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The Difference in Being Poor in Red States versus Blue States

Michele E. Gilman

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

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The Difference in Being Poor in Red States versus Blue States

Michele Gilman

Pundits tell us that our nation is divided between red and blue states, generally defined by their citizens' support for Republican or Democratic presidential candidates. In the popular imagination, red states are inhabited by pick-up truck driving, church-going, beer-swilling, country music lovers who are politically conservative. By contrast, in blue states, people drive electric cars, sip wine and eat arugula, listen to NPR, and are bleeding heart, godless liberals. Although these dueling stereotypes assume that blue state residents are more affluent, neither considers the lives of low-income people. Nevertheless, a person's experience at the bottom of the economic ladder differs widely depending on where they live, and red state versus blue state policy differences are driving part of that geographic divergence.

These disparities in poverty support have nothing to do with one's beverage or music preferences. Instead, red states generally have more punitive public benefits policies than blue states. This division is likely to widen in coming years as Republican politicians at the federal and state levels increasingly attach "behavior modification" requirements to governmental assistance, using federalism tools such as waivers to do so. For instance, in January 2018, the Trump administration approved the first waivers to states that want to impose work requirements on Medicaid recipients. In the first wave of applications, 10 states applied for waivers; all have Republican governors; eight are Republican controlled in both the executive and legislative branches. A majority of these states are also among the stingiest when it comes to cash assistance benefits under the Temporary Assistance to Needy Families (TANF) (or welfare) program. Meanwhile, the Trump administration is currently floating the idea of allowing states to impose lifetime limits on Medicaid coverage.

Work requirements and lifetime caps are brand new to Medicaid, but they are not new to low-income Americans. In 1996, Congress passed, and President Clinton signed, welfare reform, known as the TANF program, which changed welfare funding from an open-ended federal entitlement to a block grant system. TANF requires that program recipients work within two years of receiving benefits, and it limits lifetime receipt of benefits at five years, although states can – and many do – choose shorter time limits. TANF also permits states to cap benefits at a certain family size (known as family caps), to drug test beneficiaries, and to adopt other methods of attempted behavioral control, such as denying benefits to mothers who do not identify the paternity of their children and cutting benefits to families with truant children.

Upon signing TANF into law, President Clinton announced, "After I sign my name to this bill, welfare will no longer be a political issue. The two parties cannot attack each other over it. Politicians cannot attack poor people over it. There are no encrusted habits, systems, and failures that can be laid at the foot of someone else." Clinton's prediction fell flat, as low-income people continue to be attacked as lazy "takers" and "welfare queens," even though the economy fails to provide a stepping-stone out of poverty for many workers. After 22 years of experience with TANF, the evidence establishes that it fails to meet the needs of poor families. Indeed, the withering of TANF as a safety-net program has increased extreme poverty (or earnings of less than $2 a day), even as the country has climbed out of recession.[1] Nevertheless, Republicans at the federal and state levels are methodically expanding behavior control mechanisms into other public benefits programs, a phenomenon I call "welfare creep." This threatens to worsen poverty overall, but its impacts will likely be harsher in red states. We can expect that poor residents living in red states will face additional layers of disadvantage in coming years, and that behavior modification laws will help propel this divergence. This chapter traces the extent of welfare creep, identifies its causes, and examines its impacts.

WELFARE CREEP

In 1992, Lucie A. Williams wrote about emerging behavior modification proposals, such as Learnfare (conditioning welfare eligibility on regular school attendance) and family caps (denying additional benefits to families that have children while on assistance), that the Bush-era federal government permitted states to adopt under a welfare waiver program. As she wrote, "The idea behind all of these projects is the same: only those women and children who conform to middle class majoritarian values deserve government subsistence benefits."[2] Congress later codified these behavior modification options in TANF, giving states the decision whether to implement them. Today, welfare creep is resulting in "patchwork federalism," in which poor people receive vastly different levels of support depending solely on

[1] H. Luke Shaefer & Kathryn Edin, *Welfare Reform and the Families It Left Behind*, Pathways, Winter 2018, https://inequality.stanford.edu/sites/default/files/Pathways_Winter2018_Families-Left-Behind.pdf.

[2] Lucie A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 Yale L. J. 719, 720–21 (1992).

where they live. This part examines the expanding scope of three behavior control mechanisms: work requirements, family caps, and drug tests.

Work Requirements

Work requirements do not work. They neither increase work rates nor reduce poverty for three main reasons: (1) large swaths of the poor are children, the elderly, or disabled, and are not expected to work; (2) many people who want to work either cannot find work or face significant personal barriers to work; and (3) many workers do not earn enough to lift themselves out of poverty. Nevertheless, Republicans are expanding work requirements throughout the safety net.

TANF: TANF imposes work obligations on both recipients and the states, and failure to comply results in sanctions (for individuals) or fiscal penalties (for states). The rules are complex. In brief, and with some exceptions, states must engage half of all single-parent TANF families in work activities for at least 30 hours a week, with higher requirements for two-parent families.[3] A family faces sanctions if a parent fails to meet the work requirements; sanctions can include termination of benefits for the entire family.

TANF supporters tout its success by pointing a 75 percent drop in the welfare rolls since 1996. To be sure, in the immediate aftermath of TANF's enactment, work rates among TANF recipients rose due to the new work requirements and a strong economy, as well as expansions of the Earned Income Tax Credit and child care funding. However, work rates subsequently fell during the recession as welfare leavers struggled to find and keep jobs.[4] Indeed, studies have shown that mandatory work requirements do not lead to higher work participation rates or stable employment over time.[5] Moreover, states removed many families from TANF through stringent eligibility requirements, sanctions, and diversionary tactics.[6] States also used the bulk of their TANF funds for purposes other than cash assistance, such as child care and job training programs, and even to fill state budgetary gaps.[7] All these reasons contributed to the precipitous drop in the number of TANF recipients.

[3] For an overview of work requirements, see Heather Hahn et al., Urban Institute, *Work Requirements in Social Safety Net Programs*, Dec. 2017, at 4–6, www.urban.org/sites/default/files/publication/95566/work-requirements-in-social-safety-net-programs.pdf

[4] *Id.* at 5; *see also* Gene Falk et al., Congressional Research Service, *Work Requirements, Time Limits, and Work Incentives in TANF, SNAP, and Housing Assistance*, Feb. 12, 2014, https://greenbook-waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/R43400_gb.pdf.

[5] MaryBeth Musumeci and Julia Zur, Kaiser Family Foundation, *Medicaid Enrollees and Work Requirements: Lessons from the TANF Experience*, Aug. 18, 2017, www.kff.org/medicaid/issue-brief/medicaid-enrollees-and-work-requirements-lessons-from-the-tanf-experience/.

[6] Falk et al., *supra* note 4, at 19–20.

[7] Liz Schott, Ladonna Pavetti, and Ife Floyd, Center on Budget and Policy Priorities, *How States Use Federal and State Funds under the TANF Block Grant*, Oct. 15, 2015, www.cbpp.org/research/family-income-support/how-states-use-federal-and-state-funds-under-the-tanf-block-grant.

Despite TANF's underlying premise, work is not necessarily a pathway out of poverty because low-wage workers earn very little money (the federal minimum wage has been $7.25 since 2009) and often have unpredictable hours, while also bearing the costs of working, such as child care, transportation, and uniforms. Meanwhile, some people have severe barriers to work, such as limited education, criminal histories, domestic violence, mental and physical disabilities, or addiction issues.[8] Imposing work requirements on these people pushes them deeper in poverty and homelessness.

