES, July 2, 2001, at B3.

<sup>263</sup> One key factor militating against the fostering of inter-class community between church providers and welfare recipients is that, often, the target group to assist is demographically quite distinct from the provider population. Hence, the existence of paternalism and the sense of *noblesse oblige* may dampen efforts to bring recipients and providers closer together. See *infra* note 299 and accompanying text.

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On the flip side, however, whereas governments and corporations lack the potential intimacy that a faith provider might enjoy with its clients, they are also less likely to alienate (because the governmental and corporate agendas do not include spiritual reformation).<sup>264</sup> Spiritual messages are desirable only insofar as the clients are receptive to such “callings.” If a client hews to a different creed than his provider, the church provider—intent on combining a message of faith and self-help—could become a much less effective (if not altogether deleterious) partner in welfare reform. In what follows, I describe how faith-based welfare reform can distort the federal welfare message on three fronts.

First, *institutionally*, Charitable Choice providers as religious institutions might confuse and conflate their spiritual mission with the goals of federal welfare reform. Accordingly, they would serve as inherently exclusionary administrative bodies, implicitly defining boundaries of eligibility not just in terms of financial status or residential geography, but also in terms of adherence and conformity to a particular creed. Moreover, faith-based organizations are also inherently non-neutral. Unlike the government or even private, market providers, there is a conception of the good and moral life that communities of faith propound.<sup>265</sup> This affirmative moral ethos, too, may create obstacles standing in the way of effective service provision.<sup>266</sup>

Second, and related on the *managerial* level, Charitable Choice providers might stigmatize or ill-serve those that do not share their religious ethos of reform and reformation.<sup>267</sup> They may focus on the wrong package of services and training, i.e., more attention to spiritual and emotional well-being than material security and job-readiness.

And, third, there are civic harms. A legal and political regime too heavily focused on faith-based provision will erode trust in the ability of government, as a neutral, inclusive provider, to service needs; instead, individuals (recipients and general members of the civic community alike) will feel compelled to define their community more narrowly and focus attention and allegiance in the direction of

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<sup>264</sup> See Saperstein, *supra* note 232, at 1371.

<sup>265</sup> See, e.g., OLASKY, *supra* note 99; OLASKY, *supra* note 237; Magnet, *supra* note 243; see also *infra* Section V.B.

<sup>266</sup> See Saperstein, *supra* note 232, at 1361 (describing the providers’ “political and ideological concerns beyond the desire to help the poor”).

<sup>267</sup> See Segal, *supra* note 244, at 71-72.

church groups, which may be exclusionary and discriminatory.

Again, my aim is not to discredit faith-based provisions. I recognize the long and meritorious history of religious providers. My goal, and thus I lay emphasis on it, is to identify some of the more problematic elements of Charitable Choice. For centuries, churches and synagogues worked closely with government to provide services. What is different today is that some groups are much more inclined to participate because they do not have to subordinate their particular message of faith. Thus, I focus particular emphasis on these new Charitable Choice providers, which jumped into the TANF world precisely because they could promote their messages of faith and redemption. These groups, which are largely Evangelical Protestant outfits, may be distinguished from Catholic Charities or Lutheran Social Services,<sup>268</sup> because, to borrow Saperstein's terminology, they are "pervasively sectarian" rather than simply religiously affiliated organizations.<sup>269</sup> Catholic Charities and Lutheran Social Services have long been involved in government service provision and appear less likely to test the waters of heavily sectarian social service administration.<sup>270</sup>

## B. *Charitable Choice's Distortions*

### 1. *Institutional Harms*

First, the religious and spiritual *raison d'être* of religious providers may conflict or get confused with the overarching goals of welfare reform. Spiritual salvation may override the commitment to work—for a successfully "rehabilitated" person may be pious, but still jobless.<sup>271</sup> As suggested,<sup>272</sup> to date not many of the most prominent

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<sup>268</sup> Indeed, prior to Charitable Choice, sixty-two percent of Catholic Charities' funding came from the government, and thirty-nine percent of Lutheran Social Services' funding came from the government. See Gilman, *supra* note 186. At the risk of privileging the "mainstream," these organizations may be viewed as too well-respected to risk deviating too far outside the line they have carefully towed since the advent of the modern Establishment Clause doctrine.

<sup>269</sup> See Saperstein, *supra* note 232, at 1361.

<sup>270</sup> See Laurie Goodstein, *Bush's Call to Church Groups To Get Untraditional Replies*, N.Y. TIMES, Feb. 20, 2001, at A1 (noting that the biggest enthusiasts in the faith-based community to administer PRWORA and other social service initiatives are the less traditional religious outfits); Laurie Goodstein, *Bush's Charity Plan Is Raising Concerns for Religious Right*, N.Y. TIMES, Mar. 3, 2001, at A1; see also Diller, *supra* note 9, at 1764 (describing the high participation rate of less well-established churches in faith-based, government initiatives).

<sup>271</sup> Success, after all, is defined in terms of spiritual, not material gain. See, e.g., Marci A. Hamilton, *Free? Exercise*, 42 WM. & MARY L. REV. 823, 871 (2001) ("We need to be absolutely clear here: the but-for reason proffered for the success of these

churches in America have become seriously or aggressively involved in this wave of welfare reform,<sup>273</sup> so we must focus on the performance of those private religious providers that have emerged as candidates for the first sets of Charitable Choice contracts.

Some notable providers who have demonstrated considerable interest in Charitable Choice are exclusionary by virtue of their institutional constitution.<sup>274</sup> What I raise presently is admittedly anecdotal, but it is nevertheless evidence that confirms there can be distortions in welfare policy. Consider Teen Challenge, a group publicly lauded by then-Governor George W. Bush as early as 1995.<sup>275</sup> It is considered a highly successful and rapidly expanding evangelical Protestant group that believes drug and alcohol addiction is the result of spiritual troubles and can only be cured by moral teaching, or more specifically, through the process of being “born again.”<sup>276</sup> The Governor’s Advisory Task Force, *not some skeptical liberal watchgroup*, described Teen Challenge’s methodology as rehabilitation through salvation.<sup>277</sup> The specific policies and aims of Teen Challenge were discussed quite frankly before the Senate Judiciary Committee. Alarmed observers noted that “Teen Challenge based their assessment of Jewish patients’ success on their willingness to convert to Christianity—Jewish beneficiaries were labeled either ‘uncompleted’ or ‘completed’ Jews based on whether they had fully converted.”<sup>278</sup> This success criterion was, apparently, evaluated

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religious welfare service programs is the presence of God, or religion, in the program. They claim they work better because God is integrally incorporated throughout the program.”).

