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FEDERALISM, WELFARE REFORM, AND THE MINORITY POOR: ACCOUNTING FOR THE TYRANNY OF STATE MAJORITIES

Sheryll D. Cashin*

The ideals of federalism contributed significantly to the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which repealed the AFDC entitlement program and devolved broad authority to the states to design and administer programs for welfare reform. Professor Cashin challenges the federalist, a priori assumption that states are the natural situs of policy authority concerning the poor. She argues that the Act is likely to yield harmful consequences for the poor—especially the minority poor—because the political economy of state decisionmaking is more hostile to redistributive aims than is that of national decisionmaking.

The Article tests the conventional normative theories in support of federalism against the empirical reality of state decisionmaking, and concludes that such broad decentralization is not normatively justified. Marshaling empirical evidence of the risk of a "tyranny of the majority," by which local prejudices go unchecked, Professor Cashin argues that if Congress wants to ensure that welfare reform is pursued in a manner that actually meets its core purpose of reducing welfare dependency, it will need to be more interventionist in directing state action. Thus, the Article offers an alternative vision of decentralization, arguing for a more aggressive framework of national standards or incentives that would insulate the disadvantaged poor from the tyranny of the advantaged majority. At the same time, however, the Article endorses giving states free reign on all policy design decisions beyond this level of fundamental national standards, arguing that, as regards these remaining issues, the potential benefits of decentralization outweigh its potential risks to the poor.

INTRODUCTION

The question of a relation of the states to the federal government is the cardinal question of our constitutional system.

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[It cannot be settled by] one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.¹

While a few states have made choices which can improve the lives of poor families in their states, most are disinvesting in the poor.²

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("the Personal Responsibility Act" or "the Act")³ repeals a 60-year-old federal entitlement program that guaranteed income support to all individuals who met nationally-defined eligibility criteria, replacing it with fixed lump-sum payments to the states, known as block grants.⁴ The new block grant program, entitled Temporary Assistance to Needy Families ("TANF"), gives broad discretion to the states to design and administer welfare programs. Subject to various statutory limitations, the states may determine who is eligible for assistance, what kind of assistance—cash or otherwise—will be provided, how long assistance will be provided, and the terms and conditions on which assistance will be provided. The stated purpose of the Act is "to increase the flexibility of States" in operating a program that will, *inter alia*, "provide assistance to needy families so that children may be cared for" and "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage."⁵ One major strain of political rhetoric animating the passage of the Act was that of political federalism—an *a priori* presumption that, in the absence of compelling justifications for national authority, states are the natural situs of all policy authority.⁶

The manner in which federalism rhetoric was used in congressional debates, however, reflects an important ambiguity regarding Congress's

1. Woodrow Wilson, *Constitutional Government in the United States* 173 (Colum. U. Press 1961) (1908).

2. Tufts University Center on Hunger and Poverty, *Are States Improving the Lives of Poor Families? A Scale Measure of State Welfare Policies* 2 (1998) [hereinafter *Tufts Study*].

3. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

4. The Aid to Families with Dependent Children (AFDC) program was an "entitlement" in the sense that families with children who met the statutory definition of eligibility were guaranteed income support under the program, provided their state chose to participate in the program. See 45 C.F.R. § 233.20(a)(1) (1996). States were allowed, however, to set their own benefit levels. See *id.* § 233.20(a)(2).

5. 42 U.S.C. § 601 (Supp. II 1996).

6. See Newt Gingrich, *To Renew America* 9 (1995) ("'Closer is better' should be the rule of thumb for our decision making; less power in Washington and more back home, our consistent theme."); Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 *Yale L. & Pol'y Rev.* 227, 239–40 (1996) (Symposium Issue) (explaining the "federalism creed" whereby in the late nineteenth century "most American political leaders regularly paid lip service to the idea that smaller government was better than larger" and that power rightly resided in the states).

motivations in passing the Act. On the one hand, many Democrats and Republicans who supported the Act invoked federalist ideals in arguing that decentralizing power to the states 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, and they desired that this happen in a manner that *actually* increases employment, marriage, and responsibility among the welfare population.⁷ On the other hand, more conservative members often used federalist rhetoric to defend the bill while also pursuing an agenda of reducing federal spending for redistributive programs. In other words, for these members, federalism may have provided a neutral framework for the substantive aim of cutting redistributive spending and retrenching the welfare state, regardless of the consequences for the welfare population.⁸ In either case, federalism, with its *a priori* pro-state bias, contributed significantly to the Act's political appeal, and hence, to its passage.

This Article challenges the *a priori* assumption that states are the natural situs of policy authority concerning the poor. It argues that by decentralizing fundamental redistributive questions to the states—submitting them to each state's majoritarian political consensus—the Act is likely to produce consequences inconsistent with its stated purpose of “provid[ing] assistance to needy families so that children may be cared for.”⁹ In other words, empirical evidence suggests that, for an identical set of underlying voter preferences with respect to redistribution, a different policy outcome will be reached depending on the level of government at which a decision is made. At the voting booth, voters exact a higher price against state, as opposed to federal, officials for increases in social welfare spending. Similarly, the risk that negative but popular biases against welfare recipients—particularly racial biases—will color pol-

7. See, e.g., 142 Cong. Rec. E1453 (daily ed. July 31, 1996) (Statement of Rep. Morella) (“I support welfare reform that moves recipients from welfare to work and encourages personal responsibility. This legislation does that, allowing States to try new approaches that meet the needs of their recipients.”); id. at E1539 (statement of Rep. Bishop) (“By going forward with welfare reform, we are . . . replacing [AFDC] with a new system which will provide the essential tools recipients need to move from welfare to work.”); id. at S9394 (statement of Sen. Hatch) (“Today, we send the states the authority to design their own programs for the needy. We move one step further away from the one-size-fits-all approach that comes from a Federal bureaucracy far removed from individual state governments and constituencies. . . . This bill will . . . allow the States to continue to design comprehensive programs to address their unique constituencies, needs, and resources.”).

8. See, e.g., id. at S9389 (statement of Sen. Helms) (“[The welfare bill] will effectively drive a nail in the coffin of the Great Society. . . . [It] is fair to taxpayers because it saves \$55 billion of taxpayers’ money. . . . Taxpayers are sick and tired of working hard, paying taxes and watching folks on welfare get a free ride.”); id. at H9393 (statement of Rep. Solomon) (“The citizens of the States, in whom I have the utmost confidence, will be finally [sic] free to use local solutions to help low-income families in their neighborhoods. . . . The way to effect change for those who suffer in poverty . . . [is to] emphasize welfare as a temporary boost . . .”).

9. 42 U.S.C. § 601(a)(1).

icy decisions appears to heighten as decisions are moved closer to the people. This risk of a "tyranny of the majority," by which local prejudices go unchecked by any outside forces, was a key concern animating James Madison's vision of a two-tiered system of national and state government.¹⁰ This Article argues that if Congress wants to ensure that welfare reform is pursued in a manner that actually meets the core purposes of the Act, then it will need to be more interventionist by including more national standards or incentives that direct state action. In the absence of such national standards, the Act threatens to eviscerate the social safety net and bring about less redistribution—just as some of the more conservative members may have intended.

Building on the premise that state-level political processes provide worse environments than the national political arena for deciding fundamental questions about redistribution, this Article offers an alternative vision of decentralization that attempts to insulate the disadvantaged poor from the tyranny of state political majorities. In light of these risks of majority tyranny, the Article argues for a more aggressive framework of national standards or incentives that would insulate susceptible decisions from state politics. At the same time, this alternative vision recognizes that decentralization has important salutary benefits, chief among them being that experimentation born of a diversity of state approaches increases the likelihood of discovering how best to solve difficult social problems. The Article recommends giving states free reign on all remaining policy design decisions because, beyond the fundamental redistributive choices, there is less likelihood of distorting political competition, and the potential benefits of decentralization outweigh the risks to the poor.

Part I presents an overview of the Act and the changed incentive structure it creates both for welfare recipients and for states. It introduces the categories of program and policy choices states face under the Act and describes how the Act puts middle income voters in direct competition with welfare recipients for the federal dollars allocated under the TANF block grant program. Part II describes how federalism rhetoric has been used historically to justify new block grant programs that devolve important policy authority to states, and the increasing trend toward devolution to the states of policies affecting the poor. It then sets out in more detail the conventional defenses of federalism offered by the Supreme Court, legal academics, and some members of Congress—arguments which contribute to a quasi-constitutional bias, even in the political arena, in favor of vesting important policy authority in the states. Part II

10. See *The Federalist* No. 10 (James Madison); see also *The Federalist* No. 3 (John Jay) (noting the slaughter of innocent Indian inhabitants provoked by the improper conduct of certain states); Alexis de Tocqueville, *Democracy in America* 256 (Phillips Bradley ed., Alfred A. Knopf 1945) (1835) (noting the prodigious actual authority and power of the majority and the danger that ensues when no obstacles exist to impede or retard it).

concludes that a context-specific empirical examination of the political processes and institutional strengths of each level of government is more useful than any theory of federalism for determining which types of decisions ought to be made at each level. Part III analyzes the political economy of state decisionmaking, drawing on empirical literature to support the thesis that the state level provides a worse environment than the national arena for deciding fundamental questions about redistribution. In particular, it highlights the risk that racial animus may be influencing state policy choices regarding welfare. It then surveys the reasons why low-income interest groups are likely to be more effective at the national level than in state political fora, including that the possibilities for interest group formation and influence are enhanced by economies of scale and that public choice problems are minimized because voters show more willingness to accept redistributive spending at the national level. Part IV analyzes the risks presented under the Act of suburban voter dominance in the shaping of state welfare plans, examining existing research on such plans and anecdotal examples from poorly-rated, highly-rated, and middle-ground states. Part V presents an alternative vision of decentralization for welfare programs that builds on the demonstrated institutional strengths of national and state government, while shielding politically weak, low-income persons from potential state majority tyranny. In this way, the Article distinguishes between federalism on the one hand and managerial decentralization on the other. One can reject the often romantic, uninformed assumptions that come with federalism's *a priori* pro-state bias without giving up the benefits of decentralization and state experimentation.¹¹

The insights of this Article complement another predominant argument for national-level primacy over redistributive policy choices: that devolution of welfare responsibility induces a "race to the bottom" because of an inverse inter-state competition to avoid becoming welfare

11. This Article challenges the legitimacy of devolving fundamental redistributive policy authority to the states. For several reasons, it is not necessary, as a condition precedent to this enterprise, to make the case for why the nation should have redistributive policies. First, it warrants emphasis that Congress, in passing the Act, did not decide to do away altogether with redistributive social welfare spending (at least not for U.S. citizens; the provisions eliminating public benefits for certain legal aliens do, however, cease a national commitment to providing a safety net for some classes of individuals). Congress *did*, however, decide, and President Clinton agreed, to shift the center of gravity on fashioning welfare policies from the federal to the state level. It is this decision that provides the impetus for this Article. Second, there is an ample literature supporting the need for redistribution or an adequate social safety net and any further elaboration would be beyond the scope of this Article. See, e.g., National Conference of Catholic Bishops, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* (1986); John Rawls, *A Theory of Justice* (1971); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983); see also Robert Nozick, *Anarchy, State, and Utopia* 231 (1974) (acknowledging that, in order to rectify historic injustices, society might need to be organized "so as to maximize the position of whatever group ends up least well-off in the society").

magnets.¹² Paul Peterson and others argue that the fierce inter-state and inter-city competition for high tax-paying firms and people constrain state and local governments from pursuing redistributive policies.¹³ Explicit in this literature is a recognition that, if left to their own devices, lower level governments cannot be trusted to pursue redistributive aims with vigor. To do so would be economically irrational. But while Peterson's theoretical justification for the primacy of the federal government over redistributive policy is premised in large part on economic competition and avoidance of a "race-to-the-bottom," this Article focuses on the empirical evidence of political process failures and public choice problems at the state level.¹⁴ Together, the two arguments provide a

12. See Paul E. Peterson, *The Price of Federalism* 121–24 (1995) [hereinafter Peterson, *Price of Federalism*]; Paul E. Peterson, *Devolution's Price*, 14 *Yale L. & Pol'y Rev.* 111, 116–118 (1996) (Symposium Issue) [hereinafter, Peterson, *Devolution's Price*] (noting, *inter alia*, a 42% reduction by states in welfare benefit levels between 1970 and 1993). Peterson predicts that, in the absence of recessionary forces, the new welfare reform law will result in a "stately walk," rather than a "race," to the bottom as states continue to make incremental downward adjustments in response to inter-state differences. See *id.* at 120.

Peterson also argues, however, that Republican leaders are correct when they attempt to give states and localities custody over basic public services and other programs that foster economic development—the inter-jurisdictional competition for economic growth *enhances* local capacity to pursue these aims efficiently. See Peterson, *Price of Federalism*, *supra*, at 18–19, 180.

13. See Paul Kantor, *The Dependent City Revisited* 5–14, 95–99 (Westview Press 1995) (1988) (arguing that cities are dependent on the business location decisions of multilocal corporations, and that this forces cities to compete with each other to provide economic environments that attract these highly-mobile corporations, at the expense of the general welfare); Paul E. Peterson, *City Limits* 69–72 (1981) (arguing that local and state governments will be motivated to engage in developmental and allocative policies, and reluctant to pursue policies that redistribute wealth and income because the former support and the latter retard their economic growth).

14. In non-welfare contexts there is a considerable literature debating the legitimacy of "race-to-the-bottom" justifications for national regulatory standards. See, e.g., Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 *Harv. L. Rev.* 1435, 1437–42 (1992) (arguing for "substantial expansion of the role of federal law" because of failures in state competition in certain areas); Daniel R. Fischel et al., *The Regulation of Banks and Bank Holding Companies*, 73 *Va. L. Rev.* 301, 335 (1987) (arguing that competition among banks is beneficial and does not promote a race-to-the-bottom); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 *N.Y.U. L. Rev.* 1210 (1992); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. Legal Stud.* 251, 262–73, 290–92 (1977) (arguing that market forces determine corporate managers' decisions and that federal standards are necessary to avoid a race-to-the-bottom).

This Article does not contest the legitimacy of the race-to-the-bottom justification for national welfare standards. Instead, it offers a second, complementary rationale based upon public choice analysis. Cf. Revesz, *supra*, at 1223–24 & n.38 (contesting the legitimacy of the race-to-the-bottom justification for national environmental regulation, but acknowledging that conceptually distinct public choice arguments about the failures of state political processes and the better functioning of national-level political processes might offer a legitimate rationale).

much fuller explanation for why fundamental policy choices about redistribution are best made at the national level. In addition, by enriching the discussion with an empirical examination of political processes, this Article adds to the small body of literature concerning how federalism actually works in practice.¹⁵ In particular, few federalism scholars have attempted to test theories of federalism by examining the influence of politics on state policy choices. For, as one author put it, "any theory [of federalism] that fails adequately to take actual political experience into account isn't likely to be worth much."¹⁶

I. THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY ACT OF 1996

This Part presents an overview of the primary goals and provisions of the Act, underscoring the program and policy choices conferred on states. It then summarizes the reasons why this broad decentralization of authority may undermine the purported goals of the Act. As noted, the Act replaced the AFDC entitlement program with a new block grant program, TANF. The Act states a general purpose of "increas[ing] the flexibility of States in operating [the TANF] program," and it sets out four substantive goals for the program: to "(1) provide assistance to needy families so that children may be cared for in their own homes . . . ; (2) end the dependence of needy parents on government benefits . . . ; (3) prevent and reduce the incidence of out-of-wedlock pregnancies . . . ; and (4) encourage the formation and maintenance of two-parent families."¹⁷ In particular, states are charged with ending welfare dependence "by promoting job preparation, work, and marriage."¹⁸ The Conference report on the TANF law signals several congressional concerns. First and foremost, the report emphasizes that the Act "promotes work over welfare and self-reliance over dependency," thus offering "a helping hand, not a handout" to those who need it.¹⁹ It also emphasizes that "the historic step of eliminating a Federal entitlement program—Aid to Families with Dependent Children—and replacing it with a block grant . . . restores the States' fundamental role in assisting needy families."²⁰ Finally, the report takes pains to underscore that the Act is not intended to eliminate the safety net for poor children.

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 recog-

15. See Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1490 (1994) (noting that while "[t]here is an impressive body of work on the *value* of federalism there is very "[l]ittle on how federalism really works").

16. *Id.* at 1491.

17. 42 U.S.C. § 601(a) (Supp. II 1996).

18. *Id.*

19. H.R.Conf. Rep. No. 104-725, at 261 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, at 2649.

20. *Id.*

nizes the vulnerability of America's children. It guarantees that they will continue to receive the support they need.²¹

One of the primary means for achieving the Act's substantive goals is broad decentralization of power to the States. Under the TANF program, each state receives flexible block grant funds, and the Act requires states to devote to TANF assistance no less than 80% of what they spent in fiscal year 1994 for AFDC.²² Instead of a federally-defined entitlement of assistance, each state now has the discretion to define its own "objective criteria" for deciding who will receive TANF assistance, subject to constitutional limitations and a statutory requirement of "fair and equitable treatment."²³ Compared to the AFDC program, the Act dramatically changes the incentive structure both for welfare recipients and for states. For welfare recipients, TANF requires, first, that recipients eventually work or participate in work-related activities as a condition of receiving benefits,²⁴ and second, that welfare benefits be time-limited.²⁵

The changed incentive structure for states is threefold: (1) the states can keep all of the potential fiscal savings that flow from reducing welfare costs because they receive a set amount of funds, regardless of caseloads, under the TANF block grant;²⁶ (2) states are now held to clear perform-

21. *Id.* The report does not identify the protections to which it is referring. It may, however, be referring to the Act's exemption from lifetime eligibility limits for up to 20% of a state's caseload, see *infra* note 25, or the fact that families who are terminated from TANF assistance continue to be eligible for Medicaid and food stamps, see *infra* note 22I and accompanying text.

22. States can provide as little as 75% of fiscal year 1994 expenditures if they meet the work participation requirements set out under the Act. See 42 U.S.C. § 609 (Supp. II 1996).

23. *Id.* § 602. Although states are empowered to define eligibility requirements for welfare assistance, the Act bars states from using federal grant funds to provide assistance to certain classes of individuals, including teenage parents who do not attend high school or training programs, see *id.* § 608, and teenage parents not living in adult-supervised settings, see *id.* Legal immigrants who entered the country after Aug. 22, 1996 are also barred from receiving federally funded welfare or other public benefits. See 8 U.S.C. §§ 1601–1631 (Supp. III 1997), as amended by Balanced Budget Act, Pub. L. No. 105–33, §§ 5301–02, 5561–82, 111 Stat. 251, 638–43 (codified in scattered sections of 8 U.S.C. (Supp. III 1997)).

24. The Act requires that welfare recipients begin participating in qualified work activities within 24 months of receiving benefits or within a shorter period set by the states. See 42 U.S.C. § 601 (Supp. II 1996). Examples of qualified work activities include unsubsidized employment, subsidized private sector employment, on-the-job training, community service, and vocational and educational training. See *id.* § 607. Welfare recipients must engage in one of the designated activities for at least 20 hours per week. See *id.*

25. The Act also requires a cumulative lifetime limit of five years on benefits paid to an individual with federal money, or a shorter lifetime limit set by states, although states may exempt up to 20% of their caseload from the lifetime limit. See *id.* § 608. And states may elect to use state money to continue providing benefits to recipients who have met the lifetime limit. See *id.*

26. For fiscal years 1996 through 2002, the amount of federal funds states receive is tied to the amount they received under the AFDC program in previous years—i.e., the

ance standards—they must meet Congress's performance targets for getting welfare recipients into qualified work activities, or suffer financial penalties;²⁷ but (3) outside of a few socially conservative congressional mandates,²⁸ states have very broad discretion on how to spend TANF funds.²⁹ Indeed, the law confers a "bewildering array of choices"³⁰ on states and has been described as "excessively flexible on what [states] can do with the block-grant funds."³¹

greater of the amount received in fiscal year 1994, fiscal year 1995, or the average it received over years 1992–1994. See id. § 603. While the Act requires the Secretary of Health and Human Services (HHS) to reduce the block grant amount if a state fails to comply with certain requirements—e.g., work participation rates, reporting requirements, and maintenance of effort levels—no reduction is mandated for declining caseloads. See id. § 609.

27. The Act imposes a timetable for work participation by TANF recipients, with attendant economic penalties to states for noncompliance. Unless a state was granted a waiver prior to enactment of the Act that allowed for experimentation on work requirements, a state's block grant will be cut by 5% if 25% of its welfare recipients are not "working" by fiscal year 1997. See id. §§ 609, 615. Each subsequent year, the state can lose an additional 2% of funds if it does not place more people into work, according to thresholds set out in the Act. For example, by fiscal year 2002, 50% of the state's welfare recipients must be meeting the work participation requirements. See 42 U.S.C. § 607(a)(1) (Supp. II 1996).

28. For example, to be eligible for assistance, teenage parents must attend high school or an equivalent training program and live in adult-supervised settings. See id. § 608. The Act also denies assistance to individuals with drug-related convictions, see 21 U.S.C. § 862A (Supp. III 1997) and to probation or parole violators, see 42 U.S.C. § 608.

29. TANF funds may be used "in any manner that is reasonably calculated to accomplish the purpose" of the Act, although no more than 15% of the funds may be spent on administration. See id.

30. Peter Edelman, *The Worst Thing Bill Clinton Has Done*, *The Atlantic Monthly*, Mar. 1997, at 49.

31. Id. at 56. States could, for example, stop providing cash assistance to beneficiaries altogether, replacing income support with in-kind voucher assistance. See 42 U.S.C. § 1397A (Supp. II 1996). They could transfer up to 30% of TANF block grant funds to other social service programs, see id. § 604, delegate all program design and administration decisions to local governments, see id. § 602 (declaring that States do not have to treat all political subdivisions in a "uniform manner"), deny additional benefits for a new child born to a welfare recipient, see id. § 601 note (stating that TANF funds are "subject to appropriation by the State legislature, consistent with the terms and conditions required under such provisions of law"), and set tougher work requirements and shorter time limits for lifetime eligibility than those imposed by the Act. See Robert Pear, *So Far, States Aren't Rewriting the Book on Welfare Plans*, *N.Y. Times*, Oct. 15, 1996, at A21 (noting that these options are not precluded by the Act). The Act also gave states the power to give lower benefits to new state residents. See 42 U.S.C. § 602. The Supreme Court, however, recently ruled that this practice is unconstitutional because it violates the Privileges and Immunities Clause. See *Saenz v. Doe*, No. 98-97, WL 303743 (U.S. May 17, 1999).

States even have latitude as to what procedural protections will be offered to TANF recipients regarding adverse decisions. The statute states only that the state "shall set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment, including an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process." 42 U.S.C. § 602. In contrast, under prior law, states

There are five general categories of program and policy choices states face under the Act: (1) setting benefit levels and eligibility criteria;³² (2) setting time limits for welfare benefits;³³ (3) defining work requirements and sanctions for noncompliance;³⁴ (4) deciding what type of assistance to offer welfare recipients to help them prepare for and find

were required, for example, to provide benefits to eligible applicants within 45 days of submission of an application, with prorated payments retroactive to the first of the month. See 45 C.F.R. § 206.10(a)(3)(1) (1996); Aid to Families with Children Act, 42 U.S.C. § 602(a)(10)(B) (1994). Furthermore, it is unclear whether the procedural protections afforded under *Goldberg v. Kelly*, 397 U.S. 254 (1970), which barred termination of welfare assistance without a quasi-judicial, pre-termination hearing, would apply once a beneficiary begins receiving assistance under the new welfare regime. But see Cynthia R. Farina, On Misusing "Revolution" and "Reform": Procedural Due Process and The New Welfare Act, 50 Admin. L. Rev. 591, 622-23 (1998) (arguing that the *Goldberg* protections should survive because state welfare laws will necessarily specify substantive standards that constrain official discretion, thereby providing the "entitlement" necessary to trigger the *Goldberg* protections).

32. This category includes determining income eligibility limits, whether to impose a "family cap" barring additional benefits for additional children born to recipients, whether and how much of collected child support payments should be "passed through" to the welfare recipient, and whether to provide assistance to convicted drug felons or newly arrived legal immigrants. See Tufts Study, *supra* note 2, at 13-14, app. B, pt. I.A. Regarding eligibility, for example, under AFDC, recipients were subject to two nationally-determined income eligibility tests: a test for maximum gross income and a test for maximum net income (i.e., income after application of earned income disregards). The Personal Responsibility Act did not specify the income eligibility tests that states were to use under TANF, and this implicitly gave states the flexibility either to maintain the AFDC eligibility rules or create new ones. The Act also eliminated additional eligibility requirements that had been applied to two-parent families under the old AFDC law. See The Urban Institute, *One Year After Federal Welfare Reform: A Description of State Temporary Assistance for Needy Families (TANF) Decisions as of October 1997*, at III-5, III-12 (1998) [hereinafter *One Year After*].

Under AFDC, states were also required to provide cash assistance to all eligible families. The states had the authority to set the benefit levels, which were to be based on need standards established by each state, and which reflected the state's definition of the cost of meeting basic living needs for families of various sizes. States were not required, however, to set benefit levels at amounts equal to the full need standard, and therefore benefit levels typically fell short of these standards. The TANF law implicitly removed any requirement that states set benefit levels as a proportion of family needs and any requirement that benefits be paid in cash. See *id.* at VI-1.

33. This category includes determining: whether to set a lifetime limit on welfare benefits that is shorter than the federally-mandated maximum of 60 months; whether to continue providing assistance with state funds after the lifetime limit has been reached; and whether to provide for exemptions from or extensions to the lifetime limit. See Tufts Study, *supra* note 2, at 14, app. B, pt. I.B.

34. The Act requires that all adult recipients participate in state-defined work activities within 24 months of receiving benefits or such lesser period set by the states. See *supra* note 18 and accompanying text. This category of decisions includes determining whether to impose work requirements sooner than the federal 24 month limit; whether to exempt single parents with young children from the work requirements; the age of the youngest child for which such exemptions should be available; and the sanctions that will apply for non-compliance with work requirements, including the possibility of terminating all benefits to the entire family. See Tufts Study, *supra* note 2, at 15, app. B, pt. I.C.

work;³⁵ and (5) developing standards and programs to enhance income and asset-development options for welfare recipients who are working and transitioning off welfare.³⁶ As a consequence of this newly-conferred discretion, state governments have become the primary battleground for formulating the nation's welfare policies.

This broad decentralization of policy authority, however, may be undermining the substantive goals of the Act. As argued below in Part III, the political economy of state decisionmaking is more hostile to social welfare spending than is such decisionmaking at the national level. Furthermore, the usual antipathy of state voters to welfare spending may be exacerbated by the fact that poverty and non-poverty interest groups now compete for the potential budget savings flowing from the Act. The Act invites this competition in three ways.

First, the Act has resulted in a cash windfall for states, created by a substantial decline in caseloads.³⁷ Once a state has reached its required 80% maintenance-of-effort target for spending on welfare-related activities sanctioned under the Act, it can redirect the TANF surplus as it sees fit, including to general tax relief.³⁸ States therefore have an economic

35. An alternative to work mandates and sanctions as a means of aiding the transition from welfare to work is providing positive incentives such as intensive case management, job search assistance, social service supports (e.g., drug treatment and comprehensive counseling), transportation assistance, and additional or specialized educational training. States have broad discretion concerning the mix of services or resources that will be made available to assist welfare recipients using TANF or state dollars, including, for example, determining what transitional supports (e.g., child care, health care) are available after a recipient leaves the welfare rolls. See *id.* at 15-16, app. B, pt. I.D.

