ADJUDICATING WELFARE REFORM IN THE UNITED STATES: A STUDY OF THE IMPACT OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT (1996) ON WELFARE RIGHTS LITIGATION

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Elizabeth K. Hayden

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ABSTRACT OF DISSERTATION

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My aim is to understand more fully the impact of welfare reform on welfare rights litigation. I begin by providing an overview of legal claims in public assistance before and after welfare reform in 1996, and then by examining how these cases have been decided. This survey of the judicial development of welfare rights indicates that prior to the reform, federal cases set a federal minimum of welfare rights that states will not deviate from post-reform. After the Personal Responsibility Work Opportunity and Reconciliation Act (1996) increased the role of states in the administration of welfare in the United States, state courts began to receive more cases from welfare claimants challenging different aspects of the new program. The literature on the new judicial federalism suggests that some state courts, relying on the unique provisions in their own state constitutions, will begin to find new substantive and procedural protections for welfare rights. In this research, I seek to determine the extent to which state courts have turned to state constitutions to protect the poor whose benefits are at risk. I present the following research questions: (1) how has the 1996 Act affected welfare litigation in the United States, (2) how have these cases been decided, and (3) how have state courts responded to the challenge of their expanded role in deciding the outcome of welfare litigation and policy? This research seeks to inform the new judicial federalism literature by describing the variety of state court responses to welfare rights claims being brought in the post-TANF era.

Utilizing a Longitudinal and Post-test Time Series research design, this study assesses the nature and frequency of welfare litigation pre-and post-reform through the lens of new judicial federalism. The study demonstrates that after the 1996 Act (1) there has been a decrease in welfare litigation in federal courts, (2) claims are more likely to be filed and resolved in state
courts, (3) state courts are more likely to grant favorable outcomes to state or state officials named as defendant than they are to individual claimants, and (4) state courts have not been very eager to find substantive or procedural rights to welfare in state constitutional provisions. These outcomes in judicial decision-making or the tendency to find in favor of the state generally match the nature of this policy reform, which can be described as the introduction of a series of more stringent welfare measures with time-limited benefits and new requirements for seeking employment. This research illustrates the disposition of these cases such as outcome and nature of case, location and level of court, and attempts to explain state court decision-making in these cases by testing, among other things, whether the outcome of these cases is any different in ‘Red’ (conservative) versus ‘Blue’ (liberal) states and whether the mode of judicial selection--election or appointment--makes any difference. I then examine welfare policy innovations implemented since 1996.
# TABLE OF CONTENTS

Abstract 3

Table of Contents 5

List of Tables 6

List of Figures 7

Acknowledgments 8

Chapter 1 Introduction 9

Chapter 2 New Judicial Federalism: State Law Developments in Welfare Rights 19

Chapter 3 Review of Welfare Litigation Literature 41

Chapter 4 Research Methodology and Design 53

Chapter 5 Quantitative Findings from Fifty States 58

Chapter 6 Advancing State Welfare Rights in State Constitutional Law 70

Chapter 7 The Impact of Welfare Reform on Policy Changes in the States 90

Chapter 8 Conclusion: Welfare Rights Litigation and the Future of New Judicial Federalism 97

References 107

Appendices 115
List of Tables

<table>
<thead>
<tr>
<th>Tables</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Frequency of Welfare Litigation Pre -and Post-Reform</td>
<td>31</td>
</tr>
<tr>
<td>2. Outcome of Case—PRWORA</td>
<td>67</td>
</tr>
<tr>
<td>3. Red or Blue States and Elected or Appointed Judges and Outcome</td>
<td>69</td>
</tr>
<tr>
<td>4. Red or Blue States and Elected or Appointed Judges and Outcome</td>
<td>100</td>
</tr>
</tbody>
</table>
List of Figures

<table>
<thead>
<tr>
<th>Figures</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Year of Case—Federal and State Courts</td>
<td>61</td>
</tr>
<tr>
<td>2. Nature of Case—Federal and State Courts</td>
<td>64</td>
</tr>
</tbody>
</table>
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Chapter 1 Introduction

The aim of this dissertation is to examine the judicial treatment of welfare cases in federal and state courts after welfare reform in 1996. To understand the legal consequences of the policy shift resulting from the enactment of the Personal Responsibility Work Opportunity and Reconciliation Act, I explore how lawyers have framed welfare rights litigation in the wake of new reforms. I also examine the nature and results of the litigation brought before and after the Personal Responsibility Work Opportunity and Reconciliation Act. The research is meant to gauge the impact of welfare reform on welfare rights litigation as measured by a longitudinal design. After this overview of legal claims in public assistance following welfare reform in 1996, I then examine how these cases have been decided in state courts by focusing on outcome-related variables.

In a move towards the devolution of more responsibility for welfare programs to the states, the federal government instituted a block grant design which allowed states to create their own versions of public assistance. This new arrangement gave states more flexibility to cut basic benefit levels, redesign eligibility rules or eliminate citizen entitlement to welfare in an effort to control cost (Powers, 1999). The reforms instituted a five-year limit on benefits. According to a report issued by the Center on Budget and Policy Priorities (2011), California, Washington, South Carolina, Wisconsin, New Mexico, and the District of Columbia have cut monthly cash assistance benefits for families, reducing already very low benefits, while California and Arizona shortened their time limits, and several other states tightened time limits.

The Temporary Assistance for Needy Families (TANF) superseded Aid to Families with Dependent Children (AFDC), a federally funded program that was administered from 1935 to 1996. In 1996, Congress ended the AFDC program and other renewable programs,
including the Job Opportunities and Basic Skills Training (JOBS) program and the Emergency Assistance (EA) program, when it enacted the 1996 PRWORA and TANF. The adoption and implementation of PRWORA of which TANF is a part, transformed both the policy and ideology of public assistance. Welfare benefits were linked with defined and enforced work requirements, along with strict time limits and new eligibility requirements. Congress shifted more responsibilities for this policy to the states. Greater state role naturally meant more deviations among states and chance of the states or state administrative welfare officers being named as defendants in welfare litigation.

This project is ultimately about the judicial treatment of welfare cases in the states after 1996. The following questions are at the core of this analysis: (1) how has the 1996 Act affected welfare litigation in the United States (i.e., the number of cases; where brought—federal or state courts; federal or state administrative forums; nature of claims—federal due process, Section 1983 of the Civil Rights Act, Title VI of the Civil Rights Act of 1964, state due process, state APA actions, independent state constitutional claims), (2) how have these cases been decided, including case disposition (judgments in favor of the state/agency or judgments in favor of the claimant), and (3) how have state courts responded to the challenge of their expanded role in deciding the outcome of welfare litigation and policy?

The first question focuses on the nature, frequency and outcomes of welfare litigation before and after PRWORA/TANF. Given the scope and nature of the new law, I expected there to be more legal claims brought by individuals challenging various aspects of the new arrangements envisioned by the 1996 law including disputes arising from welfare policies, and new requirements such as job placement and training requirements specified by the states and state welfare agencies. I expected there to be a change in the outcomes of such cases. Given
the nature of the law, and the rhetoric that the reform would change welfare as we know it, I predicted courts would be more deferential to the states and less willing to give judgments in favor of welfare plaintiffs. In an effort to test these hypotheses, I focused on a wide variety of welfare litigation involving alleged violations of the due process clauses in the Fifth and Fourteenth Amendments, alleged violations of the Fourteenth Amendment’s equal protection and privileges and immunities clauses, alleged civil rights violations protected by state and federal civil rights statutes, and alleged deprivations of substantive rights to welfare as provided for in some state constitutions. As I will explain more fully in chapter 5, there has been a decrease in federal constitutional and statutory claims as a result of PRWORA and TANF reforms. Since greater responsibility for welfare has been devolved to the states as a result of the 1996 reform, more cases began to appear in state courts and state administrative law settings raising state constitutional, state statutory, and state administrative law issues. By assessing the nature, frequency and outcomes of legal challenges to these new, post-reform activities at the state level, I hope to shed light on the state court responses to the changes ushered in by Congress in its landmark welfare reform act in 1996.

Data from Florida, Virginia and Illinois compiled in a 2000 study suggested that the poor have experienced differential treatment in social service agencies since implementation of PRWORA (Savner, 2000). Also a study conducted in 2001 by the Scholar Practitioner Program, W.K. Kellogg Foundation, the Department of Public Administration at Jackson State University, and the Stennis Institute of Government at Mississippi State University suggested that when the poor enter a depressed economy and lagging workforce with few educational resources, family supports and insufficient work experience, they are likely to experience economic hardship.
These studies indicate that the poor will have a more difficult time obtaining the assistance they seek in this post-welfare reform era. I test this assumption empirically by taking a closer look at federal and state claims based on eligibility for benefits, violations of due process and equal protection, challenges to durational residency requirements, and challenges to various workfare policies based on wages paid and other issues under the Fair Labor Standards Act (FLSA) in the post-welfare reform era. This research primarily describes the impact of the 1996 Act on welfare litigation in the states. I am also interested in whether state courts are “stepping up” to the new challenges, and finding in their state constitutions, state administrative procedures act, or state law, any “new” procedural or substantive due process protections for the poor. The results of this inquiry are reported in chapter 5.

Since the implementation of PRWORA, how are state courts deciding the cases from welfare claimants challenging various aspects of the new programs? In this dissertation, I analyze the outcome of these cases in an effort to determine if state courts are more likely to grant favorable outcomes to the state or to the department of social services than they are to welfare recipients. To answer this question, I examine state court decisions associated with implementing and maintaining the current welfare policy, in particular, outcome of case (e.g. favorable outcomes for welfare claimant or state), frequency of cases, nature of cases (types of claims filed), level (federal vs. state) and location of court the case was tried. I also test the significance of state courts in Blue and Red states and elected or appointed judges to determine whether the dominant ideology of the state and type of recruitment influence state court case outcomes. Utilizing LexisNexis data base, I aim to investigate whether there is a relationship or pattern to the judicial-decision-making with regard to Blue and Red states and elected versus appointed judges. I am interesting in finding out whether an appointed judge from a liberal or
Blue state and not subjected to the election process is more likely to rule in favor of the welfare claimant versus a judge from a conservative or Red state subject to the pressures of election. Some of the literature informing this thesis and topic will be drawn from a chapter in “The Pursuit of Justice” (Lopez, Sobel, Hall and Ryan, 2010) as well as a series of articles that discuss the Red and Blue state paradigm and its association with issues such as welfare litigation and equal rights (Scott, 2008). I expect to find that appointed judges from Blue states are more likely to rule in favor of a welfare claimant than elected judges from Red states. In addition, I will examine the year each case was argued and resolved in order to understand the impacts of the PRWORA, and to examine how and whether the role of state court decision-making has changed following the reform.

Melnick (1994) states that lower courts determined the outcome of many cases that continue to expand welfare programs and procedures pre-welfare reform. Typically, those cases resulted in statutory or regulatory interpretations of a highly technical nature (such as determining the nature and scope of disability payment, whether they should be considered "earned" or "unearned" income). From 1983 to 1996, the US Supreme Court lists 14 cases related to welfare litigation (AFDC) as oppose to 1 TANF case listed from 1996 to 2009. As the U.S. Supreme Court tilted to the right as a result of judicial nominations made by Republican presidents from Reagan to Bush II (Chemerinsky, 2011), legal services lawyers may have decided against appealing rather than losing in higher courts. Melnick (1994) also reports that the cumulative effect of prior decisions (particularly during the AFDC period), especially the cases that were represented by the Legal Services Corporation, was to create an unwieldy, legally complex welfare system subject to litigation over every procedural or policy dispute. Though some PRWORA court cases were affected by these AFDC claims, the more stringent PRWORA
policy eventually altered the legal landscape. Data from this dissertation suggests that the new reform did result in less legal ground to argue welfare cases. The wide variety of AFDC cases that eventually reached the U.S. Supreme Court include disputes such as payment differentials between new and long term recipients, due process violations, Social Security Supplemental Insurance benefits and AFDC statutes and regulations along with violations of the federal constitution and administrative regulation. The one US Supreme Court case that has been decided since implementation of PRWORA reform involved durational residency requirements.

During the AFDC period, litigation was more likely to occur in federal courts, and there was a chance that cases would be taken on appeal and heard by the US Supreme Court. Now that the vast majority cases have shifted to state courts, these cases sometimes raise issues of state constitutional law but for most part these issues are of statutory interpretation. Though the number of federal cases filed dropped after 1996, cases such as Reynolds vs. Giuliani (1999) dominated the legal landscape. As such, the frequency of these claims in the state of NY was due to alleged procedural violations in welfare policy involving the mayor and welfare agencies. This class action suit filed in US District Court, Reynolds vs. Giuliani (1999) challenged welfare implementation in select New York state agencies for denial of access to food stamps, Medicaid, and termination of cash assistance to program participants to eligible households within required time frames. The court issued a preliminary injunction directing the City (1) to allow applicants for food stamps, Medicaid, cash assistance, expedited food stamps, and temporary pre-investigation grants to apply for benefits on the first day they visit a Job Center; (2) to process all applications for expedited food stamps and temporary pre-investigation grants at Job Centers within the time frames required by law; (3) to make eligibility determinations regarding food stamps and Medicaid separate from eligibility determinations regarding cash public assistance;
and (4) to send applicants for ongoing and emergency assistance written notice of determinations of their eligibility (Reynolds vs. Giuliani, 1999). The court has directed that an “informal intervention” process continue to be utilized to address individual cases of exigent need (Reynolds v. Giuliani, 35 F. Supp. 2d 331 (S.D.N.Y. 1999). In July 2000, the court denied the City's motion to vacate the preliminary injunction, denied state defendants' motion to dismiss the complaint, and granted plaintiffs' motion for class certification. The trial court decided in favor of welfare recipients because the city had illegally discouraged applications for benefits and encouraged people to seek private assistance from other sources such as food pantries and family members. In 2007, the US Court of Appeals for the Second Circuit removed the district court’s injunction against the state defendants, and dismissed the complaint against the state defendants. This outcome was considered to be a devastating loss for those litigating welfare cases, and we could infer that the decrease in cases were in part, the result of this decision.

In another PRWORA case, Cordos vs. Turner (1998), plaintiffs filed a suit in the Southern District Court of New York. Their claims involved the federal Fair Labor Standards Act, back wages, damages, and attorneys’ fees arising from the performance of workfare at less than the minimum wage. Cordos's claim stemmed from the failure of the New York City Department of Social Services to “reduce the number of workfare hours to which he was assigned when the rent portion of his grant was removed after he became homeless” (Cordos v. Turner, 1998). Welfare-to-work clients received less than minimum wage for cleaning sanitation garages. According to the New York Times (2000), the state's highest court ruled that New York City could continue to use the minimum wage to put a value on the work performed by welfare recipients, deciding they were not protected by a state law that could have compensated them at the prevailing rate for their skills. Furthermore, the New York Times (2000) further
reports that the Court of Appeals, in upholding a state appellate court's decision, said the 38,000 participants in the city's workfare program could not be considered municipal employees who might be entitled to higher wages. In *Cordos v. Turner* (1998), the judges claimed that welfare recipients did not qualify under the state law, due to the narrow legal definition regarding prevailing-wage protections (Hu, 2000).

It is important to note that a substantive change in the nature of claims has occurred in the courts. Following the 1996 reform, the focus of welfare rights in these cases shifted from rights concerning the individual and welfare cash benefits to 1) examination of parental rights and financial responsibilities in custody cases, and (2) individual rights and eligibility involving disability claims. However, some claims relate to procedural due process, and whether welfare claimants were given fair notification of welfare policy and procedures, and whether they were offered or given a fair hearing.

According to Legal Dockets, online availability and case summary information varies tremendously from one state to the next. Each jurisdiction has its own set of guidelines that will define and dictate how much of this information may be utilized for research purposes by outside parties. Federal and state court data sets found in LexisNexis ordinarily include welfare recipients’ cases that are brought to court. LexisNexis does not include claims brought in formal and informal adjudications within state welfare agencies; however these claims are not a focus of this research. I am interested in exploring cases that have been decided in federal and state courts after welfare reform in 1996, for the purposes of illustrating the problems and challenges associated with the current welfare policy. In chapter 2, this literature review explores the application of Solimine and Walker’s (1999) five approaches (Structural, Functional, Qualitative, Economic and Philosophical) to judicial federalism with regard to state and federal relationships
in welfare policy and litigation. In chapter 3, this literature review examines welfare litigation with regard to the research questions how and why state courts decide welfare litigation, where litigation occurs, and the nature of prior welfare litigation. In chapter 4, I present and explain the research design and methodology used for this study. My aim is to determine the extent to which state courts have relied on state constitutions to protect impoverished individuals. I utilize purposive case selection, longitudinal, time series designs and descriptive statistics in order to analyze a number of quantitative variables. In chapter 5, I present my findings. In this chapter, I determine the frequency, nature and outcome of welfare litigation since the reform, as well as determine whether state courts were engaging in the New Judicial Federalism, and whether they were attempting to expand individual rights with regard to welfare policy. In chapter 6, I will examine welfare litigation in state court cases to determine whether there are innovations. I am defining state court innovations by actions that go beyond maintaining and enforcing the current welfare policy. In this chapter, I provide a brief overview of claims and outcomes found in the intermediate and final courts of appeals, with a focus on Type I and Type II cases that illustrates the variety of state judicial making with regard to welfare rights issues. In chapter 7, I will review various welfare policy innovations since 1996. In this study, welfare policy innovations will be defined as the actions of a state to address and alleviate poverty (in contrast to the actions of a state court). Some of these innovations will involve the state legislatures and the state courts. State court innovations will also be defined as the expansion of welfare rights. With regard to law and policy, I will examine the outcomes of these cases to assess whether the policy is deemed successful, and to try and predict whether there is a future for another reform. In chapter 8, my conclusions will include a summary of findings as well as a comparison of my results to previous studies on welfare litigation. I will also provide recommendations for
increasing state court involvement with regard to expanding welfare rights. Following the 1996 reform, I anticipate a decline in welfare litigation due to implementation of the more stringent PRWORA policy.
Chapter 2 The New Judicial Federalism: State Law Developments in Welfare Rights

In this chapter, I discuss the movement in American law known as the new judicial federalism, paying particular attention to its relationship to welfare litigation and the Personal Responsibility and Work Opportunity Act. Williams (1996) suggests that state constitutions have tremendous implications for questions of how the United States governs, and have considerable consequences for the rights of state citizens. Shapiro (1999) describes the New Judicial Federalism process in which state courts interpret their state constitutions to provide rights beyond the national minimum of rights recognized by the U.S. Supreme Court interpreting the federal constitution. Citizens’ rights and rights protections in law have generated interest in the last several decades. The phenomenon of the New Judicial Federalism (NJF) dates from the early 1970’s (Tarr, 1997). The NJF denotes the increased reliance by state courts on their state constitutional law; it is the reluctance to turn to federal law/precedent when there are independent and adequate state law grounds’ for the state court decision-for example, reliance on state due process and equal protection, not 5th/14th amendment due process and protection. But empirical studies indicate that with regard to rights, state courts generally have followed not their own constitution, but rather have fallen lock step to the federal constitution (Solimine & Walker 1999, Tolley 1992). Hershkoff (2010) argues that constitutional rights establish expectations that the rights will be legally enforced. She indicates that state courts are in a position to inform and instruct legislatures with regard to affirmative rights without violating separation of powers.

