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## Articles

### LITIGATING WELFARE RIGHTS: MEDICAID, SNAP, AND THE LEGACY OF THE NEW PROPERTY

*Andrew Hammond*

**ABSTRACT**—In 2017, the Republican-controlled Congress was poised to make deep cuts to the nation’s two largest anti-poverty programs: Medicaid and the Supplemental Nutrition Assistance Program (SNAP), commonly known as “food stamps.” Yet, despite a unified, GOP-led federal government for the first time in over a decade, those efforts failed. Meanwhile, the Trump Administration and its allies in state government continue to pursue different strategies to roll back entitlements to medical and food assistance. As public interest lawyers challenge these agency actions in federal court, roughly five million Americans’ health insurance and food assistance hang in the balance.

This Article asks why Medicaid and SNAP have proven so resilient. The answer lies in the fiscal federalism that governs them and the federal litigation that reinforces them. Food and healthcare programs for poor Americans are shaped by several institutions: Congress, federal and state agencies, state legislatures, and courts. The federal government pays for 100% of SNAP benefits. States pay for up to half of the costs of administering the program, but SNAP’s substantive benefits are free to the states. For Medicaid, states contribute to the substantive benefits, but the federal government pays the lion’s share. As one would expect, when the substance of the benefit is free but the procedures surrounding the benefit are not, states are reluctant to impose procedural barriers for which the state must pay to prevent its residents from accessing benefits which cost the state nothing. As a result, the fiscal rules surrounding these programs engender an unholy, but not unstable, alliance between public interest lawyers and state administrators—one that prevents the gutting of these benefit programs. When states do attempt to restrict access to these programs, public interest lawyers can rely on statutory provisions and administrative law to contest these cuts in federal court.

In unearthing this legal infrastructure, this Article offers a new account of welfare litigation, one that sharpens and updates Charles Reich’s theory of government benefits in *The New Property*. This Article also challenges the conventional wisdom that procedural protections undermine substantive rights. Finally, it disputes the widely held belief that litigation is a poor tool for

protecting poor people’s rights. Rather, public interest litigation has played a key role in Medicaid and SNAP’s durability.

**AUTHOR**—Andrew Hammond, Assistant Professor of Law, University of Florida Levin College of Law. For their feedback, I thank Wendy Bach, Donald Campbell, Martha Davis, Stephanie Didwania, David Engstrom, Amanda Frost, Sara Greene, Ariel Jurow Kleiman, Emma Kaufman, Alan Morrison, David Noll, Lisa Pruitt, Caitlin Rathe, Judith Resnik, Ezra Rosser, Shayak Sarkar, Susannah Tahk, Karen Tani, Alex Tsesis, Adam Winkler, and my colleagues at Florida. Thanks also to the organizers and participants of conferences and faculty workshops at Florida, Loyola Chicago, Oxford University’s Rothermere Institute, SEALS, Wisconsin, and the American Constitution Society’s Public Law Workshop at the 2019 AALS Annual Meeting. Any errors are my own.

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INTRODUCTION

Last October, the United States Court of Appeals for the D.C. Circuit heard oral argument to decide whether the Trump Administration could permit Arkansas, Kentucky, and other states to impose work requirements on Medicaid recipients. Experts estimated that 195,000 people would have lost their health insurance as a result of these two states’ efforts.<sup>1</sup> Had Arkansas and

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<sup>1</sup> See Amy Goldstein, *Appeals Panel Expresses Skepticism About Medicaid Work Requirements*, WASH. POST (Oct. 11, 2019, 1:11 PM), <https://www.washingtonpost.com/health/appeals-panel-expresses-skepticism-about-medicaid-work-requirements/2019/10/11/a8357c4e-eb8a-11e9-9c6d->

Kentucky's actions succeeded, at least twenty states would have followed suit.<sup>2</sup> Imposing work requirements on such a scale threatens the health insurance of two million Americans.

The same day the D.C. Circuit considered the legality of the proposed Medicaid changes, three federal district court judges in California, New York, and Washington State granted nationwide injunctions blocking the Trump Administration's final rule on public charge. This public charge regulation would have both empowered consular officials to deny entry to and immigration judges to order removal of legal immigrants on the grounds that they or their family members were likely to access or had accessed anti-poverty programs like Medicaid and the Supplemental Nutrition Assistance Program (SNAP), commonly known as "food stamps." Those injunctions met different fates in the Second and Ninth Circuits. The Ninth Circuit stayed the injunctions in California and Washington.<sup>3</sup> The Second Circuit upheld the district court's injunction,<sup>4</sup> only to be overruled by the Supreme Court's temporary stay.<sup>5</sup> Like the Medicaid work requirement litigation, the public charge litigation will wind its way through the federal courts in the coming months. However, unlike the Medicaid work requirement litigation, the Supreme Court has signaled its interest in resolving this controversy. If the public charge regulation does go into effect, experts estimate millions will disenroll in Medicaid and SNAP, including anywhere from 875,000 to 2,000,000 citizen children who would lose their health insurance.<sup>6</sup>

A few weeks after the D.C. Circuit argument, the U.S. Department of Agriculture (USDA) finalized its work requirement rule for SNAP recipients. At the time, researchers estimated 755,000 people would lose food assistance.<sup>7</sup> As with the Medicaid work requirements, legal aid attorneys challenged these

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436a0df4f31d\_story.html [https://perma.cc/9KV7-QENQ] (identifying about 95,000 individuals at risk in Kentucky and 100,000 at risk in Arkansas).

<sup>2</sup> See *infra* Section I.B. At the time of this writing, the Trump Administration and the State of Arkansas have filed petitions for writ of certiorari in the Supreme Court. *Gresham v. Azar*, 950 F.3d 93 (D.C. Cir. 2020), *petitions for cert. filed*, Nos. 20-37 & 20-38 (July 13, 2020).

<sup>3</sup> *City of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773 (9th Cir. 2019).

<sup>4</sup> *New York v. U.S. Dep't of Homeland Sec.*, Nos. 19-3591 & 19-3595, 2020 WL 95815 (2d Cir. Jan. 8, 2020).

<sup>5</sup> *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (order granting stay).

<sup>6</sup> SAMANTHA ARTIGA, ANTHONY DAMICO & RACHEL GARFIELD, KAISER FAM. FOUND., *POTENTIAL EFFECTS OF PUBLIC CHARGE CHANGES ON HEALTH COVERAGE FOR CITIZEN CHILDREN* (2018), <http://files.kff.org/attachment/Issue-Brief-Potential-Effects-of-Public-Charge-Changes-on-Health-Coverage-for-Citizen-Children> [https://perma.cc/F6CM-JBUZ].

<sup>7</sup> LAURA WHEATON, URB. INST., *ESTIMATED EFFECT OF RECENT PROPOSED CHANGES TO SNAP REGULATIONS 6* (2019), [https://www.urban.org/sites/default/files/publication/101368/estimated\\_effect\\_of\\_recent\\_proposed\\_changes\\_to\\_snap\\_regulations\\_2.pdf](https://www.urban.org/sites/default/files/publication/101368/estimated_effect_of_recent_proposed_changes_to_snap_regulations_2.pdf) [https://perma.cc/EJF7-8DR8].

regulations in federal court and secured a preliminary injunction before the final rule could go into effect. While the Trump Administration has filed its appeal,<sup>8</sup> Congress has scuttled the final regulation by prohibiting the USDA's regulation during the duration of the COVID-19 pandemic.<sup>9</sup> Together, these three administrative actions, if implemented, would result in millions losing health insurance and food assistance in a matter of months.

Despite the expected blast radius of these proposals, most legal scholars have paid them no mind. Understandably, the health law community sees the Medicaid changes in the broader context of an effort to undo the Affordable Care Act (ACA). Similarly, immigration scholars and practitioners see the public charge regulation as one of several anti-immigrant proposals from the Trump Administration. Yet, outside of these fields, scholars have failed to see these controversies in federal court as worthy of sustained inquiry, let alone one that calls into question the nature of the American welfare state. The legal academy's neglect of these controversies stems, in part, from the fact that for the last half century, welfare has been ignored as a site of public law. When the Supreme Court declined to consider further constitutional welfare challenges in the early 1970s, the professoriate followed.<sup>10</sup> The broader public law community has let this field lie fallow for far too long.

This Article seeks to explain why the Trump Administration and the 115th Congress's efforts to fundamentally reshape the American safety net have failed—at least so far. Despite their near-total control of the presidency, Congress, and state government, ideological opponents of these programs have not easily dismantled food and medical assistance. It shows why the Trump Administration has resorted to an interlocking strategy, what I call “devolved, disaggregated conditionality,” to undermine Medicaid and SNAP. These welfare-cutting efforts from 2016 to 2019 by the Legislative and Executive Branches show the process of retrenchment is still subject to the rule of law.<sup>11</sup>

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<sup>8</sup> Notice of Appeal, *District of Columbia v. Dep't of Agric.*, No. 1:20-cv-119 (D.D.C. May 12, 2020) (filed by Sec'y Perdue, U.S. Dep't of Agric.).

<sup>9</sup> See Ashraf Khalil, *USDA to Appeal Ruling, Seeks Food Stamp Change amid Pandemic*, ASSOC. PRESS (Mar. 18, 2020), <https://apnews.com/e2a2e9be5950a98f4dabcc2649aef332> [<https://perma.cc/JA9E-W3XK>]; Lola Fadulu, *Trump Backs Off Tougher Food Stamp Work Rules for Now*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/us/politics/trump-food-stamps-delay.html> [<https://perma.cc/N2QA-SMGF>]; see also Families First Coronavirus Response Act of 2020, Pub. L. No. 116-127, § 2301, 134 Stat. 178, 187–88 (to be codified at 7 U.S.C. § 2011).

<sup>10</sup> For a discussion of the exceptions, see *infra* Section I.A.1.

<sup>11</sup> See Jonah D. Levy, *Welfare Retrenchment*, in THE OXFORD HANDBOOK OF THE WELFARE STATE 552–65 (Francis G. Castles, Stephan Leibfried, Jane Lewis Herbert Obinger & Christopher Pierson eds., 2010) (discussing scholarly treatment of this term). The classic study of welfare retrenchment is Paul Pierson's comparative analysis of the Reagan Administration and the Thatcher government. PAUL PIERSON, DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT 131–63

The Trump Administration's efforts have stalled, tied up by several federal lawsuits that have secured injunctive relief for SNAP and Medicaid recipients. The Medicaid and SNAP cases in federal courts demonstrate both the enduring vitality of welfare litigation and the durability of medical and food assistance in the United States.

Why have Medicaid and SNAP proven so tough to cut? The answer to this puzzle lies in the combination of the fiscal federalism peculiar to these programs and the doctrinal framework laid out by the Supreme Court fifty years ago. That framework stems from Professor Charles Reich's famous article, *The New Property*, which posited that government itself was increasingly the source of property that individuals needed to survive.<sup>12</sup> Drawing on Reich's theory in *Goldberg v. Kelly* in 1970, the Supreme Court held that a state agency can only terminate a recipient's welfare benefit in a manner that comports with the Due Process Clause of the Fourteenth Amendment.<sup>13</sup> In dissent, Justice Hugo Black worried that the political branches would pay for these court-imposed procedural safeguards by reducing the substantive benefits themselves, perversely hurting the very people the Court sought to protect.<sup>14</sup> The Supreme Court echoed Justice Black's reasoning in *Mathews v. Eldridge* in 1976, which remains the Court's leading procedural due process case.<sup>15</sup>

What Justice Black overlooked in his dissent in *Goldberg* and the Supreme Court misidentified in *Mathews* is that there is not just one institution that responds to judicial rulings on welfare administration. These programs are governed concurrently by Congress, federal and state agencies, state legislatures, and courts. The federal government foots the bill for all SNAP benefits. States pay for up to half of the costs of administering the program, but SNAP's substantive benefits are free to the states. For Medicaid, while

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(1994); see also R. Shep Melnick, *Subterranean Politics Blues*, 54 TULSA L. REV. 271, 272 (2019) (defining the "distinctive politics of retrenchment" as "taking away benefits and privileges previously granted" (citing PIERSON, *supra*)). Legal scholars occasionally draw on this work and the wider literature, especially to discuss the curtailment of civil rights. See, e.g., Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 FORDHAM L. REV. 37, 43–47 (2018); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1564–67, 1582 (2014) (relying on Pierson's framework); Twinette L. Johnson, *Going Back to the Drawing Board: Re-Entrenching the Higher Education Act to Restore Its Historical Policy of Access*, 45 U. TOL. L. REV. 545, 547–51 (2014) (same); Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1024–26 (2003) (synthesizing efforts to curtail disability benefits); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1101–02 (2001) (discussing retrenchment in tort liability).

<sup>12</sup> Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>13</sup> 397 U.S. 254, 261 (1970).

<sup>14</sup> *Id.* at 278–79 (Black, J., dissenting).

<sup>15</sup> 424 U.S. 319 (1976).

states do contribute to the cost of substantive benefits, the federal government pays for the vast majority and can even wholly subsidize the states, as seen in the ACA's most recent expansion of Medicaid that was intended to be free to states for several years. As one would expect when the substance of the benefit is free but the procedures surrounding the benefit are not, states should be reluctant to impose procedural barriers that prevent its residents from accessing benefits for which the state does not pay. As a result, the fiscal rules surrounding these programs engenders an unholy, but not unstable, alliance between public interest lawyers and state administrators. When states do erect procedural hurdles in part due to ideological preferences, they must contend with fighting back legal challenges in federal court. The procedural protections for SNAP and Medicaid stem less from constitutional law and more from federal statutes and regulations. Since the federal courts still treat welfare benefits as a property interest, public interest lawyers have standing and a cause of action to trigger review of agency action that impinges on these benefits.

By revisiting Reich's theory and the Supreme Court's reasoning in those cases, this Article updates the "New Property" theory for our time, precisely at the moment when the two anti-poverty programs that millions of Americans receive are under attack. As the New Property has aged, the two largest anti-poverty programs in America have fed on that theory's legacy, albeit in unexpected ways. The federal government spends \$60 billion annually on SNAP, nearly as much as spending on K-12 education, the Environmental Protection Agency's budget, and the National Aeronautics Space Administration's budget combined.<sup>16</sup> In the 2018 Farm Bill, the omnibus legislation that authorizes all federal agriculture and nutrition spending for five years, SNAP made up over 80% of the legislation's expenditures.<sup>17</sup> That spending reaches a wide swath of the country: nearly forty-three million

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<sup>16</sup> See U.S. DEP'T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM PARTICIPATION AND COSTS (2020), <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAPsummary-6.pdf> [<https://perma.cc/5MGJ-S35A>]; U.S. DEP'T OF EDUC., EDUCATION DEPARTMENT BUDGET BY MAJOR PROGRAM (2018), <https://www2.ed.gov/about/overview/budget/history/edhistory.pdf> [<https://perma.cc/M57Y-TWGM>]; ENV'T PROT. AGENCY, FY 2019: EPA BUDGET IN BRIEF (2019), <https://www.epa.gov/sites/production/files/2018-02/documents/fy-2019-epa-bib.pdf> [<https://perma.cc/M5D3-G82C>]; NASA, FY 2020: EXPLORE BUDGET ESTIMATES BRIEFING BOOK (2020), [https://www.nasa.gov/sites/default/files/atoms/files/fy2020\\_summary\\_budget\\_brief.pdf](https://www.nasa.gov/sites/default/files/atoms/files/fy2020_summary_budget_brief.pdf) [<https://perma.cc/Q3KP-UBLL>]; see also Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (codified at 7 U.S.C. §§ 2011-2036(a)). The name was changed to Supplemental Nutrition Assistance Program (SNAP) in 2008. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 4001, 122 Stat. 923, 1092.

<sup>17</sup> See *infra* Section II.A.2.

Americans receive SNAP.<sup>18</sup> SNAP's ubiquity explains why it is considered a vital countercyclical tool in economic downturns.<sup>19</sup>

Surpassing SNAP in spending, Medicaid is, after Social Security and Medicare, the most expensive domestic program in the federal budget.<sup>20</sup> However, unlike Social Security and Medicare, Medicaid expenditures implicate American federalism. Medicaid is the largest contribution the federal government makes to state budgets.<sup>21</sup> And even though the federal government pays for nearly two-thirds of Medicaid's \$600 billion price tag,<sup>22</sup> states spend more of their own revenue on Medicaid than anything else except public schools.<sup>23</sup> Intended as a targeted program to serve poor families, Medicaid now accounts for one in every six dollars spent on health care.<sup>24</sup>

Moreover, both programs loom large in the political life of the country. During the most recent government shutdown, state governments, social service providers, and retailers agonized over what would happen if forty million Americans did not receive their SNAP benefits on time.<sup>25</sup> The Supreme

<sup>18</sup> See FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM, <https://fns-prod.azureedge.net/sites/default/files/resource-files/34SNAPmonthly-7b.pdf> [<https://perma.cc/QZX7-2U2C>] (data as of July 10, 2020).

<sup>19</sup> In the depths of the 2008 financial crisis, White House advisers relied on the macroeconomic multiplier effect of SNAP. See Peter Ganong & Jeffrey B. Liebman, *The Decline, Rebound, and Further Rise in SNAP Enrollment: Disentangling Business Cycle Fluctuations and Policy Changes*, 10 AM. ECON. J. 153, 154 (2018). See generally KENNETH HANSON, U.S. DEP'T OF AGRIC., ECONOMIC RESEARCH REPORT NO. 103, THE FOOD ASSISTANCE NATIONAL INPUT-OUTPUT MULTIPLIER (FANIOM) MODEL AND STIMULUS EFFECTS OF SNAP (2010).

<sup>20</sup> See GRANT A. DRIESSEN, CONG. RSCH. SERV. 7-5700, THE FEDERAL BUDGET: OVERVIEW AND ISSUES FOR FY2019 AND BEYOND 7 (2018), <https://fas.org/sgp/crs/misc/R45202.pdf> [<https://perma.cc/K4GW-7QWX>] ("The largest mandatory programs, Social Security, Medicare, and the federal share of Medicaid, constituted 48% of all federal spending in FY2017."); Robin Rudowitz, Kendal Orgera & Elizabeth Hinton, *Medicaid Financing: The Basics*, KAISER FAM. FOUND. (Mar. 21, 2019), <https://www.kff.org/report-section/medicaid-financing-the-basics-issue-brief/> [<https://perma.cc/FVU4-M6GW>].

<sup>21</sup> Rudowitz et al., *supra* note 20.

<sup>22</sup> See *Federal and State Share of Medicaid Spending*, KAISER FAM. FOUND., <https://www.kff.org/medicaid/state-indicator/federalstate-share-of-spending> [<https://perma.cc/5ELT-Z4SA>]; *NHE Fact Sheet*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet> [<https://perma.cc/TRR8-2RVB>].

<sup>23</sup> See *NHE Fact Sheet*, *supra* note 22 (noting the health expenditures of various states); Alex Boucher & Barb Rosewicz, *Medicaid Consumes Growing Slice of States' Dollars*, PEW CHARITABLE TRS. (Apr. 22, 2015), <https://www.pewtrusts.org/en/research-and-analysis/articles/2015/04/medicaid-consumes-growing-slice-of-states-dollars> [<https://perma.cc/Q2C3-CNE5>].

<sup>24</sup> Rudowitz et al., *supra* note 20. More than 90% of nonelderly beneficiaries had incomes below 200% of the federal poverty level (FPL); 54% were below 100% FPL. See JAMILA MICHENER, *FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS* 9–10 (2018).

<sup>25</sup> See Helena Bottemiller Evich, *States Warn Food Stamp Recipients to Budget Early Benefit Payments Due to Shutdown*, POLITICO (Jan. 15, 2019, 6:58 PM), <https://www.politico.com/story/2019/01/15/state->

Court's decision in *National Federation of Independent Business v. Sebelius* has pushed the decision to participate in the ACA's Medicaid expansion down to every governor's office and state legislature in the nation.<sup>26</sup> By rendering the ACA's Medicaid expansion optional, the Court unleashed a series of pitched legislative battles and bipartisan compromises in Louisiana, Maine, and Michigan,<sup>27</sup> as well as high-profile ballot initiatives in Idaho, Nebraska, and Utah.<sup>28</sup> Across every dimension—the number of people served, the billions of dollars spent, cases that wind their way through the federal courts, political footballs kicked up Pennsylvania Avenue by the White House, back down by Congress, and across the country to every state capitol—SNAP and Medicaid controversies persist in the most important arenas of the American administrative state.

The resilience of SNAP and Medicaid defies received wisdom. Historians characterize the American welfare state as stunted, especially when compared to those in other wealthy democracies.<sup>29</sup> Some social scientists and legal

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food-stamp-benefits-shutdown-2491182 [https://perma.cc/SB9F-Z2HQ]; Press Release, U.S. Dep't of Agric., USDA Announces Plan to Protect SNAP Participants Access to SNAP in February (Jan. 8, 2019), <https://www.usda.gov/media/press-releases/2019/01/08/usda-announces-plan-protect-snap-participants-access-snap-february> [https://perma.cc/S6TL-DEL5] (explaining the Department's plans to fund February benefits).

<sup>26</sup> See 567 U.S. 519, 588 (2012) (“Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer.”); see also Akeiisa Coleman & Rachel Nuzum, *Up Close: Legislative Activity on Medicaid Heating Up Across the Country*, THE COMMONWEALTH FUND (Apr. 9, 2019), <https://www.commonwealthfund.org/blog/2019/up-close-legislative-activity-medicaid-heating-up-across-country> [https://perma.cc/3TGC-4PPK] (discussing developments on Medicaid activity in six states).

<sup>27</sup> See, e.g., Joe Lawlor, *Maine Gov. Mills Rejects Work Requirements LePage Sought for Medicaid*, PORTLAND PRESS HERALD (Jan. 22, 2019), <https://www.pressherald.com/2019/01/22/mills-rejects-work-requirements-lepage-sought-for-medicaid-beneficiaries> [https://perma.cc/P95J-8N4Y]; Catherine Shaffer, *New Data Show Benefits of Michigan's Medicaid Expansion*, MICH. PUB. RADIO (Dec. 9, 2018), <https://www.michiganradio.org/post/new-data-show-benefits-michigans-medicaid-expansion> [https://perma.cc/FVX6-J77U]; *Medicaid Expansion Enrollment Increases to 400,635; Uninsured Rate Drops*, LA. DEP'T OF HEALTH (Feb. 16, 2017), <https://ldh.la.gov/index.cfm/newsroom/detail/4169> [https://perma.cc/W9M6-P49W].

<sup>28</sup> See Lindsay Whitehurst, *Utah Reduces Voter-Backed Medicaid Expansion in Rare Move*, ASSOC. PRESS (Feb. 11, 2019), <https://apnews.com/49b24e08059e49b3b1685ff0cb450e5e> [https://perma.cc/JAT6-VD8Q]; Audrey Dutton, *Idaho Supreme Court Upholds Medicaid Expansion, Rejects Idaho Freedom Foundation Suit*, IDAHO STATESMAN (Feb. 5, 2019, 4:54 PM), <https://www.idahostatesman.com/news/politics-government/state-politics/article225578040.html> [https://perma.cc/EGX8-88YN]; Abby Goodnough, *Idaho, Nebraska, and Utah Vote to Expand Medicaid*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/health/medicaid-expansion-ballot.html> [https://perma.cc/68VU-6G3N]; see also Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495, 566–68 (2020) (discussing this activity in the states).

<sup>29</sup> See Monica Prasad, *American Exceptionalism and the Welfare State: The Revisionist Literature*, 19 ANN. REV. POL. SCI. 187, 188 (2016) (relating that “in recent decades, several scholars have argued that the American welfare state is not small after all; it is different”).



scholars similarly disparage American welfare programs as an amalgamation of race-baiting, misogyny, and anti-tax politics that accompanied the rise of right-wing politics.<sup>30</sup> Few would predict that two means-tested programs, beset by myriad regulations and challenges inherent in federal and state coordination, would represent some of the largest federal and state expenditures in twenty-first-century America. Yet, we lack an account of how and why SNAP and Medicaid have become so durable over the last half century. To best understand how SNAP and Medicaid went from minimal enterprises to massive endeavors in the space of a few decades, we must allow for an important, if imperfect, role for law.<sup>31</sup>

In the process, this Article informs two scholarly debates. First, the surprising strength of the country's two largest anti-poverty programs enriches our understanding of the relationship between procedure and substantive law. This Article challenges the purportedly perverse relationship between procedural protections and substantive rights, famously articulated by Justice Black in his dissent in *Goldberg v. Kelly* and the Burger Court in its decision in *Mathews v. Eldridge*.<sup>32</sup> Second, the Article adds further evidence that those interested in tracing these developments need to look beyond Congress to the agencies and courts. By illuminating the more concrete issues of agency action and public law litigation, accounting for the staying power of SNAP and Medicaid illustrates how law is made in today's administrative state.

This Article sets out to account for the continued durability of SNAP and Medicaid in today's administrative state. Part I traces the rise of American anti-poverty programs, the genesis of Professor Charles Reich's *The New Property*, and the Supreme Court's treatment of welfare benefits in *Goldberg v. Kelly* and beyond. This Part also outlines the New Property's intellectual and programmatic legacy and the doctrinal context for public law attorneys attempting to litigate welfare rights today. Part II discusses the Trump Administration's current attacks on SNAP and Medicaid through legislative and administrative action, paying particularly close attention to the controversy over work requirements. Finally, Part III proposes updating the New Property by putting forth a structural account recognizing that procedure not only raises

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<sup>30</sup> See, e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008); MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, POVERTY, AND THE POLITICS OF ANTIPOVERTY POLICY* (1999); Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 *FORDHAM URB. L.J.* 1159, 1163–68 (1995); Dorothy E. Roberts, *The Value of Black Mothers' Work*, 29 *CONN. L. REV.* 871, 873 (1994); Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 *U. PA. L. REV.* 1249, 1264–66 (1983).

<sup>31</sup> See generally Ira Katznelson, *Rethinking the Silences of Social and Economic Policy*, 101 *POL. SCI. Q.* 307, 320, 323 (1986) (identifying “decentralization and federalism . . . a porous central bureaucracy . . . [and] the importance of law and the judiciary” as key features of the American state).

<sup>32</sup> *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

the cost for state administrators to block social welfare program expansion, but also raises the costs for participation in those programs. The Article concludes by noting the persistent barriers to poor Americans seeking assistance, despite the courts' protection of their interests.

This Article does not intend to paint a rosy picture of welfare litigation. Instead, the Article updates the insights of the New Property in light of the maturation of medical and food assistance over the last fifty years. The durability of anti-poverty assistance in the United States cannot be fully explained without a thorough accounting of the legal infrastructure—the public interest bar, state agencies, and federal courts—that buttresses these programs. This account challenges shibboleths about public law litigation, procedural protections, and substantive rights. By necessity, that project moves the New Property away from its original premises that rights must be constitutional, lawmaking must occur in Congress, and cases must be litigated up to the Supreme Court. This Article seeks to build a theory to fit the world of welfare we live in now.<sup>33</sup> And in light of the ongoing cases in federal court, we need that theory now more than ever.

## I. THE NEW PROPERTY, FIFTY YEARS ON

Before we can understand the New Property's legacy, we must attend to its creation. This Part synthesizes that origin story with the expansion of food and medical assistance and the persistence of welfare litigation over the last half century. It traces Supreme Court precedent regarding treating welfare entitlements as property rights and concludes by setting up the next Part: a comprehensive account of how SNAP and Medicaid have fared in the Trump Administration. Indeed, the animating premise of this Article is that the Trump Administration's actions and the attendant litigation illustrate the New Property's enduring vitality. But to get there, we must know how the New Property began.