36. See *id.* at 16-17, app. B, pt. I.E. Under AFDC, recipients could not accumulate more than \$1000 in savings without losing eligibility, nor could they own a car valued at more than \$1500. The Act gives states flexibility to set their own asset rules, and authorizes states to set up Individual Development Account programs, whereby welfare recipients are allowed to accumulate additional savings in a restricted account set aside for a specific purpose, such as education. See *One Year After*, *supra* note 32, at III-1, VI-4.

37. The Act allocates each state's block grant funding based upon the state's caseloads in fiscal year 1994. See 42 U.S.C. § 603(a)(1) (Supp. II 1996). But caseloads have dropped nationally by 35% since the Act was passed in July 1996. See Administration for Children and Families, Dept. of Health and Human Services, *Change in Welfare Caseloads Since Enactment of the New Welfare Law* (updated Jan. 1999) <<http://www.ac.dhhs.gov/news/stats/aug-sep.htm>> (on file with the *Columbia Law Review*). Thus the Act dramatically accelerated a trend that began in 1995, when caseloads dropped 7%, and continued with an 11% drop in 1996. Because caseloads fell considerably in many states, most states have experienced a windfall. See Dane Smith, *Minnesota's Not the Only State Rolling in the Dough*, *Star-Tribune*, Feb. 23, 1997, at 1 (quoting Scott Mackey, a National Conference of State Legislatures (NCSL) analyst).

38. This redirection is achieved by using surplus TANF dollars to cover the costs of activities, formally paid for with state dollars, that meet the broad TANF requirements, and then diverting the freed-up state dollars to other state priorities or the state general fund. See Dana Milbank, *U.S. Funds from Overhaul of Welfare Fatten States*, *Wall St. J.*, Nov. 14, 1997, at A20. See also Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, *J. Econ. Persp.*, Fall 1997, at 43, 56-57 (analyzing the leeway provided to states by the Welfare Reform Act of 1996 under three identified principles of federalism: democratic, economic, and cooperative federalism); *supra* note 31.

incentive to take actions—for example, strict time limits and sanctions requirements—that will reduce caseloads and create fiscal savings. Indeed, in the year following passage of the Act, many state Governors attempted to reduce welfare spending and channel savings to other state priorities.³⁹

Second, the range of activities that qualify for TANF funding is so broad that TANF dollars can be reallocated away from providing direct income support to welfare recipients, and toward programs that provide indirect benefits to recipients, such as job training, child care, and teen pregnancy prevention.⁴⁰ In light of this discretion, “TANF monies are likely to be highly fungible out of direct income support, *if that is what a state’s politics prefers*.”⁴¹ Even the 80% spending target, it has been argued, may provide only a weak constraint because “state and local governments are very clever in labeling programs to circumvent federal regulations”⁴² and “[c]entral government rules on state budget allocations are typically very difficult to enforce.”⁴³

Finally, each state’s TANF allocation is not indexed for inflation, and since the Act provides only modest protection against a recession-induced rise in caseloads,⁴⁴ welfare recipients are left particularly exposed to the preferences of state politics in times of recession. By capping the block grant allocation and eliminating the concept of federal aid that matches

39. For example, in fiscal year 1997, New York redirected \$455 million of its \$730 million windfall to state and local fiscal relief. See Jason DeParle, Success, and Frustration, as Welfare Rules Change—Lessons Learned, N.Y. Times, Dec. 30, 1997, at A17. In California, which accounts for one-fifth of the nation’s welfare caseload, the state expected to receive \$820 million more in fiscal years 1997 and 1998 than it would have under the old AFDC law. Of that amount, Gov. Pete Wilson proposed to rechannel \$562 million to “other high-priority General Fund needs.” See Center for Law and Social Policy, CLASP Update: A CLASP Report on Welfare Reform Developments 23 (Feb. 1, 1997). For similar examples of early state budget fights, see *id.* at 20 (noting that when New Jersey found itself with a \$44 million surplus in its welfare program in fiscal year 1996, Governor Christine Todd Whitman proposed to spend only \$14.7 million of these funds for welfare). See also, Jonathan Rabinovitz, Rowland Sees Welfare Aid As Means to Income Tax Cut, N.Y. Times, Mar. 22, 1997, at B26 (reporting that Connecticut Governor Rowland proposed using block grant funds as means to cut state income taxes).

40. See Inman & Rubinfeld, *supra* note 38, at 56 n.16; *supra* note 31.

41. Inman & Rubinfeld, *supra* note 38, at 56 (emphasis added).

42. *Id.* at 56 n.16 (citing the example of a Pennsylvania high school district that reclassified fourth year AP Spanish as a bilingual language program to qualify for federal low-income education aid). There is a risk, therefore, that “state welfare spending will become fully fungible [such that] each additional dollar spent on welfare will imply an opportunity cost to the state of \$1.” *Id.*

43. *Id.* at 58 n.19.

44. The Act provides for a \$2 billion reserve fund that would be allocated to states in the event of a recession. See 42 U.S.C. § 603(b)(2) (Supp. II 1996). However, “the \$2 billion reserve would have covered only about one-third of the increase in AFDC spending which occurred during the mild 1991–1992 recession.” Inman & Rubinfeld, *supra* note 38, at 57 n.16.

state expenditures on behalf of welfare recipients,⁴⁵ the Act "significantly raises the cost to the middle class voters of including lower-income families in any budget coalition."⁴⁶ Thus, for state actors exercising the discretion accorded under the TANF block grant, politics can matter a great deal. In the realm of state fiscal allocations that occur under a block grant, the state official and the utility maximizing resident voter enter into a game of fiscal choice:

Each player is given the "right to play" and must negotiate an outcome. Suddenly, it is not just [voter] preferences and a budget constraint that determine local fiscal allocations; the rules of the game matter too. Who are the players? What are their standing and rights within the budgetary game? How will conflicts be resolved? These are political questions and they require political analysis for answers.⁴⁷

The politics of welfare reform is necessarily that of redistributive politics. It involves the shifting of resources from taxpayers to the poor, and some types of reforms require more resources than others. As such, the debates over welfare reform are likely to be "highly and overtly conflictual."⁴⁸

Given the competition engendered by the Act 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. For the drafters of the Act, charitably understood, these risks were outweighed by their concerns with administrative efficiency. In the view of many in Congress, decentralizing power would increase the chances of achieving the Act's stated performance goal of reducing welfare dependency through job preparation and work. The rhetoric and values of federalism, therefore, may have blinded many members of Congress to the risks of complete decen-

45. Under the prior law, the federal government picked up at least 50% of a state's expenditures on AFDC benefits. See 42 U.S.C. § 603. Thus, rich states received one dollar of federal funds for each dollar of state funds spent on AFDC (a one-to-one match) and poorer states received even more in matched funds. See C. Eugene Steuerle & Gordon Mermin, *Urban Institute, Devolution as Seen from the Budget* 3 (1998).

46. Inman & Rubinfeld, *supra* note 38, at 59. Arguably, the Act renders welfare recipients in the urban core particularly isolated from potential budget coalitions, because older central cities, with a surfeit of poor people and a declining share of low-skilled jobs, may require additional resources to meet the work participation requirements set out in the Act. See, e.g., The United States Conference of Mayors, *Implementing Welfare Reform in America's Cities, A 34-City Survey*, at 9 (1997) (92% of cities able to provide jobs data indicated that they will not have a sufficient number of low-skill jobs to enable compliance with the welfare law's work participation requirements).

47. Steven G. Craig & Robert P. Inman, *Education, Welfare and the "New" Federalism: State Budgeting in a Federalist Public Economy*, in *Studies in State and Local Public Finance* 193 (Harvey S. Rosen ed., 1986).

48. Donald F. Norris & Lyke Thompson, *Introduction: The Politics of Welfare Reform*, in *The Politics of Welfare Reform* 1, 11 (Donald F. Norris & Lyke Thompson eds., 1995).

tralization or, alternatively, it may have helped some members mask their true intent of reducing federal outlays for welfare.⁴⁹

This Article argues that the Act's substantive goals of reducing dependency and caring for poor children are unlikely to be met because many state governors and legislatures will be hard-pressed to resist the full rigors of state budgetary and cultural politics. In other words, reducing welfare dependency in a manner that actually increases employment among the welfare population—as opposed to merely kicking people off the rolls—may require more investment than many state political majorities would countenance. Only a few states, for example, are investing intensively in the welfare system, despite the common wisdom that successful welfare reform (moving people into jobs and out of poverty) requires more investment in the near term.⁵⁰ Instead, many states appear to be relying on negative incentives—such as stringent work rules and sanctions—rather than positive supports to achieve caseload reduction.⁵¹ And this approach, which has succeeded in bringing about dramatic caseload declines, has not brought about an equally dramatic increase in employment of former welfare recipients.⁵² In contrast, implementation of the alternative vision presented in Part V would increase the likelihood of meeting Congress's stated performance goals. For, unlike the present

49. See *infra* notes 54–70 and accompanying text.

50. See, e.g., Department of Health and Human Services, Temporary Assistance for Needy Families (TANF) Program, First Annual Report to Congress 4 (1998) [hereinafter HHS, First Report to Congress] (indicating that only 13 states “spent more per family in 1997 than in 1994, recognizing that a work-based system can require up-front investments”) Department of Health and Human Services Fact Sheet, State Spending Under the New Welfare Reform Law, (visited March, 1998) <<http://www.act.dhhs.gov/programs/opa/facts/finants/htm>> (finding that in fiscal year 1997 only five states spent 100% or more of fiscal year 1994 expenditures, while the majority of states spent the minimum (29 states at 75–80% of FY 1994) or near minimum (7 states at 81–85% of FY 1994) required by the Act); Tufts Study, *supra* note 2, at 2 (noting that only eight states “have implemented policies under their TANF Block Grants that are likely to improve poor families’ economic security in comparison to the old welfare system”); DeParle, *supra* note 39, at A1 (noting that few states are investing in the intensive services needed to assist the most troubled welfare populations to move into work); Robert Pear, States Deciding to Draw Billions in Welfare Money, *N.Y. Times*, Feb. 8, 1999, at A1 (noting that more than half the states failed to use the full amounts of their TANF grants for FY 1998). But because most states have experienced substantial drops in caseloads since 1994, the amount of spending per welfare recipient has risen substantially in most states, even where the state is spending the minimum required under the Act. See National Council of State Legislatures, State Appropriations and Caseload Change for the TANF Block Grant FY98 (1997) (on file with the *Columbia Law Review*). Studies suggest that, among those states that have had the most success in reducing caseloads, the single-most important contributor to that success was additional investment in the caseworker capacity of the state welfare system. See, e.g., John J. Dilulio, Jr. & Donald F. Kettl, *Fine Print: The Contract with America, Devolution, and the Administrative Realities of American Federalism* 50 (The Brookings Institution 1995) (citing Lawrence M. Mead, *The New Paternalism in Action: Welfare Reform in Wisconsin* 3, 73 (Wisconsin Policy Research Institute 1995)).

51. See *infra* text accompanying notes 212–218.

52. See *infra* text accompanying notes 224–230.

version of the Act, the alternative vision would insulate some fundamental redistributive decisions from state majoritarian politics, and thus enhance the possibility of more enlightened reform policies.⁵³

II. FEDERALISM AND THE DEVOLUTION MOVEMENT

This Part begins by presenting a historical perspective on the role of federalism rhetoric in Executive and Legislative attempts to devolve policy authority to the states. Section A recounts how such rhetoric has been used both to promote the decentralization of programs affecting the poor *and* to mask the substantive agenda of some political actors of dismantling federal support for the poor. Section B then examines the conventional defenses of federalism that contribute to a quasi-constitutional norm that, in the absence of compelling reasons for national standards, policy authority ought to be vested in the states. It argues that, in the context of redistribution, only one of the conventional defenses—the experimentation rationale—is truly persuasive. It concludes, therefore, that there is no legitimate normative justification for the sweeping decentralization wrought by the Act. It argues, however, that the experimentation rationale offers a strong argument for managerial decentralization, whereby states are conferred considerable authority within a framework of rigorous national standards.

A. Federalism Rhetoric and the Targeting of Redistributive Policy for Devolution to the States

The political premise for the Personal Responsibility Act was that state governments would do a better job than the federal government in fashioning successful welfare reforms, and that they would be more responsive and accountable to the electorate in doing so. In short, the rhetoric of federalism was instrumental in achieving passage of the Act.⁵⁴ Even in this realm of political federalism unfettered by constitutional constraints,⁵⁵ there is a quasi-constitutional bias toward permitting interstate differences in the absence of compelling justifications for national

53. See *infra* text accompanying notes 294–299.

54. See *supra* notes 7–8 and accompanying text.

55. This Article does not address “constitutional federalism”—the constitutional limits on the federal government’s power to interfere with state functions or sovereignty. Instead, it concerns “political federalism,” the reliance on national political processes to define the appropriate balance of federal-state relations. According to political federalism, Congress must determine, as a prudential and political matter, how much deference it will give to the states. Cf. *South Carolina v. Baker*, 485 U.S. 505, 527–28 (1988) (Stevens, J., concurring) (noting that the court’s decision finding no constitutional bar to congressional taxation of the interest on state and local bonds did not express “any opinion about the wisdom” of such a decision by Congress); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) (finding no constitutional constraints limiting the federal government’s application of wage and hour laws to a local transit authority in part because “[t]he political process ensures that laws that unduly burden the States will not be promulgated [by Congress]”).

standards.⁵⁶ The modern influence of federalism values can be seen in the ascendancy of state governments as the government of favor in current political debates,⁵⁷ opinion polls,⁵⁸ and Supreme Court opinions.⁵⁹ As will be seen, however, the empirical evidence suggests that, with respect to fundamental redistributive decisions, this *a priori* pro-state bias is unwarranted.

Although the unpopularity of the welfare poor may explain the outcome of the welfare reform devolution debate more than any underlying principles of federalism,⁶⁰ the rhetoric of federalism *does* matter in na-

56. See *infra* text accompanying notes 88–93. By “quasi-constitutional bias” I mean that members of Congress will often feel so compelled by federalism values that they will follow this bias as if it were an edict with constitutional force, even though such an outcome is not constitutionally mandated.

57. See, e.g., 142 Cong. Rec. S9353 (daily ed. Aug. 1, 1996) (statement of Sen. Gramm) (“We believe that the Federal Government does not have all the wisdom in the world, and that States should run welfare.”); 142 Cong. Rec. H5208 (daily ed. May 16, 1996) (statement of Rep. Nussle) (“[W]hat we are concerned about is . . . this perpetuation of big government and more programs and more bureaucracy [T]hat has been tried, and we want to get it back to the local level.”); Gingrich, *supra* note 6, at 9; see also Newt Gingrich et al., *Contract With America: The Bold Plan 73* (Ed Gillespie & Bob Schellhas eds., 1994) (“the best welfare solutions come from the states, not Washington, D.C.”).

58. See John D. Donahue, *Disunited States* 13 (1997) (citing polls showing strong public support for enlarging the role of states and belief that state governments “do a better job of running things”); see also Roper Center for Public Opinion Research, *News Interest Index Poll*, Jan. 16, 1997, available in WESTLAW, POLL Database (finding the highest public confidence in state government with respect to establishing welfare rules, providing education to low-income children, and providing job training). But see *id.* (finding strongest public confidence in the federal government with respect to protecting civil rights and providing health care for the disabled, poor, and elderly).

59. See, e.g., *Printz v. United States*, 521 U.S. 98 (1997) (holding that the federal government may not compel state executive officials to implement federal regulatory programs, thus barring as unconstitutional a requirement in the Brady Handgun law that state law enforcement officers conduct background checks on prospective handgun purchasers); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that the Indian Commerce Clause did not grant Congress authority to abrogate a state’s sovereign immunity and therefore that the Indian Gaming Regulatory Act could not grant jurisdiction over a state that did not consent to be sued); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeded Congress’s Commerce Clause authority and noting that states possess primary authority for defining and enforcing criminal laws); *New York v. United States*, 505 U.S. 144 (1992) (holding that provision of Low-Level Radioactive Waste Policy Act, which required states to assume ownership of certain waste or to regulate according to Congress’s instructions, infringed upon state sovereignty, as the Tenth Amendment precludes Congress from commandeering state legislatures); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (upholding a mandatory retirement provision for state judges against federal legislation, reasoning that congressional interference with the authority of state citizens to determine qualifications of their government officials upset the usual constitutional balance of federal and state powers).

60. The politics of devolution is really about the politics of who is deserving. Public attitudes toward some types of persons who depend on welfare for income support (e.g., young women bearing children out of wedlock) have hardened, while other types of people who depend on government income support, e.g., the elderly and the disabled, are

tional political discourse. The federalism discourse surrounding the passage of the Act is but a continuation of a historical tradition of federalism arguments being used in American political discourse to achieve substantive ends and to influence intergovernmental arrangements. From the nineteenth century tradition of "Dual Federalism," when states enjoyed maximum autonomy over matters of state "right" or "sovereignty," to the New Deal introduction of "Cooperative Federalism," where the national government set standards and distributed funds for state experimentation, to the devolutionary "New Federalism" of the current era, where power is being returned to states as part of a national deregulatory movement, the rhetoric of federalism has shaped substantive policy choices.⁶¹ And, unfortunately for African-Americans, a dark truth in our nation's history is that federalism rhetoric was often used effectively to provide a race-neutral framework for political discourse where its proponents' chief substantive end was racial subordination.⁶²

Federalism, therefore, has been used by at least some of its proponents to pursue substantive goals. For example, some would argue that federalism is philosophically linked to the substantive goal of reducing government spending for social welfare.⁶³ Those who have this substantive goal have good reason to believe that states will retreat on redistributive aims,⁶⁴ and therefore, that federalism is a logical means for achieving such ends. That federalism is often used as a stalking-horse for other substantive ends is at least suggested by the lack of consistency among many would-be federalists. Modern devolutionists who embrace the traditional defenses of federalism can also be found supporting nationalization of tort liability rules in ways explicitly designed to reduce the autono-

perceived as deserving. See Mark Rom, *Health and Welfare in the American States*, in *Politics in the American States* 399, 407-08 (Virginia Gray & Herbert Jacob eds., 1996) (noting, inter alia, the differing public perceptions between AFDC "welfare mothers" and social security insurance recipients). Hence, it is not surprising that welfare programs have been decentralized while other income support programs aimed at different populations continue as federal entitlements.

61. For an excellent overview of the historical evolution of federalism and the changing architecture of our intergovernmental system from the Founding to the New Deal to the present, see generally Scheiber, *supra* note 6.

62. See *id.* at 233-34 ("[T]he inescapable conclusion is that federalism protected slavery for the first seven decades of the nation's history. Then, for nearly another century, it served as a reliable fortress for the perpetuation of systematic racial segregation and discrimination.").

63. See Gingrich, *supra* note 6, at 104 (noting that with the Republican effort to decentralize power, "[w]e are trying to reestablish the American value of individual liberty and the citizen's first claim to their own money"). See also Scheiber, *supra* note 6, at 293 ("[a] closer look at the data often demonstrates, as even some of these champions of devolution will concede, that the 'adjustments' consist largely of cutbacks in public services that have fallen hardest upon the people who are poorest and are least able to afford private alternatives").

64. See *supra* text accompanying notes 12-13; *infra* text accompanying notes 128-161.

mous authority of the states.⁶⁵ The cynical view of "federalist" politics,⁶⁶ therefore, may explain the prevalence of federalist rhetoric in the deliberations surrounding the Act. Federalism rhetoric was frequently invoked in a manner that reflected members' intuitive (or ideological) biases—"at bottom, which level of government do you trust to handle the problem"—rather than a principled investigation of the relative competencies of state and federal government.⁶⁷ In the end, the atmospheric values of "Our Federalism"⁶⁸ fueled the successful passage of the Personal Responsibility Act because these values had singular resonance with American voters when applied to the welfare system.⁶⁹

While federalism rhetoric may have provided a neutral smokescreen for those intent on achieving substantial cuts in federal welfare spending,

65. See Timothy Conlan, *New Federalism: Intergovernmental Reform From Nixon to Reagan* 211–17 (1988) (noting the Reagan Administration's support for national rules on, *inter alia*, product liability, trucking standards, and minimum age drinking standards, as well as its litigation to force changes in affirmative action hiring programs instituted by local governments); Gingrich, *supra* note 57, at 146 (proposing national rules for product liability); Scheiber, *supra* note 6, at 290–91 (using example of devolutionists' support for nationalization of tort liability rules to show how other policy concerns can override strict federalist principles).

66. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on A National Neurosis*, 41 *UCLA L. Rev.* 903, 948 (1994) ("Many of the people who say 'federalism' in the 1990s mean gay rights, because the national government's position . . . is so disappointing to them, just as many of the people who said 'state's rights' in the 1950s and 1960s meant 'no civil rights.'").

67. For example, during the conference debate on H.R. 3734, the welfare reform bill that became law, Sen. Phil Gramm (R-TX) said flatly, "We believe that the Federal Government does not have all the wisdom in the world, and that States should run welfare." 142 *Cong. Rec.* S9353 (daily ed. Aug. 1, 1996). The House debate echoed these sentiments. Rep. Jim Nussle (R-IA) stated, "[W]hat we are concerned about is . . . this perpetuation of big government and more programs and more bureaucracy [T]hat has been tried, and we want to get it back to the local level." 142 *Cong. Rec.* H5208 (daily ed. May 16, 1996). Many Democrats, particularly those representing large minority constituencies, were suspicious of federalism's newfound favor in the 104th Congress. For example, Rep. Major Owens (D-NY) decried the Republican proposed Medicaid block grant as "a clear and present threat to the health and life of millions of Americans. By abandoning health care to the States, the Republican budget opens the door to decentralized genocide." *Id.* at H5209.

68. *Younger v. Harris*, 401 U.S. 37, 44 (1971). "While the phrase was used some forty times before, Justice Black was the first to put it in quotes and capitalize it." Judith Resnik, *Afterword: Federalism's Options*, 14 *Yale L. & Pol'y Rev.* 465, 485 n.93 (1996) (Symposium Issue).

69. Polls and studies show that Americans still have a strong appetite for national standards in nearly every aspect of their lives, including matters such as education and crime that have traditionally been understood to be the exclusive province of state and local government. See DiIulio & Kettl, *supra* note 50, at 6–7. When it comes to the welfare system, however, polls show that most Americans believe that states should take the lead in reforming welfare, and, unlike public majorities in Europe, "wide majorities of Americans do *not* believe that it is the government's responsibility to take care of the very poor who cannot take care of themselves. . . ." *Id.* at 8 (citing a Jan. 1995 Wall Street Journal/NBC News Poll for the first proposition and, for the second, the Roper Center for Opinion Research, *The Public Perspective* 5, 7 (Nov./Dec. 1991)).

I am not suggesting that the majority of members had this intent. Many, perhaps most members, supported the Act because they sincerely believed that it would ultimately benefit the poor. My main point is that federalism rhetoric, with its intuitive and popular appeal, may have blinded supporters of the Act to the potential dangers of devolving *complete* welfare policy authority to the states. The recent history of federal block grant proposals demonstrates an increasing trend of national policymakers invoking federalism values to decentralize policy authority affecting the poor, without paying much heed to the very real differences between federal and state government in terms of institutional capacity and political context.

The Personal Responsibility Act represents our national government's latest iteration of "New Federalism," a moniker reintroduced in national political discourse by President Richard Nixon when he proposed a dramatic agenda for decentralizing power in federal-state aid.⁷⁰ Nixon successfully championed passage of the General Revenue Sharing Act of 1972 (GRS) and two of his six block grant proposals, the Comprehensive Employment and Training Act of 1973 (CETA),⁷¹ and the Housing and Community Development Act of 1974 (CDBG).⁷² These programs were premised, at least in part, on a respectful vision of local government as competent to make intelligent choices about local needs. Nixon ceded control of policy areas he perceived to be truly local in nature and provided federal funds to boost local capacity.⁷³ It is important to note that he retained the primacy of the federal government in redistributive, anti-poverty programs—areas for which the national government has unique advantages and fewer constraints relative to state and local governments.⁷⁴

70. A centerpiece of his 1971 domestic agenda, President Nixon's federalism proposal consisted of general revenue sharing and six highly decentralized block grants that would have consolidated 129 programs in the areas of urban community development, rural development, job training, law enforcement, education, and transportation. See Conlan, *supra* note 65, at 31. Declared Nixon, "[i]t is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the states and to the people." *Id.* The term "New Federalism" actually was first used to describe changes in federal-state relations wrought by the New Deal. See, e.g., Jane Perry Clark, *The Rise of a New Federalism: Federal-State Cooperation in the United States* (1938). However, the term has come to be associated with the Nixon and Reagan administration's intergovernmental reforms or any modern effort to devolve significant powers from Washington to lower level governments.

71. 29 U.S.C. § 801 (repealed 1982).

72. 42 U.S.C. § 5301 (1994); see Conlan, *supra* note 65, at 44, 65. "In many ways, general revenue sharing was the principal legacy of Nixon's federalism agenda. . . . GRS provided more than \$6.1 billion a year in no-strings grants to virtually all general purpose governments in the United States." *Id.* at 65.

73. See *id.* at 98.

74. See *supra* text accompanying notes 12–13 (discussing the work of Paul Peterson). Indeed, as part of his federalism agenda, Nixon proposed to "nationalize" welfare by replacing AFDC with a family assistance plan that would provide a federal minimum income payment of \$2400 per year (in 1971) for a family of four. See Conlan, *supra* note

The rhetoric of "New Federalism" was brought to bear once again in 1981, when President Reagan initiated a second wave of devolutionary reforms in the intergovernmental grants system. This time, however, in stark contrast to Nixon, Reagan waged a frontal attack on the federal government's role in social welfare and redistributive policy.⁷⁵ Although he was ultimately stymied in this effort, Reagan did achieve some initial success, passing a federalism package in 1981 that included nine new block grants consolidating 77 categorical programs, and the outright termination of 62 additional categorical programs.⁷⁶ Furthermore, Reagan's block grants to the states were accompanied by a 25% cut in funding, reflecting his admitted intention of using block grants as a first step toward complete elimination of federal participation in many domestic programs.⁷⁷

While Nixon and Reagan invoked federalism to justify their devolution proposals, it is fair to say that motivations other than federalism also animated Nixon and Reagan's block grant proposals. Nixon's block grant strategy, for example, was consciously designed to weaken the federal bureaucracy and disempower constituent groups that had formed around particular categorical block grant programs as a result of direct funding from Washington.⁷⁸ By consolidating individual categorical

65, at 29, 31. "With added day care, job training, and higher federal matching rates, the legislation [Nixon] called for would have raised existing costs of federal welfare spending by \$4 billion annually, while expanding coverage to seven million new working poor recipients." *Id.* at 79. Although the national income floor did not pass, federal spending for food, housing assistance, and medical care for the poor increased by 250% during Nixon's tenure. See *id.* at 81.

75. Under his now-famous "grand swap" proposal, the federal government would have assumed all financial responsibility for Medicaid, in exchange for turning back to the states more than forty other social welfare programs, including AFDC and Food Stamps—two cornerstones of welfare policy in which Nixon had sought to increase federal involvement. See *id.* at 151.

76. See *id.* at 98. This resulted in the consolidation of roughly one-tenth of the 534 categorical grants that existed at the time. See Donahue, *supra* note 58, at 29.

77. Reagan stated, "we are not cutting the budget simply for the sake of sounder financial management. This is only a first step toward returning power to States and communities, only a first step toward reordering the relationship between citizen and government." AK, LA, NM, OK, and TX Advisory Committees to the U.S. Commission on Civil Rights, *The New Wave of Federalism: Block Granting and Civil Rights in the Southwest Region*, x (1983); see also Conlan, *supra* note 65, at 178; George E. Peterson et al., *The Reagan Block Grants, What Have We Learned?* 29–30 (1986). Indeed, Reagan's federalism package included a 25% income tax cut and a multi-year cut of \$130 billion in domestic programs. See Conlan, *supra* note 65, at 98. Reagan's cuts of intergovernmental aid were particularly harsh and were focused on "Great Society" service programs that he viewed as subsidizing activism at local levels. See *id.* at 13, 115, 157–60.

