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## Introduction

Ezra Rosser



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# Holes in the Safety Net

Federalism and Poverty



Edited by Ezra Rosser

CAMBRIDGE

## HOLES IN THE SAFETY NET

While the United States continues to recover from the 2008 Great Recession, the country still faces unprecedented inequality as increasing numbers of poor families struggle to get by with little assistance from the government. *Holes in the Safety Net: Federalism and Poverty* offers a grounded look at how states and the federal government provide assistance to poor people. With chapters covering everything from welfare reform to recent efforts by states to impose work requirements on Medicaid recipients, the book avoids unnecessary jargon and instead focuses on how programs operate in practice. This timely work should be read by anyone who cares about poverty, rising inequality, and the relationship between state, local, and federal levels of government.

Ezra Rosser is a law professor at American University Washington College of Law, where he teaches poverty law, property law, and federal Indian law. He is a co-author of the leading poverty law textbook and is the editor of the Poverty Law Blog.

# Holes in the Safety Net

FEDERALISM AND POVERTY

Edited by

**EZRA ROSSER**

American University Washington College of Law



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*To Mateo and Mario with love.*

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# Introduction

*Ezra Rosser*

This is a book about the relationship between antipoverty programs and federalism. It is also a book about the politics of aid to the poor. Poverty and federalism are difficult topics that invite instinctive reactions. The very use of the term *federalism* pushes the conversation from the lived experience of poverty to the structure of antipoverty programs and the balance between state sovereignty and federal control. Given the ways in which rhetoric of “states’ rights” served in the past, and continues to serve, as cover for systematic discrimination against African Americans and Latinos, including the differential provision of poor relief, federalism’s ugly side readily comes to mind. However, advocates for vulnerable populations often turn to state and local governments to provide support and relief when the federal government is unable or unwilling to fund antipoverty efforts or recognize the rights of the poor. For many antipoverty efforts, the dynamic is not an “either the federal government or state governments” one, but a complicated, interdependent relationship of cooperative, and uncooperative, federalism.

There is no single model of federalism when it comes to antipoverty work. It is nearly impossible to find an example of either a purely federal (though the federal earned income tax credit comes close) or a purely state program. The federal government provides funding to states but attaches conditions on that funding, in the form of matching payments, program conditions, and administrative requirements. For their part, states often take on the primary role administering the programs and determining program eligibility requirements and benefit levels for recipients. Even federally defined standards are subject to deviation because many programs allow states to seek waivers so they can operate their programs differently. It is important to note that reliance on federalism and allowance for significant state variation is a choice. It is a choice that reflects the traditional justification for federalism, that states are the laboratories of democracy, as well as the unwillingness of the United States to recognize a broad set of socioeconomic rights as is common in other developed countries.

## BRIEF HISTORY OF THE WELFARE STATE

Until the New Deal, assistance to the poor was traditionally a local matter. Borrowing from the poor laws of England, the colonies, and later the states, distinguished between the deserving and undeserving poor and provided different forms of relief depending on that classification. Those not part of the community were turned away. The New Deal changed things, to a point. The sense that something had to be done in response to the widespread hardship of the Great Depression created a political environment in which it was possible to pass the Social Security Act. Joined by an alphabet soup of other New Deal programs, such as the Federal Emergency Relief Act, the Civilian Conservation Corps, and the Works Progress Administration, the Social Security Act marked an important milestone in federal assistance. The Social Security Act established a national contribution-based pension system, a national unemployment insurance program, and federal aid to mothers with children. The New Deal was the “formative moment of the American national welfare state,”<sup>1</sup> but it did not sweep aside state interests. Southern states, concerned that generous socioeconomic rights would undermine the Jim Crow economic structure of the South, were allowed – through carve outs for agricultural and domestic workers, as well as through deference to state administration – to exclude blacks from coverage. The New Deal might have created federal welfare rights, but the benefited population largely did not include poor African Americans, Latinos, or Native Americans.

It took the combined pressure of the Cold War, the civil rights movement, and the War on Poverty for welfare to begin to take seriously the truth of the Declaration of Independence’s assertion that “all men are created equal.” Poverty, especially multigenerational poverty connected with discrimination against minorities, was an international embarrassment that undermined the country’s claim to the rest of the world that American-style capitalism had more to offer than communism. Aside from the propaganda problem, it was hard to fight the Cold War’s proxy fights that were supposedly about freedom when minorities could not find equal treatment at home. The civil rights movement inserted itself in the postwar period, demanding an end to institutionalized racism, not only from the de jure segregation found throughout the South but also from the institutionalized inequality of the North. It is worth recalling that Martin Luther King famously spoke about his “dream deeply rooted in the American dream” at the March on Washington for Jobs and Freedom. President Lyndon Johnson, pushed along by the civil rights movement, used his 1964 State of the Union Address to declare a War on Poverty. The declaration led to the founding of the food stamps program in 1964, the creation of Medicare and

<sup>1</sup> Robert C. Lieberman, *Race and the Limits of Solidarity: American Welfare State Development in Comparative Perspective*, in *RACE AND THE POLITICS OF WELFARE REFORM* (Sanford F. Schram et al. eds., 2003), at 28.

Medicaid (through amendments to the Social Security Act) in 1965, as well as other significant programs such as Head Start, Job Corps, and the Office of Economic Opportunity. Cold War pressure, civil rights victories, and the War on Poverty came together at a critical moment in American history in terms of both economics and law.

