Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs

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In 1968, in its first important welfare law decision, the United States Supreme Court used the phrase "cooperative federalism"[1] to describe Aid to Families with Dependent Children (AFDC), that part of our public income transfer system generally known as "welfare." The same label can also be applied to the other major income transfer programs in which the federal government participates—social security, food stamps,[2] unemployment compensation, and supplemental security income (commonly called "SSI"). However, the terms of cooperation are different in each of these programs—with national and state governments sharing power and responsibility for funding, benefit levels, conditions of eligibility, administration, and the like in quite distinct ways.

How did we wind up with this crazy quilt, this bewildering hodgepodge of programs, each with its own special allocation of intergovernmental relationships? This is the question I explore in Part I. With "welfare reform" near the top of the political agenda for both the President and the Congress, are we about to embrace yet a new form of cooperative federalism in the design of AFDC, and, if so, would this be for the better or worse? Answering this question is the focus of Part II.

Part I is organized around a discussion of three very different interpretations of the federalism reflected in America's existing public income transfer system. I call them (a) the historical explanation; (b) the efficiency explanation; and (c) the social standing explanation. Although I argue that the third theory is most persuasive, some evidence supports each of these interpretations, and I consider implications of each for the current round of welfare reform efforts.

In Part II, I begin with some of the alleged benefits and detriments of federalism in general. I examine what our experience in the social insurance arena (especially with unemployment compensation and workers' compensation) says about those advantages and disadvantages. I then explore the scope of existing state discretion in AFDC and the way it is now being exercised. From this starting point, I project the likely direction of new initiatives if states are given even more autonomy through the so-called "block grant" approach to welfare now popular both in Congress and among the nation's governors. I conclude that 1996-style welfare reform portends rather bad news for those who are concerned about America's poor children.

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1. King v. Smith, 392 U.S. 309, 316 (1968).

2. Although the food stamps program technically does not provide cash, I lump it in with the other income transfer schemes because food stamp coupons are largely the same as cash.

I. Alternative Explanations for the Current Income Transfer System and Their Implications for Welfare Reform

A. *The Historical Explanation*

1. *The Theory Described and Illustrated*

According to the first theory, which I call the historical explanation, the locus of responsibility for any given income transfer program reflects the broader outlook on governmental roles that was dominant at the time the program was enacted. In short, we have what amounts to a crazy quilt today because the various pieces were sewn in place at different times when different ideas about federalism were in vogue.

There is certainly some support for this explanation, as evidenced by the following examples. Programs providing cash aid to the aged poor and to poor widowed mothers (typically called mothers' pensions) were first adopted by states in the 1910s and 1920s. They were part of the broader progressive movement of that era which featured a new activism by state governments on many fronts. It is probably fair to say that the tail end of this era included initial state experimentation with unemployment compensation plans in the early 1930s.

The point, for purposes of my historical model, is that because of our outlook on the roles of different governments during the period of their origin, these programs were seen as fundamentally a matter of state responsibility. As a result, when the federal government got involved with these programs during the New Deal, it did not significantly disturb the established focus of accountability. In the 1935 Social Security Act the federal government embraced aid to the aged (in Title I, "Old Age Assistance"), mothers' pensions (in Title IV, "Aid to Dependent Children," later changed to Aid to Families with Dependent Children), and unemployment compensation (in Title III). Yet Congress maintained state government primacy for these programs, essentially offering the economically beleaguered states federal financial encouragement with rather few strings attached. By contrast, Title II of the 1935 Social Security Act, which ushered in Old Age Insurance (social security's retirement program), was a brand new venture and wholly federal. In turn, it reflected the bold new role for the federal government we see in New Deal schemes generally.

Further support for the historical model may be found in the adoption of the federal food stamps program in the 1960s. This national program may be seen as part of the broad expansion of federal activity in general that occurred during those Great Society and War on Poverty years.

Workers' compensation might also be squeezed into this theory. Although adopted by states as part of the Progressive movement of the 1910s, this program actually grew out of reforms of a decade or two earlier when tort law was first recognized to be inadequate to deal with the mayhem accompanying industrialization. In this light, just as tort law and its early reforms for workplace injuries were cast in the form of government-imposed duties on the private sector, it becomes understandable that workers' compensation is structured in that same way. At least in the vast majority of states, workers' compensation was and remains a government-imposed and regulated, private insurance scheme.

2. *Problems with the Theory*

The adoption of SSI in 1972 fits the historical model more awkwardly, however. As a federal program with a national minimum benefit for the aged poor and disabled, SSI could be seen as one example of the federal activism of its time. For example, those were the years that saw the creation of many new federal agencies, including the Environmental Protection Agency (EPA), the Consumer Product Safety Commission (CPSC), and the National Highway Traffic Safety Administration (NHTSA). Yet SSI also includes the option of state benefit "add ons," which are administered by either the Social Security Administration or the states at their election.[3] This feature was perhaps necessary for SSI's political adoption, since some states already provided greater financial support through their existing Old Age Assistance plans that SSI replaced. The less than full federalization of SSI benefit levels is in marked contrast, not only to food stamps, but also to Medicare (health insurance for social security recipients), another important and fully federal creature of that era.

Moreover, if SSI is somewhat awkward in this model, Medicaid (health insurance for the poor) is even more awkward. In sharp contrast to Medicare, its sister health care plan adopted at the same time, Medicaid essentially reverts to the cooperative federalism of AFDC of the 1930s—providing federal matching grants to state programs.

Moreover, other quirks that run throughout our income transfer programs also undercut the historical model. For example, although social security's retirement program began as a fully federal scheme, over time even that plan took on its own peculiar form of cooperative federalism. Since 1939, when family benefits were first added to social security (initially for wives and chil-

3. HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 2D SESS., OVERVIEW OF ENTITLEMENT PROGRAMS, 1994 GREEN BOOK 222 (Comm. Print 1994) [hereinafter 1994 GREEN BOOK].

dren of deceased and retired workers),[4] state family law rules not infrequently determine which children and their caretakers qualify for social security payments. So, too, when disability benefits were added to the social security program in 1960, the responsibility for making initial determinations of disability was given to state, not federal, agencies. Neither of these features mirrors broader thinking about the roles of state and federal government at the time of their enactment.