According to Solimine and Walker (1999) and Solimine (2002), the NJF can be defined in a number of ways: limitations on federal jurisdiction and policing the boundaries between federal and state courts; devolution of more to state courts rather than federal courts; the extent to which federal and state courts are capable of adjudicating federal constitutional clauses; and
the most relevant interpretation, the “increased use of state courts to protect individual rights based on the state constitutions” (p. 5). In this dissertation, I seek to inform the "new judicial federalism" literature by describing the variety of state court responses to welfare rights claims being brought in the post-TANF era. Chapter 5 and 8 details both my findings and conclusions about the fate of welfare rights in state courts after 1996.

Similar to Solimine and Walker’s (1999) analysis of judicial federalism, this examination finds that state courts do not typically expand substantive and procedural rights to welfare. To that end, how do state courts adjudicate federal civil causes of action and how do state courts interpret their own state constitutions with regard to public assistance? Several recent works on the state court treatment of benefits claims in light of different state constitutional commitments shed light on these questions. Solimine and Walker (1999) contend four approaches to judicial federalism. This investigation utilizes these approaches with regard to the relationship of state and federal relationships in welfare policy and litigation. Solimine and Walker assert that the four approaches are a “composite on many authors” and have not developed into a model or theory of judicial federalism. I will discuss the approaches in detail later in this chapter.

Tarr and Williams (2006) illustrate the impact of judicial decisions on statutory amendment practices or more specifically if welfare rights were expanded, courts have a tendency to narrowly construe constitutional provisions relating to, for example, cash benefits. State courts have to decide whether to actively nullify inconsistent laws or other acts of government or find a way to minimize the effect of the constitutional language (Tarr & Williams, 2006). However, these actions may involve a particular situation where a court confronts conflicting laws. Dodd (1910) contends that the rigid, conservative attitude of the judiciary in
the past, interpreting constitutional provisions has contributed to turning state constitutions from fundamental frames of government into statutory codes. Courts interpreting state constitutional provisions borrowed from other states can be a useful application when trying to interpret welfare policy and the parameters of litigation. As such, it would seem that the new judicial federalism should include courts addressing conflicts between statutory and constitutional provisions. Another relevant application of the new judicial federalism is the increased use of state courts to protect individual rights based on the state constitutions, and the extent to which state courts are demonstrating that they are willing to protect or enhance the rights of citizens. Despite opportunities that the new judicial federalism suggests, the landscape still results in an unfavorable trajectory for outcomes in social policy.

If administrative decisions result in differential treatment of minority groups, we might predict that the equal protection clause would focus on civil liberties, or more specifically the courts construing of the EPC. The problem is that arguments such as these are likely to rest on federal equal protection clause, and most state courts have not developed their state constitutional equal protection clauses. Though this dissertation is primarily focused on state approaches to judicial decision-making, in order to provide context, it is important to note the impact of the US Supreme Court rulings on lower courts. The result is that state courts rest heavily on the US Supreme Court’s interpretation of the equal protection clause of the Fourteenth Amendment (Tarr and Williams, 2006). Moreover, Tarr and Williams (2006) indicate that even though most state constitutions do not contain an equality protection clause, they do contain provisions such as due process, which has been interpreted to guarantee equal treatment. The case *Green v. Anderson* (1995) was heard in the United States Court of Appeals for the Ninth circuit No. 98-97. Here due process and equal treatment claims were not ripe for
review until after Congress enacted the Personal Responsibility and Work Opportunity
Reconciliation Act of 1996 (PRWORA), which replaced AFDC with Temporary Assistance to
Needy Families (TANF). PRWORA authorized any State receiving a TANF grant to pay the
benefit amount of another State’s TANF program to residents who have lived in the state for less
than 12 months. In *Green v. Anderson* (1995), this provision was struck down so it is no longer
part of the law. Following this response in *Green v. Anderson* (1995), respondents filed this
class action, challenging the constitutionality of the durational residency requirement and
PRWORA’s approval of that requirement. As a result, a preliminary injunction was granted, the
District Court found that PRWORA’s existence did not affect its analysis (*Green v. Anderson,*
1995). The Ninth Circuit then affirmed the injunction. The California court sought to amend its
Aid to Families with Dependent Children (AFDC) program in 1992 by limiting new residents,
for the first year they live in the State, to the benefits they would have received in the State of
(1982) and *Zobel v. Williams* (1982), it penalized “the decision of new residents to migrate to
[California] and be treated [equally] with existing residents” (*Green v. Anderson*, 1995). Also,
the Supreme Court decision did not rest exclusively on the EPC, but more directly on the
Privileges and Immunities clause.

Similarly, an example of such provisions that were challenged in the state courts can be
found in *Aliessa v. Novello* (2001), a recent New York Court of Appeals case concerning public
assistance for legal aliens. The court reviewed PRWORA’s immigrant provisions, contained in
Title IV of that law, which included two different categories of immigrants, qualified aliens and
non-qualified aliens. According to the high court’s analysis, federal law had granted states the
freedom to grant and implement stricter policies on aliens or to exclude non-citizens from their
public assistance programs such as Medicaid (*Aliessa v. Novello*, 2001). Thus, states have the power to set their own eligibility rules for immigrant participation in state or local means-tested programs with the understanding that states provide "safety net" services in an emergency. In the new judicial federalism framework, the question here is whether states will make the argument for constitutional provisions such as the equal protection clause to provide or extend benefits to the poor, particularly when the case involves immigrant populations.

Given the scope of changes provoked by PRWORA, it is not surprising that the reform spawned legal challenges. Of the few cases that were filed in US Supreme Court, *Saenz v. Roe* (2001) was one of the most significant. In *Saenz v. Roe* (1999), the US Supreme Court ruled that it was unconstitutional for a state to provide lower TANF benefits to new state residents, because such provisions violated the constitutional right of citizens to travel between states. California statute limited the amount of welfare benefits payable to a new resident (less than a year) to the amount payable by the state of the family’s prior residence. In *Saenz v. Roe* (1999), California argued that the statute should pass the RR test because the state has a legitimate interest in saving $10 million a year. Further, CA argued that the statute didn’t penalize the right to travel because new arrivals were still given benefits during their first year of residence (*Saenz v. Roe*, 1999). But the right to travel is broader than just protecting the rights of a citizen to enter and leave a state. The right to travel includes the right to the same privileges and immunities as other citizens of that state (14th amendment privileges and immunities clause). In this case, evidence of the new judicial federalism might involve a broader interpretation of the right to travel, which would include 14th amendment privileges and immunities expanding to immigrants or individuals migrating from other states.
There is some evidence indicating that the new judicial federalism has been demonstrated in the courts. According to Gilman (2004), a number of lawsuits have successfully challenged welfare agencies that engaged in unfair practices, such as dissuading the poor from applying to public assistance, denial or termination of benefits, or imposing excessive sanctions on families who failed to comply with work requirements. However, the new judicial federalism is not consistently seen in welfare litigation. Gilman (2004) reports that courts have ruled in favor of the state and Department of Social Services with regard to upholding drug testing of welfare applicants, banning client advocates from welfare offices, and denying employment discrimination protections for welfare-to-work employees. Gilman (2004) also reports that other lawsuits have challenged aspects of Charitable Choice, the PRWORA’s requirement that states must include religious groups in the process when contracting out the administration of welfare.

Winston and Castaneda (2001) suggest that there are growing disparities across the states (and localities) in standards and financing which lead to disparities in policy approaches toward poor and low-income people. Winston and Castaneda (2001) assert that the period from 1997 to 2006 saw a range of trends that affected the demand for programs for low-income people and state responses to this demand. Thus, it is difficult to tease out the specific effects of changes in federal-state arrangements, shifts in economic conditions, and other aspects of state systems change that occurred for reasons aside from devolution (Winston and Castaneda, 2001, p.45). But the general trend appears to be one of great differentiation among state policies, ranging from limited benefits in low-fiscal-capacity states and markedly more benefits in wealthier states (Winston and Castaneda, 2001, p. 45). Winston, Golden, Finegold, Rueben, Turner, and Zuckerman (2006) contend that given the wide variety of state circumstances and capacities,
policymakers should be concerned about the trend towards public assistance systems that are structured to be heavily reliant on these unequal capacities.

In general, the history of public assistance (in particular cash benefits) in the United States has not been an entitlement; it has been seen as "charity" as opposed to an entitlement, a privilege rather than a right. Prior to the New Deal, there was more expectation for communities to take care of the poor and indigent. And despite the sweeping and generous reform that addressed the fall-out from the Great Depression, the federal government has been increasingly resistant to establishing national welfare rights. To some degree, we have gravitated back towards our earlier roots, a time when government, public sentiment, and the courts prefer that communities and churches pick up the slack, when welfare means an act of charity versus an entitlement or right. With regard to providing welfare benefits for the poor, has judicial federalism served to expand or contract rights? Many who question the new judicial federalism argue that defendants usually have fewer rights in state courts than in federal courts. My review of welfare litigation rates indicate that because welfare recipients are thought to have fewer “rights” than they had prior to PRWORA reform, the frequency of disputes and challenging of benefits claims have dropped dramatically. Again, there is much less legal “ground” for welfare claimants to stand on. Within the frame of new judicial federalism, it was reasonable to assume that the advantages of federalism would provide a legal remedy to those that have been “wronged” in the system, and to those who have been treated unfairly, such as failures in due process involving fair hearings and notifications. Policy experimentation by the state courts certainly has the potential to lead to liberty. However, history indicates that it has also led to oppression that then requires legal remedy at a federal level. Solimine and Walker (1999) point out that when states have failed to protect important rights of the significant minority, the federal
government sometimes intervened to correct “the injustice.” Critics of judicial federalism further state experimentation and political dialog at the local level comes at the expense of individuals due to the “tyranny of the majority” or due to the “inferiority of state and local structures” (Solimine and Walker, 1999). In the following section I will examine and apply Solimine and Walker’s four approaches to welfare litigation.

*Structural approach*

The structural approach indicates that US judicial decision-making is made and enforced by the states versus the federal government (Solimine and Walker, 1999). Though law is subjected to the competing financial goals of a state (as opposed to federal law), more often than not, state courts will attempt to fill in the gap due to highly specialized interests such as a dominant political party, elections or powerful lobbyist groups. Justices may have advanced a structuralist outlook when discussing federal-state relations. It would seem that the implementation of PRWORA is a good fit for the structural approach as demonstrated by result of fiscal federalism and the block grant system which gives states flexibility in fashioning their own policy and administrative strategies to achieve the goals of the law. State innovation and experimentation are seen as critical ingredients of policy change (Zackins, 2013, Solimine and Walker, 1999). Again, I am defining state innovations by actions that modify and expand the current welfare policy such as anti-poverty laws. State court innovations will involve the expansion of welfare rights.

With regard to location of cases, LexisNexis lists that New Jersey, California, the New York Lower courts and Connecticut Superior court document the most frequent litigation. According to the Heartland Institute's comprehensive study “Welfare Reform after Ten Years” (2008), Virginia was given high marks for the success of anti-poverty and welfare reform
policies in the Commonwealth. The study reports that the six states with the most successful welfare policy and anti-poverty programs are Virginia, Maryland, Idaho, Illinois, Florida and California. According to the Heartland’s 2008 report, criteria for successful welfare programs are: declines in TANF participants, change in poverty rate, TANF workforce participation, change in unemployment rate as well as the teenager birth rate. The same report also evaluated whether states had “enlightened” welfare programs with variables such as service integration and coordination, Earned Income Tax Credit, length of time for beginning work requirements, availability of cash diversions, family caps, lifetime limits, and strong sanctions.

Despite the favorable ratings, California had a history of frequent welfare litigation pre and post-TANF reforms while Virginia was less likely to see legal claims after TANF, following the Heartland Institute's report that indicates best practices in the delivery and implementation of welfare. A number of states with high marks have a higher incidence of welfare litigation while states with low marks in welfare policy have the least incidence of welfare litigation. Perhaps the strict welfare policies may result in more complaints and subsequently, more efforts to seek legal remedies. In addition, other variables and interests such as the state’s population, unemployment rate or political ideology may be determining whether welfare-related claims end up in the judicial system. In addition, it is likely that the restrictions on legal services lawyers, which barred them from bringing welfare reform claims during part of this time, had an impact. Also, in some places legal services were able to spin off and refuse federal funding. As a result, some states could bring these claims while other states had no lawyers to bring these claims.
**Functional Approach**

The functional approach contends that the fluid and dynamic process associated with the states and their legal systems have greatly influenced American law, insofar as legislative action has led to innovation and adoption of state solutions by the federal government (Solimine and Walker, 1999). This potential diffusion from state to federal law illustrates the importance and power of the new judicial federalism. Tarr and Williams (2006) provide examples that illustrate the states’ interest in creating their versions of social policy such as Alabama’s constitution requiring “adequate maintenance of the poor”, or the New York Constitution requirements that legislature “provide for the aid care and support of the needy”, and Massachusetts “guarantee of food and shelter in time of emergency.” This suggests that states, to some degree, provide additional assistance and more protection than the federal government provides. How state courts have responded to their expanded role is the subject of chapters 4 and 5. As I will explain, my hypothesis is that data from this research suggests that many state courts are not taking a very active or expansive approach to the advancement of welfare rights. The social and political climate may be responsible for this finding. It is also possible that some states are finding, in general, PRWORA to be a fair and effective policy and some may have implemented other creative solutions to address poverty such as community-oriented initiatives. It is beyond the scope of this study to examine all the variables impacting the nature and frequency of welfare litigation in the United States.

**Qualitative Approach**

The qualitative approach suggests that state courts are inferior to federal courts as a result of a disparity in resources involving training and attitudes and that state court judges are unwilling or unable to protect the federal constitutional rights of litigants (Solimine and Walker,
They are more likely to seek relief in federal court for welfare rights. With regard to welfare litigation, AFDC claimants had more of a chance of bringing a constitutional argument to the federal courts because the very nature and language of welfare policy inferred more constitutional rights or entitlements than TANF/PRWORA. As such, those seeking relief under the present reform have little hope of their claims making to the federal courts, particularly using a constitutional argument. Moreover, the majority of cases now focus on child support disputes, disability and state administrative claims.

**Philosophical Approach**

Solimine and Walker (1999) describe the philosophical approach as the need to understand the norms, myths and principles that are expressed and implied by the structure of a dual court system. Since federalism is one of the fundamental features of American law and government, policy and judicial decision-making will obviously reflect that feature. This dissertation categorizes the responses in a way that distinguishes those state courts that have been receptive to the claims of welfare recipients based on state constitutional, statutory, and administrative law, and those that have been less so. This research also illustrates how the division of judicial power between federal and state court systems in the United States has considerable implications in welfare rights. If more of these cases are now being adjudicated in state courts, then it would be useful to know how state courts are grappling with this new responsibility. Are some state courts finding that claimants are deserving of the same procedural due process rights as required before 1996? Are some state courts finding more or less right to procedural due process? Though the constitutions have not changed, perhaps the issues are about: (1) the state’s interpretation of a given case involving welfare litigation, (2) whether judges are inclined to protect the poor or immigrant populations, and (3) judges’ determination
of “worthy” individuals and populations. This examination of the universe of welfare cases pre- and post-1996 reveals much about the diffusion of welfare rights norms throughout the states. Still, welfare policy was never the domain of federal courts, thus the stage was set for state court activism and innovation. This data illustrates the action at the state level and how state courts have responded to their increased responsibility.

According to Fino (1987), state court activism on behalf of rights ebbed from 1937 to 1970’s because the trend in American constitutional law was towards federal in areas such as individual rights. Those pursuing legal remedy preferred to bring their cases in federal court rather than uncover and untangle the sometimes unfamiliar provisions found in state constitutions. State courts, of course, are legally subordinate to the United States Supreme Court in the interpretation of federal law. Fino (1987) suggests that the potential for state court creativity lies in the interpretation of state constitutional provisions with no federal analog. Equally important is the idea that the decisions of state supreme courts may influence decisions in sister courts and these decisions may result in serving as precedents in factually similar cases, perhaps reassuring a court of the logic and propriety of a particular outcome or offering the justification to take a step that was not considered in prior cases (Tarr & Porter, 1988). In the last few decades, state courts have provided greater individual protections than the federal constitution in some areas such as rights of criminally accused and privacy. Oliveri (2008) states that “with the rise of the administrative and regulatory state, characterized by a proliferation of administrative agencies and the formation of countless joint federal-state programs, state courts will continue to assume a major role in adjudicating rights claimed under federal statutes.”

Nonetheless, though state and federal courts are certainly not the only guarantor of important substantive and procedural rights, rights sometime emerge in law and judicial
decision-making. In welfare litigation post-PRWORA, recipients have turned to state courts to enforce rights involving due process, procedural due process, and durational residency requirements. During the AFDC period, claimants were more likely to seek legal remedies, citing Civil Rights violations and discrimination-based claims based on the remedies found in federal courts. This study indicates that not only has the frequency of welfare litigation declined since the 1996 reform (see Table 1), but recipients are less likely to receive a favorable ruling. During the post-reform era, 51 percent of the cases were ruled in favor of the state.

Table 1

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I am also interested in explaining how state courts have responded to their expanded role. I explain more fully in chapters 4 and 5 that the majority of state courts have not taken advantage of the opportunity to address and solve violations in welfare policy and its implementation. The vast majority of cases involve child support disputes. This new domain involves the often complicated interplay between the Department of Social Services, Child Welfare and courts trying to determine who pays, how much and for how long. Regardless of the daunting task, state courts are often consumed with these domestic evaluations to determine the fiscal responsibilities of all parties involved.