The widely shared economic growth that followed World War II laid the groundwork for the country to imagine a better, more inclusive future. Between the end of the war and the first oil crisis of the 1970s, the US economy charged along, delivering not only sustained growth but also growth shared by large segments of the population across the income spectrum. Published in 1962, Michael Harrington's *The Other America* brought attention to the plight of the poor, especially those poor in areas that the postwar period had left behind: Appalachia, inner cities, the Black Belt, and Indian reservations. It challenged the cookie-cutter, *Leave It to Beaver*, version of American life and exposed the extent to which the poor were struggling. The War on Poverty reflected the optimism of the period; optimism born out of the country's sustained economic growth and optimism that the federal government could tackle poverty. The Supreme Court briefly joined the fight. In 1968,<sup>2</sup> the Court held that Alabama could not strip Sylvester Smith of her welfare benefits under the Aid to Families with Dependent Children (AFDC) program simply because she was cohabitating with a man.<sup>3</sup> A year later, the Court struck down a Pennsylvania residency requirement for welfare, protecting the welfare rights of the poor as well as their freedom of movement.<sup>4</sup> And in 1970, the Supreme Court – relying in part on a law review article by Charles Reich that argued that welfare was a new form of property – found in *Goldberg v. Kelly* that New York had violated the due process rights of welfare recipients by removing them from the welfare rolls without first providing them an in-person hearing.<sup>5</sup> This was a robust understanding of aid to the poor built on an expanding list of federal programs and Court-protected federal requirements.

The Supreme Court retreated from the War on Poverty and from federal protections quickly. Just two weeks after *Goldberg*, the Supreme Court handed states a huge victory when it upheld Maryland's family cap, an upper limit on a family's welfare benefit that would not increase if more children were born, using the highly deferential rational basis review.<sup>6</sup> According to the *Dandridge v. Williams* decision, states have the authority to make such distinctions even though a family cap policy

<sup>2</sup> *King v. Smith*, 392 U.S. 309 (1968).

<sup>3</sup> For more on the case and on Sylvester Smith, see Henry Freedman, *Sylvester Smith, Unlikely Heroine*, in *THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES* (Marie A. Failingler & Ezra Rosser eds., 2016), at 51–71.

<sup>4</sup> *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>5</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970). See also Charles Reich, *The New Property*, 73 YALE L. J. 733 (1964).

<sup>6</sup> *Dandridge v. Williams*, 397 U.S. 471 (1970).

harms families and children. Three years later, the Supreme Court ruled against minority poor families who challenged unequal public school funding in San Antonio, holding that “wealth” was not a suspect classification and education was not a fundamental right.<sup>7</sup> *San Antonio v. Rodriguez* allowed states to continue relying upon local tax funding of education, even though it guaranteed students in poor districts would continue to receive dramatically fewer resources than students in wealthy districts. Though there were occasional victories for the poor in the decades that followed *Dandridge* and *Rodriguez*, the Supreme Court effectively closed the poor out of the federal courts. To find judicial relief, the poor would have to rely upon state courts and state constitutions.

The legislative retreat from the War on Poverty took longer, with public debates in the 1980s leading eventually to the 1996 welfare reform bill. The backlash against welfare and against the poor grew out of a potent combination of racism and a belief that the poor were undeserving of support.<sup>8</sup> Though aid for the poor takes many forms, from health care coverage to food stamps, cash welfare has pride of place in the public imagination of how the government helps the needy. The deconstruction of racial barriers to welfare receipt and increased recognition of welfare rights resulted in a growth in the number of people on welfare. Even though the number of whites on welfare exceeded the figures for other races, African Americans received welfare disproportionately; the rolls darkened. The public, with the help of biased media depictions of the poor, came to think of poverty in black-and-white terms. Had the shared economic growth of the postwar period continued, the expansion in the welfare rolls might not have created a political crisis. By the end of the 1970s, things had changed. The US economy continued to expand but the gains were not widely shared. The early 1980s were marked by a rise in unemployment and downward pressure on the economy as President Reagan worked to tame inflation. Though the Reagan administration promoted the idea of trickle-down economics, inequality increased as the rich got richer and everyone else stagnated. This was not an environment in which the public was prepared to accept large numbers of black and brown people receiving “free” money from the government. Ronald Reagan, using racially coded language, rallied white voters by telling stories of “welfare queens” and welfare cheats. Conservative commentators – most notably Charles Murray – argued that welfare hurt the poor by permitting them to make “bad” decisions and provided intellectual cover for the welfare backlash.<sup>9</sup>

Antipoor and antiwelfare rhetoric worked. Welfare became a deeply unpopular program, leaving politicians scrambling to offer a new direction. In 1992, Bill Clinton used a pledge to “end welfare as we know it” as a signal to voters that he

<sup>7</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>8</sup> See, e.g., Bertrall L. Ross II & Terry Smith, *Minimum Responsiveness and the Political Exclusion of the Poor*, 72 LAW & CONTEMP. PROBS. 197, 206–7 (2009).

<sup>9</sup> See CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980* (1984).



was a different type of Democrat, one not driven to protect the legacy of the New Deal or Johnson's Great Society, nor beholden to the party's traditional constituencies.<sup>10</sup> It worked. Candidate Clinton became President Clinton, and his pledge took on new urgency after Republicans won the 1994 midterm elections in a landslide. Newt Gingrich led the resurgent conservative charge with his Contract with America, which had as its third provision the imposition of family caps, work requirements, and time limits on welfare recipients. Facing a tough reelection, Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Welfare reform had arrived.

