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Welfare and Rights Before the Movement: Rights as a Language of the State

ABSTRACT. In conversations about government assistance, rights language often emerges as a danger: when benefits become “rights,” policymakers lose flexibility, taxpayers suffer, and the poor lose their incentive to work. Absent from the discussion is an understanding of how, when, and why Americans began to talk about public benefits in rights terms. This Article addresses that lacuna by examining the rise of a vibrant language of rights within the federal social welfare bureaucracy during the 1930s and 1940s. This language is barely visible in judicial and legislative records, the traditional source base for legal-historical inquiry, but amply evidenced by previously unmined administrative records. Using these documents, this Article shows how concepts of “welfare rights” filtered through federal, state, and local administrative channels and into communities around the nation.

This finding contradicts conventional wisdom, which dates the birth of “welfare rights” language to the 1960s. This Article reveals that as early as 1935, some Americans—government officials, no less—deliberately and persistently employed rights language in communications about welfare benefits. In addition to challenging dominant interpretations, this Article identifies an under-studied aspect of rights language. An abundant “rights talk” literature chronicles and critiques claimants’ use of rights language. This Article, by contrast, identifies rights language emanating from government and being used for government purposes. Specifically, this Article argues that federal administrators used rights language as an administrative tool, a way to solve tricky problems of federalism and administrative capacity at a time in which poor relief was shifting from a local to a state and federal responsibility. Thus, this Article not only enriches debates about the role of rights in contemporary social welfare reforms, but also brings fresh insights to scholarship on the techniques of administrators and the limits of federal power.

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INTRODUCTION

In the fall of 1960, the leadership of the federal Social Security Administration¹ was in the unenviable position of having to review, and potentially to revoke, a state's multimillion-dollar federal public assistance grant. Louisiana had amended its Aid to Dependent Children² plan³ to, in effect, exclude most illegitimate children.⁴ Nearly 23,000 children—the vast

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1. This agency, formerly named the Social Security Board (SSB), was in charge of administering all the programs created by the Social Security Act of 1935, including public assistance. Originally, the agency was independent, but in 1939 it became part of President Roosevelt's newly created Federal Security Agency (FSA). The FSA, in turn, became the Department of Health, Education, and Welfare (HEW). MARTHA DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS* 21-22 (1970). Throughout the Article, I use the phrase "the Agency" to refer to the Social Security Board and its successor. Subsequently, I use the acronym "SSB" when referring to the Agency by name.

When the FSA came into being in 1939, the SSB's General Counsel (GC) became GC for the entire Federal Security Agency. See ROBERT T. LANSDALE ET AL., *THE ADMINISTRATION OF OLD AGE ASSISTANCE* 5 (1939); Interview by Peter A. Corning with Jack B. Tate, former Gen. Counsel, Soc. Sec. Bd., in New Haven, Conn. 58 (June-July 1965) (transcript on file with Oral History Collection of Columbia University). I treat the two offices interchangeably.

2. The Social Security Act of 1935, best known for establishing social insurance, created a system of federal-to-state grants-in-aid for three categories of "unemployable" Americans: the elderly, the blind, and dependent children. See Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.). By the time of the Louisiana episode, Aid to Dependent Children (ADC) had become the most controversial. Despite efforts to repair its image (e.g., by inserting "families" into its name), the program encountered vigorous opposition until the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 "end[ed] welfare as we know it." MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 317 (2001); see Pub. L. No. 104-193, 110 Stat. 2105 (1996). A variant of the child-centered program still exists (Temporary Assistance for Needy Families), but Congress replaced the system of federally supervised matching grants with a flexible block grant system and eliminated open-ended entitlements. The "adult" programs—Old-Age Assistance, Aid to the Blind, and a 1950 addition called Aid to the Permanently and Totally Disabled—also still exist, but are now under exclusive federal control and have been rolled into a program called Supplemental Security Income. See generally EDWARD D. BERKOWITZ, *AMERICA'S WELFARE STATE: FROM ROOSEVELT TO REAGAN* (1991) (providing an overview of U.S. social welfare policy from the 1930s through the 1980s).
3. The federal agency used the word "plan" to refer to all the state laws and regulations relating to public assistance. DERTHICK, *supra* note 1, at 22.
4. One statute prohibited payments on behalf of any illegitimate child who shared a mother with multiple older illegitimate children. Act of July 7, 1960, sec. 1, § 233(C), 1960 La. Acts 634, 634-35. The legislature also excluded from coverage any child living with a mother who had ever had a child out of wedlock after receiving a welfare check, unless and until the

majority black—lost their benefits.⁵ National outrage ensued. Newspapers chastised Louisiana for its “mean, uncivilized approach.” Public welfare and civil rights organizations demanded that the federal agency recognize Louisiana’s noncompliance with federal law and hold a formal hearing.⁶ News of the scandal reached as far as Northeast England, where concerned councilwomen arranged to airlift baby food into New Orleans.⁷