### A. *The Beginnings of the New Property*

For the first 150 years of the United States' history, services to people in need were designed, funded, and delivered by state governments, municipalities, and charitable organizations, particularly religiously affiliated

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<sup>33</sup> See, e.g., Elise Bant & Matthew Harding, *Introduction* to EXPLORING PRIVATE LAW 3, 3 (Elise Bant & Matthew Harding eds., 2010) (describing a legal scholar as someone who “must map what he sees from the ground, feeling his way where he must as well as taking the bird’s eye view where he can” thereby “bring order to the chaos, but not by turning away from the chaos, and not by refusing to bear the responsibility of imposing order”).

ones.<sup>34</sup> While states and cities began building more systematic responses to the newly perceived social problem of poverty at the turn of the twentieth century, the federal government was largely absent from social welfare law until the New Deal.<sup>35</sup> However, beginning with the Social Security Act of 1935, the federal government took on a far more active role in financing and overseeing these state and local efforts.<sup>36</sup> From that point forward, the federal government managed an ever-growing social insurance apparatus that dispensed payments to the elderly, dependents, and survivors of those beneficiaries, and, later, workers with disabilities.<sup>37</sup> For needy families, the Social Security Act established the Aid to Dependent Children (ADC) program, later renamed Aid to Families with Dependent Children (AFDC), which increased the federal funding of state-administered cash assistance programs on the condition of some broad federal requirements.<sup>38</sup> While scholars continue to contest the purposes and pitfalls of New Deal programs, these programs represent some

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<sup>34</sup> For the classic surveys, see MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 3–35 (10th ed. 1996); WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 1–46 (6th ed. 1999). There are two new histories of governmental responses to poverty in eighteenth- and nineteenth-century America. See KRISTIN O’BRASSILL-KULFAN, *VAGRANTS AND VAGABONDS: POVERTY AND MOBILITY IN THE EARLY AMERICAN REPUBLIC* (2019); HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* (2017).

<sup>35</sup> See MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE* 127–50 (2013) (exploring how federal responses to natural disasters informed the New Deal generally and the Social Security Act in particular); JAMES T. PATTERSON, *AMERICA’S STRUGGLE AGAINST POVERTY IN THE TWENTIETH CENTURY* 19–33 (2000) (discussing how the Progressive Era built on this understanding); DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 235–66 (1998) (discussing American interest in European social protection schemes at the turn of the twentieth century); LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935*, at 253–99 (1994) (describing compromises and concessions made by movement leaders to secure the passage of the Social Security Act); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS* 525–39 (1992) (arguing that the American welfare state predates the New Deal).

<sup>36</sup> The Social Security Act of 1935 established and updated several federal and state programs, including Aid to Dependent Children, the predecessor program to AFDC and TANF and what most people refer to as “welfare” (Title IV). Pub. L. No. 74-271, 49 Stat. 620 (codified at 42 U.S.C. §§ 601–81); see also *Goldberg*, 397 U.S. at 271–72 (Black, J., dissenting) (“In the last half century the United States, along with many, perhaps most, other nations of the world, has moved far toward becoming a welfare state, that is, a nation that for one reason or another taxes its most affluent people to help support, feed, clothe, and shelter its less fortunate citizens.”).

<sup>37</sup> See *Edwards v. California*, 314 U.S. 160, 174–75 (1941) (suggesting that “the theory of the Elizabethan poor laws no longer fit the facts” because “[r]ecent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character”).

<sup>38</sup> See PATTERSON, *supra* note 35, at 65–70. Both Medicaid and the food stamp program were conceived of as in-kind supplements of medical care and food assistance to AFDC recipients. See GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS § 2 (2008).

of the federal government's early anti-poverty initiatives and supervision of state and local welfare efforts.<sup>39</sup>

The growth of federal expenditures and regulations for anti-poverty programs accelerated when President Lyndon B. Johnson declared an unconditional War on Poverty.<sup>40</sup> Johnson's national program served several purposes. Johnson hoped to complete the work of President Franklin Delano Roosevelt's New Deal, extend the gains of the Civil Rights movement from political rights to social and economic rights, and broaden federal investment and control across urban and rural areas of the country through a domestic policy distinct from that of the slain President John F. Kennedy.<sup>41</sup> The Johnson Administration's anti-poverty efforts, directed from the White House by the newly created Office of Economic Opportunity, drew on and contributed to a confidence in the federal government's capacity to tackle national challenges. This activity, spurred by the experiences of the New Deal, World War II, and the Marshall Plan, fueled the growth of the federal bureaucracy.<sup>42</sup> That bureaucracy, in turn, confronted a federal judiciary that had to negotiate the growth in administrative activity. In response, lawyers and activists in this period drew on flourishing social movements, especially those advocating for equal rights and fair treatment of Black Americans and women, to argue that poor Americans deserved similar opportunity and justice in the United States.

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<sup>39</sup> See generally JEFFERSON COWIE, *THE GREAT EXCEPTION: THE NEW DEAL & THE LIMITS OF AMERICAN POLITICS* (2016); CYBELLE FOX, *THREE WORLDS OF RELIEF: RACE, IMMIGRATION, AND THE AMERICAN WELFARE STATE FROM THE PROGRESSIVE ERA TO THE NEW DEAL* (2012); IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013); CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004); EDWIN AMENTA, *BOLD RELIEF: INSTITUTIONAL POLITICS AND THE ORIGINS OF MODERN AMERICAN SOCIAL POLICY* (1998).

<sup>40</sup> See Video: Lyndon Johnson's First State of the Union—January 8, 1964 (UVA Miller Center), [https://web2.millercenter.org/speeches/video/mp4/1Mb/spe\\_1964\\_0108\\_johnson.mp4](https://web2.millercenter.org/speeches/video/mp4/1Mb/spe_1964_0108_johnson.mp4) (last visited Sept. 28, 2020). Some historians have discussed the role of Michael Harrington's *The Other America*, published in 1962, and particularly its review in the *New Yorker*. See Dwight MacDonald, *Our Invisible Poor*, *NEW YORKER* (Jan. 12, 1963), <https://www.newyorker.com/magazine/1963/01/19/our-invisible-poor> [<https://perma.cc/C3DX-57DW>]; ARTHUR M. SCHLESINGER JR., *A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 1010* (rev. ed. 2002) (“*The Other America* helped crystallize [Kennedy's] determination in 1963 to accompany the tax cut by a poverty program.”). In a provocative challenge to this focus on political elites and mass attitudes, Professor Alice O'Connor argues that researchers and philanthropy in the 1950s and 1960s narrowed the focus of “the poverty problem” by abandoning broader structural inquiries in favor of a technocratic, behaviorist approach. ALICE O'CONNOR, *POVERTY KNOWLEDGE: SOCIAL SCIENCE, SOCIAL POLICY, AND THE POOR IN TWENTIETH-CENTURY U.S. HISTORY* 284–95 (2001).

<sup>41</sup> See JULIAN E. ZELIZER, *THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY* 132–45 (2015).

<sup>42</sup> See MICHAEL B. KATZ, *THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY* 104 (2d ed. 2013) (suggesting that three interpretations of the early years of the War on Poverty—“the primacy of ideas and goodwill,” “the outcome of bureaucratic maneuvering,” and “a response to great social and political forces”—are at least partially correct).

This legalistic, public-spirited approach to addressing poverty manifested, in part, through the federal funding of lawyers for poor Americans. Although the Johnson Administration initially rejected such a proposal, the efforts of a few well-connected advocates and the American Bar Association's eventual acquiescence led to the creation of federally funded legal services.<sup>43</sup> These lawyers immediately began to challenge state administration of welfare programs in federal court.<sup>44</sup> Importantly, the legal service lawyers sometimes disagreed with the activist leaders in the welfare-rights movement, whose leadership and rank-and-file members pushed the lawyers to challenge the adequacy of the assistance itself.<sup>45</sup> Rather than squarely litigating a constitutional right to subsistence, the lawyers, taking a page from the NAACP's Southern strategy, attacked benefit terminations, residency requirements, and privacy violations in the former Confederacy.<sup>46</sup>

As a result of that strategy, the first welfare case heard in the United States Supreme Court was *King v. Smith*.<sup>47</sup> Reuben King, Alabama Governor George Wallace's welfare administrator, oversaw a practice which directed welfare caseworkers to terminate any family's cash assistance if the caseworker determined a man was living in the house.<sup>48</sup> Known as the "substitute father" rule, this practice, common across a swath of states, reflected racist views of Black women's sexuality, family status, and economic activity.<sup>49</sup> States like Alabama argued that the practice was lawful because federal law gave them significant leeway to run their public benefits programs, despite the federal government contributing significant portions of funding to states, including 83% of the funding to Alabama's AFDC program.<sup>50</sup> The Supreme Court

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<sup>43</sup> See MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973*, at 32–35 (1993); FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS: POVERTY AND POLITICS IN MODERN AMERICA* 69 (2007) (describing how the "legal resources available to welfare recipients changed dramatically in the middle 1960s").

<sup>44</sup> See DAVIS, *supra* note 43, at 35–37.

<sup>45</sup> See *id.* at 56–69 (detailing debates over litigation strategy among Welfare Rights organizations and attorneys).

<sup>46</sup> *Id.*

<sup>47</sup> 392 U.S. 309 (1968); DAVIS, *supra* note 43, at 4.

<sup>48</sup> *King*, 392 U.S. at 313–14.

<sup>49</sup> Suggestive of the newfound power of a network of anti-poverty lawyers, the legal services lawyer who drafted the initial complaint in the *King* litigation modeled it on a complaint filed by the Center on Social Welfare Policy and Law challenging Georgia's "employable mother" practice. Each harvest season, counties in rural Georgia terminated all AFDC recipients who had children over three years old to force Black women to work for white farmers. See DAVIS, *supra* note 43, at 62; see also Ira C. Lupo, *Welfare and Federalism: AFDC Eligibility Policies and the Scope of State Discretion*, 57 B.U. L. REV. 1, 3–11 (1977) (discussing the background and implications of *King*).

<sup>50</sup> See DAVIS, *supra* note 43, at 67; *King*, 392 U.S. at 314 (citing ALABAMA MANUAL FOR ADMINISTRATION OF PUBLIC ASSISTANCE, pt. I, ch. 2, § vi); see also *id.* at 317–18.

disagreed, holding that Alabama's policy violated the Social Security Act because it added a condition of eligibility not contemplated by the federal statute.<sup>51</sup> In doing so, the Court struck down a state's welfare policy for the first time in the nation's history. The role of federal law—and with it, the role of federal courts—in welfare administration would never be the same after *King*.<sup>52</sup>

The following term, the Supreme Court heard arguments in *Shapiro v. Thompson*, which presented three consolidated cases challenging welfare residency laws in Connecticut, the District of Columbia, and Pennsylvania. Each case involved a statutory provision imposing a one-year waiting period before newly arrived residents could receive AFDC. Reargued the following term, the case was ultimately decided in favor of the welfare recipients. In an opinion authored by Justice William Brennan, the Court reasoned that imposing a waiting period on welfare benefits violates a poor American's fundamental right to travel.<sup>53</sup> Drawing on emerging equal protection jurisprudence, the Court moved closer to suggesting that a state statute that infringed on a fundamental right to welfare needed a "compelling interest" to survive a Fourteenth Amendment challenge.<sup>54</sup>

While *King* and *Shapiro* wound their way through the federal courts, legal aid lawyers also challenged the state procedures governing benefit terminations. However, unlike *King*, which turned on the interpretation of the Social Security Act, and *Shapiro*, which relied on existing constitutional doctrine, this litigation demanded a novel legal theory that brought these programs within the ambit of the Due Process Clause of the Fourteenth Amendment. At the behest of some welfare experts who knew of his earlier writing on invasive searches of welfare recipients' homes,<sup>55</sup> Professor Charles Reich agreed to research and reflect on the legal implications of welfare administration. The result was *The New Property*, in which Professor Reich argued that government itself was increasingly a source of newfound property rights in its provision of entitlements like occupational licenses and welfare benefits.<sup>56</sup> At common law, land had provided that zone of personal autonomy,

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<sup>51</sup> *Id.* at 333.

<sup>52</sup> Indeed, Professor Karen Tani has argued that there is a constitutional dimension to *King*, albeit below the surface of the Court's opinion. See Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 885–89 (2015).

<sup>53</sup> *Shapiro v. Thompson*, 394 U.S. 618, 630–31 (1969).

<sup>54</sup> *Id.* at 638.

<sup>55</sup> Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963); see also KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972, at 263–66 (2016); DAVIS, *supra* note 43, at 81–86.

<sup>56</sup> See Reich, *supra* note 12, at 787. Professor Reich's article *The New Property* is one of the most well-known works of legal scholarship. See Fred R. Shapiro & Michelle Pearse, *The Most Cited Law Review*

but the “rootless twentieth century man” of Professor Reich’s time needed “sanctuaries or enclaves” to provide protection from government changes in policy from one administration to the next.<sup>57</sup> Since “property performs the function of maintaining independence . . . by creating zones” of independence for the rights-holder, Professor Reich wrote that procedural protections could provide “a valuable means for restraining arbitrary action” by the government.<sup>58</sup>

The next term, the Supreme Court struck down New York’s termination procedures, lending credence to Reich’s theory of the New Property, in *Goldberg v. Kelly*.<sup>59</sup> The Court reasoned that once the Social Security Act created a statutory entitlement to assistance, the Fourteenth Amendment prohibited a deprivation of that new property interest without due process of law. Notably, New York’s Social Services Commissioner had conceded that the welfare benefits in question were “property” within the meaning of the Due Process Clause.<sup>60</sup> As a result, the Court, in another majority opinion by Justice Brennan, moved past the threshold question of whether welfare benefits were “property” and focused instead on what pretermination process was due.<sup>61</sup> The Court’s answer was a set of procedural protections, including requiring an in-person termination hearing to allow the recipient to confront the agency and its

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*Articles of All Time*, 110 MICH. L. REV. 1483, 1489 tbl.1 (2012) (listing Reich’s article as the seventh most cited law review article ever); see also Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1144 (2000) (describing how the 1960s’ “legal-bureaucratic model [of welfare programs] emphasized the notion of entitlement” (citing Reich, *supra* note 12)).

<sup>57</sup> See Reich, *supra* note 12, at 787. Professor Reich was not the only legal academic theorizing about welfare rights at the time. See, e.g., Frank I. Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 11–13 (1969); Bernard Evans Harvith, *Federal Equal Protection and Welfare Assistance*, 31 ALB. L. REV. 210, 241–45 (1967); Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 154–55 (1958). And Professor Jacobus tenBroek had been writing about these issues for decades until he passed away in 1968. See JACOBUS TENBROEK, *FAMILY LAW AND THE POOR: ESSAYS BY JACOBUS TENBROEK* (Joel F. Handler ed., 1971); see also Reich, *supra* note 12, at 786 n.233 (citing works by Professors tenBroek and Jones).

<sup>58</sup> Reich, *supra* note 12, at 771, 783. While Professor Reich thought welfare benefits was one example of this new property, another impetus for his analysis came from his apprehension about McCarthyism—in particular, a case involving a New York doctor who refused to respond to a subpoena from the House Un-American Activities Committee (HUAC) and who eventually lost his medical license as a result. See Karen M. Tani, *Flemming v. Nestor: Anticommunism, the Welfare State, and the Making of “New Property,”* 26 LAW & HIST. REV. 379, 403–04 (2008).

<sup>59</sup> See 397 U.S. 254, 271 (1970).

<sup>60</sup> The litigants could have used 28 U.S.C. § 1343 or 42 U.S.C. § 1983 instead of claiming an implied cause of action in the Constitution itself. Unlike the Justices who currently sit on the Supreme Court, the *Goldberg* majority was apparently unconcerned from whence the cause of action arose.

<sup>61</sup> *Goldberg*, 397 U.S. at 262 n.8 (1970) (“It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’”).

witnesses before an “impartial decision maker” who would “state the reasons for his determination and indicate the evidence he relied on.”<sup>62</sup>

Justice Black dissented in *Goldberg* on several grounds. Most relevant for this Article, Justice Black predicted that the additional procedures the Court imposed on New York and other states would undermine the very recipients the Court sought to protect.<sup>63</sup> Justice Black’s reasoning foreshadowed the perversity argument that has dogged the due process revolution<sup>64</sup>: he predicted that the cost of increased procedural protections would discourage the political branches from extending welfare benefits.<sup>65</sup> Justice Black’s intuition about subsequent decisions across the branches of government was intriguing, but ultimately wrong, as this Article will explore.

Although *Goldberg v. Kelly* appeared to invite a revolution in the substantive law of welfare programs and constitutional due process more generally, such predictions proved premature.<sup>66</sup> Within a week of handing down *Goldberg*, the Court rejected a challenge to Maryland’s welfare grant amount on equal protection grounds in *Dandridge v. Williams*.<sup>67</sup> The lawyers who brought *Dandridge* argued that by setting a maximum grant, regardless of family size, Maryland denied equal treatment to families on the arbitrary basis of household size.<sup>68</sup> Courts and scholars have subsequently interpreted

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<sup>62</sup> *Id.* at 271.

<sup>63</sup> *Id.* at 278–79 (Black, J., dissenting).

<sup>64</sup> By “due process revolution,” I refer to federal court decisions in both the civil and criminal law contexts in the 1960s and 1970s. Compare, e.g., Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1116–17 (2019) (arguing that “[a] series of Court decisions culminating in *Goldberg v. Kelly* greatly expanded the scope of the Due Process Clause’s coverage, triggering an ‘explosion’ in due process litigation that came to be known as the ‘due process revolution’”), with Sarah A. Seo, *Democratic Policing Before the Due Process Revolution*, 128 YALE L.J. 1246, 1249 (2019) (describing the due process revolution’s dominant narrative as concerning how “the Court broke new ground by extending federal procedural rights to state criminal defendants in an effort to protect individuals, especially minorities and the poor, from the police”). Professor Charles Reich is credited for inspiring the due process revolution. See Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582, 599–600 (2014) (associating the civil context of the due process revolution with Professor Reich); Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1974 (1996) (“Charles Reich can be credited with intellectual paternity for the due process revolution.”).

<sup>65</sup> *Goldberg*, 397 U.S. at 278–79 (Black, J., dissenting).

<sup>66</sup> See Judith Resnik, *The Story of Goldberg: Why This Case Is Our Shorthand*, in CIVIL PROCEDURE STORIES 473, 498 (Kevin M. Clermont ed., 2d ed. 2008) (“In one respect, *Goldberg v. Kelly* lived a very short life.”); SUNSTEIN, *supra* note 39, at 161 (describing *Goldberg* as “an especially dramatic ruling” because it “abandoned the right-privilege distinction and ruled that welfare was indeed a form of constitutional ‘property’”).

<sup>67</sup> 397 U.S. 471, 485–87 (1970).

<sup>68</sup> *Id.* at 466–77.



*Dandridge* as the Supreme Court rejecting a right to basic assistance.<sup>69</sup> While some persuasively dispute that characterization,<sup>70</sup> none challenge that *Dandridge* represents the current limit of constitutional welfare litigation.

Six years later, the Court in *Mathews v. Eldridge* abandoned the *Goldberg* Court's quest for trial-like procedures in administrative adjudication. Instead, the Court in *Mathews* adopted a more flexible, multifactor test that balanced the interest of the impacted individual, the expected value of additional procedural safeguards, and the costs and burdens to the government to provide those procedures.<sup>71</sup> Importantly, the Court in *Mathews* tracked the reasoning of Justice Black's dissent in *Goldberg*, agonizing over how the political branches would respond to court-ordered procedural protections for benefit recipients.<sup>72</sup> While *Dandridge* and *Mathews* represent the confines of the Supreme Court's activity in this area of law, assistance to meet the needs of poor Americans has become more firmly rooted than this limited doctrine might suggest.

### B. *The New Property Grows Up, 1964–2016*

From the inception of the New Property to the election of the current Administration, several scholars have questioned and built on the New Property. First, by looking at the intellectual legacy of the New Property, this Section discerns three principal camps of scholars, each offering insights about the past and future of the New Property. Second, by looking at the origins and growth of SNAP and Medicaid, one detects a vitality to these programs, despite repeated efforts to dismantle them. This Section concludes by noting the particular political barriers to SNAP and Medicaid's growth and the programs' dogged persistence in the face of proposed cuts, suggesting their importance not only to those who use them, but also to state governments who cannot afford to stand in their way.

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<sup>69</sup> See *C.K. v. N.J. Dep't of Health & Hum. Servs.*, 92 F.3d 171, 191 (3d Cir. 1996); *Baker v. City of Concord*, 916 F.2d 744, 755 (1st Cir. 1990); Susannah Camie Tahk, *The New Welfare Rights*, 83 BROOK. L. REV. 875, 884 (2018) (describing “[t]he Court’s skepticism surrounding a ‘right to live’” as “what eventually led to the demise of the welfare rights litigation movement”); Samuel Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 MINN. L. REV. 211, 228–29 (1973) (describing the issue in *Dandridge* as “the bridge to a constitutional right to welfare,” but that “[t]he outcome of the case . . . came as a cruel and unexpected blow to the ‘right to life’ hopefuls”).

<sup>70</sup> See Julie A. Nice, *A Sweeping Refusal of Equal Protection: Dandridge v. Williams (1970)*, in *THE POVERTY LAW CANON* 129, 129–52 (Ezra Rosser & Marie Failing eds., 2016).

<sup>71</sup> *Mathews v. Eldridge*, 424 U.S. 319, 339–49 (1976).

<sup>72</sup> *Id.* at 348–49.

1. *The New Property's Intellectual Legacy*

While the Supreme Court backed away from *Goldberg's* groundwork for both a full-blown procedural revolution and a substantive right to welfare, *The New Property's* ideas live on. Although some have taken New Property into fields outside of government services and benefits,<sup>73</sup> of those who have engaged with Professor Reich's analysis in his original area of focus, most fall into one of three camps. The first diagnoses the failure to constitutionalize a right to welfare benefits. The second pragmatically focuses on pursuing the same principles in new arenas, such as tax and employment law. Finally, some see the steady, reliable growth of welfare benefits as a sign that the New Property did take root, but in an unpredicted form.

The first and largest camp is made up of those who emphasize the unfulfilled promise of the potentially transformative idea of constitutional rights to social welfare benefits. Typically retrospective, this scholarship is unsurprisingly the bailiwick of legal historians. However, these laments do not always agree as to the cause of the New Property's failure. In her book *Brutal Need*, the still-definitive account of the beginnings of welfare rights, Professor Martha Davis characterizes the efforts of lawyers and activists to build a doctrine of constitutional welfare rights as incomplete, if not misguided.<sup>74</sup> Lawyers enjoyed initial success in the Supreme Court striking down some state practices, as explained above.<sup>75</sup> Yet disagreements among the lawyers themselves, as well as tensions between the attorneys and activists, including the National Welfare Rights Organization, undermined what was ultimately an unsuccessful court-centric effort as opposed to one that could nurture the social movements crucial to fundamental change.<sup>76</sup> Professor Cass Sunstein and others have suggested that it was not a result of strategy or tactics on the part of lawyers or their movement allies that the United States failed to constitutionalize welfare rights; rather, the failure stemmed from a change in the Supreme Court's composition.<sup>77</sup> According to this account, Richard

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<sup>73</sup> See, e.g., Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1146 (1997); Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668 (1993) (exploring how the concept could inform environmental impact statements).

<sup>74</sup> See DAVIS, *supra* note 43, at 143–45 (1993) (concluding that the welfare-rights litigation strategy was an “ultimate failure”); see also FELICIA KORNBLOH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* 185 (2007) (“The welfare rights era [has] ended . . .”). But see Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 561–63 (1984) (highlighting the energizing effect of litigation on the welfare social movement).

<sup>75</sup> See, e.g., *King v. Smith*, 392 U.S. 309, 311–13 (1968).

<sup>76</sup> See DAVIS, *supra* note 43, at 133–41.

<sup>77</sup> See SUNSTEIN, *supra* note 39, at 153 (identifying the 1968 election as “[t]he crucial historical development” because of Nixon’s “four Supreme Court appointments, which created a critical mass of

Nixon's election to the presidency and his success at putting four Justices on the Supreme Court in his first term effectively shut the door to further constitutional protections for poor people.<sup>78</sup> Nevertheless, even though he offers a different explanation from Davis's, Sunstein concurs in the verdict that it was a "revolution that wasn't."<sup>79</sup> Professor Karen Tani has offered both a more expansive and a more nuanced history of these developments, putting the New Property in the context of a heterodox set of ideas and arguments swirling around and inside the American welfare state.<sup>80</sup> Notably, Professor Tani shows how administrators (many of whom were not lawyers) were grappling with forming a national welfare law long before Reich alighted on the topic.<sup>81</sup> While her history begins earlier and sweeps broader than the other accounts, Professor Tani, too, sides with Davis, Sunstein, and the other members of this camp, concluding that the New Property project failed to find anything more than a foothold within the federal administrative apparatus and state bureaucracies.<sup>82</sup> Professor Tani agrees that by the early 1970s, federal and state governments were both considered "valid centers and hence valid administrators—allowing, in effect, for unequal, nonuniform citizen experiences with authority" and "capable of tolerating extraordinary levels of poverty and inequality."<sup>83</sup>

The second camp includes scholars who, like the first, recognize the failure of the New Property to lead to a transformation in public law, but look for alternative avenues to expand legal protections for poor Americans. Their projects are, at bottom, prospective and, as a result, are in conversation with the lawyers litigating these cases. Some of these alternativists have argued that new poverty law must revolve not around public benefits like cash assistance, Medicaid, or SNAP, but rather low-wage work. As Professor Juliet Brodie has written, after the failed constitutional project of the 1960s and 1970s and the welfare-reform legislation of the 1990s, "The end of welfare entitlement meant that many former welfare recipients must now rely on wage employment for a

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justices willing to reject the claim that social and economic rights were part of the Constitution"); *see also id.* at 162–63 (describing how the Court then "limited the reach of [decisions like *Shapiro* and *Goldberg*] . . . and eventually made it clear that for the most part, social and economic rights have no constitutional status"). *But see* R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 39 (1994) (pointing out that despite naming no Justices to the U.S. Supreme Court, President Carter successfully nominated 264 Article III judges—"more than any President until Reagan").

<sup>78</sup> *See* SUNSTEIN, *supra* note 39, at 153.

<sup>79</sup> *Id.*

<sup>80</sup> TANI, *supra* note 55, at 212–14.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 280 (concluding that "the rule books have gotten thicker, but citizens are still dying, slowly and unequally from, economic need").

<sup>83</sup> *Id.* at 279.

larger percentage of their families' income than in the AFDC era."<sup>84</sup> As a result, the workplace, especially at the bottom of the labor market, "presents unique and important legal issues" that demand "a new poverty law agenda."<sup>85</sup> Others like Professors Susannah Tahk and Sara Greene have pointed to the prodigious growth in anti-poverty tax expenditures and their concomitant procedural protections to demonstrate newer federal anti-poverty efforts.<sup>86</sup> This camp insists that welfare rights should move on to more promising arenas, whether in civil justice, employment law, tax law, or some other area.<sup>87</sup>

A small camp, perhaps best characterized as the contrarians, do not see the New Property as a failure, but as still holding some promise. To paraphrase Mark Twain, these contrarians would caution that reports of the New Property's death have been exaggerated.<sup>88</sup> The contrarians maintain the focus should not be on the expressive commitments of politicians or landmark Supreme Court cases, but rather on the functional constraints placed on the bureaucrats who administer these programs. These scholars see the steady growth and routinization of public benefits, such as SNAP and Medicaid, as a

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<sup>84</sup> Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda*, 20 WASH. U. J.L. & POL'Y 201, 225 (2006); see *id.* (contrasting "an earlier era . . . dominated by welfare policy, entitlements and constitutional protections" with a new era demanding that "lawyers concerned about justice for the poor must contend with the post-welfare employment setting" (citing, *inter alia*, *Goldberg v. Kelly* and *Dandridge v. Williams* as part of the earlier era)); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 381 (2012) (describing PRWORA as "eliminating rights claims"); Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131, 1138–40 (2006) (discussing the emphasis PRWORA placed on promoting work); cf. Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA L. REV. 373, 380–88 (2006) (describing the need for a purposive account of what qualifies as "work" under welfare work requirements); Alan W. Houseman, *The Vitality of Goldberg v. Kelly to Welfare Advocacy in the 1990s*, 56 BROOK. L. REV. 831, 859 (1990) (arguing a few years before the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) that "*Goldberg* is even more vital today than it was when issued in 1970").

<sup>85</sup> See Brodie, *supra* note 84, at 225.

<sup>86</sup> See Susannah Camic Tahk, *The New Welfare Rights*, 83 BROOK. L. REV. 875, 898–916 (2018) (characterizing tax law as replete with protections for low-income taxpayers in contrast with the decline in welfare rights); Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791, 796–817 (2014) (enumerating the anti-poverty programs administered through the tax code); Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 560 (2013) (suggesting that "[i]n many regards, the [earned income tax credit (EITC)] is an ideal federal antipoverty program" but that families who receive the EITC are still vulnerable to "financial shocks"). *But see* Francine J. Lipman, *Access to Tax Injustice*, 40 PEPP. L. REV. 1173, 1186–87 (2013) (discussing challenges low-income families face in accessing EITC); Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, 73 LAW & CONTEMP. PROBS. 285, 287–89 (2010) (questioning the EITC's effectiveness at reducing poverty).

<sup>87</sup> See, e.g., Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260 (2013).