#### WELFARE REFORM

The challenge when it comes to cash welfare is the tremendous imbalance between the number of people it serves and the hold it has on the discourse about poverty. The 1996 welfare reform act had three major components: work requirements, time limits, and block grants. The first two received most of the attention. Welfare recipients were expected to work. This expectation was based on the linked ideas that all (poor) people, even single parents of young children, should work and that work is inherently a good thing. The work requirement was not grounded in an understanding of the sort of jobs and the limited possibility of upward mobility available to welfare recipients. Time limits were imposed in a similar fashion. The AFDC program was replaced by the Temporary Assistance for Needy Families (TANF) program, and the act explicitly rejected the notion that recipients had a "right" to welfare. TANF promised that the poor would face a lifetime five-year limit on receiving welfare paid with federal funds and allowed states to impose even stricter limits. Though many states would find various methods to avoid strictly enforcing – through use of state funds, credits for reducing the overall rolls that could excuse continued welfare payments, etc. – the message was clear: Welfare is not a right and it is not a way of life. Though work requirements and time limits fill the welfare reform headlines, arguably it was the third component, block grants capped at pre-welfare reform levels, that was the most significant change. The move from a federally funded, rights-based cash welfare system to a block grant system that gave tremendous latitude to states fundamentally rewrote the relationship between federalism and antipoverty efforts.

The conservative take on welfare reform is that it was a success. Large numbers of poor recipients left welfare. Buoyed along by the strong economy of Clinton's second term, many found work. Even if they did not find work, states had an incentive to get them off the welfare rolls. States were given tremendous flexibility in how they were to use their block grants, bound only by four broad goals:

<sup>10</sup> See Peter Edelman, *The Worst Thing Bill Clinton Has Done*, THE ATLANTIC, Mar. 1997.

(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.<sup>11</sup>

As a practical matter, TANF's block grant structure meant that states got to keep – and use elsewhere – whatever money they did not pay out as welfare. The incentives were there and states complied, toughening their eligibility standards, increasing the administrative hurdles associated with the program, and penalizing recipients who failed to strictly comply with the requirements. As a Congressional Research Services' report highlights, "TANF is not a program per se, but a flexible funding stream," which has replaced the prior federal cash welfare program.<sup>12</sup>

Today, less than a quarter of all people in poverty receive cash assistance from TANF, compared to 68 percent in 1996.<sup>13</sup> State-determined maximum benefit levels vary considerably. In July 2013, for example, the maximum monthly family benefit for a single parent with two kids was \$170 in Mississippi, \$389 in Virginia, and \$638 in California.<sup>14</sup> In 2017, there were 2.5 million people receiving cash assistance from TANF nationwide, but New York and California accounted for more than 40 percent of the total caseload.<sup>15</sup> In Wyoming, a state with a population of 579,000, only 1,257 people received cash welfare in 2017.<sup>16</sup> This is not because there are not poor people but because states have been successful in creating barriers to welfare. When the Great Recession hit, the welfare rolls only slight budged, increasing from 1.7 million in 2008 to 2.0 million families in 2010.<sup>17</sup> If welfare is supposed to provide a safety net when things get tough, there should have been a much bigger change. However, the number of people receiving Supplemental Nutrition Assistance Program (SNAP) benefits did take off, with 46 million people receiving SNAP benefits in 2012, a 76 percent increase from when the recession began.<sup>18</sup> Federalism largely explains the different trajectories of these two programs. While TANF is state-administered and the block grant framework means that assistance to the poor

<sup>11</sup> 42 U.S.C. § 601(a) (2012).

<sup>12</sup> GENE FALK, CONG. RESEARCH SERV., R40946, *THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: AN INTRODUCTION*, (2013) at Summary.

<sup>13</sup> IFE FLOYD ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, *TANF REACHING FEW POOR FAMILIES* (2017).

<sup>14</sup> GENE FALK, CONG. RESEARCH SERV., RL32760, *THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: RESPONSES TO FREQUENTLY ASKED QUESTIONS* (2016).

<sup>15</sup> OFFICE OF FAMILY ASSISTANCE, *TANF: TOTAL NUMBER OF RECIPIENTS: FISCAL AND CALENDAR YEAR 2017*, [www.acf.hhs.gov/sites/default/files/ofa/2017\\_recipient\\_tan.pdf](http://www.acf.hhs.gov/sites/default/files/ofa/2017_recipient_tan.pdf).

<sup>16</sup> *Id.*

<sup>17</sup> GENE FALK, CONG. RESEARCH SERV., RL32760, *THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: RESPONSES TO FREQUENTLY ASKED QUESTIONS*, (2016).

<sup>18</sup> SHEILA ZEDLEWSKI ET AL., URBAN INSTITUTE, *SNAP'S ROLE IN THE GREAT RECESSION AND BEYOND* (2012).

comes at the expense of other state budget priorities, SNAP benefits paid to individuals come out of the federal budget. The same states that seek to divert the poor from TANF recognize the benefit of increasing SNAP enrollment. Differences in how antipoverty programs are structured, in terms of federalism, can have a significant impact on their reach, effectiveness, and political resonance.

#### POVERTY AND ANTIPOVERTY PROGRAMS TODAY

The future of antipoverty policy is in flux and depends in part on the degree to which the welfare debates of the 1980s and 1990s continue to define the terms of debate about assistance to the poor. Although TANF benefits are crucial for those who receive them, the safety net is much broader than just cash welfare. The lives of the poor are affected by everything from tax policy to health care coverage. Federalism challenges are pervasive. What should the respective roles of the federal and state governments be in the various programs? How much flexibility should states have? What rights or practices should be uniform nationwide? To what degree should advocates accept second-best solutions when it comes to federalism because of political considerations? If questions about antipoverty programs are answered, as they were in the mid-1990s, by blaming the poor for their own poverty and turning a blind eye to the way that potential reforms structure the relationship between the federal government and state governments, then we will have talked a great deal about welfare reform but learned very little. Put differently, antipoverty efforts have to prioritize both the lived experiences of the poor and the structural challenges of federalism. At the moment, the road forward is obscured by both the welfare reform debates and new dark clouds on the horizon.