Furthermore, after more careful scrutiny, the food stamps program, described above as a national program of the Great Society era, is also something of a misfit for the historical model. Although mainly national in its features, the food stamps scheme is administered by state (or local) government. In this respect it differs sharply from SSI, another means-tested program which was also adopted around the same time.

I do not mean to suggest that the great variety of ways in which the states and the federal government share the running of our many public income transfer programs is historically incomprehensible. There are, for example, specific political explanations for why states got first crack at deciding who is disabled for social security purposes, for why the federal government does not administer the food stamps program, and for why Medicaid was structured so differently from Medicare. But the point is that, despite its considerable and parsimonious attractiveness, the historical model does not altogether work. Simply put, you certainly cannot explain the subtle details of our cooperative federalism solely by matching legislation about public income transfer programs with the dominant outlook on federal and state roles at the relevant time in history.

3. *Implications of the Theory*

Finally, and in any event, the historical explanation for today's crazy quilt is of rather limited predictive value. It merely suggests that *if* we are entering into a new period to be marked by a shift of responsibility from federal to state government generally, then it is likely that any income transfer program reforms adopted now will probably mirror that trend as well. But this hardly predicts whether or not we will have any, or any particular, income transfer program reform. For example, Congress failed to nationalize AFDC during the federal activism of the 1970-78 period, despite great pressures to do so from both Republican and Democratic presidents, and despite the at least partial nationalizing of Old Age Assistance through the adoption of SSI in the same period.

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4. Stephen D. Sugarman, *Children's Benefits in Social Security*, 65 CORNELL L. REV. 836, 847-66 (1980).

B. *The Efficiency Explanation*

1. *The Theory Described and Other Notions of Efficiency Distinguished*

I turn next to a second possible explanation of today's system, one that borrows from the language of economists. The theory here is that our various income transfer programs, and their specific attributes, are assigned to different levels of government for reasons of efficiency. In the strongest version of this model, our current crazy quilt is not so crazy after all. Rather, despite its complexity, it reflects the most efficient allocation of power and responsibility between levels of government. A weaker version may admit that a temporary, partial failure of the political market has led us to a somewhat out-of-kilter allocation, so that the purpose of reform at the margin is to increase efficiency. Still, even in this weaker form, efficiency concerns broadly explain the current structure.

One immediate challenge to this model is the need to reconcile its use of the language of efficiency with the redistributive objectives of so many of our income transfer programs (including our social insurance programs, which sometimes emphasize social adequacy at the expense of individual equity). After all, economists ordinarily sharply distinguish efficiency goals from redistributive goals. But the notion of efficiency in this second model is not meant to be seen as something that is to be contrasted with redistribution. Rather, it is based on the idea that one level of government is "better at" handling a particular income transfer program (or a particular feature of a program) than is another level of government.

In the same vein, the efficiency explanation should not be troubled by the arguments of those who would privatize all of today's social insurance schemes—most importantly social security and unemployment compensation—in the name of "economic efficiency." My efficiency theory only claims that *to the extent that* we have an income transfer scheme, its parts should be (and are) parcelled out to different levels of government for efficiency's sake. What I mean by this is perhaps best explained by example.

2. *Examples of Efficiency*

Why is social security a national program? The efficiency answer is that, because so many people move around the country throughout their work lives, a national scheme is the efficient way to make pension benefits, which are based upon a lifetime of employment, appropriately portable. Why then are workers' compensation and unemployment compensation not also national schemes? The efficiency answer is that there is no need for a national solution in these programs because, unlike social security, neither of them looks to a

long period of prior earnings in order to determine benefits.[5]

In this model, the differences from state-to-state in the cost of living may also suggest something about the efficient location of responsibility for determining program benefits. Social security, for example, need not worry much about this problem because it is largely self-correcting within the program's own terms. This is because social security benefits are based on past wages, and state-to-state wage differentials broadly reflect state-to-state cost of living differences. By contrast, for means-tested programs, a national solution to these cost of living differences appears to create problems. Either we wind up with uniform benefits that are not well tailored to local need or else we generate political trouble by trying to engage in explicit discrimination among the states.

The efficiency model may also help us understand certain existing funding solutions for these various programs. For example, in unemployment compensation the Social Security Act imposes a federal payroll tax that is largely waived through a federal tax credit when states adopt their own programs.[6] This funding mechanism may be seen as efficient because it effectively assures that all states have a program. Otherwise, the country as a whole runs the risk that states will wind up engaging in a competitive race to the bottom-each trying to attract new businesses by not having an unemployment compensation scheme. Yet that prospect runs counter to one important national macro-economic policy arguably underlying unemployment compensation—that economic stabilization is furthered by putting buying power in the hands of out-of-work people, especially during periods of high unemployment.

Also worth mentioning here is an efficiency argument for federal involvement in means-testing programs on the funding side. The underlying idea is that some states are much richer than others and hence much better able to carry the burden of their local poor than are others. Spreading the funding burden nationally overcomes this problem.

Efficiency notions might also explain why we have state (and local) administration of means-tested programs that have very different amounts of federal involvement: food stamps (an otherwise national program), AFDC (a very much shared, state-federal program), and general assistance (the residual, non-federal program that exists in most jurisdictions to provide assistance to poor people not eligible under any other categorical cash-grant scheme). The thought here is that the national government is not as good at making

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5. Workers' compensation will pay benefits to someone injured on the first day on the job because all that is necessary to qualify for benefits is that the injury arise out of the worker's employment. *Social Security Programs in the United States*, 56 SOC. SEC. BULL. No. 4, Winter 1993, at 3, 29. Unemployment compensation typically requires a fairly minimal amount of earnings during at least one quarter in the year prior to the claiming of benefits. 1994 GREEN BOOK, *supra* note 3, at 268-70, tbl. 7-13.

6. 1994 GREEN BOOK, *supra* note 3, at 263.

individualized determinations of need as are state and local government entities.

Indeed, this allegedly greater competence of local administrators to investigate and monitor individual circumstances and individual behavior can also broadly explain, in efficiency terms, why disability determinations in social security and SSI are first made by state agencies; why state agencies administer work requirements in AFDC, food stamps, and general assistance; and why state agencies run unemployment compensation schemes that both impose work requirements and scrutinize the reasons a worker separated from employment.