Louisiana temporarily retreated from its position, cowed by media condemnation and the eventual threat of federal defunding, but the episode was an indictment of the federal agency, which had responded with too little, too late. When the Social Security Administration finally held a hearing, months after learning about the problem, it did not revoke the state’s grant. Afterward, states continued to devise ways to reduce and to reconfigure their welfare populations, confident that they could elude federal sanction. The episode was also a lesson for the burgeoning welfare rights movement, which developed alongside these restrictive state laws and drew inspiration from the black freedom movement.⁸ It proved, as a bright intern named Bob Cover explained to a welfare rights think tank in 1967, that the federal agency lacked either the will or the tools to protect claimants’ rights.⁹ Despite knowledge of many potentially illegal state and local welfare practices, the federal agency had entertained only sixteen conformity hearings in the history of the federal-state public assistance arrangement, and had no process for providing individual

mother proved that she had “ceased illicit relationships” and was “maintaining a suitable home.” Act of July 7, 1960, sec. 1, § 233(D), 1960 La. Acts 525, 527.

5. Taryn Lindhorst & Leslie Leighninger, “*Ending Welfare as We Know It*” in *1960: Louisiana’s Suitable Home Law*, 77 SOC. SERV. REV. 564, 564 (2003).
6. WINIFRED BELL, AID TO DEPENDENT CHILDREN 142 (1965).
7. This narrative draws on newspaper coverage and scholarly reconstructions. See *id.* at 137-51; JENNIFER MITTELSTADT, FROM WELFARE TO WORKFARE: THE UNINTENDED CONSEQUENCES OF LIBERAL REFORM, 1945-1965, at 85-91 (2005); Lisa Levenstein, *From Innocent Children to Unwanted Migrants and Unwed Moms: Two Chapters in the Public Discourse on Welfare in the United States, 1960-1961*, 11 J. WOMEN’S HIST. 10, 10-13 (2000); Lindhorst & Leighninger, *supra* note 5, at 576-77; Anders Walker, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 DUKE L.J. 399, 420-21 (1997); *British Flying Food to Negroes in South*, N.Y. TIMES, Sept. 14, 1960, at 5; *Louisiana Relief Rolls*, CHI. DEFENDER, Sept. 5, 1960, at 10; *Sins of the Fathers*, N.Y. TIMES, Oct. 6, 1960, at 40; *Suffer Little Children*, NATION, Sept. 24, 1960, at 171.
8. FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA 17 (2007).
9. [Robert Cover], Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 91-92 (1967). Martha Davis identifies Cover as the author. MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 59-60, 165 n.16 (1993).

redress.¹⁰ For purposes of both vindicating existing rights and establishing new ones, the federal agency was a dead end. Cover urged instead a turn toward federal courts, fueling a fire that was already blazing through law schools, community organizations, and neighborhood law offices.¹¹ Before the decade was out, “poverty lawyers” would be advancing their clients’ claims before the highest court in the land.¹²

Had Cover observed the scene just twenty years earlier—before “welfare” became synonymous with black single mothers, before states competed to enact the most restrictive policies, and before public welfare workers commenced treating poverty as a disability to be professionally expunged¹³—his impression of federal welfare administrators would have been different. At

10. Cover, *supra* note 9, at 91-92.

11. *Id.* at 93-109. Cover would go on to become one of the foremost legal scholars of his generation. Interestingly, he is best known not for championing the virtues of judicial review, but for reminding his peers of the human costs of judicial interpretation. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

12. Notable cases include *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973), which rejected a preemption challenge to a state law that conditioned Aid to Families with Dependent Children (AFDC) benefits on participation in work-related programming; *Jefferson v. Hackney*, 406 U.S. 535 (1972), which found no equal protection violation in a state law that set lower benefit levels for AFDC recipients than for recipients of other need-based assistance programs; *Wyman v. James*, 400 U.S. 309 (1971), which upheld a state law conditioning AFDC benefits on home inspections; *Dandridge v. Williams*, 397 U.S. 471 (1970), which rejected a challenge to a state law that placed a maximum on the amount of AFDC benefits a family could receive; *Goldberg v. Kelly*, 397 U.S. 254 (1970), which held that due process required the government to provide a full evidentiary hearing before terminating an individual’s welfare benefits; *Shapiro v. Thompson*, 394 U.S. 618 (1969), which found unconstitutional Connecticut, Pennsylvania, and District of Columbia laws that prohibited new residents from receiving AFDC; and *King v. Smith*, 392 U.S. 309, 311 (1968), which struck down a state law that “denie[d] AFDC payments to the children of a mother who ‘cohabits’ . . . with any . . . able-bodied man.” For a brief history of major welfare rights cases and the reformers who pushed them toward the courts, see DAVIS, *supra* note 9, at 99-118. For explorations of the interplay between these Supreme Court decisions and social welfare policy, see SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* (1990); and R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* (1994). On the welfare rights movement, see KORNBLUH, *supra* note 8; PREMILLA NADASEN, *WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES* (2005); and ANNEISE ORLECK, *STORMING CAESARS PALACE: HOW BLACK MOTHERS FOUGHT THEIR OWN WAR ON POVERTY* (2005).

