
ARTICLE

LABORATORIES OF DESTITUTION: DEMOCRATIC EXPERIMENTALISM AND THE FAILURE OF ANTIPOVERTY LAW

DAVID A. SUPER[†]

Democratic experimentalism, the procedural component of the “new governance” movement, has won widespread acceptance in calling for decentralization, deliberation, deregulation, and experimentation. Democratic experimentalists claim that this approach offers pragmatic solutions to social problems.

Although the democratic experimentalist movement formally began only a decade ago, antipoverty law has reflected its major principles since the 1960s. This experiment has gone badly, weakening antipoverty programs. Key elements of this participatory approach to antipoverty law—decentralization, privatization, and the substitution of ad hoc problemsolving for individual rights—all contributed to the calamity that low-income people suffered during and after Hurricane Katrina. Those same features prevented the country from acting on the widely shared concern about poverty in Katrina’s wake. Indeed, almost all progress in antipoverty law has come from centralized, nonparticipatory, and non-experimentalist policymaking.

Democratic experimentalism assumes consensus on the nature of problems and the propriety of government action, reliable metrics for measuring success, the luxury of time, the lack of situations requiring centralized policymaking, and deliberation that is costless in most respects. It also requires that one side

[†] Professor, University of Maryland School of Law. The author appreciates insightful comments on earlier versions of this work from Bruce Ackerman, Richard Boldt, Danielle Citron, Vicki Jackson, Michael Van Alstine, Steven Wagner, and the participants in the Harvard Law School and Temple Law School faculty workshops on the ideas in this Article as well as the careful and expert editing of Jenn Sasso, Daniel Schwei, and Veena Viswanatha.

risk political capital to establish an experimentalist system. These assumptions have not been fulfilled in antipoverty law. Little suggests that they will be met in other fields either.

Further progress in antipoverty law must come from centralized policymaking based on substantive consensus among many, though not all, liberals and conservatives. This consensus will follow many substantive components of the new governance, including reliance on market incentives. Democratic experimentalism should learn from debates about deliberative democratic theory that have wrestled with its key weaknesses.

INTRODUCTION	543
I. DISAGGREGATING DEMOCRATIC EXPERIMENTALISM	549
A. <i>Key Assumptions Underlying Democratic Experimentalism</i>	553
B. <i>The Consequences of Failures in the Experimentalist Assumptions</i>	559
C. <i>How Democratic Experimentalist Regimes May Be Established</i>	563
D. <i>Ethical Concerns About Democratic Experimentalism</i>	566
II. DEMOCRATIC EXPERIMENTALISM AND ANTIPOVERTY LAW	567
A. <i>The Deliberative Model of Antipoverty Law</i>	568
1. Decentralization, Deliberation, and Privatization in the 1960s	569
2. Deliberative Antipoverty Law Since the War on Poverty's Demise	574
a. <i>Decentralization</i>	576
b. <i>Participation and Privatization</i>	577
c. <i>Experimentalism</i>	580
3. The Centralist Undercurrent in Antipoverty Policy	584
4. Departures from the Model: Moments of Heightened Passion	586
a. <i>The Reagan Budget Cuts</i>	587
b. <i>The 1996 Welfare Law</i>	588
c. <i>Hurricane Katrina</i>	591
B. <i>Political Sources of Antipoverty Law</i>	593
1. Major Forces Supporting Antipoverty Programs	593
a. <i>Humanitarians</i>	594
b. <i>Social Insurers</i>	595
c. <i>Redistributionists</i>	596
d. <i>Providers</i>	597
e. <i>Instrumentalists</i>	597
f. <i>Liberal Expressivists</i>	597

2. Antipoverty Programs' Critics	598
3. Origins of Democratic Experimentalism in Antipoverty Law	600
III. CONSTRUCTING A SUBSTANTIVE CONSENSUS IN ANTIPOVERTY LAW	602
A. <i>The Politics of a More Robust Substantive Antipoverty Consensus</i>	604
B. <i>Elements of a Plausible Antipoverty Consensus</i>	607
IV. WHITHER DEMOCRATIC EXPERIMENTALISM?	610
A. <i>The Value of the Antipoverty Law Example</i>	611
B. <i>The Future of Democratic Experimentalism</i>	612
CONCLUSION	613

INTRODUCTION

Few could ask for a call for justice more passionate than President Bush's speech from Jackson Square after Hurricane Katrina: "[P]overty has roots in a history of racial discrimination, which cut off generations from the opportunity of America," he said. "We have a duty to confront this poverty with bold action. . . . [L]et us rise above the legacy of inequality."¹ Later that month, the President joined many others in deeming Katrina a wake-up call for the country on poverty: "What a lot of Americans saw was . . . poverty that they had never imagined before. . . . Poverty is . . . an important issue, . . . and it needs to be addressed in a significant way."² Similarly, *Business Week* declared that "[i]f U.S. political leaders continue to concentrate on shoring up the finances of the country's wealthiest citizens and shredding the poor's safety net, the poverty rate will spiral higher."³ Secretary of State Condoleezza Rice insisted "that race and poverty are a huge problem in the United States, and we've got to deal with that."⁴ Republican activists encouraged the President to "confront the issue of poverty 'with bold action' . . . to lead the party back to [the] great-

¹ Address to the Nation on Hurricane Katrina Recovery from New Orleans, Louisiana, 41 WEEKLY COMP. PRES. DOC. 1405, 1407 (Sept. 15, 2005).

² Remarks at the Department of Energy and an Exchange with Reporters, 41 WEEKLY COMP. PRES. DOC. 1461, 1463 (Sept. 26, 2005).

³ Christopher Farrell, *Poverty: The Crisis Katrina Revealed*, BUS. WK., Sept. 27, 2005, http://www.businessweek.com/bwdaily/dnflash/sep2005/nf20050927_0544_db013.htm (last visited Nov. 15, 2008).

⁴ Rice: Disaster Shows 'Ugly Way' Race, Poverty Collide, CNN.COM, <http://www.cnn.com/2005/POLITICS/09/13/katrina.rice/index.html> (last visited Nov. 15, 2008).

ness" it had under Lincoln.⁵ Finally, as if on cue, the day after Katrina hit the Gulf Coast, the Census Bureau reported that poverty had increased for the fourth consecutive year.⁶ The nation seemed poised for action.

It was not to be. Not only did the country fail to take any new initiatives to address poverty generally, it largely abandoned for a second time the same disaster victims that had already suffered so grievously from the slow response by the Federal Emergency Management Administration (FEMA). These victims were scattered to unfamiliar cities, warehoused in isolated trailer camps, and often prevented from returning to their communities. Largely bipartisan bills offering sweeping relief to disaster victims died without floor action,⁷ and a few months later, President Bush signed a tepid legislative response to the disaster. The legislation largely excluded low-income people and provided sweeping cuts in Medicaid and new conditions on cash assistance likely to drive most states to gut their programs.⁸ Although much of the news media showed impressive staying power, other events and controversies eventually pushed Katrina's survivors from

⁵ Sophia A. Nelson, *I'm Hoping Bush Can Finish What Lincoln Started*, WASH. POST, Oct. 23, 2005, at B3.

⁶ See Carmen DeNavas-Walt et al., U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2004*, in CURRENT POPULATION REPORTS: CONSUMER INCOME 9 (2005) (indicating a 12.7% poverty rate in 2004, up from 12.5% in 2003); Carmen DeNavas-Walt et al., U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2003*, in CURRENT POPULATION REPORTS: CONSUMER INCOME 1 (2004) (reporting an increase in the poverty rate and the number of people in poverty between 2002 and 2003); Bernadette D. Proctor & Joseph Dalaker, U.S. Census Bureau, *Poverty in the United States: 2002*, in CURRENT POPULATION REPORTS: CONSUMER INCOME 1 (2003) (showing an increase in the poverty rate from 2001 to 2002); Bernadette D. Proctor & Joseph Dalaker, U.S. Census Bureau, *Poverty in the United States: 2001*, in CURRENT POPULATION REPORTS: CONSUMER INCOME 1 (2002) (showing an increase in the poverty rate from 2000 to 2001). To be sure, this sentiment was not unanimous: a Heritage Foundation spokesman complained, "[i]t's a bit unfortunate to link the hurricane with the issue of poverty in this country." Kelley Beaucar Vlahos, *Katrina Reveals Poverty Reality*, FOXNEWS.COM, Sept. 11, 2005, <http://foxnews.com/story/0,2933,168842,00.html> (last visited Nov. 15, 2008).

⁷ See, e.g., S. 1716, 109th Cong. (2005) (detailing would-be Medicaid, Temporary Assistance for Needy Families (TANF), and unemployment compensation benefits for displaced people).

⁸ See Deficit Reduction Act of 2005, Pub. L. No. 109-171, tit. VI, 120 Stat. 4, 54-134 (2006) (codified in scattered sections of 42 U.S.C.) (making wide-ranging cuts in the Medicaid program). The Medicaid and related cuts alone were twelve times larger than the cost of disaster relief. See CONG. BUDGET OFFICE, COST ESTIMATE: S. 1932 DEFICIT REDUCTION ACT OF 2005, at 35 (2006) (explaining that Katrina-related spending would total \$2.2 billion in 2006 but that direct spending on Medicaid would decrease \$26.4 billion between 2006 and 2015).

the headlines. Coverage of the Hurricane's second anniversary almost unanimously painted a picture of governmental failure and continued hardship for victims.

Cynics may question the sincerity of some of those who flocked to the antipoverty banner. That explanation, however, is plainly insufficient: the public's outpouring of concern was so broad and intense that even insincere politicians should have found it advantageous to be swept along.

For most of the last quarter-century, beginning with President Reagan's deep cuts in public-benefit programs, activists have assumed that weak public support was the main obstacle to more robust anti-poverty laws.⁹ The absence of *any* meaningful assault on poverty in the wake of Katrina suggests a more fundamental, structural problem with the dominant model of antipoverty lawmaking that this country has adopted. The decentralized, participatory, and deliberative approach the United States has relied upon to design antipoverty policies over the past four decades has prevented it from developing, and mobilizing supporters around, a coherent, plausible proposal. We have grossly overestimated the value of deliberation and underestimated the importance of achieving a meaningful consensus about the substantive principles of antipoverty law. Indeed, all substantial advances in antipoverty law that we have achieved are attributable to a second track of centralized, substantive, pragmatic policymaking on low-salience issues.

This critique of decentralized, participatory decision making goes against the grain of contemporary legal scholarship. Cass Sunstein, for example, has extolled the virtues of minimalism, defined as resolving policy questions on the narrowest possible grounds without seeking a broader substantive consensus.¹⁰ He urges "promot[ing] the democratic ideals of participation, deliberation, and responsiveness" and "leav[ing] fundamental issues undecided."¹¹

Even more prominently, democratic experimentalists have called for very much the same approach to policymaking that antipoverty law

⁹ See JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 65-67 (2d ed. 1995) (arguing that focused public attention is a prerequisite to significant political change); David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2040 (2004) [hereinafter Super, *New Moralizers*] (arguing that public sentiment in fact has been far more evenly balanced than is commonly thought).

¹⁰ CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix-xiv (1999).

¹¹ *Id.* at x.

has taken for at least the past four decades: decentralizing authority, broadening participation in policymaking, expanding reliance on the private sector, basing future policies on what experiments have found to be successful, and rejecting substantive individual rights.¹² In essence, the dominant approach to antipoverty law over at least the last four decades has been an experiment in democratic experimentalism. To be sure, the development of antipoverty law has not followed all of the choreographed moves described in democratic experimentalist theory—it certainly has not produced the salutary results that theory envisions. Nonetheless, its embrace of many major democratic experimentalist principles can provide valuable insight on their potential and limitations.

A major obstacle to systematic evaluation of democratic experimentalism has been its presumed novelty. If few examples exist so far, we have no choice but to accept the case studies that the theory's proponents identify to demonstrate its potential. In that case, a fair assessment of democratic experimentalism's likely outcomes would have to await its implementation on a wide enough scale to allow unbiased sampling. Moreover, the relative newness of the democratic experimentalists' hand-picked examples prevents examination of their durability over time. As a result, recognizing that antipoverty law has embraced the major tenets of democratic experimentalism for several decades can provide the means to assess whether this is the right path for antipoverty law and to question democratic experimentalism's prospects.

The deliberative approach to antipoverty law has displayed several major shortcomings. First, it has obstructed resolution of fundamental normative disagreements about society's responsibility to low-income people. Instead of establishing local processes to search for non-ideological answers that work, it has sustained the most extreme positions on both the Left and the Right even after it became clear that neither side could prevail in national policy debates.

Second, proceduralism has insufficiently broad normative appeal to defend antipoverty efforts against their critics: those seeking sav-

¹² See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 283-89 (1998) (detailing democratic experimentalists' approach to policymaking). To be fair, the democratic experimentalists insist that the 1996 welfare law does not conform to their vision. This Article contends that the welfare law, and the prior history of antipoverty law, fail to conform to their vision precisely because the democratic experimentalist assumptions are not met in this field—and because of the absence of means to respond to the failure of those assumptions.

ings to fund tax cuts or deficit reduction will not be satisfied with a round of community meetings. A regime that dissipates efforts to improve antipoverty programs while allowing cuts to sail through unimpeded creates a one-way ratchet that will lead to steady erosion of these programs.

Third, the lack of a meaningful consensus about the substantive goals of antipoverty law prevents coherent evaluation of the results of policy experiments: without an agreed-upon set of goals, we cannot agree on what “works” to accomplish them. Moreover, latent ideological disagreements have led to tendentious selection and interpretation of various metrics.

Fourth, deliberative models require relatively continuous engagement. That continuousness squanders the intense but intermittent activity that can drive progress on behalf of marginalized groups such as low-income people. Most major changes in antipoverty policy result from large external shocks that briefly focus attention on these problems and programs.¹³

Fifth, decentralization places responsibility on government actors that lack the fiscal capacity to respond effectively. The effects of this misallocation of responsibility are magnified because the very economic downturns that increase the prevalence and depth of poverty also shrink state and local governments’ revenues.¹⁴ Moreover, low-income people’s mobility allows irresponsible localities to free-ride on other localities’ programs. And Congress resists increasing federal contributions for fear that they will induce states to reduce their own.¹⁵

Sixth, decentralized deliberation comes with high transaction costs. This favors those with greater resources bear the costs of participating in ongoing debates. Ideologues seeking to make expressive points on both the Right and the Left may have those resources, but low-income people and their closest allies rarely will.¹⁶

¹³ See DOUGLAS R. IMIG, *POVERTY AND POWER: THE POLITICAL REPRESENTATION OF POOR AMERICANS* 25-26 (1996) (arguing that important social-welfare policies can develop from episodic reform movements).

¹⁴ See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2629-40 (2005) [hereinafter Super, *Fiscal Federalism*] (discussing the interrelation between business cycles and state spending programs).

¹⁵ See PAUL E. PETERSON & MARK C. ROM, *WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD* 100-01 (1990) (noting that some supporters of increasing federal funding in the early Aid to Dependent Children program sought assurances that states would not respond by reducing their own spending).

¹⁶ This problem closely relates to the feminist critique of the Alternative Dispute Resolution movement for creating a highly discretionary system that magnifies, rather

Finally, seeking to establish a participatory, experimentalist policymaking process consumes the scarce political capital of antipoverty advocates. Given this country's already-tepid commitment to fighting poverty, that is an extravagance low-income people can ill afford.

Some of these difficulties may be peculiar to antipoverty law. Nonetheless, they sufficiently parallel other areas of public policy to warrant a broader reexamination of the conditions under which democratic experimentalism and similar procedural models can be applied beneficially. In short, accounts of democratic experimentalism to date have suffered from a single-minded focus on the regime it seeks to establish, disregarding both the ways in which that regime could be corrupted and the pitfalls awaiting those seeking to establish such a system. An experimentalist movement should be tested in just this way: by examining actual experiences rather than accepting untested generalizations.¹⁷

Part I separates the "new governance" into its substantive and procedural components. The substantive element seeks to replace command-and-control regulation with market-based incentives. The procedural element is democratic experimentalism. Through a careful reading of prominent works on democratic experimentalism, this Part discerns the crucial assumptions underlying that theory, considers the consequences of violating those assumptions, and addresses the process by which such a regime might be installed. It also identifies some ethical considerations that may limit the range of democratic experimentalism's legitimate application.

Part II sketches the deliberative model of antipoverty law. Three decades before the democratic experimentalists rebelled against the New Deal paradigm of expert regulation, participants in the War on Poverty were doing precisely the same thing. Authority devolved to local communities, which were required to adopt inclusive deliberative processes and encouraged to innovate.¹⁸ Ideological stalemates at the national level helped maintain and expand decentralized, experimentalist policymaking on high-salience issues. At the same time, however, centralized policymaking continued on low-salience issues and programs, incrementally and non-ideologically achieving virtually

than dissipates, the effects of gender hierarchy. ROBIN WEST, *CARING FOR JUSTICE* 77-79 (1997).

¹⁷ "Experimentalism would be superfluous if its results could be anticipated by reflection." Dorf & Sabel, *supra* note 12, at 407.

¹⁸ SAR A. LEVITAN, *THE GREAT SOCIETY'S POOR LAW: A NEW APPROACH TO POVERTY* 109-31 (1969).

all of the meaningful progress that occurred. The commitment to decentralized deliberation on high-salience issues did not block major initiatives to dismantle antipoverty programs in the early 1980s¹⁹ and the mid-1990s.²⁰ It did, however, effectively prevent this country from translating its empathy for Katrina's victims into meaningful action.

Part III explores the potential of the alternative, substantive model of antipoverty law. It argues that a more proactive approach to fighting poverty would strengthen low-income communities during crises and normal times alike.

Part IV then considers what scope is appropriate for democratic experimentalism in light of these concerns, seeking insight from political theory's debates over deliberative democracy.

I. DISAGGREGATING DEMOCRATIC EXPERIMENTALISM

The "new governance" is a moniker that brings together some quite disparate substantive and procedural impulses.²¹ Substantively, new governance rejects rigid command-and-control regulation in favor of the flexible manipulation of incentives to motivate socially desirable behavior.²² More broadly, it rejects much of the existing regulatory state and seeks to destabilize it in the hope that something better will replace it. Its procedural prescriptions, commonly termed democratic experimentalism, seek to implement, but are analytically distinct from, those substantive aims.²³ Democratic experimentalism

¹⁹ MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 285-89 (1986) [hereinafter KATZ, *POORHOUSE*].

²⁰ MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 317-28 (2001) [hereinafter KATZ, *CITIZENSHIP*].

²¹ See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345-47 (2004) [hereinafter Lobel, *Renew Deal*] (setting forth the many different legal theories that comprise the new governance model). See generally Dorf & Sabel, *supra* note 12 (presenting democratic experimentalism as one new form of government that decentralizes power but also requires local information sharing).

²² See Dorf & Sabel, *supra* note 12, at 350-54 (extolling agencies' rolling best-practice rulemaking methods); Lobel, *Renew Deal*, *supra* note 21, at 357-58 (arguing that a "central control-and-command structure [is] impossible" in the modern state); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1019 (2004) (asserting a recent shift away from command-and-control regulation toward experimentalist intervention).

²³ Some new-governance scholars, however, seek to blend these substantive and procedural elements. See, e.g., Bradley C. Karkkainen, Response, "New Governance" in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 474 (2004) (describing new governance as aspiring to be "open-

would shift regulatory authority to state and local governments,²⁴ and often to the private sector as well.²⁵ It would then task them with establishing a highly participatory method of policymaking, designed to assimilate as much local expertise as possible, in preference to representative democracy.²⁶ Experimentalism would strip central authorities of most responsibilities other than gathering and disseminating information on local initiatives to enrich this deliberation.²⁷

The democratic experimentalists' critique of the extant regulatory regime is similarly bifurcated.²⁸ To support their substantive agenda, they rely upon what is essentially the standard economic argument about deadweight losses resulting from command-and-control regulation,²⁹ particularly when regulation ignores important factors affecting the costs and benefits of compliance.³⁰ To support their procedural prescriptions, experimentalists assert that federal regulators produce additional inefficiencies because they are overwhelmed by their tasks, buffeted by the conflicting agendas of the political branches,³¹ and operating on insufficient information,³² especially local information.³³

textured, participatory, bottom-up, consensus-oriented, contextual, flexible, integrative, and pragmatic").

²⁴ See Lobel, *Renew Deal*, *supra* note 21, at 381 (describing the Renew Deal as advocating a movement of power and responsibility downward to states and outward to the private sector).

²⁵ See *id.* at 381, 396 ("Renew Deal governance scholarship stresses the importance of capacity building of private actors.").

²⁶ See Dorf & Sabel, *supra* note 12, at 328-32 (espousing community policing as an effective, localized, participatory method of policymaking); Sabel & Simon, *supra* note 22, at 1067-68 (describing the experimentalist tendency to admit interest groups to the negotiation process). Although democratic experimentalists insist that their program is one of "direct deliberation," Dorf & Sabel, *supra* note 12, at 340, and disparage representative democracy, their examples often feature dialogue among representatives (albeit unelected ones) of various interest groups rather than among the citizenry itself. See *id.* at 324-27 (describing the experimentalist reform of family support services).

²⁷ See Dorf & Sabel, *supra* note 12, at 338-39 (illustrating the need for national institutions to coordinate information sharing in democratic experimentalist models).