3. *Problems with the Efficiency Model*

On the funding front, one apparent puzzle arising from this model is that if federal involvement really is required to prevent a race to the bottom in unemployment compensation, it seems as though it would be required in workers' compensation as well; yet, there is no federal presence in that program.

Interestingly enough, when it seemed clear in the late 1960s and early 1970s that some states were definitely laggards in providing decent workers' compensation benefits, a national commission was formed that urged these states to improve their programs.[7] Moreover, for a time there was a plausible threat of national workers' compensation legislation.[8] Together these pressures appear to have cajoled most of the very low benefit states to reduce their competition in this area. If pursued very far, however, this story portends a radical complication of any race to the bottom argument. In short, we have to envision states contemplating engaging in such a race doing so in the shadow of a potential national retaliation that might leave them with less freedom than they had at the outset. While this insight may help explain why we do not actually get races to the bottom in areas in which more short-term analyses predict them to occur, it makes it difficult to determine why prospects of races to the bottom are sometimes dealt with by actual federal legislation and sometimes only by threats. For now, I will put this conundrum aside.

As for setting benefit levels in means-tested programs, the efficiency point made above was that cost of living differences from state to state suggest the sensibility of keeping this decision out of the hands of federal officials. Yet, the actual allocation of responsibility for setting means-tested benefit levels is much more complicated than this argument would require. Whereas general assistance benefits levels are left entirely to the states and counties, SSI imposes a uniform federal minimum, albeit voluntarily added to by the states.

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7. *See* NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, REPORT (1972).

8. Heskin A. Whittaker, *The National Commission's Report on State Workmen's Compensation Laws and the Javits Bill*, 40 INS. COUNS. J. 283, 286-89 (1973).

AFDC falls in between GA and SSI. Although states generally have great discretion in establishing AFDC benefits, they have sometimes been discouraged or prevented by Congress from retreating from benefit levels they earlier embraced (as occurred, for example, in 1967 and 1988 federal legislation).[9] Moreover, the federal matching grant approach distorts state incentives by making it much cheaper to pay a dollar of assistance to someone on AFDC than to someone on general assistance. Indeed, at the margin it is cheaper for states to increase AFDC benefit levels than SSI benefit levels (even though the overall share of federal SSI funding is typically greater than its share of AFDC funding in any given state).[10]

Perhaps these various in-between solutions are the result of conflicting efficiency-based arguments. Whereas the cost of living argument may point to benefit setting at the state level, worries about state races to the bottom suggest that benefit setting at the national level is needed. That is, absent national requirements, the fear is that states will be enticed to provide woefully low benefits in order to discourage poor people from pouring into their jurisdictions.

A further complexity arises if, for whatever reason, benefit levels in means-tested programs are not set nationally despite the fact that federal involvement is thought desirable to overcome state-to-state wealth differences. In order to combine local benefit-level setting with national load sharing, some sort of sophisticated federal grant-in-aid scheme to the states seems to be required. Perhaps the most efficient solution is represented by the Medicaid and AFDC formulas that require the federal government to pay a greater share of state costs for poorer states. But if that is right, then the current very different funding arrangements for SSI and general assistance—programs in which states also set benefit levels—would appear to be inefficient.

Furthermore, the food stamps program is altogether inconsistent with the idea that there should be local setting of benefit levels in means-tested programs. Not only does the food stamps plan superficially offer a uniform national standard, but even more importantly, for those food stamp recipients who receive other means-tested benefits, the food stamp benefit structure positively undermines the state-to-state differences that the states have chosen. This is because the amount of other income one has significantly influences how many food stamp coupons one receives. The most important result of this is that AFDC differences from state to state are significantly evened out by the food stamp program.

If state authority to establish varying benefit levels for the poor were a

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9. See Rosado v. Wyman, 397 U.S. 397 (1970), and Beno v. Shalala, 30 F.3d 1057 (9th Cir. 1994), for discussions of limits contained in 42 U.S.C. § 602(a)(23) (1994), and 42 U.S.C. § 1396a(c)(1) (1994), respectively.

10. *See* 1994 GREEN BOOK, *supra* note 3, at 258-59, tbl. 6-23, 383-85, tbl. 10-17.

dominant goal for efficiency reasons, then it would seem rather more important to turn the food stamps program entirely over to the states than to decentralize AFDC (especially given the wide discretion already available to the states in the latter program). The current Congress, however, seems to have the opposite priorities.

Moreover, when one looks at actual AFDC benefit levels it is evident that more than mere state-to-state cost-of-living differences are involved. To be sure, at first blush one sees this idea reflected in the fact that Alaska and Hawaii pay the most and the deep South states tend to pay the least.[11] Yet, more careful analysis reveals a much more complicated picture: Vermont pays much more than New Hampshire, Iowa pays considerably more than Missouri, and Wisconsin pays a lot more than Indiana.[12] Besides, we should not make too much of state-to-state cost of living differences anyway when cost of living differences *within* states are largely or completely ignored by the states themselves. The upshot is that the urban poor in, say, Atlanta may well face economic burdens similar to (or greater than) the rural poor in California, and yet receive dramatically less from AFDC.

In short, state discretion is exercised in setting welfare benefits for reasons beyond accounting for cost of living differences. Do the benefit differences reflect differing opportunities to find work and escape from welfare (i.e., lower benefits in states where paid work is a more viable alternative)? In the same vein, does a program recipient's alternative employment opportunities also explain state-to-state benefit level differences in unemployment compensation and workers' compensation? Perhaps in some cases, but overall I doubt it. In the end, I believe that state-to-state benefit level differences importantly reveal what for now I will call differences in "taste," rather than considerations of efficiency.

4. *Implications*

In sum, although the efficiency model sheds light on certain income transfer program features, as did the historical model, it cannot fully account for our existing scheme of cooperative federalism; however, its implications for the current round of welfare reform are straightforward. Devolution to the states would be justified on the ground that the states are better at handling exactly what it is that is being devolved. The discussion of this model has shown, however, that to understand the efficiency claim we need to focus carefully on the details. Is it funding, benefit-level setting, eligibility determination, administration, etc., or some combination thereof for which the states are to have more power and responsibility? I return to this issue in Part II.