In contrast, Nixon's devolution to states was accompanied by substantial increases in state and local aid and an increase in federal spending for redistributive purposes—a combination designed to enhance the effectiveness of both levels of government in their respective spheres of competence. See *id.* at 12, 29, 222.

78. See Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 *Yale L. & Pol'y Rev.* 297, 309 n.34

grant programs into a single block grant administered by states, various political interest groups were consciously made to compete with each other and no longer had a direct line to Congress.⁷⁹ Block grants also have the inherent advantage of controlling federal financial commitments when, as with the Personal Responsibility Act, they are structured to cap the level of federal expenditures.⁸⁰ In this manner, block grants were used by the Reagan Administration as a predictable way of cutting spending for intergovernmental aid, particularly the Great Society social service programs Reagan opposed.⁸¹ Reagan's federalism rhetoric, it could be argued, helped him achieve his goal of retrenching government at all levels.⁸²

The nation was treated to a third wave of "New Federalism" with the election of a Republican-controlled Congress in 1994. This wave reflected an almost overt hostility toward federal intervention on behalf of the poor. The new Republican majority in the House, for example, proposed even more radical devolution than did Reagan. Where Reagan would have at least retained federal responsibility for Medicaid, House Republicans proposed to give states almost complete control over not just Medicaid, but also food stamps and virtually the entire phalanx of federal programs for the poor.⁸³ Of these proposals, only the welfare and child

(1996) (Symposium Issue). See also Conlan, *supra* note 65, at 31; Kantor, *supra* note 13, at 108.

79. See Conlan, *supra* note 65, at 31-32.

80. See Mashaw & Calsyn, *supra* note 78, at 298-99. The Act caps annual spending for welfare assistance at \$16.4 billion. See 42 U.S.C. § 603(a)(2) (Supp. II 1996); Cong. Budget Office, *Federal Budgetary Implications of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, at 4 (Dec. 1996). The predicted federal savings from the TANF section of the Act are \$569 million in 1997 and \$5.9 billion between 1996 and 2002. See *id.* at 3.

81. See Peterson, *Price of Federalism*, *supra* note 12, at 62-63; Scheiber, *supra* note 6, at 291; *supra* note 77. But see Peterson, *Devolution's Price*, *supra* note 12, at 115 (noting that while Reagan's cuts in intergovernmental aid were substantial, funding for welfare, food stamps, and Medicaid actually increased slightly between 1982 and 1990).

82. See Conlan, *supra* note 65, at 228; Scheiber, *supra* note 6, at 293-94.

83. House Republicans proposed to consolidate 336 individual categorical grant programs, replacing them with eight large block grants covering welfare and foster care, child care, employment and training, social services, food and nutrition, housing, and health. Furthermore, taking the Reagan "block-and-cut" approach to federal downsizing to new extremes, they proposed to cut a massive \$230 billion from domestic programs over seven years. See Neal R. Pierce, *Block These Grants: Plans Will Create Pain, Not True Reform*, *News & Observer* (Raleigh, N.C.), June 25, 1995, at A21, available in 1995 WL 2675389. Although not all eight block grant proposals were formally introduced during the 104th Congress, several were scattered throughout H.R. 4, the "Personal Responsibility Act." See H.R. 4, 104th Cong. §§ 101, 201, 301, 403(a)(3), 321, 341 (1995); H.R. 513, 104th Cong. (1995); H.R. 1200, 104th Cong. (1995). Congressional Republicans also introduced bills to abolish the Departments of Education, Commerce, and Housing and Urban Development outright, claiming that their functions were better left to states. See H.R. 1883, 104th Cong. (1995); H.R. 1756, 104th Cong. (1995); H.R. 2198, 104th Cong. (1995).

care block grants were ultimately enacted as part of the Personal Responsibility Act.⁸⁴

While the revolutionary fervor of the Republican majority has dissipated, its proposals have continued and reinvigorated debate about political federalism and the competence of state governments to undertake policy making authority theretofore wielded by the federal government. Indeed, a degree of consensus has emerged among Republicans and Democrats that the 600-odd federal categorical programs have become too numerous, overly fragmented, and inefficient in their allocations of federal and state/local responsibilities.⁸⁵ In 1995, President Clinton embraced federalism reforms of his own, proposing to consolidate 271 categorical programs into twenty-seven "Performance Partnerships"—results-oriented block grants over which the federal government would retain considerable oversight—in areas such as public health, rural development, education and training, housing and urban development, and transportation.⁸⁶

Members of Congress who supported the Personal Responsibility Act of 1996 in the sincere belief that decentralization would lead to successful

84. See The Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996), *tit.* I & VI. The 104th Congress *did* pass an omnibus budget bill that included most of its social service block grant proposals, including those concerning Medicaid and welfare; however, President Clinton vetoed that bill on January 2, 1996, citing its "damaging structural changes and deep budget cuts that would fall hardest on children and undermine States' ability to move people from welfare to work." H.R. Doc. No. 104-164, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2317.

85. See, e.g., Gingrich, *supra* note 6, at 9; David Osborne, A New Federal Compact: Sorting Out Washington's Proper Role, in *Mandate For Change* 237, 252-54 (Will Marshall & Martin Schram eds., 1993) (supporting devolution in areas where federal action is not strongly justified and proposing "competitive" block grants that distribute federal funds based both on need and the quality of state and local programs); Alice M. Rivlin, *Reviving the American Dream: The Economy, the States, & the Federal Government* 118 (1992) (arguing that many federal programs should be devolved to the states or gradually eliminated, to achieve, *inter alia*, a more efficient allocation of state and federal responsibilities).

86. See Budget of the United States Government, Fiscal Year 1996, at 152-54 (1995). But while President Clinton signed the Personal Responsibility Act and has embraced the idea of devolving more responsibility to the states, Clinton, much like Nixon, clearly has a sense, albeit not well-articulated, that the federal government should retain primacy and pursue national standards in certain policy areas, particularly child nutrition and health. For example, Clinton castigated Republican plans to replace the federal school lunch and other nutrition programs with block grants, stating that "[i]t seems to me this is one of the things we hired on to do, to stick up for the interests of children." Saul Friednan, *Halfway, House Split; GOP cheers first 50 days; Democrats Critical*, *Newsday*, Feb. 23, 1995, at A15. Furthermore, in vetoing the Republican Congress's first omnibus budget, which included a proposal to block grant Medicaid, Clinton called for a new welfare reform bill that would "restore the [national] guarantee of health coverage for poor families." See H.R. Doc. No. 104-164, at 1-2 (1996), reprinted in 1996 U.S.C.C.A.N. 2317. But see Donalhue, *supra* note 58, at 34-36 (noting that the "Clinton administration's acquiescence in the shift toward the states is most dramatically on display in its budget proposals" under which "federal domestic spending will continue its decline").

welfare reform may have simply been blinded by the intuitive logic and political appeal of federalism values. Indeed, with the latest wave of "New Federalism" initiated by the 104th Congress, we seem to have returned to the pre-New Deal era's rebuttable bias favoring state action, rather than federal action, when it comes to programs for the poor.⁸⁷

B. *Conventional Defenses of Federalism*

Federalism debates typically turn on whether the federal government is impermissibly encroaching on state prerogatives as a constitutional or political matter. Even in the realm of political federalism unfettered by constitutional constraints,⁸⁸ there is a rebuttable presumption in favor of inter-state differences: "[A] quasi-constitutional background norm holds that the federal government should tolerate inter-state differences unless there is a compelling reason to override them."⁸⁹

In the context of political federalism, there are three predominant arguments offered by those who favor devolution of policy discretion to the states.⁹⁰ First, devolutionists argue that federalism's bias toward state and local actors appropriately brings important policy decisions closer to local citizens, thereby enhancing citizen participation and influence re-

87. Congress's recent enactment of a new block grant that would allow states to decide how to provide health insurance coverage for children of the working poor, rather than mandating that this substantial new aid be distributed through the existing, federally-controlled Medicaid program, is the latest evidence of this trend. See Editorial, *Money Toss*, Wash. Post, June 20, 1997, at A22 (criticizing a Senate Committee's vote to "giv[e] the funds over to the states in the form of block grants with many fewer rules" than would be applicable under Medicaid). The Balanced Budget Act of 1997, 42 U.S.C. § 1397 (Supp. III 1997), allocated \$24 billion over five years for the "State Children's Health Insurance Program" (CHIP). The program allows states to choose among a variety of options for providing coverage, including the option to expand Medicaid coverage of children. In addition, up to 10% of the block grant funds may be used for non-coverage purposes. See *id.*

88. The debate surrounding block grants concerns political federalism, as no constitutional federalism arguments are implicated in the context of federal programs that devolve broad authority about how to allocate federal funds and implement underlying programs. When Congress attaches conditions to federal block grants, states can either refuse assistance or make futile Tenth Amendment claims regarding the strings tied to the funds. The Supreme Court has never invalidated a condition on federal funds on federalism grounds. See Lynn A. Baker, *Conditional Spending After Lopez*, 95 Colum. L. Rev. 1911, 1923-24 (1995); see also *Massachusetts v. Mellon* and *Frothingham v. Mellon*, 262 U.S. 447, 480 (1923) (stating that conditions on federal monies do not violate the powers of the State because this type of federal statute only "extends an option which the State is free to accept or reject").

89. Peter H. Schuck, Introduction: Some Reflections on the Federalism Debate, 14 Yale L. & Pol'y Rev. 1, 15 (1996) (Symposium Issue).

90. Within the realm of *constitutional* federalism, the primary argument in defense of federalism is that it constitutes "a check on abuses of government power" by diffusing power among separate sovereigns. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). For a general overview of the arguments in favor of federalism, particularly constitutional federalism, see generally Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 Vand. L. Rev. 1229 (1994); Rubin & Feeley, *supra* note 66, at 914-26.

garding those decisions. Second, by favoring state and local decisionmaking, federalism, it is argued, stimulates and encourages innovation; through a diversity of state approaches, the best policy solutions can be found and diffused to other states. A corollary is that federalism promotes administrative and allocative efficiency in that state and local bureaucracies are more agile and adaptable than the federal bureaucracy, and therefore are more able to formulate solutions tailored to unique local circumstances. A third argument, often raised by economists, is that the horizontal competition between states that is engendered by federalism produces policy outcomes that more closely approximate the public's interests. With the exception of the administrative-efficiency argument, all of these defenses of federalism were articulated by Justice O'Connor in her majority opinion in *Gregory v. Ashcroft*,⁹¹ and they have been embraced by many federalism scholars⁹² and, to varying degrees, by members of Congress.⁹³

1. *Promoting Democracy and the Public Interest.* — One of the most common defenses of federalism is that it appropriately "increases opportunity for citizen involvement in democratic processes."⁹⁴ There are two strains of thinking behind this argument. The first is that, in bringing authority closer to the people, federalism reinforces basic democratic commitments by increasing the possibility of citizen participation. In repealing a 60-year-old entitlement guaranteeing assistance to anyone who meets nationally-defined eligibility criteria and replacing it with a grant that allows each state to determine who is eligible for benefits, Congress, it could be argued, empowered citizens to develop a state-level consensus about what classes of people are deserving of public support and at what levels.⁹⁵ This argument is based in part on civic republicanism, which holds that

91. 501 U.S. 452 (1991) (upholding a state mandatory retirement provision under the Tenth Amendment and reasoning that congressional interference with the authority of state citizens to determine qualifications of their government upsets the usual constitutional balance of federal and state powers).

92. See, e.g., Daniel J. Elazar, *American Federalism: A View From the States* 2, 11–12 (3d ed. 1984); Morton Grodzins, *The American System: A New View of Government in the United States*, 383–84 (Daniel J. Elazar ed., 1966); Amar, *supra* note 90; Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 *Colum. L. Rev.* 847, 853–57 (1979); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 *U. Chi. L. Rev.* 1484, 1491–1511 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *Colum. L. Rev.* 1, 3–10 (1988); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 *Sup. Ct. Rev.* 341, 380–414.

93. See, e.g., Gingrich, *supra* note 6, at 9 ("'Closer is better' should be the rule of thumb for our decision making; less power in Washington and more back home, our consistent theme."); *id.* at 107 ("turning welfare back to the fifty states will increase the likelihood of real breakthroughs in our ability to help people"); Gingrich, *supra* note 57, at 73 ("the best welfare solutions come from the states, not Washington, D.C.").

94. *Gregory*, 501 U.S. at 458.

95. See Mashaw & Calsyn, *supra* note 78, at 298 ("The block grant technique moves governmental power 'closer to the people' and is presumptively, therefore, more accountable and democratic than is 'cooperative federalism' in the entitlement mode.").

participation in local government is an especially desirable form of civic education necessary to instill civic virtue in the citizenry.⁹⁶ Federalism, therefore, is a critical means of achieving republican ends: "[B]y ensuring that the most important activities of public life take place in small units of government, federalism made it easier for citizens to participate."⁹⁷ As Justice O'Connor has argued, "[i]f we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems."⁹⁸

The idea that states are more likely to foster citizen participation simply because they are closer to the people than the national government is an unproven theoretical assumption of federalism—an oft-repeated mantra, probably grounded in romanticism, that has come to be accepted by many as truth.⁹⁹ Yet, as an empirical matter, citizen participation in national politics is stronger than it is in state and local races,¹⁰⁰ despite polling data that suggests citizens have slightly higher confidence in their

96. See Mark Tushnet, *Federalism and the Traditions of American Political Theory*, 19 Ga. L. Rev. 981, 988–89 (1985).

97. *Id.* at 989; see also Amar, *supra* note 90, at 1234 (noting one "Populist" view of federalism that posits states as laboratories of education and participation by citizens in democratic self-government).

98. *FERC v. Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part). Justice Powell espoused a similar view, arguing that democratic self-government is best exemplified at the state and local level, and that such governments are more efficient because they are more accessible and democratically responsive than federal officials. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 576–77 (1985) (Powell, J., dissenting).

99. Indeed, much of the intuitive appeal of the argument about citizen participation is based upon communitarian conceptions associated with local, not state, government. See, e.g., Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057, 1153–54 (1980) (describing interplay between communitarian impulses and local government); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 26–31 (1987) (describing the Kantian theory of self-government, particularly with regard to its exclusionary aspects). It warrants emphasis that federalism is a concept concerning states, not local governments; although many place local government under the state rubric, they actually are espousing the virtues of localism when purportedly discussing federalism. See Richard Briffault, "What About the 'Isin'?" Normative and Formal Concerns in Contemporary Federalism, 47 Vand. L. Rev. 1303, 1311–12 (1994) ("[F]ederalism is discussed in terms of normative concerns, but federalism's values are not distinctively associated with the states. As a result, the case for federalism tends to resemble the case for localism."); Rubin & Feeley, *supra* note 66, at 919. The better communitarian argument that citizen participation and identity is at its apex in the daily interactions with local authorities—police, sanitation, schools, etc.—does not support the federalist's *a priori* assumptions about the competence of states.

100. See Mashaw & Calsyn, *supra* note 78, at 310 & n.36; Rubin & Feeley, *supra* note 66, at 915 & n.53; see also Donahue, *supra* note 58, at 46 (noting that the relentless news coverage of Washington politics is such that the federal government is better understood by the average citizen than are state and local governments that are less thoroughly covered by the news media); Tushnet, *supra* note 96, at 991 (noting that "the scale of local government" is such that "only the most avid of followers of politics communicate with their local government officials").

state, rather than federal, governments.¹⁰¹ In addition, while this defense celebrates citizen participation as a benefit conferred by federalism, it fails to account for the ugly side of state and local control of political processes, namely, the potential subordination of weak minorities by entrenched majorities. Federalism does not *necessarily* increase citizen participation, "it simply authorizes [states] to decide for themselves how much participation is desirable."¹⁰² Indeed, if the New Federalist fervor is meant to empower citizens, then one can argue that replacing entitlements that enable beneficiaries to act for themselves with block grants actually moves power *away* from the people and toward state government.¹⁰³

In the *Federalist Papers*, James Madison argued for the creation of a national government precisely because he feared that smaller governments, particularly cities, were more susceptible to the tyranny of majority factions.¹⁰⁴ As argued below, there is evidence to suggest that state and local governments are more susceptible to interest group capture, and that politically weak minority groups, such as welfare recipients, can be subjugated by political majorities in ways incompatible with sound welfare policy.¹⁰⁵

The second strain of the argument is that, by bringing authority closer to the people, resulting decisions are more likely to approximate the public interest because the likelihood of aggregating citizens' individual preferences has increased. In other words, "the political economy of state decisionmaking has a better chance of pursuing the public interest than does the political economy of federal action."¹⁰⁶ The chief problem with this defense is that there is no "obvious empirical support" for the proposition that the political economy of state decisionmaking is more likely to be in the public interest,¹⁰⁷ particularly when it comes to redistributive debates. The idea of bringing important policy decisions closer to the people, however, continues to have powerful resonance in contem-

101. See Mashaw & Calsyn, *supra* note 78, at 311 & n.38; see also William G. Mayer, *The Changing American Mind: How and Why American Public Opinion Changed Between 1960 and 1980*, at 82-83, 447-50 (1992) (noting public opinion polls that indicate that people believe they get better service from state and local government than national government, in sharp reversal from previous trends).

102. Rubin & Feeley, *supra* note 66, at 915.

103. See Mashaw & Calsyn, *supra* note 78, at 311.

104. See *The Federalist* No. 10 (James Madison).

105. See *infra* text accompanying notes 192-193, 255-279.

106. Mashaw & Calsyn, *supra* note 78, at 316. Or, as Massachusetts Governor William Weld put it, "We're closer and more directly answerable to our citizens than the cloud-dwellers in Washington are." William Weld, *The States Won't Be Cruel*, N.Y. Times, Feb. 9, 1996, at A29.

107. Mashaw & Calsyn, *supra* note 78, at 316; see also Rubin & Feeley, *supra* note 66, at 916 (arguing that there is no empirical support for the claim that states are more likely to foster citizen participation).

porary political discourse and was one of the reasons the welfare reform bill appealed to voters.¹⁰⁸

2. *Benefits of diversity—laboratories of experimentation.* — The argument that federalism fosters innovation by permitting a diversity of approaches has had currency in political and judicial circles for some time. In his now-famous dissent in *New State Ice Co. v. Liebman*, Justice Brandeis argued, “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁰⁹ Justice O’Connor has also embraced and developed this idea in her opinions espousing federalism, emphasizing not just social and economic experimentation, but also political experimentation in which, consistent with the civic republican vision, citizens learn by participating in political processes.¹¹⁰

In the policy realm, states *have* vindicated themselves as innovators. “In areas as diverse as workfare in AFDC, managed care in Medicaid, charter schools in public education, and . . . public utility regulation, the states and localities are usually the first to devise new programmatic innovations, and those innovations are often progressive.”¹¹¹ Thus, the argument for allowing a diversity of approaches has very strong intuitive and pragmatic appeal, particularly in those areas where there is great uncertainty about which programmatic strategies will be effective.¹¹² One commentator has argued, for example, that the “experimentation” rationale could explain, normatively, why one might logically devolve most policy responsibility for the welfare system to states while retaining strong federal control over Medicaid. This seeming incongruity might plausibly be explained by the “hypothesis that true welfare reform is stymied by ignorance of what works and the paucity of alternative models, while the options for Medicaid essentially involve greater or lesser degrees of austerity within a relatively well-understood undertaking.”¹¹³

108. See *supra* note 69 and accompanying text.

109. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

110. See *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991) (O’Connor, J., writing for the majority); *FERC v. Mississippi*, 456 U.S. 742, 788–91 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part); see also Amar, *supra* note 90, at 1233–35 (describing the shade of difference in Justice Brandeis’s and O’Connor’s views).

111. Schuck, *supra* note 89, at 20, see also Donahue, *supra* note 58, at 44 (giving examples of important policy innovations by states, including Ohio’s experiments with welfare rules to encourage teenage parents to stay in school and Georgia’s streamlined environmental permitting processes).

112. See Donahue, *supra* note 58, at 44 (“The greater the uncertainty about what works and what doesn’t, and the greater the ability and willingness of states to share information, the more valuable are state-level policy innovations and the more costly is any requirement of national uniformity.”).

113. *Id.*

While more persuasive than the laboratories-of-democracy argument,¹¹⁴ the experimentation defense makes much more sense as a managerial argument for decentralization than as a defense of federalism.¹¹⁵ The benefits of experimentation cannot in all circumstances justify federalism's *a priori* pro-state bias, particularly where, as with the devolution of important redistributive authority, there are serious risks of political process failure at the state level. The values of experimentation can be vindicated, however, in a system of decentralization that uses national standards to insulate the fundamental choices about redistribution from problematic state politics but accords states maximum flexibility on all other policy choices.¹¹⁶

Another argument closely related to the experimentation rationale concerns administrative efficiency. An administrative efficiency theory of federalism argues that policy functions are assigned to the level of government that can most effectively handle the given function.¹¹⁷ Using the Act as an example, the efficiency argument for devolving eligibility and benefit-level determinations to states would be that national, uniform solutions to these issues would not be well-tailored to local circumstances

114. The experimentation defense is not without problems. Susan Rose-Ackerman has argued that the horizontal competition between states engendered by federalism discourages state officials from undertaking risky innovations. See generally Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. Leg. Stud. 593 (1980). In addition, states do not necessarily pursue policy innovations with the intent of disseminating lessons to other states, and they often have limited ability to spread the word about what works. Finally, they have been known to adopt proprietary attitudes toward innovations that may confer a competitive advantage vis-à-vis other states. Much of the ferment of state experimentation, therefore, goes unobserved and does little to advance best practices among state governments. See Donahue, *supra* note 58, at 44–45. Thus, the experimentation defense fails to account for a necessary ingredient to diffusing best practices among the states: a third party with the desire and capacity for monitoring, if not policing, state experiments and accelerating the process of diffusing policy innovations. Cf. Rapaczynski, *supra* note 92, at 408–09 (noting that “a unitary government could avail itself of the same advantages [of experimentation] by a partial delegation of authority to its local branches”). As argued in Part V, below, the federal government is uniquely suited to this role. Cf. Amar, *supra* note 90, at 1235 (arguing that the experimentation perspective ignores the role of the federal government in policing state practices and fails to offer an adequate account of national legislation); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. Chi. L. Rev. 483, 498 (1991) (“[I]f 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.”).

115. Cf. Rubin & Feeley, *supra* note 66, at 914 (arguing that other defenses of federalism are actually managerial arguments for decentralization).

116. See *infra* text accompanying notes 300–315.

117. For the classic articulation of this rationale, see generally Wallace E. Oates, *Fiscal Federalism* (1972) (arguing, *inter alia*, that the central government should handle only those issues requiring economies of scale or involving significant spillovers between lower-level jurisdictions).

and needs.¹¹⁸ A corollary of this argument is that providing greater flexibility to states to make important decisions will lead to more "rational" allocation of resources.¹¹⁹

There is some evidence to support the argument that state or local administration produces better, more tailored policy outcomes.¹²⁰ Furthermore, the political realities of Congress are such that it has proven itself incapable of targeting specific solutions or subsidies to areas that need it; "the political process [in Congress] forces even the most targeted efforts to spread the wealth (or pork) fairly evenly, and . . . to impose identical solutions in states and cities with very different problems."¹²¹ Even if true, however, the administrative-efficiency rationale, like the experimentation rationale, is more persuasive as a policy argument for decentralization than as a defense of federalism. One can achieve the benefits or efficiencies of state and local-level decisionmaking by conferring flexibility under national standards. Administrative efficiency is not a convincing argument for the proposition that states presumptively are the natural locus for important policy decisions.

3. *Competition and Citizen Choice.* — Another common defense of federalism is that the diversity it engenders appropriately forces states to compete for citizens (and businesses) who can vote with their feet. As Justice O'Connor put it, federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society" and "it makes government more responsive by putting States in competition for a mobile citizenry."¹²² While the states' competition with the national government offers a salutary check on national power, their competition with each other offers a legislative diversity of policies reflective of divergent local needs and political preferences. According to political market theorists, citizens, then, can choose the mix of local laws,

118. See, e.g., Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs*, 14 *Yale L. & Pol'y Rev.* 123, 129 (1996) (Symposium Issue). "The thought here is that the national government is not as good at making individualized determinations of need as are state and local government entities." *Id.* at 129-30. Alternatively, there is "inherent difficulty in attempting to order a vast and dynamic country through the Federal Register and the Federal Reports." Richard B. Stewart, *Madison's Nightmare*, 57 *U. Chi. L. Rev.* 335, 342 (1990); see also Schuck, *supra* note 89, at 20 ("Washington often responds more sluggishly than states to the changing social conditions, market forces, and local imperatives that should inform public policy.").

119. See Mashaw & Calsyn, *supra* note 78, at 298.

120. See, e.g., John E. Chubb & Terry M. Moe, *Politics, Markets, and America's Schools passim* (1990) (asserting that decentralization improves the quality of public education); Mark H. Moore, *Policing: Deregulating or Redefining Accountability?*, in *Deregulating the Public Service: Can Government Be Improved?* 198, 198 (John J. DiIulio, Jr. ed., 1994) (noting that many leading law enforcement analysts believe decentralization aids crime control efforts). But see Donahue, *supra* note 58, at 128-29 (arguing that, in terms of administrative efficiency or management quality, there is often little appreciable difference between federal and state bureaucracies).

121. Osborne, *supra* note 85, at 241.

122. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

customs, and attitudes that best suits their individual preferences.¹²³ Centrally determined national policies, the argument goes, are bound to leave large numbers of people subject to policies they oppose.

The citizen-choice strain of this defense of federalism is fueled primarily, albeit not exclusively, by economists and adherents of the claims of Charles Tiebout. In a seminal 1956 article, Tiebout introduced the idea that localities, like businesses, compete in a market-like fashion for consumer-voters who decide where to locate based upon individual preferences.¹²⁴ This idea has spawned a theory of "Competitive Federalism," according to which "[t]he preferences of all individuals in society are better met in a system of multiple governments offering different packages of services and costs than of a single monopoly government, even a democratic one, offering a single package reflecting the preferences of the majority."¹²⁵ The "Competitive Federalists" argue, then, that the more governments there are, the better—federalism rightly results in a system of multiple centers of power in which state and local governments have broad authority to enact policies of their choice.

Tiebout's theory, however, was premised solely on considerations of economic efficiency; it did not attempt to address issues of fairness.¹²⁶

123. See, e.g., Amar, *supra* note 90, at 1236–38. Commentators often state the arguments regarding state competition and citizen choice as separate arguments. See, e.g., Rubin & Feeley, *supra* note 66, at 917–23. These arguments are so intertwined, however, that they can be understood as merely different facets of the same argument.

124. See, e.g., Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416 (1956) (arguing that a citizen, as a "consumer-voter," chooses to locate in that community which best satisfies his or her pattern of preferences for public goods). The richer the diversity of competitors, Tiebout argued, the better the opportunity the consumer-voter will have to realize her ideal preferences or mix of policies. See *id.* at 418.

125. Thomas R. Dye, *American Federalism: Competition Among Governments* 14 (1990); see also Dapline A. Kenyon & John Kincaid, *Introduction to Competition among States and Local Governments: Efficiency and Equity in American Federalism* 9 (1991) (citing defenders of competitive federalism); Richard A. Posner, *Economic Analysis of Law* 636 (4th ed. 1992); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 *J.L. & Econ.* 23, 33–35 (1983); A.P. Hamlin, *The Political Economy of Constitutional Federalism*, 46 *Pub. Choice* 187 (1985).