²⁸ Here again, some blend the elements of the substantive and procedural regimes experimentalists reject. See, e.g., Karkkainen, *supra* note 23, at 474 (criticizing "fixity, state-centrism, hierarchy, excessive reliance on bureaucratic expertise, and intrusive prescription").

²⁹ See Lobel, *Renew Deal*, *supra* note 21, at 364-65, 388-89 (suggesting that implementing policy in a top-down model is sometimes nearly impossible due to political weakness or ideological resistance); Sabel & Simon, *supra* note 22, at 1061-62.

³⁰ See Lobel, *Renew Deal*, *supra* note 21, at 394.

³¹ *Id.*

³² *Id.* at 444.

³³ See, e.g., *id.* at 420 (suggesting challenges that a centralized system might face, because of regional variance in norms, in combating employment discrimination on

They deride assertions of individual substantive rights as producing “more disorder.”³⁴ The democratic experimentalists further suggest that the high transaction costs in the current system—ongoing conflict—result from uninformed policymaking.³⁵ To oversimplify slightly, they suggest that we can move quickly from a Hobbesian state of nature to a Tocquevillian community of civic virtue through partial decentralization of regulation.

Much of the academic community’s acceptance of the new governance can be traced to its ability to offer something to people at many different points on the political spectrum. For business interests, it heralds less onerous regulation; indeed, for those business interests unreconciled to regulation, it moves authority to smaller agencies that are easier to influence or defeat. Those who tend to equate the private sector with efficiency can appreciate the promise of new governance to translate advances in industrial organization to political organization. For critics decrying federal agencies’ vulnerability to “capture,” new governance shrinks agencies’ roles in order to reduce the appeal of suborning them.³⁶ To conservative deregulators and decentralizers, it presents an opportunity to broaden their support at the cost of allowing some inexpensive information gathering by federal agencies.³⁷ For similar reasons, moderates fatigued with ideological warfare may see it as an attractive compromise, an “optimistic” marriage “drawing together elements from rival schools of thought”³⁸:

the local level); see also Dorf & Sabel, *supra* note 12, at 279 (asserting that the centralized New Deal bureaucracy lacked access to useful information gathering).

³⁴ Dorf & Sabel, *supra* note 12, at 279 (criticizing legislation establishing individual rights as checks on bureaucratic excesses). Remarkably, they suggest that the success of individuals’ claims of constitutional and statutory violations would depend in part on whether the plaintiffs could show that other locales had found effective ways to implement the same program without such violations, *id.* at 288, 398-404, and that individuals could vindicate their constitutional rights against infringements designated “experiments” only upon showing that those experiments were shams, *id.* at 464.

³⁵ See Lobel, *Renew Deal*, *supra* note 21, at 378-79 (praising local information sharing conducted by collaborative programs).

³⁶ Sabel & Simon, *supra* note 22, at 1064-65 (describing different patterns of political influence); see also Dorf & Sabel, *supra* note 12, at 278 (discussing the dynamic of agency capture).

³⁷ Lobel reports that conservatives routinely take advantage of progressives’ embrace of localism and democratic participation by “subvert[ing] the ideals of progressive social reform and replac[ing] them with conservative agendas that reject egalitarian views of social provision.” Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 972 (2007) [hereinafter Lobel, *Paradox*].

³⁸ Lobel, *Renew Deal*, *supra* note 21, at 442.

conservative demands to dismantle the federal regulatory state with continued espousal of progressive social aims.³⁹

Some progressives have such broad faith in human nature that they are inclined to blame imperfections in our democratic structures or information failures for policies they dislike; democratic experimentalism features more, broader deliberation and a new source of information (mediated, in all likelihood, by liberal social scientists). Other progressives have centralizing impulses learned from the New Deal and the civil rights movement and are dismayed at conservatives' success in recent years at devolution and deregulation⁴⁰; for them, the new governance promises to turn lemons into lemonade.⁴¹ Still other progressives fear that globalization magnifies business interests' power and imperils hard-won social gains; democratic experimentalism shifts the focus decisively to the local,⁴² with the expectation that some intervention will occur. For them, democratic experimentalism offers the means to justify appealing state and local actions in the federal government's traditional domain.⁴³ Some also applaud its efforts to jettison judicial review.⁴⁴ And for anyone of any stripe who is unhappy with the current state of national politics, democratic experimentalism dangles the prospect of starting over.⁴⁵

This Part takes a more dispassionate look at the procedural side of the new governance. Section A parses the assumptions underlying

³⁹ See *id.* at 344 (suggesting that the new governance model allows for "renewed dialogue between those who champion centralized top-down regulation and those who advocate devolution, deregulation, and privatization").

⁴⁰ See Dorf & Sabel, *supra* note 12, at 271-72 (acknowledging inefficiency and "free-wheeling delegation of interpretive authority" among other criticisms of the new federalism).

⁴¹ It also stakes out a continued role for central government, albeit a small one, that may prove relatively uncontroversial with the Right. *Id.* at 338-39.

⁴² Refuting the popular slogan, democratic experimentalism tells us that we need not think globally to act locally.

⁴³ See, e.g., Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 245-48 (2001) (describing the role of state and local governments in bypassing the federal government to advocate for international human rights).

⁴⁴ See, e.g., Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights-and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 822-24 (2003) (highlighting democratic experimentalism as one version of weak-form judicial review).

⁴⁵ See, e.g., Sabel & Simon, *supra* note 22, at 1020 (conceptualizing experimentalist public-law litigation as the right to break up settled bureaucratic patterns); see also Jeanne C. Fromer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 GEO. L.J. 1547, 1551 (2005) (describing how democratic experimentalists would analyze and suggest changes in redistricting schemes).

democratic experimentalism. Section B considers the consequences when conditions violate those assumptions. Section C examines the difficulties of establishing democratic experimentalist regimes. Finally, section D identifies some ethical issues affecting democratic experimentalism's application to laws specifically affecting vulnerable people.

A. Key Assumptions Underlying Democratic Experimentalism

Six crucial assumptions are implicit in democratic experimentalism.⁴⁶ First, invoking the metaphor of a business firm whose many units work cooperatively toward a common goal,⁴⁷ it assumes a general consensus about the existence and nature of a problem.⁴⁸ Although its champions insist that their proposal does not “rest on deep prior consensus,”⁴⁹ the business corporations to which they analogize *do* have such a consensus on a goal: maximizing value for shareholders. The “problem” of producing and selling widgets comes to light when

⁴⁶ Some of the new governance's substantive precepts also depend on important and sensitive assumptions. For example, Dorf and Sabel insist that in a new-governance regime, a company that developed new environmental or health and safety technologies would share them with its competitors, but the authors do not explain how that regime would change incentives or intellectual property law to secure that cooperation. Dorf & Sabel, *supra* note 12, at 351-52. Dorf and Sabel also assume that companies would want to avoid being the lowest environmental or health-and-safety performers enough to invest in substantial improvements, yet they specify neither regulatory penalties nor market incentives that would motivate those investments. *Id.* at 353.

⁴⁷ *Id.* at 286-87, 444 (focusing on the “delivery of services analogous, if not identical, to those provided by private-sector firms”). But see *id.* at 444-69 (applying the same methods to the “delivery” of individual rights, such as freedom of speech, equal protection, and the privilege against compulsory self-incrimination).

⁴⁸ This assumption is quite remarkable given the democratic experimentalists' embrace of a pragmatic worldview in which no agreement exists as to first principles. *Id.* at 284-86. The democratic experimentalists do acknowledge that different locales may have different “initial understandings of problems,” but they seem to assume that these differences are descriptive, not normative. *Id.* at 287. Experimentalists also report that law enforcement preferred defiance over embracing the Court's invitation to experimentation with procedural safeguards in the wake of *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Dorf & Sabel, *supra* note 12, at 460. By contrast, scholars focusing more on the new governance's substantive program candidly admit that experimentalism sometimes is little more than an attempt to make virtue out of necessity when powerful interests block legislation that would compel them to change. See Lobel, *Renew Deal*, *supra* note 21, at 395-96.

⁴⁹ Dorf & Sabel, *supra* note 12, at 321-22 (asserting that decisions in democratic experimentalist regimes do not rely on consensus any more than in pragmatist business firms).

the firm determines that doing so will be profitable; the problem is solved when the company reaches its most profitable level of production. Democratic experimentalists thus assume away much of the normative content of government.⁵⁰ They acknowledge that views of the problem may evolve in response to what communities learn about the effectiveness of their own and other remedies,⁵¹ but they assume that all parties agree on the ends of government. This assumption is evident in narratives that begin at the point when a problem has been ascertained⁵² and in accounts of debate in which the relative success of alternatives does not require parsing trade-offs among conflicting objectives.⁵³ It also is implicit in the procedures that experimentalists recommend, which offer those with an economic or ideological stake in the status quo bounteous opportunities to stall.⁵⁴ The only determined opposition that democratic experimentalists countenance is against their procedural prescriptions—decentralization and deliberation⁵⁵—not against the goals of government policy.

Second, democratic experimentalism assumes that all relevant players are inclined to act in a public-spirited way to correct that problem.⁵⁶ Democratic experimentalism assumes that both recalcitrant perpetrators, opposed to any effective action,⁵⁷ and opportunists, hoping to exploit the problem to divert regulation to serve their private

⁵⁰ See Lobel, *Renew Deal*, *supra* note 21, at 452-53 (explaining governmental decision making as a response to incentives and regulations).

⁵¹ See Dorf & Sabel, *supra* note 12, at 288 (noting that the local participation and information sharing that are a part of democratic experimentalism could lead to much debate over the current political choices).

⁵² See *id.* (suggesting that localities be directed to “publicly declare their goals”).

⁵³ See *id.* at 397-400 (arguing for a solely proceduralist version of judicial review).

⁵⁴ See *id.* at 345 (noting the inevitable obstructions that any democratic experimentalist administration would face). In acknowledging the possibility of “deception,” experimentalists insist that monitoring and information sharing provide a complete response, *id.* at 287, implying that the consensus is so overwhelming that the few deceivers cannot survive exposure. Similarly, they concede that policymaking “often” will be “paralyzed by the clash of interests,” but express faith that further dialogue can resolve any problem. *Id.* at 323; see also Sabel & Simon, *supra* note 22, at 1068 (acknowledging that some actors may resist dialogue but expressing faith that special masters can convert the holdouts). This conclusion suggests that the clashing “interests” are weak so that most interest holders will surrender rather than act to obstruct deliberative decision making.

⁵⁵ Dorf & Sabel, *supra* note 12, at 337-38. But see *id.* at 343-44 (assuming that all candidates for local, state, and federal office will embrace experimentalism).

⁵⁶ See *id.* at 288 (assuming that localities will broadly join “the experiment”).

⁵⁷ Democratic experimentalists assume that interest groups breaking ranks will doom any systematic obstructionism. *Id.* at 349.

interests,⁵⁸ will lack any significant traction in a democratic experimentalist regime.⁵⁹ If any such people do exist, democratic experimentalists assume activists to have the political power to “revers[e] the burden of proof” and force the “government to prove” its effectiveness.⁶⁰ Here again, both exponents’ narratives—focusing on services whose continuation they assume to be uncontroversial, such as education⁶¹ and policing⁶²—and the vulnerability of their proposed procedures to calculated abuse make this assumption evident.⁶³ They express faith that dialogue “loosens the hold of interest by fitfully darting, as it were, beyond its reach, thereby discovering solutions bit by bit in the unfamiliar territory beyond the reach of bounded rationality and habitual calculations of advantage.”⁶⁴ Thus, once a problem is identified, the responses that democratic experimentalism offers, and the debates it envisions, involve only the means, not the normative ends, of governance.⁶⁵

⁵⁸ Dorf and Sabel note that businesses sometimes co-opt government’s regulatory powers to ruin competitors, but they fail to explain why requiring a statement of reasons in a deliberative forum offers any better protection than having the same reasons presented to a court. *Id.* at 392-93. Similarly, Lobel celebrates the Workforce Investment Act’s involvement of local businesses in determining what skills training will be provided in a community without considering the possibility that employers on the boards that will oversee the training programs will seek to lower their labor costs by creating a glut of workers capable of doing work in those employers’ industries. Lobel, *Renew Deal*, *supra* note 21, at 412-14.

⁵⁹ On the other hand, self-interested behavior, such as “gam[ing] the rules,” capture of administrative agencies, and manipulation of legislative history, plays a prominent part in their critique of the old regime. Dorf & Sabel, *supra* note 12, at 278-79.

⁶⁰ *Id.* at 348. The democratic experimentalists also assume that courts will consider obligations to participate sincerely in program evaluation and deliberative decision making sufficiently specific to be judicially enforceable. *Id.* at 349.

⁶¹ James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003) (arguing that the decentralization of public schools is a positive development).

⁶² Dorf & Sabel, *supra* note 12, at 317-18. Dorf and Sabel mention some more controversial governmental functions, such as public transportation, public housing, affirmative action, and redistribution of income, but they fail to acknowledge that some have ideological commitments to abolishing those programs. *Id.* at 317-18, 398-99, 411-12. Even when discussing antipoverty programs, they assume that Congress is divided only about how to aid low-income people, not whether to do so. *Id.* at 341-42.

⁶³ The exponents argue that any elite faction that attempts to stall will lose to a coalition of other elites and the non-elite. *Id.* at 409-10.

⁶⁴ *Id.* at 322.

⁶⁵ *Id.* at 288. The democratic experimentalists suggest that the polity can change the routines by which it accomplishes its ends, *id.* at 298-301, 319-21, but do not acknowledge the possibility that persistent, powerful, well-organized forces might prefer *no* action.

Third, democratic experimentalism assumes that reliable metrics exist,⁶⁶ and can be readily agreed upon and implemented,⁶⁷ for measuring policies' effectiveness. These metrics must produce reliable results relatively quickly so that the community may correct defective policies. Without such metrics, local policy variations will be experiments in name only. This assumption obviously is linked to the preceding two: without an agreement on the nature of the problem and the objectives of public action—including how to balance competing objectives—no consensus metrics are possible. The experimentalists concede that "[t]here are performance measures that notoriously conceal more than they reveal" and that insiders have an enormous advantage in selecting metrics.⁶⁸ They also assume that underperforming localities will seek to avoid exposure.⁶⁹ Additionally, they note that "[m]any of those who participate in . . . 'experiments' will do so in order to advance ideas they firmly hold, not to test them."⁷⁰ Experimentalists assume, however, that all defective metrics are opaque, rather than skewed, and hence readily recognizable.⁷¹

Fourth, democratic experimentalism assumes that time does not constrain decision making. On one hand, this means that decisions are not urgent: no cost attaches to the time required to await the results of experiments in potentially slow-acting policies and the additional time subsequently required for deliberation. Were this not assumed, governments would need some means of comparing the costs of delay with the potential benefits of greater insight.⁷² On the other hand, this assumption also implies that localities can change policies

⁶⁶ See *id.* at 345-48 (insisting that localities will ignore the desire to emphasize metrics that display them in a positive light for the common interest).

⁶⁷ See *id.* at 341-42 (insisting that Congress will ignore its internal disagreements over the merits of a certain end in order to enable experimentation).

⁶⁸ *Id.* at 348.

⁶⁹ *Id.*

⁷⁰ *Id.* at 387.

⁷¹ See *id.* at 348-49 (predicting that local governments will provide accurate information due to pressure from other actors).

⁷² Dorf & Sabel's selection of auto safety, *id.* at 357-65, as an example is thus surprising. Although the information gained from experiments might have been valuable, that value would have to have been purchased at the cost of additional avoidable injuries and deaths on the roads. Particularly perplexing is the scathing criticism of *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), from advocates of data-based policymaking. Dorf & Sabel, *supra* note 12, at 362-63. *State Farm* is one of the leading limitations on willful policymakers' ability to disregard evidence. Elsewhere, they declare that "the court's task is to inquire whether the agency in fact undertook the kind of information organizing and coordinating effort necessary" to make informed policy decisions. Dorf & Sabel, *supra* note 12, at 397.

at will in response to evidence of success from other jurisdictions.⁷³ No policy choices could narrow future flexibility by, for example, reducing the government's institutional capacity, depleting public coffers, constructing buildings, or signing long-term contracts.⁷⁴ Without ongoing policy flexibility, reports of successes elsewhere would serve only to enhance the frustration of policymakers and their constituents. The costs of a failed experiment thus are assumed to be limited and manageable.⁷⁵ This assumption also interacts with the assumptions of consensus over the nature and actionability of the problem: if the norms of public policy were contested, delays in policymaking could shift the balance of power.

Fifth, democratic experimentalism assumes the absence of factors that would necessitate national regulation.⁷⁶ These include externalities from one state or locality's actions that affect another state or locality,⁷⁷ agency problems,⁷⁸ mobile entities' ability to threaten exits⁷⁹—and large entities' capacity to bully directly⁸⁰—to bend state and local governments to their will,⁸¹ costs beyond state and local govern-

⁷³ See *id.* at 287 (implying that “error-correction” follows from “error-detection”).

⁷⁴ Dorf and Sabel focus on the safety of nuclear power plant operations. *Id.* at 371-73. An experimentalist approach to nuclear plant *design* could leave some communities with reactors too dangerous to operate and too expensive to close.

⁷⁵ Curiously, exponents of this view offer as an example safety rules designed to protect construction workers from falling. *Id.* at 350. Construction workers seem unlikely to welcome an experimentalist approach to finding the right standard. The ethics of experimenting with these workers' lives are suspect, to say the least.

⁷⁶ See *id.* at 287 (“[N]ational measures can rarely address the particularities of local experience . . .”). But see *id.* at 413 (asserting that experimentalism may be adapted to national policymaking). Democratic experimentalists do acknowledge that local governments lack the capacity to analyze possible solutions to their problems. *Id.* at 287. They nonetheless believe that central dissemination of information fully remedies this limitation. *Id.* at 287-88.

⁷⁷ Experimentalists assume that each locality's citizens can readily assess the full value of its services. *Id.* at 288.

⁷⁸ See Liebman & Sabel, *supra* note 61, at 188 (equating more localized control of school systems with increases in schoolchildren's well-being).

⁷⁹ Dorf and Sabel cite air-pollution control as well suited to varying local regulation. Dorf & Sabel, *supra* note 12, at 396. They do not explain why emitters would not locate in the jurisdictions with the most lenient regulations—or simply leverage the threat of job losses if they relocate to ensure that their jurisdiction of choice adopts agreeable rules. *Id.*

⁸⁰ *Id.* at 408.

⁸¹ *Id.* at 277.

ments' capacity,⁸² and the burdens to businesses operating in multiple jurisdictions of learning and complying with each set of requirements.⁸³ To the extent that this assertion seems controversial, democratic experimentalism simply assumes that coherent national policy-making is impossible on the very sorts of highly complex issues commonly regarded as core to the federal government's responsibilities.⁸⁴ To the extent that state and local governments lack the resources to fund important activities, democratic experimentalism assumes Congress will fund them to pursue broadly defined purposes.⁸⁵ The "self-limit[ing]" members of Congress would bear the political costs of raising this revenue without the benefits of being able to point to particular activities they were supporting.⁸⁶ They would have to put their "own disagreements to one side."⁸⁷

Finally, democratic experimentalism assumes, for the most part, that transaction costs do not significantly deter political participation.⁸⁸ The one salient exception is information costs, which democratic experimentalists take to be effectively prohibitive absent the interventions they propose.⁸⁹ Yet while they doubt that members of the

⁸² They assume that acceptance of their procedural prescriptions will lead to adoption of their substantive recommendations, which in turn they assume to produce substantial savings. *Id.* at 412-13.

⁸³ *Cf. id.* at 278 (noting the burdens on businesses of complying with different regulatory regimes applicable to different sectors of the economy).

⁸⁴ *Id.* at 270-71. The democratic experimentalists do acknowledge that the methods they espouse can be ineffectual in the corporate world when conditions demand global decisions. *Id.* at 310-11.

⁸⁵ *Id.* at 341-42. Dorf and Sabel assume redistribution will take place. *Id.* at 411-12. Although they acknowledge that residential segregation leaves the localities where many low-income people live without the resources to serve them, *id.* at 408, they are unclear about whether the resources redistributed will come from federal, state, or local government.

⁸⁶ *Id.* at 342. Dorf and Sabel do note that, in passing the 1996 welfare law, Congress neither provided sufficient funds to states nor refrained from imposing onerous regulations. *Id.* at 435-36.

⁸⁷ *Id.* at 342. Indeed, the democratic experimentalists suggest that Congress should pay for costly projects even when it prefers an inexpensive regulatory solution. *Id.*

⁸⁸ *See id.* at 328-29 (responding to obstacles to participation by providing an example of a case in which they were overcome). *But see* Sabel & Simon, *supra* note 22, at 1064-66 (using public-choice concepts to explain "political blockages" that cause governmental misfeasance). Experimentalists do acknowledge the danger of "a morass of proceduralism." Dorf & Sabel, *supra* note 12, at 405. They consider the possibility that the costs of participation would give a comparative advantage to the affluent but dismiss the idea, citing serfs' campaigns for freedom and freed slaves' departure from plantations. *Id.* at 408-11.