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11. *Id.* at 375-77, tbl. 10-14.
12. *Id.*

C. *The Social Standing Explanation*

1. *The Model Described*

I turn here to a third interpretation of our existing income transfer system, one I call the social standing explanation. This model has two key aspects: the lower the social standing of the recipient, the worse the treatment; and, the lower the social standing of the recipient, the more local the treatment.

Combining these two aspects, this model posits that the more deserving the recipients, the higher the level of governmental responsibility for them and the more generous and dignified their treatment. By contrast, the most despised get both the most local and the worst treatment as local worthies scrutinize them, stigmatize them, and treat them badly. After illustrating the model, I will consider why these two aspects might go together. For now, it is enough to note that the motto for this model could be "small is ugly" (or, by contrast, "big is beautiful").

2. *Its Application to Public Assistance*

This model is most clearly illustrated by separately discussing means-tested public assistance and social insurance. On the public assistance side, we see able-bodied, childless adults (especially single men), roundly termed shiftless and relegated to the most local source of relief. They qualify for general assistance programs—frequently funded and run by the county—which offer very low levels of cash aid (if any), demeaning exercise of discretion by local welfare workers with little effective outside review, and harsh work requirements and sanctions. It is as though the entire program were actually designed to foster self-loathing in its participants.

At the other end of the public assistance ladder are the aged and disabled poor. They are the poor who have our greatest empathy. They cannot really be expected to provide for themselves, and they often wind up in need for reasons that do not at all seem to be their fault. Sure enough, as among the poor, they get the best and the most nationalized treatment. That is, through SSI they obtain benefits which are larger than those which other equally poor people receive (including a minimum federal guarantee).[13] SSI recipients may also retain more assets and still qualify for benefits as compared with participants in other means-tested income transfer schemes.[14] And their program is managed by the Social Security Administration, a national agency which has a higher professional reputation than do state welfare agencies.

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13. *See id.* at 228-29, tbl. 6-8, 366-67, tbl. 10-11.
14. *See id.* at 215-16, 331.

AFDC recipients, at least today, are somewhere in between the two extremes of SSI and general assistance. As compared with general assistance, AFDC provides both better benefits and less demeaning administration. This is a product of various minimum standards that have been imposed by higher levels of government—both states and the federal government. Still, as already noted, in several respects it is better to be on SSI than on AFDC. In the social standing model this position understandably reflects our society's ambivalent attitude towards AFDC recipients who are at once innocent children and, in many cases, not-so-deserving mothers.

3. *Its Application to Social Insurance*

A similar tale can be told on the social insurance side. Injured workers are probably treated the worst. They traditionally obtain only modest benefits, and they frequently face the necessity of hiring a private lawyer (at their own expense) to contend with private insurance company bureaucracies.[15] This is a predictable outcome of the social standing model because these traditionally blue collar workers appear to have the lowest standing of those who qualify for social insurance benefits. Moreover, also consistent with the model, there is no federal involvement in their program (apart from workers in special federally-connected industries).

Temporarily unemployed workers are barely, if at all, better off. Unemployment compensation also pays modest benefits, although, as compared with workers' compensation, the risk that there will be no funds available to pay these benefits is probably smaller.[16] As noted already, their program is most importantly a state program, with federal involvement largely limited to the payroll tax and tax credit device described above. These features are also consistent with the social standing model since unemployment compensation claimants too have relatively low status. They too tend to be blue collar workers, and while program rules are supposed to exclude from benefits those who lose their jobs because of their own fault,[17] many unemployment compensation recipients are those who are least in demand in the labor market.

The main contrast here is with social security recipients. In terms of social standing, they are the most deserving. Unlike workers' compensation and unemployment compensation, social security is not nearly so much a program for blue collar workers. Rather, both middle-class and professional class

15. 1 AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: THE INSTITUTIONAL FRAMEWORK 118-21 (1991).

16. An employer might fail to purchase workers' compensation insurance and go bankrupt or a workers' compensation insurer might go under, but both the state and federal government, in effect, stand behind the solvency of the unemployment compensation benefit system. 1994 GREEN BOOK, *supra* note 3, at 287-97.

17. *Id.* at 270-72.

employees comprise a significant share of the recipients. Moreover, whereas workers' compensation recipients might well have carelessly hurt themselves and whereas unemployment compensation recipients may well have been discharged for incompetence or carelessness, retired workers on social security are widely viewed as highly deserving—having contributed throughout their working lives toward the retirement pension they are now receiving.

In turn, as predicted by the model, the best and most nationally treated social insurance beneficiaries are social security recipients. Comparatively speaking, their benefit levels are generous and, as we have seen, social security is an almost completely national program (indeed it is entirely national with respect to retiree claimants). Claims administration for the retirement program is almost entirely unobtrusive (putting aside those who the Social Security Administration suspects are still working despite their claimed retirement). There are no hassles about disclosing assets or other forms of retirement income.

The social standing model also readily explains why Medicare, for social security recipients, is federal, whereas Medicaid, for the poor, is patterned after AFDC. The location of the food stamps program is ambiguous in this model. Perhaps this is because of our society's ambivalence towards its recipients. They are at once a mixture of the working poor, who are generally thought to be deserving, and the far less deserving poor, including those on general assistance. Hence, as noted earlier, we have wound up with national benefit levels but local, intrusive administration. The odd situation with the food stamps program might possibly be attributable to the fact that, unlike other income transfer programs, having a national financial commitment has been specially supported by politically strong agricultural interests.

If we examine public assistance and social insurance together, it would probably be agreed that all social insurance recipients have higher social standing than all, or nearly all, public assistance recipients. And, in many respects, it is certainly more desirable to be on a social insurance program than a public assistance scheme. On the other hand, I concede that the national-local part of the model is weaker here; after all, AFDC recipients have substantial national involvement in their program and workers' compensation recipients have none. Moreover, the social standing model does not explain certain timing issues, such as why high-status social security recipients got a program to deal with their needs only long after low-status general assistance recipients had become the objects of public benefits. Perhaps more light can be shed on these matters if we look deeper into the social standing model.

4. *Going Behind the Model*

The social standing model, as so far described, does not explain *why* "local" treatment should be worse, rather than better. Especially in thinking

about aid to the needy, many may find it puzzling that our distant leaders in Washington would be kinder to those they assist than are community leaders towards their own poor.