126. Tiebout was careful to condition his theoretical model on, *inter alia*, (1) the full mobility of all citizens; (2) the absence of externalities or spillovers across communities; and (3) the absence of geographical constraints with respect to earnings. See Tiebout, *supra* note 124, at 419, 424; see also Dennis C. Mueller, *Public Choice* II 155 (1989) (noting that a similar set of preconditions applies both to the theory of voluntary associations (clubs) and the theory of voting-with-the-feet). For those real-world communities that could not live up to these conditions, Tiebout argued that policies that promote residential mobility and increase the knowledge of the consumer voter would improve the allocation of government expenditures. See Tiebout, *supra* note 124, at 423. Unfortunately, the competitive federalist school of thinkers has adopted Tieboutian logic without paying much, if any, attention to these important qualifications.

Tiebout's theory has proven correct in practice but with tragic consequences for the minority poor who are relegated to the impoverished urban core and for metropolitan regions as a whole. The theory is correct in that the number of local jurisdictions *has* proliferated in metropolitan regions, and this proliferation of new governments has been

While Tiebout himself made no pretense of addressing issues of fair interest group representation or participation in political markets for public goods, those who rely on this line of thinking to justify a federalist bias toward states are obligated to consider the social value of fairness, as well as that of economic efficiency—*a fortiori* where the individual, exclusionary preferences of better-off “consumer-voters” are contributing to the marginalized position of the poor.

Even if we were to accept all of the preceding *general* justifications of federalism, the fact remains that they do not support devolution in every particular instance. Rather, the criticisms presented underscore a weakness in the federalism literature. As Schuck has argued, we lack a determinative theory of political federalism that will help us decide *which* interstate differences cannot be tolerated and which therefore must be minimized by national solutions.¹²⁷ This Article addresses this difficult problem in the welfare context by analyzing the limits of state political processes, an empirical exercise which challenges some of the conventional defenses of federalism.

III. BLOCK GRANTS AND THE POLITICAL ECONOMY OF STATE DECISIONMAKING

Despite the federalist theoretical assumption that state government is the natural situs of important policy making authority, the empirical evidence on the political economy of state decisionmaking suggests that the state level provides a worse environment than the national arena for deciding fundamental questions about redistribution.¹²⁸ On questions of

fueled by the desire (particularly of real estate developers) to accommodate the tax, public service, and attitudinal preferences of a certain class of “consumer-voters.” See Nancy Burns, *The Formation of Local Governments* 75–98 (1994). The tragedy in Tiebout’s prophesy lies in the fact that the fragmentation of the polity in metropolitan regions has rendered most such regions in America virtually incapable of addressing any problem that requires meaningful regional burden sharing. Where regional burden sharing has been achieved, it has usually taken place as a result of mandates from the federal or state governments or from state courts. See Myron Orfield, *Metropolitics* 11–14, 104–55 (1997) (describing regional reforms achieved in the Minnesota State Legislature); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *Stan. L. Rev.* 1115, 1122, 1154, 1165–70 (1996); see also Anthony Downs, *New Visions for Metropolitan America* 169–70 (1994) (noting that metropolitan governments have virtually no political support, due to divergent attitudes on the part of urban and suburban officials and residents). Tiebout’s theory has also proven correct in that low- and moderate-income persons have been consciously excluded from most newly-formed local jurisdictions. See *infra* text accompanying notes 152–157. In short, a large segment of the so-called “consumer-voters” in metropolitan regions have no choice at all about where they live, and very limited mobility regarding where they work. The competition and citizen-choice rationales for federalism fail to account for these deficiencies.

127. See Schuck, *supra* note 89, at 15.

128. Admittedly, neither context is especially hospitable to anti-poverty interest groups. See *supra* note 69 and accompanying text; see also Rom, *supra* note 60, at 408 (noting that “the willingness of all levels of government to provide cash public assistance has declined in recent years”).

redistribution, even in a context such as welfare assistance in which the federal government is assuming at least half of the fiscal burden, the political economy of state decisionmaking is such that states are not well-suited to pursue redistributive aims. If given great discretion, as is the case with most federal block grants, many states will endeavor to avoid any redistributive spending that is not mandated.¹²⁹ One of the reasons for this is the race-to-the-bottom problem articulated by Paul Peterson.¹³⁰ An additional reason, developed here, is the inexorable influence of middle class suburban voters on state policy choices, and the consequent marginalization of low-income and urban interest groups. Section A presents empirical evidence of the decisive impact of middle class voters on state policy choices, demonstrating that state political processes tend to maximize public benefits for this group while disfavoring public spending on behalf of the poor. Section B then discusses the strong influence of racial attitudes on white voters' support, vel non, for welfare spending. It suggests that the potential for racialist popular views to influence policy outcomes is stronger at the state level. Section C discusses why policy outcomes are likely to be different and more redistributive at the national level.

A. Empirical Evidence of the Impact of Suburban Voters on State Decisionmaking

Economic research on the political economy of state fiscal decisionmaking suggests that suburban voters exercise considerable influence on state decisionmaking, and that state political actors, most critically governors, are rationally compelled toward the provision of "middle class" services. In the absence of federal intergovernmental aid that creates very strong economic incentives for states to provide redistributive services, such services will be a very low priority among state actors. In fact, federal intergovernmental aid for redistributive programs tends to be a replacement for state funds that are released or reallocated to general, middle class programs. Public finance scholars have found that "federal dollars that flow into the state via grants-in-aid are allocated disproportionately toward [general expenditures] and away from the human services components—[education and welfare]—of the state budget."¹³¹

129. Admittedly, the evidence presented in this section is merely suggestive and in no way represents an exhaustive search of the existing empirical literature. The evidence presented does, however, call into question some federalist theoretical assumptions, and points out the need for further empirical testing of those assumptions.

130. See *supra* text accompanying notes 12–13.

131. Craig & Inman, *supra* note 47, at 209. Analyzing the incentive effects of the major federal-to-state aid programs—beginning with the least restrictive grant (the former revenue sharing program) and moving to the most regulated grant—open-ended categorical matching aid for entitlement programs (AFDC and Medicaid)—Craig and Inman found that state politicians endeavor to spend state public dollars on general or "middle class" state expenditures. See *id.* at 201. The federal government could stimulate state spending on human services—education and low-income assistance—only by

Obviously, it is important to understand why. One possible explanation is merely that general expenditures are the stuff of pork barrel politics, and thus make all state legislators better off in the political process. The major general service programs include state highway maintenance, state hospitals and medical centers, universities, parks, and state bureaucracies. Each of these programs promotes jobs and, unlike formula allocations for welfare or school aid, permits state legislators to deliver publicly funded benefits to their constituents in a way that can be explicitly linked to the efforts of the elected official.¹³²

It is not surprising, therefore, that state fiscal politics is middle class politics. Economic research indicates that median-income voters exert decisive influence on the fiscal policy choices of incumbent governors, who, as the lead or only full-time professional politicians in state government, tend to dominate the state budgetary process.¹³³ One economic study, for example, suggests that incumbent governors rationally avoid redistributive state welfare spending because voters exact a disproportionate political price in gubernatorial elections against those who increase such spending.¹³⁴ Regression analysis indicates that voters in state gubernatorial elections distinguish welfare spending from all other types of spending and dislike this spending about three times as much as other kinds.¹³⁵

imposing strong spending regulations and matching requirements on federal aid, "and even those requirements will not keep some dollars from leaking into [general state expenditures]." *Id.* Specifically, with unrestricted general revenue sharing (GRS), state general services were the net recipient of GRS funds, while such funds stimulated a *decrease* in state education and welfare spending. See *id.* at 203. With categorical, lump-sum aid for low-income education and services, which were nominally restricted to be spent only for these purposes, states would comply with the terms of the grant, but then cut back on their own expenditures in this program category, freeing state funds to be allocated elsewhere in the state budget. In this manner, each dollar in federal low income service and welfare aid "released" \$1.17 in state funds (97¢ from welfare and 20¢ from education) that were then reallocated to general services (\$1.05) and tax relief (12¢). The more regulated federal programs, however, did a better job of keeping federal dollars in targeted program categories. See *id.* at 204.

132. See *id.* at 209 ("In such a world, it is not surprising that federal aid dollars are rechanneled whenever possible into 'other expenditures.'").

133. See, e.g., Thad Beyle, *Governors: The Middlemen and Women in Our Political System*, in *Politics in the American States* 207, 232 (Virginia Gray & Herbert Jacob eds., 1996) (noting that governors are at the top of each state's political hierarchy, such that the state's ultimate policies will bear the imprint of the governor, and that state budget processes, now centralized under gubernatorial control, put much power in their hands).

134. In an analysis of voting behavior in presidential, senatorial, and gubernatorial elections from 1950 to 1988, the researcher found that voters penalize *both* federal and state politicians for spending growth. But while voters did not care how the federal government allocated its spending—every extra dollar was equally bad—voters did care about how the *state* budget was allocated. At the state level, voters "particularly dislike transfers to the poor (most of whom are nonvoters)." Sam Peltzman, *Voters as Fiscal Conservatives*, 107 Q.J. Econ. 327, 329 (1992).

135. See *id.* at 352. A governor would not be penalized, however, for modest, across-the-board, spending growth. See *id.* at 357.

In contrast, at the federal level, the same study indicates that voters actually rewarded incumbent presidents for spending growth during the first half of their terms and punished them for spending growth only in the second half, but without displaying any antipathy for particular types of federal spending.¹³⁶ The study's author hypothesizes that state welfare spending receives such scrutiny from voters because well-informed, self-interested voters make use of publicly available budget information and because welfare spending offers little or no benefit to most state voters, most of whom are not indigent.¹³⁷

State governors' tax-setting policies can also be greatly influenced by voter choice.¹³⁸ Voters "are sensitive to the tax changes they face, relative to those observed in neighboring states, and . . . this sensitivity translates into votes against an incumbent whose tax changes are high by regional standards."¹³⁹ Furthermore, incumbent governors facing re-election apparently are sensitive to this phenomenon, reflecting these voter attitudes in their tax policies.¹⁴⁰ Given majority voter attitudes, incumbent governors can rationalize efforts to curb spending increases to the poor or any significant increases in tax rates and will pay close attention to voters' desires in this regard.

Empirical evidence also suggests that, when states have discretion regarding allocations of resources—allocations that typically occur in the context of state budget processes—middle class, suburban interests predominate and, at least on a per capita basis, urban citizens receive a substantially smaller share of state resources.¹⁴¹ In particular, affluent,

136. See *id.* at 336–37, 346.

137. See *id.* at 358–59.

138. Analyzing the re-election bids of governors in the United States from 1960 through 1988, along with data on the taxation rates of these states during the same period, two researchers found significant positive correlations between increases in effective state income-tax liabilities and the unseating of an incumbent governor. See Timothy Besley & Anne Case, *Incumbent Behavior: Vote-Seeking, Tax-Setting, and Yardstick Competition*, 85 *Am. Econ. Rev.* 25, 29, 32 (1995). They also found a degree of "yardstick" competition in that voters would not penalize an incumbent governor for tax increases in their state if neighboring states had also raised taxes at the same time. See *id.* at 34; see also Richard F. Winters, *The Politics of Taxing and Spending*, in *Politics in the American States* 319, 345 (Virginia Gray & Herbert Jacob eds., 1996) (citing a study which confirmed that "raising a visible tax was sufficient for a governor or his party to lose votes" and other research reaching similar conclusions). But see *id.* at 345–46 (citing research suggesting that while passing new taxes had the predicted negative effects on electoral outcomes, the impacts were judged not to be significant).

139. Besley & Case, *supra* note 138, at 36.

140. Besley and Case found that when a neighboring state increased or decreased taxes by one dollar, the home state would increase or decrease taxes respectively by roughly 20¢, providing "fairly strong evidence that political calculations are influencing governors' behavior." *Id.* at 37, 38.

141. For example, analyzing all forms of aid granted by the State of Pennsylvania to local governments from fiscal years 1963 through 1990, for every dollar received by the average Pennsylvanian, a resident of Philadelphia received only 61¢. As direct federal aid to cities declined, state aid to Philadelphia increased, but Philadelphians still gained only

outer-ring suburbs tend to receive a disproportionate share of public subsidies for transportation and residential infrastructure, often as a result of cross-subsidization from the urban core.¹⁴² Decentralization of decisionmaking authority, therefore, tends to benefit those groups or local polities that are in the best position to influence policymakers.¹⁴³ Hence, state political processes may be overvaluing the desires of certain suburban jurisdictions, which wield disproportionate political influence¹⁴⁴ or, alternatively, state political majorities are simply rationally maximizing public benefits for themselves.

61¢ for each dollar increase in per-resident state aid. See Robert. P. Inman, *How to Have a Fiscal Crisis: Lessons from Philadelphia*, 85 *Am. Econ. Rev.* 378, 380 (1995). This analysis does not include aid to local school districts. Philadelphians did, however, receive their "fair" share of federal aid to local governments, receiving \$1.02 for each dollar of federal local aid per national resident. See *id.*

142. States, for example, administer federal block grant funds for transportation infrastructure. Under the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), (since replaced by the Transportation Equity Act for the 21st Century), the federal government authorized the expenditure of approximately \$20 billion each year for state and local surface transportation needs. See 23 U.S.C. § 157(a) (1994). A recent analysis of geographically referenced funding data made public by the U.S. Department of Transportation indicates that this policy discretion is being exercised at the state and local level to the disproportionate benefit of the suburban outer rings. The Surface Transportation Policy Project's 1996 report, "Getting a Fair Share," finds that urbanized areas (central cities and inner-ring suburbs) received \$54 per capita in fiscal year 1995 while outer-ring suburbs received \$115 per capita. See Surface Transportation Policy Project, *Getting A Fair Share, An Analysis of Federal Transportation Spending* 6 (July 1996) (on file with the *Columbia Law Review*).

Some might argue that this discrepancy merely reflects the reality of new transportation infrastructure needs, or rather, the state political preferences for highways. However, expensive new infrastructure investments are often duplicative of existing infrastructure in the urbanized core. See, e.g., Orfield, *supra* note 126, at 7-8. Any policy preference for highways can also be understood as a reflection of the disproportionate political influence of affluent outer-ring suburbs and the unwillingness of state political institutions to control the outmigration pressures that are created by a system where land-use decisions are highly decentralized. Cf. Kantor, *supra* note 13, at 163-65 (describing the decentralized nature of land use planning); Orfield, *supra* note 126, at 6-8 (describing the disproportionate infrastructure investments enjoyed by outer-ring suburbs and the cross-subsidization contributed by the urbanized core, even in the face of substantial unused infrastructure in those areas).

143. Cf. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *Colum. L. Rev.* 346, 355, 408 (1990) (arguing that only affluent suburbs are in a position to exercise delegated local powers in a manner that fully realizes local goals, whereas localities from the urban core are politically and economically constrained from using local powers to shape their destinies).

144. By 1990, over 60% of the population in America's metropolitan regions lived in suburbs. See David Rusk, *Cities Without Suburbs* 5 (1995). The polity in metropolitan regions is highly fragmented into scores, if not hundreds, of individual local governments. See Briffault, *supra* note 126, at 1120 (citing Donald N. Rothblatt, *Summary and Conclusions*, in *Metropolitan Governance* (Donald N. Rothblatt & Andrew Sancton eds., 1993)) (noting that "the typical metropolitan area had 113 local governments, including forty-seven general purpose governments, such as a . . . municipality"). The political landscape of metropolitan regions is divided roughly into the central city, the older inner-ring suburbs, and the outer-ring, high growth suburbs, each category comprising

This pattern of self-interested maximization of public benefits by suburban voters, and consequent disinvestment in poorer, urban districts, is repeated in the context of public school finance.¹⁴⁵ When state legislatures have turned to the question of redressing inter-district inequities in school finance, their efforts have largely been ineffective.¹⁴⁶ State legislatures that attempted school finance reform on their own without the strictures of a court order did not alter intrastate inequality in revenues and did not change the overall level of education revenues or the distribution of those revenues.¹⁴⁷ While state legislatures do play some role in reducing inter-district fiscal disparities in education funding, fiscal equity can be achieved only if it is court-ordered.¹⁴⁸ State political processes,

approximately one-third of the electorate. See Orfield, *supra* note 126, at 1–2, 12–13. The outer-ring suburbs, however, tend to receive a disproportionate share of public subsidies for infrastructure, such as roads, sewers, and utility lines. See *id.* at 5–8.

145. In the realm of public school finance, most states have created a system that leads to inter-jurisdictional disparities and, in the absence of a court order, they have not intervened aggressively to address the fiscal or social disparities that result from the decentered political arrangements they have encouraged. In most cases, states have acquiesced in or actively encouraged decentered political arrangements, for example, by relaxing local government incorporation laws, erecting stringent annexation requirements that limit border expansions of central cities, delegating land use controls to local governments, and requiring localities to rely heavily on property taxes for financing local services, such as public education. See, e.g., Kantor, *supra* note 13, at 163–64; see generally Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1 (1990).

146. Analyzing Census Bureau data on education revenues from over 16,000 school districts in 50 states from 1972 to 1992, one study found that *court-ordered* education finance reform, compared to legislature-initiated reforms, had aggressively redistributed education resources. Court-ordered reforms substantially decreased fiscal disparities between rich and poor school districts by raising per-pupil revenues from state sources by over \$700 in the poorest districts, while such revenues were unchanged in the wealthiest districts. See William N. Evans et al., *Schoolhouses, Courthouses, and Statehouses After Serrano*, 16 J. Pol'y Analysis & Mgmt. 10, 28 (1997). While some 30 states have faced state constitutional challenges for inequalities in local education funding, as of November 1997, state courts had ordered school finance reforms in only 16 states. See Robert Inman, *Editor's Introduction*, 16 J. Pol'y Analysis & Mgmt. 1, 2 n.2 (1997).

147. See Evans, *supra* note 146. The State of Michigan is the singular exception. In 1993, largely as a result of property tax revolt movements, Michigan repealed its existing system of local property taxation, effectively abolishing the existing system of school finance, but without replacing it with a new school finance system. In response to this crisis, the following year the state enacted a system for raising public school revenues funded predominantly by the state's sales tax. This system resulted in a substantial reduction of per-pupil spending disparities among districts, but its benefits flow primarily to middle class homeowners (through property tax reductions) and poor rural school districts. See Paul N. Courant & Susanna Loeb, *Centralization of School Finance in Michigan*, 16 J. Pol'y Analysis & Mgmt. 114 (1997); Evans, *supra* note 146, at 29; Inman, *supra* note 146, at 7–8. The poorest school districts actually experienced some net losses under the new finance system. See Courant & Loeb, *supra*, at 114, 122.

148. The majority of states structure state education aid in ways that are designed to reduce disparities in local resources for education. See Evans, *supra* note 146, at 19 (noting that in 1991, 38 states relied in whole or in part on foundation grants that fill the gap between a state-determined minimum level of education funding and the amount a

therefore, do not appear to value the goal of eliminating inter-jurisdictional fiscal disparities in education and, at least in some jurisdictions, they may be overvaluing the desires of middle class jurisdictions.¹⁴⁹

The inability of state political processes to eliminate fiscal disparities in public education might be explained by the entrenched political consensus favoring local control of schools. One researcher finds, however, that the political equilibrium being reached in state legislatures on state education aid appears to turn "decisive[ly]" on the desires of the median income voter.¹⁵⁰ This finding is consistent with other economic research on state fiscal politics; the outcome of debates on redistributive issues is likely to turn on the desires of median income voters, suggesting that these voters tend to maximize the public benefits to their own districts.¹⁵¹

It is also clear that, in a variety of policy realms, state majoritarian political choices are contributing to the marginalized position of the urban poor in American society.¹⁵² First, many states have encouraged the

district can raise under a state-determined minimum uniform tax rate). Existing, non-court-ordered state education aid, however, is not effective in *eliminating* fiscal disparities. See *id.* (noting that between 1972 and 1992 state revenues became far more effective in reducing inter-district inequality, but showing that in 1992 substantial intrastate inequality remained, i.e., 47.6% of the inequality that would be reflected in a system of flat, per-pupil grants).

149. See, e.g., Courant & Loeb, *supra* note 147 (identifying middle class districts as the primary beneficiaries of Michigan's school finance reform legislation and noting the negative impact of the law on the poorest school districts); Neil D. Theobald & Faith Hanna, *Ample Provision for Whom?: The Evolution of State Control over School Finance in Washington*, 17 J. Educ. Finan. 7, 22-25 (1991) (finding that school finance reform legislation in Washington resulted in a 4.9% decline in total resources available to high poverty school districts and that "the primary beneficiaries [of the legislation] have been school districts that educate mostly White and/or relatively wealthy students").

150. Charles A. M. de Bartolome, *What Determines State Aid to School Districts? A Positive Model of Foundation Aid as Redistribution*, 16 J. Pol'y Analysis & Mgmt. 32, 33 (1997). Testing an economic model for school aid politics against actual patterns in state education funding in 33 states for census years 1970, 1980, and 1990, de Bartolome finds that "the level of a state's [equalization] aid is heavily influenced by the income distribution in the state." *Id.* at 41. A politically decisive median income voter is able to convince the legislature to redistribute equalization aid from wealthier districts to less wealthy ones, including her own, thus explaining the rise in state equalization aid with the rise in income inequality between median income households and higher mean income households. See *id.* at 33, 40.

151. See, e.g., Craig & Inman, *supra* note 47, at 191 ("[T]he political process will select that level of services preferred by the voter with the median (fiftieth percentile) demand for the public good."); see also Orfield, *supra* note 126, at 168-69 (noting the potentially decisive influence of middle class, inner-ring suburbs in state and local legislative debates).

152. The federal government, no doubt, has also contributed mightily to the geographic concentration of the urban poor. See Jerry Frug, *The Geography of Community*, 48 Stan. L. Rev. 1047, 1068-70 (1996). For an excellent summary of the impact of federal housing policies on racial and economic segregation, see, e.g., Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 186-216 (1993); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. Pa. L.

proliferation of new municipalities through the passage of laws that make it easy to incorporate new towns and procure financing to build new, often duplicative infrastructure, such as roads and sewers.¹⁵³ Second, by delegating “nearly complete authority to control land use to the lowest incorporated governmental units”¹⁵⁴ and making localities rely on local property taxes to provide most of the funding for local government services, state governments have created a socio-political environment in which suburban jurisdictions are rationally motivated to use highly exclusionary zoning and developmental policies, and in which homogeneous groups of citizens can give effect to their worst biases.¹⁵⁵ Not surprisingly, the four-decade movement of suburban development—with the attendant proliferation of new, homogeneous polities that are maximally empowered to exclude non-desirable entrants—has been accompanied by dramatically increased concentrations of minority poverty in inner-cities.¹⁵⁶ And poor African-Americans have borne the brunt of this trend.¹⁵⁷

Rev. 1285, 1285 (1995) (“Throughout the twentieth century, federal housing law and policy have exhibited a locational bias that has prompted the growth of large concentrations of poor people in the inner city.”). For an example of the devastating impact of federal transportation policies and urban renewal on minority urban neighborhoods, see, e.g., Raymond A. Mohl, *Race and Space in the Modern City: Interstate-95 and the Black Community in Miami* in *Urban Policy in Twentieth-Century America* 100–42 (Arnold R. Hirsch & Raymond A. Mohl eds., 1993) (examining the effects of federal transportation policy in Miami).

153. See Kantor, *supra* note 13, at 164.

154. *Id.* at 163.

155. See Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 241 (1985) (describing “economic and racial homogeneity” as “perhaps [the] most important characteristic of the postwar suburb”); Kantor, *supra* note 13, at 164 (describing how the decentered nature of American intergovernmental arrangements has given birth to a systematic and economically rational practice of exclusion in American suburbs); cf. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 Harv. L. Rev. 1841, 1861 (1994); Frug, *supra* note 152, at 1072 (describing the role of urban and suburban authorities in promoting racially exclusionary policies). The racially neutral tools used by local governments to exclude nondesirable populations include large-lot zoning, minimum building size regulations, building code prohibitions, conservation of land for nonresidential purposes, and nonparticipation in federal subsidized housing programs. See Kantor, *supra* note 13, at 166–67. For an excellent history of the development of American suburbs and the public policies and social forces fueling the phenomenon, see generally Jackson, *supra*.

156. See Paul A. Jargowsky & Mary Jo Bane, *Ghetto Poverty in the United States, 1970–1980*, in *The Urban Underclass* 252–68 (Christopher Jenks & Paul E. Peterson eds., 1991) (the number of black ghetto poor grew by 27% from 1970 to 1980 and the number of Hispanic poor by 39%); John D. Kasarda, *Inner-City Concentrated Poverty and Neighborhood Distress: 1970 to 1990*, 4 Housing Pol’y Debate 253, 203–68 (1993) (detailing rise in black and Hispanic poverty population and concentration in 100 largest central cities between 1970 and 1990); Paul A. Jargowsky, *Ghetto Poverty among Blacks in the 1980s*, 13 J. Pol’y Analysis & Mgmt., 288, 289 (1994).

157. African-American poverty is highly concentrated while white and Hispanic poverty is much more dispersed. In 1989, 62% of African-Americans living in poverty lived within central cities, while 12% lived in suburban areas. See 1990 Census of Population:

In sum, while a state majoritarian consensus favoring decentralized zoning and taxing powers contributes to inequality of opportunity with respect to education, jobs, and housing for persons relegated to poor urban neighborhoods, state political processes are apt to reject efforts to redress these resulting inequalities.¹⁵⁸

While much more exhaustive research of the empirical literature would be required to substantiate definitively the impact of suburban majorities on state policy choices, the above-presented empirical evidence suggests that, with respect to *redistributive* issues—particularly social welfare spending—the state majoritarian political consensus is likely to be negative. Significant redistribution is not likely to happen at the state level as a result of state legislative or political processes.¹⁵⁹ It is not sur-

Social and Economic Characteristics: United States 94 (U.S. Gov't Printing Off. 1993) (placing the remaining 26% in predominantly rural areas). Fifty-nine percent of Hispanics living in poverty lived in central cities, and 20% lived in the suburbs. See *id.* at 97 (placing the remaining 21% in rural areas). Twenty-nine percent of non-Hispanic whites living in poverty lived in central cities, and 20% lived in the suburbs. See *id.* at 98 (placing 52% in rural areas).

(These statistics were derived in the following manner. The percentages were calculated by dividing the number of persons in center cities, suburbs, and predominantly rural areas by the total number of persons below the poverty level. The total number of persons is calculated by adding the total of urban persons to the total of rural persons. In Table 94, for example, there are 7,232,700 persons in urban areas plus, 1,208,729 persons in rural areas, adding up to a total of 8,441,429 persons living in poverty. This sum becomes the denominator beneath the number of persons living in "central places," which are equivalent to central cities, "urban fringes," which are equivalent to suburbs and the combination of "outside urbanized areas," plus the total number of persons in "rural" areas, which constitute predominantly rural areas.)

158. See *supra* text accompanying notes 145–151 (describing the inability of state legislative processes to eliminate inter-district fiscal inequities in school funding). Only a handful of states have attempted to tackle the problem of the lack of affordable housing in job-rich suburbs—a problem which typically results from exclusionary zoning practices by those suburbs. See J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 *Geo. L.J.* 2265, 2274 & nn.55, 56 (1997) (stating that few states have placed limits on the ability of suburbs to exclude). And those few states that have implemented regional "fair share" strategies on affordable housing have produced disappointing results, particularly for the minority poor. See Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of the Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants* 68–76 (1996) (finding that the Mount Laurel initiatives in New Jersey produced housing primarily for moderate, not low-income persons, that most low-income housing was located in the urban core, and that the majority of suburban units were occupied by whites, while the majority of urban units were occupied by black or Latino families); Margaret D. Price, *Beyond Mt. Laurel: An Analysis of Legislative and Judicial Attempts to Increase the Availability of Affordable Housing in Suburbs* 13–15, 23–26, 37–39 (July 14, 1998) (unpublished manuscript, on file with the *Columbia Law Review*) (critiquing efficiency of state judicial attempts at redistribution).