Housing: The federal government subsidizes housing for low-income people through a variety of programs, including public housing and housing choice vouchers, which pay a portion of rent in the private housing market. Yet only 25 percent of eligible families receive housing assistance due to limited funding.[9] Currently, the law governing subsidized housing programs does not contain work requirements, although most residents of public housing must meet an eight-hour monthly community service or self-sufficiency requirement.

Since 1999, HUD has granted permission to nine public housing authorities (PHAs) and seven housing choice voucher programs to impose work requirements, with the goal of moving residents to self-sufficiency.[10] While the programs vary in terms of the definition of work, hour requirements, and enforcement, residents can face eviction for failure to comply. Trump's 2019 budget included work requirements for all public housing residents.[11] Under his budget, which is being codified in proposed legislation, housing agencies and owners of property that accept subsidized funding could evict or terminate subsidies for households with able-bodied, working-age adults who do not work or participate in training or education programs. Notably, Trump's budget does not include money for services to assist people in obtaining or maintaining work, such as job training, child care, or transportation.

As with TANF, work requirements in housing have not been shown to have a meaningful impact on either work or poverty rates. To begin with, only 6 percent of subsidized households contain working-age, nondisabled members who are unemployed.[12] More than half these households are headed by elderly or disabled residents; these are populations that either cannot or should not be required to work.[13]

8 Musumeci & Zur, *supra* note 5.

9 Hahn et al., *supra* note 3, at 14 (describing work requirements in subsidized housing programs).

10 Diane K. Levy, Leiha Edmonds & Jasmine Simington, Urban Institute, *Work Requirements in Public Housing Authorities: Experiences to Date and Knowledge Gaps*, Jan. 2018, www.urban.org/sites/default/files/publication/95821/work-requirements-in-public-housing-authorities.pdf.

11 Office of Management and Budget, Budget of the U.S. Government, *Efficient, Effective, Accountable: An American Budget, Fiscal Year 2019*, at 64, www.whitehouse.gov/wp-content/uploads/2018/02/budget-fy2019.pdf.

12 Alicia Mazzara & Barbara Sard, Center on Budget and Policy Priorities, *Chart Book: Employment and Earnings for Households Receiving Federal Rental Assistance*, Feb. 5, 2018, www.cbpp.org/research/housing/chart-book-employment-and-earnings-for-households-receiving-federal-rental.

13 *Id.*

A study of work requirements within Charlotte, North Carolina's PHA found modest impacts on work rates and negligible impacts on income. By contrast, numerous studies show that *voluntary* work programs that provide support and services to job seekers and workers are more effective at improving work rates and reducing poverty than mandatory requirements.[14]

Medicaid: Work requirements are expanding into Medicaid, which is the nation's health insurance program for the needy and disabled that covers 74 million Americans. Under the Medicaid program, states can seek demonstration waivers under Section 1115 of the Medicaid statute to experiment with new policies. The Trump administration has advised states that it will approve waivers so that states can require Medicaid recipients to work. By July 2018, the Centers for Medicare and Medicaid Services granted waivers to Kentucky, New Hampshire, Indiana, and Arkansas and was considering seven other similar state requests.[15] A federal judge halted implementation of the Kentucky waiver and sent it back to the Department of Health and Human Services (HHS) for further review.

Experts have long debated the wisdom of work requirements in Medicaid: would they provide a pathway out of poverty or hurt vulnerable people given that health is a precondition to work?[16] A survey of low-income adults in Kentucky found that participants "thought it was unrealistic to assume that requiring people to work as a condition for receiving health insurance would enable them to rise out of poverty and smoothly transition to employer-based coverage."[17] Among the focus group participants, one-third said they were working but earning such low wages that they still qualified for Medicaid. Other participants reported that they struggled to find work due to prior convictions, lack of access to public transportation, or difficulty passing a credit check. Still others were either mentally or physically disabled or homeless.

This survey mirrors nationwide research. Six in ten adults on Medicaid are already working; of those who do not work, 35 percent are disabled, 28 percent are family caregivers, 18 percent are in school, 8 percent are retired, and 8 percent

[14] *See* James A. Riccio, MDRC, *Sustained Earnings Gains for Residents in a Public Housing Jobs Program*, Jan. 2019, www.mdrc.org/publication/sustained-earnings-gains-residents-public-housing-jobs-program; Abt Associates, *Evaluation of the Compass Family Self-Sufficiency (FSS) Programs Administered in Partnership with Public Housing Agencies in Lynn and Cambridge, Massachusetts*, Sept. 2017, http://abtassociates.com/AbtAssociates/files/3c/3c791568–51a4–4934-9d99–0c9cef7fdbb9.pdf.

[15] *See* Kaiser Family Foundation, *Medicaid Waiver Tracker: Which States Have Approved and Pending Section 115 Medicaid Waivers?*, May 8, 2018, www.kff.org/medicaid/issue-brief/which-states-have-approved-and-pending-section-1115-medicaid-waivers/.

[16] Jessica Greene, *What Medicaid Recipients and Other Low-Income Adults Think about Medicaid Work Requirements*, HEALTH AFFAIRS, Aug. 30, 2017, www.healthaffairs.org/do/10.1377/hblog20170830.061699/full/.

[17] *Id.*

cannot find jobs.[18] Moreover, a Medicaid work requirement does little to shift people toward employer-based health coverage because the jobs that low-income people obtain, such as in agriculture or food service, typically do not offer health benefits.

SNAP: States are also enforcing work requirements for Supplemental Nutrition Assistance Benefits (SNAP), commonly known as food stamps. Currently, about 40 million people receive SNAP, and the average income of SNAP households is less than $10,000 per year. The average benefit is $126 per person per month (or $1.40 per person per meal); amounts hinge on family size and income.[19] Work requirements are not new to SNAP; Congress authorized them in the 1996 welfare reform law that also created TANF. [20] SNAP requires that able-bodied adults between the ages of 18 and 49 without dependents (known as ABAWD) work 80 hours per month unless they fall within an exception, otherwise they cannot receive benefits for more than three months within three years.[21] States can get waivers from this SNAP time limit if their unemployment rate hits 10 percent. In 2009, during the economic recession, the Obama administration suspended SNAP work requirements nationwide. As the economy improves, however, states are reimposing time limits and work requirements with federal permission.

Republicans are proposing to tighten SNAP's work requirements and time limits further. In February 2018, the US Department of Agriculture (USDA) began soliciting public comment on a proposal to eliminate the remaining time limit waivers, which still exist in five states and parts of 28 other states.[22] President Trump's 2019 budget proposal goes even further. It limits waivers to counties where unemployment is at least 10 percent for more than a year, imposes work requirements on adults between the ages of 50 and 62, and limits work exemptions.[23]

[18] Rachel Garfield, Robin Rudowitz & Anthony Damico, Kaiser Family Foundation, *Understanding the Intersection of Medicaid and Work*, Dec. 7, 2017, www.kff.org/medicaid/issue-brief/understanding-the-intersection-of-medicaid-and-work/.

[19] Center on Budget and Policy Priorities, *A Quick Guide to SNAP Eligibility and Benefits*, Feb. 7, 2018, www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits.