Solimine and Walker (1999) report that federal courts have been forced to invalidate state laws and practices on the basis of the due process clause because they found that certain states have failed to uphold the minimum rights guaranteed under the federal due process standards. Experimentation in one state and state court may lead to that experimentation being adopted or imposed in other states. For example, progressive states such as Massachusetts tinkered with
mandatory, universal health insurance may have contributed to the other states adopting the practice and to the federal government attempting to craft similar policies for the country. But state and state court innovations that tackle intractable problems such as poverty often expose deeply embedded, entrenched systemic flaws that reflect the states’ economic health or it may reveal their dominant political ideology. States such as Virginia with low incidence of welfare litigation have taken it upon themselves to address the issue of poverty by crafting effective welfare policy. In contrast, states such as New York that have a history of welfare litigation involving discrimination and unfair practices may be more concerned with reducing the number of individuals enrolled in means-tested programs, regardless of the social and moral cost. As such, judicial federalism reminds us that interpretation and expression of rights will vary in states due to factors such as fiscal condition or whether the state and its citizens have a liberal or conservative political orientation. Despite constraints of the state courts, they have the opportunity to protect the rights of citizens when the federal courts have failed to do so.

Solimine and Walker (1999) remind us that states sometimes create rights. Before there was an Americans with Disabilities Act, a number of states adopted measures to secure job opportunities for the disabled population. State courts encouraged the federal government to create a national act ensuring equal protection for this marginalized group. Part of what fueled this new policy was efficiency. It was decidedly more efficient to put into place one federal policy rather than to deal with it “fifty statehouses” (Solimine and Walker, 1999). Perhaps judicial federalism is most effective when the public is clamoring and supportive of a radical policy shift. If government and the general public believed that welfare reform should intensely discourage individuals from seeking and staying on public assistance, then it follows that courts will support the majority consensus. However, in times of crisis, such as the Great Depression,
the government and public were lobbying to provide more generous benefits and to extend relief to the fallen middle class in order to stabilize the nation. That being said, judicial federalism is not solely dependent upon the “majority culture” and in fact, Solimine and Walker (1996) question the existence of such a consensus.

In “The Myth of Parity,” Neuborne (1977) challenges the view that entrusting state courts with adjudicating important rights will fail because state courts are not equipped to fulfill this function. According to Neuborne, the outcome of the Civil War and the passage of the 13th, 14th and 15th amendments have ultimately elevated the federal courts to a superior position over their state counterparts--this event has supposedly led to a decline in state courts’ technical competence due to the federal courts experience and expertise to deal with complex legal issues. However, if Neuborne’s argument rests on the selection process (the most competent are attracted to the federal judicial position and are selected by the Presidents and confirmed by the Senate), one could also argue that political figures may also choose federal judicial appointments to further their agenda, and choose those that are aligned with their political ideology. Also, Carrington (1998) notes that federal and state judges are inclined to favor decisions that support their political party. Later studies indicate that federal judges ruled according to their partisan attitudes (Solimine, 1999). To effectively facilitate the new judicial federalism, some have argued that state courts will better advocate for minorities and poor if the judges sitting on these courts were from more diverse backgrounds. Evidence on changes in the characteristics of state court judges suggests that these courts would be more receptive of rights-based claims brought by minorities.

According to Solimine and Walker (1999), the new judicial federalism involves interpretations of state constitutions that result in the expansion and enhancement of the rights of
citizens living in that state. Solimine and Walker (1999) indicate that historically, empirical studies of their performance suggest that state supreme courts are inclined to follow the federal constitutional law particularly when it comes to cases that involve individual rights. In other words, a case relying solely on the state constitution to pursue rights protection is considered to be a rare event. State courts are not typically in the position to overturn federal law or to adjudicate for a more forgiving or generous public assistance because they still have to operate within the supremacy clause. Article VI provides that “the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”

PRWORA and TANF reforms require strict time limits to cash assistance, residency and work requirements. State courts are inclined to enforce this policy and where appropriate, intervene when the basic rights of the individual are not being upheld in cases involving due process or procedural due process. The US Supreme Court typically reviews cases that are based on federal rather than the state constitution, though the higher courts can review state constitutions for compliance with federal constitutions. The state courts ability to operate under the federal radar with regard to interpreting their state constitution can provide opportunities which may lead to the states providing more effective strategies (other than cash assistance or welfare-to-work programs) to address poverty and unemployment in their communities—particularly if state courts were finding an increasing number of disputes relating to failures in implementation of welfare policy. If enough state courts were forced to deliberate on these claims, the federal government might then also review and deem the existing reform as ineffectual; following that, a new and improved version of public assistance could emerge. As a result of the stringent nature of the PRWORA reform and changes in the statute’s language describing our perception and expectation of welfare policy, the dramatic decrease of welfare
litigation in federal court after 1996 does not necessarily suggest that the current reform is successful. It indicates that the policy has become so stringent, there is little to argue or to challenge. It may be unfair to expect the state courts to right the wrongs of federal law, or correct the entrenched systemic flaws of this nation due to failures in the economy, education, health care and so forth. But it is still conceptually possible for states to look to Louis Brandeis and experiment with rights protection based on state constitutional law other than federal institutions.

Some claim that state constitutional initiatives have left the poor in a more vulnerable position; hence states appear to have not offered more protection despite the dwindling federal safety net. As with similar social policies and their enforcement of state equality guarantees, most states have not developed doctrines independent of the federal equal protection clause under their state constitutional equality provisions. In addition, when claims relating to violations of civil liberties and equal protection surface in welfare litigation, courts tend to rely the US Supreme Court interpretations of the equal protection clause of the Fourteenth Amendment. Welfare benefits by definition are considered to be positive rights, or an affirmative obligation on the part of the government to provide something to people. Issues that will provide opportunities for state constitutional development are likely to include education, housing, and substantive income such as welfare assistance (Tarr and Williams, 2006). But what is of particular interest in this research is predicting how courts will respond to individuals’ rights and welfare policy now and in the future.

Tarr and Williams (2006) reveal that the difficult task of expressing the intention of the framers of the state constitution involves avoiding an open invitation to the court to provide an alternative formula that “fixes” the mistakes or deficiencies in that constitution. As expected, the
vast majority of cases reflect the post-TANF shift. And if state courts are overwhelmed and their resources compromised by child support disputes involving welfare benefits, there could be less motivation to address and pursue creative solutions for the few substantive cases involving constitutional law or “higher order” rights violations. To that end, the issue of parity that is “the availability and qualitative receptivity of state courts to adjudicate, and where appropriate, to uphold federal rights” (Solimine & Walker, 1999, p. 29) has largely become a non-issue in welfare litigation. State constitutions are frequently amended though in rights guarantees the possibility and reality of change can be both appealing and frightening. According to Tarr and Williams (2006), state constitutional rights guarantees tend to fall in two categories: (1) those that are ordered similarly and/or identically to federal constitutional guarantees, and (2) those that are similarly worded, but not identical, and thus do not share a constitutional history. Tarr and Williams (2006) report that this phenomenon emerged after 1970, and involved state courts interpreting state constitutional rights guarantees in order to provide additional protection than the federal constitution. Tarr and Williams (2006) along with Zackins (2013) also state that reactions to these developments were both positive and negative, often depending on whether the critic was liberal or conservative, Democrat or Republican.

New interest in states and state supreme courts can in part be attributed to the liberal and conservative factions of the US Supreme Court (Fino, 1987). Fino further states that the reliance on “states courts of the last resort” creates a need to evaluate the state courts ability to play a more active role in complicated, policy-oriented litigation. Following that, we can develop a conceptual and operational definition of a good state supreme court, one that is a functional equivalent of the federal courts. The increased use of state constitutional law and the new judicial federalism was to some degree the sign of more liberal state courts trying to bypass or
overturn conservative legal and judicial opinions found in the US Supreme Court. Regardless, Tarr and Williams (2006) and Zackins (2013) contend that states are within their rights and authority in decisions that offer more protection than those of the US Supreme Court, and these interpretations include provisions that are similarly identical to their federal counterparts; thus, arguments surrounding the new judicial federalism does not question the legal reasoning to depart and modify state constitutions with regard to right guarantees. Tarr and Williams (2006) point out that it is whether the exercise in latitude is appropriate, whether the outcome reflects a sufficient enough understanding of the political, social and legal landscape and its impacts, and whether the actions will produce the optimum or desired results. Within this framework, states can add new rights as well as overrule or override judicial interpretations of state constitutional rights guarantees and provisions so long as these decisions rest on independent and adequate state grounds. It is important to note, the discussion in this chapter largely rests on Tar’s and William’s (2006) analysis because there has been a lack of studies applying the new judicial federalism, and because the data collection for this research concluded in 2009.

It would follow that state constitutional rights reflect the fundamental values and the goals of the state. With regard to the new judicial federalism, if for example a state is liberal in social policy such as welfare, the state’s constitutional rights involving welfare policy and its version of public assistance is likely to be more flexible and generous in nature than states that are more conservative towards welfare policy. Moving forward, I apply select recommendations of Solimine and Walker (1999) for purposes of: (1) strengthening judicial federalism in the arena of welfare policy and litigation: (2) increasing efforts to recruit a bench that is more reflective of the society at large, and (3) encouraging state initiatives in creating and protecting state guaranteed rights and continuing to protect federally guaranteed rights.
PRWORA provides states with much discretion over welfare programming and funding. For instance, there are no federal rules that determine the amount of TANF cash benefits, and states have the option of eliminating welfare benefits altogether. Benefit amounts are determined by states and each state has different initial eligibility thresholds, benefit payment amounts, and fund allocations (Falk, 2007). Though there are different welfare programs being administered in every state, judicial decision-making in the state courts support the state and Department of Social Service policies, most of which offered a bare minimum of cash assistance followed by work requirements. The problem is that welfare-to-work training and job opportunities do not result in sufficient income for participants. Hence, the poor who qualify for assistance for means-tested programs simply become the working poor, no better than off than they were before. For example, Roberts, Povich, and Mather (2012, 2013) report that there are 10 states where the rate of low-income working families increased by 5 percentage points or more between 2007 and 2011. Also, in 2007, 28 percent of working families were considered to be among “the working poor”-currently that number increased to 32 percent (Roberts, Povich and Mather, 2012, 2013). According to Falk (2007), the wide variety of welfare programs have resulted in mixed results in aiding the poor families. In general, despite trends in the new judicial federalism, state courts have supported the states’ position on decreasing the provision of cash assistance to needy families. Given the language of the statute, it appears that clients have no recourse in law. Falk (2007) asserts that after reviewing available data and perhaps investigating select claims further, clients are encouraged to seek relief in the court via a class action suit due to their: (1) vested interest in demonstrating a regular worker status, (2) violation of procedural due process due to deprivation of a fair and evidentiary hearing and deprivation of opportunities to continue and
maintain a property interest, (3) termination of benefits based on inaccurate information and denial of disability benefits, and (4) possible race-based discrimination claims of a serious nature (particularly ones that address violations of safety). Though the new judicial federalism is the increased reliance by state courts on its own state constitutional law and the reluctance to turn to federal law/precedent when there are independent and adequate state law grounds’ for the state court decision, there is little evidence to suggest that state courts have embraced the challenge of advancing welfare rights in state constitutional law. The state courts’ ability to adjudicate rights associated with welfare policy has for the most part, ground to a halt following the PRWORA reform because the federal government had not only transferred the matter to the states, but had largely eradicated the notion of welfare cash benefits as an entitlement, therefore public assistance is a privilege and not a right. In general, it would seem that state approaches to welfare litigation have embraced the stringent reform, and have supported a reduction in benefits, and a strict term limit to benefits. More specifically, to what degree, how long, how often, flexibility of terms and service delivery is now determined and carried out at the sole discretion of the states and few state courts have intervened on the policy decisions these states are making in implementing the law.

Successful experimentation of policy can be replicated when courts accept and implement the existing judicial interpretations of a given state. However, data indicates that states are not likely to challenge the status quo. Unless there are gross deficiencies in policy and in the statutes that come to light in program implementation and service delivery, courts have little reason to make changes. Moreover, courts cannot engage in legislative activities, even if they have a reason to disagree with policy. Courts interpreting state constitutional provisions borrowed from other states can be a useful application when trying to interpret welfare policy
and the parameters of litigation. Nonetheless, courts should address conflicts between statutory and constitutional provisions. A comparative analysis may be helpful in order to understand the challenges associated with welfare litigation.
Chapter 3 Review of Welfare Litigation Literature

This chapter explores prior welfare litigation literature with regard to the research questions how and why state courts decide welfare litigation, where litigation occurs, and the nature of prior welfare litigation.

Analysis of Location of Court

In 2010, Whitman’s study indicates that 21 percent of the nation’s welfare cases are in California, even though it only represents 12 percent of the total U.S. population. California has nearly twice the population as New York, but reports five times as many welfare cases. California struggles with transitioning people from welfare to work; 22 percent of welfare recipients in California who are required to meet federal work minimums are working (Whitman, 2010). Reasons why California reports such high numbers of welfare cases involve the more relaxed term limits and high cash benefits. According to the Public Policy Institute of California, California is one state out of nine that does not unconditionally enforce the federal government’s five-year lifetime limit on cash welfare assistance--this coupled with a monthly cash check that is almost 70 percent higher than the national average, works against the goal of helping more welfare recipients exit the system, and the result is more lawsuits. Other variables such as population density may impact the number of participants enrolled in public assistance programs.

PRWORA requires states to pay 50 percent or more of its cost--individual state funds are more protected because they pay a nominal sum for disability programs (Ruddy, 1998). Given this pattern, states that are prone to high welfare caseloads have instituted aggressive referral programs to encourage welfare applicants to enroll for federal disability instead (which includes asking many questions to uncover potential eligibility), thus, the state capitalizes on the savings
from the transfer from one program that they are financially responsible for to one that results in little or no financial responsibility (Ruddy, 1998).

Other types of assistance have been encouraged, particularly in states with high welfare caseloads. Mayor Rudolph Giuliani promised to "end welfare by the end of this century completely." This plan included the conversion of the city's Income Support Centers or Welfare offices into Job Centers. Job Centers were designed to move applicants into jobs and alternative forms of assistance such as family and private charities. As such, the Centers' main function was to discourage people from applying for benefits (Bers, 2001). Evidence suggests instead of focusing on helping welfare claimants find jobs, the city’s agenda and end result was a cut in welfare rolls procedurally by erecting a number of obstacles to the application process, encouraging staff to divert potential recipients, and even sometimes providing false information to applicants (Bers, 2001).

I would like to elaborate on a number of these cases to illustrate the outcomes and consequences found as a result of the 1996 reform. One of the most notable class action suits filed in the era of PRWORA, Reynolds v. Giuliani (1999), addressed violations of both state and federal law. Seven welfare applicants (together with other class members where appropriate, plaintiffs or appellees) brought a class action on behalf of all New York City claimants who have sought, are seeking or will seek to apply for food stamps, Medicaid or cash assistance at the City's job centers. In Reynolds v. Giuliani (1999), plaintiffs alleged that the City engaged in unlawful conduct aimed to deter plaintiffs from obtaining benefits to which they were entitled and that the state failed to adequately supervise the City's administration of assistance programs. The United States District Court for the Southern District of New York ultimately granted plaintiffs permanent injunctive relief, directing city defendants to comply with specified
provisions of federal and state law and directing state defendants to supervise the City's adherence to the injunction (*Reynolds v. Giuliani*, 2000). Initially all the defendants appealed the judgment, but the City withdrew its appeal prior to oral argument before this Court (*Reynolds v. Giuliani*, 2000). The National Center for Law and Economic Justice (1998) reports that the country's largest workfare program is in New York City, and because of the size and expansion of New York's workfare program, many workfare-related issues were litigated in New York while workfare programs in other parts of the country were in the early stages of operation.

There are few studies examining welfare rights and the courts post-1996-reform. The Welfare Law Center (1999) reports there have been some successes with the equal protection clause notably in invalidating welfare laws denying benefits to new state residents, and discriminating against unemployed mothers, non-citizens, and families in which the parents were unmarried. Mannix, Cohan, Freedman, Scharf, and Light (1999) and Zackins (2013) point out that state courts also have the power to interpret the US Constitution and can interpret their own state constitutional, thus there are provisions for equal protection. However, New York as well as Illinois courts report delays in scheduling hearings and issuing decisions, scheduling prehearing conferences and providing aid pending appeal (Zackins, 2013).

As seen in cases such as *Reynolds vs. Giuliani* (1999), employment law has become a relevant avenue because of the work requirements associated with PRWORA. Though enforced labor may be problematic in many respects, recipients must comply with the statute in order to receive benefits. A positive consequence of this is that welfare-to-work clients can also receive the work-related protections found in labor law, in particular, the Fair Labor Standards Act (minimum wage and overtime rights) and the Occupational Safety and Health Act, workplace health and safety; along with unemployment and anti-discrimination law (Mannix et al., 1999).
A negative consequence is that the law can be more ambiguous when the welfare recipient is involved with some workfare employment and subject to a state law that is governed by PRWORA policies--agencies have to determine whether the worker can be considered an employee, the work is considered an "employ", or the work is done for an actual employer (Mannix et al., 1999). With regard to health and safety, litigation may provide some relief to welfare recipients exposed to horrific working conditions. In *Capers v. Giuliani* (1997), a class of workfare workers assigned to street cleaning duties in New York City challenged the lack of adequate work place health and safety protections under state welfare law provisions requiring workfare placements to be made just to sites that are in compliance with worker protection requirements. The plaintiffs claimed that they were denied access to 1) toilets, washing facilities, and drinking water; 2) personal protective equipment; 3) traffic safety equipment; and 4) training and supervision (Mannix et al., 1999). Although a class action and preliminary injunction was filed,” the order was vacated after the state passed legislation extending public employee workplace protections to workfare workers” (Mannix et al., 1999). With regard to minimum wage protections and violations, in *Cordos v. Turner* (1998), the plaintiff worked for less than the minimum wage in New York City's workfare program cleaning sanitation garages.