159. States are more apt to eliminate fiscal inequities in education when ordered to do so by state courts. See *supra* text accompanying notes 145–149 (comparing the impact of court-ordered and legislative school finance reform). And legislative fair share affordable housing statutes have had a limited impact in most of the states in which they have been implemented. See Price, *supra* note 158, at 13–15, 37–45 (identifying Oregon's comprehensive land use planning statute as one example in which the fair share affordable

prising that budgetary alliances between anti-poverty and middle class interest groups do not frequently occur, because the targeted pursuit of redistributive aims—as successful welfare reform may require in the near term—would require middle- and upper-income voters to act against their perceived economic self-interest.¹⁶⁰ Federalists and civic republicans alike might retort that the rejection of redistributive aims by state majorities does not undermine the traditional arguments for empowering states to make fundamental policy choices. But the federalist and civic republican arguments fail to take any account of minority interest groups, whose marginal position in state politics is partially a by-product of state majoritarian policy choices.¹⁶¹ In particular, the arguments do not account for the role racism can play in the marginalization or subordination of weak minority groups.

B. *Race and the Risks of Majoritarian Tyranny Regarding Welfare Spending*

While state majoritarian political and economic self-interest augurs poorly for redistributive spending at the state level, racial attitudes also create a serious risk of state majoritarian tyranny over welfare recipients.

housing requirement was strictly enforced). The examples of state legislatures acting on their own to impose meaningful fair share or regional equity requirements are very rare. See Orfield, *supra* note 126, at 104–55 (describing legislative victories, including tax base sharing, achieved by a coalition of state legislators representing the central cities and inner-ring suburbs of the Twin Cities metropolitan area).

160. The empirical findings that voters show more antipathy to social welfare spending at the state than at the federal level, see *supra* notes 133–137 and accompanying text, might be explained by the stronger sense of immediacy such spending has for the voter at the state level. In other words, voters at the state level may feel much more directly that such spending takes resources away from them both in terms of tax contributions and the allocation of public resources. Or they may intuit that their net contribution to such spending is likely to be less if such revenues are raised nationally, rather than locally.

161. This failure to account for the manner in which majoritarian decisions can entrench and reinforce the disadvantaged position of minority groups tends to undermine two of the traditional defenses of federalism: the citizen participation and competitive federalism rationales. See *supra* text accompanying notes 94–108, 122–127. Both rationales assume that all citizens are capable of participating effectively in political processes and that they are sufficiently mobile to locate to those jurisdictions that provide the public goods and services they prefer. Alternatively, if proponents of these rationales do not make this assumption, they simply ignore these issues, focusing exclusively on the social values of majoritarian democracy and economic efficiency, while failing to account adequately for the negative impact that truly mobile, enfranchised citizens (or homogenous suburban polities), pursuing their individual interests and tastes, can have on marginalized or excluded groups.

The empirical evidence does not refute, however, the third conventional defense of federalism—that it stimulates and encourages innovation by fostering a diversity of state approaches. Within the vast range of policy choices deemed acceptable under the TANF law, states are bound, through diverse strategies and trial and error, to discover solutions that would not be identified in a highly centralized, federally-managed model. The values of experimentation, however, do not have to be sacrificed in a system of decentralization that respects the relative institutional capacities of the respective levels of government. See *infra* text accompanying notes 284–315.

Consistent with Madison's intuition that majority factions are more likely to dominate weak minorities at lower levels of government, the history of racial subordination in the United States has been marked by a great deal of state sponsorship or acquiescence in racist acts and policies. While the federal government has also been a sponsor of racist policies,¹⁶² federal intervention has historically been necessary to ameliorate both state-sponsored racial discrimination and private discrimination acquiesced in by many states.¹⁶³ Similarly, the dominant role of race in shaping white voters' attitudes toward welfare recipients suggests a continuing need for federal-level protections against majoritarian tyranny.

Historically, the decision to decentralize many aspects of AFDC implementation was tied directly to racial attitudes concerning African-Americans.¹⁶⁴ In charting the historical evolution of the AFDC program and other social welfare policies, one author concluded that "African-

162. See, e.g., Massey & Denton, *supra* note 152, at 186–216 (documenting racially discriminatory policies of the Federal Housing Administration); see also *supra* note 152 (citing examples of federal policies that contributed to the isolation of poor minorities in urban ghettos).

163. Among the numerous federal interventions barring discrimination, the Reconstruction Amendments to the U.S. Constitution, the Civil Rights Acts of 1866, 1870, 1875, 1957, 1960, and 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 (as amended in 1988), rendered illegal most forms of state, parochial, and private racial discrimination. See generally Michael R. Belknap, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-Brown South* (1987); Derrick Bell, *Race, Racism and American Law* 34–44, 123–27, 200–12, 685–90 (1992). For a history of state-sponsored constraints on the voting rights of African-Americans and the Supreme Court cases and legislative provisions that eliminated practices such as white-only primaries, gerrymandering, literacy tests, and poll taxes, see Selwyn Carter, *African-American Voting Rights: An Historical Struggle*, 44 *Emory L.J.* 859 (1995); Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 *Neb. L. Rev.* 389, 393–408 (1985). For an overview of the Supreme Court cases eliminating de jure racial segregation in education and some public accommodations, see generally Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (1975). For a history of the rash of lynchings that occurred in the South from 1880 to 1930, and the popular sentiments from which it sprang, see Stewart E. Tohuay & E.M. Beck, *A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930* (1995). For an excellent history of the Age of Jim Crow and the pervasive role of violence in enforcing African-American deference and subordination, see Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (1998). See also Walter White, *Rope and Faggot* (reprint ed. 1992) (examining psychological, social, and economic foundations of lynching in America). For a survey of the limited legislative, judicial, and administrative responses to lynchings by states, see generally James Harmon Chadbourn, *Lynching and the Law* (1933); see also White, *supra*, at 204–05 ("the history of state laws against lynching is, at best, a record of questionable effectiveness").

164. See Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* 7–8 (1998) ("Where African-Americans were potentially included among a [social welfare] policy's beneficiaries, Southerners demanded institutional structures that preserved a maximum of local control. Conversely, strong national social policy institutions [such as Social Security] were politically possible only when African-Americans were excluded from the center.").

Americans have suffered most when the institutions of American social policy have been parochial, and they have benefited the most when those institutions have been national.”¹⁶⁵ The risks of majoritarian tyranny at state and local levels stem from the fact that popular sentiments regarding welfare spending are “race-coded.” In other words, while policy debates concerning welfare appear to be race neutral, racial attitudes, specifically those of the white majority, are a strong determinant of the public’s level of support, vel non, for welfare spending.¹⁶⁶ Relying on a national opinion survey, Martin Gilens has found that “the dimension of racial attitudes with the strongest effect on welfare views is the extent to which blacks are perceived as lazy, and this perception is a better predictor of welfare attitudes than such alternatives as economic self-interest, egalitarianism, and attributions of blame for poverty.”¹⁶⁷ In a subsequent telephone survey designed to assess separately the influence of popular attitudes toward the poor and popular attitudes toward African-Americans, Gilens found that whites’ perception that blacks are lazy was more important in shaping their opposition to welfare than their perceptions of poor people generally.¹⁶⁸ Ultimately, Gilens concluded that “*racial considerations are the single most important factor shaping whites’ views of welfare.*”¹⁶⁹ In particular, white Americans have typically exaggerated the degree to which African-Americans constitute the poverty and welfare population.¹⁷⁰ Welfare, therefore, tends to take on a powerful symbolic meaning for white voters that can be “attractive to some politicians pre-

165. *Id.* at 230.

166. See Martin Gilens, “Race Coding” and White Opposition to Welfare, 90 *Am. Pol. Sci. Rev.* 593, 600 (1996) (“[T]he widespread intuition about the ‘race-coded’ nature of contemporary welfare politics is correct; white Americans’ welfare views are clearly not ‘race-neutral’ expressions of their economic self-interest. . . . Instead, those views are strongly rooted in their beliefs about blacks, and particularly their perceptions of black welfare recipients.”); Gerald C. Wright, Jr., *Racism and Welfare Policy in America*, 57 *Soc. Sci. Q.* 718, 728 (1977) (“[A]ttitudes of the mass public toward welfare spending are closely tied to racial attitudes, and . . . this racial basis of hostility to welfare is reflected in the policy-making processes of the states.”).

167. Gilens, *supra* note 166, at 594 (discussing an earlier work, Martin Gilens, *Racial Attitudes and Opposition to Welfare*, 57 *J. Pol.* 994 (1995)).

168. See *id.* at 598; see also *id.* (noting that “[a]lthough 63% of current welfare recipients are nonblack . . . beliefs about blacks appear to dominate whites’ thinking when it comes to evaluating welfare”).

169. *Id.* at 601 (emphasis added); see also Wright, *supra* note 166, at 722 (“It appears that public support for welfare is systematically related to underlying racial attitudes.”).

170. See Gilens, *supra* note 166, at 602 (“Although blacks represent only 37% of welfare recipients, perceptions of black welfare mothers dominate whites’ evaluations of welfare and their preferences with regard to welfare spending.”); Martin Gilens, *Race and Poverty in America: Public Misperceptions and the American News Media*, 60 *Pub. Opin. Q.* 515, 516 (1996) (“Americans substantially exaggerate the degree to which blacks compose the poor[, and] white Americans with the most exaggerated misunderstandings of the racial composition of the poor are the most likely to oppose welfare.”).

cisely because they can exploit the power of racial suspicion and animosity while insulating themselves from charges of race-baiting."¹⁷¹

This racialization of welfare attitudes is likely to intensify because the demographics of the TANF rolls have changed with the decline in caseloads. Where whites used to make up the majority of the rolls, minorities are poised to become the majority of TANF recipients.¹⁷²

C. *Comparative Treatment of Redistributive Issues at the National Level*

The preceding arguments flowing from the empirical evidence on the political economy of state decisionmaking beg the question whether interest group dynamics surrounding redistributive policy choices are any different at the national level. There are several reasons why fundamental redistributive policy choices—such as whether to have an income support program and who should be eligible for it—are likely to result in greater redistribution if made at the national level: (1) historically, voters have shown more willingness to accept redistributive spending at the national level, and voter tendency toward self-interest appears less pronounced at this level; (2) low-income interest groups are likely to be more effective at the national level, *inter alia*, because of the improved potential for voter acceptance and the benefits of economies of scale; and (3) the national legislature possesses several institutional advantages over state legislatures, including a captured tax base and its facility for logrolling arrangements that tend to equalize power between representatives of affluent and poor districts.

1. *The Historical Context.* — Admittedly, passage of new redistributive legislation is a rare occurrence in American politics.¹⁷³ If the nation were starting from scratch today, without the context of the Great Depression and the New Deal, perhaps a majority of voters would not support federal efforts to provide a minimum social safety net.¹⁷⁴ Historically, however, the national government has been far more interventionist than have state governments on behalf of both the poor and racial minorities.¹⁷⁵

171. Gilens, *supra* note 166, at 602.

172. See Jason DeParle, *Shrinking Welfare Rolls Leave Record High Share of Minorities*, N.Y. Times, July 27, 1998, at A1.

173. See John Ferejohn, *Congress and Redistribution*, in *Making Economic Policy in Congress 131* (Alan Schick ed., 1983) (citing Social Security, Medicare, Medicaid, welfare, and disability legislation passed by the New Deal and Great Society Congresses). The newest redistributive program enacted by Congress is a child health care block grant program designed to provide health care coverage for up to half of the uninsured children of the working poor. See *supra* text accompanying note 87.

174. See *supra* note 69 (citing DiIulio and Kettl's reference to public opinion polls showing that a wide majority of Americans do not believe it is government's responsibility to take care of the poor).

175. In general, the federal government has expanded health and welfare benefits for the poor, while states have been more inclined to restrict eligibility for such programs. For example, the federal government has substantially expanded the availability of Medicaid for poor families and children, while state governments have increasingly restricted or

and this history is consistent with empirical evidence suggesting that voters are more receptive to such interventions when they are made at the national level.¹⁷⁶ While voters generally are not enamored of social welfare spending, our capacity for shared sacrifice and protection of the most vulnerable in our society has been highest at the national level. By contrast, the state level is the situs of government that has been most associated with the subordination of racial, if not political, minorities in America, and state governments generally have been less willing to support public assistance programs.¹⁷⁷ Arguably, citizens show more capacity for self-interested behavior and less capacity for charity toward persons perceived as "other" the closer the issue at hand is to them.¹⁷⁸ For it has only been with pressure from higher levels of government that self-interested or discriminatory behavior at more localized levels has been overcome.¹⁷⁹ And African-Americans have fared better under nationally—rather than locally—determined welfare policies.¹⁸⁰ History suggests, therefore, that the national arena provides a better political context for deciding fundamental redistributive questions than do state-level political fora.

eliminated general assistance (GA) programs for poor, childless adults. See Rom, *supra* note 60, at 408.

176. See *supra* text accompanying notes 136–137; see also Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1217 (1977) (explaining in the context of national environmental regulations that communities and individuals "may be far more willing to undertake sacrifices for a common ideal if there are effective assurances that others are making sacrifices too"). But cf. News Interest Index Poll, *supra* note 58 (suggesting that voters who favor states taking the lead on welfare reform may be explained by their negative perceptions of welfare recipients).

177. See Rom, *supra* note 60, at 408–09. For example, the federal government has generally sponsored expansions of benefits to the poor, the elderly, and disabled. See *id.* at 411 (noting general expansions in Medicaid and Supplemental Security Income (SSI) programs since their inception). Over the past two decades, many states have been reducing or eliminating general assistance (GA) welfare programs for childless poor adults. See *id.* at 408. To be fair, however, states are much less *able* than the federal government to pursue redistributive policies, because their state constitutions prohibit them from running budget deficits, and because they are subject to economic competition from other states that rationally motivates them to avoid becoming welfare magnets. See *id.* at 406; see also *infra* text accompanying notes 194–196, discussing Congress's institutional advantage of a captured tax base and the economic competition at the state level.

178. Cf. Briffault, *supra* note 126, at 1147–59 (noting that local boundaries create self-interested politics, and that, when local polities are allowed to decide how much they will cooperate with other localities, no meaningful cooperation (or cross-jurisdictional burden sharing) will occur, because of this basic self-interested behavior); Briffault, *supra* note 143, at 429–34 (noting that boundaries facilitate and encourage self-interested behavior on the part of local jurisdictions and individual citizens).

179. Cf. Briffault, *supra* note 126, at 1122, 1154, 1165–70 (arguing that, where it has occurred, meaningful regional cooperation has been dependent on pressure from higher levels of government).

180. See *supra* text accompanying note 164.

2. *Strategic Advantages of National-Level Advocacy.* — The national arena also offers low-income and anti-poverty interest groups the strategic advantage of being able to focus energies on one political forum, with attendant economies of scale. At the national level, research, public education, and advocacy on poverty issues may be undertaken much more cheaply than if such activities are undertaken repeatedly in multiple fora.¹⁸¹ Moreover, to the extent that the self-interested tendencies of voters are more pronounced at state and local levels, anti-poverty interest groups must work harder at those levels to overcome these political barriers. The transaction costs involved in organizing in multiple fora, therefore, are much greater than the transaction costs involved in forming a few central associations at the national level. Finally, the possibilities for interest-group formation and coalition building improve exponentially when committed individuals and potential alliances can emerge from a single national pool.¹⁸²

3. *Strategic Advantages of the National Legislature.* — Beyond providing a single political forum on which anti-poverty groups can focus their energies, the national legislature offers these groups additional strategic advantages. Unlike the state level, at which fiscal politics is dominated by the full-time governor's office,¹⁸³ fiscal politics, at the national level, is dominated by the legislature, which must enact the annual budgetary and appropriations legislation through which the nation's public spending priorities are made. The institutional structure of Congress lends itself to logrolling arrangements whereby representatives of low-income interest groups can trade votes with supporters of other, non-redistributive programs.¹⁸⁴ The highly decentralized congressional committee structure

181. Cf. Stewart, *supra* note 176, at 1212 (arguing that the economies of scale offered on the national level would enable environmental groups to research and analyze complex technical issues "far more cheaply once on the national level than repeatedly at the state and local level"). The national level also offers advocacy groups economies of scale that may enhance their fund-raising efforts. See *id.* at 1214 (arguing that "environmental advocacy at the national level . . . affords scale economies in fund-raising").

182. Cf. *id.* ("a national forum for decision may greatly lessen the barriers to environmental interests' achievement of organizational critical mass"). I argue that the opportunities for interest group formation improve exponentially, as opposed to linearly, when advocacy efforts are moved from the state to the national level. This is so for two reasons. First, the pool of allies for a national-level effort is likely to be dramatically larger than that available for advocacy efforts aimed at a single state legislature. Second, there is a multiplier effect that comes with increased numbers. Assume, for example, that going from the state level to the national level increased the pool of potential allies from 10 to 100—a tenfold increase. The opportunities for interest group formation should increase more than tenfold, however, because the number of possible combinations or allegiances that can be formed among the 100 allies is in the thousands. In other words, with increased numbers, the opportunities for synergistic alliances is multiplied many times over.

183. See *supra* note 133 and accompanying text.

184. See Ferejohn, *supra* note 173, at 133. Ferejohn notes that certain congressional committees, such as the agriculture committees, are particularly conducive to such arrangements, because they "tend to use legislative alliances or logrolling to enact omnibus

tends to facilitate an “informal, universalistic norm of reciprocity between the members of Congress.”¹⁸⁵ In this institutional regime, through the coalition-building of members representing poor districts,¹⁸⁶ poor families have a much better chance of having their voices heard. This is not to say, however, that redistributive policymaking is easy or even likely at the national level. On the contrary, a coalition built on logrolling arrangements born of unrelated interests is perhaps the most difficult to form and sustain, and, because of the need to accommodate unrelated interests, the end result is likely to be a redistributive program that is not

bills containing provisions for a variety of loosely related programs.” *Id.* at 137; see, e.g., House Approves Farm Measure That Restores Many Food Stamps, *N.Y. Times*, June 5, 1998, at A14 (noting that a \$1.9 billion farm bill approved by the House would provide \$818 million over five years to restore food stamps to certain immigrants). Congressional policy making around the food stamps program has been based upon such logrolling-based coalitions for the past two decades, even though such arrangements are fragile. See Ferejohn, *supra* note 173, at 143–44. Individual members of Congress arguably have a strong incentive to engage in this type of coalition politics because, by participating in a system in which all members stand to gain something for their local districts, they ensure their own local constituencies of receiving higher net benefits over time. See, e.g., Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 *Geo. L.J.* 1737, 1743–44 (1992) (describing a model of universalism in which all local projects are approved on a mutual back-scratching basis at a cost of the average project; therefore, “[i]f local benefits are greater than average project costs, then universalism has a higher expected net gain to each congressional district over the long run”).

185. Fitts & Inman, *supra* note 184, at 1745. Through a generally followed rule of deference to committee choices, reciprocity is ensured “as each representative’s pet project is forwarded to the floor.” *Id.* at 1746; see also Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* 42 (1977) (noting that the institutional protection for “pork-barrel” politics is reflected in the privilege the House accords to certain classes of legislation—e.g., taxing, spending, and omnibus public works bills—which can bypass the Rules Committee and go directly to the floor for a vote). But see Ferejohn, *supra* note 173, at 138, 142–43 (arguing that certain committees receive more deference on the floor than others and that a committee’s logrolling arrangements are inherently fragile because of the ability of opponents to add deal-destroying amendments on the floor). Such logrolling arrangements are also facilitated by the rise in stature of individual members of Congress that has come with the decentralization of power in Congress and the decline of political party influence and discipline. See, e.g., Fiorina, *supra*, at 62–67 (describing, *inter alia*, the “surfeit of chiefs” and “shortage of Indians” that has occurred with the creation of 120-plus subcommittees, hence subcommittee chairs, in each chamber of Congress); see also Fitts & Inman, *supra* note 184, at 1740. Although the degree of power accorded to standing committees and their chairpersons changes over time and issues, “[i]f they so desire, most congressmen now have the opportunity to head up a subgovernment” that “protect[s] a few agencies under [its] jurisdiction and accommodat[es] a few concerned interest groups.” Fiorina, *supra*, at 66. In this manner, each individual Congressperson can garner the electoral credit and influence that facilitates congressional-wide observance of reciprocity. See *id.* at 66–67.

186. Among the many members of Congress who fit this model are Rep. Charles Rangel (D-NY) (Empowerment Zones legislation of 1993), former Rep. Floyd Flake (D-NY) (Bank Enterprise Act of 1994), and Rep. Bobby Rush (D-IL) (Community Development banking legislation of 1994). See Interview with Bill Zavarello, former Legislative Director to Rep. Maxine Waters (D-CA) (Washington, D.C., August 1998).

targeted effectively to the sector of the population most in need of benefits.¹⁸⁷ Thus, while some argue that rent-seeking interest groups can succeed in convincing legislators to "transfer[] wealth from groups with high information and transaction costs to groups with low information and transaction costs,"¹⁸⁸ it is clear that, while a great amount of income is transferred among individuals in the American political system, a universally reciprocating Congress is not going to change appreciably the distributions of income and wealth in the United States.¹⁸⁹ The structure of Congress does appear, however, "to produce greater political equality between representatives in Congress."¹⁹⁰ Thus, through universal reciprocity, Members who represent poor districts or who simply care about poverty issues can procure some benefits for the poor.

While state legislative processes may permit the same type of coalition politics, such coalitions are less likely at the state level because state legislatures do not share other institutional advantages enjoyed by the national legislature. First, as noted above, on redistributive issues, Congress is operating in an improved, albeit modestly improved, political environment.¹⁹¹ Second, state political institutions appear to be more susceptible to interest group capture than national ones.¹⁹² In other words, the rent-seeking lobbying efforts of wealthy, well-organized groups are more likely to hold sway in state legislative bodies and, therefore, to undermine possibilities for coalitions that support redistributive spending.¹⁹³ Third, and perhaps most importantly, any logrolling arrange-

187. See Ferejohn, *supra* note 173, at 132-33. The other potential coalition strategies for pursuing redistributive legislation are (1) seeking a broad clientele for proposed benefits (e.g., Social Security and Medicare), which also prevents narrow targeting of those most in need; or (2) seeking only ideologically partisan supporters, which requires strong partisan strength in Congress and opens any enacted legislation to watering down when partisan tides turn. See *id.* at 139-49.

188. Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 *Colum. L. Rev.* 223, 230 (1986).

189. See Ferejohn, *supra* note 173, at 151 (noting that "the overall distributions of wealth and income are not much affected by the mechanisms of redistribution employed in American politics" in part because the structure of Congress "do[es] not offer much possibility of creating stable political support for effective redistributive programs"); Fitts & Inman, *supra* note 184, at 1747, 1749 (noting that "recent universalistic Congresses have made our tax code less progressive, not more" and that "universalistic cost sharing among all districts is unlikely to lead to real income redistribution").

190. Fitts & Inman, *supra* note 184, at 1747.

191. See *supra* text accompanying notes 136-137 and 175-176.

192. See Dye, *supra* note 125, at 107 (noting that state and local governments, individually, are probably more vulnerable than the national government to rent-seeking by wealthy special interests, but arguing that rent-seeking in the sole locale of Washington, D.C. is likely to be more efficient and produce more benefits for special interests); Jerry L. Mashaw & Susan Rose-Ackerman, Federalism and Regulation, in *The Reagan Regulatory Strategy* 111, 127-36 (George C. Eads & Michael Fix eds., 1984); Mashaw & Calsyn, *supra* note 78, at 316 ("Many believe that state governments are historically more beholden to special interests than is the federal government.").

193. This is not to say that rent-seeking and disproportionate influence by well-organized and well-funded special interest groups do not occur in the national legislature.

ments in support of redistributive spending at the state level will be subject to the economic competition constraints articulated by Paul Peterson.¹⁹⁴ Unlike the national legislature, state legislatures do not enjoy the benefits of a captured tax base. The threat of exit by mobile taxpayers and of entry by low-income persons seeking redistributive benefits will necessarily constrain and influence state legislative choices.¹⁹⁵ The national legislature, therefore, enjoys *both* an enhanced political *and* economic context for decisionmaking on redistribution.

Some might argue that the national legislature has already spoken in passing the Act, reflecting a strong, anti-redistributive bent. There are two responses to this criticism. First, the Personal Responsibility Act itself reflects a continued commitment to a substantial level of federal welfare spending and has as one of its core purposes the provision of support for needy families with children. Second, coalitions can shift and Congress often self-corrects—as it did when it reinstated welfare benefits for many legal aliens within a year of passing provisions in the Act that eliminated such benefits for certain legal aliens. There are three precipitating events which may cause Congress to revisit core provisions of the Act: (1) when substantial numbers of recipients begin reaching the lifetime limits for receiving benefits; (2) when the nation enters a recession; and (3) when new funds must be appropriated for fiscal years 2003 and beyond.

IV. POLITICAL COMPETITION ENGENDERED BY THE PERSONAL RESPONSIBILITY ACT—ACTUAL STATE CHOICES AND THE INFLUENCE OF THE MIDDLE CLASS

The evidence presented above is not intended to suggest that all states will necessarily reject redistributive aims. Instead, the primary claim is that welfare recipients, or the interest groups that represent them, are likely to fare worse in state, as opposed to national, political processes, and that the risks of suburban voter dominance of these recipients and groups are heightened in the state context.¹⁹⁶ In other words,

They do, and they contribute to an overall problem of the general public and unorganized large groups being relatively disadvantaged in influencing policy debates they care about. See, e.g., Macey, *supra* note 188, at 227–33. For a general treatment of the disincentives or barriers to collective action by large unorganized groups, as compared to small groups, see generally Mancur Olson, *The Logic of Collective Action* (1971).

194. See *supra* text accompanying notes 12–13; cf. Kantor, *supra* note 13, at 114–17 (describing the massive tax abatement and economic incentive packages private corporations exact from state government as a result of threats to leave the state for other locales).

195. Several theorists emphasize the need for national policies that defuse competition among the states. See, e.g., Mashaw & Rose-Ackerman, *supra* note 192, at 117–18; Peterson, *Price of Federalism*, *supra* note 12; Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. Cal. L. Rev. 1447, 1467–75 (1995); Stewart, *supra* note 176, at 337 n.5 (citing Wallace E. Oates, *Fiscal Federalism* (1972)).

196. The reasons are fourfold. First, the TANF program is structured in ways that render federal dollars intended for redistributive purposes highly fungible to other

while not all states will behave this way, the Act enables state political majorities who are particularly hostile to redistributive aims to impose severely draconian requirements on welfare recipients, if that is what a state's politics prefers, even for reasons wholly unrelated to sound welfare policy.¹⁹⁷ In addition, some of the evidence regarding states' actual choices in implementing the TANF law suggests that this possibility has been realized, and that there is insufficient protection in the Act against this risk. Section A discusses national trends in state TANF programs, and Section B then examines the evidence from outlier states that have adopted especially draconian policies.

A. National Trends

Interstate differences in welfare policies are to be expected given differences in state wealth and political culture.¹⁹⁸ However, some national trends can be gleaned from the evidence. While it is too early to make definitive claims about the success, vel non, of the Act in meeting its core

purposes, including tax relief to state voters. See *supra* text accompanying notes 38–43. Second, and in light of this fungibility, the TANF program is premised on a federalism that leaves to state political consensus fundamental choices about how much to spend on welfare and related assistance (e.g., child care) and on whom to spend it. Third, state political consensus appears to turn, to a large degree, on the preferences of middle income, suburban voters, who appear to behave more self-interestedly in the state context. Finally, racial attitudes may be influencing the policy preferences of white majority voters. See *supra* Section III.B.