[20] *See* Hahn et al., *supra* note 3.

[21] USDA, Supplemental Nutrition Assistance Program: Able-Bodied Adults without Dependents, www.fns.usda.gov/snap/able-bodied-adults-without-dependents-abawds.

[22] Supplemental Nutrition Assistance Program: Requirements and Services for Able-Bodied Adults without Dependents: Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 8013 (Feb. 23, 2018), www.federalregister.gov/documents/2018/02/23/2018-03752/supplemental-nutrition-assistance-program-requirements-and-services-for-able-bodied-adults-without.

[23] Caitlin Dewey, The Trump Administration Takes Its First Big Step toward Stricter Work Requirements for Food Stamps, WASH. POST (Feb. 22, 2018), www.washingtonpost.com/news/wonk/wp/2018/02/22/the-trump-administration-takes-its-first-big-step-toward-stricter-work-requirements-for-food-stamps/.

Overall, the budget aims to cut SNAP funding by $213.5 billion over 10 years. In support of the budget, Agriculture Secretary Sonny Perdue said, "Too many states have asked to waive work requirements, abdicating their responsibility to move participants to self-sufficiency."[24]

However, his rhetoric does not match the reality. To begin with, SNAP benefits decrease incrementally with income, so there is no disincentive to work. Moreover, according to the USDA, 43 percent of SNAP participants live in a household with earnings.[25] At the same time, 68 percent of recipients are children, elderly, disabled, or caretakers.[26] Unemployed ABAWDs are only about 6.8 percent of SNAP recipients, and this population includes people with serious barriers to work, such as people with criminal convictions, individuals suffering undiagnosed mental illness, veterans, and teenagers aging out of foster care.

Under the leadership of former Republican Governor Scott Walker, Wisconsin has been particularly aggressive in toughening work requirements for SNAP recipients. In 2018, the Wisconsin legislature passed a bill raising the amount of time an ABAWD has to spend job searching, and the state also added parents of children between the ages of 6 and 19 to the list of people who must meet work requirements (although this change will require a federally approved waiver).[27] Since work requirements went into effect in Wisconsin in 2013, 25,000 of 700,000 SNAP recipients have found work; the state does not know what happened to the 86,000 people who lost their SNAP eligibility under these rules.[28] In Michigan, the State Senate passed a bill in April 2018 to require Medicaid recipients to work – but the bill exempts rural, predominantly white districts with high unemployment rates from the requirement. This has led to charges that the proposed legislation is racially discriminatory.[29] As two commentators opined, "If work requirements were a good idea, conservative Michigan legislators wouldn't need to exempt their rural constituents."[30]

24 Press Release, USDA, USDA Seeks Ideas to Help SNAP Participants Become Independent, Feb. 22, 2018, www.usda.gov/media/press-releases/2018/02/22/usda-seeks-ideas-help-snap-participants-become-independent.

25 USDA, Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2015, Jan. 17, 2018, www.fns.usda.gov/snap/characteristics-supplemental-nutrition-assistance-households-fiscal-year-2015.

26 *See* Hahn et al., *supra* note 3.

27 *See* Robert Samuels, *Wisconsin Is the GOP Model for "Welfare Reform": But as Work Requirements Grow, So Does One Family's Desperation*, Wash. Post, Apr. 22, 2018, www.washingtonpost.com/politics/you-ever-think-the-government-just-dont-want-to-help-as-requirements-for-welfare-grow-so-does-one-familys-desperation/2018/04/22/351cb27a-2315-11e8-badd-7c9f29a55815_story.html?utm_term=.a57ad38786a7.

28 *Id.*

29 Nicholas Bagley & Eli Savit, *Michigan's Discriminatory Work Requirements*, N.Y Times, May 8, 2018, www.nytimes.com/2018/05/08/opinion/michigan-medicaid-work-requirement.html.

30 *Id.*

Family Caps

TANF permits states to impose family caps, or limits on the amount of benefits to families who have another child while on welfare. The idea behind family caps is to reduce the birth rate among unmarried, poor women, thereby assuming that poor women are irresponsible. In truth, however, the average number of children for welfare mothers is 1.8,[31] which is lower than the national average of 2.1.

Nevertheless, at peak, 24 states had TANF family caps.[32] Seven states have since rescinded these policies, including California in 2016.[33] These states experienced what study after study confirms – family caps have no impact on birth rates.[34] This is because most welfare recipients are not aware of family cap policies, thus making it a nonfactor in their decision making. Moreover, additional welfare payments are too paltry to justify having a child. As one study concluded, "It appears that women do not make decisions about the birth of their children based on the addition of $42 per month in … benefits."[35] Not only are family caps unjustified, but, by cutting support to families, the caps are also "harmful to children, cause lifelong damage to their learning and development, and increase the 'deep poverty rate' of children by 13 percent."[36]

Nevertheless, the proposed Trump 2019 budget would extend family caps into the SNAP program, capping benefits at six persons per household. This would impact 80,000 SNAP households; the cap would max SNAP benefits at $925 per month. This means, for example, that a family of nine would see their benefits decrease from $4.87 per day per person to $3.43 per day per person. This is "significantly lower than even the most conservative amount the USDA says is needed to feed a family."[37] The cap may intend to reduce birth rates, but it would instead reduce benefits for multi-generational families who live together for financial and child care support.

[31] Office of Family Assistance, U.S. Dep't of Health & Human Svcs., Characteristics and Financial Circumstances of TANF Recipients, Fiscal Year 2010, www.acf.hhs.gov/ofa/resource/character/fy2010/fy2010-chap10-ys-final.

[32] Berkeley Law Center on Reproductive Rights and Justice, *Bringing Families Out of "Cap"tivity: The Path toward Abolishing Welfare Family Caps*, Aug. 2016, www.law.berkeley.edu/wp-content/uploads/2015/04/2016-Caps_FA2.pdf.

[33] *Id.*

[34] Diana Romero & Madina Agénor, *US Fertility Prevention as Poverty Prevention: An Empirical Question and Social Justice Issue*, 19 Women's Health Issues, 355 (Nov.–Dec. 2009), www.ncbi.nlm.nih.gov/pmc/articles/PMC2775139/.

[35] Patricia Donovan, *Does the Family Cap Influence Birthrates? Two New Studies Say "No,"* 1 The Guttmacher Report 10–11 (Feb. 1998), www.guttmacher.org/gpr/1998/02/does-family-cap-influence-birthrates-two-new-studies-say-no.

[36] Teresa Wiltz, The Pew Charitable Trusts, *Welfare Caps: More Harm Than Good?*, Stateline, July 13, 2016, www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/07/13/welfare-caps-more-harm-than-good

[37] Caitlin Dewey, *Trump's Budget Would Cut Off Food for Poor People if They Have Too Many Kids*, Wash. Post, May 24, 2017, www.washingtonpost.com/news/wonk/wp/2017/05/23/trumps-budget-would-penalize-poor-people-for-having-too-many-kids/?utm_term=.6fec558cb787.