As for minimum wage violations and protections, in *Brukhman v. Giuliani* (2000), a New York court entered a class-wide preliminary injunction requiring the City defendants to calculate the hours to be worked by all workfare workers using the prevailing rate of wage for regular workers performing similar work. With regard to the ruling, the state court first held that using only the minimum wage to calculate workfare hours violated state constitutional and statutory prevailing wage protections along with violations in due process and equal protection under law (*Brukhman v. Giuliani*, 2000). The court then held that the taking of their property
(the value of the labor) without adequate compensation is unconstitutional, and unjustly helped
the City defendant—however, that decision was reversed when the state legislature enacted a
change basing the calculation of workfare hours on the minimum wage rather the prevailing
wage (Brukhman v. Giuliani, 2000). In reference to discrimination, welfare recipients assigned
to workfare or community services work are likely covered by a number of federal, state, and
local statutes designed to protect against discrimination or harassment based on gender, race,
national origin, age and disability. To secure these protections, an aggrieved person may first
have to complain to the administrative agency prior to finding legal representation.

Analysis of Nature of Case

According to Mannix, Cohan, Freedman, Scharf, and Light (1999), the states’ exercise
of their sweeping authority to design welfare-oriented programs has presented advocates
in a number of states with opportunities for policy advocacy before legislatures and
administrative agencies, but, litigation remains one of the critical strategies for improving
welfare programs and assuring their fair and lawful administration. Mannix et al. (1999) and
Zackins (2013) also report that the threat of litigation may persuade an agency to adopt policies
or practices (or to abandon objectionable policies or practices) to avoid a lawsuit. They further
state that legal professionals who litigate in appropriate cases encounter both challenges and
opportunities in two areas: 1) the identification of legal claims, and 2) the development of
resources to conduct litigation. Given the radical shift in both the language and authority
associated with the 1996 reform, clients and lawyers have worked harder in the analysis of
welfare rights than they did when the AFDC statute provided far more legal ground to stand on
in the pursuit of legal remedy.

Mannix et al. (1999) and Zackins (2013) report that courts have a limited but vital role in
securing and enforcing rights of public benefits and fair administration such as the enforcement of existing statutory law, compliance with existing welfare law and decision-making regarding how other laws apply to welfare recipients and welfare program. This also includes enforcing constitutional guarantees such as due process and equal protection guarantees, in some limited situations. Nonetheless, it is not the role of the courts to legislate per se or to override the states’ and state agencies’ authority in terms of their definition and application of welfare policy.

According to the Welfare Law Center (1999), litigation initiated post-PROWRA will rely more on the due process clause and state statutes setting forth hearing obligations as well as issues involving multiple benefits along with hearing rights under federal food stamp and Medicaid laws. Challenges involving hearing deficiencies were found in the New York case Piron v. Wing (1997), where a state court class action also involving local advocates, challenged delays in hearings, the rendering of decisions after fair hearings, and the timely compliance with favorable decisions in TANF and state-funded cash assistance programs.

Zackins (2013) asserts that state constitutions have the potential to offer some greater protections and impose greater obligations. I explain this claim empirically in chapter 5, suffice it to say, with the notable exception of New York and a court victory in Montana that subsequently resulted in a constitutional amendment to undo the result, there have not been many favorable state constitutional law decisions. Ramsey and Braveman had made the same claim in 1997, suggesting that state constitutions may appear more promising than the federal constitution as sources of law for advancing the rights of the poor and disabled. Alvarino v. Wing (1999) presented a challenge to the denial of state-funded food stamps to certain lawful immigrants. The court ultimately ruled against plaintiffs on the grounds that the policy does not violate equal protection (Ramsey and Braverman, 1997). Ramsey and Braverman (1997) then explain that the
existence of the constitutional provision was a significant factor in the New York State Legislature's 1997 enactment of welfare reform provisions that do not terminate aid at the end of the relevant time limit. This is a good example of how state constitutional norms can play an important role in influencing state legislative decisions.

Mannix et al. (1999) and Zackins (2013) state that Food Stamps and Medicaid litigation may be necessary to in order to continue eligibility because of termination in TANF cash benefits. For example, Michigan's imposition of a full family Food Stamp sanction for non-cooperation with a TANF program child support cooperation requirement has been found illegal by a federal court while in New York, even though state law protects a person's Medicaid eligibility when welfare participants encounter program sanction, litigation has been sought to enforce that right (Mannix et al., 1999). Another issue in litigation is the securing of application process rights. A case included in this study demonstrated the violation of a number of rights. In Reynolds v. Giuliani (1999), problems arose from the Mayor's conversion of Income Support Centers where needy individuals apply for Food Stamps, Medicaid, and cash assistance, to Job Centers (Mannix et al., 1999). The process is laborious and requires interviews in addition to visits to a Job Center while agency staff discourage applicants from the extensive process and are told impoverished individuals need to seek other sources of support (Reynolds v. Giuliani, 1999). An investigation was launched due to the abusive practices and media scrutiny.

As previously mentioned, Reynolds’ plaintiffs raised claims based on the federal Food Stamp and Medicaid laws, in particular, state laws regarding the right to apply for cash assistance, receive a prompt determination and due process (Zackins, 2013). The case of Reynolds v. Giuliani (1999) resulted in the burden of proof resting on legal advocates along with welfare claimants to persuade the court that the city had established a pattern of illegal practices
that amounted to a violation of federal law. Litigation in *Reynolds v. Giuliani* (1999) included a long hearing in which it received extensive evidence, and the court issued a lengthy opinion concluding that agency workers illegally denied needy individuals their rights to apply for benefits. The result of *Reynolds v. Giuliani* (1999) was that the court banned the City from converting any more welfare offices to Job Centers and the implementation of a new auditing system was ordered to further remedy the situation. Mannix et al. (1999) suggest that *Reynolds* is strong precedent for other states where careless or overzealous welfare administrators' efforts to reduce cash assistance benefits resulted in inappropriate Medicaid and Food Stamp denials. It is not clear what other states may have been involved in a similar practice. This case demonstrates the power of litigation, in that the state courts can be watch dogs, overseers, and enforcers of welfare agencies as well as political officials who do not comply with federal and state law. According to the National Center for Law and Economic Justice, in July 2000, the court ruled against the city in an exhaustive decision in which it agreed with plaintiffs that the monitoring was flawed and that the city still had not demonstrated its compliance with federal and state law. The National Center for Law and Economic Justice (2000) also reports that unsuccessful attempts to develop and implement its own monitoring have resulted in some innovation at the state court level, that is, the city agreed to work cooperatively with plaintiffs to design and carry out a plan to audit the city's performance. With the court's supervision, both parties did engage in an audit of cases from September 2000 (National Center for Law and Economic Justice, 2000).

Mannix et al. (1999) reveal that broad-based campaigns have promoted treatment of workfare workers as other workers, and have promoted fair program administration. Litigation can also heighten awareness of the harms of welfare policies, even if the state court rules
Litigation has focused on workfare in New York City highlighting such practices as inappropriate assignments of individuals with disabilities to workfare, and securing fair hearings. Not surprisingly, given the dramatic shift in welfare policy, employment, civil rights laws, the Disabilities Act, and fair hearings have become more of an issue in the courts, while due process and equal protection claims have played a modest role in welfare litigation since 1996. According to Zackins (2013) and other legal scholars, welfare applicants and recipients frequently went to court to challenge abusive state welfare policies and practices as contrary to the federal AFDC statute and regulations, and many landmark victories were won involving unfair eligibility verification practices and excessive applications process delays. In contrast to TANF-related litigation with the focus on state law, the AFDC period was characterized by more litigation surrounding federal requirements. This shift has resulted in welfare claimants having to rely on state courts, and local law which are inconsistent from state to state, and may vary in their sympathies and desire to support welfare rights (Mannix et al., 1999).

Zackins (2013) asserts that TANF has been detrimental for minorities, non-English speaking, persons of color, and those with disabilities. Before discrimination claims are filed in court, claimants must first file complaints in the Department of Social Services, and these complaints may be resolved administratively. Discriminatory treatment of African-American and white women was found in transportation allowances under in the Virginia welfare-to-work program, along with less favorable treatment from employers, such as less desirable work hours (Savner, 2000). Mannix et al. (1999) further report that federal, state, and local civil rights laws are applied to enforce and encourage fair treatment for marginalized populations, the extent of the protection offered by each statute, which individuals can claim the protection of the law, what entities are subject to the law's prohibitions on discrimination, and what remedies the law
provides. Evidence that rights protections address discriminatory policies and practices in the welfare system can be found in plaintiffs’ claims that involve federal civil rights laws, including Title VI of the Civil Rights, the Age Discrimination Act of 1975, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act (Mannix et al., 1999).

Under SSDI and SSI, each state operates a federally funded Office of Disabilities Determination (ODD), which processes and evaluates applications. ODDs are supposed to make their decisions based on objective criteria, but criteria for benefits are not as strict, particularly criteria regarding psychological and emotional problems (Ruddy, 1998). As of 2013, the Social Security Administration reports that the number of American workers collecting federal disability payments climbed to 8,853,614. Part of this increase may be attributed to SSDI claims. The Social Security Administration documents that SSDI began in 1974 and was designed help disabled adults and children who had not contributed to Social Security. These benefits are drawn directly from the federal budget and do not involve the Social Security trust funds (Social Security Administration, 2013). It is possible that recipients see the disability programs as more lucrative than term limited welfare benefits. In this new version of welfare, there are no work requirements and no time limits on disability benefits. Case reviews are unlikely as a result of heavy backlogs and currently, the total cash benefits of SSDI and SSI was a staggering $75 billion (Social Security Administration, 2013). Ironically, these disability programs surpass the cost of the old AFDC welfare program by several billion dollars.

According to Ruddy (1998), welfare reform legislation of 1996 tightened SSI criteria for children yet data show that this action has not significantly slowed SSDI growth—since 1996, children continue to be added to the rolls at the rate of about 100,000 a year. Recipients can also apply for these benefits using criteria for learning disabled children. Jonathan Stein (1998) suggests
that legislation has been designed to tighten restrictions on the SSI and SSDI programs. Stein (1998) contends major studies and GAO reports has not uncovered any pattern of fraud or eligibility abuse, and attribute the increase to the fact that many people previously did not know the benefits were available--critics of this trend attribute reduced welfare caseloads to moving recipients from PRWORA benefits to disability rolls.

Analysis of Outcome of Red and Blue States and Appointed versus Elected Judges

Sobel, Hall, and Ryan (2010) present survey-based data on the perceived quality of each state’s overall legal system while controlling for education of the populace, judges’ salaries, lawyers per capita, and voter ideology for the purposes of estimating the influence of selection type on perceived quality of the states’ legal systems. The authors’ of this study (2010) found that states with elected judges’ fare systematically worse on the quality survey, and the majority of this effect are a product of partisan-election states. Similarly, Cordis (2010) empirically measures the effect of judicial selection methods on government corruption. Cordis (2010) utilized data from the Bureau of Justice Statistics on federal arrests of state and local government officials to examine corruption-these results suggest that corruption is lower in states with appointed as opposed to elected judges.

Joondeph (2008) states that the role of politics may shape judicial decisions such as those that address the law's indeterminacy, judges’ short-term policy preferences, electoral politics, and constitutional ideology, while others focus on historical and interpretive long-term patterns of American constitutional development, or responsiveness of courts to more immediate, external political pressures. Joondeph (2008) looks at various forms of political influence and finds evidence to support that judicial behavior is political. Judicial politics are often associated with questions about the role of courts in American government such as if and to what degree
responsiveness of judicial decisions to political pressures undermine an essential function of
courts, primarily to upholding the rule of law, or if judicial decisions are shaped by judges'
personal political views (Joondeph, 2008).

The political split of the United States has become more pronounced since the 2012 Presidential elections. However, it is not the individual states that are important in terms of red and blue, but rather what the colors represent. Blue states such as those in New England, New York, Florida and California are thought to be progressive in their policies versus Red states such as those in the deep South or Texas which are thought to be conservative in their politics and policymaking. Scott (2008) contends that there is no one completely red or completely blue state; rather these states are models for political ideologies. With regard to the parties, Scott explains that hotly contested issues emerge, and the colors are closely associated with how the parties respond to those issues. As the issues continue to grow and develop in legislatures, and in the courts, a central theme becomes clear: equality (Scott, 2008). Welfare litigation is no exception. I have turned to immigrants fighting for equality and access to benefits. Scott (2008) provides an overview of the struggle for racial equality that originated in the 1950s and 1960s with the civil rights movement—and even today, race, ethnicity, color and gender still persist as obstacles for American society. However, there have been some victories. In Aliessa v. Novello (2001), a recent New York Court of Appeals case concerned public assistance for legal aliens. In this case, the court ruled that the state of New York violated equal protection clauses, and ruled in favor of the immigrants.
Chapter 4 Research Methodology and Design

In this chapter, I seek to determine the extent to which state courts have turned to state constitutions to protect the poor whose benefits are at risk. The following questions will guide this research: (1) how has the 1996 Act affected welfare litigation in the United States? (2) how have these cases been decided? and (3), how have state courts responded to the challenge of their expanded role in deciding the outcome of welfare litigation and policy? My aim is to inform the "new judicial federalism" literature by describing the variety of state court responses to welfare rights claims being brought in the post-TANF era.

Research Design

This study employs a longitudinal and post-test time series design in an attempt to analyze federal and state court cases relating to welfare policy post PRWORA/TANF reforms. Court cases are the unit of analysis. Time series predicts trends, in this case, the nature, frequency, level of court, and outcome of case. The design can demonstrate change over time in the quantity of a variable—data in this investigation is plotted for a 26-year period. As such, a time series is defined as a series of quantitative observations arranged in chronological order (Kirchgassner & Wolters, 2007), specifically 13 years prior and post-1996 reform. This research also utilized the interrupted time series design to determine whether a change in public policy has affected the frequency, nature and outcome of welfare litigation. In a typical application of this design, multiple observations of the target (dependent) variable are analyzed to determine whether there was a shift in the level of the time series at the point when the new law or policy (labeled the “intervention” or the “treatment”) went into effect. However, the primary analysis and focus of this research is not on the comparison of pre-and post-data, but rather on post-TANF/PRWORA data.
Campbell and Stanley (1966) state that this design is regarded by some as the strongest strategy for assessing the aggregate impact of policy interventions where true experimentation is impossible or impractical—and in fact, the interrupted times series design has been applied to legal and policy issues, in particular, the impact of changes in welfare policies (Hedrick and Shipman, 1988). In this study, I employ this same technique in an effort to understand the effects of welfare reform in 1996 in welfare rights litigation.

**Limitations**

Lieberson (1985) suggests that a limitation in assessing the impact of policy changes on aggregates in states is ruling out rival explanations of observed trends in the target variable and then isolating the impact of the policy change. For example, the results of this study may have been impacted by economic crisis, widespread unemployment and natural disasters. These other variables can influence the frequency as well as the outcome in both state and federal litigation in welfare. Kleck, Britt and Bordua (1996) report that the simple interrupted time series design only allows the researcher to determine whether there was a systematic shift in the target variable time series around a given time point, as such, it cannot identify the cause of that shift. With regard to the 1996 reform, the effect was abrupt and permanent--there was an immediate effect of the policy change that has a long-term impact on behavior such as welfare claimants’ work habits, shifts in residency, and increased applications to secure other forms of long term financial support, for example, SSI or SSDI disability. Thus, it is impossible to determine and control for all the confounding factors that could shift trends in a given target variable, and these are likely changing at least some degree at the same time the policy change was implemented. However, I have examined large scale and obvious changes that occurred during the welfare policy shift on a national scale, in addition to reviewing major fiscal and other relevant factors found in each
individual state in an attempt to provide context to these findings, and to control for potential confounds. A limitation of the study was also the use of convenience and purposive sampling strategy, as identification of “appropriate” cases is up to the discretion and interpretation of the researcher. Another complication is that one case may have a number of different claims with a number of different outcomes. For example, some cases had due process claims as well as disability or child support claims, and the outcome was ruled in favor of the welfare claimant for due process but denied for child support or disability. Yet another limitation is that the data obtained for this study were solely from LexisNexis. Additional cases may have been filed and argued, but not listed in the data base as well as publicly available case opinions. These cases are said to be “unreported”. According to LexisNexis Academic, most cases are first published in print in the reporter. However, LexisNexis reports unpublished cases that are only available through electronic sources.

Quantitative

I analyzed these cases in an attempt to determine the frequency of such cases after welfare reform in 1996, and the disposition of such cases after welfare reform in 1996. Since there have been few TANF welfare cases in the US Supreme Court since 1996, this part of the dissertation has been used as context for the analysis of the welfare cases in state courts after welfare reform as seen in chapter 2. The following variables were used to assess welfare litigation since TANF and PRWORA reforms: (1) year of case decision, (2) court (state or federal court), (3) nature of case issue (e.g., procedural due process, due process claims relating to eligibility of welfare benefits, residency requirements, family caps, and violations relating to (FLSA) in welfare-to-work programs), (4) outcome of case (case was decided in favor of welfare recipient or welfare agency), (5) ideology, that is, the effect of states’ political culture on state court decision-making, and (6) individual selection, that is, the effect of state court judges in
selection on judicial decision-making. As for the ideology variables, Blue and Red states were identified using the 2008 electoral map and then coded using the letter B and R along with the identification of whether a state appoints or elects its judges on their state’s highest court.

Finally, this study identified where cases were located: this variable (1) informs the legal and social landscape of which states’ welfare policies (in particular those relating to practice and implementation) are problematic and perhaps unconstitutional in nature, and (2) informs the legal community of which state courts are taking advantage of their expanded role in the system by either supporting and reinforcing the present welfare policy or by questioning and forcing new interpretations of state provisions.

Cases selected for analysis

TANF and PRWORA were at issue in 444 cases in the period of 1996 to 2009. These cases were found by searching for “TANF” and “PRWORA” in the LexisNexis data base under federal and state cases. Out of the 444, 276 cases listed in the LexisNexis data base were selected, the remaining cases were eliminated from potential analysis due to lack of sufficient relevance to the study, for example, cases that focused on other variables such as criminal activity which did not include welfare fraud. In these cases, welfare related concerns were mentioned in passing, but did not represent the primary claim. The criteria for selecting cases was that the nature of claims had to be primarily focused on issues relating to welfare policy such as unfair termination or denial of cash benefits or SSI/SSDI, violations of due process or procedural due process, equal protection, and reevaluation of benefits based on changes in the status of child support and paternity.
Sampling

Using convenience and purposive sampling, cases were selected from fifty states on court cases documenting AFDC and PRWORA/TANF welfare litigation in US federal and state courts. Convenience sampling was utilized due to the access and availability of welfare litigation documented in the LexisNexis database. Purposive sampling was utilized so cases most relevant to welfare litigation could be selected and evaluated for the purposes of this study, for example, cases that primarily focus on durational residency requirements, family caps, PRWORA eligibility of benefits, as well as child support and disability claims as they relate to the welfare system. The criteria used for this study was: (1) available state and federal cases listed for fifty states, (2) cases found in LexisNexis, (3) cases listed from 1982-2009, and (4), cases with a primary focus on welfare policy.