<sup>88</sup> Mark Twain said, "[T]he report of my death was an exaggeration." Louis J. Budd, *Mark Twain as an American Icon*, in THE CAMBRIDGE COMPANION TO MARK TWAIN 1, 7 (Forrest G. Robinson ed., 1995).

sign of the New Property's staying power.<sup>89</sup> These scholars are not apologists for the current regime. Indeed, they often are its most vociferous critics.<sup>90</sup> But their criticisms do not suggest that the New Property project is misapprehended, just misapplied.<sup>91</sup> What these scholars share is a skepticism that the standard by which the New Property should be judged is not whether it has adherents on the Supreme Court or in Congress, but whether poor people can use the New Property to make claims through agencies and courts.<sup>92</sup>

There are worthy insights in each of these approaches. First, not only do the historical accounts serve to ground doctrinal developments in the social movements of the last century, but they also chasten those who may expect courts to lead in this area of law. The alternativist approach warns lawyers from becoming too enamored with a golden age, which, whether it was as bright as hindsight suggests, is undeniably past.<sup>93</sup> The alternativist mode challenges lawyers to go where poor people and organizations are, rather than where they might have once been. The contrarians, like the alternativists, pull attorneys away from the past to confront contemporary challenges, without abandoning welfare programs—the traditional site of the New Property—altogether. The

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<sup>89</sup> See, e.g., 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, 1285–86 (2004) (explaining that anti-hunger advocates "saved what in many respects is the best-designed means-tested program in the United States" with its "uniform benefit structure" and entitlement financing); Diller, *supra* note 56, at 1163–64 (2000) (describing the impact of discretion-based welfare administration on the changing relationship between caseworkers and program recipients); MELNICK, *supra* note 77, at 17.

<sup>90</sup> See Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 357–66 (2014) (arguing that social welfare policy can impose punitive consequences); see also Diller, *supra* note 56, at 1128 (asserting that the "lack of accountability and potential for unfairness in the new administrative regime are causes for concern").

<sup>91</sup> See Super, *supra* note 89, at 1282 (cautioning that "the common practice of studying cash-assistance policy almost exclusively is likely to yield a severely distorted picture of public-benefits law").

<sup>92</sup> This legal scholarship dovetails with similar lines of inquiry in the social sciences. See JOE SOSS, RICHARD C. FORDING & SANFORD F. SCHRAM, *DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE* 293–308 (2011); Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 12 (1984) (arguing that managerial reforms to the Aid to Families with Dependent Children program have reduced workers' discretion and their ability to respond to recipients in need); cf. Diller, *supra* note 56, at 1137 (discussing the move from the "social work" model of the 1930s to the legal-bureaucratic model that emerged by the 1970s). Importantly, Professor Karen Tani has synthesized these insights by highlighting bureaucratic disentitlement and the problems of administration without losing sight of the federal courts. See TANI, *supra* note 55, at 279–82.

<sup>93</sup> The experience of material deprivation in the United States looks different than it did more than half a century ago. The experience of poverty in America is dissimilar from that of the country during the War on Poverty. See AEI/BROOKINGS WORKING GRP. ON POVERTY & OPPORTUNITY, *OPPORTUNITY, RESPONSIBILITY, AND SECURITY: A CONSENSUS PLAN FOR REDUCING POVERTY AND RESTORING THE AMERICAN DREAM* 16–29 (2015) (discussing how poverty and economic opportunity in America have changed since the 1960s); see also Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America, U.N. Doc. A/HRC/38/33/Add.1, at 8–9 (2018).

contrarians teach us that simply because the American constitutional system currently fails to guarantee minimal entitlements does not mean that American public law does not. And as a functional matter, the source of the right may not matter to the person receiving assistance. Together, scholars from these three camps delineate the New Property's legacy and potential in light of anti-poverty programs' current challenges.

## 2. *New Property's Programmatic Legacy: Medicaid and SNAP*

More Americans receive medical and food assistance from government sources than ever before. Yet, the omnipresence of these two government programs was neither predicted nor preordained. When Congress passed the Social Security Amendments of 1965—commonly known as the Medicare Act—it tacked on a caboose to that contributory program's train and called it Medicaid.<sup>94</sup> Congress did not envision that the program would pay for nearly half the births in the country,<sup>95</sup> nor become a potential vehicle for universal health coverage.<sup>96</sup> Similarly, the year before creating Medicaid, Congress made the funding of the food stamp program permanent, and a decade later Congress extended that program nationwide.<sup>97</sup> When Congress nationalized the food stamp program, few politicians on Capitol Hill, federal or state bureaucrats, or activists and lawyers working in and through the welfare-rights movement thought that Congress had created a statutory right to food assistance. And yet, over the last half century, fuzzy but firm rights to food and medical assistance have taken root in the United States.<sup>98</sup>

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<sup>94</sup> See DAVID G. SMITH & JUDITH D. MOORE, *MEDICAID POLITICS AND POLICY* 19–40 (2d ed. 2015) (discussing Medicaid's origins as both an “afterthought” for the Johnson Administration and members of Congress, but also as a “sleeping giant” championed by then-House Ways and Means Chairman Wilbur Mills).

<sup>95</sup> See Anne Rossier Markus, Ellie Andres, Kristina D. West, Nicole Garro & Cynthia Pellegrini, *Medicaid Covered Births, 2008 Through 2010, in the Context of the Implementation of Health Reform*, 23 *WOMEN'S HEALTH ISSUES* e273, e276 tbl.2 (2013).

<sup>96</sup> State Public Option Act, S. 489, 116th Cong. § 2 (2019) (permitting individuals not eligible for Medicaid to buy into a state Medicaid plan); State Public Option Act, H.R. 1277, 116th Cong. § 2 (2019) (same); see also, e.g., FRANK J. THOMPSON, *MEDICAID POLITICS: FEDERALISM, POLICY DURABILITY, AND HEALTH REFORM* 2 (2012) (describing Medicaid as “initially seen by many as a poor second cousin to Medicare” but noting that the program now “covers more people than Medicare” and “has become a pivotal component of the epic health reform law of 2010”); Nicole Huberfeld, *Federalism in Health Care Reform*, in *HOLES IN THE SAFETY NET* 197, 211 (Ezra Rosser ed., 2019) (describing Medicaid as having “achieved a hidden, near universality”); Lindsay F. Wiley, *Medicaid for All? State-Level Single-Payer Health Care*, 79 *OHIO ST. L.J.* 843, 896 (2018) (describing the Affordable Care Act's reliance on Medicaid to get to universal coverage).

<sup>97</sup> See Amendments to the Food Stamp Act of 1964, Pub. L. 91-671, 84 Stat. 2048 (1971).

<sup>98</sup> This is not the first article to assess the half-century legacy of public interest litigation on behalf of poor Americans. Two accounts have had particular influence on this project. See Jason Parkin, *Aging*

Medicaid has seen significant expansion in the last fifty-five years. Medicaid is a program jointly administered by the federal and state governments to assist states in furnishing medical assistance to needy individuals and families.<sup>99</sup> Anyone who qualifies under program rules can receive Medicaid.<sup>100</sup> Although states administer Medicaid, the federal government determines the financial eligibility criteria for participants, and state statutes and regulations must comply with certain broad federal requirements.<sup>101</sup> As for financing Medicaid benefits, there is a fairly technical formula, called the Federal Medical Assistance Percentage (FMAP), that is calculated for each state and varies by population and covered services.<sup>102</sup> A state's FMAP ranges from 50% to 83%, with poorer states receiving more in federal funding.<sup>103</sup> Notably, for the ACA's expansion of Medicaid, the statute set the federal contribution at 100% and decreased it only to 90% in 2020 and subsequent years.<sup>104</sup> In addition to contributing less than half the benefit costs of Medicaid, states also contribute roughly half of the costs to administer the program.<sup>105</sup> Despite Medicaid expenditures making up *both* the largest source of federal funding to states *and* one of the largest budget items of state spending, federal courts have repeatedly held that states cannot claim that their own budgetary needs prevent them from complying with Medicaid's requirements.<sup>106</sup> To administer Medicaid, states must cover "mandatory" populations of people whose income falls below a means test tied to the federal

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*Injunctions and the Legacy of Institutional Reform Litigation*, 70 VAND. L. REV. 167, 189–92 (2017); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2056 (2008).

<sup>99</sup> See 42 U.S.C. § 1396-1; see also, e.g., *Frew v. Hawkins*, 540 U.S. 431, 433 (2004) ("State participation [in Medicaid] is voluntary; but once a State elects to join the program, it must administer a state plan that meets federal requirements."); *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1102 (9th Cir. 2010); *Miller v. Gorski Wladyslaw Est.*, 547 F.3d 273, 277 (5th Cir. 2008). According to the 2016 *Actuarial Report on the Financial Outlook for Medicaid*, overall Medicaid spending for FY2016 was \$575.9 billion, with federal expenditures of \$363.4 billion and state expenditures of \$212.5 billion. CHRISTOPHER J. TRUFFER, CHRISTIAN J. WOLFE & KATHRYN E. RENNIE, OFFICE OF THE ACTUARY, CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., 2016 ACTUARIAL REPORT ON THE FINANCIAL OUTLOOK FOR MEDICAID, at iv (2016).

<sup>100</sup> *Schweiker v. Gray Panthers*, 453 U.S. 34, 36–37 (1981) (interpreting the Medicaid Act such that "[a]n individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives").

<sup>101</sup> 42 U.S.C. § 1396a(a).

<sup>102</sup> ALISON MITCHELL, CONG. RSCH. SERV., R43847, MEDICAID'S FEDERAL MEDICAL ASSISTANCE PERCENTAGE (FMAP) 1–2 (2018).

<sup>103</sup> See 42 U.S.C. § 1396d(b); see also *Federal Financial Participation in State Assistance Expenditures*, 83 Fed. Reg. 61,157, 61,159 tbl.1 (Nov. 28, 2018) (listing effective quarterly FMAP rates); MITCHELL, *supra* note 102, at 12–13 tbl.A-1 (listing FMAP rates from the last five fiscal years for the fifty states and D.C.).

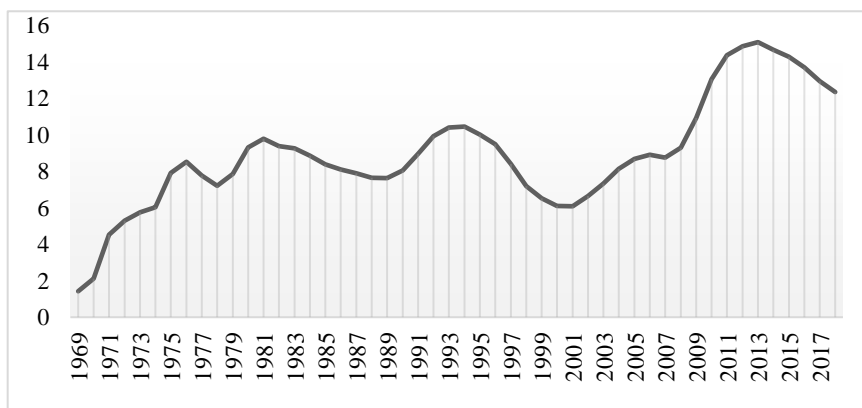
<sup>104</sup> See 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VIII), 1396d(y)(1); MITCHELL, *supra* note 102, at 8 tbl.1.

<sup>105</sup> 42 U.S.C. § 1396b(a)(7).

<sup>106</sup> See, e.g., *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 856 (3d Cir. 1999); *Tallahassee Mem'l Reg'l Med. Ctr. v. Cook*, 109 F.3d 693, 704 (11th Cir. 1997).

poverty guidelines, including children, parents, pregnant women, people with disabilities, and senior citizens.<sup>107</sup> For these populations, a state’s Medicaid program must provide certain mandatory services.<sup>108</sup> States may also receive federal matching funds to extend coverage to optional populations, including those listed above whose incomes fall slightly above the means test and those who are considered “medically needy” people, as well as additional federal funding for optional services.<sup>109</sup>

FIGURE 1: PERCENT OF U.S. POPULATION ENROLLED IN SNAP, 1969–2019<sup>110</sup>



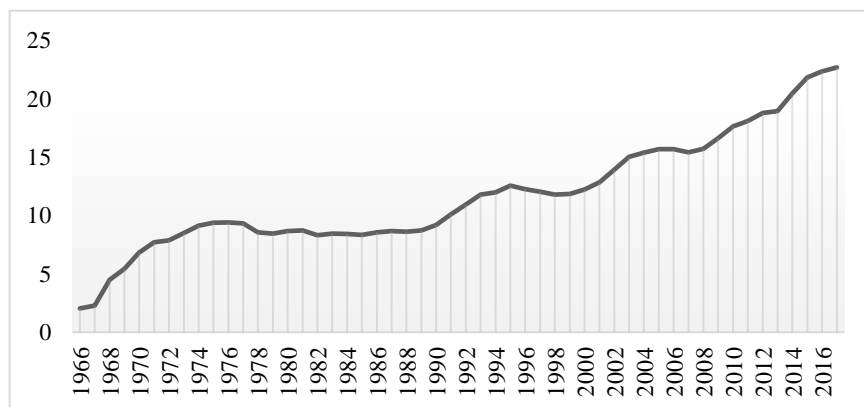
<sup>107</sup> 42 U.S.C. § 1396a(k)–(m). So far, thirty-seven states and the District of Columbia have, under the Affordable Care Act, expanded Medicaid to parents and childless adults up to 138% FPL. *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (July 1, 2020), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicare-expansion-decisions-interactive-map/> [https://perma.cc/KL6T-ZVFC]. The Supreme Court held in *National Federation of Independent Business v. Sebelius* that the federal government could not require states to expand Medicaid, rendering the provision optional. 567 U.S. 519, 588 (2012).

<sup>108</sup> These services include everything from hospital services to vaccines for children to pregnancy-related services to rural health-clinic services. For a full list, see BARBARA S. KLEES, CHRISTIAN J. WOLFE & CATHERINE A. CURTIS, U.S. DEP’T OF HEALTH & HUM. SERVS., BRIEF SUMMARIES OF MEDICARE & MEDICAID 28 (2016), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareProgramRatesStats/Downloads/MedicareMedicaidSummaries2016.pdf> [https://perma.cc/T76F-RZ9D].

<sup>109</sup> See 42 C.F.R. § 435.831(d) (2019); KLEES ET AL., *supra* note 108, at 28–29.

<sup>110</sup> Data were compiled from the U.S. Department of Agriculture and the U.S. Census Bureau. See U.S. DEP’T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM PARTICIPATION AND COSTS (2020), <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAPsummary-7.pdf> [https://perma.cc/BP8U-5PZN]; *National Population Totals and Components of Change: 2010–2019*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html> [https://perma.cc/D4NY-ZN7U].



FIGURE 2: PERCENT OF U.S. POPULATION ENROLLED IN MEDICAID, 1966–2017<sup>111</sup>

SNAP has likewise grown dramatically since its inception. While federal nutrition assistance dates back to the New Deal, the modern SNAP program originated in 1964 and, through a flurry of congressional activity and federal litigation, expanded repeatedly.<sup>112</sup> Through a series of revisions to the Food Stamp Act from 1970 to 1996, Congress expanded and standardized federal food assistance. The 1970 amendments required that the Secretary of Health, Education, and Welfare create national standards for eligibility and increase federal spending.<sup>113</sup> The 1977 amendments made far more Americans eligible, in part by no longer requiring households to pay for food stamps. At the same time, Congress grew concerned with the ways in which federal courts were interpreting the statute.<sup>114</sup>

Today, SNAP provides food-purchasing assistance to low-income individuals and families.<sup>115</sup> Like Medicaid, SNAP benefits are considered an entitlement—meaning that a state needs to cover every eligible household that applies for the benefit. Similar to Medicaid, federal law lays out SNAP eligibility rules and benefit amounts. To qualify for benefits, a SNAP household’s income must be at or below 130% of the federal poverty level

<sup>111</sup> Data were compiled from the Medicaid and CHIP Payment and Access Commission. *See* MEDICAID & CHIP PAYMENT & ACCESS COMM’N, MACSTATS: MEDICAID AND CHIP DATA BOOK 25 (2018), <https://www.macpac.gov/wp-content/uploads/2018/12/December-2018-MACStats-Data-Book.pdf> [<https://perma.cc/9LUK-ENPL>].

<sup>112</sup> MELNICK, *supra* note 77, at 183–84 (charting the “precipitous rise in spending” from fiscal years 1965 to 1992).

<sup>113</sup> Amendments to the Food Stamp Act of 1964, Pub. L. No. 91-671, § 4, 84 Stat. 2048, 2049 (1971).

<sup>114</sup> *See* MELNICK, *supra* note 77, at 207–30.

<sup>115</sup> 7 U.S.C. § 2013.

(FPL),<sup>116</sup> the household's net monthly income (after deductions for expenses like housing and child care) must be less than or equal to 100% FPL, and its assets must fall below limits identified in the federal regulations.<sup>117</sup> Households with no net income receive the maximum amount per month (\$509 for a family of three), but the average monthly benefit is far lower (\$378 for a family of three).<sup>118</sup> The average monthly benefit per person is \$134 a month or \$1.49 per meal.<sup>119</sup> SNAP benefits are provided on a "household" basis.<sup>120</sup> In federal law, a SNAP "household" means "an individual who lives alone or who, while living with others, customarily purchases food and prepares meals for home consumption separate and apart from the others; or a group of individuals who live together and customarily purchase food and prepare meals together for home consumption."<sup>121</sup> SNAP households may use the benefit to purchase food at one of the quarter-million retailers authorized by the Food and Nutrition Service (FNS) to participate in the program.<sup>122</sup> However, SNAP households cannot use their benefits to purchase other necessary household items, like sanitary products, or to purchase hot foods prepared at the retailer.<sup>123</sup>

Congress spared SNAP and Medicaid from the block grant changes of the 1996 Welfare Reform Act, and consequently, federal law continues to require that states enroll any household that meets the eligibility criteria laid out in statute. As a result, during economic downturns, especially in ones as severe as the 2008 recession or the COVID-19 pandemic, SNAP rolls will expand. States also have fiscal incentives to increase SNAP enrollment, as benefits are 100% federally funded. While administrative costs are split between the federal and state governments, every dollar of SNAP benefits spent goes to grocery stores and retailers in that state or region. As we will see in the next Section, the fact that public-benefits administration is bound up in federal–state

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<sup>116</sup> This requirement does not apply to households with an elderly or disabled member. *Id.* § 2014(c)(2)

<sup>117</sup> CTR. ON BUDGET & POL'Y PRIORITIES, A QUICK GUIDE TO SNAP ELIGIBILITY AND BENEFITS 1–4 (2019), <https://www.cbpp.org/research/a-quick-guide-to-snap-eligibility-and-benefits> [<https://perma.cc/QU2K-JKWM>]. In fiscal year 2020, the resource limits are \$2,250 for households without an elderly or disabled member and \$3,500 for those with an elderly or disabled member. *Id.* at 1.

<sup>118</sup> *Id.* at 3 & tbl.1.

<sup>119</sup> *Id.* The average meal figure was calculated by dividing \$134 by ninety meals, or three meals per day.

<sup>120</sup> 7 U.S.C. § 2014(a).

<sup>121</sup> *Id.* § 2012(n)(1)(A)–(B).

<sup>122</sup> U.S. DEP'T OF AGRIC., SNAP RETAILER DATA, FISCAL YEAR 2016 AT A GLANCE 1 (2016), <https://fns-prod.azureedge.net/sites/default/files/snap/2016-SNAP-Retailer-Management-Year-End-Summary.pdf> [<https://perma.cc/4V4R-9VZD>] ("As of September 30, 2016, 260,115 firms were authorized to participate in SNAP.").

<sup>123</sup> *See* 7 U.S.C. § 2012(k); *see also id.* § 2013(a) ("The benefits so received by such households shall be used only to purchase food from retail food stores which have been approved for participation in the supplemental nutrition assistance program.").

relations in the United States, in turn, helps to explain the judicial flavor of this area of public law.

### C. *Litigating the New Property*

As we can see from Supreme Court precedent and current efforts by public interest attorneys, public law litigation serves a particularly important role in the enforcement of welfare as a property right against federal and state cuts. Therefore, it is similarly important to understand the procedural hurdles over which public law attorneys must vault to bring these lawsuits. In many areas of American law, litigation plays a larger role in lawmaking relative to the development of public law in other wealthy democracies. Public-benefits administration is a leading example of this distinctive characteristic of the American administrative state. Because states operate Medicaid and SNAP within the confines of federal law, federal courts offer a national forum in which individual recipients can enforce their rights under federal law against the states.<sup>124</sup>

As discussed above, the Supreme Court in *Mathews v. Eldridge* was skeptical of the federal judiciary's ability to require procedural protections in welfare administration.<sup>125</sup> The *Mathews* Court assumed that government faces an inevitable procedure–substance trade-off in welfare benefits.<sup>126</sup> Writing for the Court in *Mathews*, Justice Lewis Powell suggested that procedural protections and the substance of the benefit would necessarily come from the same funding source. The Court reasoned that if the judiciary mandated more procedure for welfare recipients, the political branches would fund those procedures at the expense of the benefits themselves.<sup>127</sup> In fact, the federal government has not cut substantive benefits to provide procedural protections.

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<sup>124</sup> See, e.g., *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1398 (2013) (concluding state law violated the Medicaid Act and was therefore preempted); *Townsend v. Swank*, 404 U.S. 282, 283–85 (1971) (interpreting the Social Security Act to allow beneficiaries to bring preemption actions to enjoin state laws that conflict with federal law).

<sup>125</sup> See *supra* Section I.A.

<sup>126</sup> *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (reasoning that “the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited”).

<sup>127</sup> See *id.* (“[T]he Government’s interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed.”). Justice Black had a slightly different prediction in *Goldberg*: that government would be disinclined to enroll individuals in public benefit programs if they knew that procedural rights would attach upon enrollment. *Goldberg v. Kelly*, 397 U.S. 254, 279 (1970) (Black, J., dissenting) (warning that “[w]hile this Court will perhaps have insured that no needy person will be taken off the rolls without a full ‘due process’ proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility”).

Instead, it is the ideological state actors who attempt to limit or restrict access to welfare by imposing procedural requirements, even though they must swallow that cost themselves and even though it reduces the flow of federal funding to their citizens and state. Public interest lawyers then must challenge these requirements in federal court for violation of the federal statutory requirements. In those cases, private litigants can rely on federal courts to enforce national standards against the states.

For SNAP, the federal government pays for 100% of the substantive benefit. States have to pay for up to half the administrative costs of the SNAP program.<sup>128</sup> That means that while states have to contribute to the administration (including the procedures of the program), SNAP's substantive benefits are free to the states.<sup>129</sup> While states do contribute to the cost of Medicaid benefits, the federal government pays the lion's share, and in the Affordable Care Act, the most recent expansion of Medicaid was intended to be free to states. As one might expect when the substance of the benefit is free, but the procedures surrounding the benefit are not, states have historically been reluctant to impose procedural barriers for which the state must pay to prevent its residents from accessing benefits for which the state does not pay. As a result, there is an improbable alliance between welfare recipients and their advocates, on the one hand, who threaten to challenge procedural barriers, and state bureaucrats, on the other, who are willing to undo procedural barriers or refrain from erecting new ones. Both advocates and administrators' interests converge on keeping the benefits flowing to the recipients and the state. This political economy story has more explanatory power because SNAP and Medicaid are benefits that rely on third parties. SNAP benefits must be accessed through SNAP-participating retailers, and Medicaid is an insurance program that contributes to many hospitals' and health care providers' bottom lines.<sup>130</sup>

By permitting claimants to bring a cause of action under the Due Process Clause and federal statutes against state welfare administrators, the Supreme Court in *King*, *Shapiro*, and *Goldberg* invited federal and state courts to entertain the claims of individuals accessing SNAP and Medicaid. And perhaps because of the incomplete nature of Supreme Court doctrine in this area, lower courts knew that these welfare cases were unlikely to be taken up by the highest court.<sup>131</sup> This "new judicial terrain" was not lost on the attorneys challenging

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<sup>128</sup> 7 U.S.C. § 2025(a).

<sup>129</sup> *See id.* §§ 2013(a), 2019, 2025(a); 7 C.F.R. §§ 277.1(b), 277.4(b) (2019).

<sup>130</sup> *See, e.g.*, 7 C.F.R. § 278.2; 42 C.F.R. § 482.1(a)(3) (2019).

<sup>131</sup> The Supreme Court did not review the D.C. Circuit's decision that the Food Stamp Act created a right to an adequate diet, but the Court might have reviewed the decision had the D.C. Circuit interpreted

state welfare practices who began “stressing statutory rather than constitutional arguments” and focused on “winning a string of cases in the lower courts [rather] than one big case in the Supreme Court.”<sup>132</sup>

To this day, federal and state courts regularly invoke *Goldberg* for the proposition that welfare recipients have a statutorily created property interest significant enough to warrant the Constitution’s due process protections.<sup>133</sup> Medicaid and SNAP recipients have procedural rights under the Constitution and federal statutes to administrative hearings and meaningful notice when their claims for assistance are denied or unreasonably delayed.<sup>134</sup> As a result, welfare recipients can use the *Goldberg* legacy to challenge various state practices, albeit often relying on federal statutes rather than the Constitution itself. For instance, SNAP recipients have sued for timely processing of their applications for monthly benefits, expedited SNAP, and Disaster SNAP.<sup>135</sup> Medicaid recipients have successfully challenged fair hearing procedures.<sup>136</sup>

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the Constitution as creating the same. See MELNICK, *supra* note 77, at 205–11 (discussing *Rodway v. U.S. Dep’t of Agric.*, 514 F.2d 809 (D.C. Cir. 1975)).

<sup>132</sup> See *id.* at 40. This is not to say that SNAP and Medicaid recipients always win in federal court. See, e.g., *Toney-Dick v. Doar*, No. 12 Civ. 9162(KBF), 2013 WL 6057949, at \*10 (S.D.N.Y. Nov. 14, 2013) (granting the federal government’s motion to dismiss claims of discrimination brought by Disaster SNAP recipients after Hurricane Sandy); *McGee v. Mont. Dep’t of Pub. Health & Hum. Servs.*, 398 P.3d 245, 247 (Mont. 2017) (accepting state agency’s position); *Ennis v. N.D. Dep’t of Hum. Servs.*, 820 N.W.2d 714, 718 (N.D. 2012) (same).

<sup>133</sup> See, e.g., *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 341 (S.D.N.Y. 1999) (concluding that “[p]laintiffs also have an overarching property interest in their continued receipt of food stamps, Medicaid and cash assistance” (citing *Goldberg v. Kelly*, 397 U.S. 254, 261–66 (1970))), *modified in part* 43 F. Supp. 2d 492 (S.D.N.Y. 1999); *Perdue v. Gargano*, 964 N.E.2d 825, 832 (Ind. 2012) (“There is no question that these entitlement benefits [Medicaid, SNAP, and TANF] are ‘property’ entitled to the full panoply of due process protections.” (citing *Goldberg*, 397 U.S. at 261–62)).

<sup>134</sup> See U.S. CONST. amend. XIV, § 1; 42 U.S.C. § 1396a(a)(3) (requiring states to “provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness”); 42 C.F.R. §§ 431.200–250 (2019); see also *Hamby v. Neel*, 368 F.3d 549, 560–62 (6th Cir. 2004) (concluding that Medicaid applicants received inadequate notice and were denied meaningful hearings in violation of the Fourteenth Amendment’s Due Process Clause); *Catanzano v. Dowling*, 60 F.3d 113, 117 (2d Cir. 1995) (concluding that the Fourteenth Amendment requires a fair hearing before the state terminates Medicaid assistance); *Holman v. Block*, 823 F.2d 56, 57 (4th Cir. 1987) (“[A] household currently receiving benefits has the right to an administrative hearing before an action may be taken that adversely affects its participation in the Food Stamp Program.”); *Salazar v. District of Columbia*, 954 F. Supp. 278, 292–93, 326 (D.D.C. 1996) (interruptions in Medicaid benefits without notice violated the Due Process Clause, federal statutes, and Health and Human Services (HHS) regulations).

<sup>135</sup> Class Action Complaint for Declaratory & Injunctive Relief at 2, *Miami Workers Ctr. v. Carroll*, No. 17-cv-24047 (S.D. Fla. Nov. 2, 2017) (suing on behalf of Hurricane Irma survivors with disabilities who had been or would be excluded from participation in Florida’s D-SNAP program).