Drug Tests

TANF gives states the authority to require drug testing as a condition of welfare receipt. For its supporters, welfare drug testing is a means to combat drug abuse and reduce drug crimes, while also ensuring that government funds are not used to pay for illegal substances. Today, 15 states mandate drug testing under TANF, and 17 other states are currently considering it.[38] Federal courts have already struck down drug testing laws in Michigan and Florida as unconstitutional under the Fourth Amendment because they constituted suspicionless government searches.[39] In response to this litigation, several states have retooled their drug testing laws to require reasonable suspicion, which, depending on the state, can arise from applicant job histories, criminal backgrounds, personal observations, or questionnaires.[40]

As with other behavior modification tools, drug testing in the TANF program has proved costly and ineffective, thus raising doubts that it should be expanded into other government programs. For example, under TANF in 2014, seven states spent more than $1 million on drug testing, but in six of them fewer than 1 percent of persons tested positive (as compared to estimates of 9.4 percent of the general population).[41] Drug testing is also arbitrary given the weak correlation between poverty and drug addiction.[42] Kaaryn Gustafson describes drug testing as a "degradation ceremony," in which politicians "engage in the dramaturgy of poverty, producing stories, meanings, and symbols that then shape the lives of poor parents and their children."[43]

Nevertheless, drug testing is now creeping into other forms of government assistance. Republicans in Congress have introduced bills to require drug tests for SNAP, TANF, rental assistance, and unemployment insurance.[44] In addition, President Trump has signaled that his administration will approve program waivers to permit drug testing in a variety of safety-net programs. Some states are also eager to

[38] National Conference of State Legislatures (NCSL), Drug Testing for Welfare Recipients and Public Assistance, Mar. 24, 2017, www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx.

[39] *Marchwinski* v. *Howard*, 60 Fed. App'x 601 (6th Cir. 2003) (in this case, the en banc court was evenly split, thus the district court decision was affirmed per 6th Circuit rules); *Lebron* v. *Sec. of the Fla. Dep't of Children and Families*, 772 F.3d 1352 (11th Cir. 2014).

[40] *See* NCSL, *supra* note 37.

[41] Bryce Covert & Josh Israel, *What 7 States Discovered after Spending More Than $1 Million Drug Testing Welfare Recipients*, Think Progress, Feb. 26, 2015, https://thinkprogress.org/what-7-states-discovered-after-spending-more-than-1-million-drug-testing-welfare-recipients-c346e0b4305d/.

[42] Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 Wm. & Mary Bill Rts. J. 751, 776–77 (2011).

[43] Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. Irvine L Rev. 297, 321 (2013).

[44] *See, e.g.*, H.R. 2179, Drug Testing for Welfare Recipients Act (2017) (introduced by Rep. Rouzer R-NC).

jump on this bandwagon. Consider the SNAP program. Currently, SNAP allows drug testing only in two circumstances. First, there are five states that take advantage of a federal statutory option and permit people convicted of drug felonies to remain eligible for SNAP – but only if they submit to a drug test. Second, an individual disqualified from TANF for failing or refusing to take a drug test can be simultaneously disqualified from SNAP.[45]

Several Republican politicians are pushing for more. In December 2017, Governor Walker of Wisconsin ordered implementation of the state's drug testing law for SNAP benefits, despite the absence of a required waiver from the USDA,[46] and he also rallied 12 other governors to sign a letter asking the USDA to approve drug testing waivers. His optimism that the waiver will eventually be granted appears sound given that the USDA, which oversees the SNAP program, issued a press release in December 2017 stating "how important it is for states to be given flexibility to achieve the desired goal of self-sufficiency for people." [47]

With regard to Unemployment Insurance (UI), states have not historically conducted drug tests on applicants because the Social Security Act, which governs the federal-state UI program, only allows states to add qualifying requirements that relate to the "fact or cause" of a worker's unemployment.[48] Nevertheless, as unemployment ballooned during the recession, some states wanted to conduct drug testing, assuming that it would cut down their eligible UI population and, thus, costs.[49] In 2012, Congress passed a compromise bill that allows states to test UI claimants under two conditions: (1) when the worker loses their job due to illegal drug use; and (2) when the worker applies for jobs in an occupation that regularly conducts drug testing.[50] Under the Obama administration, the Department of Labor (DOL) then issued regulations defining the latter category of jobs to mean occupations involving transportation, guns, or positions where testing is legally required. Three states subsequently passed laws permitting drug testing pursuant to these regulations.[51]

45 Maggie McCarty et al., Congressional Research Service, *Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance*, Nov. 28, 2016, at 11, https://fas.org/sgp/crs/misc/R42394.pdf.

46 *See* Vann R. Newkirk II, *Wisconsin's Welfare Overhaul Is Almost Complete*, The Atlantic, Dec. 12, 2017, www.theatlantic.com/politics/archive/2017/12/wisconsin-drug-testing-food-stamp-program-walker/547997/.

47 Press Release, USDA, *USDA Seeks Ideas to Help SNAP Participants Become Independent*, Feb. 22, 2018, www.usda.gov/media/press-releases/2018/02/22/usda-seeks-ideas-help-snap-participants-become-independent.

48 Rontel Batie & George Wentworth, *Drug Testing Unemployment Insurance Applicants: An Unconstitutional Solution in Search of a Problem*, National Employment Law Project Policy Brief, Feb. 2017, www.nelp.org/content/uploads/Drug-Testing-Unemployment-Insurance-Applicants.pdf.

49 *Id.*

50 *Id.*

51 *Id.*

However, congressional Republicans[52] and several Republican governors[53] were unhappy with what they viewed as an unduly narrow interpretation by DOL, and Congress thus repealed the Obama-era regulation pursuant to the Congressional Review Act. Then, in January 2018, DOL announced that it would seek public comment on a broader rule that allows drug testing in a wider array of occupations, and the rulemaking is moving forward.[54]

The relationship between subsidized housing and drug testing is a bit more complex. There are no federal policies permitting or prohibiting drug testing as a condition of moving into public housing.[55] Instead, federal housing law requires that local PHAs deny admission to households that include tenants determined to be engaging in illegal drug use or alcohol use that interferes with other residents' ability to enjoy the premises.[56] In addition, PHAs may enforce a "One Strike" policy, under which a household faces eviction if one of its members engages in drug-related criminal activity – even if the leaseholder has no knowledge of or control over the activity.[57] Congress enacted this policy as part of the War on Drugs in the 1980s as a way to reduce drug abuse and drug-related crime and to make subsidized housing safer.[58] Yet policies and enforcement vary widely by jurisdiction, and thus, "similar households in different locations may encounter radically different rules when attempting to access or retain housing assistance."[59]

A few PHAs have proposed or adopted drug testing for their public housing residents, such as the Norwalk Housing Authority in Connecticut. Similar proposals by PHAs in Chicago and Flint were dropped after legal opposition.[60] For their part, private landlords can mandate drug testing for tenants who receive federally subsidized vouchers, and some landlords have done so.[61] As private actors, they do not face

[52] Human Resources Subcommittee Staff, Chairman Kevin Brady, Ways and Means, *CRA: UI Drug Testing Overreach*, https://waysandmeans.house.gov/wp-content/uploads/2017/02/CRA-UI-Drug-Testing-Background.pdf.

[53] J. B. Wogan, *What the Unemployment Drug-Testing Bill That Trump Just Signed Means for States*, Governing, Mar. 28, 2107, www.governing.com/topics/health-human-services/gov-congress-drug-testing-unemployment-states-trump.html.

[54] *See* Lydia Wheeler, *Labor Department Eyes Drug Test Rule for Unemployment Pay*, The Hill, Jan. 3, 2018, http://thehill.com/business-a-lobbying/367154-labor-department-eyes-drug-test-rule-for-unemployment-pay.