Data Analysis

In this study, descriptive statistics were used to illustrate the percentage and frequency of welfare litigation, the year claims were filed, outcome of claims, and percentage and frequency of nature of welfare litigation involving welfare recipients filing claims in state and federal courts. Convenience and purposive sampling were used to maximize the number of relevant cases primarily focused on welfare litigation, and to exert more control in the selection of appropriate cases. To clarify, available cases were selected from LexisNexis, and purposive sampling was used to select cases that would best represent the consequences of the current welfare reform.
Chapter 5 Quantitative Findings from Fifty States

In this section, I shall discuss my findings involving the frequency of cases, nature of cases, level and location of courts tried, the year case was argued and resolved, as well as the outcome of each case. I will use convenience and purposive sampling to identity appropriate court cases. To begin with, my principal finding is that there has been a substantive drop in welfare litigation since PRWORA. Evidence of the dramatic reduction in welfare litigation can be seen by comparing the 2,753 cases reported during the 13-year AFDC era with the 276 cases during the PRWORA period. This drop appears to be due, at least in part, to the stringent nature of the reform implemented in 1996, and the removal of the “entitlement” language from the statutes. As I described, there is far less “legal ground” to argue a case upon, and cases argued on the basis of equal protection, due process, civil rights violations and other constitutional protections are far less likely to occur.

Court (state or federal court)

There has been a shift from federal to state courts with regard to welfare-related claims. To that end, it would seem that state courts after 1996 may serve as “watchdogs’ of the welfare agencies, and to some extent, enforcers and protectors of welfare rights associated with the current welfare policy. This assertion is based on the percentage of claims that concluded favorably to the welfare claimant. The data base lists 141 state courts versus 135 federal cases, thus slightly more cases are being argued in state courts. In the federal courts, 98 cases were filed at the District court level. What was the number in your sample at each level before and after 1996? Many cases were found in the Court of Appeals (66), 39 in State Supreme Courts and 36 in the lower courts. The California Court of Appeals lists 18 cases in various districts, which is meaningful insofar as it represents a significant number, given that so few cases are
documented in the PRWORA era. One could surmise that the power dynamic has changed, thus, it is not surprising that state courts now bear more responsibility than federal courts, in particular the US Supreme Court, in terms of welfare litigation. It would appear that the state courts have, to some degree, risen to the challenge and attempted some innovation and decision-making. Generally, these actions are met with resistance and the decision to reinforce some erroneous position of the state, or state agency member upheld, or the more creative decisions overturned, despite the damage it may do to the individual and the family. A bold step may be for federal courts to certify a case on a limited basis to a state court to answer a particular question of law or for the litigants to appeal the case to higher level courts. Though state courts have reviewed a number of cases related to welfare policy, the hypothesis is that with the new judicial federalism, the outcome would lead to expanded welfare rights. This outcome has not been realized in the post-1996 reform.

Location of Court

Out of 276, the highest number of cases appeared in the state of New York (54) followed by California. New York reported cases involving labor law, due process, and discrimination though the majority of claims were about disability, Social Security, and the Public Health and Welfare (Social Security) Act. Cases filed in California also included a wide variety of claims involving the Public Health and Welfare (Social Security) Act, foster care benefits, Civil Rights Act of 1964, Native American disputes, and the Administrative Procedure Act. Eighteen cases were filed in California during the PRWORA period. In this study, I also found that New Jersey appellate courts reported many cases involving family caps, paternity, and child support, compared to other states--fifteen appellate cases were filed during PRWORA. Connecticut reported a large number of cases filed in the lower courts (10); however, the majority of cases
involved child support and paternity. I focus on these cases due to the frequency of litigation in order to identify (1) what states are more likely to face welfare claims, (2), identify the nature of those claims, and (3) identify whether they are expanding welfare rights. In addition, we could infer that some states are faced with and more likely to address violations of equal protection and due process—perhaps in part, due to large, diverse and immigrant populations. Other states do not represent efforts to address inequality, rather they seemed to be more overwhelmed with and focused on reevaluation of benefits based on changes in the status of child support. Might want to say something about if numbers by state are what you would have expected, given populations of states.

*Year case was decided*

With regard to the year the case tried, data from this study displays an inexplicable spike: specifically, the frequency of welfare cases dramatically increased nationally in 2001 (Figure 1). This study did not analyze the location of courts on a yearly basis to determine what states were most responsible for this shift. Before and after 2002, and through 2009, the data and frequency of cases presented a fairly stable pattern. It is important to consider the impact on case filings of the Legal Services Corp and the restrictions which were in effect from 1996 to 2001 when the US Supreme Court struck them down in the Velazquez case. As such, federally funded legal services offices were barred from litigating any cases involving "welfare reform," under the LSC regulations. That provision was eliminated by the U.S. Supreme Court in Feb. 2001 (Velazquez). Law offices that did not receive federal funding could still litigate, so the National Center on Economic Justice and Law continued its work, as did the NY Legal Aid Society, which gave up federal funding at this time. But many legal services organizations could not afford to jettison federal funding and they were forced to abide by the restrictions. It would seem
that the lifting of these restrictions might explain the jump in filings in 2002. Thus, the question should be why didn't the number stay high after the restriction was lifted? Given the limited scope of this research, it was not possible to address the many factors that may have contributed to this trajectory such as pent-up demand. The increase in unemployment, however, may have been one contributing factor to an increase in welfare-related claims. It would be reasonable to assume that when more people are out of work and cannot find work, more claims will be filed to seek financial relief through the Department of Social Services, and if unsuccessful, these claims may end up in the court system. The United States Bureau of Labor Statistics report shows a higher rate of unemployment in 2002 and 2005.

Figure 1

*Year case was tried*

PRWORA/TANF CASES $n=276$
Nature of Case

With regard to the nature and frequency of claims, there are a number of procedural due process claims. The number of this type of claim has been markedly reduced as seen with 25 percent during AFDC versus 8.3 percent during PROWRA. These are precisely the sorts of claims that rest on entitlement status. With regard to PRWORA claims in federal and state courts, the most frequent claims argued in federal courts, specifically, US Court of Appeals involved SSI/Disability and the Public Health and Welfare (Social Security) Act, while the most frequent claims argued in intermediate state courts involved child support and Medicaid. Figure 2. I would also like to include data from the secondary analysis involving the AFDC period. Significant declines in Food Stamp caseloads were found after the 1996 reform: only 15 cases involving food stamps and the Food Stamp Act were reported in the TANF era compared to 506 during AFDC.

In contrast, this research documents a slight increase in Medicaid cases during PRWORA: 31 in the recent period compared to 27 under AFDC. This research also documents a significant increase in SSI and disability claims filed in federal and state courts during the PRWORA era, 39 percent in contrast to 8 percent filed during AFDC. The rise in mental health claims seems to have played a role in the rise of disability claims as the definition of “disabled” has expanded over the years to include this population. For example, the Social Security Administration reports that in 1987, 1 in 184 people qualified for disability benefits; by 2007 that number had increased to 1 in 76, an increase of 284 percent. It would also seem that Social Security’s disability programs have replaced the time-limited means-tested traditional welfare benefits. I infer from the data of this study that this may be a consequence of the more rigid system in place. Clearly there has been a proportional increase in the number of SSDI/SSI
claims since the implementation of PRWORA. A number of these claims filed during PRWORA do not involve physical disability but rather SSDI/ SSI claims resulting from mental disabilities such as depression, bipolar, and anxiety disorders. Moreover, due to expanded eligibility, children have become recipients of SSI since the 1990s. Another finding involving AFDC and PRWORA is the percentage change in child support cases relating to welfare policy filed in the courts. The rate has increased from 16 percent during AFDC and PROWRA eras to 19.56 percent cases. When considering the small number of PROWRA cases filed in courts to begin, it is striking that out of 276 cases, 51 were filed on the basis of a dispute not only involving child support, but child support enforcement agencies which illustrates the transfer of private funds rather than government benefits. Similarly, the rate of paternity cases increased, from 0.6 percent during AFDC to 6.5 percent during PROWRA. In short, data from this study indicate that the federal government and the states may have become more aggressive in their efforts to track down fathers who have not paid child support. If successful, this action would reduce the amount of money the state has to give to support a child from an impoverished family, namely single-family households. Generally, the posture of these cases were found in favor of and brought by the state.
Figure 2

PRWORA/TANF CASES $n=276$

Nature of Case - Federal Courts

- SSUSSDI
- PHWSS
- Equal Protection
- Fair Labor Act
- Child Support
- Durational Residency Requirements

- Due Process

- 23.09
- 18.11
- 4.34
- 3.98
- 3.62
- 2.53
- 2.17
- 3.62
- 2.53
- 2.17
- 3.62
Figure 2

PRWORA/TANF CASES $n=276$

Nature of Case-State Courts

- Child Support
- Medicaid
- SSI/SSDI
- Equal Protection
- Due Process
- Welfare-to-Work
- Housing Subsidies
Outcome of case

When evaluating the outcome of the cases, it was expected that during the PRWORA period, state courts would be more likely to rule in favor of the state, not engage in innovative decision making, and simply support the state’s position in order to maintain the status quo. I am defining state court innovative decision-making by actions that go beyond maintaining and enforcing the existing laws relating to welfare policy. In terms of the distribution of cases decided in favor of the state versus the welfare claimant, this study reveals 51.1 percent for the state versus 41 percent for the welfare claimants (Table 2). I found that although most state courts eschew innovation, evidence from this study -- in particular, the case briefs, -- suggest that they are generally responsive and protective of a welfare claimant’s rights in that they require local welfare agencies to reevaluate claims that were decided in an unfair fashion, or force the state and its agency to offer benefits to those that were previously deemed not eligible by that agency by some unfair practice. Cases such as Reynolds v. Giuliani (1999) or Aleissa v. Novella (2001) illustrates this practice.
Table 2

*Outcome of Case*

PRWORA/TANF  \( n=276 \)

<table>
<thead>
<tr>
<th>Number of cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>State</td>
<td>144</td>
</tr>
<tr>
<td>Welfare Claimant</td>
<td>114</td>
</tr>
<tr>
<td>Welfare Claimant &amp; State</td>
<td>8</td>
</tr>
<tr>
<td>Father of Dependent Child</td>
<td>6</td>
</tr>
<tr>
<td>Non-Profit Organization</td>
<td>2</td>
</tr>
<tr>
<td>Private Contractor</td>
<td>1</td>
</tr>
<tr>
<td>Welfare Claimant &amp; Father</td>
<td>1</td>
</tr>
</tbody>
</table>
Outcome of State Cases in Blue and Red States and Elected versus Appointed Judges

The terms “Blue” and “Red” states have been used recently to the political parties and ideologies which dominate the state in voting, legislature and judicial decision-making. Blue states include Connecticut, Massachusetts, New York, New Jersey, Pennsylvania, Indiana, Illinois, Virginia, North Carolina, Maine, Vermont, Rhode Island, Maryland, Florida, Wisconsin, Ohio, Iowa, Michigan, California, Oregon, Washington, New Mexico, Nevada, and Colorado. I examined the outcome of welfare litigation in Blue and Red states in order to determine whether there was a relationship or pattern to the judicial decision-making and the dominant political party of a state with regard to elected versus appointed judges. More specifically, will an appointed judge from a liberal or Blue state be more likely to rule in favor of the welfare claimant versus an elected judge from a conservative or Red state? Is the disposition of these welfare rights cases any different in states with liberal or conservative political cultures? A hypothesis of this research is that Blue state appointed judges are more likely to rule in favor of welfare claimants than elected judges from Red states.

In this study, there are 104 welfare litigation cases in state courts listed for Blue States and 37 listed for Red states during the PRWORA period. Here, in terms of the welfare litigation observed in this study, I provide a frequency count of Blue and Red state data. First, cases are far more likely to involve Blue state appointed judges, 82 (58 percent) in contrast to 22 elected judges, while the Red states report 20 appointed judges and 13 elected judges (Table 3). When looking at the relationship between Blue state appointed judges and outcome, a significant number of cases were ruled in favor of the state. Four cases were decided in favor of welfare claimants and the state, sometimes because there was more than issue one argued in the courts, which may require different outcomes. Table 3. The results of Blue state elected judges did not
indicate such significance (Table 3). When looking at the relationship between the Red state appointed judges and outcome, the majority ruled in favor of the state (Table 3). Red state elected judges were also more likely to rule in favor of the state. Overall, there was little difference found between rulings of Blue and Red state appointed and elected judges with regard to outcome.

What I did find is that Blue states might be more likely to encounter litigants in welfare cases; but they are not likely to rule in favor of the welfare claimant rather than the state (Table 3). In terms of welfare litigation, the majority of cases appear before Blue state-appointed judges as opposed to Red state elected judges. Still, there was no great disparity in outcomes, as cases were more likely decided in favor of the state versus the welfare claimant. Thus, I could not assign much significance to Red and Blue state or the elected versus appointed variables. I attribute this lack of significance to the lack of welfare litigation since the 1996-reform, the removal of entitlement language from the policy (welfare is considered to be a privilege not a right), and the reluctance of courts to expand welfare rights. Also, this shows that judges are deciding based on the law, which is a good result. These variables were analyzed to determine if the Attitudinal and Judicial Selection thesis could explain case outcomes.

Table 3

<table>
<thead>
<tr>
<th>Blue State Appointed Judges and Outcome</th>
<th>Welfare Claimant</th>
<th>Welfare Claimant and State</th>
</tr>
</thead>
<tbody>
<tr>
<td>State-50</td>
<td>28</td>
<td>4</td>
</tr>
<tr>
<td>Blue State Elected Judges and Outcome</td>
<td>Welfare Claimant</td>
<td>Welfare Claimant and State</td>
</tr>
<tr>
<td>State-12</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>Red State Appointed Judges and Outcome</td>
<td>Welfare Claimant</td>
<td>Welfare Claimant and State</td>
</tr>
<tr>
<td>State-16</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>Red State Elected Judges and Outcome</td>
<td>Welfare Claimant</td>
<td>Welfare Claimant and State</td>
</tr>
<tr>
<td>State-9</td>
<td>3</td>
<td>1</td>
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Chapter 6 Advancing State Welfare Rights in State Constitutional Law

In this chapter, I examine whether there have been any state court innovations in decision-making with regard to state constitutional rights to welfare. Fino (1987) reports that the new judicial federalism emphasizes state court reliance on state constitutional grounds for the enhanced protection of individual rights. This literature argues that there is considerable state court activism in a wide variety of areas of policy, but the empirical evidence with regard to welfare rights does not bear that out. Fino (1987) conducted a quantitative analysis of 2,286 equal protection cases decided by state supreme courts between 1975 and 1984 which demonstrates a lack of exclusive use of state constitutions. Fino also reports significant regional differences in the nature of equal protection cases filed, including the types of discrimination, the use of independent and adequate state grounds, and the frequency of judicial invalidation of state action. Zackins (2013) argues that the United States has a long history of enshrining positive rights in its constitutional law, but welfare-related rights have been overlooked in welfare policy and the courts with regard to judicial decision-making simply because they are not in the federal Constitution. Zackins (2013) asserts that positive rights have been included in America's state constitutions because state governments are primarily responsible for crafting social policy. She further reports that state constitutions can look like pale imitations of their federal counterpart, but they have been sites of serious debate, reflect national concerns, and choices about fundamental values.

My study of welfare rights litigation in state courts after welfare reform in 1996 largely confirms this more nuanced and modest view of the work of state courts. In this analysis, I will first provide an overview of findings seen in the intermediate and final courts of appeal in the states post-PRWORA reform. I analyzed the cases in state appellate courts since 1996 that
explicitly raise or contemplate "state constitutional grounds" for welfare rights protection. This analysis will attempt to discern the various kinds of constitutional analysis (Due Process, Equal Protection, etc.), and the standards of review employed. Here, the state due process and state equal protection clauses will also be used as the constitutional grounds for advancing welfare rights in the states. As predicted by the “new judicial federalism” literature, I was expecting to find evidence of unique innovations in this area of law. Instead, I found little evidence in state court of legal innovations based on the state’s constitution with regard to welfare rights. And in fact, the most notable cases were seen in federal district courts such as Reynolds v. Giuliani (1999). In this case, groundbreaking strides were taken to maintain procedural and constitutional rights. The first important finding is that state constitutional provisions that contain some express guarantee of welfare assistance--the general amelioration of the people clauses -- have not been invoked with great frequency. This leads to the obvious question, why hasn't the new judicial federalism taken off in this area?

When evaluating the work of state courts with regard to welfare rights, the literature tells us to expect deference to the legislatures and the state administrative agencies when deciding whether and to what extent the state will provide for the poor. Pascal (2008) references a study showing that:

Twenty-three state constitutions implicitly or explicitly establish protections for the poor; these constitutional provisions range from categorical statements of an affirmative obligation on the state to care for the needy, to permissive grants of power to the state to provide such care, to the creation of public agencies to address the needs of the poor without any specific constitutional obligations (p. 869).

Pascal (2008) explains that four states constitutions (Alabama, Kansas, New York, and Oklahoma) require that the state or their agencies to care for the disadvantaged. While Alabama’s constitution contains the strongest affirmative language, “[i]t shall be the duty of
the legislature to require the several counties of this state to make,” Kansas, New York, and
Oklahoma constitutions limit the affirmative language by granting the legislature the power to
determine the nature of the welfare provision (Pascal, 2008). For example, the New York
Constitution states “The aid, care and support of the needy are public concerns and shall be
provided by the state and by such of its subdivisions, and in such manner and by such means”
(Pascal, 2008).

Overview of claims and outcomes from 1996-2009

I examined cases in the intermediate and final courts of appeals. In the Indiana Court of
Appeals, cases were filed on the basis of disability; Social Security, Medicaid and child
support, and claims were decided in favor of the state. In the Ohio Court of Appeals, claims
involving eligibility of benefits, child support and misappropriation of funds resulted in
favorable outcomes for the state. Similarly, in the Court of Appeals of Texas, the few claims
involved Medicaid and state-dominated outcomes. The West Virginia Supreme Court denied
an implied substantive welfare rights, but granted a favorable outcome to welfare claimants
rather than the states on the basis of procedural due process. The North Carolina Court of
Appeals heard a claim involving the Administrative Procedure Act. In reference to state court
decision-making, the Court of Appeals decided in favor of the state.