197. Admittedly, there is a great deal of uncertainty about what welfare reform strategies will work best in reducing welfare dependency, particularly among the long-term welfare population. My aspiration in this Article is not to impose my own vision about what welfare strategies should be tried, but to offer an alternative, structural framework that will enhance the possibilities for rational, deliberative policy-making that is influenced by empiricism rather than politics (or racism). See *infra* text accompanying notes 294–299 (arguing for rigorous evaluations of welfare reform experiments, systematic reporting on what happens to persons who are terminated from the TANF rolls, and more aggressive national standards or incentives that direct state action).

I do believe, however, that the Act states a clear aspiration for states to pursue welfare reform in a manner that both protects poor children and actually raises employment. See *supra* text accompanying notes 17–21. The empirical evidence presented in this Article gives me grave doubts about whether states, if left completely to the pressures of state majoritarian politics, will fulfill these goals. For this reason, I also propose a minimum national safety net for children, see *infra* text accompanying notes 294–295. While it is up to Congress to define clearly what such a safety net should consist of, I would argue, at minimum, for a system of in-kind supports or services. See *infra* note 298.

198. See Virginia Gray, *The Socioeconomic and Political Context of States*, in *Politics in the American States* 1, 4 (Virginia Gray & Herbert Jacob eds., 1996) (noting that the more generous welfare programs are found where the political competition is oriented toward issues and that differences in the nature of political competition can produce different attitudes toward a state's responsibility to the poor); Rom, *supra* note 60, at 406–07 (noting that “moralistic” political cultures, which tend to conceive of politics as centered on notions of advancing the public good, tend to be more activist and generous in their welfare programs than “traditionalistic” or “individualistic” political cultures, which tend to view politics as a way of preserving the status quo or gaining personal enrichment, respectively).

goal of reducing welfare dependency, the preliminary evidence does suggest serious risks that some states will redirect TANF resources to other, middle class priorities or, worse, adopt policies that eliminate a minimum social safety net for poor children.¹⁹⁹ The good news is that states have not rushed to narrow eligibility requirements or reduce cash assistance levels for welfare recipients,²⁰⁰ except in the case of convicted drug felons²⁰¹ or legal aliens prohibited from receiving federally-funded public assistance.²⁰² Nevertheless, there are some worrisome trends.

199. In passing the Act, Congress does appear to have intended that such a minimum safety net exist. See *supra* text accompanying note 21 (quoting Conference Report on TANF law stating an intended guarantee of support to vulnerable children).

200. See U.S. Gen. Acct. Off., *Welfare Reform: States are Restructuring Programs to Reduce Welfare Dependence* 5 (1998); *One Year After*, *supra* note 32, at III-6, III-7 to III-8 tbl.III.3, VI-II to VI-III tbl.VI.1. In fact, for two-parent families, the majority of states (35) have eliminated extra eligibility requirements that existed under the old, AFDC law, simplifying eligibility rules to treat two-parent families the same as single-parent families. See *id.* at III-12 to III-13.

With respect to benefit amounts, in the year following the passage of the Act, only nine states changed their benefit levels, with five *increasing* benefits and four lowering benefits. The remainder have retained the same benefit levels that were in effect when the Act passed. See *id.* at VI-1. However, this period of relative stability of benefit levels comes after a two-decade downward movement of benefit levels set by states. See Peterson, *Devolution's Price*, *supra* note 12, at 116 (noting that welfare benefits have declined 42% in real terms over the last two decades).

Under the TANF law, Congress granted states the authority to set different benefit levels for new residents immigrating from other states. As of November 1977, 14 states had elected to treat new state residents differently. The states are the District of Columbia, Florida, Georgia, Illinois, Maryland, Minnesota, New Hampshire, New York, North Dakota, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin. See National Governors' Ass'n Ctr. for Best Practices, *Selected Elements in State Plans for Temporary Assistance for Needy Families*, Nov. 20, 1997 [hereinafter *NGA Best Practices*]. North Carolina will allow "electing" counties to set any time limits, work requirements, out-of-state family eligibility, family caps, or diversion payments to the degree allowed under the Act. See *id.* at 15 n.58. The Supreme Court, however, recently barred the practice of setting different benefit levels for new residents. See *supra* note 31.

Finally, under AFDC, benefits for a family automatically increased when an additional child was born into the unit. The Personal Responsibility Act did not specifically address "family caps," by which the additional benefit for additional children would be eliminated or reduced. Twenty-two states have adopted family cap provisions under TANF, 17 of which provide no additional benefits for additional children. Of the 22 states with a family cap, 15 of them had them in place prior to passage of the Act using AFDC waivers. See *One Year After*, *supra* note 32, at VI-8.

201. Thirty-seven states deny TANF assistance to drug felons, while 17 provide it. See *NGA Best Practices*, *supra* note 200, at 19. While the Act bars federal TANF funds from being used to provide assistance for drug felons, states may use their own funds to provide welfare services for this group. See 21 U.S.C. § 862a(b) (Supp. III 1997).

202. The Act bars aliens arriving after August 22, 1996 from receiving any federally funded assistance. The majority of states (31) are providing no assistance to newly arrived legal immigrants that otherwise meet eligibility requirements for cash assistance. For "current" legal immigrants, the majority of states (50) are providing full benefits; only one state is denying any assistance to current immigrants. (The District of Columbia is considered a state for purposes of the Act.) See Tufts Study, *supra* note 2, app. B, pt. III.

First, it should be noted that, to date, states have been developing their welfare reform policies in the context of relative economic prosperity.²⁰³ A national or regional recession would likely force states to adopt more stringent policies in order to accommodate rising welfare caseloads.²⁰⁴ Even in a period of economic prosperity, however, the majority of states are spending at or near the minimum amount required by the Act for their state maintenance of effort. Similarly, despite the fiscal savings resulting from the often-dramatic declines in caseloads that states have experienced under the TANF regime, very few states are using this windfall to create contingency or "rainy day" funds.²⁰⁵ Nor are many states investing intensively in the welfare system.²⁰⁶ In addition, about 40% of the states have adopted a lifetime limit on TANF assistance that is shorter than the five-year maximum imposed by Congress,²⁰⁷ and only

203. In the past few years most states have enjoyed budget surpluses resulting from increased tax collections and a vibrant and growing national economy. Hawaii is the only clear exception, as it has experienced a sustained economic recession. See David Cay Johnston, *States Control Spending Despite the Tax Windfalls*, N.Y. Times, Jan. 27, 1997, at A10.

204. See Donald F. Norris & Lyke Thompson, *Findings and Lessons From the Politics of Welfare Reform*, in *The Politics of Welfare Reform* 221, 224 (Donald F. Norris & Lyke Thompson eds., 1995).

205. As of December 1997, only five states had used state monies to establish rainy day funds for welfare-related expenses. Those states were Arizona, Arkansas, Maryland, North Carolina, and Ohio. At least seven other states decided to reserve a percentage of their federal TANF block grant funds for contingencies. Those states were Colorado, Georgia, Maine, Minnesota, Wisconsin, Texas, and Utah. These funds must remain in the U.S. Treasury. Sixteen states have general budget contingency funds that are not earmarked for special purposes. See *Preparing for the Rainy Day*, NASBO News (Nat'l Ass'n of St. Budget Officers, Washington, D.C.), Oct./Dec. 1997 <<http://www.nasbo.org/pubs/newslett/9702/istea.htm>> (on file with the *Columbia Law Review*); Vermont Legislative Research Shop, *A Comparison of Reserve Funds for State General Funds and for TANF Programs* (1998) <<http://www.uvm.edu/%7evlrs/doc/budget.html>> (on file with the *Columbia Law Review*). But see Pear, *supra* note 50, at A1 (noting that many states are not drawing down all of their TANF funds from the federal government and that some states intend to reserve these unobligated funds for a future recession).

206. See *supra* note 50 and accompanying text.

207. Twenty states have adopted shorter lifetime limits, ten of which adopted lifetime limits of only two years (with some variations, e.g., 24 months within any 60 month period; applied only to adults, not children). These states are Arkansas, Idaho, Indiana, Louisiana, Massachusetts, Nebraska, North Carolina, Oregon, South Carolina, and Virginia. Of the remaining states that adopted shorter lifetime limits, one state (Tennessee) adopted an 18 month limit (must wait three months before starting another 18 months) and a lifetime limit of 60 months. Texas adopted a multi-tiered approach such that the lifetime limit varies from 12 to 60 months, depending on the extent of the recipients' recent work experience and education. Another state (Connecticut) adopted a 21 month limit with the option of 6 month extensions. Three states (New Mexico, Ohio, Utah) adopted a 36 month limit (Ohio is 36 months within 60 months). Three states (Florida, Georgia, and Missouri) adopted a 48 month limit. And, finally, one state (Iowa) has an individualized time limit that is set by the family and the welfare department. See NGA Best Practices, *supra* note 200; One Year After, *supra* note 32, at IV-5 tbl. IV-1.

States vary widely on whether they allow for exemptions from the lifetime limit or extensions of the limit once it is reached. Many of the states that provided for a 60 month

four states (about 8%) have elected to provide a cash benefit to the family or to the children after the lifetime limit is reached.²⁰⁸ In other words, Congress accorded states the discretion to determine whether there would be a back-up safety net of state-funded aid for poor children once lifetime limits on TANF assistance were reached, and only a handful of states have elected to provide such aid. This development is particularly troubling because the Act does not require states to track or monitor the status of the families who leave the welfare rolls, whether because of sanctions, time limits, or success in finding work.²⁰⁹ Furthermore, unlike in the era of welfare reform initiated under federally-granted waivers from AFDC rules,²¹⁰ the TANF law does not require rigorous evaluations of welfare reform experiments.²¹¹ In short, without systematic reporting on those who have left the rolls and rigorous evaluations of welfare experiments, it will be difficult to know whether poor children are falling through the cracks of a decentralized and eviscerated social safety net.

While states have not appreciably altered eligibility requirements for most welfare recipients, they have created a more stringent regime of work requirements and sanctions that can result in the loss of benefits.²¹²

limit made no provisions for extensions or exemptions. Most of the states that opted for shorter lifetime limits, however, made some provision for exemptions—for example, for age, disability or illness, domestic violence—and/or extensions—for example, for demonstrated hardship in finding employment. See *One Year After*, supra note 32, at IV-2, IV-5 tbl.IV.1.

208. Only four states (California, Maryland, New York, and Rhode Island) do not have a termination time limit: They continue to provide a reduced benefit to either the entire family or just the children after the lifetime limit is reached. And one state (Michigan) has no time limit under state law—the state will expend its own funds for families that exceed the lifetime limit. See *One Year After*, supra note 32, at IV-3, IV-5 tbl. V.1.

209. States are only required to keep such records for a sample of closed cases. See 42 U.S.C. § 611 (Supp. II 1996). The Act does, however, require states to collect data on child poverty rates and state expenditures. See *id.* § 611(a)(1)(A). States must maintain diasaggregated records on families receiving welfare benefits. See *id.* These records must include information on the size of the family receiving welfare benefits, ages of family members, residence, and amount of time the family has received federal aid. See *id.*

210. The Social Security Act encouraged state experimentation with welfare programs, allowing the federal government to receive state applications for waivers from AFDC rules and to grant such waivers subject, *inter alia*, to the requirement that approved experiments be conducted with a control group, and to rigorous evaluation of the outcome of the experiment. See Dep't of Health and Human Servs., *Setting the Baseline: A Report on State Welfare Waivers I* (June 1997) <<http://aspe.os.dhhs.gov/hsp/isp/waiver2>> [hereinafter *Setting the Baseline*] (on file with the *Columbia Law Review*); see generally U.S. Gen. Acct. Off., *Welfare Waivers Implementation* (1996) [hereinafter *GAO, Welfare Waivers*]. See also *infra* text accompanying notes 302–308.

211. The Personal Responsibility Act only encourages such evaluation. See 42 U.S.C. § 613(f). If a state chooses to conduct an evaluation and the evaluation is approved by the Secretary of Health and Human Services, the federal government will pay for up to 90% of the cost. See *id.* § 613(f)(3). HHS is required to “review” the three best and three worst TANF programs, *id.* § 613(d)(2), and to evaluate “innovative approaches for reducing welfare dependency,” *id.* § 613(b)(1).

212. The Act requires states to impose work requirements and sanctions for non-compliance with those requirements. See *supra* notes 24 & 34.

Slightly more than a third of states have set time limits for the triggering of work requirements for welfare recipients that are shorter than the two-year maximum set out in the Act.²¹³ In determining what types of activities qualify as "work" after the work trigger has been reached, only six states allow expanded education or training to qualify,²¹⁴ while ten states will allow participation only in employment or unpaid work.²¹⁵ The vast majority of states now permit narrower exemptions from work requirements than were available under the federally-determined AFDC regime,²¹⁶ and they now impose stricter sanctions for non-compliance with

213. Under TANF, states have the option of imposing work requirements sooner than the federal 24 month limit. Most states (33) have indicated they will conform to the federal 24 month limit. See NGA Best Practices, *supra* note 200, at 19. Typically, a state will require work participation either within 24 months or once the state determines that the individual is ready to work, whichever is sooner. The remaining states have shorter time limits for work. Wisconsin requires a recipient to begin employment or unpaid work experience *immediately*. Otherwise, the time periods before employment or unpaid work experience is required vary, from 60 days in Massachusetts, to 30 months in Vermont (which is operating under a waiver). See *id.* at 12, 18–19; One Year After, *supra* note 32, at V-11 tbl.V.5.

214. See Tufts Study, *supra* note 2, at 36, app. B (entry C1 in table). Those states that allow for expanded education are necessarily operating under a waiver or using state funds. See *id.* The Act only allows the following educational activities to qualify as "work activities": vocational educational training (not to exceed 12 months per individual), job skills training directly related to employment, education directly related to employment, and secondary school or GED programs. See 42 U.S.C. § 607(d)(8)–(11) (Supp. II 1996).

215. See One Year After, *supra* note 32, at V-11 tbl.V.5. The types of activities that qualify as "work" vary greatly across states. See *id.* at V-10. Utah, for example, counts activities such as post-natal care as participation in work. See Tufts Study, *supra* note 2, at 20. Twenty-five states allow limited education and training to qualify as work. For an explanation of the limited educational activities that qualify as work activities under the Act, see *supra* note 214. Twenty states use the same definition of work activities as applied under AFDC work experiments, offering the same options for work-qualified education and training. And, as noted above, only six states allow expanded education and training, such as college study in excess of one year, to qualify as work. See Tufts Study, *supra* note 2, at 36, app. B (entry C1 in table). So, for example, under the TANF regime, New York City disallowed full-time college study from qualifying as work for purposes of its workfare program. See Jonathan P. Hicks, Students at CUNY Complain Work Rule Limits Education, N.Y. Times, Sept. 21, 1995, at B3.

216. The Family Support Act of 1988 created the Job Opportunities and Basic Skills Training (JOBS) program and required states to place a certain percentage of AFDC recipients in work-related activities. Pub. L. No. 100-485, 102 Stat. 2343 (1988) (codified in scattered sections of 42 U.S.C.). Thus, under AFDC, non-exempt adult recipients were required to participate in the JOBS program once the state determined they were ready or as state resources permitted. However, primary caretakers of children under three years (one year at state option) or six years of age were exempt from this requirement—provided that child care was not guaranteed by the state. The TANF law replaced the JOBS program and its exemption rules with the requirement that all adult recipients participate in state-defined work activities within 24 months of receiving benefits, or sooner if the state required. See One Year After, *supra* note 32, at V-1. The TANF law retained the work exemption for parents of children under six who are unable to obtain child care and accorded states the option of setting lower age-of-child exemptions where child care is available. The majority of states (45) now set the exemption age at one year or less. See *id.* at V-3 tbl.V.1. (noting that 26 states set age at one year; two states at six months; twelve

the work requirement than were imposed under the old regime.²¹⁷ The most severe sanctions imposed by states also last longer in most cases than under the prior regime, creating another potentially severe encroachment on the safety net for poor children.²¹⁸

The use of severe sanctions is disturbing for several reasons. First, some states have experienced alarmingly high error or reversal rates for such sanctions.²¹⁹ Many families have been sanctioned and denied assist-

states near three months; and that five states do not provide an exemption at all based upon the age of the youngest child). And the majority of states (38) changed their exemption policies after the passage of the TANF law. See *id.* at V-2.

217. See Tufts Study, *supra* note 2, at 36, app. B (entry C4 in table) (noting that 43 states now impose stricter sanctions for non-compliance with the work activity requirement, either by imposing greater grant reductions and/or earlier termination). "In the past, recipients who failed to comply with a work program typically lost a third of their grant. Now, in [a majority of] states, they [can] lose all of their cash support." DeParle, *supra* note 39, at A17; One Year After, *supra* note 32, at V-6 (noting that "14 states have increased their initial sanction to a full-benefit sanction, while 36 have increased their most severe sanction to a full-benefit sanction"). Under the JOBS/AFDC regime, "the first sanction for non-compliance with a work requirement lasted until the affected recipient came into compliance; the second lasted for at least 3 months; and the third and subsequent sanctions lasted for at least 6 months." *Id.*

States may, however, be forced by perverse incentives in the Act to initiate "full family" sanctions which terminate benefits to the entire family. The work participation rates, see *supra* note 34, which mandate that a certain percentage of the caseload—25% in fiscal year 1997—be in qualified work activities is more difficult to meet the larger the caseload. If the caseload is 20,000, for example, then 5,000 recipients had to be engaged in work activities in FY1997. If the caseload were reduced to 10,000, then only 2,500 recipients had to be in work activities. Under the Act, sanctioned families may be excluded from the denominator for purposes of work participation rates, for up to three months. See 42 U.S.C. § 407(b)(1)(B), 42 U.S.C. § 607(b)(1)(B)(ii)(II) (Supp. II 1996). After three months, a sanctioned family will be included in the state's caseload for purposes of meeting the work participation rate. However, if a family's benefits are terminated altogether, they are no longer part of the caseload. Therefore, the majority of states now impose a full family sanction where an individual repeatedly fails to comply with work requirements. Similarly, the work participation rates also give states incentive to adopt narrower exemptions from work requirements for TANF recipients. See Interview with Deborah Chassman, welfare consultant and Adjunct Professor of Welfare Law, George Mason University, in Washington, D.C. (Sept. 25, 1998).

218. The most severe sanctions imposed by states last longer than under the AFDC sanctions regime, with only nine states lifting the sanction immediately after compliance with work activities. Seven states impose a lifetime sanction on continued noncompliance. See One Year After, *supra* note 32, at V-7 to V-8 tbl.V.3. Sixteen states have indicated that they will permanently or temporarily terminate Medicaid benefits for adults who fail to participate in required work activity. And 19 states will permanently or temporarily terminate or reduce food stamps benefits for failure to meet required work activity. See Tufts Study, *supra* note 2, at 36, app. B (entries C5 and C6 in table).

219. For example, Milwaukee County, Wisconsin had an error rate as high as 70% during the two month period during which it was automating its welfare system. And in one recent month, Massachusetts had 47% of its sanctions decisions partially or fully reversed on appeal. See U.S. Gen. Acct. Off., *Welfare Reform: States' Early Experiences with Benefit Termination* 51-52 (May 1997) [hereinafter GAO, *Benefit Termination*]; see also Jason DeParle, *Cutting Welfare Rolls but Raising Questions*, N.Y. Times, May 7, 1997, at A1 (noting Wisconsin's often errant use of fiscal penalties against welfare recipients for

ance without the state even bothering to assess and acknowledge the families' very real barriers to work participation. Second, states have great discretion regarding the procedural protections that welfare recipients are accorded before sanctions such as a suspension or complete loss of benefits are imposed.²²⁰ Third, case studies on the impact of benefit terminations show that a large percentage of families that lose cash assistance benefits also stop receiving Medicaid and food stamps, even though they continue to be eligible for these benefits.²²¹ Welfare monitoring agencies have also found that a sizable portion of families terminated from the TANF rolls experience a palpable increase in hardship and decrease in family well-being, compared to families that remain on the TANF rolls.²²² Fourth, social science research indicates that at least a third of welfare caseloads are comprised of individuals with severe or multiple barriers to sustained employment, such that they would have great difficulty complying with rigid work rules and are not likely to become economically self-sufficient. Hence, they truly depend on cash welfare assistance, Medicaid, and food stamps for their basic survival.²²³ And fi-

purported rule violations, which helped to reduce caseloads and keep the program affordable). Furthermore, many families have been sanctioned and denied assistance without the state even bothering to assess and acknowledge the families' very real barriers to work participation. See Children's Defense Fund & National Coalition for the Homeless, *Welfare to What: Early Findings on Family Hardship and Well-Being 3* (Nov. 1988) [hereinafter *Welfare to What*] (on file with the *Columbia Law Review*) (noting, e.g., that "in a state-funded study of Utah families who were denied assistance because of failing to participate in required activities, 23% said they failed to participate due to lack of transportation; 18% due to lack of child care; 43% due to a health condition; and 20% due to mental health issues"); see also *id.* at 6 ("In many states . . . families are being denied cash assistance for missing appointments, regardless of grave illnesses, lack of transportation, or other serious obstacles.").

220. See *supra* note 31. While "virtually all the states have retained a fair hearing mechanism that is similar to the one in place under AFDC . . . limitations on procedural due process in the fair hearing process are arising." Welfare Law Center, *Due Process and Fundamental Fairness in the Aftermath of Welfare Reform* (1998) <<http://www.welfarelaw.org/DueProcess.htm>> (on file with the *Columbia Law Review*). In particular, welfare advocates note "a general decline in the adequacy and timeliness of notices." *Id.*

221. See GAO, *Benefit Terminations*, *supra* note 219, at 4, 41-44. See also *Welfare to What*, *supra* note 219, at 17-18 (noting, *inter alia*, that falling welfare rolls were the primary reason that 500,000 fewer adults and children nationwide participated in Medicaid in 1996 than in 1995, and that when families lose Medicaid, they often lose all health coverage); *id.* at 27 (noting that food stamp caseloads have fallen more than 29% since 1994 and 21% since 1996, even though families who leave the TANF rolls continue to be eligible for food stamps).

222. See *Welfare to What*, *supra* note 219, at 12-13 (noting that seven monitoring coalitions in six states found large increases in serious deprivations for former TANF recipients compared to families who stayed on the rolls, including loss of heat, having to move because they could not pay rent, and going without food for one or more days in a 30 day period).

223. See Tufts Study, *supra* note 2, app. A. Prior to enactment of the Personal Responsibility Act, the conventional wisdom emanating from the social science literature was that one third of the AFDC caseload comprised persons who needed only short-term

nally, again, there is no requirement that states follow-up on families who leave the welfare rolls, making it easy to celebrate high caseload declines while masking any resulting harm to poor children.

Indeed, some research organizations and advocacy groups contend that the punitive elements of the welfare reform law have contributed more to the decline in TANF caseloads than have increases in employment among the welfare population.²²⁴ Nationally, as a result of welfare reform efforts by states, welfare caseloads fell 44% between January 1993 and September 1998,²²⁵ and more current and former welfare recipients are now working.²²⁶ However, according to follow-up studies, a very large percentage of welfare recipients who have left the TANF rolls *do not* have a job.²²⁷ In New York State, for example, one study reported that 71% of former TANF recipients who last received TANF benefits in March 1997 did not have employer-reported earnings.²²⁸ Large caseload declines, therefore, cannot be explained by the increase in employment among former welfare recipients. One researcher concluded, for example, that dramatic caseload declines are best correlated to declines in the number of applicants awarded assistance—declines that appear to be caused by strict work rules and/or diversion programs designed to discourage appli-

assistance and who could move into jobs relatively quickly. A second third faced great barriers to employment, but with proper supports, were capable of becoming economically self-sufficient. The final third were the long-term AFDC dependents, who faced extremely severe barriers, such as physical and mental health problems, and very low skill levels. See *id.* With the dramatic reductions in caseloads since the passage of the Act, the fraction of the remaining caseload that falls into this severely challenged category may actually be much higher than one third.

224. See, e.g., *Welfare to What*, supra note 219, at 7; David Dawson, *Demystifying the Caseload Reduction*, Alabama Arise (July 1997) (unpublished paper on file with the *Columbia Law Review*).

225. See Administration for Children and Families, *Change in Welfare Caseloads* (Sept. 1998) <<http://act.dhhs.gov/news/stats/caseload.htm>> (on file with the *Columbia Law Review*).

226. See *Welfare to What*, supra note 219, at 7 (noting that Census Bureau surveys indicated “that 32.4 percent of those who received welfare in 1997 had a job in March 1998—a large increase over the 20.7 percent of those who had received any welfare in 1989 and had a job in March 1990”).

227. See *id.* at 8 (noting that nine state studies compiled by the National Governors’ Association and other organizations found that 40% to 50% of families who left TANF did not have a job) (citing National Governors’ Association, National Council of State Legislatures, and American Public Welfare Association, *Tracking Recipients After They Leave Welfare* (Apr. 1998) <www.nga.org> (on file with the *Columbia Law Review*); see also HHS, *First Report to Congress*, supra note 50, at 4 (noting that while 50% to 60% of welfare recipients who leave TANF are working, this figure is “slightly higher than the 45% to 50%” who were working after leaving AFDC); *id.* (noting that studies suggestive of increases in employment under TANF “do not rigorously isolate the extent to which this increase in work results from the strong economy in contrast to policy changes”).

228. See *id.* (noting, in addition, that this no-earnings rate was up 61% from the year before) (citing New York State Office of Temporary and Disability Assistance, *Local District and State Performance Measures—Quarterly Report 11* (Jan. 1998)).

cation for TANF benefits.²²⁹ And many observers note that states with high caseload declines tend to have more stringent work rules and sanctions.²³⁰

Beyond strict work rules and sanctions, more than half (31) of the states have adopted formal "diversion" programs that attempt to avoid enrolling families in TANF programs by finding other ways to assist them or by requiring work-related activities as part of the application process.²³¹ "Sixteen states require TANF applicants to look for work as a condition of eligibility for benefits [and an] additional 13 states require TANF applicants to participate in other employment-related activities such as work-related orientation or registering with the employment service as a condition of eligibility."²³² Furthermore, as one comprehensive study on diversion programs noted, "[m]andatory applicant job search programs are characterized by considerable devolution of decisionmaking to local offices and by substantial worker discretion."²³³ In at least some locations, this local discretion appears to have been abused, with applicants for TANF assistance being subjected to arbitrary, if not discriminatory, diversion tactics.²³⁴ The potential for abuse is magnified when coupled with the intense pressure often placed on welfare workers to lower the caseloads. The state of Texas, for example, gives awards to

229. See, e.g., Dawson, *supra* note 224 (examining the caseload decline in Alabama from October 1995 through March 1997, and finding, using regression analysis, that the decline best correlated with the decline in the percentage of cases awarded assistance and the unemployment rate, though the former was a more important factor). The decline in the percentage of cases awarded assistance was anecdotally explained by new eligibility and job search requirements, but could not be explained definitively because the state did not conduct follow-up interviews with those who were declined assistance for failure to meet requirements. See *id.* On the impact of state diversion programs, see *infra* text accompanying notes 231–245.

230. See, e.g., Deborah Weinstein, Children's Defense Fund, *Race to the Bottom: Plummeting Welfare Caseloads in the South and the Nation* (1998); Dawson, *supra* note 224; Jo M. Dohoney, *Field Research on the Welfare Application Process in Two Alabama Counties* (May 1998) (unpublished manuscript on file with the *Columbia Law Review*).

231. See generally Center for Health Policy Research, George Washington University, *A Description and Assessment of State Approaches to Diversion Programs and Activities Under Welfare Reform* (1998) (on file with the *Columbia Law Review*) [hereinafter *Diversion Programs*].