⁸⁹ *See* Liebman & Sabel, *supra* note 61, at 266-67 (arguing that collective-action problems hamper information collection).

public will take the time to research a problem, the experimentalists assume that the same individuals are happy to spend just as much time in deliberations and other forms of community activism.⁹⁰ They assume these activists routinely attend “general meetings” with similarly inclined people from other parts of the country to compare notes⁹¹ and have acquired the skills to do so effectively.⁹² Thus, after taking a rationalist approach in adopting the neoclassical critique of direct regulation, experimentalists reverse fields to reject the central teachings of public-choice theory.⁹³

B. *The Consequences of Failures in the Experimentalist Assumptions*

The failure of these assumptions does not block the democratic experimentalist program in its entirety; it merely renders the program vulnerable to being sent radically off-course. Deregulation, decentralization, privatization, and even deliberation can still occur; they simply fail to play the constructive roles the democratic experimentalists envision for them. Broader debates about deliberative democracy have identified strong grounds for concern that the experimentalists’ assumptions often will prove to be unfounded in practice.

Without consensus about what the problem is or whether it is a desirable object of state intervention, nothing is likely to replace the

⁹⁰ Thus, for example, experimentalists assume that transparency in the interactions between regulators and regulated entities will automatically eliminate any risk of capture. Cf. Dorf & Sabel, *supra* note 12, at 355 (discussing the adoption of “[i]nspection by peer administrators” as a “higher-order error detection”). This implies that, should corruption occur, activists can smite it with certainty. Only Lobel, who has called the new governance an “analytical tour de force,” Lobel, *Renew Deal*, *supra* note 21, at 343, nonetheless criticizes a “myth of engagement [that] obscures the actual lack of change being produced.” Lobel, *Paradox*, *supra* note 37, at 985.

⁹¹ Dorf & Sabel, *supra* note 12, at 348. Lobel suggests that new technology will facilitate participation, although her examples primarily involve reducing information costs. See Lobel, *Renew Deal*, *supra* note 21, at 438-41 (discussing “e-government,” “e-rulemaking,” and “e-activism”). Others insist, however, that deliberations should be conducted face-to-face. Sabel & Simon, *supra* note 22, at 1068.

⁹² But see Lobel, *Renew Deal*, *supra* note 21, at 457 (acknowledging the need to develop participants’ skills).

⁹³ They criticize public-choice theorists for “choos[ing] democracy over the Constitution” while complaining that “the democracy they describe does not merit the name.” Dorf & Sabel, *supra* note 12, at 273 (emphasis omitted). To support this criticism, Dorf and Sabel cite Frank Easterbrook, hardly a mainstream public-choice theorist. *Id.* at 273 n.11. Yet, elsewhere, democratic experimentalists rely on game and collective-action theory, two core tools of public choice. See *id.* at 352-53 (asserting that traditional methods of pursuing product safety trigger “a game of chicken”); Lobel, *Renew Deal*, *supra* note 21, at 445; Sabel & Simon, *supra* note 22, at 1065.

centralized interventions dismantled in the experimentalist cause.⁹⁴ At best, the threat of blocking any meaningful new regime will allow strong political interests to dictate terms to the weak.⁹⁵ Much support for devolution of authority turns out to be opportunistic, motivated by a desire to eliminate public functions rather than to improve or democratize them.⁹⁶

Without reliable metrics, an attempt at experimentalism will only shift policy debates from the normative to the empirical,⁹⁷ probably becoming even less accessible to technically unsophisticated voters in the process.⁹⁸ Alice Rivlin agrees that “the difficulty in selecting exemplary projects for publicity is that each one is unique. Nobody is sure how relevant a successful program will be to other circumstances and other areas.”⁹⁹ Rivlin also notes that “[a]nother reservation about the desirability of social experimentation concerns the honesty with which experimental results will be reported. No one likes to fail. Rightly or wrongly, the administrator of a successful experimental project will receive more acclaim and greater opportunities for advance-

⁹⁴ See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 37-38 (2006) (criticizing democratic experimentalist approaches in the employment-discrimination context for a lack of normative vision). One experimentalist admits to “some ambiguity in the added value of generating synergy.” Lobel, *Renew Deal*, *supra* note 21, at 384. She suggests that either greater empathy or greater ability to monitor one another may hold the answer. *Id.* at 384-85. Yet, experience suggests that elites are unlikely to yield power and wealth to marginalized groups absent a credible threat of greater losses. See ARCHON FUNG & ERIK OLIN WRIGHT, *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE* 3-25 (2003) (“When individuals cannot dominate others . . . they are often more willing to deliberate.”). Having to hire representatives to engage in deliberations in which they never make meaningful concessions is not such a threat.

⁹⁵ See Lobel, *Renew Deal*, *supra* note 21, at 460-61 (discussing how informality in interactions is viewed by some scholars as “strategic powerlessness” which maintains “existing social hierarchies”).

⁹⁶ See, e.g., TIMOTHY CONLAN, *FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM* 108-09 (1998) (“Reagan consistently defined federalism reform as a one-sided equation that reduced the federal role but did little to encourage states and localities.” (citation omitted)).

⁹⁷ See Lobel, *Renew Deal*, *supra* note 21, at 455-56 (warning against “reliance on technical formulae for value-driven policy choices”).

⁹⁸ One leading new-governance scholar recognizes this risk: “New governance approaches often assume one-dimensional measurements in evaluating complex developments. For example, scholars may imply flat equations between advancement in business administration models and new public management models; between scientific learning and democratic learning; between small-scale knowledge and large-scale initiatives; and between accountability and responsiveness.” *Id.* at 450.

⁹⁹ ALICE M. RIVLIN, *SYSTEMATIC THINKING FOR SOCIAL ACTION* 89 (1971).

ment”¹⁰⁰ “Members of this implicit league of reformers may be willing to gloss over one another’s overweening on the charitable grounds that all experiments entail mistakes or out of the cynical expectation that should they encounter difficulties one hand will wash the other.”¹⁰¹ If some types of social achievement are more difficult to measure, the absence of measurable results may deny full consideration to proposals in those areas in subsequent experimentalist discussions. This denial violates the principle of political equality, an important precondition of democracy.¹⁰²

If one policy choice becomes effectively irrevocable, the experimentation will end prematurely, even if the results of that choice prove unsatisfactory. Yet the provisionality that the democratic experimentalists celebrate also may become an obstacle to identifying promising policies: “[S]ocial experiments may simply take too much time. Many of the really interesting effects of social action show up only after a period of years.”¹⁰³ These experiments may be ended early, effectively excluding the policies being tested from further consideration in experimentalist deliberations. This, too, violates the principle of political equality.

If only the national government can address a problem effectively, all experiments are likely to “show” that the problem is not amenable to a local response. This result could be misinterpreted as suggesting that no public response on any level would be availing.

Finally, if participation proves costly,¹⁰⁴ decentralization will move decision making into greater obscurity, hidden from the scrutiny of the national media and advocacy organizations that could spread those costs more efficiently. Local voluntary participation proves ex-

¹⁰⁰ *Id.* at 112.

¹⁰¹ Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 874-75 (2000) [hereinafter Dorf & Sabel, *Treatment Courts*].

¹⁰² See JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM 30-31 (1991) (defining “political equality” as “the institutionalization of a system which grants equal consideration to everyone’s preferences and which grants everyone appropriately equal opportunities to formulate preference on the issues under consideration” (emphasis omitted)).

¹⁰³ RIVLIN, *supra* note 99, at 117.

¹⁰⁴ Failures of this assumption are likely to have a distributional skew: “[F]actors that limit replication of successful coalitions among members of the middle and working classes, such as inadequate resources, leadership, and collective-action problems, are even more problematic for the working poor” Frank Munger, *Beyond Welfare Reform: Can We Build a Local Welfare State?*, 44 SANTA CLARA L. REV. 999, 1018 (2004).

traordinarily difficult to achieve on a broad scale.¹⁰⁵ Economic downturns and related cuts in government spending starve community groups of funds at the very times when they are needed most.¹⁰⁶ Few large foundations provide significant aid to community groups.¹⁰⁷ Community groups have been largely silent as the federal and state governments enacted massive reductions in antipoverty programs.¹⁰⁸ As Pablo Eisenberg has explained, “[f]ar from leveling the playing field, civil society appears to have acquiesced or, at worst, abetted a national policy that has slowly made it more difficult for many citizens to enjoy equal opportunities.”¹⁰⁹ Wealthy interests then will be best-equipped to fund and coordinate advocacy across a myriad of local fora.¹¹⁰ A process that insists on achieving consensus will have particularly high transaction costs,¹¹¹ making it even easier for the affluent to outlast the impoverished.

In regard to each of these risks, it should be noted that leading democratic experimentalists disavow any resort to national authority intervening where the experimental process has fallen apart: the only remedies they envision from administrative agencies,¹¹² Congress, or

¹⁰⁵ See Pablo Eisenberg, *Is it Time to End the Promise?: The Failed Volunteerism Crusade*, in CHALLENGES FOR NONPROFITS AND PHILANTHROPY: THE COURAGE TO CHANGE 165, 166-67 (Stacy Palmer ed., 2005) [hereinafter CHALLENGES] (discussing how a non-profit organization, America’s Promise, failed to reach its lofty goals); FISHKIN, *supra* note 102, at 54-58 (reporting low voter-turnout rates for American elections).

¹⁰⁶ See Pablo Eisenberg, *The Voluntary Sector in the 1970s: Problems and Challenges*, in CHALLENGES, *supra* note 105, at 23, 29-30 (finding that at the time when community groups are most needed, they are “financially strapped”).

¹⁰⁷ *Id.* at 32 (“Most [foundations] were not interested in community organizations . . . before the [Tax Reform] Act and have not changed their priorities since.”).

¹⁰⁸ Pablo Eisenberg, *Philanthropy Community Building*, in CHALLENGES, *supra* note 105, at 126, 128-29 (noting that whenever Congress was considering whether to cut programs that aided low-income people, organizations helping the poor said little in protest).

¹⁰⁹ Pablo Eisenberg, *Looking Ahead: What is the Future for the Nonprofit World?*, in CHALLENGES, *supra* note 105, at 228, 236.

¹¹⁰ See Lobel, *Renew Deal*, *supra* note 21, at 460-62 (“[S]tronger parties are able to see the benefits of a shift to the governance model.”).

¹¹¹ See FISHKIN, *supra* note 102, at 51 (stating that adopting the practices of a Quaker meeting, where the discussion continues until a general consensus is reached, would “raise decision-costs enormously”).

¹¹² Administrative agencies would be research organizations, without substantive decision-making authority. Lobel, *Renew Deal*, *supra* note 21, at 399 (“[T]he business of government agencies becomes regulatory research and development . . .” (internal quotation marks omitted)). One new-governance scholar breaks ranks with the purists to acknowledge that “retention of supervisory authority and the background threat of direct regulation and enforcement strengthen accountability in the shift to govern-

the courts are directives to share information and deliberate.¹¹³ Indeed, they declare it “most critical[.]” to bar litigation outright while experimentation—which they consider a perpetual process—is underway.¹¹⁴ Although democratic experimentalists describe ways that parties might try to be persuasive in litigation over the breakdown of deliberations,¹¹⁵ they so limit the court’s available remedies—at worst, apparently, more deliberation¹¹⁶—that it is unclear whether parties would care if they won or lost.

In short, if the deliberative process cannot function effectively because any one of these assumptions is not met, democratic experimentalists provide no means to correct the malfunction. Here, the experimentalists depart significantly from the models of industrial organization that inspire them: if an employee or unit ceases to pursue the general well-being of the corporation, or even if the employee or unit does so zealously but ineffectually, senior management fires them. No company would long remain profitable if it disabled the mechanisms of central discipline as resolutely as the democratic experimentalists propose.

C. *How Democratic Experimentalist Regimes May Be Established*

In addition to the system’s ongoing vulnerabilities, the process of establishing democratic experimentalism in the first place may be problematic. “Shifts from one paradigm to another are always about shifts in power allocation. Governance processes not only provide a framework for decision making and action, but also alternate the power relations among the participants.”¹¹⁷

ance,” but does not explain how to integrate this power with the radical devolution of power at the core of the experimentalist program. *Id.* at 452.

¹¹³ See Dorf & Sabel, *supra* note 12, at 349 (outlining the remedies that a legislature, an agency, or the courts could use in an experimentalist regime when confronted with an actor who does not cooperate). Congress also apparently could withdraw research funding from a jurisdiction that refused to share information. *Id.* at 341. Lobel suggests that greater “orchestration”—dialogue with interested parties and data collection—could remedy employers’ use of “cosmetic” antidiscrimination programs as liability shields. Lobel, *Renew Deal*, *supra* note 21, at 420-22.

¹¹⁴ Dorf & Sabel, *supra* note 12, at 356.

¹¹⁵ *Id.* at 400-01, 464.

¹¹⁶ *Id.* at 389-90, 397-400.

¹¹⁷ Lobel, *Renew Deal*, *supra* note 21, at 460; see also *id.* at 458 (finding it “irresponsible to discuss the shift from a state-centered regulatory model to a new governance model based on collaboration and the empowerment of diverse actors without asking who will win and who will—at least some of the time—lose”).

Some scholars assert that the new paradigm can be established “piecemeal,”¹¹⁸ but it remains unclear who would expend political capital to establish a democratic experimentalist system. Advocating for these procedures would divert resources away from each side’s advocacy for its substantive program. Significantly, this cost is unlikely to be felt symmetrically; ironically, it will disadvantage groups with more collaborative predispositions. Moralistic political cultures, which often have a liberal tint, are disproportionately likely to advance “public interest” approaches to policymaking.¹¹⁹

If the democratic experimentalists were not so scornful of public-choice theory, they also might recognize that they have created a classic prisoner’s dilemma for the opposing sides of any public policy dispute. They may be right that having both sides collaborate on experimentalist problem solving is optimal for society as a whole, but each side will be better off husbanding its resources to advance its substantive agenda, whatever its adversary may do. If one side is seeking an experimentalist dialogue, aggressive substantive advocacy can allow the other side to frame the issue decisively in its own terms; if the first group is behaving aggressively, a similarly aggressive posture is necessary to avoid an adverse framing.

Democratic experimentalists respond that the potential for mutually utility-enhancing results from experimentalist collaboration differentiates this situation from a classic prisoner’s dilemma by making mutual cooperation the optimal outcome for both sides.¹²⁰ The experimentalists offer no basis for believing that such solutions exist all, most, or even a good deal of the time.¹²¹ Moreover, even if an outcome that takes both sides’ interests into account maximizes total value, deliberative processes are far from the only means to achieve that result. Even in hard-nosed, thoroughly adversarial competition, each side has an incentive to structure its demands so as to minimize burdens on the other.¹²² A single-minded environmentalist with no

¹¹⁸ See, e.g., Dorf & Sabel, *supra* note 12, at 284 (noting that democratic experimentalism’s “adoption might be accomplished piecemeal by drawing on the available precursors”).

¹¹⁹ PETERSON & ROM, *supra* note 15, at 39.

¹²⁰ See, e.g., Dorf & Sabel, *supra* note 12, at 322 (“[I]t is the very practical particularity of this deliberation . . . that advances the good of all participants.”).

¹²¹ Indeed, Lobel warns that “the governance model must not accept a naïve account of the win-win theme. Situations in which multiple interests are mutually enforcing are context specific.” Lobel, *Renew Deal*, *supra* note 21, at 458.

¹²² Dorf and Sabel argue that including marginalized people in deliberations will cause policymakers to begin to consider their interests. Dorf & Sabel, *supra* note 12, at

sympathy for industry might nonetheless prefer to reduce pollution through efficient, market-based incentives rather than command-and-control standard setting because she recognizes that the vehemence of industry opposition will depend on its expected losses: for any given amount of political capital, she can win greater emissions reductions with a scheme that minimizes deadweight loss. She also might calculate that market reliance will make her look more reasonable to moderate policymakers lacking a firm commitment to either side.

An actor recognizing the value of an option that minimizes burdens on other players may nonetheless eschew cooperative, dialogic policymaking processes for several reasons. First, she may seek to avoid the transaction costs of such processes. Second, she may fear that entering into cooperative processes will be interpreted as weakness by other players and lead them to raise their demands. Most fundamentally, imposing the most efficient, socially wealth-maximizing option unilaterally will allow the actor to harvest the entire resulting surplus, whereas doing so collaboratively would force the actor to share. The single-minded environmentalist described above may try to achieve the greatest possible emissions reduction by imposing an incentive regime with a burden on industry comparable to the most onerous command-and-control regime that is politically feasible. If she entered into a collaborative process with industry, she presumably would have to purchase its consent by dividing the efficiency gains: she would get emissions lower than under the command-and-control regime but higher than she could have won from the political process. Thus, even if the democratic experimentalists could show that alternative policies are always available that, by taking both (or all) sides' needs into account, produce the best results for each, they would not establish that deliberative processes are in all actors' interests.¹²³

405. If marginalized people lack the power to defeat a final decision antithetical to their interests, it is unclear why powerful groups would make concessions to them, even if forced to talk. If formerly marginalized people do have political leverage, that should affect the result, whether through dialogue or through other parties calibrating their proposals to avoid a fight. Exponents passionately insist that the autonomy of the formally powerless is vital to democratic experimentalism, but they do not explain how that will be achieved. *Id.* at 405-06.

¹²³ And even if experimentalists could somehow establish that mutual cooperation produces the best result for all players, they cannot assure cooperation. More precisely, assuming that each side receives the best result from cooperating transforms the game from a simple prisoner's dilemma to an endlessly iterated prisoner's dilemma. Cooperation does indeed become the dominant strategy in this game, but players may take different lengths of time to recognize that. The democratic experimentalists assume that uncertainty about the political situation will cause powerful interests to co-

D. *Ethical Concerns About Democratic Experimentalism*

These practical problems associated with democratic experimentalism also help to illustrate an important set of ethical concerns. Insisting on experimentalist means to decide questions affecting vulnerable human beings, rather than favoring whichever method will yield the best substantive results, comes perilously close to treating those people as means rather than as ends. Although the democratic experimentalists are correct that the results of an experiment cannot be known with certainty before it is conducted,¹²⁴ some outcomes may be far more probable than others. A strong argument could be made that showing low-income people equal respect as human beings entails a duty to apply our best efforts to estimate experiments' likely results and to proceed only with those likely to prove consistent with our ethical beliefs. A series of tragedies in which those ethical concerns were disregarded¹²⁵ led to strict rules forbidding human experimentation without obtaining prior third-party ethical review and the fully informed consent of the participants.¹²⁶ Insisting upon experimentalist policymaking when other means are more likely to secure vulnerable people's well-being risks repeating those mistakes.

A related concern involves the democratic experimentalists' opposition to substantive individual rights. Although they do not provide explicitly for any exceptions, many kinds of rights surely will not be dropped. Property owners will not lose their rights against uncompensated takings even if they cannot identify "working alternatives that do not."¹²⁷ Courts will not ignore affluent political donors' First Amendment rights just because a locality has met its "obligation of self-explication."¹²⁸ The experimentalists' discussion focuses largely

operate but fail to consider that it could do just the opposite. *Id.* at 409-10. In one of Dorf and Sabel's examples, a moderate policymaker, such as former Transportation Secretary William Coleman, may seek to impose an experimentalist regime. *Id.* at 362. As they demonstrate, however, such a regime is likely to prove unsustainable if one side or the other seizes the reins of power. *Id.*

¹²⁴ Dorf & Sabel, *supra* note 12, at 407.

¹²⁵ See generally Donald H.J. Hermann, *Lessons Taught by Miss Evers' Boys: The Inadequacy of Benevolence and the Need for Legal Protection of Human Subjects in Medical Research*, 15 J.L. & HEALTH 147, 147-48 (2000) (noting historical instances of abuse of medical research subjects).

¹²⁶ 42 U.S.C. §§ 201 to 300gg-92 (2000).

¹²⁷ Dorf & Sabel, *supra* note 12, at 288.

¹²⁸ *Id.* at 399.

on equal protection and regulatory statutes that protect individuals against exercises of concentrated power.¹²⁹

Granting judicial protection to the substantive interests of one set of actors and not those of another set has profound political consequences. Those whose key interests enjoy judicial protection can devote all of their political capital to pursuing secondary preferences while their rightless counterparts can take nothing for granted. Having a judicially secured floor on one's vulnerability to misfortune can encourage political gambling that brings rich rewards; those who could lose everything tend to hedge their bets more and are thus less likely to win transformational change. Contemporary constitutional- and administrative-law doctrines already create considerable imbalances in recourse to the courts; exacerbating that imbalance will further hinder a deliberation of equals.

II. DEMOCRATIC EXPERIMENTALISM AND ANTIPOVERTY LAW

In much of the world, antipoverty policy is primarily a matter for the central government. Whether conducted through broad social insurance, targeted need-based programs, subsidization of particular industries or staples, or trade policies that promote export industries, central officials almost invariably play a key role.

Not here. From its birth, this country has seen poverty as a local concern to be addressed by local means. Moreover, our antipoverty policy is profoundly heterodox. Our society as a whole is largely agnostic as to what substantively should be done, leaving state and local antipoverty policymaking with broad scope. It optimistically valorizes legislatures as addressing poverty "one step at a time."¹³⁰

In addition, American antipoverty policy is highly participatory. It offers individual low-income people the opportunity to participate in determining the terms of their own relief through adversarial hearings.¹³¹ It finds participation in the project of relieving poverty ennobling and seeks to extend that participation as broadly as possible through state and local governments and private charities.

¹²⁹ *Id.* at 323-39, 356-64, 444-69; Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL'Y REV. 261, 299-317 (2004).

¹³⁰ *Jefferson v. Hackney*, 406 U.S. 535 (1972).

¹³¹ *See* 7 U.S.C. § 2020(e)(10) (2006) (granting a "fair hearing and a prompt termination thereafter to any household aggrieved by the action of the State" regarding its food stamp program).