One answer, already noted, is that local leaders fear that if they are kind to their own poor, soon they will have to contend with everybody's poor—a fear, perhaps a fantasy, that was made even more vivid in 1969 by what is perhaps the Supreme Court's single most important welfare rights decision. In *Shapiro v. Thompson*, the Court struck down durational residency periods.[18] Those rules had forced people to wait up to a year to qualify for public assistance and were plainly designed, whatever their effectiveness, to discourage the poor from moving in.[19] As already explained, this fear that "the beggars are coming to town" can be played out as a race to the bottom.[20]

But this is not the only reason why the national government might treat poor people better than do state and local governments. To start with, the poor have little political power at all levels of government. Nevertheless, national advocacy organizations and other lobbyists for the poor seem to be marginally more effective if they only have one target on which to concentrate—the Congress—rather than multiple targets as they do at the state level. By contrast, better funded anti-tax-and-spend interests seem much more able to mount the sustained effort needed in legislature after legislature.

Moreover, advocates for the poor have at least two other advantages at the national level. First, the federal government may engage in deficit spending in ways that the states cannot—exactly what the conservative revolution is now trying to undo. Hence, advocates for the poor who appeal to Congress are not contending with others seeking government aid in quite the same way as they are in state legislatures. Second, in Congress it is easier to embarrass the United States in the eyes of the world community. How sordid it is that the country that brags so much about being the richest in the world (or at least one of the richest and certainly the most powerful) has such a large army of poor, unemployed people and so many destitute children.

Despite their greater leverage at the national level, advocates for the poor are still often defeated when the poor they represent are not seen as deserving. As noted earlier, for example, in the 1970s, despite support from Republican and Democratic presidents, the effort to nationalize AFDC failed at the very time that SSI was being adopted. Another way to look at it is that the more deserving poor, who are able to win better treatment for themselves, seek and obtain it at a higher level of government—at least in part, in order to put distance between themselves and other recipients.

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18. Shapiro v. Thompson, 394 U.S. 618 (1969).
19. *Id.* at 628.
20. *See supra* Subsection I.B.3.

This point is most vividly illustrated if we focus on single mothers. At the start of this century, single mothers were understood by society to be widows, and at the 1909 White House Conference on Children, it was argued that these women and their children were especially deserving of public assistance.[21] Rather than having to make do with existing general assistance programs available at the local level, states were urged to provide these widows with more generous, less stigmatizing, "mothers' pensions."[22] And, by the mid-1930s, most states had rallied to the call.[23] Unfortunately, the Depression depleted the ability of many states to maintain these programs. Yet, the relatively high social standing of this segment of the poor (along with the aged poor) won them special federal law treatment in the 1935 Social Security Act.[24] This much I have already described.[25]

More remarkable, however, is what happened in 1939. Not content to leave widowed mothers to the mercy of either means-tested programs or the states, Congress amended the social security program to provide non-means-tested survivors' benefits for these single-parent families.[26] From that date forward, their assistance was to be more generous and completely unstigmatizing. Under the amended regime, these new benefits could be characterized, in effect, as life insurance annuities paid for by the deceased father through his social security contributions.

At the time, many thought moving widows onto social security in this way would largely do away with AFDC.[27] But they failed to foresee the huge growth in divorce and childbearing outside of marriage that was on its way. By having already elevated widowed mothers and their children out of AFDC, however, Congress effectively left behind those single mothers who are generally viewed by society as less deserving. The result is that, while it has been good for widowed mothers to have separated themselves from other single mothers by winning a national program for themselves, doing so has influenced the social standing of the remaining single mothers. To date, this has doomed all of them to more local and worse treatment.

This perspective casts some doubt on the connection between treatment of the poor and the apparent lobbying advantage the poor have in the national arena. In other words, by deciding which people it will take care of and which it will not, the federal government sets the agenda for state and local government by default. As a result, the treatment of the poor who are put into

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21. *See* Sugarman, *supra* note 4, at 845.
22. *Id.*
23. *Id.*
24. *See id.* at 846-47.
25. *See supra* Subsection I.A.1.
26. *See* Sugarman, *supra* note 4, at 847-66.
27. Stephen D. Sugarman, *Reforming Welfare Through Social Security*, 26 U. MICH. J.L. REF. 817, 826 (1993).

the hands of locals might not reflect how others would fare if left to the same fate.

I will offer a final thought about the worse treatment of the poor at the state and local level. With the begging that goes on today in prominent locations in nearly all of our large cities, the poor are increasingly visible. Not too many years ago when homeless people first appeared from skid row in large numbers, there was initial sympathy for them along with the shock and dismay about how public shopping areas were beginning to look. But now, after what appears to the public to be years of programs in aid of the homeless that have not reduced their numbers, the visible homeless (or apparent homeless, as panhandlers are increasingly described) seem to have worn out the public's patience. As with winos on skid row of years past, this segment of the poor is back in the ranks of the lowest social standing. Predictably, therefore, they find it especially difficult to win public support for anything that is not calculated to clear them out of public view. There are, of course, local poor people, including many homeless poor, who would invite more compassion and assistance. But they are not the people that those of us who are not poor generally see. Having been crowded out of the public's attention, they now seem to gain our attention primarily during Christmas time, newspaper-run charity drives, in what is often called the "season of sharing." Formal local policy towards them and their fellow poor, however, remains meager at best.

5. *Implications*

The implications of the social standing model are not promising for poor children in single parent households who currently receive AFDC and whose program is now under assault. The push by both Congress and the White House is to devolve responsibility from the federal government to the states, and there is much talk that the states in turn would assign much responsibility for these poor people to local government.

Why is this happening? From the perspective of the social standing model, the public is getting fed up with poor single mothers on AFDC just as it is getting fed up with the panhandlers. Too many of these mothers are viewed as irresponsible teens who get pregnant and keep their babies, irresponsible adults who have more babies when they are already on welfare, or irresponsible adults who shun employment at a time that mothers generally appear to be entering the paid labor force in record numbers. Moreover, many of these mothers are thought to be incompetent, or at least ineffectual, mothers whose own children go on to pose dangers to the rest of society. In short, the social standing of AFDC mothers is becoming lower than what it was in 1910 when mothers' pensions were adopted, lower than what it was in 1935 when AFDC was first enacted, and lower than what it has been since the 1960s when at least much of the focus has been on the needs of and our compassion for poor,

innocent children and the desirability of having them raised in decent material circumstances by their own mothers.