<sup>136</sup> *Shakhnes v. Berlin*, 689 F.3d 244, 263 (2d Cir. 2012) (holding that the Medicaid Act “creates a right—enforceable under 42 U.S.C. § 1983—to have Medicaid fair hearings held, and fair hearing decisions issued, within the regulation’s specified time frame”).

SNAP recipients have challenged the implementation of the statutory time limit for Able-Bodied Adults Without Dependents (ABAWDs).<sup>137</sup> Recipients have challenged the privatization of welfare administration.<sup>138</sup> They have attacked state statutes penalizing recipients who have criminal records, secured relief for HIV-positive welfare recipients, and challenged states' failures to accommodate recipients who have disabilities.<sup>139</sup> Indeed, these lawsuits duck many of the procedural and doctrinal obstacles that have made federal litigation so challenging for other marginalized groups.<sup>140</sup> As discussed below, lawyers litigating to defend SNAP and Medicaid still can rely on private enforcement of federal statutes, obtain class certification, and secure injunctive relief.

### 1. *Private Enforcement of Federal Law*

Even though 42 U.S.C. § 1983 authorizes lawsuits to enforce federal statutes against state officials,<sup>141</sup> simply because a federal statute creates a right does not mean individuals can enforce those rights in court. The Supreme Court has instructed that § 1983 “does not provide an avenue for relief every time a state actor violates a federal law.”<sup>142</sup> Rather, a plaintiff must demonstrate

<sup>137</sup> See *Brooks v. Roberts*, 251 F. Supp. 3d 401, 436–37 (N.D.N.Y. 2017); Order Setting Objections Deadline & Hearing, *Hatten-Gonzales v. Earnest*, No. 88-0385 KG/CG (D.N.M. Feb. 5, 2018), ECF No. 811 (appointing a special master to help the state comply with the court's orders); Order & Reasons, *Romain v. Sonnier*, No. 15-06942 (E.D. La. July 18, 2016), ECF No. 23.

<sup>138</sup> See VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* 39–83 (2017) (detailing the bureaucratic mess and political fallout from Indiana's efforts to privatize its welfare benefits system by contracting with IBM); see also Class Action Complaint at 1, *Gemmell v. Affigne*, No. 16-cv-00650 (D.R.I. Dec. 8, 2016) (challenging Rhode Island's widespread failure to process SNAP applications in a timely manner, in part due to the implementation of a faulty new computer system). After filing the lawsuit, the plaintiff class settled with the Rhode Island Department of Human Services. See Stipulation & Order of Settlement at 2, *Gemmell v. Affigne*, No. 16-cv-00650 (D.R.I. Feb. 24, 2017).

<sup>139</sup> *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 210 (E.D.N.Y. 2000), *aff'd sub nom.*, *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003) (regarding HIV-positive welfare recipients); see also Complaint at 1, *R.H. v. Rawlings*, No. 17-cv-01434 (N.D. Ga. Apr. 24, 2017) (federal lawsuit on behalf of three low-income residents with disabilities alleging that the Georgia SNAP and Medicaid agencies systematically failed to accommodate the disabilities of vulnerable applicants and recipients); *Raymond v. Rowland*, 220 F.R.D. 173, 181 (D. Conn. 2004) (certifying class of welfare recipients with disabilities). This is not to suggest that all SNAP litigation involves recipients. There is a gaggle of federal cases brought by grocers and convenience stores seeking review of the Food and Nutrition Service's decisions to disqualify them as SNAP-approved retailers—almost always unsuccessfully. See, e.g., *Irobe v. U.S. Dep't of Agric.*, 890 F.3d 371, 382 (1st Cir. 2018); *SS Grocery, Inc. v. U.S. Dep't of Agric.*, 340 F. Supp. 3d 172, 186 (E.D.N.Y. 2018); *Alhalemi, Inc. v. United States*, 224 F. Supp. 3d 587, 594 (E.D. Mich. 2016).

<sup>140</sup> For a sustained critique of these trends, see ERWIN CHERMERINSKY, *CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE* (2017).

<sup>141</sup> See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

<sup>142</sup> *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119 (2005).

that the underlying statute creates enforceable “rights” and “not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced under” the statute.<sup>143</sup> Many have bemoaned the increasingly restrictive approach federal courts have taken to finding a federal statute enforceable in federal court, absent an explicit grant.<sup>144</sup> Neither SNAP nor Medicaid has an explicit statutory provision authorizing private enforcement, leaving § 1983 as the chief vehicle for vindicating these claims in federal court. But should federal courts consider SNAP and Medicaid as creating rights enforceable through § 1983?

To answer that question, federal courts must navigate among various Supreme Court precedents, including *Blessing v. Freestone* and *Gonzaga v. Doe*. In *Blessing*, the Supreme Court laid out the test to make such a determination: (1) “Congress must have intended that the provision in question benefit the plaintiff”; (2) the right “is not so ‘vague and amorphous’ that its enforcement would strain judicial competence”; and (3) “the statute must unambiguously impose a binding obligation on the States.”<sup>145</sup> If satisfied, this three-part inquiry creates a rebuttable presumption that the statute is privately enforceable under § 1983.<sup>146</sup> This presumption can be overcome if Congress precluded private enforcement either “expressly” or “impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.”<sup>147</sup>

Yet, finding an implied cause of action has not been fatal to welfare recipients’ efforts to enforce federal requirements in either program, with the notable exception of Medicaid’s equal access provision.<sup>148</sup> In *Briggs v. Bremby*, the Second Circuit held that “[u]nlike the [FERPA] funding provision involved in *Gonzaga*,” the Food Stamp Act’s timely processing provisions “conferred individual rights upon food stamp applicants in clear and unambiguous terms” because the statute “contain[s] language that is focused on the interests of the applicant households and calibrated to their economic needs” and thereby satisfies *Blessing*’s first prong.<sup>149</sup> As for the other two components of the *Blessing* test, the Food Stamp Act, the Second Circuit pointed out, “create[s] a specific requirement that must be followed for every food stamp applicant, rather than a generalized ‘policy or practice,’” or one that “merely direct[s] the

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<sup>143</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276, 283 (2002) (holding that a provision of Family Educational Rights and Privacy Act (FERPA) did not create an enforceable right under § 1983).

<sup>144</sup> See, e.g., CHEMERINSKY, *supra* note 140, at 101–03.

<sup>145</sup> *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997).

<sup>146</sup> *Id.* at 341.

<sup>147</sup> *Id.*

<sup>148</sup> *Harris v. Olszewski*, 442 F.3d 456, 459–65 (6th Cir. 2006) (holding that Medicaid’s “freedom-of-choice provision” creates a privately enforceable right).

<sup>149</sup> *Briggs v. Bremby*, 792 F.3d 239, 244–45 (2d Cir. 2015).

distribution of funds.”<sup>150</sup> Once the Second Circuit accepted the presumption that the Food Stamp Act is enforceable under § 1983, the court further rejected Connecticut’s attempt to rebut the presumption. Connecticut argued that since the Food Stamp Act “empowers the Secretary of Agriculture to investigate State noncompliance, withhold federal funds, and refer a noncompliant State to the Attorney General to seek an injunction” that the statute bars “parallel enforcement by individuals in federal and state courts.”<sup>151</sup> The Second Circuit rejected the State’s argument, reasoning that “[i]n stark contrast with FERPA [the statute at issue in *Gonzaga*], however, the Food Stamp Act contains no similar agency adjudication process or enforcement structure that could take the place of private lawsuits.”<sup>152</sup>

On the other hand, the Supreme Court recently took a restrictive approach to finding a private cause of action in a Medicaid case that could portend a forbidding future for welfare litigation. In *Armstrong v. Exceptional Child Center, Inc.*, health care providers sued Idaho on the grounds that the State’s reimbursement rates were so low that they violated the Medicaid statute’s provision guaranteeing that a state’s rates “are consistent with efficiency, economy, and quality of care.”<sup>153</sup> The Supreme Court rejected that challenge, holding that the Medicaid Act’s requirement for adequate reimbursement rates does not create a private cause of action, via the Supremacy Clause, to invalidate state-provider payment policies.<sup>154</sup> Writing for the Court, Justice Antonin Scalia reasoned that “[t]he sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, § 1396c, shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts.”<sup>155</sup> The circuits are split as to whether *Armstrong* is limited to federal statutory provisions that foreclose private enforcement in a cause of action in equity or if *Armstrong* extends to a case brought under § 1983.<sup>156</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 245 (citing 7 U.S.C. § 2020(g)).

<sup>152</sup> *Id.* The Eighth Circuit has suggested that “[i]t is now settled that nothing ‘short of an unambiguously conferred right’ will support a cause of action under § 1983.” *Does v. Gillespie*, 867 F.3d 1034, 1040 (8th Cir. 2017) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)).

<sup>153</sup> 42 U.S.C. § 1396a(30)(A).

<sup>154</sup> *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015).

<sup>155</sup> *Id.* (referencing 42 U.S.C. § 1396c).

<sup>156</sup> *Compare, e.g., Does*, 867 F.3d at 1040 (concluding that § 30(A) of the Medicaid Act can no longer proceed under § 1983, because the Court’s later decision in *Armstrong* “plainly repudiate[s] the ready implication of a § 1983 action that *Wilder* exemplified” (quoting *Armstrong*, 135 S. Ct. at 1386 n.\*)), with *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 372 (5th Cir. 2018) (rejecting that reading of *Armstrong* precisely because it “would likely overrule cases such as *Wilder* in which the Court found other provisions of the Medicaid Act to be enforceable by health care providers through § 1983” (citation



Along with the question of whether any individual can enforce a statutory right for welfare benefits, there is the related question of whether individuals have standing to enforce that right. Derived from Article III's case-or-controversy requirement, standing demands that a "plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision."<sup>157</sup> A plaintiff must demonstrate standing for each claim and each form of relief sought.<sup>158</sup> Federal courts have found that welfare recipients do have standing to challenge wrongful terminations and denials of benefits.<sup>159</sup> Indeed, perhaps because of the pecuniary nature of benefits, the injury is quintessentially concrete and redressable.<sup>160</sup> Put together, these questions, one resolved and the other unclear, pose obstacles for public law attorneys litigating these issues that must remain top of mind for the success of any suit.

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omitted)), *revised* (Feb. 1, 2018), *cert. denied*, 139 S. Ct. 211 (2018), and *BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 820–21 (7th Cir. 2017) (applying *Blessing's* three-factor test and noting that "nothing in *Armstrong*, *Gonzaga*, or any other case we have found supports the idea that plaintiffs are now flatly forbidden in section 1983 actions to rely on a statute passed pursuant to Congress's Spending Clause powers"). The Second Circuit has distinguished *Armstrong* from a case involving federal law intended to benefit foster parents. *N.Y. State Citizens' Coal. for Child. v. Poole*, 922 F.3d 69, 85 (2d Cir. 2019).

<sup>157</sup> *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). *But see* James E. Pfander, *Standing, Litigable Interests, and Article III's Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 182–88 (2018) (suggesting that such an interpretation of Article III conflicts with historical practice in the early years of the federal courts).

<sup>158</sup> *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Friends of the Earth v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). And the Supreme Court has interpreted Article III as "demand[ing] that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013).

<sup>159</sup> *See, e.g., Gresham v. Azar*, 363 F. Supp. 3d 165, 174 (D.D.C. 2019) (discussing how standing is "easily established for their claim challenging the [Arkansas Medicaid waiver] as a whole"); *N.B. ex rel. Peacock v. District of Columbia*, 682 F.3d 77, 81, 86 (D.C. Cir. 2012) (concluding that plaintiffs had standing to enforce procedural rights to adequate notices where the alleged violations threatened their ability to obtain prescription medications under Medicaid).

<sup>160</sup> *See, e.g., Peña Martínez v. Azar*, 376 F. Supp. 3d 191, 200 (D.P.R. 2019) ("Plaintiffs have standing to raise their claims because they have adequately alleged that they would be entitled to receive greater benefits under SNAP than they currently do under NAP [Puerto Rico's food assistance program]." (citing *Lujan*, 504 U.S. at 560–61)); *Stewart v. Azar*, 313 F. Supp. 3d 237, 252 (D.D.C. 2018) (holding that Medicaid recipients have standing because they would be required to pay increased premiums); *see also Rumsfeld v. F. for Acad. & Institutional Rts.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

## 2. *Class Actions and Injunctive Relief*

Federal courts have become increasingly hostile to class actions, one of the primary vehicles for welfare-rights litigation.<sup>161</sup> However, even in this climate for aggregate litigation, classes of welfare recipients are often immune or, at least, resistant. To be certified in federal court, a class of plaintiffs must convince the federal district court that first, “the class is so numerous that joinder of all members is impracticable”; second, “there are questions of law or fact common to the class”; third, the “claims or defenses of the representative parties are typical of the claims or defenses of the class”; and fourth, “the representative parties will fairly and adequately protect the interests of the class.”<sup>162</sup> The first requirement, numerosity, is easily met in welfare litigation, as the relevant fraction of a Medicaid SNAP caseload will include thousands of recipients at least.<sup>163</sup> As for commonality, if class members’ benefits are delayed, unfairly terminated, or reduced, class counsel can often tie that injury to a single statutory provision.<sup>164</sup> And such a statutory provision makes it easier for named plaintiffs to show that their situation is not only typical of the recipients they seek to represent, but also that the representative parties, being so similarly situated to the unnamed class members, will fairly and adequately protect the class’s interests.<sup>165</sup>

A class of public benefits recipients is also in a strong position to request injunctive relief pursuant to Rule 23(b)(2), since it is often seeking to enforce a federal statutory provision with which the state agency must comply.<sup>166</sup> Driving the federal courts’ fairly rigid approach to enforcing the Food Stamp Act and the Medicaid Act against state agencies is the fact that these courts repeatedly insist on absolute, rather than substantial, compliance.<sup>167</sup> Given the

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<sup>161</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342, 367 (2011) (reversing a certification of a nationwide class of female employees); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336, 352 (2011) (allowing corporations to insulate themselves from consumer class actions via arbitration clauses).

<sup>162</sup> FED. R. CIV. P. 23(a).

<sup>163</sup> See, e.g., *Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 206 (D.D.C. 2018) (pointing out that “even taking just the applications processed after the statutory time limit in one quarter of one fiscal year, [p]laintiffs provide a reason to estimate the proposed class number to be in the hundreds, if not thousands,” which “presumptively satisfies numerosity”).

<sup>164</sup> *Id.* at 207 (concluding there is commonality because the Food Stamp Act “speaks in terms of absolute deadlines without any caveats or limitations when it comes to meeting them”).

<sup>165</sup> *Id.* at 210 (determining the plaintiffs met the typicality requirement because they “present a single legal injury, a single legal theory, and a single means of injury: the District has systemically failed to process applications or issue recertification notices on time and consequently violated Plaintiffs’ statutory rights under the SNAP Act”).

<sup>166</sup> See *id.* at 211 (finding that “that injury can be remedied by a single injunction ordering the District to comply with the statutory timelines”).

<sup>167</sup> See, e.g., *Withrow v. Concannon*, 942 F.2d 1385, 1387–88 (9th Cir. 1991); *Haskins v. Stanton*, 794 F.2d 1273, 1277 (7th Cir. 1986); *Alexander v. Hill*, 707 F.2d 780, 784 (4th Cir. 1983) (“The defendants’

cooperative federalism inherent in both programs, one could imagine that states would be given some leeway in their administration of welfare programs. Yet, apart from the notable exception of *Armstrong* discussed above, federal courts have insisted on absolute compliance with federal statutes, which smooths the way for class certification and injunctive relief.

The availability of the class action device in welfare litigation dovetails with the availability of injunctive relief.<sup>168</sup> For instance, a party seeking a preliminary injunction must show: “(1) a likelihood of irreparable harm; (2) either a likelihood of success on the merits or sufficiently serious questions as to the merits . . . ; (3) that the balance of hardships tips in their favor regardless of the likelihood of success; and (4) that an injunction is in the public interest.”<sup>169</sup> As for the second factor, the likelihood of success on the merits falls back on questions discussed above—whether there is a federal claim and whether the plaintiffs have made a showing of state noncompliance.<sup>170</sup> The remaining three factors often weigh in favor of the welfare recipients.

In assessing the propriety of a preliminary injunction, federal courts have repeatedly concluded that the harm stemming from improper denial or termination of welfare benefits is quintessentially irreparable.<sup>171</sup> As a result, the first factor is met for any case that pleads the loss of welfare benefits.<sup>172</sup> Courts have rejected welfare administrators’ claims that the harm is not irreparable

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objection to the 100% applicability of the relief ordered, based on a claim that it is too Draconian, need not long detain us . . . . The law itself compels 100% compliance.”); *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 210 (E.D.N.Y. 2000), *aff’d sub nom.*, *Henrietta D. v. Bloomberg*, 331 F.3d 261, 262 (2d Cir. 2003). For litigation around the timely processing of SNAP, see *Briggs v. Bremby*, No. 3:12-cv-324 (VLB), 2012 WL 6026167, at \*17–18 (D. Conn. Dec. 4, 2012), *aff’d*, 792 F.3d 239, 240 (2d Cir. 2015); *Robidoux v. Kitchel*, 876 F. Supp. 575, 579 (D. Vt. 1995); *Robertson v. Jackson*, 766 F. Supp. 470, 475–76 (E.D. Va. 1991), *aff’d*, 972 F.2d 529 (4th Cir. 1992).

<sup>168</sup> See *Benisek v. Lamone*, 138 S. Ct. 1942, 1943–44 (2018) (per curiam).

<sup>169</sup> See *Brooks v. Roberts*, 251 F. Supp. 3d 401, 422 (N.D.N.Y. 2017) (quoting *Gen. Mills, Inc. v. Chobani, LLC*, 158 F. Supp. 3d 106, 114 (N.D.N.Y. 2016)) (applying this test to a class action brought by all ABAWD SNAP recipients in New York).

<sup>170</sup> See David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 797–98 (2016) (arguing that class certification often becomes a preview of the merits of the case and the requested remedy).

<sup>171</sup> *Morel v. Giuliani*, 927 F. Supp. 622, 635 (S.D.N.Y. 1995) (“To indigent persons, the loss of even a portion of subsistence benefits constitutes irreparable injury.”); *Brown v. Giuliani*, 158 F.R.D. 251, 264 (E.D.N.Y. 1994) (reasoning that a “loss of even a small portion of welfare benefits can constitute irreparable injury”). *But see Brooks*, 251 F. Supp. 3d at 433 (concluding irreparable harm factor weighs against SNAP recipient class because for “the alleged harm flowing from the lack of due process and statutory protections, any harm to recipients whose benefits are discontinued based on being a non-compliant ABAWD is cut by the fact that they can immediately reestablish eligibility by reapplying for benefits and complying with work rules”).

<sup>172</sup> Where some courts hesitate to grant preliminary injunctions in welfare cases is when the plaintiffs cannot show that their benefits have, in fact, been terminated or that an adverse decision is imminent. *Id.* at 432.

because the administrator will compensate the plaintiffs with restored benefits, including benefits dating back to the erroneous agency action, should the plaintiffs prevail.<sup>173</sup> Furthermore, due to the grave risk of harm to welfare recipients of lost benefits—the concept of “brutal need” from *Goldberg v. Kelly*—the balance of hardships and the public interest often weigh in the welfare recipient’s favor.<sup>174</sup>

### 3. *Financing Welfare Litigation*

This is not to say that welfare applicants and recipients seeking relief in federal court do not encounter skepticism or even hostility from the bench. No doubt many Americans, judges included, share beliefs and biases that recipients are scroungers.<sup>175</sup> Furthermore, regardless of what they think about welfare, federal judges are often reluctant to wade into the morass of any government bureaucracy. But the cases discussed above suggest that arguably the greatest impediments to litigation on behalf of welfare applicants and recipients are not driven by a lack of doctrine. Instead, the real threat is a lack of funding. When the Supreme Court heard the canonical cases of *King v. Smith*, *Shapiro v. Thompson*, *Goldberg v. Kelly*, and *Dandridge v. Williams*, the federal government had just begun to fund legal services for poor Americans. Although that funding increased significantly for a time, over the last fifty years the federal government has made deep cuts to that funding and attached a variety of strings to whatever funding was left.<sup>176</sup> Since 1974, legal

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<sup>173</sup> See *supra* note 167.

<sup>174</sup> See, e.g., *Banks v. Trainor*, 525 F.2d 837, 842 (7th Cir. 1975) (affirming a district court judge’s conclusion that “the hardship to plaintiffs and their class . . . outweigh[ed] the administrative inconvenience and cost”); *Willis v. Lascaris*, 499 F. Supp. 749, 759 (N.D.N.Y. 1980) (“Even a slight change in food stamp allotments effects a public assistance household’s ability to procure the necessities of life.” (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970))); *Hudson v. Bowling*, 752 S.E.2d 313, 322–23 (W. Va. 2013) (concluding notices from state SNAP agency did not comport with constitutional due process); *Baker v. Alaska Dep’t of Health & Soc. Servs.*, 191 P.3d 1005, 1009–10 (Alaska 2008) (reading *Goldberg* to mean that Medicaid recipients “should be afforded a degree of protection from agency error and arbitrariness in the administration of those benefits” and concluding notices from state agency did not meet the constitutional standard of procedural due process); *Hardges v. Dep’t of Soc. Servs.*, 442 N.W.2d 752, 755 (Mich. Ct. App. 1989) (same, but with regards to SNAP); see also *Blum v. Caldwell*, 446 U.S. 1311, 1314 (1980) (Marshall, J., in chambers) (order denying stay of mandate to continue to provide Medicaid) (reasoning that “the very survival of these individuals and those class members . . . is threatened by a denial of medical assistance benefits”).

<sup>175</sup> David Lauter, *How Do Americans View Poverty? Many Blue-Collar Whites, Key to Trump, Criticize Poor People as Lazy and Content to Stay on Welfare*, L.A. TIMES (Aug. 14, 2016), <https://www.latimes.com/projects/la-na-pol-poverty-poll/> [<https://perma.cc/LCU8-KFGM>] (describing a public opinion survey).

<sup>176</sup> See Andrew Hammond, *Poverty Lawyering in the States*, in HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY, *supra* note 96, at 215, 222–23; Catherine Albiston, Su Li & Laura Beth Nielson, *Public Interest Law Organizations and the Two-Tier System of Access to Justice in the United States*, 42 LAW & SOC. INQUIRY 990, 1017 (2017) (concluding that “political attacks and legislative constraints have limited the scope of [these legal organizations’] activities, and developed a striking, empirically

aid organizations funded by the federal Legal Services Corporation (LSC) have not been able to engage in political activities, including voter registration and labor-organizing activities, or litigate in various areas of public concern, including abortion and the desegregation of schools.<sup>177</sup> Congress cut legal aid funding in 1982 and 1996 and imposed further restrictions.<sup>178</sup> Since 1996, LSC-funded attorneys have been barred from bringing class actions, representing prisoners, and representing noncitizens (with a couple limited exceptions).<sup>179</sup> They cannot lobby in Congress or in state legislatures.<sup>180</sup> These restrictions have fractured the public interest bar that represents welfare recipients.<sup>181</sup> With fewer lawyers to represent Americans who have claims against welfare bureaucrats, it is not surprising that many legal aid attorneys have spurned federal funding. And regardless of LSC restrictions, all legal aid lawyers focus on the regulations and guidance coming out of the relevant federal and state agencies. Due to the fact that states have some flexibility under SNAP and Medicaid to extend certification periods and add additional services, legal aid lawyers have ample opportunities to push for expanding and streamlining both programs in ways that are consistent with federal law, but often have to do so with limited and restricted funding.<sup>182</sup>

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documented divide between local and regional organizations that provide direct services and national organizations that seek law reform”); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 224 (2003) (arguing that Legal Services Corporation restrictions were designed to remove any form of advocacy for “entire subgroups” of low-income people); BRENNAN CTR. FOR JUST., *RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER* 9–13 (2000) (discussing the prohibition on Legal Services Corporation-funded lawyers from filing class actions).

<sup>177</sup> Hammond, *supra* note 176, at 222.

<sup>178</sup> *Id.*

<sup>179</sup> See Luban, *supra* note 176, at 221; Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 652–55 (2011) (providing a comprehensive overview of the restrictions on representing noncitizens).

<sup>180</sup> 45 C.F.R. § 1612.1 (1998); see also *LSC Restrictions and Other Funding Sources*, LEGAL SERVS. CORP., <https://lsc.gov/lsc-restrictions-and-funding-sources> [<https://perma.cc/5AKQ-PC35>].

<sup>181</sup> See Hammond, *supra* note 176, at 222; see also Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201, 228 (2016) (explaining how many clinics focus on direct, and often limited, representation over other types of lawyering); ABA STANDING COMM. ON PRO BONO & PUB. SERV. & THE CTR. FOR PRO BONO, *SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS* 3, 6, 45 (2018), [https://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/lc\\_pb\\_supporting\\_justice\\_iv\\_final.pdf](https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lc_pb_supporting_justice_iv_final.pdf) [<https://perma.cc/SX6H-NX8S>] (surveying 47,242 attorneys in twenty-four states and estimating that in 2016, American attorneys provided an average of 36.9 hours of pro bono); Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC’Y REV. 79, 97 (2007) (estimating that it would take fifty-nine pro bono attorneys to make up for a single, year-round legal aid attorney).

<sup>182</sup> For instance, the Food and Nutrition Service publishes an annual report detailing how states use this flexibility. See U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERV., *STATE OPTIONS REPORT: SUPPLEMENTAL*

The combination of a lack of substantive constitutional rights to assistance and the prodigious growth of Medicaid and SNAP made these programs tempting targets for retrenchment once the Republican Party regained control of the presidency and both houses of Congress in 2017. The next Part explains how these retrenchment efforts have fared.

## II. THE NEW PROPERTY UNDER ATTACK: SNAP AND MEDICAID IN THE TRUMP ERA

The surprising strength of Medicaid and SNAP is explained, in part, by how the courts and public interest lawyers make it difficult for legislators and agencies to cut existing benefits. Yet, this account of poverty law's durability runs counter to the current political climate, in which detractors of both programs control much of federal and state lawmaking.<sup>183</sup> This stress test for SNAP and Medicaid is what makes this analysis so timely. From 2017 to 2019, committed welfare retrenchers—those dedicated to reducing spending on SNAP and Medicaid—controlled much of national and state government, precisely at a time when spending on means-tested programs has continued to increase over the last half century. The 115th Congress teemed with legislators interested in reducing the size of welfare expenditures. The most prominent was then-Speaker of the House Paul Ryan who, as a former chair of both the Ways and Means Committee and the Budget Committee, repeatedly advocated for transformative proposals to Medicaid and SNAP.<sup>184</sup> Similarly, in the Trump Administration, there are also many officials with experience and interest in dismantling the welfare state.<sup>185</sup>

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NUTRITION ASSISTANCE PROGRAM 1 (14th ed. 2018) [hereinafter STATE OPTIONS REPORT], <https://fns-prod.azureedge.net/sites/default/files/snap/14-State-Options.pdf> [<https://perma.cc/PY9M-UFXA>].

<sup>183</sup> See Video: National Review Institute Ideas Summit, Speaker Paul Ryan (C-SPAN 2017), <https://www.c-span.org/video/?425555-6/national-review-institute-ideas-summit-speaker-paul-ryan> (last visited Oct. 10, 2020) (“Medicaid—sending it back to the states, capping its growth rates. We have been dreaming of this since I’ve been around, since you and I were drinking at a keg.”).

<sup>184</sup> See TASK FORCE ON POVERTY, OPPORTUNITY, & UPWARD MOBILITY, A BETTER WAY: OUR VISION FOR A CONFIDENT AMERICA 11–12 (2016), [https://www.heartland.org/\\_template-assets/documents/publications/abetterway-poverty-policypaper.pdf](https://www.heartland.org/_template-assets/documents/publications/abetterway-poverty-policypaper.pdf) [<https://perma.cc/C8JP-4S6F>]. Then-Speaker Paul Ryan created the task force in 2016. John Bresnahan & David Rogers, *New House Republican ‘Anti-Poverty Plan’ Repackages GOP Proposals*, POLITICO (June 7, 2017, 12:03 AM), <https://www.politico.com/story/2016/06/house-gop-poverty-223969> [<https://perma.cc/3BHR-UAJ7>]; HOUSE BUDGET COMM., 114TH CONG., FY2016 BUDGET RESOLUTION: A BALANCED BUDGET FOR A STRONGER AMERICA 20, 29 (2015) (proposing to repeal Obamacare’s Medicaid expansion to allow states to manage their Medicaid programs and to convert SNAP to a “State Flexibility Fund”).