This participatory model would seem tailor-made for democratic experimentalism. Many of the most difficult tasks in establishing an experimentalist regime—weaning the country from the centralized regulatory system borne of the New Deal and encouraging broad participation—seemingly have already been accomplished. Antipoverty policy thus would seem to provide an ideal arena in which to test democratic experimentalism.

Sadly, the participatory model of antipoverty law has been a resounding failure. This Part shows why. Section A traces the history of the deliberative model of antipoverty law. It also identifies a countermovement: a relatively obscure trend of centralized, largely nonparticipatory policymaking that has been responsible for virtually all progress against poverty despite being confined to low-salience issues of little interest to those engaged in the main experimentalist project. Section B examines how diverse political constituencies combine to create these two tracks of antipoverty law.

A. *The Deliberative Model of Antipoverty Law*

Antipoverty law in this country always has been highly decentralized. For most of its history, caring for low-income people was almost exclusively a local responsibility.¹³² Apart from taking some tepid measures to aid veterans,¹³³ the federal government had minimal involvement until relief costs during the Great Depression threatened to bankrupt local and even state governments.¹³⁴ Even then, the new federal role was largely confined to financing: Congress regarded low-income children as having insufficient ties to the national economy to justify much federal involvement.¹³⁵ It further dampened ambitions for benevolent national leadership when it tightly capped grant levels.¹³⁶ A modest expert bureaucracy developed, but its powers were few.¹³⁷

Although not explicitly experimentalist, the law governing low-income people also had strong scientific pretensions long before the

¹³² KATZ, POORHOUSE, *supra* note 19, at 3-88, 146-78.

¹³³ *Id.* at 200-01.

¹³⁴ *Id.* at 213-18.

¹³⁵ See PETERSON & ROM, *supra* note 15, at 92-95 (detailing legislative history primarily concerned with providing benefits for retired lifelong workers and noting the lack of representation for unemployed parents with dependent children).

¹³⁶ *Id.* at 97.

¹³⁷ See, e.g., *King v. Smith*, 392 U.S. 309, 326 n.23 (1968) (noting that for almost a decade federal officials had been criticizing to no avail the state practices that the Court subsequently declared unlawful).

New Deal. For example, the nineteenth-century “scientific charity” movement split up low-income families and institutionalized their members with the full support of some of the leading social scientists of the day.¹³⁸ Program designers in different cities debated one another vigorously about whose approach to institutionalization was best, seeking to convert other localities.¹³⁹

1. Decentralization, Deliberation, and Privatization in the 1960s

The War on Poverty changed far less than is commonly believed. Because of President Johnson’s discomfort with addressing income support directly, control of welfare—as well as the new food stamp and Medicaid programs—remained heavily decentralized.

Moreover, the War on Poverty was founded on an emphatically deliberative model. Its leading congressional champion insisted that the “solution of the poverty problem is not possible without the full participation of all elements of our society.”¹⁴⁰ Its embrace of broader participation in the 1960s was for very much the same reasons the democratic experimentalists cite: a reaction against control of programs by New Deal-style professional elites, who were perceived as too hidebound and insensitive to understand and meet low-income communities’ needs.¹⁴¹ Even critics conceded that an emphasis on participation over substance in forming antipoverty policy seemed natural for “a society increasingly concerned with the desiccation of the community ties that lead men to accept and abide by the norms of trust, integrity, and mutual aid.”¹⁴² A prominent feature of the War on Poverty was the funding of agencies to increase low-income people’s

¹³⁸ See HERBERT J. GANS, *THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY* 47 (1995) (discussing how the scientific charity movement legitimated the concept of an “underclass” in order to justify punitive measures, such as institutionalization in prisons and mental hospitals, against the poor).

¹³⁹ See DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 180-86 (1971) (discussing various states’ approaches to rehabilitating the poor and historical shifts in trends of institutionalization).

¹⁴⁰ HUBERT H. HUMPHREY, *WAR ON POVERTY* 171 (1964).

¹⁴¹ See DANIEL P. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY* 64-70 (1969) (noting that President Kennedy’s short-lived President’s Committee on Juvenile Delinquency illustrated the problematic lack of beneficiary participations in “elite community leadership” programs); see also IMIG, *supra* note 13, at 26-27 (describing the professionalization of antipoverty work and its consequences).

¹⁴² MOYNIHAN, *supra* note 141, at 15.

participation in the political process.¹⁴³ From the outset, federal law required these community-action agencies to proceed with “maximum feasible participation” in setting priorities.¹⁴⁴

Soon after, however, the rise of the welfare-rights movement changed the purpose of participation significantly.¹⁴⁵ In contrast to the democratic experimentalists’ vision of deliberation as a search for efficiency or the general good, the movement and its supporters saw deliberative processes as opportunities to pursue the interests of those most directly affected. Advocates of low-income people’s participation in antipoverty programs saw benefits both to policy formulation and to the development of skills and constructive habits for those participating.¹⁴⁶ The Ford Foundation played a major role in bringing about this change.¹⁴⁷ Paul N. Ylvisaker, director of the Foundation’s Public Affairs Program, declared his goal was “to mobilize and individualize; to gather power and liberate it.”¹⁴⁸ For a time, the direction of anti-poverty policy was contested between the Ford Foundation, which advocated for a participatory model, and the Johnson administration, which focused on substantive policies shaped by social science.¹⁴⁹ When the Vietnam War weakened and ultimately ended the Johnson administration, the Ford Foundation was left in a position to implement its view.¹⁵⁰ The Left sharply criticized Johnson’s Office of Economic Opportunity (OEO) for insufficiently involving low-income people.¹⁵¹ The increasing focus on self-interested advocacy affected

¹⁴³ See ROBERT F. CLARK, MAXIMUM FEASIBLE SUCCESS: A HISTORY OF THE COMMUNITY ACTION PROGRAM 22 (2000) (describing legislation that required low-income persons to make up at least one-third of the board of directors in community-action agencies).

¹⁴⁴ *Id.* at 55-57. These agencies still receive federal funding and are required to involve low-income people in an annual priority-setting process. *Id.* at 22.

¹⁴⁵ See WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE 344-45 (5th ed. 1994) (describing mass welfare-rights demonstrations, beginning in 1966).

¹⁴⁶ See Lucie E. White, *On the Vision and Practice of Participation in Project Head Start*, in LAW STORIES 197, 201 (Gary Bellow & Martha Minow eds., 1996) (discussing the participation of parents in Head Start programs as a way of fostering parental involvement in their children’s education).

¹⁴⁷ MOYNIHAN, *supra* note 141, at 38-43.

¹⁴⁸ *Id.* at 39.

¹⁴⁹ *Id.* at 76.

¹⁵⁰ *Id.* at 4.

¹⁵¹ CLARK, *supra* note 143, at 108-09.

the form of dialogue as well: community organizers stressed conflict, not concord.¹⁵²

In keeping with the tenets of democratic experimentalism, an early focus of the War on Poverty was improving the means of measuring success¹⁵³ and pressing local communities to “self-evaluate against stated objectives.”¹⁵⁴ Federal officials “monitored local activities, conducted audits and periodically mounted full-scale evaluations . . . [but] exercised little direct control over the actual expenditures.”¹⁵⁵

The empowerment movement soon, however, foundered on the costs of participation. Other pressing concerns drew most recipients away from welfare-rights organizations shortly after their own particular concerns were addressed.¹⁵⁶ Ineffectual local welfare-rights leaders became entrenched, with collective-action problems preventing their displacement.¹⁵⁷ Many of the activist groups that formed to influence the War on Poverty quickly “died from lack of leadership, goals or financial nourishment.”¹⁵⁸ Some of those that survived did so with government contracts or foundation grants, which often led their agendas away from advocacy.¹⁵⁹ At a minimum, most groups lost the incentive to organize aggressively or to take controversial positions.¹⁶⁰

The movement also lost important allies. The decline of the most activist stages of the civil rights movement saw a decline in acceptance

¹⁵² See TRATTNER, *supra* note 145, at 312 (citing criticism by well-known community organizer Saul Alinsky in the 1950s).

¹⁵³ See CLARK, *supra* note 143, at 78-82 (discussing the adoption of new poverty thresholds as affecting the perspective and operations of aid programs).

¹⁵⁴ *Id.* at 85.

¹⁵⁵ *Id.* at 83.

¹⁵⁶ See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 307-08 (Vintage Books 1979) (1977) [hereinafter PIVEN & CLOWARD, *MOVEMENTS*] (discussing the lack of stable groups in attempts to build welfare-rights organizations and the need to create new groups to maintain membership rolls).

¹⁵⁷ See *id.* at 309-10 (noting that those in leadership positions tended to focus more on their incumbency than the goals of the movement itself and, thus, resisted new organizing efforts).

¹⁵⁸ JAMES J. GRAHAM, *THE ENEMIES OF THE POOR* 271 (1970).

¹⁵⁹ See IMIG, *supra* note 13, at 26-27 (arguing that such organizations historically avoided political advocacy in order to focus on service provision); see also PIVEN & CLOWARD, *MOVEMENTS*, *supra* note 156, at 321-26 (recognizing the weakened militancy of the National Welfare Rights Organization as it relied more on the federal system).

¹⁶⁰ See PIVEN & CLOWARD, *MOVEMENTS*, *supra* note 156, at 312-15 (noting that a leadership agenda to cultivate relationships with other organizations led to changes in rhetoric, but no incentives to act on them).

of participatory policymaking.¹⁶¹ For a time, the antipoverty movement made striking gains in transforming the professional bureaucracy it had set out to oppose. After initially fearing reform as a threat to their profession, many social workers reconceptualized social work's ethics to require representing low-income clients' chosen interests.¹⁶² Beginning in the late 1960s, however, states began to eliminate the professional bureaucracy, replacing social workers with non-professional technicians in the administration of public benefit programs.¹⁶³ Neither these "eligibility workers" nor the social workers—installed in administrative roles or displaced away from antipoverty work altogether—took strong roles in policy advocacy.¹⁶⁴

The crushing blow to empowerment, however, resulted from the very delay inherent in deliberation. The time required to reach decisions left advocates under unrealistic pressure for quick results. One participant ruefully noted that "[w]e constantly underestimate difficulties, overpromise results, and avoid any evidence of incompatibility and conflict, thus repeatedly creating the conditions of failure out of a desperate desire for success."¹⁶⁵ Then, after antipoverty advocates spent much of the War on Poverty's first four years putting together a deliberative process for deciding which battles to fight, they learned, with the election of Richard Nixon, that the War was over.

The difficulties and delays that deliberation brought should not be surprising. The goals of antipoverty policy have long been controversial, even among those committed to helping low-income people.¹⁶⁶ Disillusioned participants have noted that deliberative approaches assume common "good intentions" without specifying what they are.¹⁶⁷ Although many debates focus on the effectiveness of particular pro-

¹⁶¹ See *id.* at 331-32 (finding that the external resources on which the welfare-rights movement had come to depend lasted only as long as the civil rights movement held a strong mass base and ebbed away after the death of Dr. Martin Luther King, Jr., and the election of Richard Nixon).

¹⁶² See TRATTNER, *supra* note 145, at 312, 345. Some social workers even rejected casework outright. *Id.*

¹⁶³ Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1126-27 (2000).

¹⁶⁴ See William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1254-67 (1983) (describing the conflicting interests between the working class and liberal reformers that doomed progressive advocacy).

¹⁶⁵ MOYNIHAN, *supra* note 141, at xii-xiii.

¹⁶⁶ For example, early voluntary antipoverty groups actively opposed government-funded relief efforts, advocating for psychological counseling instead. IMIG, *supra* note 13, at 27-28.

¹⁶⁷ MOYNIHAN, *supra* note 141, at 39.

grams, the ends of antipoverty policy are also controversial, with important leaders challenging the legitimacy of any public intervention.¹⁶⁸ Many argued that economic forces would naturally eliminate poverty.¹⁶⁹ Later, the Reagan administration's "master vision as to how societies overcome poverty [was that] . . . [s]ocieties and people do it on their own, and help from government is likely to do more harm than good."¹⁷⁰ And among those championing a public role, a divide emerged as to whether it should be a humanitarian effort to protect the neediest against severe deprivation or a broader effort to redistribute wealth that would also benefit those with modest means but who were at no risk of doing without the basic necessities.¹⁷¹ To minimize controversy, President Johnson excluded income-assistance programs from the War until after his ability to enact legislation largely had ended; local antipoverty agencies' inability to address these basic needs led to paralyzing debates in many communities.¹⁷²

As protracted deliberation robbed the War on Poverty of what dynamism it had, experimentalism, too, failed. In practice, voluntary reporting systems faltered as local agencies found them burdensome.¹⁷³ Over time, the pressures to reduce government employment as well as the demands of other tasks tend to shrink the staffing of federal agencies assigned to monitor state and local agencies' activities under federal programs.¹⁷⁴ Congress's commitment to experimentalism also proved weak: even when most local agencies perform well, those with problems attract negative publicity, causing Congress to tighten federal controls.¹⁷⁵ Even when rigorously evaluated local experiments showed promise of alleviating poverty, conservative critics

¹⁶⁸ See, e.g., CLARK, *supra* note 143, at 62 (describing the views of Senators Barry Goldwater and John Tower that the poor are responsible for their own condition); see also TRATTNER, *supra* note 145, at 308-09 (describing efforts to roll back the New Deal's expansion of relief during the 1950s).

¹⁶⁹ See TRATTNER, *supra* note 145, at 310 (pointing to John Kenneth Galbraith as one such scholar).

¹⁷⁰ Nathan Glazer, *The Social Policy of the Reagan Administration*, in *THE SOCIAL CONTRACT REVISITED: AIMS AND OUTCOMES OF PRESIDENT REAGAN'S SOCIAL WELFARE POLICY* 221, 236 (D. Lee Bawden ed., 1984).

¹⁷¹ MARTIN ANDERSON, *WELFARE* 68-73 (1978).

¹⁷² See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 286 (1971) [hereinafter PIVEN & CLOWARD, *REGULATING*].

¹⁷³ See CLARK, *supra* note 143, at 28.

¹⁷⁴ See *id.* at 169 (describing a drop in the federal staff assigned to monitor the Community Services Block Grant from 170 to 55 in just one year, with the remaining staff absorbed into the Family Support Administration three years later).

¹⁷⁵ *Id.* at 94-95, 111-13.

raised sophisticated methodological questions about the reliability of any results achieved on such a small scale.¹⁷⁶ Experimentalism was equally a failure on the macro level. The War on Poverty began with limited goals—the two strategies with the greatest potential to affect low-income people directly, income support and job creation, were excluded from the beginning—and a tiny fraction of the required funding. It was “[l]ess a war on poverty than a minor skirmish.”¹⁷⁷ Nonetheless, the war was widely regarded as a failure, dooming major state interventions in the future.¹⁷⁸

2. Deliberative Antipoverty Law Since the War on Poverty’s Demise

The deliberative model of antipoverty law did not die with the War on Poverty. The value of participation was embedded both in law and in the norms of activists. Antipoverty activists assumed that the widespread sympathy toward low-income people achieved in the 1960s would continue to provide a solid political grounding for the programs,¹⁷⁹ allowing debate to proceed on questions of implementation. Reducing policy debates to technical questions would make sense if a sympathetic consensus remained; the great majority of the social scientists that presumably would join in these deliberations were liberals.¹⁸⁰

The courts provided another impetus for a deliberative model. Although unwilling to recognize substantive constitutional social-welfare rights,¹⁸¹ the Supreme Court granted welfare recipients robust rights to participate in deliberations about their cases in *Goldberg v. Kelly*.¹⁸² Assisting recipients in these deliberations proved an impor-

¹⁷⁶ See ANDERSON, *supra* note 171, at 105-15 (cataloguing the types of biases that might undermine the validity of social experiments).

¹⁷⁷ TRATTNER, *supra* note 145, at 324.

¹⁷⁸ *Id.* at 325.

¹⁷⁹ See PHILIP S. LAND, SHAPING WELFARE CONSENSUS: U.S. CATHOLIC BISHOPS’ CONTRIBUTION 104-05 (1988) (describing a “positive consensus on welfare,” including the proposition that “[w]elfare works but it does not produce miracles”).

¹⁸⁰ See Super, *New Moralizers*, *supra* note 9, at 2089 (noting the liberals’ “broad consensus on a basic set of social values”).

¹⁸¹ See, e.g., *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972) (“So long as its judgments are rational, and not invidious, the legislature’s efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket.”); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (“In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.”).

¹⁸² See 397 U.S. 254, 260-61 (1970) (holding that recipients of financial aid were entitled to notice and a hearing prior to the termination of their benefits).

tant recruiting opportunity for welfare-rights organizers.¹⁸³ The Court also handed down a series of cases aggressively interpreting public-welfare statutes in favor of low-income people, implicitly inviting the political process to engage in response.¹⁸⁴ Like the strictly procedural form of judicial review that the democratic experimentalists espouse, the effectiveness of *Goldberg* and a regime of generous statutory interpretation assumes the independent presence of humane values and depends on the power of deliberation.¹⁸⁵ Without such values, legislators could reduce or eliminate the liberally construed programs,¹⁸⁶ eliminating the individualized determinations that give rise to the right to deliberation.¹⁸⁷ Like the truncated form of judicial review that the experimentalists advocate, this approach gave low-income people no substantive entitlements beyond those they could secure through the deliberative process.

This participatory approach also proved convenient for another, quite different reason: it provided a substitute for substantive agreement. As one leading conservative scholar noted,

[i]n the short run it might be possible to pass legislation that would institute a guaranteed income for all or, at the other extreme, simply eliminate all government welfare programs over a period of time and allow private charitable efforts to take care of people in need. But neither of these approaches will work unless preceded or accompanied by massive changes in deeply held public beliefs.¹⁸⁸

Although this is true on the national level, decentralization gave each ideological extreme the opportunity to search out areas where its program could command a majority. As each side publicized its own perceived successes and the perceived failures of policies it opposed, this regime became experimentalist as well. This resort to decentral-

¹⁸³ See PIVEN & CLOWARD, MOVEMENTS, *supra* note 156, at 297-98 (arguing that the "objective of these activities" to address claimants' grievances "was to expand membership affiliation").

¹⁸⁴ See, e.g., *Shea v. Vialpando*, 416 U.S. 251, 258 (1974) (holding that standardized allowances for work expenses must be adequate to cover all actual expenses).

¹⁸⁵ See PIVEN & CLOWARD, REGULATING, *supra* note 172, at 306-14 (describing attempts to implement more procedural safeguards for denying welfare benefits in order to decrease officials' capriciousness).

¹⁸⁶ See, e.g., *Heckler v. Turner*, 470 U.S. 184, 211 (1985) (finding that Congress limited *Shea* in 1981 with the passage of the Omnibus Budget Reconciliation Act of 1981).

¹⁸⁷ See *Atkins v. Parker*, 472 U.S. 115, 129-30 (1985) (holding that recipients have no right to a *Goldberg* hearing when the state reduces or terminates their benefits en masse as it implements new legislation).

¹⁸⁸ ANDERSON, *supra* note 171, at 159.

ized, participatory, and experimentalist decision making turned the usual approach to deliberation on its head: instead of proceeding from a shared set of values about the task to be accomplished, it resulted precisely from the absence of such shared values.¹⁸⁹

a. *Decentralization*

Decentralization appeared to offer something appealing to each side. As Donald Rumsfeld and other Nixon appointees took the reins of federal antipoverty agencies after 1968,¹⁹⁰ activists sought to limit their power by entrenching local authority. Similarly, disliking President Nixon's proposal to federalize welfare, these activists aligned themselves with the far right to preserve the highly decentralized welfare system they had inherited from the New Deal.

Today, conservatives such as Grover Norquist seek to shrink government to a size that would allow it to be dragged into the bathtub and drowned.¹⁹¹ Other conservatives blame features they dislike in the current system on federal involvement and see decentralization as an opportunity to reopen those issues, preferably as a way station on the road to radically reducing the overall public role.¹⁹² The 1996 welfare law could not have been clearer in retasking Health and Human Services (HHS): it prohibited HHS from imposing any requirements on states without express statutory authorization.¹⁹³

Liberals, in turn, rhapsodize about enlightened people's ability to make a difference at the grassroots level.¹⁹⁴ The abiding faith in the

¹⁸⁹ To the extent that the Left and the Right did have common ground, it was in a utilitarian approach to these problems rather than one based on defining social rights and responsibilities. See LAND, *supra* note 179, at 31-35 (critiquing the utilitarian, individualistic approach).

¹⁹⁰ CLARK, *supra* note 143, at 128-34.

¹⁹¹ David Theo Goldberg, *Deva-Stating Disasters: Race in the Shadow(s) of New Orleans*, 3 DU BOIS REV. 83, 86 (2006) (quoting Grover Norquist, President of Americans for Tax Reform, expressing the desire to "reduce [government] to the size where he can drag it into the bathroom and drown it in the bathtub.").

¹⁹² See, e.g., ANDERSON, *supra* note 171, at 164-66.

¹⁹³ See 42 U.S.C. § 617 (2000) ("No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provisions of this part, except to the extent expressly provided in this part.").