<sup>272</sup> See *supra* notes 268-70 and accompanying text.

<sup>273</sup> See *supra* note 249 and accompanying text.

<sup>274</sup> See Saperstein, *supra* note 232, at 1361, 1371; Segal, *supra* note 244, at 71-72.

<sup>275</sup> See GLENN, *supra* note 233, at 63; David Gramm, *Where W. Got Compassion*, N.Y. TIMES, Sept. 12, 1999, at F62 (describing then-Governor Bush’s efforts to promote Teen Challenge’s message and programs).

<sup>276</sup> See Laurie Goodstein, *Conservative Church Leaders Find a Pillar in Bush*, N.Y. TIMES, Jan. 23, 2000, at A16; Gramm, *supra* note 275 (characterizing Bush’s and Olasky’s strident support for Charitable Choice social services as deriving from their own evangelical faith).

<sup>277</sup> Governor’s Advisory Task Force, *supra* note 246, at 18. Charles Glenn devotes an entire chapter to Teen Challenge. GLENN, *supra* note 233, at 62-73.

<sup>278</sup> Lin et al., *supra* note 228, at 195; see also *Faith-Based Solutions: What are the Legal Issues?: Hearing Before the Senate Comm. On the Judiciary*, 107th Cong. (2001) (testimony of Richard T. Foltin, Legislative Director and Counsel, the American Jewish Committee Office of Government and International Affairs); GLENN, *supra* note 233, at 62 (“When one does not have a personal relationship with Jesus Christ, that person has a great emptiness inside.”) (quoting from the “Philosophy of Teen Challenge”). Glenn recounts the major tenets of Teen Challenge.

There is hope.

independently of whether or not the client actually overcame her addiction.

Lest we dismiss the rhetoric of Teen Challenge as aptly localized to heavily Protestant, rural Texas, it is important to recognize that Teen Challenge has a noticeable presence in border towns in Texas, as well as in more cosmopolitan locations including San Antonio, Los Angeles, and New York City.<sup>279</sup> In all these communities there are quite large non-Protestant populations, who potentially could be assigned to its services as a condition of receiving welfare under TANF. And lest we dismiss Teen Challenge as a fringe provider with which no county or municipality would formally contract, its success rate has been widely heralded.<sup>280</sup>

Another program endorsed by the Governor's Advisory Task Force is Lands Victory Fellowship. Its methodology, too, is quite simple:

We don't use drugs or psychiatrists or any of that, only Bible study. We believe that sin is the reason why people take drugs. . . . The drug addict is a slave to sin, not to drugs. We believe that drug addiction is a spiritual problem, and that Jesus Christ is the solution.<sup>281</sup>

Finally, one last active social service provider seeking state funding is Victory Home, which also centers its drug and alcohol rehabilitation curriculum on instilling Christian values. The

Drugs are not the major root problem.  
Sin is the major root problem.  
Drugs are not sin; they are a symptom of the problem.  
The only cure for sin is Jesus Christ.  
Jesus Christ died on the cross to save a man from his sin.  
Through faith in Jesus Christ you can be forgiven and cleansed from the power of sin . . . .

GLENN, *supra* note 233, at 67 (citing the group's central creed).

<sup>279</sup> *Id.* at 64-69. After all, there must have been a sufficient number of Jews involved in the program to make such discussion relevant to their congressional testimony.

<sup>280</sup> See, e.g., Nat'l Ctr. on Addiction & Substance Abuse at Columbia Univ., *So Help Me God: Substance Abuse, Religion and Spirituality* 26 (2001), available at <http://www.casalibrary.org/CASAPublications/Spirituality.pdf> (last visited Dec. 28, 2003) (noting Teen Challenge's eighty-five percent rehabilitation rate); see also GLENN, *supra* note 233, at 62-73.

Indeed, praise for religiously oriented substance abuse programs is hardly monopolized by the Right. Joseph Califano, an architect of Lyndon Johnson's Great Society and Secretary of Health, Education and Welfare under President Carter, has said: "I don't see anything wrong with public funding for a drug-treatment program that provides for spiritual needs . . . if that's what an individual needs to shake cocaine, to shake alcohol, to shake heroin." Shapiro & Wright, *supra* note 252.

<sup>281</sup> See Governor's Advisory Task Force, *supra* note 246, at 17 (quoting Lands Victory's founder).

program, though also praised for its success rate, recognizes it is not for everyone. Its founder has suggested that Victory Home “is geared to a particular modality—which is accept Jesus and accepting Jesus will drive out the addiction—and that’s not going to work for everyone.”<sup>282</sup> As a program “not for everyone,” Victory Home, like Victory Fellowship and Teen Challenge, may fill a particularly gaping hole in the broad tapestry of private service provision. The founder of Victory Home, testifying before Congress, remarked that “we teach Jesus in the morning, Jesus at noon, Jesus at night.”<sup>283</sup> But when it stands in for the state—and seeks government contracts—and is given the state’s imprimatur, it cannot help but alienate individuals who want personal and professional assistance but not salvation, and may fail, quite possibly, to provide the proper medical care necessary for those whose addiction is more physiological than these groups are willing to concede.<sup>284</sup>

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In such instances, faith-based provision is, accordingly, institutionally ill-equipped (and structurally ill-disposed) to handle all clients. In those cases, it may not realistically treat individuals on their own, or at least neutral, terms. The traditional norms of eligibility for service provision are geographic, jurisdictional, and economic: If you are poor and can claim a local residency, you are likely to be eligible for service. But, faith-based provisions create an additional barrier: a religious litmus test. Though one does not, by law, need to ascribe to the faith messages associated with the service provider to remain eligible, the programs are obviously geared toward promoting particular perspectives. It would be a false analogy to say that litmus tests exist in the public sector. Indeed, the government’s “litmus test,” a willingness to work, is a decidedly neutral one. Thus, it is problematic that the sectarian providers could effectively divide communities according to the message proffered and its receptiveness.