In July 2018, the Council of Economic Advisors concluded that “War on Poverty is largely over and a success.”<sup>19</sup> Based on an alternative consumption-based standard of poverty, the Council of Economic Advisors’ conclusion was remarkable in several respects. Not only was the conclusion problematically driven by the arbitrary selection of 1980 as the fixed (and dated) consumption standard, but also Trump’s appointed council seemed to be undercutting a long-standing conservative talking point – that the country wastes money spending on the poor. A 2012 Cato Institute report claiming that “the United States spends nearly \$1 trillion every year to fight poverty” became the basis for Congressman Paul Ryan’s provocative claim that “\$15 trillion had been spent fighting poverty since 1964” with very little to show for it.<sup>20</sup> Both figures were falsely inflated and failed to acknowledge that many antipoverty

<sup>19</sup> COUNCIL OF ECONOMIC ADVISORS, *EXPANDING WORK REQUIREMENTS IN NON-CASH WELFARE PROGRAMS* (2018).

<sup>20</sup> MICHAEL TANNER, CATO INSTITUTE, *THE AMERICAN WELFARE STATE: HOW WE SPEND NEARLY \$1 TRILLION A YEAR FIGHTING POVERTY – AND FAIL* (2012); *see also* Glenn Kessler, *Paul Ryan’s Claim That \$15 Trillion Has Been Spent in the War on Poverty*, WASH. POST, AUG. 2, 2013.

programs “are both very efficient and effective at reducing poverty.”<sup>21</sup> Indeed, it is this last point that makes the Council of Economic Advisors’ conclusion so surprising: By declaring the War on Poverty a success, it seemed to indicate a rhetorical course reversal.

The Republican Party has long made attacking means-tested programs an important plank of the party’s national platform. A 2014 Heritage Foundation headline provocatively declared, “The War on Poverty: 50 Years of Failure.”<sup>22</sup> Not to be outdone, a *Forbes* headline from the same year went even further, “The War on Poverty Wasn’t a Failure – It Was a Catastrophe.”<sup>23</sup> And in 2011, *Business Insider* published an op-ed that purported to show that “LBJ’s War on Poverty Is the Greatest Policy Failure of Modern America.”<sup>24</sup> Such hyperbolic language about the War on Poverty fits the long tradition of politicians attempting to score political points by attacking the poor as undeserving and antipoverty programs as misguided. One of Trump’s first actions explicitly about poverty, the euphemistically titled “Executive Order Reducing Poverty in America by Promoting Opportunity and Economic Mobility,” called for “strengthening existing work requirements for work-capable people and introducing new work requirements when legally permissible.”<sup>25</sup> This is not to say that Democrats have not done the same – after all, it was President Clinton who signed welfare reform into law – but it is especially noteworthy that Trump’s Council of Economic Advisors declared victory over poverty. As the Urban Institute’s Gregory Acs noted, while the council was wrong “to declare the War on Poverty over, it is important to recognize the progress we have made and the important role our antipoverty programs such as SNAP and EITC [Earned Income Tax Credit] have played in that success.”<sup>26</sup>

The problem with declaring national victory over poverty is that it is self-evidently untrue. Poverty continues to exist in the United States, despite the size and strength of the country’s overall economy. The homeless can be found in every major city, too many schoolchildren still do not have enough food at home, and families often cannot afford the cost of basic necessities. But just as Trump and his surrogates insisted against all evidence that the size of the crowd at his inauguration exceeded

<sup>21</sup> Mike Konczal, *No, We Don’t Spend \$1 Trillion on Welfare Each Year*, WASH. POST, Jan. 12, 2014.

<sup>22</sup> Robert Rector, *The War on Poverty: 50 Years of Failure*, THE HERITAGE FOUNDATION, Sept. 23, 2014, [www.heritage.org/marriage-and-family/commentary/the-war-poverty-50-years-failure](http://www.heritage.org/marriage-and-family/commentary/the-war-poverty-50-years-failure).

<sup>23</sup> Louis Woodhill, *The War on Poverty Wasn’t a Failure – It Was a Catastrophe*, FORBES, Mar. 19, 2014.

<sup>24</sup> Walter Russell Mead, *LBJ’s War on Poverty Is the Greatest Policy Failure of Modern America*, BUSINESS INSIDER, July 6, 2011.

<sup>25</sup> Proclamation No. 13,828, 83 Fed. Reg. 15,941 (Apr. 10, 2018); see also Ezra Rosser, *Pulling from a Dated Playbook: President Trump’s Executive Order on Poverty*, HARV. L. REV. BLOG (Aug. 20, 2018, 10:04 PM), <https://blog.harvardlawreview.org/pulling-from-a-dated-playbook-president-trumps-executive-order-on-poverty/>.

<sup>26</sup> Gregory Acs, *Have We Won the War on Poverty? Not Yet*, URBAN INSTITUTE, July 26, 2018, [www.urban.org/urban-wire/have-we-won-war-poverty-not-yet](http://www.urban.org/urban-wire/have-we-won-war-poverty-not-yet).

that of Obama's, his administration has doubled down on its insistence that poverty affects a tiny percentage of the population. After the United Nations issued a country visit report that found that in United States "40 million live in poverty, 18.5 million in extreme poverty, and 5.3 million live in Third World conditions of absolute poverty," the US Ambassador to the United Nations Nikki Haley called it "patently ridiculous for the United Nations to examine poverty in America."<sup>27</sup> Instead of 18.5 million in extreme poverty, "there are only approximately 250,000 persons in 'extreme poverty' circumstances," according to the official State Department response.<sup>28</sup> The response, leveraging the same consumption-based study that the Council of Economic Advisors relied upon, also argued that "poverty is down by 77 percent since 1980."<sup>29</sup> These are extraordinary claims by the State Department, unsupported by those government agencies tasked with tracking poverty in the United States.