¹⁹⁴ See, e.g., HARRY C. BOYTE, *THE BACKYARD REVOLUTION: UNDERSTANDING THE NEW CITIZEN MOVEMENT* xi-xiv (1980) (praising community organizers for resisting corporatist threats to democracy); MANUEL CASTELLS, *THE CITY AND THE GRASSROOTS: A CROSS-CULTURAL THEORY OF URBAN SOCIAL MOVEMENTS* (1983) (providing case studies illustrating the role of urban movements in effecting broader social change); ROBERT FISHER, *LET THE PEOPLE DECIDE: NEIGHBORHOOD ORGANIZING IN AMERICA*

inevitability of successful innovation, and of state and local governments' fidelity to the interests of low-income people, permeates this viewpoint.¹⁹⁵

This decentralization of antipoverty policy has persisted despite considerable inefficiencies. Decentralization imposes the burden of redistributing to low-income people on narrow segments of society that lack any particular duty or exceptional ability to pay.¹⁹⁶ Indeed, as proximity is the main basis on which these burdens are imposed, decentralization has the paradoxical effect of increasing low-income people's isolation by taxing interactions with them. Thus, a hospital in an affluent area, or one that closes its emergency room, will not have to provide uncompensated care; an employer that automates low-skill functions will not have to pay minimum wage for labor with a lower market value.

Moreover, because the media and electorate cannot closely monitor each of the numerous local interventions, local action becomes particularly vulnerable to capture and manipulation by special interests lobbying for subsidies that benefit themselves, rather than subsidies that may be more urgently needed.

b. *Participation and Privatization*

Both the Left and the Right also embrace privatization through volunteerism, again for quite different reasons. Conservatives see it as an alternative to, and a rationale for shrinking, government.¹⁹⁷ As Democratic politicians increasingly support human-services funding cuts, they find this vision appealing as well.¹⁹⁸ This follows a long his-

(1994) (focusing on the line between the national political economy and local community organizing).

¹⁹⁵ See KATZ, *CITIZENSHIP*, *supra* note 20, at 354 (noting that although devolution "seems consistent with American traditions of localism," local governments' propensity to act in the best interests of their citizens is uncertain).

¹⁹⁶ Thus, for example, the federal government has required states providing refuge to families that evacuated areas hit by Hurricanes Katrina and Rita to pay part of the additional costs of Medicaid. Families' choices of destinations appear to result primarily from proximity; constructing a normative basis for imposing costs on this basis is difficult. The timing of these burdens on state and local governments is similarly irrational, imposing greater burdens at just the point that these governments' revenues are falling. See Super, *Fiscal Federalism*, *supra* note 14, at 2629-40.

¹⁹⁷ Cf. CLARK, *supra* note 143, at 160-62 (highlighting President Reagan's view that if low-income people truly cannot resolve their issues alone, the private sector would provide for them).

¹⁹⁸ KATZ, *CITIZENSHIP*, *supra* note 20, at 163-64.

tory of citing the supposed capabilities of private charity to eliminate public aid for the poor.¹⁹⁹

Liberals see volunteerism as “a strengthening of democracy, a devolution of power not to individuals and private corporations but to local democratic institutions and self-governing communities.”²⁰⁰ Neither vision treats the benefit to low-income people in need as an important end in itself. Yet even those progressives who embrace neither of these visions—and who recognize that the contributions of volunteerism pale in comparison to the contributions government can make—may nonetheless be drawn to volunteerism. Although wishing for a more robust public response, they may feel that voluntary aid is better than nothing; for them, abandoning volunteerism because it conflicts with their philosophical preference for more government action would neglect an ethical duty to aid low-income people as well as possible.

Some progressives assert that working with low-income people will enlighten volunteers and make them more sympathetic to governmental involvement.²⁰¹ In practice, volunteerism tends to be highly parochial: people rarely volunteer outside of communities and organizations of which they are members, and in a nation highly segregated by income, this means that few volunteers develop meaningful interactions with people very different from themselves.²⁰² Moreover, volunteers may fall victim to misinformation as organizations seeking their contributions systematically tend to understate government’s contributions and to overstate the impact of volunteers’ work so that continued contributions seem more important.

An additional factor securing the place of non-profit organizations in social-welfare provision, and of the voluntary sector in our model of antipoverty law, is fiscal: the massive infusion of federal funding to those non-profits between the early 1960s and the early 1970s.²⁰³ This

¹⁹⁹ *Id.* at 137-42.

²⁰⁰ Benjamin R. Barber, *The How and Why of Volunteering*, PHILA. INQUIRER, Apr. 20, 1997, at E11.

²⁰¹ Consequently, by the end of the nineteenth century, critics of the poor urged that government programs replace religious charity because they believed that congregations were too easily deceived by lazy claimants. See KATZ, CITIZENSHIP, *supra* note 20, at 156 (remarking that, unlike in these earlier periods, religious groups were substantially left out of federal plans during the New Deal).

²⁰² See *id.* at 147, 165 (acknowledging the failure to spur Americans to volunteer time and money on causes outside their communities).

²⁰³ See *id.* at 142 (noting primarily the roles of the Public Welfare Amendments of 1962 and Title XX of the Social Security Amendments of 1974).

“mixed economy” of public- and private-sector involvement muddled any competition between the two sectors.²⁰⁴ If advocates for a stronger public role begin criticizing nonprofits, they are effectively criticizing government programs, too.

Yet as both the Left and the Right call for more participation, the public has grown less inclined to provide it. In the early and mid-1990s, while charitable giving increased substantially, giving as a share of income declined.²⁰⁵ More significantly, between 1991 and 1997, charitable contributions to social-service agencies actually declined by five percent while religious, educational, and medical institutions all experienced double-digit growth.²⁰⁶ Giving by private individuals—as opposed to foundations—has shifted even more sharply away from social services.²⁰⁷ Private giving to human-services charities in 1995 was less than one percent of the federal government’s spending on social insurance and public assistance that year.²⁰⁸ Volunteer work also declined through the 1990s—and what remained was overwhelmingly directed at religious and other non-social-services activities.²⁰⁹ Less than five percent of Americans contribute *any* time to social welfare volunteer activities.²¹⁰ Indeed, human-services organizations often lack the capacity to organize and effectively apply voluntary labor of uncertain ability or reliability.²¹¹

Nonetheless, the participatory, deliberative vision remains firmly entrenched on both sides of the ideological divide and is often presented as a reason for eschewing governmental action. Antihunger leader Bill Shore declares that “to transform welfare we must look in the mirror . . . [n]ot through higher taxes . . . but by giving of ourselves through whatever skills made us strong.”²¹² The “success of so-

²⁰⁴ See *id.* (describing private charity as existing “in the shadow of government”).

²⁰⁵ *Id.* at 146-47.

²⁰⁶ *Id.* at 147.

²⁰⁷ See *id.* (noting that while household donations to social-services programs dropped five percent from 1991 to 1997, contributions to educational and religious institutions rose substantially).

²⁰⁸ *Id.* at 147-48 (comparing \$1.5 trillion in federal government social insurance and public assistance to \$12 billion in private donations).

²⁰⁹ See *id.* (noting that religious organizations received more than twice the time given to human-services organizations).

²¹⁰ KEN AULETTA, *THE UNDERCLASS* 367 (rev. ed. 1999).

²¹¹ See KATZ, *CITIZENSHIP*, *supra* note 20, at 164 (discussing “the limits of voluntarism”).

²¹² BILL SHORE, *REVOLUTION OF THE HEART: A NEW STRATEGY FOR CREATING WEALTH AND MEANINGFUL CHANGE* 7 (1995).

cial policy depend[s] upon our personal participation.”²¹³ His organization and its allies are trying to “reclaim . . . meaningful engagement in [the] communit[y].”²¹⁴ A leading Protestant antihunger group, Bread for the World, emphasizes broad involvement, declaring that “hundreds of thousands of leaders at all levels and in all sectors” are necessary, lest “the democratic experiment . . . fail.”²¹⁵

Conservative Charles Murray, who first popularized the idea of eliminating federal and state antipoverty programs entirely, nonetheless praised local and private-sector philanthropy because of its greater accountability.²¹⁶ Making these agencies the focus of aid, he reasoned, would force low-income people to conduct themselves to win “sympathy from the white middle class” by seeking work and minimizing their requests for aid.²¹⁷ Others argued that “[t]he more administration of policies and programs is brought down to the state and local level, the better the people will be able to judge who is fair, who is honest, who is creative, and who is productive and efficient.”²¹⁸

c. *Experimentalism*

Finally, both Left and Right have enthusiastically embraced experimentalism as a guiding force in antipoverty law. The Reagan administration in 1986 sought to make local experimentalism the basis of a new welfare system.²¹⁹ The Texas Public Policy Foundation declared that “conservative policy experiments at the state and local level [that] would take place without risk to the rest of the country . . . could save the country from a continuation of costly, but ineffective liberal policies at the national level.”²²⁰ Rather than articulate detailed

²¹³ *Id.*

²¹⁴ *Id.* at 11.

²¹⁵ ELLEN JENNINGS & SHOHREH KERMANI PETERSON, BREAD FOR THE WORLD INST., TRANSFORMING ANTI-HUNGER LEADERSHIP: A GUIDE TO THE PROGRAM 1.3 (1996).

²¹⁶ See CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980, at 229–30 (1984) (arguing that the increase in resources for local and private human services following the decrease in federal spending has led to a “more humane, more wisely distributed, and more effective” service-coverage network).

²¹⁷ *Id.* at 231.

²¹⁸ DAN W. LUFKIN, MANY SOVEREIGN STATES: A CASE FOR STRENGTHENING STATE GOVERNMENT—AN INSIDER’S ACCOUNT 194 (1975).

²¹⁹ LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA 193 (1992).

²²⁰ TEX. PUB. POLICY FOUND., MAKING GOVERNMENT WORK: A CONSERVATIVE AGENDA FOR THE STATES, at xxv (1992) [hereinafter CONSERVATIVE AGENDA].

national proposals, many liberals based their hopes for progress on the results of state experiments.²²¹

In practice, both sides' reliance on research can be selective. Moreover, even tendentious studies with fundamental, well-documented flaws²²² have proven influential and been cited by policymakers if they supported those policymakers' normative stance. On the other hand, liberals did largely abandon their long-cherished goal of a guaranteed national income after experiments in Denver and Seattle seemed to show that it reduced work effort.²²³ Whatever role that research evidence may have played in resolving particular policy disputes, however, experimentalism did shift the terms of the debate from broader societal problems that are difficult to measure, such as racism, to criticism of low-income people's behavior.²²⁴

Experimentation also played a large role in shaping income support policies. Throughout the 1980s, most states adopted experimental work programs for Aid to Families with Dependent Children (AFDC) recipients that differed widely.²²⁵ Liberals pinned their hopes on state initiatives that promoted job training under the highly flexible Family Support Act of 1988²²⁶ and on major experiments transforming cash assistance and food stamps that Washington State and Minnesota mounted in the late 1980s and early 1990s.²²⁷ Fiscal limitations brought on by the recession of 1990–1991, however, prevented these proposals from running their full course, to conservatives' pleasure.²²⁸ Moreover, with many liberal experiments relying on the rela-

²²¹ See, e.g., LAND, *supra* note 179, at 109–15 (discussing various state-level experiments).

²²² See, e.g., CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 82–83 (1992) (showing the implausibility of Charles Murray's oft-cited assertion that welfare led to out-of-wedlock childbearing).

²²³ MILDRED REIN, *DILEMMAS OF WELFARE POLICY: WHY WORK STRATEGIES HAVEN'T WORKED* 61 (1982).

²²⁴ See MEAD, *supra* note 219, at 197–98 (“The effect was not to end controversy, however, but to shift its focus from the character of society to that of welfare.”).

²²⁵ See, e.g., JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* 62–75 (1995) (describing various projects that states enacted in the 1980s).

²²⁶ See *id.* at 76–85 (discussing the law's flexibility in allowing states to design education and training programs).

²²⁷ See 7 U.S.C. §§ 2030–2031 (2006) (authorizing food stamp components of experiments).

²²⁸ Robert Rector & Michael McLaughlin, *A Conservative's Guide to State-Level Welfare Reform*, in *CONSERVATIVE AGENDA*, *supra* note 220, at 137, 138.

tively slow process of building human capital, their short duration meant they had little chance of yielding promising results.²²⁹

The conservative Heritage Foundation called on “state lawmakers to handle the problem” of welfare.²³⁰ Conservatives drew attention to initiatives in Wisconsin, Michigan, and other states to limit eligibility for cash assistance and impose new behavioral requirements.²³¹ Because many of these initiatives began as the economy was growing, and because many saved rather than cost money, they could run their course. Their advocates made reducing caseloads, as opposed to reducing poverty, their primary focus. Progress by this measure was much easier to achieve, producing a widespread impression that the initiatives had been successful.

States also experimented with fundamental solutions to low-income people’s access to health care. First Minnesota and Vermont, then Tennessee, and most recently Massachusetts and California have announced bold plans to cover the uninsured.²³² Each round of experiments has been stalled or curtailed, however, by economic downturns that robbed states of the ability to pay the promised subsidies to low-income people. Conservatives, in turn, hailed state experiments in mandating managed care for Medicaid recipients.²³³

States and localities face important limits, however, in their ability to experiment. Although the research is mixed, some studies suggest that low-income people respond to interstate differences in welfare policy to a degree roughly comparable to their responses to differential wage opportunities between states: although relatively few move in the short term, over time these factors affect locational decisions.²³⁴ Moreover, significant redistribution is impossible at the local level in a society like ours where affluent people have significant mobility. Wealthy opponents of redistribution can move to jurisdictions lacking such policies, causing the burden on those remaining to become

²²⁹ *Id.* at 154.

²³⁰ *Id.* at 138.

²³¹ KATZ, CITIZENSHIP, *supra* note 20, at 83-103; MEAD, *supra* note 219, at 190-92; *see also* Rector & McLaughlin, *supra* note 228, at 164 (arguing that welfare benefits should not be increased when a mother who is receiving benefits has an additional child).

²³² *See* John Holahan & Mary Beth Pohl, *Leaders and Laggards in State Coverage Expansions*, in *FEDERALISM & HEALTH POLICY* 179, 185-87 (John Holahan et al. eds., 2003).

²³³ Edmund F. Haislmaier, *Health Care*, in *CONSERVATIVE AGENDA*, *supra* note 220, at 206, 206-08.

²³⁴ PETERSON & ROM, *supra* note 15, at 82-83.

more concentrated until they, too, find it intolerable.²³⁵ Thus, local programs assisting the poor effectively require virtually unanimous political support, a hurdle that most other public policies need not surmount. Interstate economic competition constrains states' antipov-erty policy choices as policymakers seek to improve their "business climate" by cutting taxes while preserving services important to the affluent.²³⁶ Politicians reject policy proposals that seem to put their states too far out of step with others around the country.²³⁷ Indeed, absent a consensus about the nature of the problem, democratic experimentalism provides no basis for preferring a community that helps low-income people lift themselves out of poverty over one that gives low-income people one-way bus tickets.

Beginning in the late 1980s, the AFDC and Food Stamp Program sought to reduce improper payments of benefits with very much the kind of "rolling best-practice rules" that democratic experimentalists advocate.²³⁸ Both programs had a "quality control" program comparing each state's error rate to the national average and sanctioning those with the lowest performance. In both programs, this quality-control review led to resentment from states arguing that their caseloads were atypically difficult to manage, making the comparison unfair. These resentments contributed to the elimination of AFDC and nearly killed the Food Stamp Program as well.²³⁹ Rather than spurring improved performance, the threat of these penalties drove the states most at risk to manipulate the metric by removing the most error-prone categories of recipients from their programs.²⁴⁰ These turned out to be low-wage workers, including many needing help with the transition from cash assistance.

²³⁵ See DENNIS C. MUELLER, *PUBLIC CHOICE III*, at 677 (2003) ("When local polities attempt to provide redistribution programs and other programs unwanted by some taxpayers, individuals vote with their feet and move to communities where such programs do not exist.").

²³⁶ PETERSON & ROM, *supra* note 15, at 5, 54-55.

²³⁷ See *id.* at 24-38 (describing debates generated by Wisconsin's benefits program, which was more generous than that of its neighboring states).

²³⁸ See Dorf & Sabel, *supra* note 12, at 350-51 (discussing the use of "rolling best-practice rules" in the context of pollution reduction).

²³⁹ David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1298-1303 (2004) [hereinafter Super, *Quiet Revolution*].

²⁴⁰ See David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051, 1109-13 (2005) [hereinafter Super, *Efficient Rights*] (discussing the perverse incentives created by the Food Stamp Quality Control System).

3. The Centralist Undercurrent in Antipoverty Policy

President Nixon's election spelled the end of the War on Poverty, but it did not bring an end to the expansion of antipoverty programs. His administration broadly opposed deliberative approaches to anti-poverty law,²⁴¹ yet it made numerous aggressive moves against poverty.

The result of the Nixon presidency was to divide antipoverty law-making into two very different tracks. One track involved high-salience issues, particularly those characterized as addressing the core problem of poverty. These remained the subject of extensive deliberations but yielded no action at the federal level. Conservatives attacked broad proposals as creating "entitlements," taking advantage of the ambiguity of that term.²⁴² They railed against President Nixon's Family Assistance Plan (FAP), President Ford's Income Supplementation Plan, and President Carter's Program for Better Jobs and Income as the products of "a small, largely liberal, intellectual elite . . . trying to foist on an unsuspecting public . . . a guaranteed income."²⁴³ They regarded the defeat of these programs as evidence of the public's acute distaste for such guarantees.²⁴⁴ The Left, in turn, divided over whether the programs were sufficiently liberal to justify the mantle of "reform."

This stalemate at the federal level meant that foundational questions could only be addressed through state and local experimentalism. A similar ideological impasse on national health care reform in 1994 resulted in a similar shift in the locus of policymaking on fundamental health care issues.²⁴⁵

Ideological debates over elevated policy concerns led to neglect of the mundane business of keeping up with inflation. Expansion in most means-tested public-benefit programs had slowed or stopped by

²⁴¹ See, e.g., PIVEN & CLOWARD, *MOVEMENTS*, *supra* note 156, at 331-32 (presenting a series of examples of the Nixon administration's opposition to programs grassroots advocates favored).

²⁴² See generally David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 709-10 (2004) [hereinafter Super, *Political Economy*] ("Supposed subjective and unconditional entitlements are favorite targets of criticism.").

²⁴³ Martin Anderson, *The Objectives of the Reagan Administration's Social Welfare Policy*, in *THE SOCIAL CONTRACT REVISITED* 15, 25 (D. Lee Bawden ed., 1984) [hereinafter *REAGAN'S WELFARE POLICY*].

²⁴⁴ *Id.* at 25-26.

²⁴⁵ Randall R. Bovbjerg et al., *State and Federal Roles in Health Care: Rationales for Allocating Responsibilities*, in *FEDERALISM & HEALTH POLICY* 31 (John Holahan et al. eds., 2003).

1975.²⁴⁶ “[T]he degree of protection afforded by the safety net was declining in real terms even before Ronald Reagan took office in January 1981.”²⁴⁷ Increases in food stamps and energy assistance failed to offset declines in real AFDC benefits during the 1970s, even for families receiving all three benefits.²⁴⁸

At the same time, however, a second track developed at the federal level to address several low-salience “secondary” programs. These initiatives required, and obtained, bipartisan coalitions.²⁴⁹ Contrary to popular belief, antipoverty policies enjoyed strong Republican support throughout the twentieth century, with only brief interruptions.²⁵⁰

Thus, while President Nixon’s FAP was slowly dying in Congress, he prevailed on three monumental structural improvements in anti-poverty programs: combining and federalizing cash assistance to the elderly and people with disabilities as the Supplemental Security Income (SSI) program, expanding the Food Stamp Program to cover the entire country, and establishing the Section 8 voucher program for low-income people in private housing. All three significantly reduced state and local discretion: SSI replaced three federal/state programs similar to AFDC in which states enjoyed broad freedom to determine eligibility and benefit levels; the food stamp legislation forced many recalcitrant counties into the program; and local housing authorities had far less control over vouchers than they did over the housing projects they replaced. Again in 1977, divisions on both the Left and the Right killed President Carter’s welfare-reform initiative, but the bipartisan Food Stamp Act of 1977 offered benefits to millions of low-wage workers.

After a hiatus during the Carter administration’s decline and the first years of the Reagan Revolution, bipartisan efforts to find substantive compromises on low-salience antipoverty issues eventually resumed. Congress expanded Medicaid every year from 1984 to 1990; liberalized the Food Stamp Program in 1983, 1987, 1988, and 1993; provided more child-care funds in 1988, 1990, and 1993; and grew the

²⁴⁶ Timothy M. Smeeding, *Is the Safety Net Still Intact?*, in REAGAN’S WELFARE POLICY, *supra* note 243, at 69, 90.

²⁴⁷ *Id.* at 91.

²⁴⁸ *Id.* at 90.

²⁴⁹ PETERSON & ROM, *supra* note 15, at 99.

²⁵⁰ *Id.* at 117.

Earned Income Tax Credit in 1986, 1990, and 1993.²⁵¹ These dramatic improvements were little-noticed products of elite politics. Whenever the broader political community focused on an issue, it deadlocked.

The one successful effort to legislate federally on high-salience antipoverty programs that was genuinely bipartisan was the Family Support Act of 1988.²⁵² Although commonly described as “welfare reform,” its welfare and work provisions did little beyond authorizing and funding state experiments whose normative content it largely failed to specify. Its signal achievements came in lower-salience programs, particularly Medicaid and child-care subsidies. It therefore was a simultaneous exercise in decentralized experimentalism over high-profile issues and centralized, negotiated policymaking on more obscure topics.