If the effort to diminish the social standing of AFDC households sticks, it is altogether predictable by the social standing model that the federal government will begin to wash its hands of this segment of the poor, relegating it to state and local government treatment which is going to be worse. In other words, the social standing model anticipates that what we now see in state and local management of general assistance is what we can expect to accompany more state and local responsibility for AFDC—a "retreat" toward the "poorhouse" attitudes of the turn of this century that considered the able-bodied poor to be indolent people with character defects.

II. HARVESTING FEDERALISM'S BENEFITS AND DETRIMENTS THROUGH FURTHER DEVOLUTION OF PUBLIC RESPONSIBILITY FOR WELFARE

Notwithstanding the prediction of the social standing model, not too many of our nation's governors and congressional leaders who favor the devolution of responsibility for welfare are going around publicly stating that their purpose is to be nastier to the poor (even if, for many of them, it is). Rather, they argue, local solutions will somehow be better solutions.[28] In short, they invoke the efficiency model. As they see it, AFDC is now a failure, and improvement lies in giving more power to the states for the reason that the states are going to be better than the federal government at doing what needs to be done to turn that failure around.

Before addressing that claim, I note that not long ago the major failings of AFDC were seen by many in Washington to lie in inadequate benefits and demeaning administration.[29] In view of our experience with other income transfer programs, the desirable direction of reform to solve those failings would be to enhance federal responsibility through the creation of a generous national benefit level managed by the social security administration. But that strategy assumed not only public empathy with these single parent families but also a willingness to enable the mothers in those families to care for their children without entering the paid labor force if they chose not to do so—exactly the way we now treat most widowed mothers, and have been treating them through social security since 1939.

With the failings of AFDC seen in a dramatically different light by today's national leaders, long term public dependency, at least for these mothers, has

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28. *See, e.g.*, Michigan Governor John Engler, *Testimony Before the U.S. Senate Budget Committee*, 1995 FED. DOC. CLEARING HOUSE, INC., Feb. 2, 1995, *available in* WESTLAW, 1995 WL 39728.

29. *See* Stephen D. Sugarman, *Financial Support of Children and the End of Welfare As We Know It*, 81 VA. L. REV. 2523, 2536 (1995).

become unacceptable. Indeed, many critics further argue that long term public dependency for single mothers is not only something the taxpayers oppose, but also something that is actually bad for these families.[30] In short, the new mantra has become that some sort of "tough love" approach will, in the end, be best for these families.

Will states better solve the "welfare mess" as it is portrayed by conservatives today? In order to appraise that prospect, I will first more generally consider some of the supposed advantages of federalism. Then I will examine what lessons we can learn about the realization of those advantages from the experience with workers' compensation and unemployment compensation. After that I will focus on exactly what additional autonomy the states are likely to obtain through the further devolution of welfare. Then I will be in a position to forecast how states are likely to employ their enhanced power and thereby assess whether a "better" welfare system promised by efficiency claims is plausible—or whether merely "worse" treatment of welfare recipients is probable.

A. *Some Claimed Advantages of Federalism and the Lessons from Social Insurance*

1. *Experimentation and Variation in Local Tastes, etc.*

Federalism is often lauded as a spark for innovation and experimentation in government. The argument here is that the national government too quickly imposes a uniform system, and so we lose the opportunity to learn from a diversity of approaches to a problem that individual states are likely to take (even though, of course, the federal government could itself deliberately engage in direct sponsorship of experimental solutions). The notion seems to be that once some states do experiment, others will observe the results and embrace the best solution for themselves. Hence, over time, one would expect a convergence on policies that prove successful.

Federalism is also often praised for providing variety in government, thereby giving people with different tastes reason to live in one locale or another—although this idea is traditionally more frequently applied to local variation, not so much to state-to-state variation. Still, the notion here is not that states will learn from and then emulate each other; rather it is that states will differentiate themselves from each other because values and preferences vary from place to place.

Federalism is sometimes supported on the ground that it means less government, or perhaps better put, that it avoids excessive and unnecessary

30. *See, e.g.*, CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980, at 196-218 (1984).

government. The idea here is that the closer government is to the people, the better able the people are to block their leaders from doing things that the citizenry doesn't really want, especially through tighter local control over government revenues (i.e., taxes).

2. *Lessons from Unemployment Compensation and Workers' Compensation*

When I think about social insurance, however, it is difficult for me to detect these virtues of federalism. If we compare social security on the one hand with unemployment compensation and workers' compensation on the other, just what are the benefits that we have attained through state, rather than federal, control?

In unemployment compensation, for example,[31] some states provide benefits to those who quit their jobs to follow a spouse to a new place of employment; some do not.[32] Some states provide benefits to employees who quit work because of a good faith fear of health risks to themselves or others; some do not.[33] Some states completely deny benefits to workers who quit their jobs without good cause; others only deny benefits for a fixed period of time. Among the states with significant numbers of seasonal workers, their eligibility for unemployment compensation varies somewhat. These are differences, to be sure; differences that federalism permits, even encourages. But they do not seem properly understood as experiments or innovations. It is not as though states have mounted serious research efforts to decide which of these various paired solutions are somehow to be judged best and then conformed. Nor do these interstate differences seem plausible bases on which one would decide to live in one state or another. Nor do they lead to less, or more, government.

Instead, these differences are probably best understood to reflect the political struggles between business and labor lobbyists from state to state. I do not mean to argue that this is necessarily bad. But it does not seem to me to demonstrate the special virtues claimed for federalism. If unemployment compensation were a national program, as it is in most countries, we would presumably have a uniform solution to each of these issues. Depending on what those solutions were, then, as compared with today, there would be some winners and some losers, at least in most states. Nonetheless, it is difficult for me to see why state autonomy on these matters provides any important overall

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31. For a discussion of these and other state programs, see Daniel N. Price, *Unemployment Insurance, Then and Now 1935-85*, at 48 SOC. SECURITY BULL. 22 (1985).

32. Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511 (1987) (discussing voluntary quits for personal reasons).

33. Amador v. Unemployment Ins. Appeals Bd., 677 P.2d 224 (Cal. 1984) (discussing voluntary quits for fear of health risks).

advantages.