New York and New Jersey Appellate Court, Court of Appeals and Supreme Courts
heard claims relating to Misappropriation of Funds, Medicaid and eligibility for benefits—one
New York case was decided in favor of the welfare claimant. A case argued in the Supreme
Court of New Jersey involving Family Caps and Due Process was decided in favor of the state,
as the court chose to reaffirm upholding the constitutionality of limiting benefits by limiting
the number of children a welfare claimant can enroll in PRWORA. The California Court of
Appeals heard a variety of claims involving child support, paternity, over issuances of benefits, Native American disputes, family caps, Medicaid, Social Security Insurance, and disability, some involving Equal Protection and Due Process claims; many were decided in favor of the state. Claims relating to Medicaid benefits and alien immigration status were more likely to be decided in favor of the welfare claimant, as Medicaid has an implied substantive right, whereas welfare benefits do not fall in that category.

*Type 1 Claims*

Hershkoff (1999) suggests that consistent with the ‘states-as-laboratories’ metaphor, "the Constitutions of the fifty states present a very different framework in which to analyze whether government may stand by and ignore the hunger and homelessness of its citizens.” Hershkoff (2010) reports that, unlike the Federal Constitution, every state constitution in the United States addresses a number of social and economic concerns, and provides the basis for a variety of positive claims against the government—these positive rights range from the right of children to receive free public schooling, to the right of workers on public construction projects to receive "prevailing" wage rates, and more than a dozen state constitutions provide explicit protections for the poor. The author (1999) further states that Type-I claims raise questions about how individual claimants can demonstrate their economic circumstances that fall within need, more specifically, a statutory category of need. Hershkoff (1999) tells us the court insists the state “may not use evidentiary requirements to erect a "paper gate" barrier to relief.” These claims, however, differ from other categories of claims, in that they involve substantive conditions – such as immigration status or work participation in order to set the stage for potential relief to claimants. Hershkoff (1999) suggests that the courts have deferred
to legislatures’ administrative choices, tolerating conditions related to economics and the state definition of need.

One case involving Medicaid entitlement demonstrated violations of the state constitution and also, had elements of a Type I-claim. *Aliessa v. Novello* (2001) presented, in addition to violations of a federal nature, violations in the state equal protection clause, state due process clause and the General Amelioration of People clause.

In *Aliessa v. Novello* (2001), the New York Court of Appeals considered a case involving a group of legal aliens permanently residing in the United States under color of law (PRUCOLs) who were denied Medicaid benefits by the state. On appeal, they argued that the state statute violated the United States and New York Constitutions by denying them Medicaid benefits funded solely by the state based on their status as legal aliens. Upon review, the court of appeals concluded that there was a violation of the Equal Protection Clauses of both the New York and United States Constitutions. Section 122 was subject to and could not pass strict scrutiny because it denied state Medicaid to otherwise eligible legal aliens permanently residing in the United States under the color of law and lawfully admitted permanent residents based on their status as aliens (*Aliessa v. Novello*, N.Y.2d 418, 2001).

With regard to the *Aliessa v. Novello* (2001) case, the following opinion by Judge Rosenblatt reports:

that the plaintiffs are 12 aliens who lawfully reside in New York State. As legal aliens, they fall into two groups. Some are lawfully admitted permanent residents of the United States under the Immigration and Nationality Act (i.e., green card holders), the rest are permanently residing in the United States under color of law (PRUCOLs). All suffer from potentially life-threatening illnesses and would allegedly qualify for Medicaid benefits funded solely by the State. As for qualified aliens, title IV does not require, but instead allows States to grant or deny them state Medicaid, subject to certain exceptions. Finally, notwithstanding all of these restrictions, both non-qualified aliens and qualified aliens (during their periods of ineligibility) may receive state and federally funded emergency medical treatment (*Aliessa v. Novello*, N.Y.2d 425, 2001).

Judge Rosenblatt (2001) concludes that in *Aliessa v. Novello* (2001): that Section 122 is subject to--and cannot pass- strict scrutiny, notwithstanding title IV’s authorization. Title IV authorizes each Stat to extend the ineligibility period for Federal Medicaid beyond the mandatory five years and terminate Federal Medicaid Eligibility for certain refugees after seven years, it is directly in the teeth of *Graham* insofar as it allows the states to "adopt divergent laws on the subject of citizenship
requirements for federally supported welfare programs. Moreover, title IV goes significantly beyond what the *Graham* Court declared constitutionally questionable. In the name of national immigration policy, it impermissibly authorizes each State to decide whether to disqualify many otherwise eligible aliens from State Medicaid. Section 122 is a product of this authorization. Title IV can give Section 122 no special insulation from strict scrutiny review. Thus, Section 122 must be evaluated as any other State statute that classifies based on alienage. The majority holds that Section 122 violates the Equal Protection Clauses of the United States and New York State Constitutions insofar as it denies State Medicaid to otherwise eligible PRUCOLs and lawfully admitted permanent residents based on their status as aliens (*Aliessa v. Novello*, N.Y.2d 425, 2001).

In *Aliessa v. Novello* (2001), a high standard of review was evident as the decision under review was overturned because deference hinged on the decision under review, and the intermediate court found error in the lower court's decision. The NY Court of Appeals implied a substantive right to Medicaid, and concluded that rights of a constitutional nature had been violated. Nonetheless, Medicaid battles in the courtroom may be a bit more encouraging for the welfare claimant than battles involving entitlement to welfare benefits. Hershkoff (1999) reports that in Type-I claims, the courts examine procedural requirements closely, using a standard that is somewhat more robust than mere rationality to determine whether the requirements are associated with an assessment of need along with proof of eligibility regarding claims such as Medicaid. This example was decided at this point favorably to welfare claimants because the case passed strict scrutiny, and because the legal aliens were deemed eligible to receive this type of assistance. Of course, this begs the question; why the tendency to use rational basis review in these cases which arguably involve the "necessities of life"? Should the standard be elevated since fundamental rights to the essentials of life are at stake? The benefit is also viewed as a statutory entitlement, because it involved the state's discretion to deny or approve assistance to indigent people for substantive reasons unrelated to need. One could also contend that this case demonstrates an example “where the state courts
serve as rights enforcers” (Hershkoff, 1999).

Type II Claims

In *Sojourner v. New Jersey Department of Human Service* (2002), recipients sought preliminary injunctive and declaratory relief, contending that the "family cap" violated the right to privacy and equal protection guarantees.

The trial court denied the requested relief, but granted class certification. The trial court thereafter upheld the family cap against constitutional challenge, based on application of the balancing test. The appellate division affirmed, holding that the family cap provision bore a substantial relationship to legitimate and reasonable goals. On further appeal, the court noted that the rational basis test applied when economic legislation, including statutes that established benefit programs, was challenged. The court found that the New Jersey statute did not infringe on a woman's right to make procreative decisions by penalizing her for choosing to bear a child. It was also held that the cap did not improperly single out classes of poor children based on their parents' reproductive choices and the timing of their birth. The court also stated that the Department of Human Services provided ample justification for the family cap (*Sojourner v. New Jersey Department of Human Service*, 177 N.J. 318, 2002).

It is important to note that the state court case was preceded by a federal case challenging the same policy that went to the 3rd Circuit Court of Appeals before the litigants (the recipients in this case) decided not to seek cert before the Supreme Court. In Sojourner, the litigants weren't choosing between federal and state court, but had already exhausted federal remedies.

In *Sojourner vs. the New Jersey Department of Health* (2002), the case appears to have elements of Type-II. Sojourner sued the DHS, however the agency was found not to have violated the state equal protection clause Equal Protection. The courts reinforced the idea that family caps are considered to be a reasonable goal for the state.

The Supreme Court of New Jersey Appellate Plaintiff welfare recipients appealed from a judgment of the Superior Court, Appellate Division (New Jersey), which affirmed the trial court's grant of summary judgment dismissal of the recipients' claims to defendants, the New Jersey Department of Human Services and its Commissioner. This class action attacked the New Jersey statute or the "family cap" provision of the Work First New Jersey Act (WFNJ). The recipients sought preliminary injunctive and declaratory relief, contending that the "family cap" violated the right to privacy and equal protection guarantees of *N.J. Const. art. I, para. 1*. The trial court denied the requested relief, but granted class certification. The trial court thereafter upheld the
family cap against constitutional challenge, based on application of the balancing test. The Appellate division affirmed, holding that the family cap provision bore a substantial relationship to legitimate goals. On further appeal, the court noted that the rational basis test applied when economic legislation, including that established benefit programs, was challenged. The court found that the state did not infringe on a woman’s right to make procreative decisions by penalizing her for choosing to bear a child. It was also held that the cap did not improperly single out classes of poor children based on their parents’ reproductive choices and the timing of their birth. The court also noted that the Department of Human Services provided ample justification for the family cap. The court affirmed the judgment of the trial court (*Sojourner v. New Jersey Department of Human Service*, 177 N.J. 318, 2002).

In *Sojourner vs. the New Jersey Department of Health* (2002), the courts resort to upholding previous federal standards and laws with regard to family caps, as the case failed to satisfy the rational basis test. Because the court stated that the Department of Human Services provided “ample justification for the family cap,” we could surmise that the state had determined that it is in the state’s best interest to limit the amount of children that can be claimed in welfare benefits, perhaps in order to prevent women from having children they cannot provide for and to prevent them for having more children for the purposes of receiving additional welfare benefits. In addition, it would seem that a doctrinal approach was utilized, as the decision may also reflect discernible patterns in judicial interpretative approaches.

In the case of *Spano v. Wing* (2001), argued in the Supreme Court of New York Appellate division, potential violations in State Due Process, State Protection and General Amelioration of Poor People clauses were not upheld.

Petitioners, a person who received public assistance and a New York county, filed an action against respondent, Commissioner of the New York State Office of Temporary Disability Assistance (OTDA), challenging the commissioner’s decision to withhold payment of temporary assistance to needy families (TANF) funds. The Supreme Court, Albany County (New York) granted the commissioner’s motion to dismiss the petition, and the petitioners appealed. The Commissioner of OTDA was authorized by law to provide quarterly advances of public assistance funds to New York counties in anticipation that the State of New York would receive reimbursement from the federal government through TANF block grants but he reduced advances for July, August, and September 1999 due to expectations that state maintenance of effort goals would not be met and that the amount of funds the state received from the federal government would be reduced. A person who received public assistance and a county
that received funds from OTDA filed an action, claiming that the commissioner acted arbitrarily and capriciously by withholding full advance payment of funds, and they sought restoration of the full amount of TANF advances for the period in question and an injunction preventing future reduction in TANF advances. The appellate court held that the petitioners failed to state a cause of action under Article 78 because they sought to mandate the commissioner's performance of wholly discretionary acts. The trial court's judgment was affirmed (Spano v. Wing, 285 A.D.2d 809, 2001).

In Spano v. Wing (2001), the court avoided an interpretation that suggests that the commissioner acted in an unfair manner when withholding benefits to welfare claimants. The claimants failed to demonstrate adequate proof that the plaintiff was guilty of, e.g. misappropriation or withholding of funds, thereby they were not operating within a statutory scheme that would grant them relief. Still, it is possible that the commissioner was acting unfairly and putting vulnerable populations at further risk, but the welfare claimants could not access and demonstrate the particular evidence the court required. In short, just because claimants could not produce that evidence; it does not necessarily mean the commissioner was innocent of wrongdoing. Though some potential for alternative and creative decision-making may have been possible, given the nature of the case, and despite the New York courts reputation for state court innovation, it was not demonstrated with Spano v. Wing. Perhaps it would have been advantageous if the courts closely examined the state’s constitution to determine any provisions for the poor and emergency relief, required that the department of human services provide records to determine if numerous claims of this nature had been filed at the administrative level, and took into consideration previous litigation filed at this location on the same basis, before they made their final decision. This case did present some evidence of violations of state constitutional-related provisions and clauses, but the court chose a conservative path, maybe due to conservative judges, and also perhaps, due to a doctrinal approach in judicial decision making. And as Hershkoff (1999) suggests, in New York courts, such cases can be effective in terms of changing legislative policy choices even when the legislature withholds assistance for the purpose of controlling or punishing behavior that is legal
although the state considers it to be deviant. In this case, it is also probable that the judges and legal system wanted to maintain the status quo, fall back on previous decisions, and not overstep the bounds of the lower courts, which can be disruptive to the state. The consequence of this established framework would result in a lack of state court innovations with regard to welfare rights. Potential innovations would involve raising the standard in state equal protection analysis, as well as judicial recognition and enforcing the explicit to welfare in state constitution.

_Arrowood v. North Carolina State Health and Human Services_ (2000) argued in the Court of Appeals North Carolina, primarily involved State Due Process claims, and as a result, this seemed to present another Type-II case, and an example where state courts are in the role of fact gatherers.

The appellant sought review of the Rutherford County (North Carolina) Superior Court decision affirming appellee department's order to terminate appellant's public assistance, claiming enactment of the work first program failed to comply with the Administrative Procedure Act, N.C. Gen. Stat. § 150B, et seq. The Appellant and his family began receiving public assistance under the Aid to Families with Dependent Children (AFDC) program. Appellee received a waiver from federal guidelines to implement a work first program, including a 24-month limitation on receipt of public assistance. Congress repealed AFDC, and North Carolina formally enacted their program. Following enactment, the program was retroactively applied to appellant, limiting him to nine months of assistance. Appellant was eventually terminated, and sought review. The court reversed the trial court order affirming appellee's termination of appellant's benefits. Upon its approval, the waiver did not immediately function as a binding federal law or a federal amendment to the state plan. Thus, the period was an agency rule which had to be promulgated in accordance with the Administrative Procedure Act (APA), N.C. Gen. Stat. § 150B, et seq. The statute made no reference to the period applying retroactively; thus, the rule was not properly enacted. Judgment was reversed because the work first program failed to comply with the Administrative Procedure Act, and thus violated State Due Process clause (Arrowood v. State Health and Human Services, 140 N.C. App. 31, 2000).

Again, the state courts do not appear to demonstrate innovation but rather serve as advocates for the welfare claimants, in a sense, and as statutory watch dogs to the state itself and to the Department of Human Services. Also, a low standard of review was evident as the decision under review was overturned because the intermediate court
found error in the interpretation of the lower court's decision. What is important to note, it seems as though the lower courts did not thoroughly evaluate the welfare claimant’s case, as the intermediate court discovered specific violations involving the Administrative Procedure Act, and therefore implying violations in State Due Process clause. One could ask, why the lower courts did not examine the language of the statute, and a lack of application of the statute to the work first program. Reasons this could have occurred could be the carelessness of an overwhelmed court due to the number of cases tried or judges engaging in doctrinal avoidance, which results in a pattern of ruling in favor of the state and department of human service agencies.

Another Type-II case was seen in *Megrabian et al. v. Saenz* (2005) argued in the CA Court of Appeals, involving State Due Process and State Protection clauses.

The Superior Court of the City and County of San Francisco, California, granted respondent applicants’ petition for a writ of mandate and ordered appellant Director of the California Department of Social Services (DSS) to cease denying benefits under California's Cash Assistance Program for Aged, Blind and Disabled Legal Immigrants to eligible applicants as a result of DSS's interpretation of Cal. Welf. & Inst. Code § 18938. The DSS appealed. The DSS had construed the phrase "entered the United States" in Cal. Welf. & Inst. Code § 18938 to mean the date an immigrant attained his or her current immigration status. The trial court commanded the Director of the DSS to interpret the phrase in the same way the Social Security Administration interpreted that same phrase in 8 U.S.C.S. § 1613, i.e., to mean physical entry. However, the instant court concluded that the DSS’s interpretation of Cal. Welf. & Inst. Code § 18938 was entitled to its deference. The DSS's interpretation was within the scope of the authority conferred by 8 U.S.C.S. § 1613. The DSS’s interpretation was reasonably necessary to effectuate the statute's purpose. The interpretation also had consistently been the DSS's policy for several years. The record showed that the DSS had adopted its interpretation of the statute before the applicants filed their administrative appeals and before they filed this lawsuit. The judgment was reversed, and the writ of mandamus was vacated. The trial court was directed to enter a new and different judgment denying the writ (*Megrabian et al. v. Saenz*, 130 Cal. App. 4th 468, 2005).

In *Megrabian et al. v. Saenz* (2005) state court innovations were seen in the lower courts versus the intermediate courts. A low standard of review was invoked because the higher court considers the decision to have error. The trial court’s interpretation of these CA statutes
was in favor in the welfare claimant because their interpretation and desire was to enforce the Social Security Administration’s interpretation of said benefits in relationship to immigrants and eligibility while the Court of Appeals supported the interpretation of Department of Social Services to deny benefits on the basis of the traditions DSS held for years regarding immigration status and eligibility. To that end, the lower state courts were the rights enforcers while the intermediate courts chose to support the status quo in this case.

In the Type-II case of *State of West Virginia and Katrina V. West Virginia Department of Health and Human Services* (2002) tried in the Supreme Court of West Virginia, the substantive issue was one of due process, and violations in State Due Processes clauses.

Petitioners, families receiving assistance, filed a petition for a writ of mandamus against respondents, West Virginia Department of Health and Human Resources and it’s Secretary, challenging the constitutionality of their benefit terminations under Temporary Assistance for Needy Families (TANF), *42 U.S.C.S. § 601 et seq.*, through the W.V. Works Act (1996). They also alleged defects in the operation of the TANF program. The families received monthly TANF checks, which were for a limited period of 60 months and which could be extended by a maximum of 6 months. However, there were no extensions granted to the families and they sought relief through their petition, which matter was referred to a special commissioner for findings. The court adopted the commissioner's finding that although the State had a responsibility to the poor, there was no constitutional right to receive welfare and that the families did not have a property interest in their assistance payments. The court noted the multitude of other programs offering assistance and found that the termination did not violate federal constitutional principles, and that there was no right to a pre-termination hearing. Nonetheless, the court noted that the procedure adopted for review of the extension committee's determination was in violation of state due process rights in that it afforded the fair hearing examiner no right to reverse the committee unless its decision was based on inaccurate information. Accordingly, the court granted the writ with directions to modify the procedure for an assistance recipient who challenged the committee's denial of an extension. The Supreme Court of West Virginia expressly denied a substantive right to welfare benefits; however it did execute the right to due process with regard to fair hearings and extensions (*State of West Virginia and Katrina V. West Virginia Department of Health and Human Services*, 212 W.VA 783, 2002).