<sup>185</sup> For example, Vice President Mike Pence’s former State Medicaid Director Seema Verma now runs the federal Center for Medicaid and Medicare Services. See Rachana Pradhan & Alice Miranda Ollstein, *How Mike Pence’s ‘Indiana Mafia’ Took Over Health Care Policy*, POLITICO (May 20, 2019, 5:04 AM), <https://www.politico.com/story/2019/05/20/mike-pence-health-care-1331705> [<https://perma.cc/C8G7->

Importantly, this unified government in Washington mirrored the GOP's near-total control of state government. Starting in the 2010 midterm election, the Republican Party made consistent, nationwide gains in state elections.<sup>186</sup> Following the 2016 election, Republicans controlled both chambers of the state legislature in thirty-two states.<sup>187</sup> In contrast to the federal government, which has been synonymous with divided government since 1981,<sup>188</sup> state governments exhibit increasingly unified, partisan control.<sup>189</sup> The ubiquity of unified state government streamlined policy change in several areas, including welfare. While Congress sets parameters for funding and eligibility of Medicaid and SNAP, states make important decisions about how those benefits are administered, such as whether to cover optional populations and whether to provide optional services. Furthermore, states can request waivers from the federal government to further change how their agencies run welfare programs.

This Part analyzes how the Trump Administration, the 115th Congress, and their political allies in state government have tried to dismantle SNAP and Medicaid. It describes how opponents of safety net programs failed to enact

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NCMQ] (discussing Verma's record in Indiana and HHS Secretary Azar's previous work for Indiana-based drug company Eli Lilly); *see also* Jake Harper, *Trump Picks Seema Verma to Run Medicare and Medicaid*, NPR (Nov. 29, 2016, 5:18 PM), <https://www.npr.org/sections/health-shots/2016/11/29/503762324/trump-picks-seema-verma-to-run-medicare-and-medicaid> [https://perma.cc/P4NE-C4CU] (describing Verma's involvement in Indiana's Medicaid expansion and the expansion's intent "to appeal to conservatives").

<sup>186</sup> During President Obama's two terms, Democrats lost—on net—816 seats, the largest of a two-term presidency since Dwight D. Eisenhower. NAT'L CONF. OF STATE LEGISLATURES, ANALYSIS ON THE ELECTION FROM THE STATE PERSPECTIVE (2016), [https://www.ncsl.org/Portals/1/Statevote/StateVote\\_Combined%20Presentation.pdf](https://www.ncsl.org/Portals/1/Statevote/StateVote_Combined%20Presentation.pdf) [https://perma.cc/CBP9-WUYW].

<sup>187</sup> *Id.*

<sup>188</sup> Since 1981, there were only three periods where either party has controlled both houses of Congress and the presidency: 2003 to 2007 for the Republicans and 2009 to 2011 for the Democrats. The election of President Trump and the GOP-controlled 115th Congress, the period that is the focus of this Article, is the third. *See Party Divisions of the House of Representatives, 1789 to Present*, OFF. OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> [https://perma.cc/M75A-5LGB]; *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [https://perma.cc/PSF6-4YZ5]. For discussions of how divided government in Washington functions differently from unified government or not, compare DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, at 2–4 (2d ed. 2005), suggesting Congress is productive even when different parties control each chamber or the presidency, with MORRIS FIORINA, *DIVIDED GOVERNMENT 110* (Sean Wakely & Stephen Hull eds., 2d ed. 1996), documenting how divided government can frustrate national lawmaking.

<sup>189</sup> Following the 2018 midterm elections, many journalists and political analysts pointed out that not since 1914 has only one state had a divided legislature. *See, e.g.*, Adam Nagourney & Sydney Ember, *Election Consolidates One-Party Control over State Legislatures*, N.Y. TIMES (Nov. 7, 2018), <https://nytimes.com/2018/11/07/us/politics/state-house-elections.html> [https://perma.cc/EUR6-JR7M] (noting that, following the 2018 midterms, one party controls both chambers in every state legislature except Minnesota's).

Medicaid and SNAP cuts, despite their control of both the Executive and Legislative Branches of the federal government.<sup>190</sup> By adopting the categorization of previous scholarship on welfare state retrenchment, this Part suggests that direct, traditional attacks on both programs, so-called “programmatically retrenchment,” failed spectacularly. Despite unified government, President Trump and congressional leaders were unable to repeal the Affordable Care Act, defund Medicaid or SNAP through block grants, or achieve structural cuts and increased conditionality to SNAP in the Farm Bill. The White House and their congressional allies were more successful in their efforts at “systemic retrenchment,” which consists of depriving state and federal government of resources and revenue in order to undermine past expansions. To that end, the Tax Cuts and Jobs Act of 2017 and less visible budgetary maneuvers put discretionary spending on a collision course with historically low tax rates—a wreck that will be foisted on future lawmakers.<sup>191</sup> The government shutdown in 2019 may also be best understood as an example of systemic retrenchment, as the federal government’s closure jeopardized SNAP benefits.<sup>192</sup> That said, the heart of this Part posits that the lawmaking worth tracing is no longer in Congress, but in federal and state agencies. The Trump Administration and certain states are pursuing an interconnected strategy to cut SNAP and Medicaid not through legislation, but through regulation and devolution—a kind of lawmaking in the shadow of Congress. Therefore, tracking these state-focused efforts better explains the real threat facing anti-poverty programs today and the lasting influence of the New Property’s procedural protections.

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<sup>190</sup> See Agriculture Improvement Act of 2018, H.R. 2, 115th Cong. (2018) (enacted). The Senate companion bill was S. 3042, but it did not pass the Senate. S. 3042, 115th Cong. (2018); see also American Health Care Act of 2017, H.R. 1628, 115th Cong. (2017). The Better Care Reconciliation Act of 2017 was a Senate amendment in the nature of a substitute to H.R. 1628. Better Care Reconciliation Act of 2017, Amendment H.R. 1628, LYN17343, 115th Cong. (June 26, 2017) (amendment in the nature of a substitute).

<sup>191</sup> The tax cuts represent arguably the best example of systemic retrenchment by the Trump Administration. See, e.g., Erica Werner, *White House Budget Director Effectively Admits Tax Bill Doesn’t Pay for Itself*, WASH. POST (Feb. 14, 2018, 5:18 PM), <https://www.washingtonpost.com/news/business/wp/2018/02/14/white-house-budget-director-effectively-admits-tax-bill-doesnt-pay-for-itself/> [https://perma.cc/892N-4KCU]; Sam Fleming, *US Budget Deficit Hits \$779bn in Trump’s First Full Fiscal Year*, FIN. TIMES (Oct. 15, 2018), <https://ft.com/content/c8a990d8-d0a5-11e8-a9f2-7574db66bcd5> [https://perma.cc/M6H2-VY75]. Indeed, this effort by President Trump parallels Presidents Ronald Reagan and George W. Bush’s earlier systemic retrenchment in reducing tax revenues. PIERSON, *supra* note 11, at 149–55 (discussing Reagan’s “impairment of the federal government’s ability to generate tax revenues”); Larry M. Bartels, *Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind*, 3 PERSPS. ON POL. 15, 23 (2005) (casting Bush tax cuts in a similar light).

<sup>192</sup> See, e.g., Helena Bottemiller Evich, *Food Stamps for Millions of Americans Become Pawn in Shutdown Fight*, POLITICO (Jan. 7, 2019, 10:25 AM), <http://politico.com/story/2019/01/07/food-stamps-government-shutdown-1062090> [https://perma.cc/JJM2-F5BA].



### A. Legislative Action

With control of both houses of Congress and the White House for the first time in over a decade, the Republican Party appeared poised in 2017 to make significant cuts to Medicaid and SNAP. The Republican Party's stated priorities were to repeal the Affordable Care Act, cut taxes, and shrink the federal government's size, and the GOP insisted that those goals were served by paring back both growing assistance programs.<sup>193</sup> These kinds of legislative actions that are designed to reduce benefit levels and decrease the number of benefit recipients are typically considered examples of programmatic retrenchment. However, as seen in the failed efforts to roll back Medicaid and slash SNAP, all of these efforts in Congress proved futile.

#### 1. The Failed Efforts to Roll Back Medicaid

The Trump Administration's legislative efforts to cut Medicaid are bound up with its broader policy of undoing the Affordable Care Act. Just as President Obama's first session of Congress was consumed by trying to enact the Affordable Care Act, President Trump's was dominated by attempts to repeal it. However, despite significant coordination between the Trump Administration and Republican congressional leadership, the repeal of the ACA failed repeatedly.<sup>194</sup> For the purposes of this Article, there is neither room nor reason to recount the play-by-play of Congress's unsuccessful efforts to repeal the ACA beyond a single footnote.<sup>195</sup> Suffice it to say, had the Trump

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<sup>193</sup> PLATFORM COMM., REPUBLICAN PLATFORM 2016, at 1–2 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL%5B1%5D-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf) [<https://perma.cc/YLM2-UEGU>] (promising to cut taxes); *id.* at 23 (promising to shrink the size of the federal government); *id.* at 36 (promising to repeal the Affordable Care Act).

<sup>194</sup> See Tessa Berenson, *Reminder: The House Voted to Repeal Obamacare More Than 50 Times*, TIME (Mar. 24, 2017), <https://time.com/4712725/ahca-house-repeal-votes-obamacare/> [<https://perma.cc/8VEE-P6DW>].

<sup>195</sup> American Health Care Act of 2017, H.R. 1628, 115th Cong.; Press Release, U.S. Dep't of Health & Hum. Servs., The American Health Care Act Is Critical First Step Toward Protecting Patients (Mar. 7, 2017), <https://www.hhs.gov/about/news/2017/03/07/american-health-care-act-critical-first-step-toward-protecting-patients.html> [<https://perma.cc/D2FT-CUDR>] (supporting first repeal-and-replace bill, entitled the American Health Care Act, upon its introduction in the House); *Final Vote Results for Roll Call 256*, OFF. OF THE CLERK: U.S. HOUSE OF REPRESENTATIVES (May 4, 2017), <http://clerk.house.gov/evs/2017/roll256.xml> [<https://perma.cc/96U8-3MUN>] (passing the American Health Care Act). The Senate then released the Better Care Reconciliation Act (BCRA), which would have capped Medicaid spending, repealed tax provisions paying for ACA benefits, and allowed states to waive consumer protections in health law. See Robert Pear & Thomas Kaplan, *Senate Health Care Bill Includes Deep Cuts to Medicaid*, N.Y. TIMES (June 22, 2017), <https://nyti.ms/2tSE2IN> [<https://perma.cc/64NC-ZQNZ>]. Senate sponsors then released a revised version of the BCRA. See Better Care Reconciliation Act, H.R. 1628, ERN17490, 115th Cong. (July 13, 2017) (amendment in the nature of a substitute). While the Senate initially voted to begin debate on a revised BCRA, the Senate then rejected the legislation. See, e.g., Thomas Kaplan & Robert Pear, *Senate Votes Down Broad Obamacare Repeal*, N.Y. TIMES (July 25, 2017),

Administration and the Republican Congress repealed the Affordable Care Act, millions of Medicaid recipients would have lost their health insurance,<sup>196</sup> and Medicaid's trajectory would have changed dramatically.<sup>197</sup> Important for our purposes, although not all ACA-repeal efforts included a Medicaid block grant, all versions eliminated the ACA's Medicaid expansion and reduced Medicaid spending further.<sup>198</sup> The fact that the 115th Congress only considered ACA-repeal legislation that would have cut Medicaid betrays the role Medicaid now plays in our public health insurance system.<sup>199</sup> Once the Democrats took control of the House in January 2019, the Trump Administration indicated their intention to bypass Congress and block grant Medicaid using regulations and waivers.<sup>200</sup>

## 2. *The Failed Efforts to Slash SNAP*

Despite consistent promises and proposals by the Trump Administration and Republicans in Congress to achieve structural cuts to SNAP by turning it into a block grant to states, those efforts, like the efforts to cut Medicaid, have foundered. Following President Trump's inauguration, Republicans in the House proposed \$150 billion in cuts to SNAP.<sup>201</sup> Those proposals came to

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<https://nyti.ms/2tWG2cz> [<https://perma.cc/2QYW-6EW8>] (analyzing first failed floor vote); Sean Sullivan, Juliet Eilperin & Kelsey Snell, *Senate GOP Effort to Unwind the ACA Collapses Monday*, WASH. POST (Sept. 25, 2017, 8:20 PM), [https://www.washingtonpost.com/powerpost/new-version-of-health-care-bill-will-help-alaska-and-maine--home-of-two-holdout-senators/2017/09/25/24697f62-a188-11e7-b14f-f41773cd5a14\\_story.html](https://www.washingtonpost.com/powerpost/new-version-of-health-care-bill-will-help-alaska-and-maine--home-of-two-holdout-senators/2017/09/25/24697f62-a188-11e7-b14f-f41773cd5a14_story.html) [<https://perma.cc/K2D4-9RKB>] (detailing recognition among Senate leaders that there were not enough votes to repeal and replace the ACA).

<sup>196</sup> See CONG. BUDGET OFF., COST ESTIMATE: H.R. 1628, AMERICAN HEALTH CARE ACT OF 2017 tbl.4 (2017); Letter from Keith Hall, Dir., Cong. Budget Off., to Hon. Mike Enzi, Chairman, Comm. on the Budget (July 20, 2017) (regarding H.R. 1628, the Better Care Reconciliation Act of 2017: An Amendment in the Nature of a Substitute) (on file with journal).

<sup>197</sup> See Letter from Keith Hall, *supra* note 196 (estimating that in the BCRA “[t]he largest savings would come from a reduction in total federal spending for Medicaid resulting both from provisions affecting health insurance coverage and from other provisions,” and that “[b]y 2026, spending for that program would be reduced by 26 percent”).

<sup>198</sup> See Aaron E. Carroll, *How Would Republican Plans for Medicaid Block Grants Actually Work?*, N.Y. TIMES (Feb. 6, 2017), <https://nyti.ms/2kEw1Qu> [<https://perma.cc/Z3WE-4DKA>].

<sup>199</sup> See Nicole Huberfeld, *Federalism in Health Care Reform*, in HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY, *supra* note 96, at 197, 211 (“Despite targeting only the deserving poor for its first five decades, Medicaid covers half of all births, more than a third of all children, and is the primary payor for long-term care—anyone who lives long enough is highly likely to become a Medicaid Beneficiary.”).

<sup>200</sup> Rachana Pradhan & Dan Diamond, *Trump Wants to Bypass Congress on Medicaid Plan*, POLITICO (Jan. 11, 2019, 5:14 PM), <https://politico.com/story/2019/01/11/trump-bypass-congress-medicaid-plan-1078885> [<https://perma.cc/9RAL-LAE7>].

<sup>201</sup> Greg Trotter, *Food Stamp Program Faces Uncertain Future as Power Shifts in Washington*, CHI. TRIB. (Jan. 6, 2017), <https://chicagotribune.com/business/ct-food-stamps-block-grants-0108-biz-20170105-story.html> [<https://perma.cc/3DLZ-H6E2>]. Although the 2018 budget proposal did not mention the phrase, most think tanks and analysts interpreted the House budget proposal to mean something akin to block grants.

naught. Despite being unable to make deep cuts to SNAP through the budget process, the 115th Congress and the Trump Administration had another significant opportunity to codify SNAP cuts: namely, the Farm Bill. The Farm Bill is the omnibus legislation that reauthorizes federal agriculture and nutrition spending for a five-year period.<sup>202</sup> The Nutrition Title, which authorizes SNAP funding, has become the largest expenditure in that legislation—and increasingly so over the last twenty years.<sup>203</sup> Since 2014, the Republican House leadership made it clear that they saw the Farm Bill as a vehicle for their vision of welfare reform.<sup>204</sup> In the House version of the 2018 Farm Bill (an \$860 billion legislation that passed by only two votes), the House made changes to the SNAP program that would have cut SNAP benefits for millions of Americans.<sup>205</sup> The House bill sought to reduce SNAP benefits in three ways, one of which is worth detailing because it has since resurfaced in regulatory efforts.<sup>206</sup> The House version tightened the time limit for able-bodied adults without dependents who did not meet a work requirement, which would have ultimately removed 1.2 million recipients from the program. Analysts connected the work requirements proposal in the House bill as part of a coordinated campaign by the Trump Administration and the GOP-led Congress to make similar changes to Medicaid.<sup>207</sup>

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ISAAC SHAPIRO, RICHARD KOGAN & CHLOE CHO, CTR. ON BUDGET & POL'Y PRIORITIES, HOUSE GOP BUDGET CUTS PROGRAMS AIDING LOW- AND MODERATE-INCOME PEOPLE BY \$2.9 TRILLION OVER DECADE 4 (2017).

<sup>202</sup> RENÉE JOHNSON & JIM MONKE, CONG. RSCH. SERV., RS22131, WHAT IS THE FARM BILL? 1 & n.1 (2018) (identifying the “17 farm bills since the 1930s” and concluding that “[f]arm bills have become increasingly omnibus in nature since 1973, when the nutrition title was included”).

<sup>203</sup> *Id.* at 7 (“[W]hen the 2008 farm bill was enacted, the nutrition title was 67% of the five-year total. When the 2014 farm bill was enacted, the nutrition share had risen to 80%.”). Lawmakers have tried repeatedly to separate the Nutrition Title from the rest of the Farm Bill, most recently in 2013. Jonathan Weisman & Ron Nixon, *House Republicans Push Through Farm Bill, Without Food Stamps*, N.Y. TIMES (July 11, 2013), <https://nyti.ms/14L66pW> [<https://perma.cc/6KCK-Q838>].

<sup>204</sup> See STAFF OF HOUSE BUDGET COMM., 113TH CONG., THE WAR ON POVERTY: 50 YEARS LATER 81, 92, 96 (2014).

<sup>205</sup> Jeff Stein, *Congress Just Passed an \$867 Billion Farm Bill. Here's What's in It*, WASH. POST (Dec. 12, 2018, 4:03 PM), <https://www.washingtonpost.com/business/2018/12/11/congress-billion-farm-bill-is-out-heres-whats-it/> [<https://perma.cc/4P8W-US77>].

<sup>206</sup> The 2018 Farm Bill was officially entitled the Agriculture Improvement Act of 2018 and enacted as Public Law 115-334. See H.R. 2, 115th Cong. (2018) (enacted).

<sup>207</sup> Diana R.H. Winters, *Everything You Need to Know About the Upcoming Farm Bill Debate*, HEALTH AFFS. BLOG (Feb. 21, 2018), <https://healthaffairs.org/do/10.1377/hblog20180215.383921/full/> [<https://perma.cc/V5DU-S8GA>] (describing the Department of Agriculture’s position as “consistent with the administration’s broader efforts to connect public benefits to work requirements, as in the Medicaid program”). Under the House version, states could have continued to exempt a portion of the caseload and request geographic waivers based on labor-market measures, but with some amendments. The Congressional Budget Office (CBO) estimated that the House-passed work-related changes would reduce spending on SNAP benefits by approximately \$14.1 billion over ten years and would have increased spending on program

However, when the Senate passed its version of the Farm Bill only a week later, the legislation contained none of these proposed cuts to SNAP. By a vote of 86–11, the Senate passed its version of the Farm Bill, which essentially maintained the status quo for SNAP.<sup>208</sup> Both the Chairman and the Ranking Member of the Senate Agriculture Committee stated that the House cuts to SNAP and the work requirements could not pass the sixty-vote threshold for legislation in the Senate, and the Senate voted down an amendment to the bill that would have added work requirements.<sup>209</sup> Thus, despite having both House and Senate versions of the Farm Bill by the end of June 2018, Congress failed to pass the Farm Bill before authorization expired at the end of September 2018.<sup>210</sup> The failure to pass the Farm Bill before the expiration date became a key issue in many congressional races during the 2018 cycle.<sup>211</sup> After the 2018 midterm election confirmed that the Democrats would control the House in the next Congress, the House and Senate agreed, during the lame-duck session of the 115th Congress, to a Farm Bill that left out all three of these cuts to SNAP benefits.

Yet, there was one feature of the final bill that aligned with the Trump Administration and Republican Congress's goal of defunding SNAP. Although the Senate included a provision blocking the Trump Administration from cracking down on state ABAWD waivers, that provision was dropped in the final version of the Farm Bill, which the President signed.<sup>212</sup> The same day President Trump signed the 2018 Farm Bill, the President's Secretary of Agriculture, Sonny Perdue, announced a proposed rule that would tighten work requirements for ABAWDs, characterizing the requirements as "common-

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administration by approximately \$7.3 billion—a net reduction of \$6.8 billion. Letter from Keith Hall, Dir., Cong. Budget Off., to Hon. Michael Conaway, Chairman, Comm. on Agric. (Apr. 13, 2018) (on file with journal).

<sup>208</sup> Catherine Boudreau & Liz Crampton, *Senate Passes Farm Bill, Setting Up Food Stamp Battle with the House*, POLITICO (June 28, 2019, 8:09 PM), <https://politico.com/story/2018/06/28/senate-passes-farm-bill-683232> [<https://perma.cc/X4ZP-B3VM>].

<sup>209</sup> *Id.*

<sup>210</sup> See Humeys Pamuk, *U.S. Lawmakers, at Impasse on New Farm Bill, Mull Extension of Old One*, REUTERS (Oct. 2, 2018, 1:34 PM), <https://reuters.com/article/us-usa-farbill/u-s-lawmakers-at-impasse-on-new-farm-bill-mull-extension-of-old-one-idUSKCN1MC2EU> [<https://perma.cc/A93L-MYZ6>].

<sup>211</sup> See Jeff Daniels, *Stalled Farm Bill Grabs Attention During Midterms, Expected on Front Burner When Congress Returns*, CNBC (Nov. 1, 2018, 2:56 PM), <https://cnbc.com/2018/10/31/stalled-farm-bill-expected-on-front-burner-when-congress-returns-.html> [<https://perma.cc/RAF6-B8JX>].

<sup>212</sup> See Helena Bottemiller Evich & Catherine Boudreau, *Farm Bill Headed to Trump After Landslide House Approval*, POLITICO (Dec. 13, 2018, 11:34 AM), <https://politico.com/story/2018/12/12/house-passes-farm-bill-1060916> [<https://perma.cc/AE5N-P3SL>] (“Well, we lost the House of Representatives in November . . . That was the final nail on the coffin in terms of leverage that I got.” (quoting House Agriculture Chairman Mike Conaway)). Conservatives proclaimed the ABAWD omission “a win because it allows USDA to tighten the process without congressional approval.” *Id.*

sense policy, particularly at a time when the unemployment rate is at a generational low.”<sup>213</sup> As the next Section explores, the Department of Agriculture’s proposed work requirement regulation was the first of several efforts to cut SNAP through agency action—many of which run parallel to similar efforts by the Trump Administration to undo Medicaid.

### *B. Administrative Action*

Both during and after these efforts in Congress, the Trump Administration pursued agency actions that sought to achieve the same policy they had attempted via legislation, namely, reducing access to and generosity of SNAP and Medicaid benefits. To do so, the Trump Administration combined three major strategies: devolution to states, disaggregation of the recipient population, and increased conditionality of benefit receipt.<sup>214</sup> This framework for administrative action suggests an understanding among opponents of these programs on how to undo the protections envisioned by the New Property. However, the federal courts’ rulings on work requirements in Medicaid, SNAP, and public charge litigation demonstrate that there are potent checks on the Trump Administration’s efforts to achieve through regulation what it has failed to enact through legislation.

#### *1. The Trump Administration’s Strategy*

Following the successive defeats in Congress to legislate cuts in food and medical assistance, the Trump Administration looked to achieve similar ends through an interlocking strategy, what I call “devolved, disaggregated conditionality,” for both the SNAP and Medicaid programs.<sup>215</sup> By and large, the Trump Administration has sought to reduce food and medical assistance

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<sup>213</sup> Press Release, USDA, USDA to Restore Original Intent of SNAP: A Second Chance, Not a Way of Life (Dec. 20, 2018), <https://www.fns.usda.gov/news-item/usda-restore-original-intent-snap-second-chance-not-way-life> [<https://perma.cc/NGA9-6MXR>] (quoting Department of Agriculture Secretary Sonny Perdue); see also Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, 84 Fed. Reg. 22 (Feb. 1, 2019) (to be codified at 7 C.F.R pt. 273).

<sup>214</sup> See Reducing Poverty in America by Promoting Opportunity and Economic Mobility, Exec. Order No. 13,828, 83 Fed. Reg. 15,941, 15,943 (Apr. 10, 2018) (requiring eight Cabinet-level secretaries to each submit a report to the President with “a list of recommended regulatory and policy changes and other actions to accomplish the principles outlined in this order,” and within 90 days of submitting those reports, to “take steps to implement the recommended administrative actions”); see also Ezra Rosser, *Pulling from a Dated Playbook: President Trump’s Executive Order on Poverty*, HARV. L. REV. BLOG (Apr. 18, 2018), <https://www.blog.harvardlawreview.org/pulling-from-a-dated-playbook-president-trumps-executive-order-on-poverty/> [<https://perma.cc/2846-RXYQ>] (analyzing and criticizing the order).

<sup>215</sup> This account cuts against those proposed by some who have found that the Trump Administration’s efforts in this area are fundamentally incoherent or held together only by animus. See, e.g., David A. Super, Opinion, *The Cruelty of Trump’s Poverty Policy*, N.Y. TIMES (July 24, 2019), <https://nyti.ms/2y6tUtz> [<https://perma.cc/MDE3-37W5>].

not by regulating both programs nationwide, but by directing federal agencies to cut SNAP and Medicaid through partnerships with like-minded elected officials and bureaucrats in state government.<sup>216</sup> Using the discourse of federalism, the Trump Administration has characterized many of these proposals as optional for the states. Yet, none of the devolutionary proposals permit states to expand either program. The only choice states have under these policies is to reduce benefits and services. This “insincere devolution” is similar to earlier cooperative-federalism efforts in Temporary Assistance for Needy Families (TANF), the cash assistance program, in the wake of welfare reform.<sup>217</sup>

Not only has the Trump Administration pursued a state-specific strategy; it is group-specific within any particular state. The Administration has not attempted any changes to the entire SNAP or Medicaid caseload in a given state. Instead, federal agencies have exploited fractured definitions of American citizenship. Long before President Trump took office, American public law constructed tiers of social citizenship.<sup>218</sup> And for the last fifty years, there have always been restrictions on which needy Americans could access SNAP and Medicaid. For instance, Americans who reside on tribal lands, in overseas territories, or who live in mixed-status families experience a distinct, often deteriorating safety net.<sup>219</sup> Similarly, Americans who do not have children, or at least are not raising children in the home, also cannot equally access SNAP and Medicaid. Notably, the Affordable Care Act eliminated most of these distinctions across citizenship with its Medicaid expansion, but the Supreme Court deemed that expansion unconstitutionally coercive for states.<sup>220</sup> It is no accident that these groups are considered to be less politically powerful.

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<sup>216</sup> Somewhat surprisingly, the Trump Administration has not made similar efforts to devolve control of SNAP and Medicaid to private actors. *See generally* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC 119–42 (2017) (characterizing privatization efforts over the last forty years as an existential threat to the American public law system).

<sup>217</sup> *See* Andrew Hammond, *Welfare and Federalism’s Peril*, 92 WASH. L. REV. 1721, 1741–44 (2017) (describing how TANF devolution is, in effect, “statutized deterioration”). For a discussion of how the implementation of devolved standards of the TANF program and PRWORA did not live up to the policy promises from Washington, respectively, see Zatz, *supra* note 84, at 1134, 1155, and Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 604–06 (2004).

<sup>218</sup> *See generally* FOX, *supra* note 39, at 291–94 (discussing the exclusion of Blacks and Mexicans from New Deal programs and its implication today).

<sup>219</sup> *See* Andrew Hammond, *The Immigration-Welfare Nexus in a New Era?*, 22 LEWIS & CLARK L. REV. 501, 505–17 (2018) (detailing the doctrinal, statutory, and regulatory framework for immigrant families applying for Medicaid, SNAP, SSI, and TANF); *The Study of the Food Distribution Program on Indian Reservations*, NORC AT THE UNIV. OF CHI., <https://www.norc.org/Research/Projects/Pages/the-study-of-the-food-distribution-program-on-indian-reservations.aspx> [https://perma.cc/Z24H-2J2C].

<sup>220</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012).