I would say much the same for workers' compensation. Most states rely on private insurance to administer their schemes, some have competing state insurance funds, and a few rely upon an exclusive state fund from which all employers purchase their workers' compensation insurance coverage.[34] But this pattern has persisted for decades. So, once again, it is not as though the states have experimented with these three models and the best solution has subsequently paved the way to near universal adoption. Nor does this difference seem a plausible basis for an enterprise locating in one state or another.

In the same vein, one well-recognized problem in workers' compensation is how to deal with those who have partial permanent disabilities.[35] California has one solution, New York another, and so on; not too many years ago Florida adopted a new approach. On the face of it, this may seem promising—just the sort of innovation that is predicted of federalism. But, once again, the states simply do not seem to treat these diverse approaches as experiments that, after a suitable period of time and study, lead all, or most of them, to agree that one solution is best.

I do not mean that the states learn nothing from each other. In recent years concerns have been raised by business leaders in many states about the number of stress-related workers' compensation claims that are being filed;[36] so, too, business owners in some states are complaining about the amount of money going to rehabilitation programs with little to show for them in terms of increased rates of employees returning to work.[37] States where these matters are considered problems are undoubtedly watching what other states are doing about them. But, again, it is by no means clear how much federalism really matters. If workers' compensation were a national scheme, business (or labor) would also be complaining about the problems it perceived and pushing for reform. And, presumably, the national political process would respond to those pressures just we have seen Congress respond to pressures from labor and from employers concerning the social security disability program and the national Black Lung program.[38] In short, I do not read the record on state-run social insurance schemes as one that has either: (a) enabled states to experiment boldly and to act decisively based on the results of each other's experiments; or (b) permitted states to capture in their plans important cultural or value differences that may exist from state to state.

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34. *Social Security Programs in the United States*, *supra* note 5, at 29.
35. AMERICAN LAW INSTITUTE, *supra* note 15, at 116-18.
36. *See, e.g.*, COUNCIL ON CALIFORNIA COMPETITIVENESS, CALIFORNIA'S JOBS AND FUTURE, 19-20 (1992).
37. *See, e.g., id.*
38. *See* Whittaker, *supra* note 8, at 284.

B. *Permitted Experimentation and Variation in Welfare Today*

In any event, once we turn to AFDC, *if* there are benefits to be gained from state autonomy, perhaps they are already captured (or able to be captured) in the flexibility states now have in designing and running their own welfare programs. In other words, the argument for devolution in welfare seems to imply that there are additional things that states want to do that they should be permitted to do, but are not under today's cooperative federalism.

In order to address this claim, it is essential first to understand the existing ground rules. In 1935, when AFDC was enacted, the federal government imposed few conditions on states in return for receiving federal matching funds. Through the years, however, more and more conditions were added as Congress amended the program to, on some occasions, protect recipients[39] and, on others, force the states to make certain demands on the recipients.[40]

Beginning with the Reagan Administration, however, and continued by the Bush and Clinton Administrations, states have been encouraged to ask for waivers of federal welfare requirements in order to carry out so-called AFDC experiments.[41] Both the Bush and Clinton administrations have been quite liberal in granting waivers, provided at least that the change does not cost the federal government more money.[42] As a result, through this "waiver program" a great number of the conditions that Congress has added to AFDC over the years may now be set aside.

Indeed, it is important to emphasize that, while the statutory authority to grant waivers is cast in terms of experimentation, states have been permitted to make changes statewide if they wish to do so. To be sure, the federal government typically insists that the state is to test its reforms by singling out certain experimental and control groups for evaluation. The experiments, however, are clearly not so limited. Instead, wholesale change has been permitted.

The upshot is that, under the waiver program, many states are currently in the process of changing their AFDC programs. Many of these changes are said to be aimed at eliminating long-term dependency by encouraging the poor to get off aid and into the paid labor force.[43] These incentives mostly include harsher provisions such as putting time limits on the receipt of cash welfare,

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39. For example, to prevent waiting lists, Congress required that aid be paid with reasonable promptness to all eligible individuals. 42 U.S.C. § 602(a)(10) (1994).

40. For example, recipients were required to cooperate in establishing the paternity of their children. *See* Stephen D. Sugarman, Roe v. Norton*: Coerced Maternal Cooperation: Advocacy, Law Reform, and Public Policy*, *in* IN THE INTEREST OF CHILDREN 365-447 (Robert H. Mnookin ed., 1985).

41. Lucy A. Williams, *The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard*, 12 YALE L. & POL'Y REV. 8, 16-18 (1994).

42. *Id.* at 33-34.

43. *Recent Welfare Waiver Applications and Approvals*, 29 CLEARINGHOUSE REV. 580 (1995).

reducing the amount of monthly welfare benefits, and accelerating the time after a child's birth when a recipient ceases to be exempt from work search requirements. Some states are combining these sorts of changes with an increase in the amount of earnings a recipient can keep while continuing to receive some welfare benefits. Other changes brought in by the wavier policy are largely aimed at parental behavior. They include requiring a recipient's children to have been vaccinated, precluding a minor mother from establishing her own independent AFDC household except in very limited circumstances, and refusing to grant additional aid to welfare mothers who have additional children. In sum, the waiver program itself has generated a new variant of cooperative federalism.

C. *The Future of Welfare Under Block Grants with Broadened Home Rule*

As this is written, considerable political momentum appears to have been generated behind what is being called the "block grant" approach to welfare. As envisioned by most, AFDC would no longer be a federal "entitlement."[44] States would be given enormous leeway as to how they would design and run their programs to aid poor children and their families. The federal government would continue to provide substantial funding through "block grants," but it is not clear how much the states would be required to spend of their own money (the "maintenance of effort" issue). In any event, this change would put the states back in a legal position very similar to that which existed when AFDC was adopted in 1935: federal grant-in-aid would be paid directly to the states with few strings attached.

