The System Worked: Our Schizophrenic Stance on Welfare

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The republic has welfare reform on its mind. On August 22, 1996, President Clinton, faced with an impending election and the daunting prospect of explaining a three-time veto in light of his past promises to remake welfare, signed into law a bill that, among other things, devolves greater flexibility to the states and imposes sharp restrictions on the availability of AFDC. Even the staunchest advocates of reform acknowledge that we have entered an era of uncertainty. In such a climate, Steven Teles’s study, Whose Welfare? AFDC and Elite Politics, enhances our collective understanding of AFDC’s history and continues the national conversation about society’s obligations to the poor.

Whose Welfare vividly describes the genesis of AFDC, the changes in the composition of the program and its recipients, and the various attempts at reform beginning in the 1960s. Eschewing the approach taken by consensus-based scholarship, Teles insists that welfare politics represents a breakdown of the democratic decision making process. He claims that welfare policy has not legitimately reflected popular sentiment over the last thirty years, and argues that this state of affairs is best explained by a theory of “elite dissensus.” Unfortunately, the study falls short in two respects. First, contrary to the author’s claim, the political system has “worked” by producing policy in tune with popular views. Notwithstanding the dramatic recent

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1 See F. Christopher Arterton, Campaign ‘92: Strategies and Tactics of the Candidates, in THE ELECTION OF 1992, at 74, 99 (Gerald M. Pomper ed., 1993) (discussing Clinton/Gore ad that announced, “Welfare Can Be a Second Chance, Not a Way of Life” and called for “an end to welfare as we know it”).

2 See 42 U.S.C.A. § 601 (West, WESTLAW through Pub. L. No. 104-94). For most mothers, AFDC is a transitional program. See MARY JO BANE & DAVID T. ELLWOOD, WELFARE REALITIES 28 (1994). Less than 15% of current beneficiaries will be on welfare for two years or less in a lifetime; 48% will return to AFDC for periodic spells adding up to ten years or more. See id.

3 See, e.g., All Things Considered (NPR radio broadcast, Aug. 1, 1996), transcript available in LEXIS, News Library, Curnws File (quoting Sen. Slade Gorton, who admitted that he was “not at all certain of what the consequences of the passage of this bill will be”); Alison Mitchell, Two Clinton Aides Resign to Protest New Welfare Law, N.Y. TIMES, Sept. 12, 1995, at A1 (reporting resignations of DHHS Assistant Secretaries Peter Edelman and Mary Jo Bane over “deep concerns” about new law).


5 As Teles explains, dissensus is characterized by “large or intellectually powerful elites at the extremes of the ideological spectrum who possess roughly equal power” and a resulting “insufficiency of the political center” (pp. 76-77). Consensus politics, by contrast, is recognizable by an alignment of public opinion and elite opinion that is “sufficiently strong, persistent, and mature to act as a counterweight against interest-group agreements” (p. 11).

6 See LESLIE H. GELD & RICHARD K. BETTS, THE IRONY OF VIETNAM: THE SYSTEM WORKED (1979) (arguing that political system “worked” with respect to American involvement in Vietnam in that even when public opinion
round of devolution of authority, it is the public as a whole, and not merely the elites, that remains deeply conflicted over welfare goals. Second, even if there were a disjunction between public sentiment and policy, this is best understood as characteristic of a healthy deliberative democracy.

*Whose Welfare* analyzes the actions of the cast of intellectuals who have been charged, whether by electoral process or by chance, with the responsibility of defining the contours of welfare policy. Teles’s explanation is top-down by nature: Politicians, activists, and judges have prevented AFDC from evolving to reflect the prevailing views of the populace. As a first step, he argues that whereas AFDC’s precursor, Aid to Dependent Children, originally was established in 1935 to supplement state programs designed to keep destitute widows out of the labor force, today eighty-five percent of the public supports requiring women with preschool children to work in order to receive public assistance (p. 55). As Teles asserts, “[t]he set of beliefs that formed the moral foundation for the mother’s aid and Aid to Dependent Children programs has utterly collapsed” (p. 57).