[55] Marah A. Curtis, Sarah Garlington & Lisa S. Schottenfeld, *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 Cityscape 37 (2013) (summarizing range of approaches used nationwide), www.huduser.gov/portal/periodicals/cityscpe/vol15num3/ch2.pdf.

[56] *See* McCarty et al., *supra* note 45, at 19–20 (describing the complexities of crime-related restrictions in housing assistance).

[57] The Supreme Court upheld this One Strike policy in *U.S. Dept. of Housing and Urban Development* v. *Rucker*, 535 U.S. 125 (2002).

[58] Lahny R. Silva, *Collateral Damage: A Public Housing Consequence of the "War on Drugs,"* 5 U.C. Irvine L. Rev. 783, 789–92 (2015), www.law.uci.edu/lawreview/vol5/no4/Silva.pdf.

[59] Curtis et al., *supra* note 55, at 38.

[60] *See* McCarty et al., *supra* note 45, at 17.

[61] *Id.*

the same constitutional constraints as government entities. Meanwhile, congressional Republicans have introduced a variety of bills to mandate drug testing in housing programs nationwide.[62] At the state level, Wisconsin will soon begin drug screening for its public housing residents;[63] this will likely spur other states to follow given Wisconsin's role as a leader in public benefits reform.

Moreover, Wisconsin has also sought a waiver from HHS to drug test Medicaid recipients and to mandate treatment for anyone with positive test results.[64] If granted, it would be the first state with mandatory drug screening for Medicaid recipients. And, whither goes Wisconsin, so do other – mostly Republican – states.

PUNISHING THE POOR

We have much more data today about the effectiveness of behavior control mechanisms than we did when welfare reform went into effect in 1997. As discussed previously, the evidence shows that they are counterproductive and harmful, particularly to children. These tools are also unnecessary because poor Americans share the same values and work ethic as mainstream Americans.[65] The question thus arises why Republicans are pushing to expand these tools into additional social welfare programs. To be sure, there are some economic similarities between the early 1990s and today – both eras are marked by low unemployment and a booming economy, making it easier to fault nonworkers than during recessionary times. The highly polarized political climate is also similar. In 1992, as welfare reform proposals were gathering steam, Lucie Williams explained that they were driven by "an ideology of division," which "sought to divert workers' justified anger from the wealthy and to focus it on welfare recipients."[66] This explanation holds particular resonance today.

The three main figures behind welfare creep are all white, male, Republican politicians. First, former Speaker of the House Paul Ryan, a Republican from Wisconsin, burnished a reputation throughout his career as a policy wonk with poverty expertise. (He joined Congress in 1999; ran for Vice President in 2012; and served as Speaker from 2015 to 2018, before retiring from Congress). He regularly hyped the supposed success of welfare reform and advocated for block grants across the safety net. He cautioned that the safety net was becoming a "hammock that lulls able-bodied people to lives of dependency and complacency, that drains them of

[62] *See e.g.*, H.R. 2179, Drug Testing for Welfare Recipients Act (2017) (Rep. Rouzer R-NC).
[63] Laurel White, *Assembly Approves Walker Welfare Package*, Wis. Public Radio, Feb. 15, 2018, www.wpr.org/assembly-takes-walker-welfare-package.
[64] Paige Winfield Cunningham, *Want Medicaid Coverage? A Drug Test Should Come First, Wisconsin Governor Says*, Wash. Post, Apr. 2, 2017, www.washingtonpost.com/powerpost/want-medicaid-coverage-a-drug-test-should-come-first-wisconsin-governor-says/2017/04/02/190068f0-160c-11e7-ada0-1489b735b3a3_story.html?utm_term=.3cb38513144b.
[65] William Julius Wilson, When Work Disappears 181 (1997).
[66] Williams, *supra* note 2, at 741–42.

their will and their incentive to make the most of their lives."[67] Although he later walked back these comments, he issued lengthy antipoverty plans to great fanfare in 2014 and 2016 that identified harms of poverty, but centered on cutting expenditures while expanding work requirements, public-private partnerships, and state flexibility.[68] The emphasis on federalism is a key component of welfare creep.

Second, former Governor Scott Walker of Wisconsin, elected in 2010 and defeated in 2018, focused early in his tenure on (successfully) weakening organized labor in his state and then turned his attention to behavior modification proposals. In early 2018, he steered the Republican-controlled Wisconsin legislature to pass a slew of public assistance reform bills that, among other things, expand work requirements for food stamps; require Medicaid recipients to maintain health savings accounts; cut Medicaid benefits for parents behind in child support payments; and require drug testing and employment for people in subsidized housing.[69] These bills passed with nary a Democratic vote. Under his leadership, Wisconsin was also seeking a federal waiver to adopt work requirements within Medicaid. Conservative activists are touting Wisconsin's approach as a blueprint for the Republican Party, and a conservative advocacy group, the Foundation for Government Accountability, has staff in 14 states pushing for similar reforms.[70] Notably, Walker was self-consciously following in the footsteps of former Wisconsin Governor Tommy Thompson who, in the mid-1990s, implemented many of the welfare reform ideas that Congress later expanded nationally in TANF.[71] The state-level push for welfare creep will exacerbate red and blue state differences.

Third, President Trump is actively peddling behavior modification proposals. Experts attribute the ascendance of President Trump to his appeal to white, working-class voters who have faced decades of wage stagnation and job losses due to globalization and technological displacement.[72] Trump was able to channel their discontent and funnel it toward minority groups, immigrants, and the poor, who he

[67] Greg Sargent, *Scott Walker and the Hammock Theory of Poverty*, Wash. Post, Feb. 3, 2015, www.washingtonpost.com/blogs/plum-line/wp/2015/02/03/scott-walker-and-the-hammock-theory-of-poverty/?utm_term=.ddf26ee6c382.

[68] Chairman Paul Ryan, House Budget Committee Majority Staff, *Expanding Opportunity in America* (2014), http://budget.house.gov/uploadedfiles/expanding_opportunity_in_america.pdf; Paul Ryan, *A Better Way* (2016), https://abetterway.speaker.gov/.

[69] Scott Bauer, *Walker Signs 9 Bills Limiting Wisconsin Welfare into Law*, U.S. News & World Rep., Apr. 10, 2018, www.usnews.com/news/best-states/wisconsin/articles/2018-04-10/walker-to-sign-9-welfare-overhaul-bills-into-law.

[70] Reid Wilson, *Wisconsin Welfare Reform Could Be Model for GOP*, The Hill, Feb. 21, 2018, http://thehill.com/homenews/state-watch/374781-wisconsin-welfare-reform-could-be-model-for-gop; Jen Fifield, *Where the Work-for-Welfare Movement Is Heading*, The Pew Charitable Trusts, Stateline, Jan. 25, 2018, www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/25/where-the-work-for-welfare-movement-is-heading.

[71] *See* Williams, *supra* note 2, at 726.