This is more likely the type and nature of case seen in welfare litigation since the implementation of PRWORA. A high standard of review may have been employed and
decisions were made on the basis of the error itself, rather than on the higher courts taking a
different direction on the matter.

Type TII and Type HII Claims

With regard to state court cases, involving the Courts of Appeals, Supreme Courts and
Appellate Divisions, there were no Type-TII cases found from 1996-2009. According to
Hershkoff (1999), Type-TII cases involve the state's discretion to define the package of
assistance provided to needy individuals. Hershkoff (1999) states that this category of
challenges include matters such as the level of public assistance pay. The New York United
States District Courts, though, are more likely to encounter Type-TII cases since the
implementation of PRWORA. Hershkoff (1999) reports that this typology describes the
“various levels of limited scrutiny that the New York court applies in determining whether the
legislature has complied with Article XVII, or the rule that establishes the state's duty to extend
assistance to all individuals who meet a state-defined standard of need.” Not surprisingly, there
were no Type-HII claims associated with the intermediate state courts, or more specifically,
claims that “challenge the adequacy of benefits provided, thus moving from considerations of
eligibility to assistance level”. Type-HII claims reflect “the court's highest level of deference to
legislative decision and the court largely remits substantive questions of this kind to legislative
discretion” (Hershkoff, 1999).

Legal Effects of the State Court’s Decision

To further this examination of the legal effects of the state courts decision, it would be
helpful to address the following question: does government have a legitimate interest in
regulating this activity? The majority of state courts have interpreted the present statutes and
regulations to ensure procedural rights versus substantive rights to welfare benefits. Given the
position of the majority of state courts, it appears that they determined government and law is
responsible for ensuring adequate measures for upholding and enforcing present regulations in the lower and trial court. The majority of state courts assert that the opinion is consistent with similar, previously upheld laws and regulations that involve welfare policy; still a few state court decisions and innovations suggests that the individual is a concern of government and it’s the “state’s” responsibility to protect its citizens. Nonetheless, the majority contend that creating constitutional rights that depart from federal policy and the expectations associated with that policy would undermine much of the administrative state. I agree with the majority’s opinion, with some clarification. I think the country has a legitimate interest in protecting and ensuring the welfare of vulnerable populations.

Rosenberg (2008) argues that landmark cases such as Brown v. Board of Education, Roe v. Wade, and others, in terms of court decisions, had little impact or had negative impacts with regard to desegregation or abortion. Rosenberg further states that courts are poor agents of change due to a number of constraints such as lack of independence and support from executive and legislative branches, the nature of constitutional rights precludes acting on social reforms, and in general, a lack of sufficient power to change social policies. This dissertation further demonstrates that the courts have not expanded welfare rights, and that policy innovations are more likely to be found in legislative interventions.

Devin (2011) suggests that the new judicial federalism sees the states as critical players in the shaping of national constitutional values. Devin (2011) claims that the issue is often relating to whether a state court has some obligation to undertake an independent analysis of the state's constitution or, whether it may simply disagree with contemporary Supreme Court methods in applying its state constitution without searching for special reasons in the state's text or traditions. He cites decisions involving Hawaii and Massachusetts Supreme Court on same-sex marriage that have been savaged and considered to be” disastrous" and "provoking.” Still, Devin (2011) reports that state courts ought not to consider out-of-state
backlash—instead they should experiment and serve as laboratories when evaluating and
discussing constitutional arguments. He further reports that in-state backlash is relevant to these
experiments, because it undercuts judicial authority, but out-of-state backlash has no bearing on
them. I believe this is a reason why there is such a lack of state court innovations with regard to
welfare policy and litigation. A similar result was evident in a number of cases examined in this
dissertation such as Sojourner v. New Jersey Department of Health (2002), Spano v. Wing

Hypothetically, if a NY Court of Appeals court ruled in favor the plaintiff, it may imply a new constitutional right that is in conflict with the framers intent, one that implies
welfare benefits are and should be a substantive, constitutional right. In a natural law tradition, a
dissent’s opinion centers on individual liberties as it pertains to preserving life or the right to life.
In their view, welfare benefits could be interpreted as a “fundamental right” which would
warrant protection under the due process clause. Still, the dissenting opinion does not
necessarily advocate the pursuit of “rights of this magnitude.” As such, their request for further
analysis suggests that if enough cases of welfare litigation could not establish a “compelling
government interest” to justify state court precedents, then definitions and interpretations of the
liberty interest or fundamental rights are not likely to result in state court innovations and
substantive changes in welfare policy. State courts are typically bound to the values determined
of the legislature. If state courts innovations frequently resulted in an implied substantive right
to welfare benefits, then Congress might then have to reevaluate the goals of the policy. If state
courts try to adopt changes to PRWORA, how would their actions impact the historical and
current relationship with legislature? Though modifying existing laws will help vulnerable
populations if we were to challenge welfare policies, we would then have to reevaluate state
statutes and DSS operating procedures.
The substantial drop in welfare litigation reveals the change in language regarding welfare rights and the previous entitlements. -- the due process of law is the principle that “government must respect all of a person's legal rights instead of just some or most of those legal rights when the government deprives a person of life, liberty, or property.” As seen in landmark cases, past arguments have been whether welfare claimants possess a substantive due process right or property interest in welfare benefits. The US Supreme Court is likely to support the previous court’s decision which is based on pragmatic concerns and the preservation of current policies and regulations associated with welfare policy.

There are a few cases argued in CA and NJ state courts that suggest judges are appealing to the authority of the Constitution because their interpretation is reflective of the framers’ overall intent which is to protect the people. Historically, lawmakers and legislatures are not so beholden to the liberty clauses of the US Constitution that they will refuse to enact and enforce laws that ultimately ensure the welfare of its citizens and the nation. The majority opinion implies that government is responsible for ensuring the proper implementation of welfare policy and programs. In these cases, we could say that the majority is applying to the plain meaning of the law because it is in the best interest of citizens.

As previously stated, this suggests that individuals are a concern of the state and country and it is the state’s responsibility to protect citizens. The majority of state courts have framed the issue from a formalist standpoint. In formalist legal theory, the content of law is up to legislature and the role of courts is to focus on procedure and interpreting laws based on the plain meaning of the law. State courts are supporting current statutory schemes because the plain meaning of the law is likely to indicate that parties and agencies
should for the greater good and maintenance of the present system be subjected to comprehensive evaluations. As seen in the analysis of state court findings, it is probable that state courts are assuming legislature had just cause to create and establish present statutes and the corresponding regulatory agencies, thus the majority’s opinion is that the courts should apply the law and not make it.

In welfare litigation, state courts have examined previous judicial decisions and outcomes. What's happened in the past? In this case, what strategies have worked in the state and in the US? What strategies have produced negative results? Therefore, state courts recognize and adhere to the following versions of jurisprudence: (1) the importance of context, (2) the instrumental nature of law, and (3) the unavoidable presence of alternate perspectives (Posner, 2003). The state courts in these cases rely on the use of government restriction and regulation to fix societal problems rather than abstract theories and interpretations. Despite the new judicial federalism, it appears that the state courts are more focused on the consequences of a legal decision. In addition, state court decisions are based on what the present political and economic structure can support. In the economics of justice, the legal decisions may hinge on maximizing economic welfare while trying to maintain stability in society. Creating expanded access to welfare is not the intent of the state courts. State courts support the current acts and statues because it was appropriate given the social and economic context, and it was their inclination to work within the present system rather than challenge the status quo. Thus, the court’s opinion is also likely to encourage the individual to work within the present system.

WelfareLaw.org (1999) conducted an extensive review of welfare cases in the AFDC era and to a limited extent, PWRORA cases from 1996-1999. This analysis (1999) suggests that while the states’ exercise of their new and sweeping authority to design income support programs has presented advocates in many states with opportunities for policy advocacy before legislatures and administrative agencies, litigation remains one of the important strategies for
improving welfare programs and assuring their fair and lawful administration. They (1999) further found that “courts serve as a check on arbitrary governmental action by enforcing constitutional guarantees such as due process and equal protection guarantees, in limited situations but will not assume a legislative role and create broad new welfare rights; rather they will generally defer policy decisions to legislatures and in some instances to administrative agencies.” A number of cases were successfully fought on the basis of Federal regulations involving abusive eligibility verification practices and excessive applications process delays (WelfareLaw.org, 1999). It would seem that claims filed that involve procedural due process are more likely to be won by a welfare claimant versus claims filed that involve, for example, equal protection.

Hershkoff (1999) reports that the intent of New York courts, as innovative as they might be with regard to substantive rights, was not to provide explicit interpretive methodology for state constitutional welfare claim, or to reinvent the wheel in terms of judicial decision-making and welfare policy. She further explains that “New York welfare cases draw significantly from Supreme Court cases in applying federal rationality review under the Fourteenth Amendment to social and economic classifications, thus other state courts adjudicating welfare cases can use this strategy and develop manageable standards that draw guidance from external sources of information.” Hershkoff (1999) concludes that the state court's most appropriate stance may be to acknowledge openly the limits of the judicial process, and to use its power of review to encourage the coordinate branches to work together to develop conditional responses to constitutional questions.

According to WelfareLaw.org (1999), in the AFDC program, litigation typically focused on enforcing federal requirements, rather than state law, not surprisingly, federal courts were considered a friendlier forum than state courts, and there was a body of uniform federal law on which advocates could rely with regard to welfare. The federal law eliminates the federal
guarantee of aid to individuals, moreover, the federal law also gives states broad discretion to design welfare programs that make sense for their communities, and at the same time limits that discretion in important arenas, by requiring time limits on an individual’s receipt of federal aid and imposing strict work requirements (WelfareLaw.org, 1999). Because of these policy changes in federal welfare law, rights to welfare benefits are now defined under state law and individuals must look primarily to these state welfare laws, which vary from state to state, to determine the extent of their rights, to complicate matters, some states which have shifted decision-making to localities; there may not even be state law to enforce (WelfareLaw.org, 1999). As this study also reports, there has not yet been extensive litigation seeking to enforce state TANF laws.

As such, there does not appear to be much creative and independent decision-making at the state court level in this area of law. The “new judicial federalism” does not appear to have reached welfare rights in the same way it has the rights of criminal procedure, the right to equal funding of public education within states, and the recognition of the rights of same-sex individuals to marry. It is interesting to note, shifts and deviations in decision-making are more likely to occur in federal district courts. Hershkoff (1999) suggests that because of the lack of social consensus on redistributive issues, state courts are incapable of devising manageable standards for welfare rights cases, and more importantly, "no right answer" exists for cases raising state constitutional welfare claims, that it is impossible to define any public values. Hershkoff (1999) further states that the implications of the proposed consequentialist approach for welfare rights enforcement can be seen in the “current typology of Article XVII decision-making, hence, the state court can contribute to the more effective implementation of positive rights by encouraging, and insisting upon, the gathering of information, the testing of methods, and the learning by monitoring, that commentators associate with improved decision-making.”

As this dissertation illustrates, state courts have not engaged in thinking and making
decisions “outside the box,” which makes me wonder, why has the spirit of the new judicial federalism not infused this area of state constitutional law? There are four possible answers 1) Attitudinal thesis--the high state court judges deciding these cases may be attitudinally predisposed against finding in favor of welfare rights claimants (i.e., conservative judges); 2) Separation of Powers thesis--state courts are concerned about judicial overreaching and thus are overly deferential to the legislature and the state admin agencies in welfare rights cases; 3) Difficulty in Enforcing Positive Rights thesis--idea that courts are better equipped to handle negative rights cases; and 4) Judicial Selection thesis--elective judges may be less willing to find for welfare rights claimants out of concern about facing the voters in retention elections who may resent taxpayer dollars ordered spent to benefit the state's poor. What it would take for state courts to begin to find meaningful state constitutional protection for the poor? It would seem that the answer is raising the standard in state equal protection analysis, or getting the legal aid societies to press the state constitutional arguments in their briefs. The above cases have demonstrated that those strategies were available, however, they were not utilized or they were applied with little result. In addition, though introducing into the state courts issues that focus on preventing abusive practices and negative impacts to the nation’s economy has produced some positive consequences, the notion that litigation and court decisions are the best way to solve all societal ills are problematic. I conclude there should be more legislative initiatives and encouragement of courts to be innovative rather than fear of backlash from other courts.
Chapter 7 The Impact of Welfare Reform on Policy Changes in the States

In this chapter, I would like to explain that in some states policy innovations to protect rights to public assistance came from state legislatures, not state courts. This relates to my principal finding that state courts after 1996 did not find any substantive/procedural protection for welfare rights in state constitutional law. To the extent there were any state level policy changes, they came from state legislatures. This sheds light on the Separation of Powers explanation for why the state courts did not “step up” as the ‘new judicial federalism’ predicts. State courts tended to defer to the political branches on matters dealing with welfare law and policy. Here I will discuss policy initiatives in the states that were developed as a consequence of welfare reform in 1996. I will describe the effect or effects welfare reform had on changes in state law and policy. In particular, this survey describes state legislative changes that were made and what state administrative regulations were promulgated in response to welfare reform. I examine policy innovations in this area of social policy instituted by state legislature/agencies in order to determine how states have handled welfare reform post-1996. It appears that number of states have been more creative about addressing the issue of poverty and have conducted intensive evaluation research. We could infer that regardless of the current welfare reform and its limitations, some states are concerned with providing a wider safety net. As this study demonstrates, the state courts were not very forthcoming, thus, some policy innovations introduced in the states as a result of the discretion the federal law were allowed. The finding that state courts did not, as predicted by the ‘new judicial federalism,’ begin to find and protect in state constitutional law rights to welfare is important but it leads to other questions: if not the state courts, then what about other institutions of state government? Courts after all are not the only rights-protecting institutions. This welfare reform shifted responsibility to the states, and in
general, state courts' responses were inadequate. The chapter will explore whether there were any other institutions of state government that sought to protect welfare rights.

Weaver and Gais (2002) ask a number of questions relevant to this dissertation. Have states used their flexibility--and, if so, how? Have they advanced the philosophy of the federal legislation, or have they introduced different elements? Weaver and Gais (2002) tell us that states can craft programs without time limits or work requirements when they use their own money, spending state funds under TANF's "maintenance of effort" provision, which requires states to spend 75 percent of the state dollars--moreover, states can use TANF funds to provide benefits to low-income families without time limits if those benefits help pay costs associated with child care or transportation.

Weaver and Gais (2002) then report that forty-three states strengthened the federal work requirements by requiring that caregivers engage in a work activity before the TANF-imposed deadline of twenty-four months; seventeen states now levy 100 percent sanctions for first-time violations, and twenty-one states impose 100 percent sanctions for at least three months. Weaver and Gais (2002) further report that twenty-two states also reduce or eliminate Medicaid and/or food stamp benefits if sanctions are imposed for violations of work requirements while twenty-three states have adopted family caps, and finally, thirty-four states have ended or reduced the "pass through" to families on welfare of $50 per month of child support collections.

Weaver and Gais (2002) also identify (1) ideological factors (conservative versus liberal states) correlated with policies restricting cash assistance, (2) policies restricting cash assistance are correlated with a high percentage of African Americans on the caseload, (3) state's resources from the TANF block grant are strongly correlated to policy choices regarding income supplements through state earned income tax credits, and (4) policy decisions among the states
were generally not correlated to the severity of social problems in the states. In short, Weaver and Gais (2002) highlight two important findings: policies that restrict assistance are responsive to factors likely to affect a state's politics and its social policy, such as electoral tendencies and the racial and ethnic composition of the caseload while policies offering positive incentives to work are most strongly affected by a state’s resources, especially resources associated with TANF block grants.

State Initiatives:

The Center for Law and Social Policy in conjunction with the Spotlight on Poverty and Opportunity (2008) released a national report highlighting the efforts of states with regard to alleviating poverty. Here I present a summary of their findings. Alabama created a 14 person House Task Force on Poverty in 2007 consisting of a bipartisan group of state legislators and representatives of state anti-poverty nonprofit--this resulted in a pending bill. Colorado put together a bipartisan Common Good Caucus to encourage collaboration between legislators and public-policy and private-sector efforts. This action resulted in an anti-poverty budget request that included a $213.5 million increase in programs aimed at fighting poverty. As of 2004, Connecticut became the first state in the nation to enact a law setting an anti-poverty target – to cut child poverty in half by 2014, which resulted in the creation of the Child Poverty and Prevention Council. In the District of Columbia, a city council established in 2006 the Commission on Poverty to evaluate the success of local anti-poverty programs and make recommendations to the City Council on methods to reduce the rate of poverty in the District. Following this, a Roundtable on Poverty was held in 2008, and then a National Poverty Summit. In 2007, Delaware established the Child Poverty Task Force in order to collect information and consider recommendations from experts and communities. The Illinois state legislature was
more aggressive in their attempts to address the problem. The state introduced a bill which sets a target to cut extreme poverty in half by 2015. In 2007, Iowa founded the innovative Successful Families Caucus, which aims to explore approaches for tackling poverty and to change the way Iowa legislators think about the problem. Louisiana has taken a strong stance with a pending bill and goal to establish a Child Poverty Prevention Council charged with disbursing grants directly to parishes in order to cut poverty in half by 2017. While the Maine state legislature is in the earlier stages of the evaluation process, subsequently, they are considering legislation to establish a Council on Poverty and Economic Security. Some governments were more tentative in their approach, for example, Michigan held a poverty summit in 2008 to address the needs of the state’s low-income and disadvantaged residents. Following the lead of states who are seriously tackling the problem, the Minnesota state legislature created the Legislative Commission to End Poverty by 2017, gathered information from stakeholders, and made an effort to raise awareness about the issue. Oregon is also very committed to addressing the issue of poverty. An Oregon state law declared that it is a state goal “to eliminate or alleviate poverty,” and thus established a benchmark to cut poverty to 10 percent of the state’s population by 2010 (a progress board releases a report on a yearly basis to determine poverty rates). In 2007, Rhode Island established the comprehensive bipartisan Commission on Family Income and Asset Building for the purposes of considering programs and legislation to build income and assets for families, promoting financial education, literacy and counseling, and protecting families from predatory and abusive financial services. Also in 2007, Vermont holds public hearings and founded a Child Poverty Council to examine child poverty in the state and identify priorities and benchmarks toward achieving a 50 percent reduction in poverty by 2017. Finally, the Washington state Department of Community, Trade, and Economic Development created
community forums and a Poverty Advisory Committee in 2006 (The Center for Law and Social Policy in conjunction with the *Spotlight on Poverty and Opportunity*, 2008). It would seem that the majority of states have taken steps, some more aggressive than others, to address and combat poverty.