What would this enable the states to do that the current law as augmented by the waiver program precludes? Certain differences strike me as fairly trivial. For example, states would be relieved of the bureaucratic obligation of filing an application with the Department of Health and Human Services for waivers that would, in any case, be granted. So, too, states would be able to make changes they are now making with no pretense of calling them experiments and with no need to evaluate their consequences. Indeed, this freedom would resolve a looming and possibly awkward period of state-federal relations when the existing waivers expire. Under the experimental rubric through which waivers have been granted, a time period (often five or more years) has been placed on the states' new ventures. Since none of the time limits has yet expired, we do not really know what position the federal government would take. Conceivably, states would be required to return to their pre-waiver programs. Nevertheless, I predict that states would be allowed to continue their experiments for an extended period, possibly by making slight variations. If I am right, then, for the block grant approach to be significant,

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44. Sugarman, *supra* note 29, at 2552 n.79.

it should amount to more than these relatively minor changes.

Therefore, in principle, the key objective that the block grant solution would accomplish would be to allow states to enact changes for which they cannot currently obtain waivers. What are some of those changes? One category includes changes that the federal government thinks are unconstitutional but that the states would like to make anyway, with hopes of convincing the courts that they are not unconstitutional.

A good example is the strategy of high-benefit states to offer newcomers to the state lower welfare benefits than are paid to old timers. The lower benefits are based on those payable in the state from which the newcomer moved. This differential treatment, clearly designed to discourage people from moving into a state in order to obtain a larger welfare check, is probably unconstitutional under *Shapiro v. Thompson*,[45] as noted earlier. Nonetheless, the Bush Administration allowed Wisconsin to try it out on the ground that state officials should have the right to make a pitch to the current U.S. Supreme Court to abandon or limit *Shapiro*.[46] The Clinton Administration, however, has refused to grant a waiver for this two-tier benefit strategy, and by the same token would also refuse to grant waivers for other experiments containing conditions that it considers to be unconstitutional under prevailing doctrine.[47]

Another example of programs currently considered unconstitutional but that states may try to enact anyway might be a state plan that barred all welfare benefits to applicants with children born outside of marriage. In any event, advocates of federalism are unlikely to rest their argument on those special circumstances in which states want to try out measures that are apparently unconstitutional under existing doctrine.

A second group of changes that states might like to make, but for which they cannot currently obtain waivers, are those that the federal government will not now permit because, while the changes may be constitutional, nonetheless they are too inconsistent with the fundamental underlying purposes of the AFDC program. Examples of these are best revealed by requested waivers that the Clinton Administration has actually refused to grant on this basis.

They include proposals such as: (1) a complete separation from welfare after a maximum period (as contrasted with required public service work in lieu of a cash grant at such time); (2) submission to random drug testing as a condition of receiving welfare; and (3) strict sanctions in the form of immediate exclusion from welfare for non-cooperative behavior that now leads initially

45. For a description of such a program and its constitutionality, see Green v. Anderson, 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated*, 115 S. Ct. 1059 (1995).

46. Interview with Michael Wald, Stanford Law Professor and former Deputy General Counsel of HHS in charge of AFDC waiver policy in the Clinton Administration, Berkeley, Cal. (Mar. 12, 1996).

47. *Id.*

only to mild punishments.[48]

Further examples come from former state practices that the courts or the federal bureaucracy have outlawed as inconsistent with the Social Security Act even if otherwise constitutionally valid. While states realize that they would probably be turned down today if they asked for waivers like these, some states might re-enact these old rules if the federal agency no longer stood in the way.

Examples here include: (1) establishing waiting lists when state budgets are tight, so that new applicants could not get aid until others went off the program;[49] (2) eliminating aid to AFDC households when there is a "man in the house";[50] (3) eliminating aid if a child is born while the family is on aid;[51] and (4) curtailing aid to all claimants during harvest seasons or other periods of high demand for labor.[52]

Would block grants unleash new state experiments designed to move the poor from long term dependency into the work force? As President Clinton's staff discovered in preparing their welfare reform plan, a serious strategy to stimulate economic self-sufficiency above the poverty level would require spending a lot more money, at least in the short run, if it would hope to have any real chance of working.[53] And, as noted above, experiments intended to cost the federal government more money cannot gain waiver approval. So, in the abstract, we have a third type of change: states could adopt costly new programs that they cannot get the federal government to endorse now. But I find this prospect exceedingly unlikely in practice. The block grant strategy is clearly designed not only to cut and cap federal spending, but also to enable the states to cut their own welfare spending.

CONCLUSION

Is the political support for turning AFDC into block grants really rooted in federalism? I suppose it is to the extent that the goal is to have a smaller government role in the support of poor children, and to the extent that it is meant to encourage something of a race to the bottom by liberating those with political power in the state legislature to cut back assistance for this "discrete and insular minority." But this is very different from saying that block grants are well justified by considerations of efficiency and experimentation.

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48. *Id.*

49. *See* GEORGE COOPER ET AL., LAW AND POVERTY: CASES AND MATERIALS 170-71 (2d ed. 1973) (discussing history of this change).

50. *See* Lewis v. Martin, 397 U.S. 552 (1970); King v. Smith, 392 U.S. 309 (1968).

51. For a discussion of the Flemming Ruling that struck down this practice, see *King*, 392 U.S. at 322.

52. *See, e.g.*, Anderson v. Burson, 300 F. Supp. 401 (N.D. Ga. 1968).

53. *See* Jeffrey L. Katz, *Long-Awaited Welfare Proposal Would Make Gradual Changes*, 52 CONG. Q. 1622 (1994); Jason DeParle, *The Difficult Math of Welfare Reform*, N.Y. TIMES, Dec. 5, 1993, at 30.

Put differently, I find in the block grant approach a refuge of political cowards. These are members of Congress who, in private, embrace popular fantasies about how the poor lead their lives and would be eager to support a welfare regime that treats the poor in a very nasty manner. But they know that it is unlikely that the federal government would impose draconian provisions on a program for which it takes significant responsibility. That is what the social standing model teaches us. Hence, by passing off the responsibility elsewhere, these legislators are hoping that the states, or at least some of them, will do the sort of dirty work that Congress dare not do. Alas, this is not an altogether foolish hope, I would say, given the states' past record of dealing with the poor when they really hold the reins.

Should we be pleased at the prospect that the block grant form of cooperative federalism would facilitate this harsh approach to poor children? You might be if you really believe that ruthless treatment will prod poor adults to lift themselves out of poverty on their own. Believing that outcome implausible, I personally find appalling the much greater child misery that would ensue.