[72] See Andrew Gelman & Julia Azar, *19 Things We Learned from the 2016 Election*, 9–10 (Sep. 19, 2017), www.stat.columbia.edu/~gelman/research/published/what_learned_in_2016_5.pdf; Brian F. Schaffner, Matthew MacWilliams & Tatishe Nteta, *Understanding White*

painted as undeserving interlopers. In turn, these working-class individuals see themselves as "victimized by the poor."[73] Katherine Cramer calls this strategy a "politics of resentment," in which "[p]eople understand their circumstances as the fault of guilty and less deserving social groups, not as the product of broad social, economic, and political forces."[74]

In December 2017, after Trump signed a massive tax cut package whose benefits flow to the wealthiest Americans and corporations, Trump and his Republican counterparts in the House and Senate immediately began proposing cuts to public benefits programs, along with behavior modification requirements. In his 2018 State of the Union address, Trump threatened to cut off public assistance to recipients unwilling to do a "hard day's work."[75] He followed up this rhetoric in April 2018, signing an executive order directing federal agencies to strengthen and introduce new work requirements for recipients of Medicaid, food stamps, housing benefits, and TANF.[76] As a result, federal agencies are expected give states much more leeway in adopting work requirements and other behavior control mechanisms and, in turn, this will likely fuel a red and blue state policy divergence.

These Republican attacks on the poor weaken societal responsibility for aiding the needy and divert the nation's attention from the fortunes the wealthy are amassing. Currently, the top 1 percent of the wealthy hold one-third of the nation's assets, while the top 1 percent of earners take home one-fifth of the nation's total income. Although states vary in their degrees of economic inequality, inequality has risen in each and every state since the mid-1970s.[77] This widening economic inequality shows no signs of slowing down. Moreover, higher levels of economic inequality at the state level are associated with a corresponding safety-net retrenchment.[78]

In advocating for welfare creep, Republicans are seizing advantage of several dynamics within the American polity. Since the founding of America, the poor have been categorized as either deserving – meaning they cannot be blamed for the poverty, such as children, widows, and the disabled, or undeserving – meaning they should be self-sufficient, such as able-bodied adults. The modern welfare state,

Polarization in the 2016 Vote for President: The Sobering Role of Racism and Sexism, 133 Pol. Sci. Quart. 9 (2018).

73 Gustafson, *supra* note 43, at 354–55.

74 Katherine J. Cramer, The Politics of Resentment: Rural Consciousness in Wisconsin and the Rise of Scott Walker 9 (2017).

75 President Donald J. Trump's State of the Union Address, Jan. 30, 2018, www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/.

76 Executive Order Reducing Poverty in America by Promoting Opportunity and Economic Mobility, Apr. 10, 2018, www.whitehouse.gov/presidential-actions/executive-order-reducing-poverty-america-promoting-opportunity-economic-mobility/.

77 Lyle Scruggs & Thomas Hayes, *The Influence of Inequality on Welfare Generosity: Evidence from the US States*, 45 Pol. & Soc. 35, 38–39 (2017).

78 *Id.* at 51.

created during the New Deal, reinforced this dichotomy.[79] Social insurance programs designed for white working men, such as social security and unemployment insurance, have carried no stigma, provided generous benefits pursuant to objective criteria, and been federally administered. By contrast, cash assistance programs for the undeserving, such as single mothers, became stingy, stigmatized, and state administered. The relentless blame targeted at the "undeserving" makes them easy political targets. Meanwhile, it ignores structural determinants of poverty such as globalization, the weakening of unions, and economic shifts from a manufacturing to service economy, as well as the lack of living wage, affordable housing, or child care for American workers.

The stigma around poverty is the flipside of the American conception of our nation as a meritocracy, where the most talented and hard-working rise to the top. In this view, failure to thrive in a capitalist economy is equated with moral failings.[80] However, Americans are not as upwardly mobile as we like to think.[81] In fact, we are less mobile than other developed countries.[82] Forty percent of children born in the bottom quintile of the income distribution will stay there. The same "stickiness" is present at the top quintile. In short, one's economic standing in life is largely determined by the "birth lottery," that is, who your parents are.[83] Indeed, intergenerational wealth transfers, or inheritance, is a major determinant of economic stability.[84] While individual merit certainly plays a role in one's life outcomes, it is blunted by the effects of discrimination and growing up poor.[85] Meanwhile, rich people get ample government benefits, such as tax deductions for home mortgages and employer-provided health care worth thousands of dollars, but these are viewed as earned, rather than as government charity. As Wendy Bach explains, these programs are designed to incentivize behavior, but their inclusion in the tax code submerges their nature as social support.[86]

Race underlies these political dynamics. Martin Gilens concludes that Americans "hate" welfare because they associate it with African Americans, who they stereotype as lazy.[87] Although African Americans are disproportionately poor, the majority of public assistance recipients are white. Still, the media relentlessly portrays poor people as black in its stories and images, and this has a large impact on public

79 *See* Michele Gilman, *The Return of the Welfare Queen*, 22 J. of Gender, Soc. Pol'y & the L., 247, 257–59 (2014).
80 Gustafson, *supra* note 43, at 343.
81 Stephen J. McNamee & Robert K. Miller Jr., The Meritocracy Myth 61 (2d ed. 2009).
82 Raj Chetty et al., *Economic Mobility*, in Pathways: State of the States 2015 55 (2015).
83 McNamee & Miller, *supra* note 79, at 60. *See also* David B. Grusky, Marybeth J. Mattingly & Charles Varner, *Executive Summary*, Pathways, State of the States: The Poverty and Inequality Report 2015 6 (2015) (discussing state variations in social mobility).
84 McNamee & Miller, *supra* note 81, at 61.
85 *Id.* at 221.
86 Wendy Bach, *Poor Support/Rich Support: (Re)Viewing the American Social Welfare State*, Fla. Tax Rev.13–14 (2017).
87 Martin Gilens, Why Americans Hate Welfare (1999).

opinion.[88] The very word *welfare* evokes an emotional response that "exploit[s] racial animus" – and that is the very point.[89] Racial animus toward the poor is crystallized in the trope of the welfare queen, who is portrayed as a lazy, black mother of too many children who refuses to work while living off government largesse. President Reagan introduced this stock character, and she remains a part of political theater. The truth is that most TANF recipients are not African American; they stay in the program for short-term spells; they marry at the same rates of other women; and they have long worked to meet basic expenses.[90] "The overriding myth continues to be that welfare persists because of the characteristics of the families, not because of larger, structural conditions of society," such as discrimination, wage stagnation, and lack of work-related benefits.[91] Despite the rhetoric, the political salience of the welfare queen far outstrips her budgetary impact – TANF is a meager 0.47 percent of annual federal expenditures.

In 1996, President Clinton signed welfare reform to position himself as a centrist; he and other Democrats also said that they hoped linking welfare with work would ultimately increase public support for safety-net programs.[92] Yet this never happened. As Joe Soss and Sanford Schram explain, "[W]elfare reform did not alter the way Americans distinguish the deserving from the undeserving or think about policies for the disadvantaged" because welfare does not touch the lives of most Americans, thus leaving "elite rhetoric, media frames, and widely held cultural beliefs" firmly in place.[93] Today's Democrats appear to have recognized the folly of championing the poor by making their lives harsher. Thus, behavior modification proposals no longer garner significant bipartisan support. Instead, Republicans are making welfare creep a central part of their domestic policy prescriptions. In turn, this is driving a red and blue state divide for poor Americans.