4. Departures from the Model: Moments of Heightened Passion

For the most part, during the last four decades, attention to anti-poverty policy issues of major symbolic importance has largely been characterized by copious debate within and between the liberal and conservative communities at all levels of government, and relatively modest local innovations that other jurisdictions rarely copied, whatever their results. Pragmatic policymakers of both parties worked together quietly on antipoverty issues deemed secondary to each side’s ideological agenda.

On three occasions, however, public sentiment became unusually inflamed in favor of one side or the other. In 1981, President Reagan persuaded the public that economic revival depended on large cuts in taxes and domestic spending. Newt Gingrich led Republicans to victory in the election of 1994 on a “Contract with America,” asserting in part that antipoverty programs were out of control and fostering idleness. And, in 2005, seeing low-income people’s extreme vulnerability to Hurricane Katrina stimulated a massive wave of public sympathy.

From 1981 to 1982 and from 1995 to 1996, congressional critics succeeded in enacting deep cuts in antipoverty programs that contrasted sharply with either the decentralized, experimentalist approach

²⁵¹ Alone among these initiatives, the Omnibus Budget Reconciliation Act of 1993 was not bipartisan. Pub. L. No. 103-66, 107 Stat. 312 (codified in scattered sections of 7, 26, and 42 U.S.C.). The acrimony then focused on taxes, not the benefit expansion.

²⁵² Pub. L. No. 100-485 (1988) (codified as amended in scattered sections of 42 U.S.C.).

to high-salience issues or the moderate elite negotiations that typically govern low-salience issues. On both occasions, not only did professed commitments to decentralization and participation fail to slow these centralized, ideological moves, but democratic experimentalist tropes were invoked to justify the moves. Yet in Katrina's wake, antipoverty advocates were so mired in decentralized, deliberative, experimentalist policymaking that they were unable to coalesce around a significant policy proposal before the opportunity dissipated.

a. *The Reagan Budget Cuts*

President Reagan pushed legislation through Congress that cut federal fiscal year 1983's domestic spending \$43 billion below the level required to maintain current services.²⁵³ These reductions focused overwhelmingly on programs serving low-income people. Indeed, between 1980 and 1983, the share of federal spending devoted to non-means-tested social programs rose slightly while that for means-tested programs dropped seventeen percent.²⁵⁴ Over two-thirds of the budget cuts affected families with incomes below \$20,000, while only ten percent affected those with incomes above \$40,000.²⁵⁵ This legislation terminated numerous antipoverty programs entirely, replacing them with loosely drawn block grants that did little more than transfer resources to state and local governments. President Reagan obtained additional cuts in safety-net programs over the next few years.²⁵⁶

Decentralization and community involvement in addressing poverty were central themes in the Reagan administration's justification of its cuts: "Leave to private initiative all the functions that citizens can perform privately. . . . Use the level of government closest to the community for all public functions it can handle."²⁵⁷ The benefit cuts helped fund large tax cuts—the administration argued that cutting federal taxes allowed states and localities more fiscal room to raise taxes to support programs devolved to them.²⁵⁸

²⁵³ Stuart E. Eizenstat, *Comments, in* REAGAN'S WELFARE POLICY, *supra* note 243, at 28, 29.

²⁵⁴ Jack A. Meyer, *Budget Cuts in the Reagan Administration: A Question of Fairness, in* REAGAN'S WELFARE POLICY, *supra* note 243, at 33, 37-38.

²⁵⁵ See Eizenstat, *supra* note 253, at 29-30 (citing CONG. BUDGET OFFICE, MAJOR LEGISLATIVE CHANGES IN HUMAN RESOURCES PROGRAMS SINCE JANUARY 1981, at 76 tbl.1 (1983)).

²⁵⁶ Smeeding, *supra* note 246, at 103-06.

²⁵⁷ Anderson, *supra* note 243, at 24-25.

²⁵⁸ *Id.*

In practice, this decentralization did more to conceal the depth of the cuts than to empower local democracy. The block grants generally amounted to only about seventy-five percent of the prior funding for the programs that they were replacing.²⁵⁹ Even these were specified to last only for a transition period, until 1988, after which states were expected to raise their own revenues to pay for whatever services they chose to continue.²⁶⁰ Indeed, the Reagan administration sought to reduce federal funding from one-quarter of state and local budgets in 1980 to four or five percent in 1991, roughly the same percentage as existed in 1933.²⁶¹ Seeing this pattern, states rallied to block the devolution of AFDC and food stamps.²⁶²

Although the Reagan administration happily cited research that supported its views,²⁶³ it ignored experimental results that did not suit it. A former senior administration official noted “a fundamental flaw in the administration’s welfare logic—namely, that . . . [s]tudies have consistently found that long-term welfare dependency is the exception rather than the rule, and that our welfare system most often serves as a temporary fallback position for those individuals living at the margin who suffer unexpected setbacks.”²⁶⁴

b. *The 1996 Welfare Law*

A decade later, the first President Bush initiated a process leading to even more severe cuts in a thoroughly experimentalist way: by granting waivers of federal rules to several governors wanting to reshape welfare within their states. Many of these waivers “appear merely to be attempts to reduce benefits under the guise of experimentation.”²⁶⁵ President Clinton accelerated this process, eventually granting waivers to forty-three states.²⁶⁶ Neither administration was prepared to expend much political capital pressing unwilling states to

²⁵⁹ Eizenstat, *supra* note 253, at 28-29.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 30.

²⁶² Smeeding, *supra* note 246, at 107 (describing the “dismay[]” of state officials at the prospect of the federal government delegating AFDC and Food Stamp Program to the states).

²⁶³ See, e.g., Meyer, *supra* note 254, at 54 (discussing empirical research on the work incentives of AFDC beneficiaries).

²⁶⁴ G. William Hoagland, *Comments, in* REAGAN’S WELFARE POLICY, *supra* note 243, at 121, 122-23.

²⁶⁵ Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare Reform*, 26 U. MICH. J.L. REFORM 741, 745 (1993).

²⁶⁶ KATZ, CITIZENSHIP, *supra* note 20, at 91.

conduct rigorous evaluations of their experiments. As leading conservative commentators noted, states and localities enamored by their reform ideas resisted rigorous experiments because they did not want to exempt a control group.²⁶⁷

When Newt Gingrich led Republicans to congressional majorities in 1994, they repeated the Reagan cuts on a much grander scale. Gone was Reagan-era rhetoric about protecting those in the greatest need.²⁶⁸ The 1996 welfare law repealed AFDC, transferring its funding into the Temporary Assistance to Needy Families (TANF) block grant. It also cut almost \$55 billion over six years from other means-tested programs, particularly food stamps, benefits for legal immigrants, and SSI for children with disabilities.²⁶⁹ Virtually none of these budget cuts had even an ostensible connection to promoting work or marriage or to reducing fraud; budget cuts of this nature, as a group, dramatically increase burdens on state and local governments.²⁷⁰ Indeed, even the most prominent lobbyist for the legislation, the Heritage Foundation's Robert Rector, had earlier argued that experimental evidence demonstrated that compelling mothers of preschool children to work full-time outside the home, the legislation's centerpiece, was harmful:

It is particularly important to avoid imposing work requirements on AFDC mothers with children under age five. [T]here is now a substantial body of evidence indicating that separating a young child from its mother for long periods of time has strong, negative effects on the child's development. This is particularly true for children under age two.²⁷¹

Nonetheless, conservatives presented the law in thoroughly experimentalist terms. According to four of its key House Republican sponsors,

[an] important outcome of block grant policy is innovation. If states are given maximum authority and flexibility, they will develop widely divergent policies. Flexibility yields innovation. Through innovation, a host of new and potentially effective welfare strategies can be developed and tested. This innovation can be seen in the welfare waiver programs states mounted in the years leading up to the 1996 reform. . . .

²⁶⁷ Rector & McLaughlin, *supra* note 228, at 154.

²⁶⁸ President Reagan pledged during the campaign and in his first budget to protect the "safety net." He sought to portray himself as seeking to improve the efficiency of programs rather than eliminating them. Anderson, *supra* note 243, at 17-18.

²⁶⁹ DAVID A. SUPER ET AL., CTR. ON BUDGET & POLICY PRIORITIES, THE NEW WELFARE LAW (1996), available at <http://www.cbpp.org/WECNF813.HTM>.

²⁷⁰ E.g., HANDLER, *supra* note 225, at 135-37.

²⁷¹ Rector & McLaughlin, *supra* note 228, at 161.

... [S]tates will also submit their programs to third-party evaluations to examine the impacts of their new policies. Again, this tendency can be seen clearly²⁷² in the state waiver programs that preceded national reform in 1996.

The scope of states' data-reporting requirements was one of the hardest-fought issues in the 1996 welfare law.²⁷³ *The Washington Post* reported that "[e]ighteen months after federal lawmakers dramatically changed the nation's welfare program, it is becoming clear that the mass of data the government requires states to collect is in such disarray that it is impossible to determine whether the law is working."²⁷⁴ In the end, however, one highly contestable metric came to dominate: caseload reduction.²⁷⁵ This outcome, of course, provided no insight into how the programs were meeting any of their humane goals, especially with states no longer obliged to provide aid to families in need. To the extent that analysts considered a secondary measure, it was workforce connection.²⁷⁶ Positive impacts on poverty or child well-being were either assumed or ignored.

²⁷² NANCY L. JOHNSON ET AL., WELFARE REFORM HAS ALREADY ACHIEVED MAJOR SUCCESSSES: A HOUSE REPUBLICAN ASSESSMENT OF THE EFFECTS OF WELFARE REFORM 10 (1999).

²⁷³ Cf. H.R. REP. NO. 104-430, at 351-56 (1995) (Conf. Rep.). Like many issues in that legislation, these were debated and resolved in the conference committee on the initial welfare bill that President Clinton vetoed in early 1996, and they were not reopened when Congress prepared the very similar legislation that President Clinton signed that summer. See H.R. REP. NO. 104-725, at 302-04 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 2649, 2690-92 (describing identical reporting requirements in the House and Senate versions of the 1996 bill).

²⁷⁴ Barbara Vobejda & Judith Havemann, *States' Welfare Data Disarray Clouds Analysis*, WASH. POST, Apr. 13, 1998, at A1.

²⁷⁵ See, e.g., JOHNSON ET AL., *supra* note 272, at 15-18 ("Consideration of the effects of welfare reform must begin with caseload reductions."); IRENE LURIE, AT THE FRONT LINES OF THE WELFARE SYSTEM 253-59 (2006).

²⁷⁶ See JOHNSON ET AL., *supra* note 272, at 16-21 figs. 2-6 (discussing the increases in the work rates after the 1996 welfare law); LURIE, *supra* note 275, at 263 (pronouncing fears of harm to low-income families unfounded because sixty percent of adults in families leaving cash assistance "were employed at some point during the first 13 weeks off welfare" and over seventy percent had a job at some point within the year).

c. *Hurricane Katrina*

Because disasters rivet the public's attention,²⁷⁷ they provide an immediate opportunity for change in policy areas otherwise stalemated in obscurity.²⁷⁸ Critics of the status quo try to seize these opportunities by generalizing from the disaster and urging the nation to "heed the lessons" that failings surrounding the disaster taught.²⁷⁹ These changes, however, are only transitory. In the recovery period, secondary values—such as wealth, status, and comfort—regain primacy.²⁸⁰ The news media rapidly loses interest in disasters as dramatic events give way to "prosaic" rebuilding efforts.²⁸¹ The established order's apologists therefore emphasize the exceptional nature of the disaster and try to hasten its disappearance from the collective consciousness.

Antipoverty advocates never came close to formulating a winning response to the Katrina disaster.²⁸² With policymaking so decentral-

²⁷⁷ This is not to say that such disasters universally ennoble the public; some of this attention is expressed in morbid, voyeuristic ways. See Robert N. Strassfeld, *Taking Another Ride on Flopper: Benjamin Cardozo, Safe Space, and the Cultural Significance of Coney Island*, 25 CARDOZO L. REV. 2189, 2213 (2004) (describing amusement park attractions recreating the Galveston and Johnstown floods and crowded, burning tenements).

²⁷⁸ Special interest groups and politicians long have exploited disasters to highlight issues of importance to them or to gain favorable publicity. See CHARLES E. FRITZ & J. H. MATHEWSON, NAT'L ACAD. OF SCIENCES, CONVERGENCE BEHAVIOR IN DISASTERS 58 (1957) (listing ways that special interest groups and others exploit disasters opportunistically); see also KINGDON, *supra* note 9, at 187 (arguing that attracting public attention is a prerequisite to achieving political change).

²⁷⁹ The lessons can be about private as well as public law. See, e.g., Jed Handelsman Shugerman, Note, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 YALE L.J. 333, 335 (2000) (tracing the adoption of strict-liability tort standards to a series of disasters, including the Johnstown flood of 1889). Moreover, those seeking to teach these lessons may have policy agendas quite distinct from relief of human disaster victims. See Phillip M. Bender, *Restoring the Elwha, White Salmon, and Rogue Rivers: A Comparison of Dam Removal Proposals in the Pacific Northwest*, 17 J. LAND RESOURCES & ENVTL. L. 189, 198, 203 n.63 (1997) (invoking the disasters resulting from the failures of the Johnstown and St. Francis dams in support of an environmentalist proposal to restore rivers' natural flow).

²⁸⁰ James D. Thompson & Robert W. Hawkes, *Disaster, Community Organization, and Administrative Process*, in MAN AND SOCIETY IN DISASTER 268, 281-82 (George W. Baker & Dwight W. Chapman eds., 1962).

²⁸¹ HARRY ESTILL MOORE ET AL., NAT'L ACAD. OF SCIENCES, BEFORE THE WIND: A STUDY OF THE RESPONSE TO HURRICANE CARLA 126 (1963); cf. James Dao, *Louisiana Sees Faded Urgency in Relief Effort*, N.Y. TIMES, Nov. 22, 2005, at A1 (reporting the decrease in the nation's attention to the travails of Hurricane Katrina survivors only three months after the hurricane).

²⁸² E.J. Dionne, Jr., Op-Ed., *That Was a Short War on Poverty*, WASH. POST, Oct. 14, 2005, at A19.

ized, antipoverty advocates had no strong national organization and hence no unified federal policy agenda. They frittered away valuable time debating what to propose; over a year later, *Congressional Quarterly Weekly* reported that “the debate over poverty is alive and vigorous, though mostly outside official Washington.”²⁸³ Despite the enormity of the problem, as well as the failure of four decades of decentralized, participatory, experimentalist responses to poverty before Katrina, that approach remained dominant: “Cities and states . . . have in particular become ‘leading thinkers and doers’” and cities are “organizing partnerships with private companies, foundations and even low-income communities themselves to address some of these issues.”²⁸⁴

Conspicuously “lacking . . . [was] the political leadership that could put all the pieces together into a broader, coherent plan.”²⁸⁵ The result was a laundry list of requests with little coherent unifying theme on which the public could be enlisted. Proposals included changes to the Food Stamp Program even though it had been by far the most effective program in responding to the disaster. Others put more money into the TANF block grant, despite its structural inability to keep money from leaking out to unrelated state priorities. Proposals for additional housing vouchers made more sense substantively; grossly inadequate housing had greatly increased low-income people’s vulnerability to the storm, and the lack of housing resources kept many doubled-up or in cramped trailers for months and years afterwards. Yet the major national housing-aid programs all arbitrarily cap participation; although a higher cap helps more people than a lower one, the difference is not intuitive to middle-income people. As a result, any increase in the number of vouchers would be highly vulnerable to subsequent budget cuts.

The most promising proposal was health care legislation co-sponsored by the Republican Chairman and the Democratic Ranking Member of the Senate Finance Committee, Charles Grassley and Max Baucus respectively. The bill would have extended federally financed health insurance to all low- and moderate-income people in the affected areas without regard to Medicaid’s usual rules relating to age, health, or family status.²⁸⁶ The Finance Committee endorsed this measure, but Senate Majority Leader Bill Frist and Senate Budget

²⁸³ John Cochran, *New Perspectives on Poverty*, 64 CQ WKLY. 2802 (2006).

²⁸⁴ *Id.* at 2802-03.

²⁸⁵ *Id.* at 2804.

²⁸⁶ S. 1716, 109th Cong. 102 (2005).

Chairman Judd Gregg prevented it from coming to the floor. They feared its expressive value as a precedent for national health insurance.²⁸⁷ Although health care advocacy groups supported the Grassley-Baucus bill, no broad movement came to its aid.

B. *Political Sources of Antipoverty Law*

The pattern of antipoverty law development is complex. It operates on two sharply contrasting tracks: a centralized, negotiated, substance-oriented, non-ideological track that has produced significant advances on low-salience issues, and a democratic experimentalist track for high-salience issues that has been effectively stalemated along ideological lines. Unusual circumstances that temporarily strengthen foes of antipoverty programs can lead to high-salience cuts, often justified in democratic experimentalist terms. As the prior section demonstrated, however, surges in public sympathy for low-income people do not lead to corresponding program expansion.

This process's peculiar characteristics spring from the peculiar constellation of interests and motivations of the participants. Subsection 1 examines the major groups commonly supporting antipoverty programs. Subsection 2 considers those often regarded as foes of these programs. And subsection 3 explains how these groups' interests converge to produce this two-track process and the one-sided departures from it.

1. Major Forces Supporting Antipoverty Programs

To endure, any policy regime allocating significant resources must provide value to a group of people with sufficient political capital to sustain it. That value need not be purely avaricious; some people derive great pleasure from seeing their vision of a proper society implemented even if it does not benefit them tangibly.

The obvious constituency for antipoverty programs is the low-income beneficiary population. In practice, however, low-income people have lacked sufficient political strength to sustain these programs. Despite occasional organizing campaigns, low-income people

²⁸⁷ Cf. 151 CONG. REC. S10578-79 (daily ed. Sept. 28, 2005) (letter from Dep't of Health and Human Servs. to Sen. William H. Frist, Majority Leader, U.S. Senate) (expressing the Bush administration's opposition to the "massive new Federal program" being considered).

vote at relatively low rates.²⁸⁸ They also have relatively weak group identification: their votes may easily be driven by issues other than antipoverty policy, either because they do not expect to remain poor or because they blame themselves for their situation. By definition, they cannot afford meaningful political contributions. Because this country has recognized few positive rights for low-income people, the group lacks the leverage that the ability to release claims can provide. Moreover, many welfare-rights organizations have taken positions so extreme that they have effectively excluded themselves from policy debates. Whether out of discomfort or paternalism, their allies have hesitated to speak candidly with them about political realities.

As a result, antipoverty programs depend heavily on support from people too affluent to qualify for them. These supporters' motives fall into several categories, each with quite different consequences.

a. *Humanitarians*

Some people simply empathize with human suffering. Others base their humanitarianism on developed moral theories. For example, religious and other moral codes charge individuals, and society at large, with responsibility for preventing suffering.²⁸⁹ Preventing extreme suffering is a minimum requirement of many conceptions of distributive justice and may be essential for democratic processes to function well. Although few associate humanitarian attitudes with utilitarianism, some normative public-choice theory postulates that ethical voters will equally value their own utility and that of others, causing them to support redistribution that benefits the typical recipient more than it decreases their own well-being.²⁹⁰

The political process can respond to ethically based preferences just as it can respond to self-interested ones, but these two kinds of aims differ in important practical ways.²⁹¹ Milk producers', steel workers', or gun enthusiasts' demands on the political system reflect their direct knowledge and constantly occupy their minds. Middle-class supporters of antipoverty programs, by contrast, may have little direct

²⁸⁸ FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 4 (1st paperback ed. 1989).

²⁸⁹ See, e.g., LAND, *supra* note 179, at 31-35 (comparing modern Catholic social thought's concern "for the growth and improvement of the social order as a whole" with liberalism's and conservatism's views of the common good).

²⁹⁰ MUELLER, *supra* note 235, at 570.

²⁹¹ *Id.* at 49-52.

knowledge of either the nature or the extent of low-income people's travails. Rent-seeking interest groups presumably understand the benefits they receive, whether from one source or twenty; politicians are unlikely to fool them by creating insignificant or inaccessible programs. By contrast, low-income people's middle-income sympathizers are likely to be bewildered by a proliferation of programs and overestimate what society is already doing.²⁹²

Humanitarian support for antipoverty programs thus tends to be quite episodic. Humanitarians may be distracted easily by other public interest commitments or by more self-serving pursuits. And assistance to low-income people can be seen as a public good. As a result, because everyone can be said to benefit when poverty is relieved whether or not they contributed to the effort, free riders will keep nongovernmental relief efforts small.²⁹³

In addition, altruistic advocates of antipoverty programs often hold visions of the public interest that make them unreliable champions. In particular, they may have a cross-cutting vision of "good government" that makes them reluctant to log-roll to advance antipoverty programs' interests.²⁹⁴ Their sense of "good government" also can make altruists more responsive than most to calls for shared sacrifice for fiscal rectitude. For example, antipoverty programs bore a grossly disproportionate share of cuts in both Democratic and Republican balanced budget plans of 1995–1996, with little public controversy. The divided loyalties of altruistic supporters of antipoverty programs increase these programs' vulnerability to large cuts in times of deficit while providing no corresponding advantage in times of surplus.

b. *Social Insurers*

Some people whose current means suffice to preclude their qualification for antipoverty programs fear they may need aid in the future. These concerns have had uneven effects. On the one hand, social in-

²⁹² Super, *Political Economy*, *supra* note 242, at 696-705 (describing nonrecipients' difficulties comprehending the true nature of public-benefit programs).