According to the Census Bureau's standard measure of poverty, there were 40.6 million people in poverty in the United States in 2016, or 12.7 percent of the population.<sup>30</sup> If the Census Bureau used the Supplemental Poverty Measure, a poverty measure based on recommendations by the National Academy of Sciences, the figures would be 44.8 million people, or 14 percent of the population.<sup>31</sup> But these figures tell only part of the story. A total of 18.5 million people, 5.8 percent of the population, have an income under half of the poverty line, including 6 million children.<sup>32</sup> As the *New York Times* reported in 2010, "About one in 50 Americans now lives in a household with a reported income that consists of nothing but a food-stamp card."<sup>33</sup> Kathryn Edin and Luke Shaefer found that if food stamps are not taken into account, 3.55 million children in the United States lived in extreme poverty – in households living on less than \$2 per person a day – in mid-2011.<sup>34</sup> Even taking into account food stamps, 1.17 million children lived in extreme poverty.<sup>35</sup> Edin and Shaefer explain, "The bottom line is that extreme poverty has grown

<sup>27</sup> Jenny Jarvie, *Nikki Haley Calls U.N. Report on Poverty in U.S. "Misleading and Politically Motivated,"* L.A. TIMES, June 21, 2018.

<sup>28</sup> US Dept. of State, *Country Concerned Statement in Response to SR Alston's Country Report on the United States*, June 22, 2018, <https://geneva.usmission.gov/2018/06/22/country-concerned-statement-in-response-to-sr-alstons-country-report-on-the-united-states/>.

<sup>29</sup> *Id.*

<sup>30</sup> Jessica L. Semega et al., U.S. BUREAU OF THE CENSUS, *INCOME AND POVERTY IN THE UNITED STATES: 2016 (2017)* at 12.

<sup>31</sup> LIANA FOX, U.S. BUREAU OF THE CENSUS, *THE SUPPLEMENTAL POVERTY MEASURE: 2016 (2017)* at 20 (Appendix Table A-1, "Number and Percentage of People in Poverty Using the Supplemental Poverty Measure: 2016 and 2015").

<sup>32</sup> Jessica L. Semega et al., U.S. BUREAU OF THE CENSUS, *INCOME AND POVERTY IN THE UNITED STATES: 2016 (2017)* at 17.

<sup>33</sup> Jason DeParle & Robert M. Gebeloff, *Living on Nothing but Food Stamps*, N.Y. TIMES, Jan. 20, 2010.

<sup>34</sup> H. Luke Shaefer & Kathryn Edin, *The Rise of Extreme Poverty in the United States*, PATHWAYS, Summer 2014, at 28.

<sup>35</sup> *Id.*

sharply since welfare reform.”<sup>36</sup> Whatever the supposed justifications were for welfare reform, these are shocking statistics about how the country fails to protect children. Had the State Department looked around the world, it would have discovered that other developed countries, including countries with lower per capita resources, use tax-and-transfer policies to lift a far larger percentage of their population out of poverty.<sup>37</sup>

But poverty is about more than just income, it is also about the lives people are forced to live. More than 2 million Americans with yearlong, full-time jobs live in poverty.<sup>38</sup> For many working poor, jobs offer little by way of pay or security. Even a set work schedule is often asking too much, making work especially demanding for parents of young children. In Richmond, Virginia, more than 10 percent of renters are evicted each year,<sup>39</sup> starting a chain of negative consequences that harm families, disrupt children’s schooling, and can lead to homelessness.<sup>40</sup> Those “fortunate” enough to have public housing often have to deal with poor conditions, deferred maintenance, and invasions of their privacy.<sup>41</sup> As the UN Special Rapporteur noted, not only do American “citizens live shorter and sicker lives compared to those living in all other rich democracies” but also the country “has one of the lowest rates of intergenerational social mobility of any of the rich countries.”<sup>42</sup> The country’s limited response to poverty means that poor parents not only have to suffer the indignities and hardships of poverty but can also expect their children to live similar lives when they grow up.

National poverty statistics disguise the fact that poverty affects some communities and groups more than others. While 42.5 percent of all poor people in the United States were non-Hispanic whites in 2016, the white poverty rate was only 8.8 percent.<sup>43</sup> In contrast, 22.0 percent of blacks and 19.4 percent of Hispanics were below the poverty line.<sup>44</sup> The group with the highest, 26.2 percent, poverty rate: American Indians and Alaska Natives.<sup>45</sup> Though the poverty rate for the United States as a whole was 13.5 percent in 2016, the rate in the Midwest was 11.7 percent,

<sup>36</sup> *Id.*

<sup>37</sup> Orsetta Causa & Mikkel Hermansen, *Income Redistribution through Taxes and Transfers across OECD Countries*, 85 (Org. for Econ. Co-operation and Dev., Working Paper No. 1453, 2018).

<sup>38</sup> JAY SHAMBAUGH ET AL., BROOKINGS, WHO IS POOR IN THE UNITED STATES? (2017).

<sup>39</sup> Eviction Lab, *Eviction Rankings*, <https://evictionlab.org/rankings/#/evictions?r=United%20States&a=0&d=evictionRate&l=1>.

<sup>40</sup> See generally MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).

<sup>41</sup> See generally KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017).

<sup>42</sup> U.N. GAOR, 38th Sess., U.N. Doc. A/HRC/38/33/Add. 1 (May 4, 2018) at 3–5.

<sup>43</sup> Semega, *supra* note 29, at 13 Table 3, “People in Poverty by Selected Characteristics: 2015 and 2016.”