Justice O’Connor, in a pair of Establishment Clause cases, articulates the concerns raised above more eloquently. In *Wallace v. Jaffree*, she opines that government endorsement of a particular religious grouping may make people’s religious beliefs or their

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<sup>282</sup> Karen Branch-Brioso, *Faith-Based Drug Rehabilitation Program Offers Only One Treatment: Jesus Christ*, ST. LOUIS POST-DISPATCH, Feb. 11, 2001, at A1.

<sup>283</sup> GLENN, *supra* note 233, at 70.

<sup>284</sup> See, e.g., Laurie Goodstein, *Antidrug Program Lauded by Bush Is More Ministry than Treatment Center*, N.Y. TIMES, Feb. 23, 2003, at A18; Marvin Olasky, Editorial, *Bush’s GOP Critics Miss His Point*, AUSTIN AM.-STATESMAN, Feb. 17, 1999, at A11 (celebrating the fact that faith-based centers “break bureaucratic rules”).

membership in a religious grouping determinative of their political standing in the community.<sup>285</sup> Elsewhere, Justice O'Connor has written that when government has the purpose of endorsing religion, it sends a message to some that they are favored insiders. And, for those who adhere to different sets of beliefs, they are not "full members of the political community."<sup>286</sup> Under PRWORA, there must be a secular alternative;<sup>287</sup> but the existence of an alternative does not fully render acceptable that which is a de facto endorsement of a particular religion. Even if that religious institution does not fully stand in place of the government, it does—at the very least—stand along side it in an undeniably privileged place that should make observers mindful of Justice O'Connor's writings.

Moreover, the laws on Charitable Choice do not say that such a secular alternative has to be remotely comparable to the principal provider in scope or funding. Indeed, if a religious provider has the main contract with the city or county, inevitably we can envisage any secular alternative as being a makeshift, ersatz set-up for the few dissenters in town.<sup>288</sup> Their choice, then, (if one actually is aware that she has a choice)<sup>289</sup> becomes one of whether to swallow the religious message as a necessary by-product of the main social service provider—that may likely be better funded and have better connections for purposes of job placement—or take one's chances with the ostensibly less well-situated, but neutral provider. To provide services in an uncomfortable environment is antithetical to the spirit of improvement. It is one thing to use diversion tactics to encourage self-help and to use workfare to instill an ethos of employment; it is,

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<sup>285</sup> See *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring).

<sup>286</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). A federal judge in Wisconsin recently voided a state contract with a faith-based provider on similar grounds. See *Freedom from Religion Found. v. McCallum*, 179 F. Supp. 2d 950 (W.D. Wis. 2002); Laurie Goodstein, *Judge in Wisconsin Voids A Religion-Based Initiative*, N.Y. TIMES, Jan. 10, 2002, at A22.

<sup>287</sup> See, e.g., Adam Clymer, *Filter Aid to Poor Through Churches, Bush Urges*, N.Y. TIMES, July 23, 1999, at A1. As suggested above, *supra* note 244, the secular alternative provision is a weak one, for providers do not have to alert clients of their right to seek this alternative.

<sup>288</sup> One might be reminded of the makeshift law school education provided to blacks in the South in the 1940s and 1950s and how this system of alternative schooling was ultimately declared separate—but not equal. See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that a makeshift law school for blacks could not provide an education equal to that offered by the University of Texas Law School).

<sup>289</sup> See Segal, *supra* note 244, at 71-72 ("Charitable choice does not provide adequate protection for the religious liberties of welfare beneficiaries. . . . [B]eneficiaries may assume that they have no option but to go to a religious institution or forgo their benefits altogether.").

however, quite another, to deter people based on sectarian differences of opinion. The former set (ideally) promotes self-sufficiency whereas the latter simply serves no work-related goal.

Moreover, institutionally does welfare reform sit well with the possibility of religious messages? One might say, welfare reform is an act of Congress throwing up its hands and letting communities do what they think will work well. But, as I have been arguing, that conventional line of reasoning must be refined. Does separating members of a community along religious lines further a goal, and if so, does that goal outweigh the cost imposed on those who are discomforted and alienated in the process?<sup>290</sup> Recall Justice Breyer's gloss on the virtues of a strong Establishment Clause in *Zelman*. He suggested the Warren Court protected the Establishment Clause in part because it recognized the "anguish, hardship and bitter strife that could come when zealous religious groups struggle with one another to obtain the government's stamp of approval."<sup>291</sup>

Indeed, perhaps the Governor's Advisory Task Force provides us with an honest look at how Charitable Choice might map onto the welfare scene in a divisive manner. In lieu of offering the governor an objective, policy-wonkish plan to reduce dependency, it concludes with a sectarian parable:

When a lame beggar asked for a handout, Peter didn't do the kindhearted (but weak-minded) thing and give him money. Nor . . . did he proffer a job, 'the secular conservative solution' (work alone cannot redeem, either). Instead he addressed the deeper problem and told the man to arise and walk in Jesus's name.<sup>292</sup>

It would seem as if workfare might not be the governing theme of Charitable Choice. If federal welfare reform shifted the welfare eligibility standards from "being poor" to "being poor *and actively seeking work*," then the Charitable Choice dimension adds a third component: some commitment to a life of faith.

## 2. Managerial Harms

It is not a far leap for us to consider that these heavily sectarian organizations may ill-serve or alienate potential clients. From the institutional distortion, the managerial harms follow closely on its

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<sup>290</sup> See, e.g., Salim Muwakkil, Editorial, *Need for Secular Public Square*, CHI. TRIB., Jan. 7, 2002, at N15 (recognizing the dangers of retreating into religious enclaves and noting religious programs' likelihood to polarize members of a multicultural society).

<sup>291</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 659 (2002) (Breyer, J., dissenting) (quoting *Engel v. Vitale*, 370 U.S. 421, 429 (1962)).

<sup>292</sup> See Governor's Advisory Task Force, *supra* note 246, at A-16.

heels. Religious service is infused with messages that may distort the ideals of welfare reform and may push people away from social service assistance altogether.