Diversion programs are formal efforts to address immediate needs of families seeking cash assistance in lieu of enrolling these families in TANF. Typically, they fall into three categories: (1) lump sum payment programs that provide short term financial assistance in the form of a one-time lump sum; (2) mandatory job applicant search programs that require job searches as a condition of TANF eligibility; and (3) alternative resource programs that discourage families from applying for cash assistance if other sources of family or community support are available. See *id.* at *ii*.

232. *Id.* at *iv*.

233. *Id.* at *v*.

234. See *infra* note 273; see also *Welfare to What*, *supra* note 219, at 21–22 (citing inconsistent or seemingly arbitrary diversion tactics deployed in local welfare offices in Alabama, New Mexico, and New York City).

welfare offices that discourage the largest numbers of people from applying for welfare *and* food stamps.²³⁵

One of the potential negative consequences of diversion programs, especially those with mandatory job search requirements, is the potential for Medicaid and Food Stamp eligible populations to be turned away from receiving such assistance.²³⁶ New York City, which represents about 10% of all welfare cases in the country,²³⁷ came under criticism because its explicit diversion program withheld applications not just for TANF but also for food stamps and Medicaid.²³⁸ From 1997 to 1998, the City's Food Stamps rolls fell by 15%, even though eligibility for food stamps remained unchanged. Requests for assistance at soup kitchens and food pantries rose 24% in the same period.²³⁹ As a result of the diversion program, the rate of applicants who receive welfare assistance has fallen from 75% during the Dinkins Administration to 25% in the "job centers" implementing the Giuliani Administration's diversion program.²⁴⁰ But while the City's job-search diversion program is highly successful in re-

235. See Rachel L. Swarns, *In an Odd Turn, Officials Are Pushing Welfare*, N.Y. Times, Nov. 22, 1998, at 4 (citing the Texas example of incentive awards for reduction of TANF caseloads, but noting state efforts to reverse the trend of discouraging food stamp applications as part of TANF diversion programs); see also Welfare Law Center, *supra* note 220, at 2 (noting that "inconsistent administration by workers unfamiliar with program rules coupled with intense pressure to reduce caseloads has resulted in dramatic decreases in applications approved [in New York City] and has forced thousands of needy families to reapply many times"); Dohoney, *supra* note 230, at 13-15 (surmising that the pressure to reduce caseloads was the reason for the arbitrary diversion tactics deployed in Birmingham welfare offices).

236. See *Diversion Programs*, *supra* note 231, at vi-vii; Rachel L. Swarns, *U.S. Inquiry Asks if City Deprives Poor: Fear That Welfare Policy May Limit Aid Unfairly*, N.Y. Times, Nov. 8, 1998, at 39, 44 (noting that since 1996, the number of food stamp recipients has dropped 21% nationwide and that federal officials say this drop cannot be explained by the strong economy).

237. See Carl Vogel & Neil deMause, *Jason's Brain Trust*, *City Limits*, Dec. 1998, at 23.

238. See *id.* After the U.S. Department of Agriculture initiated an investigation of the New York City program, suggesting that it violated federal Food Stamp eligibility laws, Mayor Giuliani reversed course, allowing applicants to apply immediately for food stamps. See Jason DeParle, *What Welfare-to-Work Really Means*, N.Y. Times, Dec. 20, 1998 (Magazine), at 50; see also *Welfare to What*, *supra* note 219, at 27 (noting that federal laws require persons to be allowed to apply for food stamps and Medicaid without delay and that federal investigation of New York's practices is pending).

Under the City's diversion program, an applicant for welfare assistance must first see a "financial planner" who encourages applicants to seek other alternatives, such as relying on family members. The wait for a financial planner "can easily stretch to five or six hours." DeParle, *supra*, at 55. If the applicant still wants to pursue TANF aid, she typically is required to come back a second day to complete an application (at which time she would be allowed to apply for Food Stamps and Medicaid). She must then complete a supervised job search that lasts 30 days for applicants with children and 45 days for childless applicants. See *id.* The application may be voided altogether for a single missed hour of supervised job search activities if there is no approved excuse. See *id.*

239. See *id.*

240. See *id.*; see also Swarns, *supra* note 236, at 39 (noting that the rate of successful application in New York City for Medicaid, food stamps, and cash assistance was 53% prior

ducing the number of persons who receive TANF, its initial data suggest very limited success in getting people into jobs. Of the first 5300 people to enter the job-search program, only 256 were placed in jobs—just under 5%.²⁴¹ Mayor Giuliani cites the drive to reduce the caseloads as one of the seminal purposes behind New York's diversion program and its workfare program which, by the year 2000, aims to require every TANF recipient to work at least twenty hours as a condition of receiving TANF benefits.²⁴² At the same time, however, he has resisted doing tracking studies on families that are terminated (sanctioned) or diverted from the rolls,²⁴³ arguing that the fact of a person no longer receiving a government check is a measure of success in itself.²⁴⁴ However, the questionable results of such stringent policies on the ability of needy persons to enter and remain in the workforce and the negative impact on family well-being points up the need for rigorous evaluation of such programs.²⁴⁵

An alternative to sanctions and punitive measures as a means of encouraging the transition from welfare to work is to provide positive supports and incentives such as intensive case management, specialized training, and social service supports (e.g., substance abuse treatment and relevant counseling). As noted above, states have broad discretion regarding the mix of services or resources that will be made available to assist welfare recipients and those who have recently left the welfare rolls. The states' record in implementing this discretion is quite mixed.²⁴⁶ On the one hand, states have generally received favorable ratings for their investments in child care,²⁴⁷ their liberalization of income and asset rules

to the TANF law being implemented and that it had dropped to 25% under the current program).

241. See DeParle, *supra* note 238, at 56.

242. See *id.* at 52, 59. The City has cut the rolls by 460,000, or 37% since the workfare program was instituted in 1995. See *id.* at 59, 70. Its savings in welfare and Medicaid spending are likely to exceed \$800 million in 1998 alone. See *id.* at 89.

243. See *id.* at 55.

244. See *id.* at 70.

245. See Diversion Programs, *supra* note 231, at vii (noting that "States know little about the effects of their diversion programs . . . both because most programs are so new, and because data collection efforts are lacking" and that "[i]mportant questions remain about the effectiveness of these . . . programs as well as the implications of their operation for Medicaid eligibility").

246. According to one study, 18 states provided greater support (investments) than under AFDC for recipient families' efforts to achieve job readiness. Nine states provided the same level of assistance in this regard as they did under AFDC. *And 24 states made changes that represent a disinvestment in assisting poor families to achieve job readiness and employment.* See Tufts Study, *supra* note 2, at 16. The same study found, however, that a majority of states (36) were spending more on case management training, and that in 27 states, case managers were handling fewer cases and providing more services than under AFDC and JOBS. See *id.* at 37, app. B (entries D4 and D5 of table).

247. Under a separate title of the Personal Responsibility and Work Opportunity Act, Congress expanded the existing Child Care Development Block Grant, rolling into this grant funding previously provided under AFDC and other programs for child care. The

for TANF recipients, and their encouragement of asset development.²⁴⁸ On the other hand, while there have been few rigorous studies evaluating states' overall performance to date, one such study concluded that "[f]orty-two states have adopted policies under their TANF Block Grants that are likely to worsen the economic security of poor families[.]" and that most states "are disinvesting in the poor."²⁴⁹

B. Examples from Outlier States and the Risks to Poor Children

While the evidence of national trends in welfare reform policy indicates serious risks to many poor families and children of a loss of a basic social safety net, the evidence from outlier states that have adopted especially draconian welfare policies highlights this risk more clearly. Interestingly, those states whose policies have been deemed especially harsh and potentially most damaging to the economic security of the poor are geographically concentrated in the Southeast and Midwest, while states whose policies have been deemed most beneficial to the poor tend to be in the Northeast and the West.²⁵⁰ This geographic pattern correlates

combined funding for child care increased 24% in 1996–1997 and 35% over the six years covered under the legislation. States must use approximately 47% of the entire child care block grant on the TANF, at-risk, or transitional population. See 42 U.S.C. § 9858 et seq (Supp. II 1996). Not surprisingly, the majority of states (37) chose to fully subsidize child care for those involved in a work activity under TANF, and the remaining states (14) offer partial subsidies in such circumstances. See Tufts Study, *supra* note 2, at 39, app. B (entry F1 of table). In the Tufts Study, every state in the nation received a neutral or positive rating regarding child care, meaning that they were doing the same or better than under the AFDC regime. See *id.* at 18, 26 tbl.4.

248. Thirty-nine states have increased the asset limit for recipients above the \$1000 limit allowed under AFDC, and forty-eight states have increased the vehicle exemption above the AFDC limit of \$1500, with twenty-two states excluding at least the full value of the first vehicle from consideration. Twenty-two states allow recipients to accumulate additional savings in a restricted account set aside for a specific purpose, such as education, thereby implementing the Act's authorization to use TANF funds to create Individual Development Accounts. See *One Year After*, *supra* note 32, at III-1. All states rated under the Tufts Study received a positive or neutral rating in the income and asset development category. See Tufts Study, *supra* note 2, at 16–17. A positive score in this category indicates that the state has made policy choices that promote greater economic security. See *id.* at 17. A neutral score means the state has not made any changes from the previous policy under AFDC. See *id.* at 6.

249. Tufts Study, *supra* note 2, at 2. When states' policies concerning child care and legal immigrants were also factored in, the Tufts Study concluded that more than two-thirds of states (35) have implemented policies that will worsen the economic situation of poor families, compared to the old welfare system, and that less than a third (14) have implemented policies that are likely to improve poor families' economic conditions. See *id.* at I; see also *Welfare to What*, *supra* note 219, at 6 ("Concrete measures of family well-being—such as access to food, health care, housing, and child care—show that a sizable portion of needy families [who have been terminated from TANF programs for failure to comply with program rules] are doing *worse* than they did on cash aid.").

250. See Tufts Study, *supra* note 2, at 21–22 (noting that of the 14 states with the lowest overall scores, seven are in the Southeast and four in the Midwest, and that, among the 14 states receiving positive ratings, seven are in the Northeast and four are in the West).

roughly with political science research on the political cultures which dominate specific regions of the United States and with research on the impact of political cultures on the policy choices of states.²⁵¹ But political culture alone cannot explain state policy choices, as some states, such as Wisconsin, that have been deemed to be dominated by a moralistic political culture in which politics revolves around issues,²⁵² have also been accused of pursuing welfare reform in a manner more dominated by politics and political symbols than by rational policymaking based upon deliberative analysis.²⁵³ Indeed, this criticism has been leveled at several states that were early leaders in state welfare reform, regarding efforts that predated the passage of the Personal Responsibility Act.²⁵⁴ Because the politics of welfare reform necessarily involves questions of redistribution, it tends to be highly conflictual, and that conflict is often resolved at the highest levels of the political system.²⁵⁵ Political election cycles can also contribute to the heightened profile and diminished rationality of welfare reform debates.²⁵⁶ In this context, there is a temptation for political leaders to seize on simplistic and often symbolic measures that can be translated to the public as "fixing" the welfare problem, regardless of whether there is a sound policy basis for the measure.²⁵⁷ And the evi-

251. See Gray, *supra* note 198, at 25–26 (noting the concentration of traditionalistic and individualistic political cultures in the South and Midwest and the concentration of moralistic political cultures in the far North, Northwest, and Pacific Coast) (citing Daniel J. Elazar, *American Federalism: A View from the States* (1984)); *id.* at 28 (noting persuasive research on the impact of popular opinion and political culture on policy choices) (citing Robert S. Erickson et al., *Statehouse Democracy: Public Opinion and Policy in the American States* (1993)); *supra* note 198 (explaining the impact of different subcultures on welfare policies).

252. See Gray, *supra* note 198, at 25–26.

253. In a case study of Wisconsin's considerable state reform efforts predating passage of the Personal Responsibility Act, the author concluded that both Democrats and Republicans in the state discovered that it did not matter whether a proposed reform was sound welfare policy. All that was necessary was to be seen by the public as doing something about the welfare "iness." The end result of the competition not to be outflanked in the eyes of the public was a proposal sponsored by the Democratic legislature to end welfare completely by 1998, which the Republican Governor Tommy Thompson signed. See Thomas J. Corbett, *Welfare Reform in Wisconsin: The Rhetoric and the Reality*, in *The Politics of Welfare Reform* 19, 42–43 (Donald F. Norris & Lyke Thompson eds., 1995). But see *id.* at 42 (noting that Wisconsin's welfare reform processes became more deliberative over time). For information on the impact of W-2, Wisconsin's work-based TANF program, see *infra* note 281.

254. See Norris & Thompson, *supra* note 48, at 13; Norris & Thompson, *supra* note 204, at 219, 224, 229 (summarizing case studies of California, Maryland, Michigan, New Jersey, Ohio, and Wisconsin, and finding that in all of the states but Maryland "rational policy development, empirical data, and prospective policy analysis played virtually no role in welfare reform policy making," and that welfare reform debates in those states "had a high political profile and were highly conflictual").

255. See Norris & Thompson, *supra* note 204, at 225–26.

256. See *id.* at 229.

257. See Corbett, *supra* note 253, at 36–37, 42 (citing the examples of *Learnfare* and *Bridefare* in Wisconsin); Norris & Thompson, *supra* note 204, at 231 (concluding that "[t]he politics of welfare reform [in Wisconsin] was primarily about politics, not about

dence from outlier states suggests that the pressures from a dominant political culture can be considerable.

The Personal Responsibility Act provides scant protection to welfare recipients, who are weak political minorities, against a dominant political group or culture whose views on fundamental issues—such as whether to reduce benefits or to institute punitive reforms—may be colored by ideology, cultural values, a strong desire to create and redirect fiscal savings, or outright racism. The state of Idaho, which is widely viewed as having adopted one of the most, if not the most, draconian welfare plans in the country, provides an instructive example of the potential impact of political culture.²⁵⁸ Idaho has a political tradition imbued with self-reliance and a deep-seated distrust of government, particularly the federal government.²⁵⁹ The state also lacks a meaningful two-party system, as the Republican party overwhelmingly dominates both houses of the state legislature, and the state is racially homogenous with 95% of the population being white. This political environment and culture has contributed to state policies that have been characterized by critics as punitive toward the poor.²⁶⁰ Under the TANF program, Idaho provides a maximum monthly benefit of \$276 for a family of three, with no increases for additional children,²⁶¹ well below the national average monthly benefit of \$344.²⁶² It adopted a two-year lifetime limit for TANF benefits, with no exemptions whatsoever, and an extension of the limit only in cases of disability or illness.²⁶³ Should an Idaho welfare recipient reach the life-

poverty or welfare," that it had "distinctly ideological and symbolic overtones," and that "[a]t best, the problems and needs of the poor received secondary attention").

258. Idaho was ranked last among the fifty-one state jurisdictions (including the District of Columbia) evaluated under the Tufts Study because of the likely impact of the Idaho welfare reform plan on the economic security of the poor in that state. Such "worst-rated" states tend to have stricter eligibility criteria and reduced benefit levels, and, most importantly, rely almost solely on negative incentives and sanctions to meet the Act's performance goals. See Tufts Study, *supra* note 2, at 20; see also DeParle, *supra* note 39, at A17 (noting that "Idaho passed a [welfare reform] law so restrictive it removed half the state's recipients from the rolls in a single day").

259. See Timothy Egan, *As Idaho Booms, Prisons Fill And Spending on Poor Lags*, N.Y. Times, Apr. 16, 1998, at A1.

260. See *id.*

261. See *One Year After*, *supra* note 32, at VI-2, VI-9 n.3; NGA Best Practices, *supra* note 200, at 9.

262. See Tufts Study, *supra* note 2, at 51.

263. See *One Year After*, *supra* note 32, at IV-6 tbl.IV.1. An exemption allows a TANF recipient to avoid the lifetime limit altogether, while an extension allows a TANF recipient to have more time, for example, the duration of an illness, before the lifetime limit is reached.

The Personal Responsibility Act authorizes states to exempt up to 20% of their caseload from the lifetime limit, see 42 U.S.C. § 608 (Supp. II 1996), presumably because Congress recognized that there would be some recipients with difficult, even insurmountable, barriers to employment. Other states that adopted such a short lifetime limit typically provided for exemptions from the time limit based upon age, disability, domestic violence, caring for a young child, or general hardship. See *One Year After*, *supra* note 32, at IV-5 to IV-11 tbl.IV.1.

time limit for TANF benefits, the state offers no back-up form of cash aid for the family or the children.²⁶⁴ The Idaho plan requires that welfare recipients begin work activities immediately upon receiving TANF benefits, and its sanctions for failing to comply with work requirements range from a one-month termination of benefits for the first infraction to a maximum penalty of lifetime ineligibility for TANF benefits.²⁶⁵ Not surprisingly, Idaho has one of the highest rates of caseload decline in the country; its caseload has decreased by 85% since the passage of the Act,²⁶⁶ and there is little information about how the families who have left the rolls are faring.²⁶⁷

Interestingly, while Idaho has distinguished itself by adopting one of the nation's most draconian welfare plans, it also stands out for undertaking one of the nation's most extensive public outreach efforts in designing its system. Using a two-year process of public forums conducted throughout the state, the Idaho welfare system truly reflects the conservative political culture from which it sprang.²⁶⁸ Thus it provides an extreme counterpoint to the federalist and civic republican intuitions that bringing decisions "closer to the people" is likely to produce better policy

264. Upon leaving the TANF rolls, a recipient is, however, entitled to an additional 12 months of child care assistance and Medicaid coverage, in order to facilitate transition to the work force. In justifying the two-year lifetime limit, members of the Idaho Governor's Welfare Reform Advisory Council stated that the two-year limit makes a "statement saying there's a sense of urgency when you come on welfare," and that the resulting savings on cash benefits would help pay for increased investments in child care, on which the task force placed highest priority. Report of the Governor's Welfare Reform Advisory Council, *How can the welfare system reflect Idaho values?* 12, 17-18 (Dec. 1995) (quoting one council member) (on file with the *Columbia Law Review*). Idaho does, however, provide welfare recipients participating in a work program with support services such as education, training, and child care. See HHS Approves Idaho as 43rd State Welfare Demonstration, M2 Presswire, Aug. 21, 1996, available in 1996 WL 11271741 (on file with the *Columbia Law Review*).

265. See HHS, First Report to Congress, *supra* note 50, app. tbl.9.1 (July 6, 1998) (on file with *Columbia Law Review*). In contrast, most states impose a reduction of benefits, as opposed to full termination, for the first failure to comply with work requirements, and only six other states assess a maximum penalty of lifetime ineligibility. See *One Year After*, *supra* note 32, at V-7 to V-8 tbl.V.3. And for first-time sanctions, states frequently provide that benefits would resume upon compliance with work requirements. See *id.* Under the Idaho sanctions regime, however, a person could be banned for life from receiving TANF benefits even if she has yet to reach the lifetime limit of 24 months and even if she is willing, despite past failings, to comply with work requirements.

266. Between August 1996, the month the Act was enacted, and September 1998, Idaho's caseload decreased from 21,780 to 3,285. See *Change in Welfare Caseloads*, *supra* note 225.

267. In a survey that garnered 447 responses from the universe of 2,700 TANF recipients who left the rolls in Idaho, researchers found, *inter alia*, that 53% of respondents were working and that 49% felt unprepared or slightly prepared for the transition out of cash assistance. See *Temporary Assistance for Needy Families in Idaho (TAFI) Closure Study* (on file with *Columbia Law Review*).

268. See Report of the Governor's Welfare Reform Advisory Council, *supra* note 264, at 11.

results. Idaho has received some of the worst ratings from policy evaluators because it relies so heavily on negative sanctions to encourage the transition from welfare to work, and because it offers few positive incentives of any kind.²⁶⁹

Idaho, however, is not alone in its outlier status. Most southern states, for example, have also taken a stringent approach to welfare reform, relying more heavily on negative incentives than positive ones that require additional investments in the welfare system. The majority of southern states have imposed a lifetime limit that is shorter than the five-year maximum set out in the Act.²⁷⁰ While the Act does not require penalties as harsh as terminating all benefits to the entire family, all but three southern states, and thirty-six states nationwide, have adopted such sanctions.²⁷¹ And southern states, like Idaho, tend to have fewer exemptions from work requirements, even though most of the parents who lose benefits because of sanctions often have one or multiple problems that present serious barriers to sustained employment, including domestic violence, lack of child care or transportation, illiteracy, disability, substance abuse, or mental illness.²⁷² The stringent nature of the welfare plans of southern states may explain why the region as a whole has experienced sharper caseload declines than the national average.²⁷³ Meanwhile, southern states have continued their historical pattern of low investments in assistance to poor families,²⁷⁴ even though the region as a whole has

269. See Tufts Study, *supra* note 2, at 20; Egan, *supra* note 259 (citing a study directly linking Idaho's low investments in poor children with low performance by Idaho children in education, and indirectly linking such low investment with the increases in the state prison population).

270. See *One Year After*, *supra* note 32, at IV-5 to IV-11 tbl.IV.1.

271. See Weinstein, *supra* note 230, at 1.

272. See *id.*; see also *One Year After*, *supra* note 32, at IV-5 to IV-11 tbl.IV.1.

273. See Weinstein, *supra* note 230, at 3 (noting that the welfare caseload fell by 27% for the region in the first year following passage of the Act, compared to a nationwide reduction of 20%). Some have suggested that stringent, discriminatory, or even illegal practices by state welfare offices may better explain the dramatic decline in caseloads in some southern states than any positive reasons, such as increased employment. See Dawson, *supra* note 224 (identifying a dramatic reduction in Alabama in the number of applicants who were ultimately placed on the welfare rolls after passage of the Personal Responsibility Act); Dohoney, *supra* note 230, at 12-15 (documenting systematic diversionary tactics used in the welfare offices of two densely populated counties of Alabama, which apparently were intentionally designed to reduce, and did dramatically reduce, the numbers of persons who succeeded in receiving benefits for which they were legally eligible).

274. Southern states typically provide cash benefits at levels significantly lower than the rest of the nation. See Weinstein, *supra* note 230, at 2 ("Of the 17 states in the region, only the District of Columbia and Maryland equal or exceed the national median of \$377 a month."). The lower benefit levels in Southern states might be explained, at least in part, by a lower cost of living in these states. However, southern states also typically provide less generous child care subsidies than other states, often at rates that make it unrealistic for TANF recipients to work, and they tend to offer very limited education and training opportunities for welfare recipients. See *id.* at 5.

higher percentages of child poverty than the national average.²⁷⁵ The southern states' especially stringent approach to welfare reform might be explained, as it is in Idaho, by the generally conservative political culture of the region.²⁷⁶ In addition, the racial makeup of welfare caseloads in the South (racial minorities comprise the majority of TANF recipients in the region) may also be contributing to the southern states' harsh approach.²⁷⁷

Idaho and the southern states represent the draconian extreme of state welfare reform—a model that has been characterized as “[w]elfare reform’ as caseload reductions”²⁷⁸—whereby dramatic caseload reductions are being achieved by means that cannot be correlated with sound welfare policies or dramatic increases in employment. Under this model, negative incentives and policies that deter eligible applicants from receiving benefits in the first place—or that knock recipients off the rolls because of time limits or failure to meet rigid rules—appear to be the main mechanisms for meeting Congress’s numerical targets for work participation by welfare recipients.²⁷⁹ While the degree to which these states have cut welfare supports and investment is extreme, some degree of disinvestment in the welfare poor has been common. The balance of the evidence on state choices points to an overall decline in institutional investments for the poor, even at a time when states are flush with cash from their TANF windfall and from budget surpluses created from a strong national economy.

In the new regime of decentralized decisionmaking in welfare reform, intensive investment in the welfare system by a state is an aberration. Highly-rated states such as Vermont and Oregon make it clear that the poor will not be worse off in all states under the new regime created by the Act. Oregon especially has been praised for producing impressive caseload declines and fiscal savings, through a program that has few harsh sanctions and many positive supports.²⁸⁰ Such highly-rated states,

275. *Id.* at 2.

276. See Corbett, *supra* note 253, at 25–26 (describing the region as traditionalistic).

277. See Weinstein, *supra* note 230, at 5, 9. With the dramatic reduction in caseloads that has been occurring throughout the country, the racial makeup of welfare caseloads throughout the nation increasingly is becoming predominantly minority, precipitating concerns that political support for the TANF program will erode over time. See DeParle, *supra* note 172, at A1.

278. See, e.g., Dohoney, *supra* note 230, at 14.

279. The work participation targets create an incentive to have tunnel vision regarding caseload reduction. See Dohoney, *supra* note 230; Dawson, *supra* note 224; see also DeParle, *supra* note 219 at A1 (noting Wisconsin’s often errant use of fiscal penalties against welfare recipients for purported rule violations, which helped to reduce caseloads and keep the program affordable).

Other states besides Idaho and the southern states that also fit this model of relying heavily on negative sanctions include Iowa, Kansas, Missouri, New Jersey, Ohio, and Wyoming. See Tufts Study, *supra* note 2, at 20–21.

280. See Change in Welfare Caseloads, *supra* note 225 (noting that Oregon’s welfare caseload fell 62% between 1993 and 1998); see generally U.S. Dep’t of Health and Human

and even middle-ground states that combine negative incentives with positive investments,²⁸¹ demonstrate the complexity of welfare reform politics. With vigorous advocacy or a progressive political culture, state political processes can sometimes work to protect low-income interests.²⁸² Still, many if not the majority of states in the country are making decisions that are likely to worsen the economic security of the poor. Furthermore, the structure of the Act creates a strong incentive for state political actors to focus exclusively on achieving caseload reductions, regardless of

Servs., National Evaluation of Welfare-to-Work Strategies, Implementation, Participation Patterns, Costs and Two-Year Impacts of the Portland (Oregon) Welfare-to-Work Program (May 1998) <<http://aspe.os.dhhs.gov/hsp/isp/portland/xsportld.htm>> (on file with the *Columbia Law Review*). In contrast, Wisconsin has also achieved dramatic declines in caseloads, but with the heavy use of negative sanctions. See Chassman, *supra* note 217.

According to the Tufts Study, when the states' TANF, child care, and legal immigrant policies are considered, only 14 states fall into the category of making investments likely to improve the economic security of the poor. See Tufts Study, *supra* note 2, at 20–21. When only state TANF policies are considered, only eight states (Connecticut, Maine, Massachusetts, New Hampshire, Oregon, Rhode Island, Vermont, and Washington) were found to have implemented policies under their TANF block grants that were likely to improve poor families' economic security in comparison to the old welfare system. See Tufts Study, *supra* note 2, at 25.

281. Middle-ground states, such as Wisconsin, rely on a combination of negative sanctions and positive incentives. Wisconsin's plan, probably more than any other in the country, reflects the dual ethic of forcing *all* recipients to work as a condition of receiving benefits, with virtually no exceptions, while also investing extensively in universally available supports for low-income persons who work. For example, the state offers subsidized child care, not just to welfare recipients, but to all low-income workers, and it is proposing to do the same with health care. Because of its emerging system of universal supports for the poor, the Wisconsin plan has many supporters in the policy evaluation community. See DeParle, *supra* note 39; Chassman, *supra* note 217. Wisconsin is also one of the few states to pass through all child support it collects to the family. Most other states either lower the TANF benefit \$1 for each \$1 of child support received, or only pass through the first \$50. See One Year After, *supra* note 32, at VI-11 to VI-12 tbl.VI.6.

However, due to its tough work requirements, Wisconsin has had one of the steepest caseload declines in the nation. See Change in Welfare Caseloads, *supra* note 225 (noting 86% decline between 1993 and 1998). A Wisconsin state survey of TANF recipients who left the rolls found that 62% were working at an average wage of \$7.42/hr. See Jason DeParle, Wisconsin Welfare Overhaul Justifies Hopes and Some Fear, *N.Y. Times*, Jan. 15, 1999, at A21. The survey also revealed, however, an increase in five categories of material hardship since leaving TANF, including ability to afford food. See *id.* at A18.