<sup>44</sup> *Id.*

<sup>45</sup> U.S. BUREAU OF THE CENSUS, CB17-FF.20, AMERICAN INDIAN AND ALASKA NATIVE HERITAGE MONTH: NOVEMBER 2017 (based on 2016 figures from the American Community Survey).

while the rate in the South was 15.3 percent. The confluence of race and place can result in areas of notably concentrated poverty at the local level, as can be seen in two areas of the nation's capital. For the last decade, almost 50 percent of the predominantly African American residents of Washington, DC's Anacostia neighborhood have been below the poverty line.<sup>46</sup> In contrast, the poverty rate for the wealthy, white neighborhood of Ward 3 in upper northwest DC was less than 3 percent for the same period (2006–15).<sup>47</sup> The same basic contrast exists between Oakland and San Francisco, California, North and South Milwaukee, Wisconsin, and Ferguson and Ladue, Missouri. Though we as a nation have moved away from de jure segregation, the struggle of poor minority families in poor communities continues. It has been more than 50 years since the Kerner Commission's famous words, "Our nation is moving toward two societies, one black, one white – separate and unequal," but, sadly, such a conclusion still holds for much of the country.<sup>48</sup>

That struggle continues does not mean the fight against poverty has been in vain. But for existing forms of government assistance, it is estimated that double the number of people in the United States would be in poverty.<sup>49</sup> The elderly provide a good example of what can happen when we no longer tolerate high levels of poverty for a given population. Owing in large part to Social Security and Medicare, the poverty rate for those age 65 or older is only 8.8 percent, compared to a rate of 19.7 percent for those under age 18.<sup>50</sup> A common complaint on the right is that government does not work; that government programs are wasteful and ineffective. But consider SNAP for a moment. Food stamps reduce poverty, extreme poverty, and food insecurity; if anything, the effectiveness of the SNAP program is limited not by its implementation but by the need to increase funding for the program so that recipient benefits do not run out at the end of the month.<sup>51</sup> Even though antipoverty spending is likely to always face political headwind, it is inaccurate to say that antipoverty programs are failures or do not make a difference.

<sup>46</sup> DC Kids Count, *Ward Snapshots: Tracking Child Well-Being in Your Ward*, WASH. POST (Aug. 20, 2018, 11:51 PM), <http://apps.washingtonpost.com/g/documents/local/dc-action-for-children/2407/>.

<sup>47</sup> *Id.*

<sup>48</sup> U.S. RIOT COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

<sup>49</sup> David Cooper & Julia Wolfe, *Poverty Declined Modestly in 2016; Government Programs Continued to Keep Tens of Millions Out of Poverty*, ECONOMIC POLICY INSTITUTE, Sept. 12, 2017, [www.epi.org/blog/poverty-declined-modestly-in-2016-government-programs-continued-to-keep-tens-of-millions-out-of-poverty/](http://www.epi.org/blog/poverty-declined-modestly-in-2016-government-programs-continued-to-keep-tens-of-millions-out-of-poverty/) (based on calculations done in connection with the Supplemental Poverty Measure).

<sup>50</sup> Semega, *supra* note 29, at 13 Table 3, "People in Poverty by Selected Characteristics: 2015 and 2016."

<sup>51</sup> COUNCIL OF ECONOMIC ADVISORS, LONG-TERM BENEFITS OF THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (2015).

## OUTLINE OF THE BOOK

Though the chapters in this book vary considerably in their focus, the authors all share the belief that government can and should act to help those in poverty. This shared assumption allows the chapters to focus on the relationship between federalism and the safety net, freed from the need to justify assistance for the poor. Ranging from chapters that explore the history of antipoverty efforts abstractly to chapters that delve deeply into the workings of individual programs, each chapter offers a different way of understanding the practical impacts of federalism on the most vulnerable. Each individually offers a window on how states and localities interact with the federal government; read together, the chapters shed considerable light on how federalism operates in practice. This book, grounded as it is in the relationship between federalism and poverty, provides a layer of realism to the highly theoretical discussions about federalism that fill academic works.

The question each of the chapters is asking, in one way or another, is whether federalism is working for or against the poor. Of course, the answer is often not black or white. Or, for that matter, red or blue. The chapters show that state governments have made very different choices about how to help the poor. Often, these choices mirror normative assumptions about how red states or blue states behave. But sometimes state policy does not fit so easily into standard political boxes when it comes to helping the poor. All states, regardless of which party dominates their politics, have figured out how to take advantage of block grants and other cooperative federalism arrangements to serve their own ends, often to the detriment of the poor. Put differently, this book is less about what states, as the “laboratories of democracy,” might do, and more about what states are doing.<sup>52</sup> Similarly, the chapters focus more on the politics of the relative authority of states versus the federal government when it comes to poverty programs than on the abstract reasons to favor cooperative federalism. As this book shows, the decision to have states implement and administer federal programs that assist the poor has significant consequences in terms of both the effectiveness of those programs and how the poor are treated.

Federalism is a fundamental part of governance in the United States. While it is easy to think of moments when states did little to protect the poor, especially the minority poor, at other points, states have stepped up to help the poor or protect antipoverty programs when the federal government seemed either powerless or determined to act against the interests of the poor. The goal of this book is not to convince anyone that all antipoverty programs should be nationalized nor to demonize states or localities. Federalism has its place, but the chapters in this book

<sup>52</sup> For a critique of theoretical assertions of devolution as an independently valuable governance move, see David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PENN. L. REV. 541 (2008).



suggest ways states and the federal government could do a better job managing the dynamics of federalism when it comes to antipoverty programs. Though united in their commitment to the poor, it is impossible to imagine that antipoverty advocates (much less all the contributors to this book) would come together and agree on a single best model of federalism in terms of helping the poor. Perhaps the best approach is to narrow the space in which states are allowed to experiment or implement state-specific choices regarding eligibility and benefit levels. Some scholars have argued that poverty programs, even ones that rely on state administration, should be structured around hard national baselines below which states cannot deviate.<sup>53</sup> Perhaps the best approach is to nudge states toward good governance through the use of soft power such as reporting and rankings mechanisms. Or perhaps full nationalization of all welfare programs should be on the table after all. The point of this book is not to provide a single answer but to bring out ways to improve how federalism in the antipoverty context works in practice. Full agreement about an ideal version of federalism may be impossible, but, without question, there is a need to pay more attention to the tremendous power that the particular version of federalism built into particular programs has to shape whether federalism helps or hurts the poor.