²⁹³ See MUELLER, *supra* note 235, at 47-49 (arguing for a government redistribution program rather than a purely voluntary, charitable approach because of the free-rider problem).

²⁹⁴ One of the most successful antipoverty programs, the Food Stamp Program, has advanced in part because its supporters held no such compunctions, tying their fate to that of subsidies for corporate farms that are difficult to defend on the merits.

surance, along with closely associated means-tested programs,²⁹⁵ has established an income floor for most of the elderly, a large fraction of persons with disabilities, and a significantly smaller share of the recently unemployed. Conservative challenges to Social Security and Medicare failed because middle-income people can imagine themselves needing assistance in age and infirmity. On the other hand, assaults on unemployment insurance have fared better as fewer middle-income voters envision themselves becoming unemployed for significant periods.²⁹⁶

The social insurance approach, however, has provided little traction for dealing with chronic poverty because middle-class people cannot imagine themselves facing that need. Universalizing antipov-erty programs would radically increase their costs while doing little to broaden their appeal. Efforts to persuade middle-income voters that government should provide them with “food security” in the same way it provides Social Security—hence that school meals should be free to all children—collapsed of their own weight when predictably few middle-class voters proved insecure about their access to food.

c. Redistributionists

Some progressives are not satisfied with relieving severe deprivation and seek to reduce wealth inequalities more generally.²⁹⁷ Although antipoverty programs advance this agenda, this country’s resistance to European-style social support has hampered efforts to significantly expand eligibility for those programs. Accordingly, redistributionists have focused more on tax policy and regulatory transfers, such as labor law and tariffs. Opponents sometimes seek to discredit antipoverty programs by associating them with redistributionists.

²⁹⁵ Although SSI is not social insurance under most definitions, in operating it the Social Security Administration (SSA) relies significantly on eligibility decisions made for Social Security Disability Insurance. Similarly, Medicaid is means-tested but operates as a Medicare supplement for the elderly and those persons with disabilities that receive Medicare. Congress designed the means test for Medicaid’s nursing-home component to allow large numbers of middle-income people to receive care once Medicare’s modest nursing-care benefit runs out.

²⁹⁶ CHARLES NOBLE, *WELFARE AS WE KNEW IT: A POLITICAL HISTORY OF THE AMERICAN WELFARE STATE* 136-37 (1997).

²⁹⁷ See REBECCA M. BLANK, *IT TAKES A NATION: A NEW AGENDA FOR FIGHTING POVERTY* 140-42 (1997) (comparing the United States’s wealth-transfer systems unfavorably with those of other Western nations); MARTIN CARNOY & DEREK SHEARER, *ECONOMIC DEMOCRACY: THE CHALLENGE OF THE 1980S*, at 334-43 (1980) (advocating the use of social-welfare policy to reduce inequality).

d. *Providers*

Some people have direct interests in antipoverty programs despite being ineligible for their benefits. Builders want contracts for housing projects, hospitals and nursing homes want reimbursement for their services, and so on. Even some of those engaged in volunteerism want their work subsidized, for example with government food to distribute at church pantries. Some groups receive funding to advocate for antipoverty policy.

Just as often, however, providers start competing with the programs' beneficiaries for resources—as farm interests do with nutrition programs²⁹⁸ and homebuilders do with housing vouchers—or warp the programs' priorities to meet their own interests. In addition, some providers derive little enough income from antipoverty programs that they may ignore all but the most important decisions.

e. *Instrumentalists*

Some see antipoverty programs as avoiding negative externalities such as crime, infectious diseases, visible homelessness, and hungry children disrupting classrooms. Before 1989, some saw ameliorating poverty as crucial to propaganda struggles with communism.²⁹⁹

Instrumentalists, however, can be unreliable. Other means, albeit sometimes repressive ones, can provide easier remedies for some problems. And the kinds of benefits they seek are generally public goods, with the attendant risks of free-riding. Moreover, antipoverty programs' opponents find instrumentalists relatively easy to dissuade with empirical evidence casting programs' effectiveness into doubt.

f. *Liberal Expressivists*

Many liberals use antipoverty policy for expressive purposes.³⁰⁰ In a sense, expressivists are another type of instrumentalist. Some seek governmental endorsement of a substantive message: an economic message involving redistribution or a social message. Others' values are process-oriented, such as those that won broad participation requirements in War on Poverty programs. With the National Welfare Rights Organization's collapse in the early 1970s and persistent diffi-

²⁹⁸ Super, *Quiet Revolution*, *supra* note 239, at 1383 n.480.

²⁹⁹ Super, *New Moralizers*, *supra* note 9, at 2075 n.138.

³⁰⁰ Super, *Quiet Revolution*, *supra* note 239, at 1273-83.

culties organizing successors, low-income people's direct participation in policy deliberations is easiest to arrange on the local level. This aligns many liberal procedural expressivists with the democratic experimentalists.

Improving the well-being of low-income people, and of the society to which they belong, may provide insufficient motivation to engage expressivists in debates over antipoverty policy. When liberal substantive expressivists participate, they drive the liberal policy agenda to the left. They may be unwilling to accept anything less than their ideal set of policies: they may feel that the expressive costs of a compromise exceed the benefits that it could bring even in situations where most groups advocating out of self-interest would find a deal advantageous. They may feel that programs modest enough to have any political chance of success—modest enough to represent the irreducible cost of indisputable necessities and to placate concerns about moral hazard—would send little expressive message. Expressivists often seek to shame more moderate antipoverty advocates, blocking potential agreements with conservatives. And because messages can be sent through many different kinds of policy, they tend to drift in and out of antipoverty debates.

Even more moderate expressivists may be more committed to movement in a positive direction—to having society “do something”—than to any particular set of substantive results. They may regard poverty as an intractable problem but nonetheless balk at the expressive implications of ignoring it. As a result, they may not be as demanding about the efficiency of the expenditure of the funds they secure. Indeed, some may satisfy their desire to “do something” with private charitable efforts, making them less dogged advocates for public antipoverty funding.

2. Antipoverty Programs' Critics

Most opposition to antipoverty programs falls into three categories: instrumental, fiscal, and expressive. Economic conservatives object on instrumental grounds to many aspects of antipoverty programs: perceived insufficient incentives to work and marry, arbitrary differences in the treatment of comparably impoverished people, the multiplicity of programs, and the failure to target funds to the poor-

est.³⁰¹ Although some support devolution, others criticize the incentives to migrate that differential welfare policies can create.³⁰²

The cost of antipoverty programs also produces opposition. Those with other fiscal priorities—other spending programs, tax cuts, or deficit reduction—may oppose antipoverty spending programs. Those subject to regulatory redistributions, such as low-wage employers or landlords, may oppose minimum wages or rent controls. The activity of these opponents is likely to depend on the amount of resources that antipoverty programs are redistributing and the relative vulnerability of other potential sources for similar amounts of resources.

Finally, conservatives, like liberals, often seek to make expressive points through antipoverty law. Here, too, the expression can be substantive or procedural. Substantive expressivists may see cutting or eliminating an antipoverty program as making a statement about the proper size of government or the importance of an unregulated market without arousing the kind of opposition that an assault on farm price supports would bring. Moral statements have become increasingly common: “new moralizers” can impose restrictions on low-income families through eligibility conditions that could never be imposed on the middle class.³⁰³

The conservative procedural expressivist agenda involves shifting functions to lower levels of government or to the private sector.³⁰⁴ Here again, symbolic achievements devolving antipoverty programs are easier than devolving or selling off national parks prized by more affluent voters. Devolution and privatization can work at cross-purposes with substantive objectives—expressive or otherwise³⁰⁵—but

³⁰¹ MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 107-08 (1980).

³⁰² See, e.g., *id.*

³⁰³ See Super, *New Moralizers*, *supra* note 9, at 2051-53 (“[T]he new moralizers have called for objective determinations of morality based on arbitrary per se standards. These standards typically have little to do with the actual state of mind of the individuals being judged, but the inferences they draw are likely to seem plausible to middle-class policymakers, reporters, and voters that have little contact with the judged individuals.” (citation omitted)).

³⁰⁴ See David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CAL. L. REV. 393, 395-98 (2008) [hereinafter Super, *Privatization*] (finding the movement to privatize public-benefit administration to be motivated more by ideology than probable results).

³⁰⁵ Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 598-99 (2004) (“[S]tate, church, and private welfare vendors may exploit their discretionary authority

conservative procedural expressivists typically have not objected to substantive conditions on devolution.

Like their liberal counterparts, conservative expressivists often have little interest in half-measures and often shame more moderate colleagues. They also may drift away to act on opportunities in other policy areas. On the other hand, they enjoy two key advantages over liberal expressivists: their wholly substantive orientation allows them to seize opportunities decisively without the time-consuming deliberations that liberals prize, and their desired policies generally are inexpensive, freeing them from competition for scarce public resources.

3. Origins of Democratic Experimentalism in Antipoverty Law

The diversity, and often frailty, of interests among supporters of antipoverty programs undermines their effectiveness relative to other competitors for public funds. It also contributes to the peculiar two-track mechanism by which antipoverty policy is made. In particular, expressivists on both ends of the political spectrum drive the process toward democratic experimentalism. Conservative procedural expressivists favor decentralization on its merits; liberal procedural expressivists find local and state governments, and private nonprofits, the venues best suited to the participatory, deliberative mode of decision making they favor; and substantive expressivists on both wings have far better chances of finding ideologically skewed localities receptive to their proposals than they do of prevailing nationally. Similarly, social insurers and redistributionists have little reason to participate in national policy debates that can only bear fruit through compromise with conservatives staunchly opposed to their views. Some liberal advocacy groups also may find it easier to raise funds for a continual series of local battles than for preparatory work during lulls in national attention to poverty. On the other wing, fiscal opponents of antipoverty programs may feel at less risk because state and local revenue-raising capacity is far weaker than the federal government's. In sum, contrary to the democratic experimentalists' implicit assumption that decentralized problem-solving will flourish on the basis of shared values, it is precisely the lack of such values that drives the decentralization of antipoverty policy.

and under-provide services in ways that leave hundreds of thousands of individuals materially far worse off than even a fiscally conservative Congress might have intended.”).

Results-oriented humanitarians, provider groups, and instrumentalists, on the other hand, may prefer centralized policymaking because it offers the greatest return on advocacy efforts invested and because policymakers on that level have access to superior data and analytical resources. To reach compromises with economic conservatives, however, they must ensure the nonparticipation of expressivists on both wings, who often try to shame their more moderate colleagues out of such compromises. In-kind programs, and cash programs for relatively sympathetic populations, have less expressive potential, making them superior candidates for pragmatic consensus. In addition, most non-cash benefits are of little interest to middle-income people which assures little involvement from social insurers or redistributionists, either of whom might scare off pragmatic conservatives.

During sharp swings to the right, like those after the 1980 and 1994 elections, right-wing expressivists see sufficient opportunities to justify reentering national policymaking. Expressivists on the left, by contrast, have great difficulty seizing transitory political opportunities. Their number includes many proceduralists who are opposed to an elite's rapid formulation of a program. Even within substantive expressivists, divisions about what message to enact, and the desire to take on the symbolic challenge of cash assistance, hampers timely formulation of proposals to respond to moments of heightened public sympathy.

This suggests a discontinuity in the politics of antipoverty programs, with the positions of those programs' opponents responding to the scale of proposed changes far more than their supporters. Small cuts may be politically infeasible because programs' supporters will react angrily to the symbolism while the proceeds are insufficient to purchase significant support from fiscal conservatives or other interest groups. Because they are not personally affected, however, those supporters may not react much more intensely to proposed cuts large enough to fund meaningful advances in some other group's agenda. When antipoverty programs are reduced incrementally, it is generally through design features that allow those cuts to occur passively (e.g., a failure to adjust for inflation or the failure to increase an appropriation to respond to increased need during recessions).³⁰⁶

³⁰⁶ Super, *Fiscal Federalism*, *supra* note 14, at 2629-40.

III. CONSTRUCTING A SUBSTANTIVE CONSENSUS IN ANTIPOVERTY LAW

Scholars and policymakers increasingly recognize that the decentralized, experimentalist model's key assumptions are not met. President Reagan's success waging war on mythical "welfare queens" shattered the faith many had in widely shared benevolent norms toward the poor and in policymakers' openness to serious debate based on verifiable data. The 1996 welfare law's dismantlement of AFDC, along with its gratuitous cuts in food stamps and aid to impoverished legal immigrants, further demonstrated the depth of the dissensus on basic values. Moreover, conservatives' successes in setting major substantive policies have not warmed many of them to deliberative decision making in the implementation of those policies. Some continue to equate fair hearings with obstruction of behavioral requirements and obfuscation of the moral messages those requirements seek to convey.³⁰⁷

The catastrophe of Hurricane Katrina, however, eliminated all meaningful doubt. The destitution of 100,000 New Orleans residents, and tens of thousands of others across the Gulf Coast, showed the abject failure of the system of antipoverty law constructed over the last forty years. Whether due to state and local governments' lack of capacity, their lack of desire, or deliberative delay, devolving primary responsibility for fighting poverty to them left vast numbers of people too poor to flee a clearly predicted devastating storm. And in Katrina's aftermath, "the incomplete and ambiguous . . . specification of means and ends"³⁰⁸ that the democratic experimentalists celebrate left sincere opponents of poverty at all points on the political spectrum without a ready response and paralyzed the political process until the opportunity had passed. Even Cass Sunstein a committed advocate of deliberative policy formulation, recognizes the need for "an agreed-upon background."³⁰⁹ This background was fatally lacking.

Whenever a structure or a machine suffers a catastrophic failure, one of the first questions that engineers must answer is which components were to blame and which can continue to function effectively in the future. The same is true of a legal system that fails catastrophically to serve the purpose for which it was created. Thus, although many facets of tort law were discarded when they proved impediments to industrialization, others remained. Similarly, although the Court

³⁰⁷ NANCY L. JOHNSON ET AL., *supra* note 272, at 27.

³⁰⁸ Dorf & Sabel, *Treatment Courts*, *supra* note 101, at 834.

³⁰⁹ SUNSTEIN, *supra* note 10, at x.

abandoned several constitutional doctrines after 1937, it continued or retasked others. In the same vein, the basic challenge for scholars in the wake of these twin catastrophic failures of our antipoverty lawmaking system is to identify which aspects of that system to abandon and which elements can perform important functions in a new, viable model.

A successful model must offer a substantive policy vision that can galvanize as many groups of altruistic antipoverty advocates as possible without goading them into divisive, and therefore doomed, absolutism. It must offer prospects of identifiable results that will tamp down fatalism about poverty. At the same time, it must reduce information costs for altruistic supporters of antipoverty programs. A successful model will position antipoverty advocates to regularly exploit opportunities to improve those programs, such as those following Katrina, while not giving critics obvious targets in more difficult political climates. And it must offer enough to moderate liberals and moderate conservatives that they will expend the political capital to resist expressivists' radicalizing pressures.

Abandoning the substantive indeterminacy of democratic experimentalism, however, does not mean that the opposite extreme—a grand unified plan—is the answer. Each side's dogged clinging to one plan or another, in the absence of the sweeping political consensus needed to enact it, is much of what drove antipoverty law to its version of democratic experimentalism. Thus, as much as one might wish to declare that "[t]he time to end poverty has arrived,"³¹⁰ the political will to do so has not.

A narrower consensus is possible, however, on measures that would make a real difference in low-income peoples' lives. This plea is, in essence, a call to recognize and emphasize the strand of centralized, bipartisan antipoverty policymaking that has continued in the shadows of more prominent deliberations, most of them decentralized and experimental, about grand solutions.

This Part explores the potential for a partial but significant substantive consensus on improving antipoverty law. Section A examines the politics of assembling such a consensus, while Section B addresses what substantively antipoverty activists can hope to accomplish.

³¹⁰ JEFFREY D. SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* 364 (2005).

A. *The Politics of a More Robust Substantive Antipoverty Consensus*

Although the vast majority of federal policymaking on secondary antipoverty programs over the past four decades has been bipartisan, negotiations can founder unless the participants have some sense of what the default result is likely to be in the absence of a deal. Regardless of whether action is ultimately largely partisan or fully bipartisan, conscientious actors in both parties still need to consider how to appeal to a range of political perspectives. Even partisan proposals can win fairly easy enactment if they avoid positions anathematic to broad segments of the other party. This again requires disaggregating both the Right and the Left.

Many prominent economic conservatives do not question the basic concept of public aid for low-income people.³¹¹ To the contrary, they argue that private charities cannot perform this role effectively because of free-rider problems: the benefits of relieving poverty flow to members of society whether or not they contribute.³¹² Savvy economic conservatives also recognize that Americans' anti-ideological strain prevents them from seeing rigid laissez-faire doctrine as a satisfactory justification for ignoring people in distress.³¹³ A key to enlisting their support is to design programs that minimize distortions on the economy and on individuals' incentives. For example, President Bush and leading conservative Republican senators supported substantial increases in food stamps in 2002 as a means of diverting funds from trade-distorting agricultural subsidies.³¹⁴

Likewise, fiscal conservatives should not present an insuperable obstacle. Meaningful antipoverty initiatives are possible at costs that are quite modest relative to the budget as a whole. Mandatory income-security programs—including some with large components not limited to low-income people—will consume just 6.6% of federal

³¹¹ See MILTON FRIEDMAN & ROSE FRIEDMAN, *supra* note 301 at 109.

³¹² See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 191 (1962) ("It can be argued that private charity is insufficient because the benefits from it accrue to people other than those who make the gifts . . ."); see also MUELLER, *supra* note 235, at 47-49 (finding that voluntary associations may lead to free-riding and less than Pareto-optimal redistribution).

³¹³ See CONLAN, *supra* note 96, at 315 (finding that most American voters who self-identify as being ideological conservatives are also "operational liberals" in that they support major public programs); Super, *New Moralizers*, *supra* note 9, at 2075-76 (finding divergence between conservatives and the electorate on responding to innocent misfortune).

³¹⁴ Super, *Quiet Revolution*, *supra* note 239, at 1383 n.480.

spending within the next decade.³¹⁵ Doubling these programs—far more than is politically plausible—nonetheless would have just 63% of the cost of extending President Bush’s tax cuts over this period.³¹⁶

Those conservatives most committed to using antipoverty law for expressive purposes—the “New Moralizers”³¹⁷—and those seeing it as a potential partisan wedge to split the Democratic coalition are unlikely to join in any meaningful antipoverty initiatives. Given the low saliency that antipoverty policy has in normal times, and the dangers those groups would face opposing initiatives in conditions like those that followed Katrina, their reservations need not be determinative. Even as partisan a Republican as Newt Gingrich declared that declining welfare caseloads “didn’t end poverty in America,” requiring further initiatives “to help those still left out of the American dream.”³¹⁸

Similarly, a new antipoverty agenda could count on support from many, but by no means all, liberals. Low-income people themselves would naturally benefit from these initiatives. Fully engaged low-income advocates have strong reasons to be pragmatic. Humanitarians, liberal as well as conservative, should be the core constituency for antipoverty law. Many instrumentalists, particularly those with objections to harsher means of achieving their goals, should support antipoverty initiatives.

Highly partisan Democrats, on the other hand, are unlikely to find an antipoverty initiative that the general public strongly supports but that Republicans do not. Redistributionists likely could not be accommodated in the same coalition with economic conservatives,³¹⁹ and the latter are far more numerous and important. And those liberals wishing to deliver expressive messages through antipoverty law would bring more controversy than support. Fortunately, like conservative expressivists, such liberals have many other vehicles for achieving the symbolic statements they seek.

³¹⁵ CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2008 TO 2018, at 52 tbl.3-1, 56 tbl.3-3 (2008).

³¹⁶ *Id.* at 106. The cost of doubling income-support programs in the final year of this period would consume less than forty-five percent of the cost of the expiring tax cuts that year.

³¹⁷ Super, *New Moralizers*, *supra* note 9, at 2053-57 (criticizing some expressive laws).

³¹⁸ Cochran, *supra* note 283, at 2809.

³¹⁹ See FRIEDMAN, *supra* note 312, at 195 (“One cannot be both an egalitarian . . . and a [classical] liberal.”).

Beyond maintaining significant elite support on both sides of the ideological divide, the success of significant antipoverty initiatives depends on broad appeals to public opinion. Absent the ability to mobilize strong public support, antipoverty programs will remain vulnerable to raids for other priorities and to partisans in search of “wedge issues,” as both occurred in the early 1980s and mid-1990s. Instrumental arguments, however, tend to be too complex to engage a distractible electorate: the information costs required to confirm or reject them are too great. Successful appeals to the public must be humanitarian.

Such an appeal is feasible. For example, few plausible instrumental arguments exist for disaster relief—indeed, instrumental arguments will tend to favor aid to businesses in the affected region rather than to individual disaster victims. Yet the response to Hurricane Katrina shows that humanitarian appeals can work: the electorate had no problem with people in New Orleans feeling a sense of entitlement to aid from the government while in a crisis. Attempts to blame the victims in New Orleans failed: the public was not convinced that those not evacuating did anything wrong, and felt that even if they did this was far more harm than most of the public was willing to see visited upon even the “unworthy poor.” Despite widespread resistance to providing cash assistance to low-income people, FEMA, after it was embarrassed, announced that it would give debit cards worth \$2,000 each to displaced families.