*a. Message of Patriarchy*

Religion in the United States can be a force of patriarchy and Occidentalism, perhaps condemning of those who do not fit the mold. The messages offered on the respective sabbaths in people's respective private services may not map well onto the messages offered seven days a week to a diverse (but highly dependent by virtue of their poverty) American population. For instance, "[t]he interests of the faith-based crowd in 'repairing' the family [may] mean[] restoring the male head, crafting legal obstacles to divorce, and deepening the stigma attached to female-headed households."<sup>293</sup> Presumably, messages regarding abortion play a role, as well. Indeed, in religious contexts, women may often stand to lose more than they would in civic space.<sup>294</sup> To some extent, secular welfare social policy is already moving toward promoting marriage and traditional family values,<sup>295</sup> which implies welfare reform notwithstanding Charitable Choice may itself be patriarchal and implicitly linked to the Protestant Work Ethic; this realization takes some of the force out of the argument that religious organizations are unique in this respect. So to this extent, it would seem as if religious providers comport well with the government's message of self-sufficiency not only through work, but also through an affirmation of the traditional nuclear family.

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<sup>293</sup> Rickie Solinger, *But No Faith in the People*, SOC. JUST., Mar. 22, 2001, at 11.

<sup>294</sup> *Id.* ("Women stand to lose full access to citizenship status when the faith-based crowd prevails. . . . Faith-based initiatives . . . would strengthen the anti-abortion work by involving religious institutions in changing the culture of the United States."); see also McClain, *supra* note 92, at 1722 (acknowledging the concern that some religious organizations would use social service organizations to promote their messages of male authority and female submission).

<sup>295</sup> See Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 427-28 (1999) (describing PRWORA's pro-marriage rhetoric as well as state implementation of "Bridefare" proposals that offer economic incentives for poor single mothers to marry); Backer, *supra* note 4, at 45 (characterizing sections 101(1)-(10) of PRWORA as expressing Congress's unabashed promotion of marriage); Anna Marie Smith, *The Sexual Regulation Dimensions of Contemporary Welfare Laws: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 124 (2002) ("[PRWORA's] policies have led directly to an intensive, widespread, and arbitrary invasion of poor women's private lives and bodily integrity . . ."); Robin Toner & Robert Pear, *Bush Urges Work and Marriage Programs in Welfare Plan*, N.Y. TIMES, Feb. 27, 2002, at A18.

*b. Focus on Spirituality over Tangible Services*

However, there remain religious distortions. Leaving aside the potential proselytizing impact, which I focused on above as a source of institutional exclusion, the thrust of the provider's message—for any and all would-be clients—may not focus enough on the welfare-to-work agenda. Recall above the methodology of some faith-based providers. They focused exclusively on personal salvation and such efforts might have to come at the expense of emphasizing job training, job-search skills, and physical well-being. The potential managerial harm, therefore, may take the form of a relatively inflexible and possibly unhelpful package of service provisions.

*c. Religiosity of Providers*

Finally, but related, it should be noted that part of the religious freedom of church providers is not just permission to sermonize, but also to hire those who will reflect the teachings of the particular faith. Church providers are exempt from Title VII of the 1964 Civil Rights Act anti-discrimination provisions<sup>296</sup> and thus may have a staff of caseworkers who do not have much of a demographic connection with the client population. One of the goals of welfare reform was more intimate client-caseworker relationships.<sup>297</sup> If the caseworkers are somehow vastly different than the clients with respect to sex, class, ethnicity, and even race,<sup>298</sup> this process might be impeded. The combination of a demographically distinct and moralizing caseworker may impede the process of mainstream integration. One of the goals of localism is to foster stronger ties between members of the larger community and the client population. It might be helpful if some of the individuals assisting the poor actually looked like (and had shared experiences with) the poor,<sup>299</sup> a suggestion one also hears

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<sup>296</sup> See *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (“Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices.”); *Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp. 2d 1174, 1183 (E.D. Wis. 2001) (non-ministerial officers are exempt from Title VII); *EEOC v. Presbyterian Ministries*, 788 F. Supp. 1154, 1156 (W.D. Wash. 1992) (holding that a Christian retirement home can ask a Muslim receptionist to take off her religious head covering). For a discussion of anti-discrimination and faith-based provision, see Lin et al., *supra* note 228, at 196-97, 214-16.

<sup>297</sup> See Diller, *Localism*, *supra* note 1; Simon, *supra* note 87.

<sup>298</sup> See Wendy Kaminer, *The Joy of Sects*, AM. PROSPECT, Feb. 12, 2001, at 32 (positing that anti-discrimination Title VII exemptions on religious grounds may affect the racial composition of employment patterns).

<sup>299</sup> See, e.g., Shapiro & Wright, *supra* note 252 (describing Mississippi Governor Fordice's call to, presumably, white churches to each adopt a needy black family).

raised in the context of community policing reform.

### 3. *Civic Harms*

Here, I briefly describe the potential undermining of “faith” in government; like privatization, Charitable Choice signals an erosion of trust in the public sector. Charitable Choice posits a great civic harm:<sup>300</sup> that government is (only) next to godliness. With individuals and communities turning (most optimistically) inward to focus on help via their religious organizations, a local sense of engagement in a particular religious community may engender a concomitant withering of the public domain.<sup>301</sup> God, not government, helps people—parishioners, not citizens—and the collective action of a community is sacrificed for the collection action of a congregation. Leaving aside these organizations’ structural limitations in promoting work opportunities, this metaphorical insularity will segregate rather than connect people. As we retreat to our respective altars, we lose our sense of pluralism and our links to the American experience and her people. The threat this poses is considerable, for it spawns great divisions.<sup>302</sup> Moreover, will every faith-based organization have opportunities to provide? Probably not, even assuming there is no prima facie discrimination against non-Western religious providers.<sup>303</sup> Some faith communities will not have the resources to compete with the more established church providers. Their messages of salvation will never be accorded the same prominence in public discourse because they do not have the financial means or popular sway to bid competitively to manage a segment of the welfare infrastructure. All

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<sup>300</sup> See Muwakkil, *supra* note 290; cf. Michaels, *supra* note 45 (characterizing privatization initiatives not motivated by economic efficiency as posing unique problems vis-à-vis public governance).