282. See Elaine McCrate & Joan Smith, When Work Doesn't Work: The Failure of Current Welfare Reform, 12 *Gender & Soc'y.*, 61 (1998) (documenting the positive impact of women's advocacy groups in bringing about substantial improvements to Vermont's welfare reform plan). In California, for example, Gov. Wilson's extremely harsh welfare proposal was tempered by a Democratic legislature. The result was a highly-rated program that will make significant investments in the welfare system (and its recipients) in the initial years of the program. See Jason DeParle, As Rules of Welfare Tighten, Its Recipients Gain in Stature, *N.Y. Times*, Sept. 11, 1997, at A1 (noting, *inter alia*, that the New York Legislature rejected Gov. Pataki's plan to cut benefits by 45% and to abolish general assistance to single adults, and that the California Legislature blocked Gov. Wilson's proposal to enforce time limits as short as one year and to abolish general assistance programs). Furthermore, California is one of a few states that has enacted a safety net for children of parents who hit lifetime limits on welfare. See *supra* note 208.

the means or consequences, or to approach welfare reform merely as a means for achieving fiscal savings.²⁸³

V. BEYOND FEDERALISM: AN ALTERNATIVE VISION FOR DECENTRALIZATION OF REDISTRIBUTIVE PROGRAMS

Section A of this part sets out the justifications for more aggressive national oversight of state policy authority concerning the poor. Section B then sets out the justifications for decentralization of policy authority, arguing that states should be accorded substantial discretion, but only within a framework of more rigorous national standards or incentives than currently exist in the TANF program.

A. *The Argument for National Standards on Fundamental Redistributive Choices*

In passing the Personal Responsibility Act, Congress made clear that one of the core purposes of the Act was to ensure that poor children would be cared for "in their own homes."²⁸⁴ By decentralizing such broad authority to the states over the content and direction of welfare assistance programs, however, Congress has left the status of much of the social safety net for poor children to state political consensus and to the jawboning efforts of policy advocates and interest groups.²⁸⁵ If Congress intended that states should maintain a minimum safety net for poor children, it has placed too much trust in state governments and may in fact be encouraging states to eviscerate the safety net. The Act creates this negative incentive in three ways. First, by decentralizing broad authority, with only an 80% maintenance-of-effort requirement on state spending, the Act leaves most fundamental redistributive choices involved in developing a reformed welfare system to state political processes.²⁸⁶ Thus it

283. See *supra* text accompanying notes 37–46 (discussing financial incentives under the Act); *supra* note 279 (discussing incentives created by the work participation targets in the Act).

284. 42 U.S.C. § 601(a) (Supp. II 1996). The statute is also intended to end welfare dependency, reduce the number of out-of-wedlock pregnancies, and encourage the formation of two-parent families. See *id.*

285. There is a considerable policy literature circulating about what states ought to be doing, especially in light of TANF windfalls, to enhance the economic security of poor families. See, e.g., Center on Budget and Policy Priorities, *Reinvesting Welfare Savings: Aiding Needy Families and Strengthening State Welfare Reform* (Mar. 30, 1998) (visited Feb. 26, 1999) <<http://www.cbpp.org/330rein.htm>> (on file with the *Columbia Law Review*) (providing an overview of the major policy proposals).

286. See *supra* note 22 and accompanying text. Very few constraints are placed on states with respect to the use of federal TANF funds. As noted above, the Act grants states the broad authority to use TANF money in any manner "reasonably calculated" to fulfill the purposes of the Act, including to provide aid for needy families, end welfare dependency, reduce out-of-wedlock pregnancy, and encourage the creation of two-parent families. 42 U.S.C. § 604(a)(1) (Supp. II 1996); see also *id.* § 601(a) (stating the purposes of the Act). However, the Act does prohibit states from using more than 15% of TANF funds for administrative purposes, see *id.* § 604(b)(1), transferring more than 30% of the

reflects a federalist's faith in the states' ability or willingness to pursue welfare reform in a manner that both reduces welfare dependency *and* ensures that poor children are cared for. The evidence presented on the political economy of state decisionmaking and on the states' actual choices to date in designing their welfare programs suggests that such faith is misplaced. In many states it appears to be easier, politically, to adopt stringent work requirements and sanctions that precipitate dramatic caseload reductions (and resulting fiscal savings) than it is to adopt a system that provides extensive positive incentives and supports.²⁸⁷ In short, the predominant calculus of state majoritarian political processes appears to be one of pursuing the majority's imagined, as opposed to enlightened, self-interest.²⁸⁸ In the context of redistributive policymaking, therefore, decentralization exacerbates the public choice problem of disaggregation of political power between low-income interest groups and the suburban political majority.²⁸⁹

TANF grant to the Child Development Block Grant or the Social Services Block Grant, see id. § 604(d)(1), and using TANF funds to provide medical services for welfare recipients, see id. § 608(a)(6). Federal review of state action only occurs when state plans are submitted prior to the beginning of the fiscal year, see 42 U.S.C. § 602 (Supp. II 1996) or through quarterly reports to the Department of Health and Human Services, see id. § 611(a). While these submissions give federal observers some insight into state practices, they are at best a bare-bones account. The Act merely requires that state plans outline how a state intends to conduct its welfare program. See id. § 602(a). Quarterly reports must indicate the amount of federal funds used for administrative purposes, transitional services, the number of noncustodial parents participating in work activities, and the total amount expended by the state on welfare programs. See id. § 611(a)(2).

287. See *supra* notes 279–280 and accompanying text.

288. For example, states that have pursued stringent work rules and sanctions that precipitate dramatic caseload reductions receive an immediate fiscal savings that may be the impetus for such policies. Yet policies which result in the termination or loss of cash assistance, food stamps, and Medicaid for the entire family, see *supra* text accompanying note 221, may actually cost a state more in the long run to ameliorate resulting negative effects, such as poor health and inadequate nutrition, *and* they can make it more difficult for TANF recipients to achieve self-sufficiency. See Tufts Study, *supra* note 2, at 15.

289. See *supra* text accompanying notes 128–161. In particular, there are three categories of decisions accorded to states by the Act that seem peculiarly susceptible to state majoritarian political competition, either because voters would have a strong interest in this type of decision as a fiscal or cultural issue, or because of the potential for fiscal savings that can be redirected to other, middle-class priorities. These categories involve the setting of (1) benefit levels and eligibility, (2) benefit time limits, and (3) work requirements and sanctions. Because these categories of decisions directly impact the size of a state's welfare caseload, they also heavily affect the amount of funds that will be freed up to spend on services to welfare recipients or to be redirected to other priorities. These types of decisions also are easily translated into political symbols that the public can understand. In state welfare reform political debates, for example, high-level political actors tend to focus on these big-picture items, and they are likely to intuit or anticipate middle-class voter demands. See Norris & Thompson, *supra* note 204, at 224–26; *supra* text accompanying notes 159–161. The setting of sanctions for failure to comply with work rules, in particular, is the area in which the majority of states have chosen to impose a stricter regime than previously existed under the federally-determined AFDC regime, and

Second, by requiring states to meet numerical targets for participation in work activities by welfare recipients and attaching financial penalties to failures to meet these targets, Congress sent the clearest possible signal that the work participation goals were of primary concern. But while the goal of moving welfare recipients into work is laudable, the work participation targets may be having the unintended consequence of encouraging states to meet those targets by arbitrarily reducing the number of people they have to place in work activities.²⁹⁰ In the absence of some congressionally-imposed national standards that require states, for example, to provide minimum supports for poor children, states are rationally compelled to proceed by any means necessary to avoid the financial penalties that ensue for non-compliance with the work participation requirements.²⁹¹

This potential problem is compounded by the third structural incentive created by the Act. By failing to require rigorous evaluation of all welfare experiments and reporting on all families who are terminated from the TANF rolls,²⁹² it becomes all too easy for state actors to mask or ignore the consequences of stringent policies that may be worsening the condition of poor families. One benefit of the rigorous evaluation re-

the majority of states have received negative ratings for the choices they have made in these categories of decisions. See Tufts Study, *supra* note 2, at 11–12.

290. As noted above, states must meet annual work participation targets—half the caseload must be engaged in qualified work activities by fiscal year 2002—or suffer certain fiscal penalties. See *supra* note 27. The Act also provides that states may reduce the work participation rate that it must meet by reducing the caseload by an amount not otherwise required by federal law. See 42 U.S.C. § 607(b)(3) (Supp. II 1996). In other words, under the Act, if a state has achieved a 5% reduction in caseload since September 30, 1995, for reasons unrelated to federal law, the state may reduce the work participation requirement for a given year by 5%. A 25% participation requirement, therefore, would be reduced to 20%. See *id.*

Even apart from the pro rata reduction provision mentioned above, it is simply easier to meet mandated work participation rates when there are *fewer* persons in the caseload with whom to deal. With fewer cases, states can invest more resources in each individual TANF recipient, and they have fewer persons to place in jobs or qualified work activities. Thus some observers have suggested that welfare reform is being pursued in some areas with a strong emphasis on caseload reduction. See *supra* note 279 and accompanying text; see also *supra* note 217 (discussing the incentives the work participation targets create for states to adopt full family sanctions that terminate benefits). Urban areas with high TANF caseloads and fewer available jobs for welfare recipients have a particularly strong incentive to pursue such strategies. See Dohoney, *supra* note 230, at 11–13 (noting this strategy was pursued in urban Birmingham but not in other rural parts of the state of Alabama); see also The United States Conference of Mayors, *supra* note 46, at 3 (suggesting that many cities will not have a sufficient number of low-skill jobs to allow compliance with the Act's work participation requirements).

291. The Act also may be too prescriptive regarding the work participation targets by failing to allow for regional differences in employment opportunities. States are allowed, however, to exempt single parents caring for a child under 12 months old from work participation requirements, see 42 U.S.C. § 607(b)(5) (Supp. II 1996), and teen parents who regularly attend secondary school or a job training program, see *id.* § 607(c)(2)(C).

292. See *supra* notes 209–211 and accompanying text.

quirement during the era of welfare reform by waivers that preceded the Act was that it enhanced the likelihood that any systematic reforms arising from welfare experiments would have a sound policy basis.²⁹³ By depriving the public and advocacy groups of systematic information about the impact of state welfare reform and about what has happened to families who have left or been forced off the welfare rolls, it becomes much more difficult to advocate for more enlightened welfare policies.

In light of the risks of political process failure around redistributive debates at the state level, Congress—if it truly wishes to ensure that poor children are cared for—should amend the Act to include some minimum national standards for child well-being, and it should require more systematic evaluation and reporting on the impact of state policy choices on the welfare poor. Taking these steps to insulate some of the fundamental redistributive choices states face from state majoritarian politics would also increase the likelihood that states meet another core goal of the Act: reducing welfare dependency. Both goals—ensuring that poor children are cared for and reducing dependency—require a degree of public investment that may not be compatible with state majoritarian political consensus, as suggested by the evidence from outlier states.

Specific legislative proposals are beyond the scope of this Article, which is devoted primarily to identifying the political process problems associated with decentralizing fundamental redistributive questions to the states. Congress should consider, however, imposing a minimum national safety net for poor children. One option would be a federally-imposed mandate of cash or voucher assistance for poor children whose parents have been terminated from the TANF rolls.²⁹⁴ Another option would be to impose minimum national standards for the categories of decisions delegated to the states by the Act that are peculiarly susceptible to the distorting effects of state majoritarian political competition.²⁹⁵ Congress might, for example, establish a national eligibility standard, a national minimum benefit formula, and a narrow, well-defined “best efforts” exception to any sanction or time limit.²⁹⁶ Such minimum stan-

293. See Chassman, *supra* note 217.

294. See *supra* note 208 (identifying the four states that provide state-funded aid for children whose parents have been forced off the welfare rolls because of the lifetime limit or sanctions); see also Bipartisan Welfare Reform Act of 1996, Title I, H.R. 3266, 104th Cong. (1996) [hereinafter *Castle-Tanner Bill*] (a bipartisan alternative bill that did not pass but proposed, *inter alia*, that states would be required to provide vouchers for specific items or services to families with children under age six who were terminated because of state time limits less than the five-year federal time limit).

If Congress pursued such an option, however, it should do so on a matching basis whereby the federal government matches any spending by states for this purpose. Otherwise the federal government would unfairly be leaving states, which lack a captured tax base and face fierce horizontal economic competition with each other, to carry the burden of such redistributive policies. See *supra* notes 194–195 and accompanying text.

295. See *supra* note 289 (identifying the three “peculiarly susceptible” categories).

296. See also *Castle-Tanner Bill*, *supra* note 294 (proposing, *inter alia*, that states not be able to terminate benefits for a single parent who failed to meet work requirements if

dards would act as minimum external constraints—floors rather than ceilings—on state discretion.

Other, less intrusive options for insulating welfare recipients from state majoritarian tyranny include raising the maintenance-of-effort thresholds for state welfare spending²⁹⁷ and providing stronger incentives for states to meet the core goals of the Act through positive investments rather than negative sanctions.²⁹⁸ Either form of federal intervention—minimum standards or more aggressive incentives—would be justified as an external check on state majoritarian choices that may be animated by unfounded racial or cultural biases against welfare recipients. Such federal standards could also be justified on the grounds that some level of redistributive spending renders all citizens better off,²⁹⁹ especially in light of the fact that state political processes seldom reflect this reality.

B. *The Argument for Decentralization and the Alternative to Federalism*

While the national legislature is better positioned, both politically and economically, to make fundamental redistributive choices, state governments are significantly better positioned than the federal government to develop welfare policies that are tailored to local realities and to fashion innovative policies that effectively reduce welfare dependency. This is evident both from the limited results of the AFDC program in reducing welfare dependency and from the extensive reform efforts by states in the decade preceding passage of the Act. The AFDC program, which combined a federal entitlement with some overly rigid federal rules about how AFDC resources could be spent, clearly inhibited the ability of state

the parent had a child under age six and was unable to obtain necessary, adequate child care); cf. *infra* note 310 (discussing the protective outer constraints imposed by the Clinton Administration on AFDC waiver requests submitted by states, including a “best efforts” exception for recipients who really tried but failed to find a job).

297. See, e.g., Castle-Tanner Bill, *supra* note 294 (proposing, *inter alia*, an 85% maintenance-of-effort requirement that could be reduced to 80% for states with high performance in placing recipients in the workforce and raised up to 90% for states that failed to meet work requirements). The Act, by comparison, imposed an 80% maintenance-of-effort requirement that could be reduced to 75% under certain conditions. See *supra* note 22 and accompanying text.

298. The Act does provide for bonus awards to induce high performance, and authorizes the appropriation of \$1 billion for such awards over five years. See 42 U.S.C. § 603(a)(4)(F) (Supp. II 1996). High performance states are selected based on their ability to achieve the purposes of the Act. See *id.* § 603(a)(4)(C). An additional bonus is given to those states with the greatest reduction in the number of out-of-wedlock births. See *id.* § 603(a)(2).

The present availability of such bonus awards does not appear to outweigh the strong fiscal and political incentives described in this Article toward disinvesting in the poor.

299. See, e.g., Richard Posner, *The Costs of Poverty and the Limitations of Private Charity*, in *Economic Analysis of the Law* § 16.4, at 463 (1992) (“Poverty imposes costs on the nonpoor that warrant, on narrowly economic (i.e. wealth-maximizing) grounds and without regard to ethical or political considerations, incurring some costs to reduce it.”); see also *supra* note 11.

welfare agencies to deal directly with underlying problems that were contributing to dependency among welfare recipients.³⁰⁰ With the passage of the Family Support Act in 1988 (FSA),³⁰¹ Congress began the process of transforming the AFDC program into a transitional program that emphasized helping recipients become employed. The FSA mandated that states place a certain percentage of their caseload in work activities.³⁰² At the same time, the Social Security Act permitted states to apply to the federal government for approvals of welfare reform experiments, subject to specific requirements regarding evaluation and reporting on the results of those experiments.³⁰³ As a result, by the time the Personal Responsibility Act was passed, thirty-seven states had already enacted major, statewide reforms, with a predominant emphasis on moving to a work-based welfare system.³⁰⁴

As a result of the AFDC waiver process, there was a rapid diffusion of reform approaches from state to state, with innovations in one state reform plan quickly finding their way into those of other states. This diffusion of policy innovations appeared to accelerate in the early nineties as fiscal constraints arose and public opinion and ideology toward welfare shifted.³⁰⁵ Among the many types of reforms states experimented with were time limits, work participation requirements, and "family caps" (which denied additional benefits for additional children born to welfare recipients).³⁰⁶ One of the fundamental discoveries arising from this period of experimentation was that "work-first" strategies that emphasized providing job search assistance and moving welfare recipients quickly

300. For example, under the old AFDC regime, two-parent families were not allowed to receive AFDC benefits if the principal wage earner in the family worked for more than 100 hours each month—a rule which obviously discouraged work, self-sufficiency, and marriage. Under waivers, states began experimenting with eliminating the 100 hour rule and other additional eligibility rules for two-parent families. The Personal Responsibility Act allows states to decide whether to impose such a rule. Thirty-five states have opted to treat two-parent families the same as single-parent families for purposes of eligibility. See *One Year After*, supra note 32, at III-12, III-13.

Under the AFDC regime, states also were not permitted to use AFDC funds to provide diversion assistance payments to families—lump sum payments that allow a family to deal with an emergency situation such as a car repair in lieu of going onto the welfare rolls. A few states began experimenting with diversion assistance payments using waivers, and now, under TANF, states are free to provide such assistance without waivers; twenty-two states have elected to do so. See *id.* at III-9.

301. 42 U.S.C. § 600 et seq (1994).

302. See 42 U.S.C. § 1315(d) (1994).

303. See supra note 210.

304. See Jack Tweedie, *Building a Foundation for Change in Welfare*, *State Legislatures Mag.* (Jan. 1998) <<http://www.ncsl.org/statefed/welfare/foundtn.htm>> (on file with the *Columbia Law Review*). The Bush Administration approved the first of these waivers but most were approved by the Clinton Administration, which granted waivers to 43 states between 1993 and 1996. See *Setting the Baseline*, supra note 210, Foreword.

305. See Norris & Thompson, supra note 48, at 10; Norris & Thompson, supra note 204, at 220.

306. See *Setting the Baseline*, supra note 210, at 4-5.

into work activities—as opposed to strategies that emphasized providing extensive basic education—were cheaper and more effective, at least in the first two years, in improving the economic prospects of a large percentage of welfare recipients.³⁰⁷ Consequently, the work-first strategy has been adopted by many states in implementing the TANF program. This process of experimentation and discovery simply could not have occurred in a centralized system where the federal government was dictating what types of reforms ought to be tried. More generally, as traditional defenders of federalism argue, there is no substitute for a multiplicity of approaches when operating in areas of great uncertainty, such as how to reduce long-term welfare dependency among welfare recipients who face extreme barriers to employment.³⁰⁸

But there is a dark side to this decentralized experimentation process. Even in the AFDC waiver context, which required a rigorous federal approval process and rigorous evaluation of the impact of approved experiments, many states were accused of pursuing politically symbolic reforms without rationally assessing the substantive merits of available policy alternatives.³⁰⁹ The federal government helped mitigate this danger by imposing *some* policy-based standards on state experimentation proposals. In this manner, the federal government protected welfare recipients from the most extreme tendencies of state welfare politics.³¹⁰ Thus, although

307. See Dan Bloom, *After AFDC: Welfare-to-Work Choices and Challenges for States* 17–20, 22 (visited June 4, 1998) <<http://www.mdrc.org/Reports/After%20AFDC/After%20AFDC.htm>> (on file with the *Columbia Law Review*) (summarizing the favorable initial results of controlled evaluations of work-first welfare demonstration experiments, but noting that over the long term job search participants were not much better off than control group members). While work-first strategies appear to produce some positive results for a large segment of the AFDC/TANF population, they have much more limited, and perhaps even negative, impact on the third of the welfare population that faces extreme barriers to entering the workforce. For this reason, a mixed strategy, whereby work-first strategies are targeted to work-ready welfare recipients, leaving more resources available to assist the welfare population that faces extensive barriers, may be a better approach to welfare reform. Cf. *id.* at 17–19 (noting that mixed models can outperform job-search-only programs on some measures). Because work-first strategies are cheaper than strategies that require more intensive supports, there is a risk that the hard-to-employ population, and their children, will be worse off in a highly decentralized TANF regime that does not provide sufficient protection against self-interested state fiscal politics. See *supra* text accompanying notes 219–245.

308. See *supra* text accompanying notes 111–113.

309. See *supra* notes 253–258 and accompanying text.

310. The Clinton Administration reportedly had an unwritten policy or practice of not approving, for example, time limits that had no exceptions, sanctions of lifetime ineligibility, or family caps that impacted teenage parents. See Chassman, *supra* note 217; see also AFDC Waiver Demonstration Programs: Necessary Flexibility or Ad Hoc Decisionmaking?: Hearing Before the Subcomm. on Human Resources & Intergov'tal Relations of the House Comm. on Gov't Operations, 103d Cong. 41 (1994) (testimony of Mark Greenberg, Senior Staff Attorney, Center for Law & Social Policy) (noting that Administration Officials indicated that they would “not grant a waiver for a provision which they believe[d] to be unconstitutional, and thus ha[d] stopped granting waivers for provisions to pay lower benefits to new state residents”); Mark Greenberg et al., *Limits on*

states are better suited, institutionally, to develop policy innovations than the federal government, in the realm of redistributive policy states suffer comparative political and economic disadvantages that can undermine their ability to pursue sound welfare policies. If, however, state redistributive policymaking can be insulated to some degree from state majoritarian politics, particularly high-intensity cultural politics, the states' institutional strength as policy innovators can be maximized.³¹¹

The preceding Section presented an alternative vision of decentralization that would provide such insulation by imposing minimum national standards and rigorous evaluation and reporting requirements. Thus, the proposal builds on a critical institutional strength of the federal government: By determining certain fundamental redistributive questions at the national level, in the forum of the national legislature, those questions are placed in an institutional context that offers the best chance of fair interest group representation, and of policymaking based upon enlightened self-interest.³¹² Outside of certain fundamental redistributive choices, however, there appears to be much less risk of political distortions that distract from the substantive merits of welfare reform. Once one moves beyond the most politically symbolic and fiscally consequential questions, such as the lifetime limit on benefits, the issues become much more technical and less susceptible to easy political posturing.

In addition, state welfare bureaucracies bring special expertise to the policy development process, and they can be more protective of their client base than are state political actors.³¹³ Hence, policymaking at this level is less prone to the distorting influence of the middle class, and the

Limits: State and Federal Policies on Welfare Time Limits, Center for Law and Social Policy i-ii (June 1996) ("The Clinton Administration has required that, in order to receive waiver approval, a state must agree to continue aid or allow participation in a work program in cases where the adult has complied with program rules but has been unable to attain employment despite her best efforts."); cf. *Setting the Baseline*, supra note 210, at 4 (noting that "certain factors were constant across states" that received waivers from HHS; among those factors that "provided a safety net" were exceptions to time limits, the absence of lifetime limits, and an established extension from time limits "for people who substantially met all program requirements, made good faith effort to find a job, and yet could not find a job"); Medicaid Program; Demonstration Proposals Pursuant to Section 1115(a) of the Social Security Act; Policies and Procedures, 59 Fed. Reg. 49,249, 49,249 (1994) (U.S. Department of Health and Human Services announcing that it "may disapprove or limit [waiver] proposals on policy grounds or because the proposal creates potential constitutional problems or violations of civil rights or equal protection requirements").

311. For example, in at least one case, welfare reform policy development processes were rational and merit-based when the process was largely insulated from the political arena. See Norris & Thompson, supra note 204, at 226-27 (case study of Maryland reforms developed largely by the state welfare bureaucracy).

312. See supra text accompanying notes 173-190.

313. See, e.g., Douglas E. Ashford, *Decentralizing Welfare States: Social Policies and Intergovernmental Politics*, in *The Dynamics of Institutional Change: Local Government Reorganization in Western Democracies* 29 (Bruno Dente & Francesco Kjellberg eds., 1988) (arguing that at the state level, a "reserve army" of social service providers will battle

public choice problems identified above are of less concern.³¹⁴ At the same time, once one moves beyond the realm of the fundamental redistributive questions, the state's institutional strengths over the federal government are marked, and the merits of encouraging innovation born of a multitude of state approaches outweigh any concern with potential tyranny of suburban voters.³¹⁵

In this manner, the alternative vision gives effect to some of the values of federalism without blindly ignoring critical political realities concerning the impact of state majorities on politically weak minorities. Within a framework of minimum national standards or incentives, states would be able to innovate and tailor their policies to reflect the preferences and needs of their citizens. But they would be less able to give effect to racist, ideological, or fiscally self-interested biases of state majorities that have little to do with meaningful welfare reform. The alternative vision also has a second important advantage over the standard version of federalism: It attempts to allocate policymaking authority based not on abstract theories of federalism but on empirically demonstrated facts about relative institutional advantages. At bottom, enhanced national standards would shield politically weak, low-income persons from the potential tyranny of majority suburban voters and enhance their chances of being fairly represented in fiscal and political debates regarding policies that directly affect them.

CONCLUSION

James Madison was prescient, to put it mildly. He predicted that entrenched majority factions in cities, and to a lesser degree in states, would threaten to dominate weak minorities. A national government was needed to counterbalance this threat. The empirical evidence presented in this Article suggests that welfare or redistributive spending is the policy arena that is most susceptible to such negative majority dominance. By devolving almost complete responsibility to the states over the content of the Nation's welfare policies, Congress and the President placed these issues in a more hostile economic context *and* in a more hostile political context. The unfavorable political and economic conditions for redistribution are most pronounced at the metropolitan level, where constraints on political decisionmaking regarding redistribution or burden-sharing are created by often-artificial political boundaries. In metropolitan regions fragmented into scores, if not hundreds, of fairly homogeneous localities, local boundaries reinforce economic and political self-interest, such that cross-boundary problem-solving or redistributive alliances tend

funding cuts); Jocelyn M. Johnston & Kara Lindaman, Implementing welfare reform in Kansas: moving but not racing, *Publius*, Vol. 28, No. 3, 123, 124-25 (1998).

314. Indeed, there are some program design areas in which Congress was overly prescriptive, unduly constraining states' choices and role as innovators. See, e.g., *supra* notes 214-215 (allowing only limited education to qualify as "work activity").

315. See *supra* text accompanying notes 109-121, 305-308.

not to occur. At the state level, empirical evidence suggests the dominance of middle class, suburban voters on state-level policy outcomes. In particular, at the state level voters show a strong antipathy toward welfare spending that is not reflected at the national level. To be sure, under the new TANF regime, a few states have pursued admirable welfare reform policies, making necessary, intensive investments that enhance the likelihood of welfare recipients entering and staying in the workforce. The balance of the evidence points, however, in the other direction. Many, if not most, states are disinvesting in the poor, relying heavily on negative incentives to reduce caseloads. But the often dramatic declines in caseloads have not been accompanied by equally dramatic rises in employment among the welfare population. The evidence from outlier states that have pursued especially draconian welfare reform policies also suggests that there is insufficient protection in the Personal Responsibility Act against a dominant culture that wishes to impose policies for political or symbolic rather than sound policy reasons.

The direct competition between middle class voters and welfare recipients for public resources will be most acute in times of recession, when swelling welfare caseloads call on states to allocate more *state* resources for welfare spending. By arguing for a more aggressive framework of national standards or incentives that would insulate fundamental redistributive choices, this Article offers an alternative vision of decentralization that increases the possibility that the interests of low-income families will be fairly represented in welfare reform and redistribution debates. At the same time, the alternative vision would afford states substantial discretion to experiment and innovate in search of successful welfare reform strategies.