Having explained that requiring work is a critical element of any legitimate form of welfare, Teles goes on to argue that reform has been frustrated by “elite dissensus,” a system malfunction marked by a failure on the part of the political elite to “give form and structure to [the public’s] preferences” (p. 165). He notes that, compared with the public at large, professional elites possess “well-constrained ideological structures” (p. 62). The more actively elites involve themselves in the social issues of the day, the more likely it is that extreme bipolar debate will occur (p. 74). Teles finds that welfare is particularly vulnerable to dissensus dynamics because the issue implicates “regime level consequences”7 (p. 164), and because the poor have no direct representation in the political process but are spoken for by competing organizations (pp. 15, 16, 164). He avers that elite “disjunction” has characterized welfare politics since the 1960s. His portrait is of an America where “welfare dependency continued to rise” (p. 80), even as attempts to tie public assistance meaningfully to work requirements were foiled.

The author lays much of the blame squarely at the door of self-styled advocates of the poor, such as the National Welfare Rights Organization (NWRO).8 Rather than lobbying for legislative reform or assisting the poor to get off the rolls, the welfare movement sought to secure a guaranteed annual income. NWRO was instrumental in the derailment of Nixon’s Family Assistance Plan (PAP), a proposal supported by politicians on both sides of the aisle. Subsequent plans either failed or produced only cosmetic effects.9 Political leaders, for their part, opted for

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7 By “regime level” issues, Teles means those “basic issues of citizenship and social system maintenance . . . [that] concern[ ] not merely who gets what, when, where, and how, but why a particular community exists and for what ends it is organized” (pp. 16-17).

8 The contributions of the welfare rights movement should not be wholly overlooked, however, since lawyers were instrumental in the creation of “fair processes for eligibility determination and ... ensure[ing] horizontal equity.” See *Bane & Ellwood, supra* note 2, at 12-14.

9 The Work Incentive Program (WIN) passed in 1967, requiring states to establish work programs with sanctions for noncompliance and creating a financial incentive to work, but WIN was never fully implemented (p. 95). President Carter’s Program for Better Jobs and Income was defeated in 1976. The Family Assistance Plan
the expedient practice of credit-claiming and risk-avoidance instead of seeking national reform: Successive administrations granted waivers for states to implement innovations (pp. 124-38). Finally, Teles argues that the Supreme Court’s rulings, as well as the intellectual ideas embodied in them, exacerbated the climate of gridlock.

While Teles accurately points out that support of AFDC expenditures has declined and values of work have changed over time, he is wrong to conclude that the electorate no longer supports the program. That AFDC occasionally has been amended suggests that the program has been susceptible to the ebb and flow of public pressures. Indeed, the new law demonstrates that strict limits can be enacted when national will is brought to bear on existing policy. In other words, welfare policy has reflected, and continues to exemplify, the rational contradictions of popular goals. The answer is that Americans feel that a safety net is necessary, but have come to dislike the costliness of the program and the effects that such a safety net may have on those who rely on it. The author is surely correct that support for “welfare” spending has consistently declined, yet he fails to mention that when the query is rephrased as “assistance to the poor,” sixty-four percent of those polled advocate more spending, while only eleven percent favor decreased spending. While Americans see lack of effort, poor schools, and loose morals as causes of poverty, a significant number also understand that there are not enough jobs available (pp. 51-52). The overwhelming majority of Americans believes that welfare alleviates hunger and helps people overcome hard times, but fears that welfare encourages out-of-wedlock births and creates a disincentive to work (pp. 49-50). These numbers, taken as a whole, indicate that the people are profoundly divided over the goals of AFDC: Is it primarily intended to help eligible mothers achieve self-sufficiency, or is it meant to provide a minimal standard of living for poor children? Teles’s analysis assumes that current policy is out of step with public opinion based on a conception of AFDC as furthering the former goal, while almost entirely ignoring the complicating purpose of the latter. The populace seems to want to “have it both ways” (p. passed in 1988, but the work provisions were widely seen as paper requirements (pp. 94-95). See also Id. at 20-21. 10 See, e.g., Charles Reich, The New Property, 73 YALE L.J. 733 (1964). Reich suggested that welfare might be more accurately understood as a property right rather than as merely a privilege, and this idea was adopted in the Court’s analysis in Goldberg v. Kelly. 397 U.S. 254 (1970). See infra text accompanying notes 16-21.

11 Actually, although AFDC expenditures have increased over time and in 1993 reached $13 billion (4.7 million families assisted), they comprise less than one percent of the annual federal budget. See BANE & ELLWOOD, supra note 2, at x.