Besharov (2008) argues that the current welfare reform legislation did help reduce the number of Americans on federal assistance in most states, but dependency still can be found, cloaked in state-run programs such as food stamps and SSI—it would seem that decreased caseloads were the only reason why the Republican party thinks welfare reform has been a success. Besharov (2008) reveals that the dramatic decrease in caseloads was no more likely in states with strong work-first requirements, mandatory work programs, job training programs or generous child care subsidies, and interestingly enough, they fell in states without any of these programs. There is evidence that says a great deal of dependency is now diffused and hidden within larger social welfare programs such as SSI and SSDI (Besharov, 2008). Since data collection of this study concluded in 2009, literature supporting claims have been focused on studies and analysis leading up to and prior to 2009. This dissertation illustrates an explosion of these claims, which suggests that dependency has just changed programs, and that impoverished populations without sufficient educational and employment opportunities are ending up on another type of permanent assistance.

Weaver and Gais (2002) claim that when evaluating welfare reform, the definition of success or failure is highly dependent upon whether one is a researcher, politician or citizen, and it may be dependent upon an individual’s political orientation and party. As such, the role of one’s political party is often times reflective of one’s values, beliefs, and thus, one’s political ideology. For instance, Kim and Rector (2006), affiliated with the conservative Heritage
Foundation, suggests the following to the Committee on Ways and Means United States House of Representatives: child poverty has declined, decreases in poverty have been greatest among African-American youth, steep declines in poverty occurred among children of single mothers, and welfare caseloads were cut in half. Perhaps everything can be open to interpretation, and the speaker hopefully clarified his operational definitions of poverty. While it is true, that welfare caseloads have dramatically been reduced, the evidence is questionable as to whether these families are better off, and whether poverty has been significantly reduced or eradicated in these cases. Clark (2006) suggests that while many did find jobs, particularly in the 1996-2000 period, only a small percentage earned wages that put them beyond the poverty level. Clark asserts that major obstacles to anti-poverty policies are the following assumptions (1) economic outcomes are the sole result of individual choices, and (2) that the market will generate employment for everyone at decent wages. According to the Governing States and Localities publication, the number of Americans making the federal minimum wage of $7.25 an hour or less was 3.3 million in 2013. For example, 7.4 percent of Tennessee's hourly workforce earned wages at or below the federal rate in 2013, the largest share of any state while less than 2 percent of hourly employees earned federal minimum wages or less in Oregon, California and Washington the (Governing States and Localities, 2013).

Nonetheless, welfare claimants have found some alternatives to cash benefits. A result of welfare reform was an increase in the Supplemental Nutritional Assistance program (SNAP), from 25.5 million per month in 1996 to 47.5 million in 2012 (Edin and Shaefer, 2013). Similarly, the Tax Policy Center (2010) reports there was an increase in families receiving tax credits (ETIC), from 19.5 million to 27.8 million in 2010. Not so surprising, Lewin and Nelson
(2004) reports that Medicaid spending increased faster than social welfare expenditures while Edin & Lein (1997) predicted the expansion in unemployment benefits in a number of states.

In conclusion, though this dissertation has revealed a significant increase in disability claims (a replacement for pre-1996 reforms), many states have taken steps to address poverty by conducting state-wide evaluations, enacting anti-poverty laws, as well as establishing various committees, commissions and summits. Other policy implications may be increased funding to alternative programs picking up the slack for reduced or elimination of welfare benefits such as federally funded programs related to electricity and home heating costs, food, childcare and tax subsidies. In terms of the state courts, it is likely they will avoid expanding welfare rights, but will continue to enforce the welfare policy and procedures in state administrative agencies. However, state courts may demonstrate incremental steps towards expansion of welfare rights in the future. To facilitate this goal, I recommend changes in state equal protection analysis, as well as shifting legal aid societies’ focus to state constitutional arguments.
Chapter 8 Conclusion: Welfare Rights Litigation and the Future of New Judicial Federalism

This research examined a number of variables involving welfare litigation pre- and post-1996 welfare reform in an effort to understand more fully the impact of the change in federal law on state law and policy. As this research progressed, data were gathered and collated to determine the frequency, nature and outcome of welfare litigation since the reform. I assessed the extent to which state courts were fulfilling the potentiality of the so called “new judicial federalism” in this area of law by expanding substantive and procedural rights to welfare. In the course of this dissertation, I came to understand more fully the conditions that increase the likelihood state courts will employ innovative decision-making on behalf of welfare rights. The viability of the new judicial federalism has been dependent on many factors such as entrenched political ideology, fear of alienating the people and the federal courts, and the need to maintain the status quo. In the secondary analysis, results from the AFDC period were gathered to determine the frequency and nature of welfare litigation in comparison to litigation rates after the introduction of the more stringent provisions of PRWORA. A time-series design was utilized to identify patterns and changes associated with the two different approaches and applications to the welfare policies found in the AFDC and PRWORA periods. Descriptive statistics were used to compare the frequencies and percentages on a number of cases between AFDC and PRWORA data sets. The primary analysis focused on solely PRWORA data examined such as location, level of court, nature of case, outcomes, Red and Blue states, as well as elected versus appointed judges. Cases that were not deemed relevant in terms of types of claims were eliminated from the sample.

As a result of the 1996 law, I found that more legal claims were brought by individuals challenging various aspects of the new arrangements envisioned by the 1996 law include
disputes arising from welfare benefits, job placement and training requirements specified by the states and state welfare agencies. There has been a shift in favoring the state in the outcomes of such cases, as such, courts are more deferential to the states and less willing to give judgments in favor of welfare plaintiffs involving alleged violations of the due process clauses in the Fifth and Fourteenth Amendments, alleged violations of the Fourteenth Amendment’s equal protection and privileges and immunities clauses, alleged civil rights violations protected by state and federal civil rights statutes, and alleged deprivations of substantive rights to welfare as provided for in state constitutions. In addition, there has been a decrease in federal constitutional claims as the very nature and definition of welfare and public assistance has changed since PRWORA and TANF reforms.

Greater responsibility for welfare has been devolved to the states as a result of the 1996 reform, thus more cases have appeared in state courts and state administrative law settings raising state constitutional, state statutory, and state administrative law issues than in the past. Yet many claims were still filed in federal courts. This study of all fifty states demonstrates that (1) there has been a decrease in welfare litigation in federal courts in the period after the 1996, (2) more cases are filed and resolved in state courts than before, and (3), courts after the 1996 reform are more likely to grant favorable outcomes to the state than they are to welfare recipients. These litigation patterns and outcomes in judicial decision-making or the tendency to find in favor of the state match the nature of the policy reform, which can be described as the introduction of a series of more stringent welfare measures. This research illustrates the disposition of these cases, such as outcome and nature of case, location and level of court, as well as year the case was decided in state and federal courts.

This analysis was conducted to evaluate the cases as reported in state and federal court
databases (LexisNexis) to determine effectiveness of service delivery. An underlying question that is important to this research involves whether the current reform is working, and what states are more likely to face welfare-related claims in the courts. In this dissertation, I wanted to identify states that are more likely to engage in new judicial federalism. More specifically, I wanted to determine if innovations are taking place given the frequency of case. To begin with, cases are more likely to be filed in state courts, most located in New York and California, involving disability and social security claims, while the state of Connecticut reported a large number of claims in the lower courts primarily involving child support and paternity. I found that regardless of the nature of case, frequency of cases, and location of the court, the majority of claims were ruled in in favor of the state. I analyzed these variables in order to understand both the unrealized potential of the New Judicial Federalism, and to identify states that are not taking advantage of this opportunity by expanding welfare rights. In general, I found that states were not inclined to expand welfare rights.

Another focus of this research is examining whether the general political orientation of the state has any effect on how welfare rights are decided in state courts. In the coding process and selection, merit based systems included both appointment and retention election. States were coded with B for blue and R for red states according to the most current electoral map. These findings were intended to test whether political orientation of a state makes any difference on how these cases were decided in state courts with regard to liberal or conservative orientation, in the state courts, during the PRWORA era. Here, the vast majority of cases involved Blue state appointed judges. When looking at the relationship between Blue
state appointed judges and outcome; over half of the cases were ruled in favor of the state, in contrast there was little difference in outcome with Blue state elected judges. Table 4.

When looking at the relationship between the Red state judges and outcome, the majority of appointed and elected judges also ruled in favor of the state. Table 4.

Table 4

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<th>Blue State Appointed Judges and Outcome</th>
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<th>Blue State Elected Judges and Outcome</th>
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<th>Red State Appointed Judges and Outcome</th>
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As such, there was little difference found between rulings of Blue and Red state appointed and elected judges with regard to outcome.

Since the implementation of PRWORA, state courts have been more likely to receive the cases from welfare claimants challenging some aspect of the new programs. In this dissertation, I have analyzed the outcome of these cases in an effort to determine if state courts are more likely to grant favorable outcomes to the state or to Department of Social Services than they are to welfare recipients. I found that the disposition of these cases was for the most part against the welfare claimant. I have reviewed decisions associated with implementing and maintaining the current welfare policy, in particular, outcome of case (e.g., favorable outcomes for welfare claimant or state), frequency of case, nature of case (types of claims filed), system (federal vs. state) and location of court the case was tried, political orientation of the state (Blue and Red
state affiliation) and method of judicial selection in the states (appointed and elected judges). These variables were examined in order to understand how the role of state court decision-making has changed following welfare reform which ended AFDC in 1996.

With regard to the New Judicial Federalism, state courts will arrive at the constitutional questions only if they have to. The doctrine of constitutional avoidance leads courts to focus on statutory and administrative claims. Nonetheless, constitutional claims involving issues such as due process and race-based discrimination remained in the background in the majority of welfare litigation. This research described the impact of the 1996 Act on welfare litigation in the United States, and why state courts did “not step up” to the new challenges and find in their state constitutions, state administrative procedures act, or state law, any “new” procedural or substantive protections for the poor in order to highlight disparities in programs for purposes of program and policy refinement or reform.

I began this dissertation thinking I would find the promise of the New Judicial Federalism fulfilled, but as the findings suggest, that hypothesis was not supported in the post-reform era of welfare policy. In many respects, these results contradict Kincaid’s (1995) report that over the past thirty years, there has been a rise of the “new judicial federalism” as documented by a noticeable increased in state court activism in several areas of law and policy. It would seem that the resilience and practice of the new judicial federalism is questionable, given the findings of my research.

Though the notion of independent state constitutionalism has been advocated, it is not a standard practice. I would agree with Friedman (2011) in that courts avoid establishing doctrinal tests that do not flow from federal precedent, and this lack of independent constitutional analysis does not represent a “failure of interest on the part of state courts, or a failure of methodology,
character, or culture, but rather is simply the consequence of strong path dependence.” I also agree with Friedman that it is possible for state courts to make valuable contributions to constitutional discourse, such as the ongoing discussion among judges, advocates, commentators and citizens about constitutional meaning. I think it would be more productive to adopt Freidman’s approach rather than focusing on the constraints of the state courts. I have come to the conclusion that the focus should be on what state courts can realistically accomplish given the variety of restraints.

This research supports Friedman (2011) argument that constrained independent state constitutionalism still has some value. Friedman writes:

> enduring normative value in respect to constitutional discourse about individual rights and liberties, independent state constitutionalism is a function of a state constitutional experience, including text and history, which is different from the federal Experience—and this application only works if federal doctrine provides a presumptively correct framework for analyzing individual rights issue (pp. 789-790).

And as this study demonstrates, there appears to be a failed discourse of state constitutionalism. The data also support Friedman’s view that state courts fail to develop state constitutional doctrine primarily due to a lack of uniqueness about the state experience and state constitutional interpretation comes from the function of state constitutions in the federalist governmental structure. Thus, a crucial question in this examination focused on what is the role of state courts and state constitutions. Justice Brennan’s (1976) reminds us that state courts once relied heavily on the United States Supreme Court and federal constitutional rights in determining state constitutional rights. Now more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens more protections than the federal provisions (Brennan, 1976). More importantly, my results confirm what Justin Long (2006) has observed over the last decade--how state courts engage in “intermittent independent
state constitutionalism,” ruling in certain cases on state grounds and in others deferring to national standards is deemed more appropriate than to frequently move outside the limits of federal doctrines.

I agree with Long (2006) when he attributes the lack of independent state constitutionalism to the unique state character or values that cannot provide the basis for a more “vibrant independent state constitutionalism.” For example, New England states are more likely to be dominated by a more liberal political culture while the Southern states are more likely to be dominated by a more conservative political culture. Also, it is expected that conservative judges are less likely to carve out new ground with regard to welfare rights. Nonetheless, this dissertation has found that regardless of political ideology, state court judges were generally unlikely to pursue independent state constitutional analysis in this area of law (welfare rights). State high courts may have recognized and enforced the federal minimum, but they were generally unwilling to expand on the existing individual rights associated with their federal standards and explore what the state constitutional ceiling might be. Further, the lack of state court innovation in recognizing new protections for welfare rights may involve too much risk, or as Freidman (2011) suggests, the rejection of federal precedent, or the risk of appearing illegitimate to the people. To clarify, both the courts and public may not support the expansion of welfare rights, because the change does not support current law, the political (conservative legislation and parties) or economic climate. Findings from my research point to Justin Long’s view of the practice and maintenance of the value associated with the United States Judicial system, though no one is questioning the supremacy of federal law, this study indicates that state courts are reluctant to develop their own constitutions, and expand individual rights. This explains a pattern of intermittent state constitutionalism. Perhaps a constructive approach is to
encourage “state courts valuable contribution toward ensuring that established doctrinal frameworks serve to implement these protections adequately and appropriately” as Freidman (2011) contends. Still, meaningful contributions of state courts to constitutional discourse may not ultimately be what the proponents of independent state constitutionalism had envisioned, and are modest at best (Freidman, 2011).

Unlike Friedman’s (2011) study, my results demonstrate the reluctance to convince state courts to engage in independent state constitutional analysis. The findings of this dissertation contradict Friedman’s empirical review of a year’s worth of state constitutional decisions in four states which historically have claimed to favor independent constitutional decision-making: Oregon, Washington, New Jersey, and New Hampshire. Similar to my findings is Williams’ (2009) claim that despite these successes, the above states engage in independent state constitutional analyses intermittently with regard to individual rights and liberties. Like Williams (2009), I advocate that we focus on efforts of state courts that consider their state constitutions as sources of individual rights protections, and recognize that state constitutional rights claims may be created that are similar to federal constitutional rights guarantees. Moreover, it would seem a better approach to view state constitutional law from a bipartisan lens.

The new judicial federalism is the increased reliance by state courts on its own state constitutional law and the reluctance to turn to federal law/precedent when there are independent and adequate state law grounds for the state court decision. However, when it comes to welfare rights, state courts have not embraced the challenge of expanding welfare rights protections under state constitutional law. As demonstrated in this research, the state courts capacity to adjudicate rights in welfare policy has been restrained following the PRWORA reform. I believe the reasons the promise of the new judicial federalism was not realized are related to the
Separation of Powers thesis and the Difficulty in Enforcing Positive Rights thesis. This hope has not been realized in terms of action on behalf of the courts and judicial decision-making, which is further evidence that the new judicial federalism has not been embraced with regard to welfare policy. What little litigation activity that has occurred on behalf of welfare claimants focused on maintaining or reinforcing due process and fair practices in the administration of welfare programs and benefits. Future legal implications may include, as Grossman (2012) suggests, the Obama administration pushing for a “weakening of legal requirements regarding immigration, education and welfare”. Another interpretation of this attempt may have to do with granting more flexibility to states in order to provide for impoverished citizens.

As previously mentioned, there are two possible answers as to why the new judicial federalism “experiment” has more or less failed in its application to welfare litigation. I included in my analysis two models to account for the lack of state court involvement and welfare rights. In the Separation of Powers thesis, the United States have separation of powers as a part of their constitutions in order to prevent the abuse of power. Here, the branches are independent and keeps a check on each other (Carolan, 2009). State courts are concerned about judicial overreaching and thus are overly deferential to the legislature and the state administrative agencies in welfare rights cases. Shapiro and Murphy (2012) found that Republicans on the Court of Appeals for the District of Columbia Circuit are four times more likely to deny standing to environmental plaintiffs than Democrats. Shapiro and Murphy also report that between 1991 and 1995, the probability that a Democratic-majority panel on the D.C. Circuit would vote in favor of a challenge seeking more stringent health-and-safety regulation was 50.3 percent while the percentage of the Republican majority panel was 27.8. Some conservative jurists assert that courts should find statutes unconstitutional only if their constitutional defect is essentially
uncontroversial because split decisions harm the judiciary’s prestige as well as erode the right of citizens to “self” (Heriot, 2014). In *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.* (1984), a conservative supported decision states that courts must defer to an agency’s interpretation of the statute it is charged with enforcing if it is within reasonable limits (Heriot, 2014). Heriot (2014) further reports that in the *City of Arlington v. Federal Communications Commission* (2013), the Supreme Court held that this deference requirement extends to an agency’s expansive interpretation of its own jurisdiction.

**When defining the Difficulty in Enforcing Positive Rights thesis, it is important to provide the difference between these categories of rights.** Negative rights can involve first generation rights such as the "rights to be left alone" (avoid assault or property invasion) versus positive rights that involve the state’s decision to provide education, welfare benefits or health care. Due to issues such as financial cost and the intensely polarized views of liberals and conservatives, it is not surprising that US state courts are better equipped to handle negative rights cases. Americans appear to believe that the courts cannot possibly enforce subsistence rights guarantees. Elective judges may be less willing to find for welfare rights claimants out of concern about facing the voters in retention elections who may resent taxpayer dollars ordered spent to benefit the state’s poor. Nonetheless, it is important to note that courts are not the only institutions that protect rights, such as welfare rights. A few policy innovations have resulted from state-wide evaluations that address poverty. The most promising state intervention in this regard has been anti-poverty laws.
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Appendix A

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