*Holes in the Safety Net* begins with three chapters that set the stage for many of the other chapters in the book. Debates about cash welfare play an outsized role in public perception of antipoverty programs and of the poor, and Part I, Chapters 1 through 3, focuses on such assistance and shows the extensive reach of welfare rhetoric. Part II, Chapters 4 through 8, looks at state antipoverty efforts and at state administration of various antipoverty programs. The chapters in Part II cover diverse topics, ranging from the imposition of work requirements on rural poor populations to the bureaucratic interests behind state administration of the federal food stamp program. Collectively they show the way federalism, as it operates in practice, helps and hurts the poor. Part III focuses on advocacy. Chapter 9 focuses on health care reform and Chapter 10 focuses on the work of poverty lawyers, but both chapters share an appreciation for expanding protections for the poor within the federal structure. The last chapter, Chapter 11, provides a holistic vision of antipoverty advocacy going forward.

Before introducing each chapter, it is worth acknowledging that the topics covered in particular chapters defy easy characterization and bleed across the book's loose three-part structure. There is no right way to read *Holes in the Safety Net*. The chapters can be read individually and out of sequence. That being said, the complexity of the relationship between poverty and federalism comes across best

<sup>53</sup> See, e.g., JAMILA MICHENER, FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS 15, 168 (2018); Sheryll D. Cashin, Federalism, *Welfare Reform and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 618–26 (1999).

from reading the book as a whole. Aspects of federalism that may work well for one program may contribute to a race to the bottom in another, and the conservative versus liberal politics of one program may be reversed when it comes to a different form of aid to the poor. Although the chapters vary in their approach, with some focused on policy changes over time and others focused on how federalism impacts the poor today, together they paint a vivid picture of the relationship between federalism and the major antipoverty programs. The hope is that this book, written by some of the leading poverty law scholars in the United States, contributes to the work of poverty advocates at both the national and state levels.

### *Part I: Welfare and Federalism*

Professor Wendy Bach argues in Chapter 1, “Federalism, Entitlement, and Punishment across the US Social Welfare State,” that poverty programs are wrongly treated as separate and distinct from the way the government provides subsidies across the income spectrum. As Bach shows, government benefits enjoyed by the nonpoor such as favorable tax treatment of employment-based health insurance are normalized and operate largely behind the scenes. In contrast, assistance to the poor is closely monitored and often punitive. The form that federalism takes, the chapter argues, changes from joint federal and state administration when it comes to the poor, to largely federal for those subsidies that flow to the wealthy.

Chapter 2, “Laboratories of Suffering: Toward Democratic Welfare Governance,” written by Monica Bell, Andrea Taverna, Dhruv Aggarwal, and Isra Syed, details the policies and politics behind the TANF program. The chapter provides a history of cash welfare programs and details the broad authority Congress granted states when it passed welfare reform. Using Illinois and Kentucky as examples, the authors highlight the divergent paths states are allowed to follow under TANF. The chapter ends by arguing that if federalism is to live up to its promise of supporting democratic participation, more needs to be done to protect the participation rights of the poor, who are currently sidelined when it comes to welfare policy.

Unfortunately for the poor, states, particularly conservative “red” states, are extending the punitive policies of welfare reform and applying them to other means-tested programs. Chapter 3, “The Difference in Being Poor in Red States versus Blue States,” shows how work requirements, family caps, and drug testing have migrated from TANF to other programs in what Michelle Gilman labels “welfare creep.” Federalism, Gilman argues, creates space for conservative politicians at the national and state level to punish the poor, the result being a patchwork of policies that make poor people’s rights and benefits highly dependent on where they happen to live. Though federalism promises innovation, Chapter 3 highlights that in practice it has created a split in benefit levels between more generous blue states and more punitive red states.

*Part II : States, Federalism, and Antipoverty Efforts*

Chapters 4 through 8 offer in-depth explorations of the interplay between antipoverty efforts and federalism, with an emphasis on the role of states. The chapters focus on the nuts and bolts, how programs work in practice – how they benefit the poor and how levels of government interact – not on the theoretical benefits of cooperative federalism.

Chapter 4, “States’ Rights and State Wrongs: Supplemental Nutritional Assistance Program Work Requirements in Rural America,” highlights the mismatch between work requirements and the limited employment options available in rural parts of the country. Rebecca H. Williams and Lisa Pruitt show that the recent push to impose work requirements on SNAP beneficiaries seems to be divorced from the barriers to employment in rural areas. The chapter uses Maine’s experience with work requirements to show how such policies harm the poor.

Any discussion of government assistance to the poor is incomplete if the analysis does not include tax policies. Part of the justification given for welfare reform, at the time and after the fact, is that the EITC expanded to provide substitute aid to the working poor. But federal tax policies are only part of the story, as Professor Francine Lipman shows in Chapter 5, “State and Local Tax Takeaways.” Though federal taxes are mildly progressive, meaning the wealthy pay more than the poor, state and local taxes are regressive for a variety of reasons. For those committed to helping the poor but with limited knowledge of tax, the chapter serves as tax primer, focusing on the way state and local taxes burden the poor. As Lipman highlights, in addition to state efforts that build upon federal initiatives, such as state-level EITC programs, there is a great deal that states and localities can do to help the poor and move away from their dependence on regressive tax structures.