Winning and maintaining public support requires transparency. Few voters will bear many information costs in developing antipoverty policy. Journalistic attention to, and effectiveness in explaining, poverty issues is intermittent. Some liberal and conservative elites are likely to criticize any initiative; if the public cannot readily judge the merits of that criticism, it will become frozen in ambivalence. Transparency is also crucial in holding together a coalition that crosses ideological lines: each side will show more trust if it expects that the public would recognize any breach by the other.

The public cannot be expected to maintain continuous interest in the way necessary to enact several successive initiatives. This counsels in favor of designing initiatives that make sense in their own terms, rather than small programs designed to lead to something larger. Moreover, a constant drumbeat of stories about poverty can convince the public that the problem is insoluble. Indeed, because many initiatives may take some time to show results, intermittent public attention to poverty may reduce the risk of impatience. As a result, progress

depends significantly on capturing rare moments of intense public sympathy for low-income people to achieve major improvements.

B. *Elements of a Plausible Antipoverty Consensus*

Whatever the shortcomings of in-kind benefits, U.S. public opinion remains profoundly hostile to providing cash assistance under most circumstances to most groups of low-income people. Any broad initiatives involving cash assistance would also draw in expressivists on both the Left and the Right, hindering pragmatic agreement. Including cash assistance programs would also eliminate any chance of drawing support from provider groups, as recipients spend cash aid on a range of needs.

In addition, although the public would support more generous assistance than this country now offers, overbroad guarantees will draw attacks for destroying work incentives and creating moral hazard.³²⁰ Once the safety net gets beyond a certain point, these arguments become difficult to deflect. A new body of research suggests that families receiving somewhat more generous public benefits respond to work incentives better than the absolutely destitute.³²¹ This makes sense on several levels. Having one's life in utter chaos can lead to panic or depression, both of which impair rational thinking. Destitution also radically shortens an individual's time horizon: a mother with no way to feed her hungry children today may prefer a \$4 per hour off-the-books job that pays cash right away to a permanent job paying twice that but requiring her to wait two weeks for her first paycheck.

A key feature of a sustainable antipoverty strategy is reliance on fewer, better programs. This feature directly opposes the instincts of liberal experimentalists, who have sought to create numerous small programs in the hope that some will yield sufficiently appealing results to build support for more funding.³²² Multiplying programs, however, wreaks havoc with transparency and accountability. Senior policy-makers, and the electorate, cannot tell the difference between a program that is having little impact because its funding is insufficient to

³²⁰ See Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17, 24-27 (1992) (arguing that guaranteed shelter would weaken work incentives and reduce aggregate social welfare).

³²¹ See CYNTHIA MILLER, MANPOWER DEMONSTRATION RESEARCH CORP., EXPLAINING THE MINNESOTA FAMILY INVESTMENT PROGRAM'S IMPACTS BY HOUSING STATUS 1 (1998) (finding that almost all positive impacts of an incentive-laden welfare experiment occurred among recipients in subsidized housing).

³²² Super, *Political Economy*, *supra* note 242, at 723-25.

provide a meaningful benefit or to serve enough people, and one with a bad design. Supporters tend to overpromise; the failure to redeem these promises persuades the public that government cannot affect poverty. Journalists and the public also cannot evaluate how much help people get when numerous small programs are serving small numbers of people; they tend to assume that all programs are available to everyone, grossly overstating the aid provided and creating the sense that little more is needed.³²³ The costs of acquiring more accurate information, though not huge, are more than most reporters or voters will bear.

Thoughtful conservatives have long advocated for reducing the number of programs as a way of minimizing administrative costs.³²⁴ With resources concentrated on a few programs, those programs can be designed as responsive entitlements (serving all eligible claimants without artificial caps³²⁵) and functional entitlements (defining their benefits in terms of the amount necessary to accomplish a particular purpose rather than as an arbitrary sum that may not make a measurable difference and that may prove vulnerable to inflation and budget cuts).³²⁶ Developing common programs applicable to all low-income people, regardless of age, health, or family arrangement, would promote simplicity, transparency, and equity. As a leading economic conservative has argued, a sound antipoverty program “should be designed to help people as people not as members of particular occupational groups or age groups.”³²⁷

Beyond that, the contours of a plausible antipoverty policy draw much from the *substantive* component of the new governance. To retain economic conservatives’ support, antipoverty policies must minimize market distortions³²⁸ by paying close attention to incentives.³²⁹ This minimization can avoid much of the bureaucracy required to operate command-and-control regulation. Creating incentives also of-

³²³ See *id.* at 696-705 (describing problems in evaluating a program’s effectiveness).

³²⁴ See, e.g., FRIEDMAN, *supra* note 312, at 192-93 (advocating tax breaks “as a substitute for the present rag bag of measures” to reduce the total administrative burden).

³²⁵ See Super, *Political Economy*, *supra* note 242, at 654-55 (explaining responsive entitlements).

³²⁶ See *id.* at 655-58 (describing functional entitlements).

³²⁷ FRIEDMAN, *supra* note 312, at 191.

³²⁸ *Id.*

³²⁹ See David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 836-44 (2004) (cataloguing the increasingly varied and complex ways in which public benefit programs manipulate claimants’ incentives).

fers a compromise on values important to one faction of the coalition but disputed by others.³³⁰ Thus, for example, eliminating rules that deny or limit eligibility to married people can win broader support than either preserving those rules or imposing explicit marriage-promotion efforts. Programs that reduce benefits too sharply as recipients' income rises will be unsustainable.

Although the ultimate market-based form of assistance—cash—is anathema to much of the electorate, the government's role should be limited to financing goods as opposed to directly purchasing or even producing them. This will enhance support among economic conservatives,³³¹ expand low-income recipients' ability to meet their preferences, and provide more effective quality control than command-and-control regulation. Thus, antipoverty advocates should favor programs such as food stamps, Section 8 housing vouchers, and fee-for-service Medicaid over commodity distribution, project-based Section 8, and Medicaid-managed care, which in turn are preferable to soup kitchens, public-housing projects, and free clinics.

To secure economic conservatives' support for a coherent system of public benefits, liberals should be prepared to substitute transfers for regulatory redistributions.³³² Economic conservatives attack minimum-wage laws as inefficient because they distort the market, they risk eliminating low-skilled jobs, and their class of beneficiaries maps badly onto that of low-income people.³³³ Some minimum-wage law would still be needed as a backstop against grossly coercive employment contracts, but liberals should be receptive to improving low-wage workers' well-being through transfer payments rather than increases in the real value of the minimum wage. Similarly, responding to the effects of globalization with public benefits rather than trade limitations could appeal to economic conservatives while targeting aid at those most in need. The relative prevalence of regulatory redistributions at the local level gives economic conservatives an incentive to support moving

³³⁰ See *id.*, at 842-44 (noting that moving from command-and-control rules to incentives requires accepting that some disfavored behavior will continue).

³³¹ See, e.g., FRIEDMAN, *supra* note 312, at 178-80 (arguing the merits of cash grants over public housing programs).

³³² Professors Kaplow and Shavell find manipulation of legal rules inferior to transfer payments as a means of redistributing income due to one kind of under-inclusiveness: the failure of any given rule to help low-income people not coming in contact with that portion of the legal system. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 33-34 (2002). Each legal rule manipulated to this end creates additional inefficiencies.

³³³ FRIEDMAN, *supra* note 312, at 180-81.

the locus of antipoverty policymaking to the national level. Thus, economic conservatives' antipathy for local regulatory redistribution should align their interests with those fiscally sophisticated supporters of antipoverty programs, who recognize that affluent people's mobility, and the cyclical vulnerability of local tax bases, are likely to doom significant local transfer programs.³³⁴

IV. WHITHER DEMOCRATIC EXPERIMENTALISM?

Democratic experimentalism's potential for success depends heavily on several assumptions unlikely to be met in a wide range of circumstances. Under less-than-ideal conditions, it can impede and distort public action rather than unleash and inform it. Moreover, it remains highly vulnerable to commandeering by its philosophical opponents. Even the welfare-rights movement's relatively brief appearance in the late 1960s transformed the norms underlying participation in antipoverty policymaking from the deliberative ones implicit in democratic experimentalism to those of interest-group competition. No doubt a great deal of public-spirited deliberation has taken place since, but from that time forth the two approaches to participation have co-existed without clear delineation. In addition, the norm of deliberation proved wholly insufficient to blunt the expressivist Right's drive to slash and dismantle antipoverty programs, both in 1981 and even more sweepingly in 1996. Whether these cuts are seen as the result of interest-group democracy or elite decision making, they reflect focused, centralized decisions strikingly insensitive to the cause of fighting poverty. In 1996, deliberative, decentralized experimentalism not only failed to prevent the cuts but provided an effective political smokescreen. And in the wake of Hurricane Katrina, its dogged indeterminacy produced a political calamity that compounded the physical one.

This Part uses antipoverty law's experiences to seek insight into the future of democratic experimentalism. Section A considers the broader applicability of that experience. Section B explores options for modifying democratic experimentalism.

³³⁴ See MUELLER, *supra* note 235, at 677 (noting the ultimate ineffectiveness of redistribution at a local level due to people's ability to "vote with their feet").

A. *The Value of the Antipoverty Law Example*

The past four decades of the decentralized system for antipoverty policy formation have been so dismal that few would want to claim that history. Democratic experimentalists can argue legitimately that this system did not operate in full conformity with their prescriptions: among other things, participants on both ideological wings elevated symbolic victories over pragmatic accomplishment. To their credit, democratic experimentalists have recognized the 1996 welfare law's cynicism,³³⁵ while many others have not.

Nonetheless, when a regime espouses most of the experimentalists' core precepts—decentralization, deregulation, deliberation, and learning from the results of local experiments—it is no answer to say that the regime got it wrong when the experimentalists propose no mechanism for preventing such expropriation of their ideas or for correcting such errors. It would be anomalous for a regime defined as experimentalist to countenance only successful efforts. Experimentalists must accept and learn from failures as much as triumphs. And with the literature dominated to date by the democratic experimentalists' hand-picked anecdotes of promise, an analysis of some of these techniques' failures is crucial to assessing democratic experimentalism's true potential and any appropriate modifications of its terms. Just as leading democratic experimentalists criticize institutional approaches whose "successes [a]re limited to unusual contexts,"³³⁶ their prescriptions' value depends on their breadth and reliability of application.

Moreover, the democratic experimentalists themselves rely heavily on examples that depart significantly from the decentralized model they espouse. They tout drug treatment courts as a major example of experimentalist governance, deeming them "an outgrowth of a series of grass-roots initiatives that emphasized similarly community-based team-oriented approaches."³³⁷ The federal role they describe is one of collecting and diffusing information. Local initiatives and information sharing undoubtedly played an important role in spreading drug-treatment courts. So, however, did some very centralized, coer-

³³⁵ Dorf & Sabel, *supra* note 12, at 434-38 (calling the 1996 welfare law "the evil twin" of positive experimentalist legislation); Lobel, *Renew Deal*, *supra* note 21, at 459 (noting that the 1996 welfare law disguised what is merely a reduction in benefits as government experimentation).

³³⁶ Dorf & Sabel, *Treatment Courts*, *supra* note 101, at 835.

³³⁷ *Id.* at 843.

cive methods: a public defender in the first drug-treatment court was the incoming President's brother-in-law, who urged both using federal financial leverage to establish those courts nationally and appointing the first court's founder (Janet Reno) as attorney general.³³⁸ Facing severe, chronic shortages of funds for drug-treatment programs, if the only way a community could get federal treatment money was by starting a drug-treatment court, it is not surprising that hundreds of desperate communities did so. We will never know how communities would have responded to a true experimentalist approach, in which federal treatment funds were available on equal terms to communities responding to drug abuse through other models: perhaps some of those other models would have proven superior to drug courts. Evaluating the effectiveness of these courts is also problematic;³³⁹ although exponents celebrate lower recidivism rates among those subjected to drug-treatment courts, the courts are designed to serve less serious offenders who would be expected to succeed more in any event.

B. *The Future of Democratic Experimentalism*

One possible course for the democratic experimentalists is to look for areas of government responsibility where their implicit assumptions are met, and where key actors might be expected to support its establishment. This would exclude "conflicts of economic interest" and "disputes over rights arising from moral differences" but leave some of the third area that they assert is ripe for experimentalism: "the provision of public services."³⁴⁰ Efficient solid-waste disposal systems, for example, probably enjoy consensus support, can be measured with relative reliability, do not involve particularly time-sensitive decisions, and are appropriately organized at the local level.³⁴¹ No group has an obvious motive to organize a deliberative, experimentalist approach to designing such systems, but neither does

³³⁸ Mary Wisniewski, *Courts Get a Fix on Drug Treatment Alternatives in Low-Level Drug Cases*, CHI. LAWYER, June 1999, at 6-7.

³³⁹ U.S. GAO, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS 8 (1997) (failing to come to any definitive conclusions on the impact of drug-court programs).

³⁴⁰ Dorf & Sabel, *supra* note 12, at 284.

³⁴¹ Participation in deliberations about solid-waste disposal still will have significant cost. Absent a crisis, few are likely to care enough about these issues to spend time on them. The same is likely true of most issues on which broad substantive consensus exists. On the other hand, at least persons wishing to participate in deliberations over solid-waste disposal need not acquire specialized technical knowledge.

any have a reason to oppose them. Here, however, the new governance's procedural side may run into conflict with its substantive component. Many of the areas in which we have consensus concerning the nature of the problem, the importance of taking action, the measure of success, and the wisdom of decentralization are precisely those subject to the strongest demands for privatization. Even frequent critics of privatization may not object to turning over many of these functions to the private sector.³⁴²

Another option would be to relax considerably democratic experimentalism's prescriptions. A thinner democratic experimentalism—for example, one that did not disparage individual rights or confine courts to a purely procedural role—could contribute constructively to policymaking in some environments in which the pure version likely would misfire. Orly Lobel's thoughtful work could be seen as a move in this direction. Legal rules could create incentives for deliberative approaches in these areas. To some extent, administrative law already does this. Even when statutes do not require agencies to pursue deliberative decision-making processes, they receive far more judicial deference when they do.³⁴³

CONCLUSION

Contemporary debates about deliberative democracy have grappled with the very problems that democratic experimentalism assumes away. For example, far from assuming consensus on the normative character of policy problems and the appropriate scope of government intervention, many deliberative democrats' major focus is on how we can manage normative conflicts.³⁴⁴ They understand that de-

³⁴² See Super, *Privatization*, *supra* note 304, at 414-27 (objecting to privatization of functions implicating contested normative choices and those whose performance government cannot readily monitor).

³⁴³ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (identifying a "category of interpretive choices distinguished by an additional reason for judicial deference" as those in which the agency used participatory decision-making procedures).

³⁴⁴ See, e.g., AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 10 (2004) ("The general aim of deliberative democracy is to provide the most justifiable conception for dealing with moral disagreement in politics."); 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 189-93 (Thomas McCarthy trans., 1981) (describing means of finding normative commonality across cultural differences); *id.* at 19 (discussing the means of converting self-interested dialogue into theoretical normative discourse).

liberation can easily polarize.³⁴⁵ They are keenly aware that “deliberation can also be used cynically . . . as a cover for the exercise of power politics.”³⁴⁶ Critics have demanded a plan for handling those “driven by self-interest, blinded by prejudice, or deluded by ideology.”³⁴⁷ More broadly, deliberative democrats argue that “substantive agreement on preferences or values is neither practically realistic nor normatively appealing in a large, pluralist constituency.”³⁴⁸

Debates on deliberative democracy have focused on the sensitivity of reliable, transparent metrics for measuring policies’ success. Public communication about causal mechanics may be more manipulable than that about purely normative questions.³⁴⁹ Special interests can deceive the electorate at least as easily as their lobbyists can capture public officials.³⁵⁰ Some regard economic issues as too complex for effective deliberation.³⁵¹

These scholars acknowledge that occasionally time will not allow deliberative policymaking.³⁵² Time pressures, among other reasons, can necessitate resorting to experts to clarify questions of fact.³⁵³ Rec-

³⁴⁵ See Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175, 177 (2002) (stating that “deliberation predictably pushes groups toward a more extreme point”).

³⁴⁶ GUTMANN & THOMPSON, *supra* note 344, at 46.

³⁴⁷ James Johnson, *Arguing for Deliberation: Some Skeptical Considerations*, in DELIBERATIVE DEMOCRACY 161, 166 (Jon Elster ed., 1998).

³⁴⁸ *Id.* at 176; see also BENJAMIN BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 242-44 (1984) (finding that deliberation requires commonality of norms, but placing much value on autonomy and plurality).

³⁴⁹ BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 195 (2004) (noting that the average citizen may find the bureaucratic system “opaque” but still be engaged by policy issues such as global warming); Susan C. Stokes, *Pathologies of Deliberation*, in DELIBERATIVE DEMOCRACY, *supra* note 347, at 123, 123 (“Public communication influencing . . . causal beliefs is as important as deliberation over normative matters, and perhaps more subject to manipulation.”).

³⁵⁰ Stokes, *supra* note 349, at 128 (“[O]rganized interests shaped citizens’ preferences over policies, and those endogenously formed policy preferences in turn caused a shift in government policy . . .”).

³⁵¹ See Daniel A. Bell, *Democratic Deliberation: The Problem of Implementation*, in DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 70, 71-72 (Stephen Macedo ed., 1999) (“Many economic issues are so complex that it is difficult for non-experts to contribute meaningfully to the ‘debate.’”).

³⁵² See GUTMANN & THOMPSON, *supra* note 344, at 43 (“The theory of deliberative democracy does not always in all circumstances demand the practice of deliberation.”).

³⁵³ See *id.* at 54 (stating that deliberative groups that “enlist experts to answer questions and clarify matters of fact” tend to be less polarizing).

ognizing that many issues must be addressed nationally, these scholars seek the means to make deliberation viable on that scale.³⁵⁴

Acknowledging that substantial costs will deter participation, deliberative democrats work to minimize those costs.³⁵⁵ They do this in part by limiting their deliberative models to a few key issues. They are particularly concerned with how to preserve legitimacy in light of the gross inequalities in wealth that affect parties' ability to bear participatory costs.³⁵⁶ Some scholars note other, non-economic costs to deliberation, including stigmatization and loss of a sense of self-worth in the low-income community resulting from debates on poverty.³⁵⁷

Debates on deliberative democracy also have focused on the problem of establishing such a regime. Skeptics note that deliberative democrats assume healthy interactions without showing why those are likely;³⁵⁸ advocates concede that "politicians are not automatically transformed from representatives of special interests into trustees of the public interest as a result of talking to one another."³⁵⁹

Awareness of these limitations has led deliberative democrats to make less ambitious claims for their proposals' applicability than those the democratic experimentalists assert. They "recommend that . . . not . . . every political activity itself be deliberative"³⁶⁰ and avoid "making a black-and-white claim" about the desirability of their approach.³⁶¹ And in marked contrast to the democratic experimentalists, leading deliberative democrats find respect for individual rights indispensable to

³⁵⁴ See ACKERMAN & FISHKIN, *supra* note 349, at 120 (proposing a \$150 stipend to pay citizens to participate in a national "Deliberation Day"); BARBER, *supra* note 348, at 245-48 ("The problem of scale is the problem of communication, and to deal with the second is to deal with the first.").

³⁵⁵ See GUTMANN & THOMPSON, *supra* note 344, at 31 (acknowledging that the large number of citizens in modern democracies creates significant participation costs in direct democracy).

³⁵⁶ See ACKERMAN & FISHKIN, *supra* note 349, at 189-93 (explaining how the introduction of deliberative democracy would add moral weight to political outcomes that address income distribution).

³⁵⁷ See Stokes, *supra* note 349, at 124, 134-35 (noting the effect public characterizations of welfare recipients have on the self-image of those recipients).

³⁵⁸ See Johnson, *supra* note 347, at 164 (observing that advocates of deliberative democracy often fail to meet the exacting standards they apply to those they critique).

³⁵⁹ GUTMANN & THOMPSON, *supra* note 344, at 11.

³⁶⁰ *Id.* at 56.

³⁶¹ See ACKERMAN & FISHKIN, *supra* note 349, at 192 (conceding that political outcomes addressing economic equality may have legitimizing effects for the victorious party's policy, but arguing that they will be more significant in a deliberative democracy).

the legitimacy of deliberative democracy.³⁶² In particular, they see basic economic opportunity as a vital prerequisite to the deliberative process.³⁶³

Deliberative democrats have not found magical answers to these daunting questions.³⁶⁴ Indeed, some argue persuasively that their enterprise is fundamentally flawed.³⁶⁵ Nonetheless, the clarity of debates over deliberative democracy, and their candid recognition of its limitations, could help produce a better democratic experimentalism.

³⁶² *Id.* at 53, 59; BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 314-20 (1980); Joshua Cohen, *Democracy and Liberty*, in DELIBERATIVE DEMOCRACY, *supra* note 347, at 185, 207-21 ("The principle of deliberative inclusion extends naturally from religious liberty to a *wide guarantee* of expressive liberty.").

³⁶³ GUTMANN & THOMPSON, *supra* note 344, at 142-43 ("When a political system is structured to give rich citizens far more political power than is warranted . . . , then deliberative processes will suffer."); *see generally* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 83 (William Rehg trans., 1996) (stating that "modern law is especially suited for the social integration of economic societies").

³⁶⁴ ACKERMAN & FISHKIN, *supra* note 349, at 189.

³⁶⁵ *Cf.* JEREMY WALDRON, THE DIGNITY OF LEGISLATION 151-56 (1999) (rejecting the idea espoused by many deliberative theorists that disagreement or lack of consensus is necessarily indicative of a failure of the deliberative system).