Even going after the least politically popular or sympathetic populations, the Trump Administration could not simply cut Medicaid or SNAP benefits for those groups. While the Supreme Court in *Dandridge* rejected a constitutional challenge that would have increased the substantive benefits,<sup>221</sup> federal law still prevents agencies from singling out certain populations for direct cuts. Federal law requires that states cover certain mandatory populations in both programs. For Medicaid, federal law also requires that states provide certain services to every Medicaid recipient.<sup>222</sup> A state cannot decline to insure a mandatory population nor can a state choose to cover a certain population, but deny them certain mandatory services.<sup>223</sup> Similarly, SNAP requires that benefit levels are uniform across the continental United States.<sup>224</sup> Of course, as a near-cash benefit, SNAP's generosity rises and falls with a household's net income, and administrators can sanction recipients individually.<sup>225</sup> But a state cannot create, via statute or regulation, a new category of recipients that receive reduced SNAP benefits.<sup>226</sup>

As a result, benefit levels of Medicaid and SNAP are not immediately susceptible to regulatory change. Absent amending the federal statute, states have to come up with some other way to cut both programs, either by preventing people from signing up or by kicking off current recipients. One of the challenges with creating these additional conditions is that they impose costs on the recipient *and* the administrator. And because both programs operate under a cooperative-federalism scheme, state administrators could face a federal lawsuit relying on precedent that has grown up around welfare programs since Professor Reich penned *The New Property* in 1964.

## 2. Work Requirements

The most prominent illustration of the Trump Administration's administrative strategy—a mix of devolution, disaggregation, and conditionality—is the work requirement. Welfare programs have always been bound up in the myths and realities of low-wage work.<sup>227</sup> Work requirements

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<sup>221</sup> See *supra* notes 64–68 and accompanying text.

<sup>222</sup> 42 U.S.C. § 1396a(k)–(m).

<sup>223</sup> KLEES ET AL., *supra* note 108, at 28.

<sup>224</sup> See Memorandum from U.S. Dep't of Agric. to All Reg'l Dirs., SNAP—Fiscal Year 2019 Cost-of-Living Adjustments (July 27, 2018), <https://fns-prod.azureedge.net/sites/default/files/snap/COLAMemoFY19.pdf> [https://perma.cc/CM4R-87RE].

<sup>225</sup> See *A Quick Guide to SNAP Eligibility and Benefits*, *supra* note 117, at 1–4; see also, e.g., OHIO ADMIN. CODE 5101:4-3-11.2 (2020).

<sup>226</sup> See U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 540 (1973).

<sup>227</sup> Mass. Dep't of Pub. Welfare v. Yeutter, 947 F.2d 537, 540 (1st Cir. 1991) (holding that USDA could sanction a state for failure to comply with federal plan for mandatory employment and training (E&T)).

abound in public benefits programs. The most obvious example is TANF,<sup>228</sup> but housing programs also include work requirements.<sup>229</sup> Similarly, the Trump Administration has pursued work requirements in SNAP and Medicaid to make stealth cuts to both programs.<sup>230</sup> Here, the federal government invites states to opt in to applying an additional condition of receiving a public benefit, namely, that they have to prove a certain number of hours in formal employment or sometimes activities that could lead to employment, for a certain segment of the welfare caseload. By looking at these requirements, we can see the shape of welfare litigation today: namely, the federal government must rely on state actors, often with varying levels of success.

*a. Medicaid work requirements*

Since the failure to repeal the Affordable Care Act, the Trump Administration's efforts to cut Medicaid have centered on granting waivers to individual states. Nearly fifty years before the Affordable Care Act, federal law authorized states to depart from certain requirements of the Social Security Act to pursue a demonstration project if they received a waiver from the federal government.<sup>231</sup> The Social Security Act empowers the Health and Human Services (HHS) Secretary to allow states to run an "experimental, pilot, or

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program); *see also* Zatz, *supra* note 84, at 380–88 (discussing the challenges of defining "work" for the purposes of a welfare program).

<sup>228</sup> *See* Hammond, *supra* note 217, at 1722–24; *see also* *Policy Basics: Temporary Assistance for Needy Families*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 6, 2020), <https://www.cbpp.org/research/family-income-support/temporary-assistance-for-needy-families> [<https://perma.cc/PCU4-MKA9>].

<sup>229</sup> Michele Gilman, *The Difference in Being Poor in Red States Versus Blue States*, in *HOLES IN THE SAFETY NET*, *supra* note 96, at 68, 70–74 (discussing this feature of welfare governance with respect to work requirements); *see also* U.S. GOV'T ACCOUNTABILITY OFF., *MEDICAID DEMONSTRATIONS: APPROVALS OF MAJOR CHANGES NEED INCREASED TRANSPARENCY* (2019) (discussing Medicaid work requirements); DAVID SUPER, *PUBLIC WELFARE LAW 956* (2017) ("Although the Supreme Court in the 1960s and 70s struck down most states' attempts to impose behavioral norms on welfare recipients without explicit federal approval, it ignored these holdings when the norms being imposed related to work."); Kali Grant, Funke Aderonmu, Sophie Khan, Kastubh Chahande, Casey Goldvale, Indivar Dutta-Gupta, Aileen Carr & Doug Steiger, *Unworkable & Unwise: Conditioning Access to Programs That Ensure a Basic Foundation for Families on Work Requirements* (Geo. Ctr. on Poverty & Inequality, Working Paper, 2019).

<sup>230</sup> *See* COUNCIL OF ECON. ADVISERS, *EXPANDING WORK REQUIREMENTS IN NON-CASH WELFARE PROGRAMS 7* (2018), <https://www.whitehouse.gov/wp-content/uploads/2018/07/Expanding-Work-Requirements-in-Non-Cash-Welfare-Programs.pdf> [<https://perma.cc/V8SP-7QTG>] (detailing "the current state of work requirements in Medicaid, SNAP and housing assistance programs" and noting that they "are much weaker and less expansive than those in TANF").

<sup>231</sup> Public Welfare Amendments of 1962, Pub. L. 87-543, 76 Stat. 172 (codified at 42 U.S.C. § 1315) (commonly referred to as § 1115 of the Social Security Act); S. REP. NO. 87-1589, at 31 (1962); *see also* Anthony Albanese, *The Past, Present, and Future of Section 1115*, 128 *YALE L.J.F.* 827, 828 (2019) (detailing HHS's history as a "lenient gatekeeper" in granting waivers); Jonathan R. Bolton, *The Case of the Disappearing Statute: A Legal and Policy Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program*, 37 *COLUM. J.L. & SOC. PROBS.* 91, 92–94 (2003).



demonstration project” in its Medicaid program that would otherwise run afoul of federal requirements if the Secretary determines that that project “is likely to assist in promoting the objectives” of the Act.<sup>232</sup> To apply for the waiver, the state must follow some basic procedures,<sup>233</sup> as must the Secretary in considering the waiver.<sup>234</sup>

To date, twenty states have submitted waivers that, if implemented, would allow them to impose work requirements on Medicaid recipients.<sup>235</sup> The question of whether these waivers violate federal law is best understood through the litigation involving Kentucky—the first state to receive such a waiver—and Arkansas. On January 1, 2014, Kentucky opted into the Affordable Care Act’s Medicaid expansion. As a result, more than 400,000 Kentuckians received medical assistance through the Medicaid expansion.<sup>236</sup> However, in December 2015, Matt Bevin, who had campaigned against the Medicaid expansion, began his first term as Kentucky Governor. To honor that campaign promise, in 2016 Governor Bevin submitted a waiver application to the Secretary of HHS to “comprehensively transform Medicaid.”<sup>237</sup> On July 3, 2017, the Bevin administration submitted a modified waiver.<sup>238</sup> Kentucky’s new Medicaid plan required the expansion-eligible recipients and others to participate in “community engagement” activities.<sup>239</sup> Those activities include at least eighty hours each month of such activities as a condition of receiving health coverage. The project also calls for, among other things, increased premiums and more stringent reporting requirements.<sup>240</sup> Kentucky projected that the state would reduce Medicaid enrollment over a five-year period by over 95,000 recipients and reduce payments by \$2.4 billion.<sup>241</sup> However, the Obama Administration let Kentucky’s application languish.

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<sup>232</sup> 42 U.S.C. § 1315(a). Section 1115 of the Social Security Act requires that the Secretary consider two criteria before granting the waiver: (1) whether the project is an “experimental, pilot or demonstration project,” and (2) whether the project is “likely to assist in promoting the objectives” of the Act. *Id.*

<sup>233</sup> See 42 C.F.R. § 431.408(a) (2019).

<sup>234</sup> *Id.* § 431.416(b), (e)(1).

<sup>235</sup> *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State*, KAISER FAM. FOUND. (June 11, 2020), <https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/> [<https://perma.cc/MXA2-4KQV>].

<sup>236</sup> *Stewart v. Azar*, 313 F. Supp. 3d 237, 243 (D.D.C. 2018).

<sup>237</sup> Letter from Matthew G. Bevin, Governor of Ky., to Hon. Sylvia Burwell, Sec’y, Dep’t of Health & Hum. Servs. (Aug. 24, 2016) (discussing HEALTH § 1115 Demonstration) (on file with journal).

<sup>238</sup> Letter from Adam Meier, Deputy Chief of Staff, Off. of Governor Matthew G. Bevin, to Brian Neale, Dir., Ctr. for Medicaid & CHIP Servs. (July 3, 2017) (discussing Kentucky HEALTH § 1115 Demonstration Modification Request) (on file with journal).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

In contrast, the Trump Administration, before and after its efforts to repeal the ACA, made concerted efforts to encourage such waiver applications. On March 14, 2017, HHS Secretary Price and the new Administrator of the Centers for Medicare and Medicaid Services (CMS) Seema Verma published a letter to all governors encouraging them to apply for Medicaid waivers. The “Dear Governor” letter singled out the ACA expansion group, describing it as “a clear departure from the core, historical mission of the program” and offering to “fast-track” approval of waivers that dealt with this population.<sup>242</sup> Despite the promise to fast track, no work requirement waivers were approved for several months. Presumably, the Trump Administration held off giving states further guidance because they were after bigger game: the repeal of the ACA. Once the repeal-and-replace bill was defeated in the Senate, however, the Administration ramped up its efforts, publicly and privately. In November 2017, Verma declared that the ACA’s decision to “move[] millions of working-age, non-disabled adults into” Medicaid “does not make sense,” and announced that CMS would resist that change by approving state waivers that contain work requirements.<sup>243</sup> To that end, on January 11, 2018, CMS published a letter “announcing a new policy designed to assist states in their efforts to improve Medicaid enrollee health and well-being through incentivizing work and community engagement among nonelderly, nonpregnant adult Medicaid beneficiaries who are eligible for Medicaid on a basis other than disability.”<sup>244</sup> This letter was aimed squarely at people who

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<sup>242</sup> Letter from Thomas E. Price, Sec’y, Health & Hum. Servs. & Seema Verma, Adm’r, CMS, to All Governors (Mar. 14, 2017), <https://www.hhs.gov/sites/default/files/sec-price-admin-verma-ltr.pdf> [<https://perma.cc/4CTZ-RXY9>]. A few months later, Verma authored an op-ed describing how the United States had “a rare opportunity, through a combination of congressional and administrative actions, to fundamentally transform Medicaid.” Seema Verma, Opinion, *Lawmakers Have a Rare Chance to Transform Medicaid. They Should Take It*, WASH. POST (June 27, 2017, 4:22 PM), [https://www.washingtonpost.com/opinions/lawmakers-have-a-rare-chance-to-transform-medicaid-they-should-take-it/2017/06/27/f8e5408a-5b49-11e7-9b7d-14576dc0f39d\\_story.html](https://www.washingtonpost.com/opinions/lawmakers-have-a-rare-chance-to-transform-medicaid-they-should-take-it/2017/06/27/f8e5408a-5b49-11e7-9b7d-14576dc0f39d_story.html) [<https://perma.cc/W6AB-DNCP>].

<sup>243</sup> Seema Verma, Adm’r, CMS, Remarks at the National Association of Medicaid Directors (NAMD) 2017 Fall Conference (Nov. 7, 2017), <https://www.cms.gov/newsroom/fact-sheets/speech-remarks-administrator-seema-verma-national-association-medicaid-directors-namd-2017-fall> [<https://perma.cc/NN2A-JCBB>]. A few days later, Verma said in an interview that one of the “major, fundamental flaws in the Affordable Care Act was putting in able-bodied adults” since Medicaid was “not designed for an able-bodied person.” *The Future of: Health Care*, WALL ST. J. (Nov. 10, 2017, 4:10 PM) <https://www.wsj.com/video/the-future-of-health-care/D5B767E4-B2F2-4394-90BB-37935CCD410C.html> (last visited Oct. 10, 2020). In the interview, Verma also said that CMS was “trying [to] restructure the Medicaid program.” *Id.*

<sup>244</sup> Letter from Brian Neale, Dir., Ctr. for Medicaid & CHIP Servs., to State Medicaid Dir. (Jan. 11, 2018), <https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf> [<https://perma.cc/AZ2Q-LELM>] (regarding “Opportunities to Promote Work and Community Engagement Among Medicaid Beneficiaries”).

received Medicaid under the ACA expansion.<sup>245</sup> The next day, HHS approved Kentucky's Medicaid waiver.<sup>246</sup>

Shortly after, sixteen named plaintiffs, on behalf of all Kentucky Medicaid recipients, filed a class action in federal court arguing that HHS's approval of the Kentucky waiver violated the Social Security Act and the Administrative Procedure Act (APA).<sup>247</sup> In their complaint, the class representatives pointed out that, by the end of 2014, over 375,000 Kentuckians had enrolled in Medicaid.<sup>248</sup> In addition to detailing the medical services received by these ACA-expansion Medicaid recipients, the plaintiffs emphasized the reduction in Kentucky hospitals' uncompensated care costs and the 12,000 new jobs attributed to the Medicaid expansion.<sup>249</sup> In addition to requesting certification as a class under Rule 23(b)(2), the plaintiffs requested, *inter alia*, that the district court issue a declaratory judgment that Administrator Verma's letter to State Medicaid Directors (SMDL) and the decision to approve Kentucky's waiver violated federal law as well as preliminarily and permanently enjoin the SMDL.<sup>250</sup>

The district court granted plaintiffs' motion for summary judgment, in part, and vacated the HHS Secretary's grant of Kentucky's Medicaid waiver.<sup>251</sup> Reviewing the agency record, Judge James E. Boasberg held that the HHS Secretary "never adequately considered whether Kentucky HEALTH would in fact help the state furnish medical assistance to its citizens, a central objective of Medicaid."<sup>252</sup> Judge Boasberg concluded that that "signal omission" rendered the Secretary's determination arbitrary and capricious and in violation of the APA.<sup>253</sup> Judge Boasberg noted that while TANF and SNAP "condition benefits on working, there is no equivalent for the Medicaid program."<sup>254</sup> Looking at past agency practice, Judge Boasberg pointed out that "during the 50-plus years of Medicaid, CMS has not previously approved a

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<sup>245</sup> See David A. Super, *A Hiatus in Soft-Power Administrative Law: The Case of Medicaid Eligibility Waivers*, 65 UCLA L. REV. 1590, 1594–95 (2018).

<sup>246</sup> Letter from Brian Neale, Deputy Adm'r, Ctr. for Medicaid & CHIP Servs., to Adam Meier, Deputy Chief of Staff, Off. of Governor Matthew Bevin (Jan. 12, 2018), <https://affordablecareactlitigation.files.wordpress.com/2018/11/5745524-0-18348.pdf> [<https://perma.cc/B7XW-9VXG>].

<sup>247</sup> Class Action Complaint for Declaratory & Injunctive Relief at 4, *Stewart v. Hargan*, No. 18-cv-152 (D.D.C. Jan. 24, 2018). Alex Azar later replaced Acting HHS Secretary Eric Hargan as a named defendant.

<sup>248</sup> *Id.* at 17.

<sup>249</sup> *Id.* at 17–18.

<sup>250</sup> *Id.* at 76.

<sup>251</sup> *Stewart v. Azar*, 313 F. Supp. 3d 237, 243 (D.D.C. 2018).

<sup>252</sup> *Id.*; see also *id.* at 262 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983)).

<sup>253</sup> *Id.* at 243.

<sup>254</sup> *Id.* at 245 (first citing 42 U.S.C. § 607; and then citing 7 U.S.C. § 2029(a)(1)).

community-engagement or work requirement as a condition of Medicaid eligibility.”<sup>255</sup> Because the Secretary “glossed over ‘the impact of the state’s project’ on the individuals whom Medicaid ‘was enacted to protect,’” the district court vacated HHS’s approval of Kentucky’s and remanded it to the agency.<sup>256</sup> On remand, Governor Bevin submitted, and the Trump Administration approved, after a notice-and-comment period, a second, nearly identical waiver request.<sup>257</sup> But the district court stopped the Trump Administration again by vacating the new waiver.<sup>258</sup>

The same day the district court vacated the reapproved Kentucky waiver, it handed down another decision regarding the Trump Administration’s approval of Arkansas’s Medicaid waiver. Like Kentucky, Arkansas submitted a Medicaid waiver during the Obama Administration.<sup>259</sup> The Obama Administration initially denied Arkansas’s waiver proposal in part because it included a work requirement.<sup>260</sup> Following the 2016 election and before President Trump’s inauguration, the Obama Administration approved a modified waiver from Arkansas, even while it let Kentucky’s languish.<sup>261</sup> Some

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 265 (quoting *Beno v. Shalala*, 30 F.3d 1057, 1070 (9th Cir. 1994)); *see also id.* at 274. In response to the court’s ruling, Governor Bevin eliminated vision and dental benefits for 460,000 Medicaid enrollees, claiming that the state could no longer afford those benefits. Daniel Desrochers, *After Medicaid Ruling Doesn’t Go His Way, Kentucky Governor Eliminates Dental and Vision*, GOVERNING (July 3, 2018), <https://www.governing.com/topics/health-human-services/tns-kentucky-bevin-vision-dental.html> [https://perma.cc/6773-DDFM].

<sup>257</sup> Josh James, *Kentucky Medicaid Fight Enters Round Two*, MOREHEAD STATE PUB. RADIO (Jan. 15, 2019), <https://www.wmky.org/post/kentucky-medicaid-fight-enters-round-two> [https://perma.cc/9ZLS-VJCC].

<sup>258</sup> *Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019).

<sup>259</sup> *See* Letter from Asa Hutchinson, Governor of Ark., to Hon. Sylvia Mathews Burwell, Sec’y, U.S. Dep’t of Health & Hum. Servs. (June 28, 2016), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ar/Health-Care-Independence-Program-Private-Option/ar-works-application-07072016.pdf> [https://perma.cc/EF79-E2FJ] (requesting permission from HHS to extend and amend its program for the ACA expansion population, renaming the project “Arkansas Works”).

<sup>260</sup> *See* Letter from Sylvia Burwell, Sec’y, U.S. Dep’t of Health & Hum. Servs., to Asa Hutchinson, Governor of Ark. (Apr. 5, 2016) (denying Arkansas’s request because it is not “consistent with the purposes of the Medicaid program”) (on file with journal); *see also* Letter from Andrew M. Slavitt, Acting Adm’r, Ctrs. for Medicare & Medicaid Servs., to Thomas Betlach, Dir., Az. Health Care Cost Containment Sys. (Sept. 30, 2016) (approving the waiver but denying a work requirement and other provisions from Arizona and, in the process, concluding that work requirements do “not support the objectives” of Medicaid) (on file with journal).

<sup>261</sup> *See* Letter from Andrew M. Slavitt, Acting Adm’r, Ctrs. for Medicare & Medicaid Servs., to Cindy Gillespie, Dir., Ark. Dep’t of Hum. Servs. (Dec. 8, 2016), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ar/Health-Care-Independence-Program-Private-Option/ar-works-amndmnt-appvl-12292017.pdf> [https://perma.cc/4KJG-PJ9W] (extending the §1115 project through the end of 2021).

viewed these actions as evidence that the Obama Administration sought to get as many states as possible to opt in to the ACA expansion, even though Arkansas's was a proposal the federal government would have never designed themselves.<sup>262</sup> Once President Trump took office, Arkansas Governor Asa Hutchinson submitted a request to HHS to amend its Medicaid waiver.<sup>263</sup> Specifically, Arkansas requested to implement a work requirement, eliminate three-month retroactive coverage, and phase out Medicaid coverage of individuals with household incomes above 100% FPL.<sup>264</sup> After a public comment period, the Secretary of HHS approved the Arkansas Works Amendment, with qualifications.<sup>265</sup> The federal government allowed Arkansas to implement the work requirement and to reduce the retroactive coverage to not less than one month.<sup>266</sup> The federal government denied the state's request to reduce the income eligibility for Medicaid.

Similar to Kentucky, Arkansas residents impacted by the Medicaid changes challenged the waiver in federal court, which the district court designated as related to *Stewart v. Azar* and thus assigned to Judge Boasberg.<sup>267</sup> As Kentucky had in *Stewart*, Arkansas intervened as a defendant, and both sides filed for summary judgment. In his decision in the Arkansas litigation, *Gresham v. Azar*, Judge Boasberg found that, like in *Stewart*, the Secretary “neither offered his own estimates of coverage loss nor grappled with comments in the administrative record projecting that the Amendments would lead a substantial number of Arkansas residents to be disenrolled from Medicaid,” making the decision to grant Arkansas's waiver “arbitrary and capricious.”<sup>268</sup>

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<sup>262</sup> See Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1737–39 (2018); BETHANY MAYLONE & BENJAMIN D. SOMMERS, THE COMMONWEALTH FUND, EVIDENCE FROM THE PRIVATE OPTION: THE ARKANSAS EXPERIENCE (2017), [https://www.commonwealthfund.org/sites/default/files/documents/\\_\\_\\_media\\_files\\_publications\\_issue\\_brief\\_2017\\_feb\\_1932\\_maylone\\_private\\_option\\_arkansas\\_ib\\_v2.pdf](https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_issue_brief_2017_feb_1932_maylone_private_option_arkansas_ib_v2.pdf) [<https://perma.cc/YT6V-8R7L>]; Rebecca Adams, *Federal Officials Give Arkansas Medicaid Waiver*, THE COMMONWEALTH FUND (Sept. 27, 2013), <https://www.commonwealthfund.org/publications/newsletter-article/federal-officials-give-arkansas-medicaid-waiver> [<https://perma.cc/M9N4-UNQL>].

<sup>263</sup> See Letter from Asa Hutchinson, Governor of Ark., to Hon. Thomas E. Price, Sec'y, U.S. Dep't of Health & Hum. Servs. (June 30, 2017) (on file with journal).

<sup>264</sup> See *id.*

<sup>265</sup> Letter from Seema Verma, Adm'r, Ctrs. for Medicare & Medicaid Servs., to Cindy Gillespie, Dir., Ark. Dep't of Hum. Servs. (Mar. 5, 2018) (on file with journal).

<sup>266</sup> *Id.*

<sup>267</sup> While HHS objected to this related-case designation, the district court determined the cases shared legal and factual issues that weighed in favor of retaining the case. See Minute Order, *Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019) (No. 18-cv-1900), ECF No. 22.

<sup>268</sup> *Gresham*, 363 F. Supp. 3d at 175 (“As Opening Day arrives, the Court finds its guiding principle in Yogi Berra’s aphorism, ‘It’s *déjà vu* all over again.’”)

While the district court's decision to vacate and set aside Arkansas's Medicaid waiver tracked its decision to do the same with Kentucky's, Arkansas's waiver presented an additional wrinkle. Whereas Kentucky's changes had yet to take effect, Arkansas's changes were an amendment to an existing waiver.<sup>269</sup> For this reason, Arkansas and the federal government in *Gresham* were in a slightly stronger position than Kentucky in *Stewart* to ask the court not to vacate the waiver because of the disruption it would cause to Arkansas's Medicaid program.<sup>270</sup> The decision to decline to vacate turned on the "seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change."<sup>271</sup> The district court said that for Arkansas, like Kentucky in *Stewart*, "the road to cure the deficiency in this case is, at best, a rocky one," but that the second factor of disruptive consequences was a "closer call."<sup>272</sup> The court balanced the disruption for the state administrators against "the harms that Plaintiffs and persons like them will experience if the program remains in effect."<sup>273</sup> The court also took into consideration that "Arkansas's own numbers confirm[ed] that in 2018, more than 16,000 persons have lost their Medicaid" and that "[HHS and the State] offer[ed] no reason to think the numbers w[ould] be different in 2019" and "indeed, once the requirements apply to persons aged

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<sup>269</sup> *Id.* at 169, 182.

<sup>270</sup> The district court acknowledged that even though vacatur is "the normal remedy," courts "sometimes decline to vacate an agency's action." *Id.* at 182 (quoting *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014)).

<sup>271</sup> *Id.* (quoting *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

<sup>272</sup> *Id.* at 183. The district court considered concerns that vacatur would undermine data collection and their ability to educate Arkansas Medicaid recipients on the work requirements, which began for some recipients in June 2018 and others in January 2019. *Id.* The district court pointed out that even though HHS was concerned about data collection, the federal government approved the project despite it lacking any evaluation component and Arkansas did not mention this concern in its summary judgment motion. *Id.* Moreover, the district court suggested, Arkansas and HHS could always extend the demonstration project to facilitate more data collection. *Id.* at 183–84. As for outreach efforts, the district court acknowledged that "vacatur of work requirements that have already been implemented may send mixed messages," but that the disruption would be minimized since the court was handing down its decision before Arkansas began disenrolling noncompliant recipients. *Id.* at 184.

<sup>273</sup> *Id.*

19–29” would be “likely to rise.”<sup>274</sup> The court concluded that the Arkansas Works Amendments could not stand.<sup>275</sup>

Judge Boasberg’s opinions could have taken a different tack and stood against sloppy agency action that intended to cut anti-poverty programs without following their own procedures. There were other details in the *Stewart* record that suggested the illegality of the Trump Administration’s actions. For instance, CMS published its letter to state Medicaid directors and approved the Kentucky waiver the following day.<sup>276</sup> However, the waiver approval had the date filled in for a prior day.<sup>277</sup> If ever there was a smoking gun in an administrative record showing that an agency decision was unreasoned, this was it. CMS had drafted the waiver request to fit Kentucky’s waiver—a backwards process which betrayed its arbitrary action.<sup>278</sup> Instead, *Stewart v. Azar* reads as broader defense of legality in administrative action, or, at the very least, meaningful judicial oversight of an agency action that could undo a longstanding statutory regime.

Recently, the D.C. Circuit considered appeals by the federal government, Kentucky, and Arkansas challenging Judge Boasberg’s decisions. At oral argument, the panel voiced concern that the federal government and the two states were attempting through agency action to add an additional condition to Medicaid without any authority from Congress to do so.<sup>279</sup> These concerns

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<sup>274</sup> *Id.* at 184–85. In light of this litigation, GOP lawmakers in Michigan continue to push their proposal to exempt white rural areas from its Medicaid work requirement. Alice Ollstein, *Trump Admin Poised to Give Rural Whites a Carve-Out on Medicaid Work Rules*, TALKING POINTS MEMO (May 14, 2018, 6:00 AM), <https://talkingpointsmemo.com/dc/trump-admin-poised-to-give-rural-hites-a-carve-out-on-medicaid-work-rules> [<https://perma.cc/VU4D-NSBV>] (discussing proposals in Michigan and Ohio). The question of whether states can apply these work requirements to federally recognized tribes adds yet another layer of complexity. *Id.*

<sup>275</sup> *Gresham*, 363 F. Supp. 3d at 185.

<sup>276</sup> *Stewart v. Azar*, 313 F. Supp. 3d 237, 246 (D.D.C. 2018).

<sup>277</sup> See Plaintiffs’ Memorandum in Support of Motion for Summary Judgment at 46, *Stewart*, 313 F. Supp. 3d 237 (No. 18-cv-152).

<sup>278</sup> This may be another instance of “regulatory slop” by the Trump Administration. See, e.g., Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1653–54 (2019) (describing how “the Trump Administration has doggedly ignored some settled administrative-law expectations for agency decisionmaking”); Super, *supra* note 245, at 1593 (arguing that “[t]he Trump administration, in word and deed, has rejected the broad structural consensus about the means and limits of administrative law that have existed since the New Deal”).