12 Teles indulges the widespread misperception that fuels at least some of the public antipathy toward AFDC: that welfare encourages individuals to have out-of-wedlock children (p. 173). In fact, as studies repeatedly confirm, there are other dynamics in play; there are complex, real costs to raising children, and AFDC’s support is quite small relative to these costs. See, e.g., GREGORY ACS, URBAN INSTITUTE, THE IMPACT OF AFDC ON YOUNG WOMEN’S CHILDBEARING DECISIONS at i (1994) (observing that AFDC generosity had “very modest” effect on first births and “virtually no effect on subsequent births”); BANE & ELLWOOD, supra note 2, at 111 (“There is little observed impact of welfare on births out of wedlock.”); JANET CURRIE, WELFARE AND THE WELL-BEING OF CHILDREN 71-73 (1995) (reporting that studies have concluded that “AFDC benefits have little effect on the probability of birth”).

13 See CURRIE, supra note 12, at 1.

14 Today, one in five children is defined as poor; the proportion of poor children rose from 15% to 20% between 1974 and 1989. See IRWIN GARFINKEL, ASSURING CHILD SUPPORT 1 (1992). See generally OLIVIA GOLDEN, POOR CHILDREN AND WELFARE REFORM (1992) (analyzing benefits of program); BOBBIE G. TURNER, FEDERAL/STATE AID TO DEPENDENT CHILDREN PROGRAM AND ITS BENEFIT TO BLACK CHILDREN IN AMERICA 1935-1985 (1993) (discussing importance of AFDC for black children). Some studies suggest that, compared with in-kind aid, AFDC produces no quantifiable direct benefits for children. See CURRIE, supra note 12, at 92-117. Nonetheless, a case can be made for cash assistance based on the argument that in-kind aid does not permit individuals sufficient autonomy.
53)—it would like mothers to work but insists on maintaining an appropriate standard of care for poor children. In short, any actual dissensus exists with the public at large, and is not attributable solely to elites.

Even assuming that welfare policy has been out of step with the views of the populace, however, Teles does not offer a compelling explanation as to why this is so. The primary weakness of Teles’s thesis is its failure to distinguish between dissensus and consensus politics, and perhaps normal politics, on conceptual and historical levels. Although the author provides clues as to why the issue of welfare may be particularly divisive, he does not demonstrate why the actions of elite actors here differ dramatically from the vigorous political mobilizing and legal strategizing of daily politics. One problem lies in his vague definition of dissensus. On the one hand, because of the characteristics of elites, polarizing dynamics appear to be the norm when they participate in robust public debate. This suggests that on most contentious social issues, dissensus will occur. On the other hand, the author implies that dissensus is an unusual phenomenon, producing “aberrant policy” (p. 8).

A further difficulty emerges in Teles’s failure to provide detailed examinations of welfare politics vis-à-vis other historical examples. Without such analogies, it is unclear why elite behavior and the political dynamic in the welfare context should be deemed dysfunctional. Teles’s more specific arguments demonstrate this point. One critical thread of his theory is that elites within the legal profession are partly responsible for dissensus—that “[s]tarting with King [v. Smith] and running through Goldberg [v. Kelly], the ordinary legislative process was circumvented” (p. 144)(emphasis added). Yet while the welfare cases were dramatic decisions in their own right, it is debatable whether the Supreme Court departed from the norm in applying the law. The author rather overstates the actual scope of these decisions and misunderstands the nature of the judicial-political process. Contrary to Teles’s claim (p. 116), the welfare cases do not resemble the abortion cases, in which, according to some jurists and scholars, illegitimate judicial activism arrested and polarized political deliberation. Wher as the Court has pronounced with unmistakable clarity a woman’s fundamental right to terminate her pregnancy within the first trimester, it has never “ratified” a right to welfare. In Goldberg v. Kelly, the

15 Teles mentions only the airline deregulation of the 1970s and the tax reform of the 1980s as examples of consensus politics (p. 11). No historical examples of dissensus politics are explored.

16 More plausible is Teles’s claim that the Court’s decisions helped spur stricter welfare rules (pp. 115-16), as it is undisputed that the costs of maintaining welfare rose as a result of these rulings.

17 See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 995 (1992) (Scalia, J., concurring in part, dissenting in part) (“Not only did Roe not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve.”); cf. Stephen L. Carter, Rush to a Lethal Judgment, N.Y TIMES, July 21, 1996, § S (Magazine), at 28-29 (arguing that recent decisions by Ninth and Second Circuits threaten to short-circuit deliberative process over divisive notion of assisted suicide).

18 See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (holding that woman has “fundamental” privacy right to terminate her pregnancy in first trimester).