PATCHWORK FEDERALISM FOR THE POOR

The Constitution allocates power between the federal and state levels of government, making the core question of federalism about where to set the boundaries. Supporters of increased federalism – that is, greater power to the states – argue that it moves decision making closer to the people, pushes states to serve as laboratories of innovation, and increases efficiencies resulting from more localized service

88 *Id.* at 134–35.

89 Kenneth J. Neubeck & Noel A. Cazenave: WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR 3 (2001).

90 Gilman, *supra* note 79, at 263–64.

91 Joel F. Handler & Yeheskel Hasenfeld, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 158 (2009).

92 *See* Jason DeParle, AMERICAN DREAM: THREE WOMEN, TEN KIDS, AND A NATION'S DRIVE TO END WELFARE 138–54 (2005).

93 Joe Soss & Sanford F. Schram, *Welfare Reform as a Failed Political Strategy: Evidence and Explanations for the Stability of Public Opinion*, 24 FOCUS 17, 21 (2006).

provision.[94] Federalism rhetoric was potent and effective during the debates that lead to enactment of TANF.[95] While federalism is neither inherently progressive nor conservative,[96] devolution to states on issues of redistribution is generally bad for poor people.[97] As compared to the federal government, states tend to adopt more punitive redistribution policies and are less responsive to the needs of the poor. In addition, federalism makes it harder for antipoverty advocates to lobby because they must advocate in 50, rather than one, jurisdiction.[98] Devolution of social welfare policy also drives massive disparities between states that make one's ability to weather or even overcome poverty partly dependent on the state where they live.[99]

Today, public assistance in the United States is a shared federal and state undertaking. By contrast, in early American history, states and localities carried all the burdens of poor relief. The federal government began to play a role after the Civil War, by establishing pensions for veterans and their widows. Still, the federal role remained small until the Great Depression of the 1930s, when states were overwhelmed by massive need. The New Deal, spearheaded by President Roosevelt, made the federal government central to poor relief through the implementation of social security, unemployment insurance, aid to families with children, jobs programs, and other social welfare measures. The New Deal carried out these programs through a system of cooperative federalism, in which the federal government funded the bulk of public assistance programs and set program parameters, while states administered funds to beneficiaries and sometimes contributed a share to program expenditures. Lyndon Johnson's Great Society programs, such as Medicaid, continued this model.

By contrast, TANF represented a shift to New Federalism, in which the federal government provides a set level of funding in the form of a block grant and gives the states wider discretion to set eligibility and enforcement standards. Yet as Andrew Hammond has explained, the TANF block grants not only resulted in massive disparities among states but also in an overall reduction in spending on poverty alleviation and a concurrent inability of the federal government to respond to economic and natural emergencies.[100] For this reason, he cautions progressive federalists – those who see states as a bulwark against the current conservative,

94 *See, e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991) (setting forth federalism justifications).

95 *See* Sheryll D. Cashin, *Federalism, Welfare Reform and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 Colum. L. Rev. 552, 553 (1999).

96 *See* Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 St. Louis L. 997 (2015).

97 David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. Pa. L. Rev. 541 (2008).

98 *See* Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs*, 14 Yale L. & Pol'y Rev. 123, 136 (1996).

99 Sarah K. Bruch, Marcia K. Meyers & Janet C. Gornick, *The Consequences of Decentralization: Inequality in Safety Net Provision in the Post-Welfare Reform Era*, 92 Soc. Svc. Rev. 3, 23 (2018).

100 Andrew Hammond, *Welfare and Federalism's Peril*, 92 Wash. L. Rev. 1721 (2017).

Trumpian federal regime – against advocating for federalism when it comes to redistributive programs. Power to the states is usually disempowering for the poor.

Hammond's warning with regard to block grant funding holds true in connection with regard to welfare creep. Welfare creep is occurring primarily through federally granted waivers, which are permitted under various statutes. These statutes give federal agencies the selective authority to allow states to deviate from statutory requirements under certain circumstances. In short, they involve "the delegation of the power to unmake Congress's law."[101] Waivers are an increasingly popular governance tool because, in theory, they give states flexibility while ensuring federal oversight and adherence to core statutory purposes.[102] In addition, in an era of extreme partisanship, they provide a way around statutory gridlock because they shift some specific policy-making decisions down the line and off the front pages.[103]

While waivers may have regulatory merits, Edward Stiglitz argues that in safety-net programs, waivers inevitably lead to state retrenchment.[104] This is because states, unlike the federal government, must balance their budgets. They cannot issue money, and they are restricted in their spending and revenue-raising ability.[105] As a result, "[T]hey face the strongest budget pressure to control spending and decrease services at precisely the time that safety nets have the most value in blunting poverty and inequality."[106] States thus tend to seek waivers that allow them to reduce costs and services – waivers for Medicaid work requirements are a prime example of this phenomenon.

At the same time, as Thad Cousser explains, when safety-net financial responsibility shifts from the federal to state governments, such as through block grants, low-income taxpayers pick up a greater share of the tab.[107] This is because moderate- and low-income people pay a larger share of state tax burdens due to their regressive nature compared to federal taxes, which are generally more progressive.[108] Thus, devolution means that low-income people pay a larger share of their income in return for less services. This impact is greater in red states, which are comparatively more regressive than blue states.[109]

[101] David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 269 (2013).

[102] Brietta Clark, Safeguarding *Federalism by Saving Health Reform: Implications of National Federation of Independent Business* v. *Sebelius*, 46 LOY. L.A. L. REV. 541 (2013); Bruce Frohnen, *Waivers, Federalism, and the Rule of Law*, 45 PERSP. ON POL. SCI. 59 (2016) (criticizing waivers for lack of rule of law norms)

[103] *See* Barron & Rakoff, *supra* note 98, at 270; Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L. J. 1920, 1944–46 (2014).

[104] Edward H. Stiglitz, *Forces of Federalism, Safety Nets, and Waivers*, 18 THEORETICAL INQUIRIES L. 125 (2017).

[105] David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544 (2005).

[106] Stiglitz, *supra* note 104, at 138.

[107] Thad Kousser, *How America's "Devolution Revolution" Reshaped Its Federalism*, 64 REV. FRANCAISE DE SCIENCE POLITIQUE 65, 76–77 (2014).

[108] *Id.* at 79.

[109] INSTITUTE OF TAXATION AND ECONOMIC POLICY, WHO PAYS? (5th ed. 2015).

Meanwhile, waivers in safety-net programs have failed to provide the innovations promised by federalism. For instance, more than one-third of all federal Medicaid spending is through waiver programs. Yet as the General Accountability Office reported in 2018, state Medicaid waiver programs have not been rigorously evaluated, making it difficult to draw meaningful lessons from state policy variations.[110] Likewise, in the context of TANF, states as "[l]aboratories have produced very little innovation … it is hard to link observed variation in benefits or other program components to anything other than race, political culture, ill-informed choice, and the lingering influence of AFDC funding."[111]

As each state goes it alone, safety-net waivers have resulted in a patchwork of policies across the country. For instance, under the TANF program, "where a family lives helps determine whether it receives cash assistance, the amount and types of assistance, and the requirements to maintain eligibility."[112] Postrecession, the national poverty rate has fallen by 3 percent, while the TANF caseload has nevertheless plunged 28 percent – indicating that many people are not getting the help they need to make ends meet.[113] Indeed, TANF serves only 23 out of 100 poor families, which is a sharp drop from 68 out of 100 when TANF was enacted.[114] Yet states vary widely in this TANF-to-poverty ratio; Louisiana's TANF program reaches 4 out of 100 poor families, while California's reaches 66 out of 100.[115] There are 15 states in which TANF reaches 10 percent or lower of the poor population. Not surprisingly then, rates of extreme poverty – or families living on less than $2 a day – are highest where TANF is least accessible, particularly in Appalachia and the Deep South.[116]