<sup>301</sup> See Mike Allen, “Faith-Based” Backup Plan; Agencies Look To Lower Barriers to Social Service Contracts, WASH. POST, Aug. 17, 2001, at A2 (describing concerns and reservations among government officials unsure of the degree to which religion can pervade social service administration); Muwakkil, *supra* note 290; Peter Steinfelds, *Hiring for Faith-based Programs*, N.Y. TIMES, June 9, 2001, at B6 (describing the public’s discomfort with discriminatory hiring practices).

<sup>302</sup> See *Zelman v. Harris-Simmons*, 536 U.S. 639, 717-19 (2002) (Breyer, J., dissenting); Saperstein, *supra* note 232, at 1371; Muwakkil, *supra* note 290.

<sup>303</sup> Many erstwhile supporters of faith-based provision balked at the idea of including non-Western faiths within the Charitable Choice tent. Reverend Pat Robertson has said the Unification Church, the Hare Krishnas, and the Scientologists should not be funded. Pat Robertson, Editorial, *Bush Faith-based Plan Requires an Overhaul*, USA TODAY, Mar. 5, 2001, at 15A. Reverend Jerry Falwell has insisted on the exclusion of all Muslim groups—even before September 11, 2001—on the basis that “the religion of Islam ‘teaches hate.’” Jane Lampman, *Faith in Government?*, CHRISTIAN SCI. MONITOR, Mar. 15, 2001, at 11.

of this also suggests that religious provision, especially sectarian provision, may be alienating to individuals and communities. Will there be, for instance, internal struggles with one's own faith as another religion happens to emerge as the source of welfare provision and material and spiritual comfort?

### C. Summary

Parts III, IV, and V of this study focused on the possible distortions that can occur when the federal government leaves policy implementation decisions to local, for-profit, and religious service providers. But a study of welfare devolution and privatization stands out from examinations of devolution and privatization in other domestic policy areas for two reasons. First, the target population being served is, by definition, one of the weakest, most marginalized in society. Those resorting to public assistance, by and large, have few socio-economic resources, civic or political ties, or alternative means of support or subsistence.<sup>304</sup>

Second, welfare reform is a particularly subjective business. Unlike a host of other policy programs that Washington has punted to the states, welfare policy is difficult to assess—except in absolute numbers in roll reduction. And even with absolute numbers, it is hard to keep track of those who do not succeed in welfare reform programs, and it is difficult to evaluate what percentage of workfare failures will land on their feet versus those who will fall flat.<sup>305</sup> Success stories may be fatuous as well, for it is difficult to determine whether improvements should be attributed to extrinsic factors (the economy) or to the hard work of innovative local administrators. Indeed, the federal government has left itself with limited access to gauge how well the program is working, let alone to revise and recalibrate the programs accordingly. Those federal officials serious about making welfare reform work have an attenuated connection to the programs, data, and families themselves—that limits their ability to continue to improve the lives of poor Americans. In short, Congress's concessions to the narrative of devolution sparked a

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<sup>304</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 340-41 (1976) (discussing how an individual on SSI disability, unlike someone on welfare, can always find alternative sources of funding—including welfare—to survive).

<sup>305</sup> See, e.g., Laura Cohn, *From Welfare to Worsefare?*, BUS. WK., Oct. 9, 2000, at 103 (“Sadly, no national surveys track welfare mothers after they leave the dole.”); Raymond Hernandez, *McCall Urges Better Tracking of Those Leaving Welfare*, N.Y. TIMES, June 19, 1999, at B4; Leslie Kaufman, *Are Those Leaving Welfare Better Off Now? Yes and No*, N.Y. TIMES, Oct. 20, 2003, at B1 (noting the difficulty of tracking former welfare recipients).

seismic shift in the federal-state balance that left it without any principal control over the direction of welfare reform. Its failure to strike the proper federalism note left it without the opportunity to guide reform as only the federal government can.

VI. REDESIGNING WELFARE REFORM:  
PROMOTING INDEPENDENCE THROUGH BALANCED FEDERALISM

In this final Part, I briefly outline a possible alternative, process-based approach to achieving the substantive goals of federal welfare reform. My aim is to build a policy framework that can serve as the foundation of a new legal paradigm—and to rekindle an important conversation. The federal goals should, by now, be clear: to end dependency by promoting an ethic of work and personal responsibility. The federal government's intended methodology should be equally clear: to end the federal entitlement to cash assistance and to enlist the help of local and private actors with the design and implementation of innovative strategies to transform welfare recipients into self-sufficient workers. Thus, we want to end dependency and want to rely on local actors to experiment with different approaches to help us arrive at our collective goal. Yet in the course of its legislative process, devolution seemed to be privileged above all else—even the substantive objectives of welfare reform, objectives which themselves were compromised by the forces of devolution. Simply put, a legal regime focused exclusively on local autonomy may sound appealing and play well on the campaign trail. But, it is a fundamentally impoverished (and counterproductive) conception of welfare reform—and of federalism. States and their subsidiaries lack the requisite tools (notably, large-scale economic policymaking) and, at times, the proper motivation to promote fully the substantive and rhetorical aims of welfare reform as designed by Congress.

The avowed procedural reforms in welfare policy—flexibility, localism, discretion, efficiency, and faith—all have the potential to be taken too far, suggesting devolution is better swallowed in moderation. We need to develop a strategy to rein in devolution and embark on a new course relying on a more balanced version of federalism. This more balanced federalism retains the dynamic benefits of localism while enlarging opportunities for greater federal participation, coordination, and oversight. Unpopular as this shift back toward the center may seem, such a shift is not only necessary to carry out the substantive aims of welfare reform, but it also represents a more faithful effort to maintain the delicate balance of American

federalism. Realistically, the current, dominant narrative of protest against greater federal involvement will not be quieted by a simple, dispassionate lesson on the virtues of a more balanced approach to federalism. But, reformers may be able to appease the states if Congress is willing to compensate them (with added funding) for loosening their vice-grip on welfare policy authority.