19 In King v. Smith, 392 U.S. 309 (1968), the Court struck down an Alabama regulation that denied AFDC benefits to families in which a male cohabited with the mother of eligible children. See id. But as Teles acknowledges (p. 108), the case was decided on statutory grounds and did not create a new substantive constitutional right. See id. at 329-34. In Shapiro v. Thompson, 394 U.S. 618 (1959), the Court struck down Connecticut’s one-year residency requirement for AFDC eligibility. Yet rather than finding a constitutional right to public assistance, the Court grounded its decision in the right to travel freely and equal protection of the laws. See
Court held that due process required only that recipients be granted an evidentiary hearing before termination of their benefits, but stopped far short of finding an unconditional right to the statutory distribution of wealth.\(^{21}\) Teles does not clearly explain how judges should have avoided contributing to dissensus while fairly deciding the critical legal claims at stake; it is not sufficient to simply say that courts must avoid the language of “entitlement.” Nor is it apparent that lawyer/activists circumvented the normal political process. Elites, as well as lay persons, have long sought to vindicate their rights in the legal system. Litigation, moreover, often comprises an integral component of normal political strategy.

If one remains convinced that AFDC has long been out of step with public opinion, it is still possible to understand disjunction as illustrative of a properly functioning system. As the historian Gordon Wood aptly noted, our peculiar “balanced constitutional” political order was designed to “check the imprudence of democracy.”\(^{22}\) The American political-legal structure does not reflect every shift in popular approval; rather, it may, at times, prolong debate or frustrate transient majorities in the interest of protecting not only deeply entrenched values,\(^{23}\) such as due process and perhaps the modern principle of an activist national government,\(^{24}\) but also policies across generations. Just as the system “controlled the effects” of the welfare rights movement’s “passions,”\(^{25}\) so it checked the efforts of those who sought transformation of either the policy of cash assistance or the underlying principle of limited social welfare spending. However unpopular AFDC has been, it does not follow that intense public scrutiny of the issue has occurred until recently, or that, borrowing Bruce Ackerman’s language, “broad and deep”\(^{26}\) support for fundamental reform has ever existed during the last three decades. Hence, the cycle of devolution represents an institutional slowdown that permits ad hoc tinkering until informed deliberation takes place and a new consensus emerges in favor of comprehensive reform.

Upon reflection, it is apparent that the new welfare structure, in its nascent form, falls far short of Teles’s vision of a national solution.\(^{27}\) Although it puts teeth into existing work requirements, the law follows the pattern of devolution of which Teles is sharply critical (pp. 119-46), and it remains to be seen whether adequate training programs will emerge, or whether

\(^{Id.}\)\ at 529-33.


\(^{21}\) Subsequent decisions further affirmed the notion that no fundamental right to welfare exists. See, e.g., Bowen v. Gilliard, 483 U.S. 587 (1987) (upholding federal law requiring that children living in same home be considered as part of same household); New York State Dep’t of Social Servs. v. Dublino, 413 U.S. 405 (1973) (upholding state work incentive law); Dandridge v. Williams, 397 U.S. 471 (1970) (rejecting “substantive” challenges to state’s monthly AFDC cap).


\(^{23}\) See 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 10 (1991) (advocating dualist theory of judicial review in which courts serve democracy by protecting erosion of “hard-won principles” by “political elites who have failed to gain broad and deep popular support for their innovations”).

\(^{24}\) Public opinion is but the beginning of a process of refinement to “best discern the true interest” of the citizens, to promote “justice,” and to ensure that these considerations are not “sacrifice[d] to temporary or partial considerations.” THE FEDERALIST No. 10, at 59 (James Madison) (Modern Library ed., 1937).

\(^{25}\) See id. at 56-59; see also Wood, supra note 22, at 575 (“To regulate and not to eradicate [the passions] . . . is the province of policy.” (quoting John Adams)).

\(^{26}\) See ACKERMAN, supra note 23, at 10.

\(^{27}\) The author believes that support for a national solution exists. Accordingly, he advocates uprooting AFDC and planting a national “insurance-like system of income security” (p. 170). His approach would establish a “general civic entitlement,” thereby “guaranteeing work to everyone” (p. 172).
private institutions will fill in the void on behalf of children whose mothers no longer qualify for AFDC. In the end, although *Whose Welfare* posits an intriguing theory, its parts do not coalesce as a persuasive whole. To be sure, the author makes a number of incisive observations and provides often arresting accounts of the welfare rights movement. Still, at a time when sober reflection on the past and thoughtful solutions for the present are sorely needed, *Whose Welfare* speaks in a softer voice than one would have hoped.

—Robert L. Tsai