Poverty rates also vary by state. While the national poverty rate is around 12 percent, that number masks huge differences among states. The poorest regions are the South and West; while poverty rates are lowest in New England, the Mid-Atlantic, and the Upper Midwest.[117] Poverty rates only tell part of the story, however, because they do not capture the scope or scale of relief efforts. The effectiveness of the overall safety net

[110] U.S. Government Accountability Office, Medicaid Demonstrations: Evaluations Yielded Limited Results, Underscoring Need for Changes to Federal Policies and Procedures (Jan. 2018), www.gao.gov/assets/690/689506.pdf. *See also* Frank Thompson & Courtney Burke, *Executive Federalism and Medicaid Demonstration Waivers: Implications for Policy and Democratic Process*, 32 J. of Health Pol. 971, 982 (2007):

[111] Michael Wiseman, *Why Haven't the States Become Authentic "Laboratories of Democracy"?* Pathways: State Policy Choices (2018).

[112] Hahn et al., *supra* note 3, at 7.

[113] *See* Ife Floyd, Ladonna Pavetti & Liz Schott, Center on Budget and Policy Priorities, *TANF Reaching Few Poor Families*, Dec. 13, 2017, www.cbpp.org/research/family-income-support/tanf-reaching-few-poor-families.

[114] *Id.*; Hahn et al., *supra* note 3, at 30.

[115] Schott, Pavetti & Floyd, *supra* note 7.

[116] Shaefer & Edin, *supra* note 1.

[117] Marybeth J. Mattingly & Charles Varner, *Poverty*, Pathways: State of the States, The Poverty and Inequality Report 2015 18 (2015).

varies widely by state, as shown by the "poverty relief ratio," which "reports the amount of income support provided, relative to the amount required to provide for all low-income households' basic needs."[118] This metric shows that some states meet only about 26 percent of need, while others meet as much as 40 percent of need. The states with the highest relief ratios tend to be in the West and Northeast, while the lowest ratios are in the South and some interior states.[119] "It follows that, when one's market income falls short, much rides on whether one lives in a state with an effective safety net."[120] States with weak safety nets tend also to score lower in other domains related to economic security, such as labor markets, poverty, inequality, education, health, and economic mobility. In other words, disadvantages tend to be concentrated in certain states.[121] These layers of disadvantage also operate regionally, particularly in the South, making it hard for individuals to escape their effects simply by moving across state lines.[122]

Race explains part of the state variation in the poverty relief ratio. Consider the geographic differences in TANF policies across the country. Over the last two decades, scholars have consistently found that TANF policies are more punitive and less generous in states with higher proportions of minority populations.[123] The Urban Institute recently reaffirmed these findings after studying multiple TANF policy choices in every state and concluding that states with harsher sanction policies, higher asset limits, and shorter time limits are states where African American people are disproportionately concentrated.[124] Not surprisingly then, "States with TANF-to-poverty ratios in the bottom half nationally are home to the majority (56 percent) of African American people but only 46 percent of non-Hispanic white people."[125]

By contrast, as Brown and Best explain, race is not correlated with variations in SNAP policies (food assistance) or Children's Health Insurance Program (CHIP) policies (heath care for low-income children). With regard to CHIP, state policy variations are driven by economic need (states tend to be more generous where need is greater), as well as by politics (Republican legislative control at the state level is associated with higher-income eligibility levels). In comparison, SNAP policies are tied most closely with political variables; states with Republican governors generally have much stricter

[118] Karen Long Jusko & Katherine Weisshaar, *Are We Providing Enough to Those Who Have Too Little? Measuring Poverty Relief*, Pol. Sci. Rsch. & Methods 1 (2017), https://people.stanford.edu/kljusko/sites/default/files/20170222_jusko_weisshaar.pdf.

[119] Karen Jusko & Kate Weisshaar, *Safety Net*, Pathways: The Poverty and Inequality Report 19 (2014), https://inequality.stanford.edu/sites/default/files/media/_media/pdf/pathways/special_sotu_2014/Pathways_SOTU_2014_Safety_net.pdf.

[120] Karen Long Jusko, *Safety Net*, Pathways: State of the States, The Poverty and Inequality Report 41 (2015).

[121] Grusky et al., *supra* note 83, at 6.

[122] *Id.* at 8.

[123] Gustafson, *supra* note 43, at 306.

[124] Hahn et al., *supra* note 3, at 18, 23.

[125] *Id.* at 7.

eligibility requirements. Notably, in 2018, Republicans dominate states with unified control of government; Republicans hold twenty-six, while Democrats hold eight.[126]

Early indicators of welfare creep seem to be bringing these three dynamics – economic, racial, and political – into play. First, an improving economy is making it politically more palatable to blame the poor for their plight, even though wages remain stubbornly stagnant. Second, Trump and his fellow Republicans are aggressively terming all safety-net programs as "welfare," in a ploy to reduce public support for public assistance. By turning *welfare* into a dirty word, they are rhetorically pushing all needy people into the "undeserving" category and extending racist tropes about the needy. Whereas CHIP was long considered a bipartisan program to assist innocent (i.e., deserving) children, Trump is now proposing $7 billion in budget cuts to the program to reduce the deficit – which is ballooning due to the 2017 tax cuts for the wealthy. This follows a four-month funding gap for CHIP in late 2017 after the program became a bargaining chip in a government shutdown over the budget. This new politicized dynamic around CHIP suggests that even the most bipartisan safety-net programs are no longer secure. Third and finally, welfare creep is almost exclusively a Republican project.

The convergence of these economic, racial, and political factors will fall most harshly on red states, as early signs suggest. Of the 10 states that first applied for Medicaid work waivers, seven are in the bottom half of states in terms of the TANF-to-poverty ratios, and six of the ten have TANF-to-poverty ratios of less than 10 (meaning fewer than 10 out of 100 eligible families are receiving TANF). Five of the ten states are in the bottom half of states when considering their poverty relief ratio. Four of the states are among the most regressive in terms of tax policies (states in which the bottom 20 percent pay up to seven times as much of their income in taxes as the wealthy). All 10 of these waiver-seeking states are led by Republican governors, and eight of the states are entirely Republican controlled in both the executive and legislative branches.

Being poor in America is difficult wherever you live – but there tends to be more generous support in blue states. In addition, postrecession labor force participation in blue states is outpacing red states, likely due to the variations in industrial structure (manufacturing and retail are concentrated in red states, while blue states have growth in technology and life sciences).[127] At the same time, red states are increasingly adopting behavior modification requirements as a condition of receiving public assistance. The red state/blue state divide is a real one for poor Americans. It can mean the difference between being able to pay rent, put food on the table, or obtain necessary medical care.

[126] *See* National Conference of State Legislatures, *State Partisan Composition*, Apr. 11, 2018, www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_071018_26973.pdf.

[127] Robin Brooks, Jonathan Fortun & Greg Basile, *Global Macro Views – The Red-Blue Labor Market Split*, Institute of International Finance, Mar. 8, 2018.