This Part proceeds in two stages. In the first section, I offer an alternative legal architecture for welfare reform, one perhaps better able to promote its substantive and rhetorical aims. Yet power politics may make it difficult to disturb the status quo. Thus, the second section posits a political solution for Congress to wrest back some control it too readily abdicated in 1996. Congress needs to reassert some authority and build partnerships that combine the local virtues of experimentalism and dynamism with the federal virtues of being able to set national standards,<sup>306</sup> to coordinate national economic policy, and to internalize the state-level externalities that encourage races-to-the-bottom. Thus, Section A and Section B lay a cursory groundwork for reconceptualized welfare reform.

#### A. *Re-federalizing Devolved Welfare Policy*

There is strong and persuasive evidence that states and localities can do a better job of crafting welfare programs than can Washington, if it were to set policy by fiat. But there is a third legal regime that, I argue, can outperform either a totally centralized or completely localized and atomized model of reform.

Reforming welfare may require recalibrating Congress's (and the states') view of federalism. This approach is hardly novel. Imagine a return to a more balanced, cooperative system in which the states continue to craft and shape policy, but with more federal oversight that includes advice, rewards, and punishments: a decentralized regime in which state and federal excesses can both be mitigated by the coercive power each level of government has over the other.<sup>307</sup> This system<sup>308</sup> might be structured in the following way. States would be required to design welfare programs in exchange for federal funds. States would then submit their proposals to HHS for

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<sup>306</sup> See Cashin, *supra* note 3, at 620-24 (highlighting the desirability of imposing minimum national standards and stronger federal oversight over local programs).

<sup>307</sup> See THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961).

<sup>308</sup> What follows is merely a cursory sketch of an alternative legal structure for welfare reform. It is intended to be understood as merely a start of a larger conversation about reforming welfare reform.

stringent review.<sup>309</sup> HHS would have the ability (and obligation) to negotiate with states over the design of those experimental innovations it finds troublesome. The political consensus favoring localism and devolution would, in turn, keep the federal authorities deferential to the states in most circumstances.<sup>310</sup> But, federal oversight would still help policymakers anticipate problems or, in the alternative, quickly correct them.

Presently, I posit three foundational tenets for a revised welfare strategy. First, as a condition of approving a state's plans that may have fewer safeguards than HHS might otherwise want, the federal government could insist on retaining greater oversight involvement in that state's program. Congress and HHS might exact promises that states file periodic research reports attesting to the success of the program; that a federal officer (or a welfare recipient, or both) would be allowed to sit *ex officio* on any private welfare vendor's board of directors;<sup>311</sup> or, that the state add statutory protection for fair hearings and, perhaps, receive a good-faith bonus from the federal government to subsidize these legal expenses. Thus, some of the more innovative programs that the states devise might be subject to federal-state negotiations over safeguards.

All of these measures might be derided by proponents of devolution as more of the same "red tape" they successfully fought to eliminate in 1996. Yet we should see these heightened administrative costs as actually offering a boon to democracy and innovative policymaking as these partnerships between federal and local officials create a climate conducive to thoughtful reform and greater political collaboration among governmental entities.<sup>312</sup> And, in the long run, this more rigorous collaborative process may produce more effective,

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<sup>309</sup> In fairness, states currently need to report to the federal government periodically on their programs. But this reporting is often understood to be merely pro forma. See 42 U.S.C. § 617 (2000) ("No officer or employee of the Federal Government may regulate the conduct of States . . . or enforce any provision . . . except to the extent expressly provided . . ."); see also Mary Jo Bane & Richard Weissbourd, *Welfare Reform and Children: Welfare Reform Is Likely To Result in More Children in Struggling Low Wage Working Families, and More Children in Families Without Either Employment or Other Means of Support*, 9 STAN. L. & POL'Y REV. 131, 131 (1998); Cimini, *supra* note 10, at 256-57.

<sup>310</sup> One need only recall the popularity of the Midwestern governors, especially Governor Thompson and Governor Engler, during the AFDC waiver efforts of the mid 1990s, taking on the HHS bureaucracy. See, e.g., Jason DeParle, *Aid from an Enemy of the Welfare State*, N.Y. TIMES, Jan. 28, 1996, at D1; Gary Wills, *The War Between the States . . . and Washington*, N.Y. TIMES, July 5, 1998, at F26.

<sup>311</sup> See, e.g., Bezdek, *supra* note 9, at 1609.

<sup>312</sup> See Dorf & Sabel, *supra* note 95, at 314-39 (outlining "deliberative polyarchy," their innovative model of cooperative federalism).

enduring welfare programs.

Second, the federal government can place a minimum standards floor to forestall pernicious races-to-the-bottom. The federal government need not mandate a rigid floor uniform across the fifty states. Instead, in keeping with the desire for flexibility while fending off races-to-the-bottom, the federal government may create minimum standards for certain state clusters, neighboring, comparable states that have similar economic climates and high incentives to divert their poor across state lines.

It can, moreover, work to offer advice and support. For example, HHS can compare proposals from states in a given region and recommend those states work together to realize some economies of scale. There is no reason why the Dakotas or, for that matter, New York and New Jersey might not want to coordinate welfare policy to achieve economies of scale, collaborate on job search and transportation needs, and minimize fears of cross-border welfare magnets.<sup>313</sup> The federal government can play a central role in identifying and encouraging opportunities for such collaboration and coordination.<sup>314</sup>

Third, a movement back toward the old federal-state contracting system allows the federal government to always be in the know. It can request updates and reports and ask the states to conduct studies in exchange for increasingly lenient waivers. Transparency and disclosure on the part of states could be rewarded by HHS with less

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<sup>313</sup> For discussions of interstate compacting and their applications in the context of modern policy contexts, see JOSEPH F. ZIMMERMAN, *INTERSTATE RELATIONS: THE NEGLECTED DIMENSION OF FEDERALISM* (1996); Felix Frankfurter & James Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *YALE L.J.* 685 (1925); Jill Elaine Hasday, *Interstate Compacts in Democratic Society: The Problem of Permanency*, 49 *FLA. L. REV.* 1 (1997); and Jon D. Michaels, *The Compacting Renaissance* (working draft, on file with author). See also *New York v. United States*, 505 U.S. 144 (1992) (describing the contours of the Low-Level Radioactive Waste Management Act and the compacts that the federal legislation spawned).