<sup>279</sup> See Oral Argument at 28:18, *Gresham v. Azar*, 950 F.3d 93 (D.C. Cir. 2020) (No. 19-5094), *petitions for cert. filed*, Nos. 20-37 & 20-38 (July 13, 2020), [https://www.cadc.uscourts.gov/recordings/recordings2019.nsf/836067B4CDCC615785258490005718B0/\\$file/19-5094.mp3](https://www.cadc.uscourts.gov/recordings/recordings2019.nsf/836067B4CDCC615785258490005718B0/$file/19-5094.mp3) [<https://perma.cc/T8GX-NUXN>]. For more information about and description of the oral arguments, see Amy Goldstein, *Appeals Panel Expresses Skepticism About Medicaid Work Requirements*, WASH. POST (Oct. 11, 2019, 1:11 PM), <https://www.washingtonpost.com/health/appeals-panel-expresses->

became moot for Kentucky as, following Governor Bevin's defeat in the 2019 election, Kentucky rescinded its waiver request and withdrew its appeal.<sup>280</sup> But the Arkansas waiver remained, and the D.C. Circuit held that the Secretary's grant of that waiver was arbitrary and capricious and affirmed Judge Boasberg's vacatur.<sup>281</sup>

In an opinion penned by Judge David Sentelle, the D.C. Circuit rejected the Trump Administration's contention that the Secretary's waiver authority was unreviewable because the Medicaid Act itself says the Secretary is to grant waivers "likely to assist in promoting the objectives" of Medicaid.<sup>282</sup> The D.C. Circuit went on to point out that "[t]he district court is indisputably correct that the principal objective of Medicaid is providing health care coverage."<sup>283</sup> The Court of Appeals relied on the text of the statute and judicial interpretation by other circuits.<sup>284</sup> The D.C. Circuit also rejected the Secretary's arguments that it was a reasoned decision on the grounds that the Secretary's approval of the waiver cited alternative objectives like transitioning recipients to commercial coverage and promoting financial independence, since the Secretary could not point to anywhere in the Medicaid Act that suggests those objectives were part of the statutory scheme.<sup>285</sup> Judge Sentelle rightly pointed out that Congress has added language in the purposes of the statutes governing TANF and SNAP as well as work requirements in both those programs, but that Congress declined to do either for Medicaid, at precisely the same time they amended the statutes governing the other two programs.<sup>286</sup> The D.C. Circuit concluded that, since

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skepticism-about-medicaid-work-requirements/2019/10/11/a8357c4e-eb8a-11e9-9c6d-436a0df4f31d\_story.html [https://perma.cc/9KV7-QENQ].

<sup>280</sup> See *Gresham*, 950 F.3d at 98 (noting that "[o]n December 16, 2019, Kentucky moved to dismiss its appeal as moot because it 'terminated the section [1315] demonstration project'" and that "[n]either the [federal] government nor the appellees opposed the motion" (citation omitted)); see also Alex Ebert, *First Approved Medicaid Work Rule on Chopping Block in Kentucky*, BLOOMBERG L. HEALTH & BUS. NEWS (Nov. 14, 2019, 5:17 AM), <https://news.bloomberglaw.com/health-law-and-business/first-approved-medicaid-work-rule-on-chopping-block-in-kentucky> [https://perma.cc/F9AZ-TJ4W] (quoting Kentucky Governor-elect Andy Beshear's victory speech: "In my first week in office I am going to rescind this governor's Medicaid waiver").

<sup>281</sup> See *Gresham*, 950 F.3d at 96.

<sup>282</sup> See *id.* at 96, 98 (reasoning that judicial review is barred "only in those 'rare instances' where 'there is no law to apply'" (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971))).

<sup>283</sup> See *id.* at 99.

<sup>284</sup> See *id.* at 99–101.

<sup>285</sup> See *id.* at 101–02 ("When Congress wants to pursue additional objectives within a social welfare program, it says so in the text.").

<sup>286</sup> See *id.* (pointing out that Congress did not add a work requirement to Medicaid or any language about promoting work). Judge Sentelle made this point at oral argument. See Goldstein, *supra* note 279 (quoting Judge Sentelle that the Medicaid, Food Stamp, and TANF statutes "'are not comparable at all' because Congress specifically wrote that financial self-sufficiency is a goal of the other two programs [TANF and SNAP] but has never included that in Medicaid law"); see also Nicole Huberfeld, *Can Work Be*



the Secretary failed to consider whether the Arkansas waiver would result in Medicaid recipients losing coverage, the decision to approve the State's waiver was arbitrary and capricious.<sup>287</sup>

Meanwhile, other states' efforts to impose work requirements ground to a halt, even before the COVID-19 pandemic hit. Judge Boasberg blocked another waiver granted by HHS that would have allowed New Hampshire to impose work requirements on Medicaid recipients.<sup>288</sup> And shortly before the D.C. Circuit heard argument on Kentucky and Arkansas's actions, Judge Boasberg was assigned two other lawsuits involving Michigan and Indiana's waivers.<sup>289</sup> After the D.C. Circuit sitting, Arizona and Indiana announced delaying the implementation of work requirements, referencing the controversies in court.<sup>290</sup> Depending on the length of the pandemic, the Arkansas and New Hampshire litigation will continue, and the cases will test Governor Bevin's prediction: "'We'll win at the U.S. Supreme Court, but it takes time' . . . . 'And this will be the first entitlement reform of any significance in America since the mid-'90s.'"<sup>291</sup> Despite Governor Bevin's electoral defeat, and although he was proven wrong about Kentucky, he may

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*Required in the Medicaid Program?*, 378 NEW ENG. J. MED. 788, 788–91 (2018) (providing the background for this omission).

<sup>287</sup> See *Gresham*, 950 F.3d at 104 ("While we have held that it is not arbitrary or capricious to prioritize one statutorily identified objective over another, it is an entirely different matter to prioritize non-statutory objectives to the exclusion of the statutory purpose.").

<sup>288</sup> *Philbrick v. Azar*, 397 F. Supp. 3d 11, 15 (D.D.C. 2019) ("The issues presented in this case are all too familiar. In the past year or so, this Court has resolved challenges to similar programs in Kentucky and Arkansas, each time finding the Secretary's approval deficient.").

<sup>289</sup> See Class Action Complaint for Declaratory & Injunctive Relief, *Young v. Azar*, No. 19-cv-3526 (D.D.C. Nov. 22, 2019) (challenging the legality of Michigan's Medicaid waiver in a manner similar to the Kentucky, Arkansas, and New Hampshire lawsuits); Complaint for Declaratory & Injunctive Relief, *Rose v. Azar*, No. 19-cv-2848 (D.D.C. Sept. 23, 2019) (challenging Indiana's Medicaid waiver on similar grounds). While Indiana has represented that its waiver will not reduce its Medicaid rolls, it was likely that this waiver would meet a similar fate.

<sup>290</sup> See Jonathan J. Cooper, *Arizona Quietly Suspends Medicaid Work Requirement*, ASSOC. PRESS (Oct. 22, 2019), <https://apnews.com/1fad03f5d68d4797a24f7f942d0aa430> [<https://perma.cc/5PTE-DXSD>]; Shari Rudavsky, *State Temporarily Suspends Controversial Work Requirement for Healthy Indiana Plan*, INDY STAR (Oct. 31, 2019, 3:29 PM), <https://www.indystar.com/story/news/health/2019/10/31/medicaid-work-requirement-suspended-while-indiana-faces-lawsuit/4110646002/> [<https://perma.cc/GG92-YECM>]. But see Corin Cates-Carney, *Health Department: Medicaid Expansion Work Requirements Won't Take Effect in January*, MONT. PUB. RADIO (Nov. 7, 2019), <https://www.mtpr.org/post/health-department-medicaid-expansion-work-requirements-wont-take-effect-january> [<https://perma.cc/2LET-WXQN>] (pressing ahead with the work requirements policy due to state law).

<sup>291</sup> Paige Winfield Cunningham, *The Health 202: Medicaid Work Requirements Were Defeated at the Ballot Box Last Night*, WASH. POST (Nov. 6, 2019), <https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2019/11/06/the-health-202-medicaid-work-requirements-were-defeated-at-the-ballot-box-last-night/5dc1bd3888e0fa10ffd20b7b/> [<https://perma.cc/28X7-FUGA>].

yet be proven right about Medicaid as a whole. The Trump Administration and the State of Arkansas have filed certiorari petitions in the Supreme Court.<sup>292</sup>

*b. SNAP work requirements*

The Trump Administration has pursued a similar strategy of reducing access to SNAP and has been similarly stymied in federal court. The same day President Trump signed the 2018 Farm Bill, which lacked any structural cuts to SNAP or increased work requirements for its recipients, Secretary of Agriculture Sonny Perdue proposed a rule to achieve these changes by other means.<sup>293</sup> In the proposed rule, the Department claimed that it “consistently approved waivers based on qualification for extended unemployment benefits because it has been a clear indicator of lack of sufficient jobs and an especially responsive indicator of sudden economic downturns,” but that states’ “widespread use of ABAWD waivers during a period of historically low unemployment” suggests that “regulatory standards should be reevaluated.”<sup>294</sup>

True to form, the Trump Administration’s rule disaggregates the SNAP caseload rather than cutting benefits directly. It impacts only SNAP recipients who are considered to be ABAWDs within the meaning of the Food Stamp Act and implementing regulations. ABAWDs include recipients ages eighteen to forty-nine who do not have a disability and are not caring for children or other dependents in their own home.<sup>295</sup> The USDA’s rule would limit the extent to which states can waive a statutory provision that places a time limit on ABAWDs’ receipt of SNAP benefits. ABAWDs currently can only receive three months of SNAP benefits in a three-year period unless they meet a work requirement or are exempted from that work requirement.<sup>296</sup> States, however, can apply to the federal government for a waiver if the state’s unemployment

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<sup>292</sup> *Gresham*, 950 F.3d 93.

<sup>293</sup> See Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, 84 Fed. Reg. 980 (proposed Feb. 1, 2019) (to be codified at 7 C.F.R. pt. 273).

<sup>294</sup> *Id.* at 981, 985.

<sup>295</sup> See 7 C.F.R. § 273.24(c) (2019) (excepting individuals from time limits for able-bodied adults if certain conditions apply). As it happens, two-thirds of SNAP recipients are children, senior citizens, or people with disabilities. *SNAP Supports Children and Families*, ROBERT WOOD JOHNSON FOUND. (Sept. 2018), <https://www.rwjf.org/en/library/research/2018/09/snap-supports-children-and-families.html> [<https://perma.cc/ZYF2-WTHN>].

<sup>296</sup> See 7 U.S.C. § 2015(o); see also 7 C.F.R. § 273.24(b) (“Individuals are not eligible to participate in SNAP . . . if the individual received [food stamps] for more than three countable months during any three-year period . . .”). See generally Andrew Hammond & MacKenzie Speer, *SNAP’s Time Limit: Emerging Issues in Litigation and Implementation*, CLEARINGHOUSE REV. (Apr. 2017) (summarizing SNAP’s statutory and regulatory scheme for ABAWDs).

rate is above a certain threshold.<sup>297</sup> The Trump Administration’s final rule would require a higher unemployment rate from states to trigger waiver eligibility, thereby allowing fewer states to qualify for the waivers.<sup>298</sup> The regulation would also require states to reapply for waivers every year—rather than every two years, thus adding administrative costs—and would prohibit states from carrying over unused exemptions into the following year.<sup>299</sup> The Department of Agriculture estimates that 1,087,000 SNAP recipients will be subjected to the new time limit and that “approximately 688,000 will not meet the work requirement.”<sup>300</sup> Researchers estimate that 755,000 Americans may lose their SNAP benefits under the proposed rule by living in an area that will lose its waiver.<sup>301</sup>

As with the Medicaid work requirements, this agency action regarding SNAP was swiftly challenged in federal court. Before the rule could go into effect as planned on April 1, 2020, a federal court preliminarily enjoined the Department of Agriculture from implementing it nationwide. Nineteen states, the District of Columbia, and the City of New York sued the USDA alleging that the agency’s rule violated the Administrative Procedure Act for exceeding its statutory authority, failing to observe required procedures, and being

<sup>297</sup> 7 U.S.C. § 2015(o)(4)(A) (allowing states to seek a waiver to suspend the ABAWD time limit for “any group of individuals in the State” if the requested waiver area “has an unemployment rate of over 10 percent” or “does not have a sufficient number of jobs to provide employment for the individuals”).

<sup>298</sup> Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, 84 Fed. Reg. 66,782, 66,790 (Dec. 5, 2019) (to be codified at 7 C.F.R. pt. 273).

<sup>299</sup> Supplemental Nutrition Assistance Program Requirements for Able-Bodied Adults Without Dependents, 84 Fed. Reg. 980, 987–88 (proposed Feb. 1, 2019) (to be codified at 7 C.F.R. pt. 273); Danielle Paquette & Jeff Stein, *Trump Administration Aims to Toughen Work Requirements for Food Stamp Recipients*, WASH. POST (Dec. 20, 2018, 5:00 AM), [https://www.washingtonpost.com/business/economy/trump-administration-aims-to-toughen-work-requirements-for-food-stamps-recipients/2018/12/20/cf687136-03e6-11e9-b6a9-0aa5c2fcc9e4\\_story.html](https://www.washingtonpost.com/business/economy/trump-administration-aims-to-toughen-work-requirements-for-food-stamps-recipients/2018/12/20/cf687136-03e6-11e9-b6a9-0aa5c2fcc9e4_story.html) [https://perma.cc/PB8A-H96C]. The unused exemptions are the 15% rule. See Supplemental Nutrition Assistance Program Requirements for Able-Bodied Adults Without Dependents, 84 Fed. Reg. 980, 987 (proposed Feb. 1, 2019) (to be codified at 7 C.F.R. pt. 273).

<sup>300</sup> Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, 84 Fed. Reg. 66,782, 66,809 (Dec. 5, 2019) (to be codified at 7 C.F.R. pt. 273); see also Jacob Bunge, *White House to Tighten Work Requirements for Food-Stamp Aid*, WALL ST. J. (Dec. 4, 2019), <https://www.wsj.com/articles/trump-administration-to-curb-states-control-of-food-aid-11575455401> [https://perma.cc/W68M-TGVN] (discussing rollout of the Administration’s policy).

<sup>301</sup> See, e.g., Paquette & Stein, *supra* note 299; Lauren Bauer, *Workers Could Lose SNAP Benefits Under Trump’s Proposed Rule*, BROOKINGS (Dec. 20, 2018), <https://www.brookings.edu/blog/up-front/2018/12/20/workers-could-lose-snap-benefits-under-trumps-proposed-rule/> [https://perma.cc/WTS8-2U5B] (drawing on research to conclude that “strict enforcement of work requirements will sanction not only those who are able to work but are choosing not to, but those who are unable to work and those who are unable to find work or prove that they have met the requirement”).

arbitrary and capricious.<sup>302</sup> A social service organization and individual plaintiffs also filed suit.<sup>303</sup> The lawsuits were consolidated as both made similar claims and requested that the district court preliminarily enjoin the final rule.

In weighing the propriety of an injunction and a stay under § 705 of the Administrative Procedure Act, the district court determined that on all issues but one, the plaintiffs were likely to succeed on the merits that the USDA's rule was arbitrary and capricious. While the district court did not address the plaintiffs' other claims about whether the USDA failed to observe procedural requirements, the district court pointed out that USDA received over 100,000 comments, which were overwhelmingly opposed to the rule change, and that on some comments the "USDA did no more than state that that this evidence was rejected."<sup>304</sup> The district court, quoting the D.C. Circuit in *Gresham*, reminded USDA that "[n]odding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."<sup>305</sup>

Unlike with Medicaid, which has no statutory provisions or existing regulations regarding work requirements, the Trump Administration relied on statutory provisions and existing regulations that permit such requirements for some SNAP recipients. While the plaintiffs were not in as strong of a position as the Medicaid recipients were in the aforementioned litigation, the plaintiffs drew on similar arguments that the Administration had sought to achieve through regulation what it failed to secure through legislation, and that the proposed regulation ran afoul of SNAP's federal statutory scheme. Furthermore, like in the Medicaid litigation, the government plaintiffs and SNAP recipients could point to the longstanding practices that have governed SNAP administration since the provision was enacted in 1996.<sup>306</sup>

As for the other preliminary injunction factors discussed in Section I.C.2, they weighed in favor of stopping the SNAP rule.<sup>307</sup> The district court credited the state plaintiffs' representations that the increased procedural costs associated with implementing the new rule would be significant and irreparable.<sup>308</sup> On the "balance of [the] equities" inquiry, the federal judge

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<sup>302</sup> Complaint ¶¶ 93–94, *District of Columbia v. U.S. Dep't of Agric.*, No. 20-cv-119 (D.D.C. Jan. 16, 2020) (contrary to law); *id.* ¶¶ 94–95 (procedural claim); *id.* ¶ 95 (arbitrary and capricious).

<sup>303</sup> Complaint, *Bread for the City v. U.S. Dep't of Agric.*, No. 20-cv-127 (D.D.C. Jan. 16, 2020).

<sup>304</sup> *District of Columbia v. U.S. Dep't of Agric.*, No. 20-cv-119, 2020 WL 1236657, at \*1, \*21 (D.D.C. Mar. 13, 2020).

<sup>305</sup> *Id.* at \*21 (quoting *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020), *petitions for cert. filed*, Nos. 20-37 & 20-38 (July 13, 2020)).

<sup>306</sup> See Complaint, *supra* note 302, ¶¶ 15–16.

<sup>307</sup> *District of Columbia*, 2020 WL 1236657, at \*22–31.

<sup>308</sup> *Id.* at \*22–24.

noted that “[t]he equities weigh sharply in favor of preliminary relief” since “USDA’s only harm is that it will be required to keep in place the existing regulation—which USDA has used for 19 years—while judicial review of its new regulation runs its course” whereas “absent preliminary relief, the state plaintiffs will suffer irreparable harm in the form of massive costs associated with implementing a sea change in a program that serves over forty million U.S. residents.”<sup>309</sup> Here, the federal court identified the dynamics of fiscal federalism discussed earlier in this Article. Furthermore, the court, like many before it in welfare litigation, identified “the grave harm to the individual plaintiffs who will have to go without the \$194 per month they need to buy food,” not to mention the “[n]early 700,000 people across the country [who] face the same hardship.”<sup>310</sup>

In granting the relief sought, the district court pointed out that a nationwide injunction was appropriate since the affected individuals “reside in 34 states, plus the Virgin Islands and the District, as those 36 jurisdictions currently have either statewide or partial ABAWD time limit waivers.”<sup>311</sup> The Trump Administration signaled that it planned to appeal the nationwide injunction, but the COVID-19 pandemic changed its calculus and the governing law.<sup>312</sup> In one of the initial stimulus packages enacted in the wake of the coronavirus outbreak, Congress lifted all SNAP work requirements beginning in April 2020 and lasting until a month after the COVID-19 public health emergency declaration is lifted.<sup>313</sup> The Trump Administration appears committed to pursuing its appeal despite the pandemic,<sup>314</sup> but given the duration of the COVID-19 crisis, the district court’s stay could be the only court decision on SNAP work requirements before the next presidential Administration.

### 3. *Public Charge Regulations*

While work requirements are the most prominent example of efforts to undo food and medical assistance through federal agency action, another example of this strategy of disaggregation is the Trump Administration’s

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<sup>309</sup> *Id.* at \*31.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at \*36.

<sup>312</sup> Ashraf Khalil, *USDA to Appeal Ruling, Seeks Food Stamp Change amid Pandemic*, ASSOC. PRESS (Mar. 18, 2020), <https://apnews.com/e2a2e9be5950a98f4dabcc2649aef332> [<https://perma.cc/9U96-8PRY>]; Lola Fadulu, *Trump Backs Off Tougher Food Stamp Work Rules for Now*, N.Y. TIMES (Apr. 10, 2020), <https://nyti.ms/3e5m6we> [<https://perma.cc/N2QA-SMGF>]; see also Families First Coronavirus Response Act of 2020 § 2301, Pub. L. 116-127, 134 Stat. 178, 187–88 (codified at 7 U.S.C. § 2011).

<sup>313</sup> Families First Coronavirus Response Act § 2301(a).

<sup>314</sup> Notice of Appeal, *District of Columbia v. U.S. Dep’t of Agric.*, No. 20-cv-119 (D.D.C. May 12, 2020), ECF No. 61 (filed by Secretary Perdue).

efforts to discourage legal immigrants and their families from accessing public benefits.<sup>315</sup> Here, the Trump Administration is not changing the eligibility rules for welfare programs. Instead, the Trump Administration has promulgated a final rule that creates dire consequences for noncitizens who try to access or who have accessed these benefits, allowing immigration officials to deny them entry, withhold permanent status, and deport them.<sup>316</sup> In effect, consular officials could deny admission to any individual who they determined would be likely to apply for benefits like Medicaid or SNAP.<sup>317</sup> For individuals seeking permanent status, immigration judges could deny a Permanent Resident Card, known as a “Green Card,” to a noncitizen who had used these programs or others. As a result, this regulation is expected to spur a decline in enrollment in immigrant communities, including citizens who are legally entitled to these benefits.<sup>318</sup>

Here, too, public interest lawyers sued the Trump Administration in federal court. And yet, the Administration has better prospects for achieving its policy goals. The Trump Administration published its final rule on public charge on August 14, 2019.<sup>319</sup> The same day the D.C. Circuit heard oral argument in the Medicaid work requirement cases discussed above, three federal district courts issued three preliminary injunctions staying the implementation of the final regulation.<sup>320</sup> Each district court relied heavily on Congress’s actions (or lack thereof). Each judge relied on Congress’s refusal to deny eligibility for noncitizens for these programs. The opinions detailed how Congress considered but rejected such eliminations of eligibility in the Welfare Reform Act of 1996 (PRWORA) and in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). These abandoned

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<sup>315</sup> See Hammond, *supra* note 219, at 518–28 (2018) (detailing the Trump Administration’s efforts before the promulgation of the final rule).

<sup>316</sup> Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245 & 248).

<sup>317</sup> See *id.* at 41,462; see also *Public Charge Update: What Advocates Need to Know Now*, NAT’L IMMIGR. L. CTR. (Mar. 26, 2020), <https://www.nilc.org/issues/economic-support/pubcharge/public-charge-update-what-advocates-need-to-know-now/> [<https://perma.cc/HU3A-KWR8>].

<sup>318</sup> HAMUTAL BERNSTEIN, DULCE GONZALEZ, MICHAEL KARPMAN & STEPHEN ZUCKERMAN, URB. INST., ONE IN SEVEN ADULTS IN IMMIGRANT FAMILIES REPORTED AVOIDING PUBLIC BENEFIT PROGRAMS IN 2018, at 3 (2019), [https://www.urban.org/sites/default/files/publication/100270/one\\_in\\_seven\\_adults\\_in\\_immigrant\\_families\\_reported\\_avoiding\\_publi\\_8.pdf](https://www.urban.org/sites/default/files/publication/100270/one_in_seven_adults_in_immigrant_families_reported_avoiding_publi_8.pdf) [<https://perma.cc/CZP8-7PRC>].

<sup>319</sup> See Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292.

<sup>320</sup> See *City of San Francisco v. Citizenship & Immigr. Servs.*, 408 F. Supp. 3d 1057, 1072, 1130–31 (N.D. Cal. 2019) (including four states and D.C. as plaintiffs); *New York v. U.S. Dep’t of Homeland Sec.*, 408 F. Supp. 3d 334, 353 (S.D.N.Y. 2019) (including three states as plaintiffs); *Washington v. U.S. Dep’t of Homeland Sec.*, 408 F. Supp. 3d 1191, 1224 (E.D. Wash. 2019) (including fourteen states as plaintiffs). A few days later, another federal court issued a more limited preliminary injunction. See *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1031 (N.D. Ill. 2019).

statutory changes, the district courts reasoned, were evidence in favor of stopping the Trump Administration from attaching immigration enforcement consequences to receiving these benefits.<sup>321</sup> One federal district court pointed to the inaction on the part of Congress since the 1999 Field Guidance was published by the Immigration and Naturalization Service (INS), the predecessor to U.S. Immigration and Customs Enforcement (ICE), to revise the definition of public charge, including most recently in 2013.<sup>322</sup> Summing up, one federal district court characterized the federal government's position as "urg[ing] the Court to take two unsupported leaps of statutory construction."<sup>323</sup> The first is "a legal conclusion that the purpose of the public charge inadmissibility provision is to 'ensur[e] the economic self-sufficiency of aliens,'" despite evidence of welfare provisions to the contrary.<sup>324</sup> The second is that "Congress has delegated to DHS the role of determining what benefits programs, income levels, and household sizes or compositions[] promote or undermine self-sufficiency," even though the government failed to "cite[] any statute, legislative history, or other resource that supports" such a delegation.<sup>325</sup>

While the legal arguments echo those made in the Medicaid work requirements litigation, the plaintiffs differed. The public charge lawsuits included state, county, and city governments as plaintiffs, which each federal court concluded had standing to bring such a suit.<sup>326</sup> And the district courts relied on the upheaval of the state governments' operations as the basis for the likelihood of irreparable harm, a key element in the balancing test for deciding whether to grant a preliminary injunction, as discussed in Part I.<sup>327</sup>

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<sup>321</sup> See *City of San Francisco*, 408 F. Supp. 3d at 1097–99; *New York*, 408 F. Supp. 3d at 347; *Washington*, 408 F. Supp. 3d at 1215 (citing 8 U.S.C. § 1182(a)(4)).

<sup>322</sup> *Washington*, 408 F. Supp. 3d at 1216.

<sup>323</sup> *Id.* at 1217.

<sup>324</sup> *Id.* (quoting the federal government's brief).

<sup>325</sup> *Id.*

<sup>326</sup> See *City of San Francisco*, 408 F. Supp. 3d at 1126; *New York*, 408 F. Supp. 3d at 334; *Washington*, 408 F. Supp. 3d at 1203. In the last few years, there has been a bumper crop of scholarship on state standing. See, e.g., Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229 (2019); Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851 (2016); Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201 (2017); Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637 (2016). This scholarship tends to attribute this multistate litigation strategy to the Supreme Court's decision in *Massachusetts v. Environmental Protection Agency* that states are "entitled to special solicitude" when it comes to standing. 549 U.S. 497, 520 (2007); see also Tara Leigh Grove, *Foreword: Some Puzzles of State Standing*, 94 NOTRE DAME L. REV. 1883, 1883–84 (2019).

<sup>327</sup> *City of San Francisco*, 408 F. Supp. 3d at 1126–27; *New York*, 408 F. Supp. 3d at 350.

The Trump Administration has enjoyed some recent, but not uniform, success in convincing the courts of appeals and the Supreme Court to, at least, stay the district court injunctions. The Trump Administration immediately appealed these injunctions to the Second and Ninth Circuits. The Second Circuit denied the Administration's request, but the Ninth Circuit stayed both injunctions from the district judges in California and Washington State.<sup>328</sup> Then, the Supreme Court injected even more uncertainty into this controversy by staying the New York district court's injunction.<sup>329</sup> In a 5–4 ruling, the Court's order did not discuss the merits of the underlying lawsuits. The only indication as to any Justices' opinion on the merits was Justice Neil Gorsuch's concurrence, joined by Justice Clarence Thomas, in which he questioned the legality of nationwide injunctions beyond the public charge context.<sup>330</sup>

While the grant of an emergency stay in the New York case appeared to rely on the overly broad relief, as opposed to the public charge rule itself, a few weeks later the Supreme Court granted another request for an emergency stay by the Justice Department for the public charge injunction that only applied to the rule's implementation in Illinois.<sup>331</sup> Justice Sonia Sotomayor dissented from the grant of the stay, noting that the government “has recently sought stays in an unprecedented number of cases, demanding immediate attention and consuming limited Court resources in each.”<sup>332</sup> Justice Sotomayor pointed out that, unlike the nationwide public charge injunctions, the injunction at issue here only applied to Illinois.<sup>333</sup> Therefore, “the Government's only claimed hardship is that it must enforce an existing interpretation of an immigration rule in one State—just as it has done for the past 20 years—while an updated version of the rule takes effect in the remaining 49.”<sup>334</sup> Justice Sotomayor concluded that that was not the type of hardship that merits the extraordinary relief the Supreme Court granted.<sup>335</sup>

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<sup>328</sup> See *New York v. U.S. Dep't of Homeland Sec.*, Nos. 19-3591 & 19-3595, 2020 WL 95815 (2d Cir. Jan. 8, 2020) (order denying stay); *City of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773 (9th Cir. 2019) (order granting stay).

<sup>329</sup> *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (order granting stay).

<sup>330</sup> *Id.* at 600–01 (Gorsuch, J., concurring in the grant of stay) (stating that the “real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them”).

<sup>331</sup> *Wolf v. Cook County*, 140 S. Ct. 681 (2020).

<sup>332</sup> *Id.* at 683 (Sotomayor, J., dissenting from the grant of stay).