Chapter 6, “Early Childhood Development and the Replication of Poverty,” highlights the importance of early childhood education and experiences on human development and explores the different ways states help (or fail to help) poor children during this crucial period. After providing a summary of the scientific studies finding that support, stability, and interactions from birth until age five provide the foundation for later outcomes in life, Professor Clare Huntington notes that experiences of poverty in early childhood can have lasting impacts on school readiness and lifetime earnings. Effective state interventions exist, and Huntington emphasizes that whether a state is predominantly Republican or Democrat does not seem to be determinative when it comes to state funding for early childhood programs.

While Chapter 6 includes some hopeful examples of red and blue states stepping up to help the poor, Chapter 7, “States Diverting Funds from the Poor,” describes the dark side of poverty programs and federalism. Professor Daniel Hatcher presents

example upon example of states behaving badly. As Hatcher shows, states routinely divert money meant for the poor to fill holes in their general budgets. Contracting with private firms that specialize in maximizing federal outlays, states treat poor people as sources of revenue but do not use those revenue streams to benefit the poor. Hatcher argues that states revenue maximization and diversionary strategies must be stopped, as they are antagonistic to the purposes of these federal-state antipoverty programs.

Though SNAP (formerly food stamps) is thought of as a federal program, Chapter 8, “States’ Evolving Role the Supplemental Nutritional Assistance Program,” details the important role states play administering the program. Though benefits are federally funded, administration of SNAP is left to the states. Professor David Super’s in-depth exploration focuses on the history of state SNAP administration and on the groups that support and attempt to influence the direction of the program. The chapter challenges common understandings of federalism in antipoverty efforts by showing the importance of state administration even in the context of SNAP, a supposedly “federal” program.

### *Part III: Advocacy*

Chapter 9, “Federalism in Health Care Reform,” focuses on the most controversial part of the safety net over the past decade. It examines the history of incrementally expanding health care coverage for the poor and the political compromises in the name of federalism that expansion has required. Professor Nicole Huberfeld shows that states often are granted authority to deviate from the standards and priorities of national health care programs such as Medicaid, not because such deviation furthers health care goals, but because of political expediency. Huberfeld considers whether the political trade-offs have been worthwhile and highlights the way the Trump administration has used waivers to undercut the Affordable Care Act.

In Chapter 10, “Poverty Lawyering in the States,” Andrew Hammond describes the often state-centric practice of poverty lawyering and the many constraints on poverty lawyers. As the chapter shows, ever since the US Supreme Court balked at expanding the rights of the poor after *Goldberg*, state-level practice has become central to the work of poverty lawyers. Hammond notes that limited funding, practice area restrictions, and even the limited legislative capacity of many state governments make the work of poverty lawyers today particularly challenging. Whether pushing for state enforcement of existing rights under the various poverty programs or pushing for the recognition of rights as a matter of state law, much of the “action” in the field involves state law and administrative decisions at the state level.

The book ends with a broad look at the history and future of the nation’s antipoverty efforts. Chapter 11, “Conclusion: A Way Forward,” argues that the Left needs to coalesce around economics as a way to promote economic justice, not just

for the poor and near poor but also for the middle class. The chapter emphasizes that antipoverty programs lift large numbers of people out of poverty. Though universal basic income proposals seem to be popular right now, Professor Peter Edelman urges caution because of the danger that such proposals will be co-opted as a way to weaken existing programs. This final chapter calls for increased attention to the connections between poverty and race and poverty and place, and illustrates the point through examples of successful, multifaceted community efforts. Successful efforts, Edelman shows, are dynamic, network based, and responsive to the needs of the poor.

## CONCLUSION

Debates about the nature of poverty can seem a bit tired, mere reflections of the political fights of the 1990s. But since welfare reform, much has been learned about how cooperative federalism works in practice. This book seeks to bring our understanding of the importance of the structure of antipoverty efforts into the present and to highlight how program design affects poor people. By connecting history with ongoing debates about the role of the federal government and the states in responding to poverty, *Holes in the Safety Net* provides concrete examples of how poverty federalism functions in practice. The many competing interests at stake when it comes to states, the federal government, cooperation across levels of government, program flexibility, and the rights of the poor mean that the relationship between poverty and federalism is destined to be contested territory far into the future.

The relationship between federalism and antipoverty efforts cannot be reduced to a simple preference for federal or for state authority. The advantages of federalism – the ability to bring decisions down to lower levels of government, the possibility such devolution will further democratic participation, and the possibility that state involvement will lead to innovation – have powerful rhetorical appeal. They may even prove true in some circumstances. By contrast, the federalism of anti-poverty programs is not without disadvantages. States have taken advantage of federalism to redirect federal money away from the poor and politicians have weakened the country's safety net by disguising their intentions behind the rhetoric of federalism. The way in which the country helps the poor is up for grabs as politicians debate radical proposals to undermine the basic structure of the social safety net under the banner of federalism. Since the New Deal, providing for the poor has been a joint effort of federal, state, and local governments, but welfare reform showed that politicians can replace long-standing federal protections for the poor with block grants to the states. Armed with that lesson, conservatives in Congress are using the rhetoric of states' rights and local control to challenge the welfare state.

The Great Recession brought increasing attention to the struggles of the poor, but not necessarily agreement about what should be done to aid them. The promise and danger of state primacy when it comes to protecting the most vulnerable cannot be ignored, nor should federalism be treated as a matter of secondary importance when policy reforms are debated. In practice, federalism is not singular. It is instead dynamic, it is contested, and its contours vary across programs and across time. Most importantly, questions of federalism matter because of the significant impact they can have on the lives of the poor.

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