<sup>314</sup> See Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 *U. CHI. L. REV.* 483, 498 (1991). He has contended:

Many of the common clichés about the benefits of “federalism” actually have little to do with the idea of federalism, strictly speaking. States can indeed “experiment” by passing different laws whose results can be monitored and assessed. But a centralized government could run the same kind of experiments among geographically defined “provinces” whose governments hold office at the pleasure of the center. Indeed, if experimentation is our chief desideratum, a purely pyramidal government structure may well be preferable, enabling central planners to shape and reshape government boundaries and policies for more carefully controlled experiments.

*Id.*

intrusive oversight. This framework of more robust communication enables Congress to be more readily informed and better prepared to step in to correct problems. For example, the states might work with the federal government in determining how much job growth is needed (and whether or not stimulus programs are forthcoming). It is important to make those decisions before programs are designed and work targets are set.<sup>315</sup> Thus, if the federal government and a state develop a plan with these factors in mind, more realistic goals could be established and met. In this process, states, too, can extract demands of the federal government. A state may expand its education vouchers for the poor on the condition the federal government invests in job growth in the area.

Professors Dorf's and Sabel's scholarship on federal-state relations in the policymaking context might be applicable here.<sup>316</sup> Dorf and Sabel endorse a more dynamic model of consultation and evaluation in cooperative policymaking—as opposed to a rigid, periodic review system. Their proposals contemplate a need to create a primary information clearinghouse to pool and evaluate findings around the country. Thus, Wisconsin can be informed that Minnesota had numerous problems starting up a rural job center, or that Tennessee had troubles contracting with a particular corporation. Moreover, Dorf and Sabel endorse a system of central “benchmarking,” which enables the federal government to set standards<sup>317</sup> that, again, limit the likelihood of a race-to-the-bottom effect and require the states to make gains—but only those gains that have already been proven to be feasible. This benchmarking *based on empirical results* stands in contrast to the current approach in which a new work-requirement standard is (rather arbitrarily) established, even though it may not be rationally or empirically pegged to the contours of economic growth or labor demand.<sup>318</sup>

In short, we need to reverse the default position. No longer should states be allowed to design welfare reform policies with little federal oversight. A deferential, but still rigorous, review of state policies by Congress and HHS should be made a necessary precursor to federal funding.<sup>319</sup> The single biggest obstacle to this reform

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<sup>315</sup> See *infra* notes 317-18 and accompanying text.

<sup>316</sup> See Dorf & Sabel, *supra* note 95, at 288 (envisioning the role of Congress vis-à-vis domestic social policy as authorizing, coordinating, and financing state experimental reform).

<sup>317</sup> See *id.* at 287, 298-302.

<sup>318</sup> See, e.g., Bernstein, *supra* note 66; Editorial, *supra* note 66.

<sup>319</sup> While effectively allaying some of the concerns raised in Section III.B, this proposed reorganization of authority and autonomy between the federal

proposal, of course, is the political opposition from the states. I address this directly in Section B.

*B. Paying an Efficiency Wage:*

*Inducing the States toward Specific Performance*

Ultimately this policy will require state acquiescence. States may be more likely to accept these reforms if the federal funding structure were amended to (1) compensate states for this loss in discretion and to (2) reward them with carrots for complying with federal objectives. Without including these compensatory measures, reclaiming state authority and discretion is politically problematic, if not altogether untenable. But, if packaged as part of an effort to overhaul the incentive structure of the grants, the states may prove more receptive.

Let me begin with a brief digression. An elementary concept in economics is that the marginal cost for labor (the wage) is set equal to the laborer's marginal product of labor. Similarly, of course, if the federal government wants to give the states \$100 million in aid, say, to increase the number of teachers, it writes a check for that amount. But, in practice, many firms (with principal-agent problems) do not adhere to the rigors of orthodox economic theory in structuring their

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government and the states does not, *prima facie*, do anything vis-à-vis problems introduced into the welfare system via privatization. Given the federal government's enthusiastic reliance on private actors for all sorts of provisions, it is highly unlikely that Congress would scale back its extensive outsourcing agenda. *See supra* note 42 and accompanying text.

That said, the federal government's larger presence in the world of welfare will provide an extra layer of government oversight, and an extra layer of governmental influence to keep contractors in check; it is, after all, understood that contractors such as Lockheed, Andersen, and Maximus also have considerable business dealings with the federal government. While it is doubtful that greater centralization and federal-state cooperation will turn the tide on privatization and deregulation *per se*, the federal government's potential to resist corporate capture and negotiate better deals (because of its larger purchasing power) might create the right set of disincentives to keep private actors from overstepping their bounds. *See, e.g.,* Freeman, *supra* note 42, at 1317. Professor Freeman suggests:

Congress could, therefore, tailor privatization experiments to extend federal goals not only to the state and local government grantees that directly receive the funds, but also to private contractors charged with service delivery. Congress might minimize the discretion of private contractors by specifying performance criteria or dictating substantive contractual terms, including requirements for regular and detailed reporting. Congress might demand closer or more extensive monitoring of private contractors by federal agencies, not only for cost control and fraud prevention purposes, but also for quality control, which these agencies charged with oversight have traditionally not done very effectively.

*Id.*

own payrolls. Instead, many offer employees an “efficiency wage.” A firm pays a worker more than the value of her marginal product of labor in order to reduce her incentive to slack or, perhaps worse, take another job with another firm. Thus, the firm spends a little more on the worker, but reduces its long-term costs associated with turnover (hiring and training new employees). An efficiency wage, moreover, also encourages workers to be more affirmatively gung-ho about their jobs. Satisfied with their generous compensation, they may go the extra mile for the boss.<sup>320</sup>

Perhaps we should think about funding state initiatives mindful of the applicability and utility of efficiency wages. The welfare recipient population is such a vulnerable community in America that it is imperative for the federal government to ensure fair and humane treatment of those undergoing the transition from welfare to work. A more comprehensively and sensitively structured funding system may go a long way in increasing state compliance with federal objectives (and in reducing incentives to deviate). Currently, largely undifferentiated state block grants are given with relatively few strings attached. States’ grants are largely open-ended. It might make more sense, however, to give more generous grants, but with greater conditions attached. Thus, give the bitter with the sweet.<sup>321</sup>

Under the proposed system primitively sketched out in the previous section, a state could still be given an undifferentiated block grant and continue to operate as it presently has been. Or, it could take advantage of a federal bonus scheme. A modest bonus might be offered to states in exchange for comprehensive monitoring and reporting of welfare-to-work programs and their successes. To receive this modest bonus, states would be required to investigate, analyze, and report on the status of its programs to HHS. Additionally, a more generous bonus could be offered in exchange for successful job placements. An “unsuccessful” roll reduction, in contrast, would take the form of diverting an individual from welfare and losing track of her. That person may have a job, but he also may

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<sup>320</sup> For an analysis of the efficiency wage, see WENDY CARLIN & DAVID SOSKICE, *MACROECONOMICS AND THE WAGE BARGAIN* 401-07 (1990).