<sup>333</sup> *Id.* at 681.

<sup>334</sup> *Id.* at 683.

<sup>335</sup> *Id.* at 681–82 (characterizing the new regulation as “expand[ing] the type of benefits that may render a noncitizen inadmissible, including non-cash benefits such as the Supplemental Nutrition Assistance Program (formerly food stamps), most forms of Medicaid, and various forms of housing assistance”).



Similarly to Justice Sotomayor's dissent, each district court that considered a public charge challenge emphasized that the decades of precedent, coupled with the absence of explicit congressional authorization for the Administration's proposal, counseled against the federal government's position.<sup>336</sup> However, with the backdrop of the Immigration and Nationality Act, the public charge litigation is beginning to diverge from the work requirements litigation. Federal courts are generally quite deferential to the federal government in the area of immigration enforcement and have routinely ruled in its favor in litigation against state and local governments.<sup>337</sup> Given the Supreme Court's grants of emergency stays, the Trump Administration is in a strong position to prevail on public charge.

While the Trump Administration's prospects to effectuate its public charge and work requirement policies appear to diverge in the federal courts, the thrust of the policies is identical, betraying how difficult it is to cut Medicaid and SNAP directly. Instead, agencies will be most successful where they can argue that Congress delegated more discretion to the agency in shaping the parameters of access. In both situations, the Trump Administration's efforts are not directed at *all* SNAP and Medicaid recipients, but rather a specific group such as noncitizens and their families or childless adults. Nor does either policy take away benefits immediately; instead, they attach conditions to the targeted groups continuing to receive benefits that can reasonably be expected to deter use. Some of those subject to the public charge regulation will fail to enroll or disenroll in Medicaid and SNAP, lest they risk their legal status in the United States. Some of those subject to the work requirement waivers will fail to meet or fail to report their labor activity and will lose access to Medicaid and SNAP as well. In a sense, the Trump Administration's actions in this sphere betray the state of poverty law today: it has become extremely difficult to reduce food and medical assistance in Congress, and the federal courts will thwart agency attempts to restrict welfare programs when it conflicts with the agency's statutory mandate. Rather, the only avenue available to a presidential administration committed to retrenchment is to engage individual states through waivers, to disaggregate recipients by only changing rules as to recipients with specific statuses like noncitizens, and to attach other conditions to receiving SNAP or Medicaid.

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<sup>336</sup> See *City of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 408 F. Supp. 3d 1057, 1100–01 (N.D. Cal. 2019); *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 347 (S.D.N.Y. 2019); *Washington v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1215–18 (E.D. Wash. 2019); *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1022, 1028 (N.D. Ill. 2019).

<sup>337</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2400 (2018) ("By its terms, § 1182(f) exudes deference to the President in every clause."); *Arizona v. United States*, 567 U.S. 387, 395–96 (2012).

Each of these efforts will present different doctrinal challenges under administrative law, but all will follow this pattern.

Inevitably, this is a messy story. The setting includes Congress, the federal courts, federal agencies, and state governments. The remainder of this Article takes a step back from the commotion to reflect on what these actions suggest about how the New Property has changed over time.

### III. UPDATING THE NEW PROPERTY

As Part II shows, the Trump Administration and its allies in state government have run into various legal obstacles in their attempts to undo SNAP and Medicaid through agency action. The Supreme Court in *King*, *Shapiro*, and *Goldberg* identified a constitutional dimension of public-benefits administration and, in doing so, created a path for federal and state agencies and public interest lawyers to exploit the obstacles peculiar to welfare retrenchment.<sup>338</sup> In effect, courts, agencies, and lawyers operate within a peculiar fiscal federalism that extends the federal statutory entitlements beyond what Congress set out to do some fifty years ago. Such an account has important implications for two scholarly debates: the relationship between procedure and substantive law and how public law matures absent constitutional and legislative revision.

#### A. Procedure–Substance Trade-Off?

Is there an inverse or even perverse relationship between procedural protections and substantive law when it comes to welfare? Professor Charles Reich, Justice Black, and the Supreme Court in *Mathews v. Eldridge* all saw procedure as a cost to government. Professor Reich thought that cost would protect the individual’s entitlement to her livelihood, whether that be a welfare benefit or an occupational license.<sup>339</sup> Justice Black predicted that the additional cost of procedures would discourage the government from extending benefits in the first instance.<sup>340</sup> In *Mathews*, the Supreme Court predicted that the New Property’s proceduralist bent would cause the political branches to reduce the substantive benefits to pay for court-mandated process.<sup>341</sup>

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<sup>338</sup> See, e.g., ROBERT A. KATZMANN, JUDGING STATUTES 23 (2014) (suggesting that “agencies are generally the first—often the primary—interpreters of statutes”); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 111 (1990) (“[L]egislative reform must overcome an enormous burden of inertia. It is through interpretation, in the courts and the executive branch, that regulatory improvements, interstitial to be sure, can be brought about most easily.”).

<sup>339</sup> See *supra* notes 53–56 and accompanying text.

<sup>340</sup> *Goldberg v. Kelly*, 397 U.S. 254, 278–79 (1970) (Black, J., dissenting).

<sup>341</sup> *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

What Justice Black missed in his dissent in *Goldberg* and the *Mathews* Court misidentified is that there is not a single government body that responds to judicial decisions on social welfare programs. This unitary theory predicts the government would respond to judicial decisions imposing costs on the program by seeking savings elsewhere. Hence, a court order requiring a Medicaid program to provide in-person hearings for benefit terminations could lead to a reduction in the generosity of Medicaid benefits. But as this Article explains, the welfare administrator is responsible for overseeing the procedure, not the substance of the benefit—the latter being Congress’s remit. Layered on top of this horizontal division of welfare administration between the bureaucracy and Congress is the further vertical division between federal and state government. State government must pay for the procedures, but not the substantive benefits of federal programs. As a result, state bureaucrats will respond to court orders in exactly the opposite way the Supreme Court predicted. Rather than reduce the generosity of the benefits, states may simply become more lenient—refraining from denying, reducing, or terminating benefits lest they incur more costs following court-mandated procedures.

In effect, the public law surrounding these programs engenders an unholy, but not unstable alliance of state government, federal courts, and public interest lawyers. State government sees SNAP and Medicaid as vital sources of federal funding.<sup>342</sup> Federal courts see SNAP and Medicaid as creatures of federal law, requiring agencies to operate within the strictures of the APA and the relevant statutes. And legal aid lawyers see SNAP and Medicaid as crucial support for their low-income clients. Each of these actors have different reasons for their shared interest in maintaining the federal statutory regime. The *New Property* did not usher in the revolution of welfare as a constitutional right that Reich envisioned or for which the legal aid community worked.<sup>343</sup> Yet Medicaid and SNAP recipients enjoy increased legal protections and more generous benefits than they did in 1964—the year Reich wrote *The New Property* and President Johnson declared a War on Poverty. This is not to say that Reich’s scholarship

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<sup>342</sup> Certainly, there is a dark side to this revenue maximization. Professor Daniel Hatcher documents how several states have used federal funding for Medicaid for various purposes. See DANIEL L. HATCHER, *THE POVERTY INDUSTRY* 111–42 (2016). SNAP funding is less likely to be used in such a substitutionary way because there is no cost-sharing in the substantive benefits and the benefits go directly to the individuals. Furthermore, while Professor Hatcher indicts this practice, his argument is functionally similar to the one advanced in this Article. Professor Hatcher emphasizes the structural dimensions of fiscal federalism, arguing that it transcends party or ideology, causing state officials to vehemently oppose any proposed cuts to Medicaid. See *id.* at 111–12.

<sup>343</sup> See Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 *BROOK. L. REV.* 731, 731 (1990) (remarking that “[t]wenty years later, we must confront the fact that the road opened by *Goldberg v. Kelly* has not been taken”).

can claim credit for the forty million Americans who receive SNAP and the approximately seventy million Americans who receive Medicaid.<sup>344</sup> But it is to say that the procedure–substance trade-off that spooked Justice Black in *Goldberg v. Kelly* and the Burger Court in *Mathews v. Eldridge* has not come to pass for two of the country’s largest anti-poverty programs. The relationship between procedure and substantive law in public-benefit programs is more complex than either Professor Reich’s or Justice Black’s visions. Unlike Reich’s New Property, which thought of procedure as protecting recipients by raising the cost of reducing the welfare rolls, this Article recognizes that procedure also raises the costs to participate in the program. Given the fiscal federalism written into these programs and the APA framework, the government agencies administering these programs do not see procedural dollars and substantive dollars as fungible. If the funding for substantive benefits and the procedures to administer these benefits are not interchangeable, there are asymmetries that multiple legal actors can exploit.

This structural account has difficulty explaining why any state would seek a Medicaid work requirement waiver. According to this Article, no state would opt to increase procedural hurdles to stymie SNAP and Medicaid applicants and recipients. While it might be too much to expect a theory to predict each of the fifty state governments’ actions in this area, it could be that the anti-government ideology of many in the Republican Party overwhelms the fiscal incentives inherent in this cooperative-federalism program. Indeed, the Medicaid litigation in Arkansas, Kentucky, and New Hampshire exposes this illogic. Judge Boasberg repeatedly pointed out that these states are spending state resources to kick people off a program that the states are not paying for.<sup>345</sup> Regardless of whether this Article can account for each and every government actor’s behavior in this field, this theory does crystallize the current state of welfare litigation.

The strategies of the New Property’s adherents and its opponents underscore this reality. If one canvasses reforms to SNAP and Medicaid championed by public interest lawyers and advocates, it has not been to increase process à la Reich’s theory, but rather to streamline it. Legal aid lawyers have fought for extended certification, telephonic rather than in-person

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<sup>344</sup> CTR. FOR BUDGET & POL’Y PRIORITIES, THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) (2019), <https://www.cbpp.org/sites/default/files/atoms/files/policybasics-foodstamps.pdf> [<https://perma.cc/UD4G-LPQE>]; *May 2020 Medicaid & CHIP Enrollment Data Highlights*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html> [<https://perma.cc/NQW6-SS8U>].

<sup>345</sup> See *supra* notes 263–275 and accompanying text.

interviews, adjunctive eligibility, and third-party assistance with enrollment.<sup>346</sup> These efforts are a far cry from the formalities of trial-like adjudication envisioned by the New Property or the *Goldberg* majority. That is because low-income people and their advocates want to reduce the costs of accessing and maintaining government services. No legal aid lawyer wants to subject their client to more hearings and more documentation, particularly when their client is raising children and holding down multiple jobs. Further, what has made these procedural simplifications so attractive in this instance is that “government” is not singular, but plural. Congress legislates the substantive requirements of eligibility, but often leaves federal and state agencies to determine the procedures to enroll and recertify. The state agencies that must administer these determinations know that their governors and state legislatures have to pay for a portion of those procedures, but that the federal government pays for the bulk of the benefits themselves. Indeed, in the case of SNAP, states only pay for procedure. Therefore, a SNAP state administrator can either ratchet up the procedure required for an applicant, understanding that it will come out of the state budget, or the administrator can cooperate with anti-poverty advocates and create an eligibility system that keeps the benefits and the federal funding flowing, benefiting the applicant and the administrator alike. As a result, legal aid lawyers use procedure as much as a sword as a shield. *Goldberg* and the other welfare cases from the due process revolution expected individual recipients to use fair hearings to defend against arbitrary actions. But over the last half century, public interest lawyers have used these procedural requirements as a basis to enforce federal law and tie up federal and state agencies in the courts.<sup>347</sup> Notably, the APA provides procedural protections that avoid the problem of case-based due process—which imposes time and resource costs on the welfare beneficiaries—and instead impose costs on agency rulemaking and action instead. Moreover, the mere threat of litigation yields significant leverage in lawyers’ legislative and administrative advocacy.<sup>348</sup>

On the other side of this conflict, those who are ideologically opposed to welfare programs and the New Property’s legacy have also learned this lesson. Retrenchers now know that the relationship between procedure and substance

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<sup>346</sup> See CTR. ON BUDGET & POL’Y PRIORITIES & CLASP, IMPROVING SNAP AND MEDICAID ACCESS: SNAP INTERVIEWS (2018), [https://www.cbpp.org/sites/default/files/atoms/files/11-30-18fa\\_asap\\_snap\\_interviews.pdf](https://www.cbpp.org/sites/default/files/atoms/files/11-30-18fa_asap_snap_interviews.pdf) [<https://perma.cc/TYD9-L66Q>]; SARAH GOODELL, HEALTH AFFS. & ROBERT WOOD JOHNSON FOUND., HEALTH POLICY BRIEF: NAVIGATORS & ASSISTERS (2013), [https://www.healthaffairs.org/doi/10.1377/hpb20131031.857471/full/healthpolicybrief\\_101.pdf](https://www.healthaffairs.org/doi/10.1377/hpb20131031.857471/full/healthpolicybrief_101.pdf) [<https://perma.cc/3TB9-L4ET>].

<sup>347</sup> See *supra* notes 131–137 and accompanying text.

<sup>348</sup> See Hammond, *supra* note 176, at 218, 221 (discussing how the whole of these lawyering strategies is greater than the sum of its parts).

is more complicated. And they understand that procedure can impose not only costs on the government, but also on the recipients themselves. The current retrenchment efforts of the Trump Administration offer a straightforward application of this theory. Falling short of legislating cuts to SNAP and Medicaid in Congress, the Administration's strategy is to increase the procedures and intensify the process by which individuals prove and maintain eligibility.

In particular, this updating of the New Property's insights helps account for the fight over work requirements and public charge discussed in Part II. Work requirements in SNAP and Medicaid are best understood not just as a substantive legal change (i.e., adding work as a condition of eligibility for both programs), but as an imposition of additional procedures through reporting requirements. Indeed, these work requirements, like the public charge regulation, increase the burden of applying for and maintaining access to public benefits. The Trump Administration's strategy is the converse of efforts by previous administrations to extend certification with the elderly and the disabled.<sup>349</sup> Adjunctive eligibility in SNAP and Medicaid, in which receiving one benefit qualifies a recipient for the other, is another example of the legal aid strategy. Indeed, the Obama Administration's HHS spent significant agency resources to bootstrap SNAP to the additional resources and streamlined processes that the Affordable Care Act envisioned for Medicaid.<sup>350</sup> And the ACA legislated simplified enrollment for its Medicaid expansion.<sup>351</sup>

The Trump Administration understands that in order to change the substantive welfare law (i.e., who receives benefits and how much), it needs to impose additional procedures. By increasing the reporting requirements, the Administration and its allies in state government can eliminate people's food and medical assistance without changing the statutory provisions of eligibility. From its perspective, it does not matter what the additional procedural requirement entails. As long as the requirement is an additional hurdle to prove

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<sup>349</sup> See STATE OPTIONS REPORT, *supra* note 182, at 27 (detailing how states can opt-in to extended certification periods for SNAP recipients who are elderly or who have a disability).

<sup>350</sup> See U.S. DEP'T OF HEALTH & HUM. SERVS., MEDICAID/CHIP AFFORDABLE CARE ACT IMPLEMENTATION: AVAILABILITY OF ENHANCED FUNDING FOR IT SYSTEMS (90/10) (2012) (90% match for modernization of Medicaid eligibility and enrollment systems until on or before December 31, 2015, regardless of whether a state participates in the Medicaid expansion).

<sup>351</sup> The ACA requires states to use a streamlined Medicaid eligibility process. 42 U.S.C. § 18083(a). Individuals must be able to file streamlined eligibility forms online, in person, by mail, or by telephone. *Id.* § 18083(b)(1)(A); 42 C.F.R. §§ 435.907(a), 435.908(a). And the eligibility determination must occur with "reasonable promptness." 42 U.S.C. § 1396a(a)(8); see also 42 C.F.R. §§ 435.906, 435.912(c)(3). Furthermore, federal law made mandatory the "presumptive" eligibility process for Medicaid, requiring states to provide immediate, temporary coverage to individuals who appear to their healthcare provider to be Medicaid-eligible. 42 U.S.C. § 1396a(a)(47).

or maintain eligibility, it can deter access. For instance, drug testing is not just about signaling that welfare recipients are scroungers and assuring the public that they are not financing addiction through the government fisc; it also creates an obstacle that applicants must overcome.<sup>352</sup> Work requirements, at a level of generality, serve the same function. Forcing a recipient to jump through some additional hoop to maintain benefits—whether that is a drug test or a work requirement—is a cost to an individual for whom time and resources are particularly scarce. With these hurdles, the Trump Administration can limit access to SNAP and Medicaid not with direct cuts, but through furtive actions.

This Article’s account of welfare litigation does not line up neatly with previous accounts of the relationship between procedural and substantive law. Several commentators have expressed skepticism about the due process revolution’s salutary effects on agency action.<sup>353</sup> In administrative law, some scholars have bemoaned how judges have beaten a hasty retreat to the protection of the administrative state.<sup>354</sup> But the resilience of two of the largest government programs over the last half century suggests that judges have not been subservient to the administrative state, as some would suggest, but that judges have helped to protect this area of public law. Administrative law presumes some background allocation of constitutional authority, and in this area, judges have not been missing in action. Litigation has proven to be a useful mechanism for building the public law of public benefits. Of course, this is not the judicial role that critics of the administrative state envision. These scholars often exhort judges to construe statutes narrowly to minimally disrupt private rights best understood through principles of common law.<sup>355</sup> But that

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<sup>352</sup> See *1115 Medicaid Waivers in Wisconsin*, FAMS. USA (Oct. 31, 2018), <https://web.archive.org/web/20190707151724/https://familiesusa.org/waivers-wisconsin> [<https://perma.cc/EK89-YVVX>] (requiring a “Health Risk Assessment” of Medicaid recipients in place of Wisconsin’s original proposal to include a mandatory drug test for all Medicaid applicants).

<sup>353</sup> See generally JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* (1983) (arguing that the elements associated with due process in adjudicatory proceedings are inadequate in the social-welfare context); JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985) (proposing a more streamlined understanding of administrative due process that accounts for institutional competency and political goals); Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 *CORNELL L. REV.* 772, 820–23 (1974) (proposing management solutions to due process adjudication issued in the administrative-state context).

<sup>354</sup> See, e.g., ADRIAN VERMEULE, *LAW’S ABNEGATION* 6 (2016) (describing law’s “considered, deliberate, voluntary, and unilateral surrender” to the administrative state).

<sup>355</sup> See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 493–512 (2014). *But see* Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* 58 (June 30, 2016) (Oxford Legal Stud., Research Paper No. 44/2016), <https://papers.ssrn.com/a=2802784> [<https://perma.cc/2U7K-HMRG>] (characterizing Professor Hamburger’s work as “misconceiv[ing] the administrative state and the way in which it was perceived during

tradition of using private law as the source of background assumptions for interpreting public law fails to provide much guidance in areas where public law *itself* is the source of private rights. Indeed, that may have been Charles Reich's point all along.<sup>356</sup> If government is the source of the property right, the holder of that right must be afforded sufficient legal protections. Otherwise, Reich warned, the government would abuse its position over the property against the individual.<sup>357</sup>

Beyond administrative law, in criminal procedure, Professor Bill Stuntz is credited with crafting a highly influential account of how the federal courts' insistence on greater procedural protections engendered ever harsher criminal law.<sup>358</sup> It is certainly possible that Stuntz's perversity thesis is not inconsistent with this Article's account of procedure and substantive law in a different context. Nor does this Article suggest that procedure builds substantive law. It does, however, advance the more modest claim that the relationship between financing procedure and substance in the welfare context is more complicated than the New Property predicted, or earlier legal scholarship suggests. And furthermore, the relationship between procedure and substance can only be understood by tracing which government institution funds and administers these programs, something Stuntz understood when it came to prosecutors and police, but which subsequent scholars may misapply to other corners of the administrative state.

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the seventeenth century and thereafter, the very time period on which he draws when using material from England").

<sup>356</sup> See Reich, *supra* note 12, at 739 ("As government largess has grown in importance, quite naturally there has been pressure for the protection of individual interests in it.").

<sup>357</sup> See *id.* at 786 (concluding that "[o]nly by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny").

<sup>358</sup> See, e.g., William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 810 (2006) ("State legislators and members of Congress have spent where they could govern. Constitutional law made governing policing hard, governing litigation somewhat easier, and governing punishment very easy indeed. Legislators have spent accordingly."); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 32–34 (1997) (discussing how low funding and high costs of indigent defense impacts the severity of criminal case outcomes); see also Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 902–07 (2013) (discussing different academic critiques of the Warren Court's criminal procedure decisions around right to counsel); David Alan Sklansky, *Killer Seatbelts and Criminal Procedure*, 119 HARV. L. REV. F. 56, 56–57 (2006) (summarizing and contesting Professor Stuntz's argument that the Warren Court's "criminal justice revolution . . . has worsened the very ills it was intended to remedy"). *But see* Margo Schlanger, *No Reason to Blame Liberals (Or, The Unbearable Lightness of Perversity Arguments)*, NEW RAMBLER (2015), <https://newramblerreview.com/book-reviews/law/no-reason-to-blame-liberals-or-the-unbearable-lightness-of-perversity-arguments> [<https://perma.cc/X7AZ-H39R>] (reviewing NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014), and suggesting that perversity arguments might be particularly seductive to academics).



### B. *The New Property in the Age of Statutes*

The surprising durability of SNAP and Medicaid demonstrates the enduring strength of the New Property, but the path of both programs moves us away from a focus on constitutional due process and individual adjudication to the main events of the administrative state: appropriations and rulemaking. Recently, scholars have sought to explain how American public law is made in the absence of constitutional amendments and an increasingly unproductive Congress.<sup>359</sup> One such effort is the notion that some statutory schemes become so entrenched by judicial interpretations, agency action, and congressional acquiescence that they are best understood as “super statutes.”<sup>360</sup> This literature often identifies the Social Security Act as a prime example of a federal statute that, over time, has attained a status of higher law.<sup>361</sup> Importantly, this scholarly literature does not discount the role of courts and litigation. However, instead of conceiving of courts as fora to resolve individual disputes, this literature attends to how litigation serves a *regulatory* function, pushing agencies to expound on statutory meaning through rulemaking.<sup>362</sup> Furthermore, this litigation can discipline federal policymakers who seek to reverse the course

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<sup>359</sup> See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1470–73 (2001) (discussing a deliberate strategy during the New Deal to rely on statutes rather than constitutional amendments); cf. Barbara Sinclair, *Question: What’s Wrong with Congress? Answer: It’s a Democratic Legislature*, 89 B.U. L. REV. 387, 387–89 (2009) (challenging the argument that Congress is “an increasingly dysfunctional and ineffective institution”).

<sup>360</sup> See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 6–12 (2010); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 412 (2007) (arguing that “[m]any of our most important individual rights—rights against discrimination based on age or disability, rights to welfare, medical care, and social security—stem from statutes rather than the Constitution”).

<sup>361</sup> See, e.g., Young, *supra* note 360, at 424–25 (arguing that “American constitutional culture has generally been reluctant to recognize positive rights to housing, food, health care, or economic security, but we have created elaborate statutory entitlements to such benefits under the Social Security, Medicare, Medicaid, Aid to Families with Dependent Children, and unemployment assistance regimes”). There is also the overlapping literature of “small ‘c’ constitutionalism” and “administrative constitutionalism.” See Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010) (defining administrative constitutionalism as “regulatory agencies’ interpretation and implementation of constitutional law”); see also Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 585 (2015); Tani, *supra* note 52, at 825 (applying the administrative constitutionalism framework to the Equal Protection Clause). For a dissenting view that posits that scholars are wrong to conflate administrative law’s stability with entrenchment or some higher law, see Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1233–34 (2014).

<sup>362</sup> See, e.g., David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 624 (2013) (describing “a growing scholarly literature that aims to re-think the contours and work of the administrative state by training attention on the increasingly blurred boundary between administration and litigation”).

of prior administrations' regulations.<sup>363</sup> And because much of federal agency action turns on the cooperation of state governments, judicial review of agency action sometimes begins at the behest of state lawmakers.<sup>364</sup>

SNAP and Medicaid amplify the chorus of case studies in these overlapping literatures. Neither program has grown through formal constitutional change or Supreme Court doctrine, as Reich or his contemporaries would have predicted. Admittedly, Congress has played an active role in reauthorizing the appropriations for SNAP roughly every five years through the Farm Bill.<sup>365</sup> And Congress has repeatedly expanded Medicaid by adding additional eligible populations and services.<sup>366</sup> But the precise contours of the programs, like the procedures governing benefits applications and terminations, have been left to federal agencies.<sup>367</sup> Furthermore, Reich's theory of the New Property and the due process revolution more generally conceived of an individual's legal protections in light of administrative adjudication and constitutional doctrine.<sup>368</sup> Yet, as Part II shows, the durability of SNAP and Medicaid stems not from fair hearings for individual recipients, but through aggregate litigation, and the strongest

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<sup>363</sup> See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 20 (2010) (“Lawsuits provide a form of auto-pilot enforcement that will be difficult for bureaucrats or future legislative coalitions to subvert . . .”). To be sure, scholars in the 1980s identified this “auto pilot” function. See, e.g., John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 227 (1983) (admitting that private lawsuits “perform[] an important failsafe function by ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers”); Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 198 (1987) (discussing how private enforcement provides a “back-up guarantee of redress”).

<sup>364</sup> See David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171, 174 (2015) (describing administrative federalism as a descriptive inquiry into “the role that agencies play in shaping the federal–state balance of power today” and a “visionary project designed to shape federalism’s future through adjustments to the existing administrative system”); Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 954–56 (2014); see also Katherine Shaw, *State Administrative Constitutionalism*, 69 ARK. L. REV. 527, 530–31 (2016) (arguing that scholarship on administrative federalism is still “focused on federal agencies as the relevant administrative bodies, even if the *interests* in question are state interests”).

<sup>365</sup> See Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1967 (2020) (describing the Farm Bill as “[p]erhaps the most-known reauthorization legislation”).

<sup>366</sup> See Super, *supra* note 245, at 1592 (“Congress can override agencies’ interpretations of statutes, but scarce resources make that difficult, and it rarely does.”).

<sup>367</sup> See *supra* Section I.B.

<sup>368</sup> See Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 205 (2008) (discussing how “[d]uring the 1960s and 1970s, welfare rights held a prominent place on the public agenda not only in the legislative process but also in mainstream constitutional discourse” (citing, *inter alia*, Reich, *supra* note 12)).

challenges to government action are not based in the Constitution, but the Food Stamp Act, the Medicaid Act, and the Administrative Procedure Act.<sup>369</sup>

These cases and their attendant political controversies are far from over, but the last four years have shown that executive action in the welfare arena is still subject to the rule of law. Ideological opponents of the welfare state, even when they enjoy near-total control of the presidency, Congress, and state government, cannot easily discard and dismantle anti-poverty programs. So long as the peculiar fiscal federalism of welfare administration persists, litigation in the federal courts will too. Welfare recipients can wield the law to ensure that agencies comport with constitutional due process and federal statutory commitments. And, as a result, law will remain an effective tool to protect access to food and medical assistance in the United States.

#### CONCLUSION

This Article does not seek to serve as an apologia for the ways in which food assistance and medical assistance have developed in the last fifty years. Rather, it works to show that the maturation of both SNAP and Medicaid have made these programs harder to dislodge and dismantle by even a unified federal government. In light of the ubiquity of committed welfare opponents at all levels of federal and state government, the absence of a constitutional commitment to basic assistance, and the comparative stinginess of the American welfare state, the durability of food and medical assistance in the United States is, in a word, surprising.

Yet, the rights to food and medical assistance are not held equally across the American citizenry, let alone the broader society. Put short, public law in the United States condemns poor Americans to their fates in states. Despite the resilience of Medicaid and SNAP in American society, access to food and medical assistance is still not evenly distributed across the country. No procedural protections will prevent the federal or state governments from perpetuating these discriminatory practices unless we have a conception of social citizenship that transcends states' borders and other divisions in American society.

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<sup>369</sup> This contingent, iterative process echoes other discussions of private enforcement. See Sean Farhang, *Regulation, Litigation, and Reform*, in *THE POLITICS OF MAJOR POLICY REFORM IN POSTWAR AMERICA* 48, 69 (Jeffrey A. Jenkins & Sidney M. Milkis eds., 2014) (“As private enforcement regimes have diffused across the American regulatory state, the interests formed around them have become more widely spread and deeply rooted, increasing the political capacity of the coalition to defend the private enforcement infrastructure from retrenchment.”); Engstrom, *supra* note 362, at 641 (“Over time, private enforcement may thus drive legal mandates in very different directions than we might expect if enforcement authority remained in purely public hands.”).