<sup>321</sup> This criticism of current welfare reform as underutilizing incentive bonuses could be extended to the design and administration of AFDC. The cooperative federal-state relationship under AFDC could be characterized as having sticks, but few carrots. States could lose grant money for failing to serve the community, but they were not eligible for bonuses if they did a particularly good job at alleviating poverty and dependency. Current welfare reform does build into its funding the opportunity for states to “pocket” unspent money, but that bonus is too loosely tied to the objective of empowerment (for the federal government does not condition that surplus on any showing of “success” other than roll slashing).

be on the streets. A report attesting to the successful (employed) transition, on the other hand, would result in extra funding. If the tracking attests to successful long-term placements, perhaps six months or a year, then, again, the states could be given additional moneys.<sup>322</sup>

Federal spending on welfare provisions is surprisingly small. And, the bonuses contemplated would only be a fraction of aggregate spending, yet may mean a great deal to states. It may be worthwhile for them to track and report, to be diligent in placements, and to be extra-diligent in making good placements. The additional money could be invested back into social welfare (to get even larger bonuses by getting more clients into jobs) or could be used for any other state endeavor. States do not have to go along with this system, but the offer and opportunity is there for them to work just a little harder to see welfare reform succeed.<sup>323</sup> Who says government service provision has to be indifferent to forces of market incentives?

Efficiency funding greases the wheels of political compliance and in turn improves the overall operation of welfare reform. We can retain the benefits of decentralization, so long as we are willing to invest a little more money to establish the requisite amount of oversight. All of this, of course, applies equally in the context of sub-devolution and privatization.

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Implicit in a movement away from wholesale devolution is either a return to central authority or an effort to balance the two extremes. I endorse the latter alternative and thus underscore the need to cultivate federal-state partnerships, not only to regulate state behavior, but also to get public officials and civil servants at all levels of government thinking and talking about policy. I earlier noted that Colorado's welfare reform is administered individually by each of its sixty-three counties; nearly half of those sixty-three counties lacked formal, written regulations for administering welfare.<sup>324</sup> The importance of federal oversight is obviously central to my desire to strike a better balance vis-à-vis federalism; but having each of those counties convene meetings, hash out ideas, and issue referenda is also a worthy end insofar as it is democracy-enhancing. Federal

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<sup>322</sup> A "performance" bonus system does exist under TANF. See 42 U.S.C. § 603(a)(4) (2000). My aim would be to make this a bigger part of a revised version of welfare reform.

<sup>323</sup> For an extensive discussion of the structuring of welfare incentives, see David A. Super, *Working for Food: The Food Stamp Program as Model for a New Anti-Poverty Agenda*, 78 N.Y.U. L. REV. (forthcoming 2004).

<sup>324</sup> See *supra* note 110 and accompanying text.

involvement does not need to be reduced to flats from HHS, just as federalism does not mean a complete abdication of national oversight. It should, alternatively, contemplate federal partnerships with cities, corporations, and faith institutions to coordinate efforts, highlight efficiency gains, and promote the substantive and rhetorical aims of welfare reform. In all, reining in devolution does not mark the death of autonomy, localism, or efficiency; it marks a new movement to more creative policymaking and civic participation.

## VII. CONCLUSION

This Article began with a counterintuitive proposition: Devolution does not go hand-in-hand with welfare reform. I took that proposition further and challenged the argument that privatization and Charitable Choice actually promote the substantive and rhetorical aims of welfare reform. These private actors, like their local governmental counterparts, are structurally limited in their ability to achieve the ostensible federal objectives of welfare reform. They do not have all the tools, incentives, and, possibly, allegiances necessary to devote themselves fully to the imperatives of federal welfare reform.

Even without a booming economy, there is no reason why these providers could not reduce the welfare rolls by engaging in diversion tactics and by conditioning payments on unreasonable demands. Ostensibly, then, these providers would be furthering the objectives of welfare reform, but only *ostensibly*. It is more difficult, however, to demonstrate affirmative results: actual self-sufficiency. While federal mandates on work requirements put pressure on states to find jobs for clients (or simply divert them from the rolls), there is no corollary commitment to making sure these clients become self-sufficient. Congress can demand reductions in dependency, but cannot similarly mandate improvements in families' socioeconomic status under the present formulation of PRWORA. Without greater federal oversight, states have few incentives to work toward that latter end. In fact, current funding practices suggest states and private firms may have incentives to under-provide services aimed at promoting socioeconomic advancement.

In criticizing devolution and privatization as potentially at odds with the substantive goals of welfare reform, I do not reject localism or experimentation. Rather, I seek to distinguish the ideology of devolution from the pragmatic understanding of federalism that balances the forces of devolution with those of decentralization. Moving away from devolution toward decentralization, the federal

government should take a firmer grip of the reins of welfare policy and require states to submit proposals as a condition of funding. Though remaining deferential, Congress and HHS may reserve the right to ask states for additional safeguards to be put in place if their proposed programs seem particularly risky. Moreover, I suggest restructuring the federal grant appropriation system. The federal government should offer a series of bonuses to states that specifically comply with more detailed federal welfare goals. The federal government should not simply require a certain percentage of welfare roll reduction. Instead, it should give bonuses to states that can demonstrate that their welfare “graduates” remain gainfully employed. Finally, the (more) generous bonus structure lessens the political opposition states might otherwise mount in the face of a proposed shift in power back to Washington. I have argued that Congress subverted its own substantive and rhetorical aims when it decided to abdicate nearly complete authority over welfare reform, and thus I recommend the need to reconceptualize welfare policy (and federalism) to correct those distortions.