13. On public assistance policy and administration between the late 1940s and the early 1960s, see MITTELSTADT, *supra* note 7, at 52-53; ELLEN REESE, *BACKLASH AGAINST WELFARE MOTHERS: PAST AND PRESENT* (2005); and Karen M. Tani, *Securing a Right to Welfare: Public Assistance Administration and the Rule of Law, 1935-1965*, at 237 (Sept. 2011) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with Van Pelt Library, University of Pennsylvania).

that moment, the federal agency's Assistant General Counsel, A. Delafield Smith, was broadcasting to every audience he could find that a right to public assistance, and ancillary rights of fair and equal treatment, were inscribed in positive law. As soon as "Government" took action to assure a means of livelihood for broad classes of needy individuals, "rights and privileges . . . accrue[d]," he explained to a conference of fellow federal government attorneys in 1938.¹⁴ One might even conclude, he told the 1939 Annual Meeting of the American Schools of Social Work, that "participation in the public bounty" in time of need had become "a right or privilege" of "citizenship."¹⁵ The message was not limited to experts. For example, after consulting with Smith, one Indiana congressman informed a constituent, concerned about his destitute mother-in-law, that federally subsidized old-age assistance was the woman's legal right; local administrators might hassle her, but she was "entitled" by law to public payments.¹⁶ In short, Smith preached, poor relief was no longer a matter of discretion, as it was under the old poor law; it no longer depended on community understandings of desert or adherence to community norms. It had become a matter of right.

Smith was hardly a voice in the wilderness. Other sources emanating from Smith's agency, such as training guides for local welfare workers, went further. Drafted primarily by professional social workers with the clearance of lawyers, these guides enumerated rights apart from a basic guarantee of income support that, with the creation of federal-state welfare programming, were now established in law. These included the right to submit a formal application for assistance, the right to receive fair treatment, the right to spend support payments freely, and the right to keep private one's reliance on the state.¹⁷

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14. Report of the Regional Attorneys Conference, December 5 to 10, 1938, at 78 (Dec. 1938) (on file with NARA II, HEW Records, 235/1). Throughout this Article, "NARA II" refers to the National Archives and Records Administration, College Park, Maryland. "HEW Records" refers to the General Records of the Department of Health, Education, and Welfare and the Federal Security Agency. Citations are given in the form [Record group number]/[Box number]/[Folder number (where applicable)].
 15. A. Delafield Smith, *Interrelationship of Education and Practice in the Development of a Profession*, 1939 ANN. MEETING AM. SCH. SOC. WORK 5 (on file with author).
 16. Letter from George W. Gillie, U.S. Representative from Ind., to W.B. Hays (Mar. 15, 1939) (on file with NARA II, HEW Records, 235/26/PA Residence Requirements (1939-1943)); Letter from W.B. Hays to George W. Gillie, U.S. Representative from Ind. (Mar. 12, 1939) (on file with NARA II, HEW Records, 235/26/PA Residence Requirements (1939-1943)).
 17. BUREAU OF PUB. ASSISTANCE IN COLLABORATION WITH BUREAU OF ACCOUNTS AND AUDITS AND OFFICE OF THE GEN. COUNSEL, FED. SEC. AGENCY, MONEY PAYMENTS TO RECIPIENTS OF OLD-AGE ASSISTANCE, AID TO DEPENDENT CHILDREN, AND AID TO THE BLIND, BUREAU CIRCULAR NO. 17 (1944); GRACE F. MARCUS, THE NATURE OF SERVICE IN PUBLIC ASSISTANCE ADMINISTRATION 30 (Bureau of Pub. Assistance, Fed. Sec. Agency, Pub. Assistance Report

Some agency sources, especially those issued in the wake of World War II, went further still: they declared that poor individuals had not just legal rights but “soci[al]”¹⁸ or “human”¹⁹ rights – rights to the income, the process, and the freedom necessary “to live as participating members of the community.”²⁰

These sources disrupt the narrative that scholars of U.S. social welfare provision have constructed. According to conventional accounts, policymakers and administrators did their utmost to attach rights rhetoric and rights practices (automatic, fixed benefits linked to minimally invasive procedures) to the new social insurance program, Social Security. At the same time, they deliberately denied those trappings to public assistance, predicting and even hoping that public assistance clients would bear the stigma associated with traditional poor relief.²¹ In short, rights language helped construct and maintain a “two-track” welfare state.²² Not until the welfare rights movement and the high tide of legal liberalism, the standard narrative continues, did Americans use the language of rights to talk about need-based income

No. 10, 1946) (identifying as a “major operating purpose[.]” the “adminis[tration] [of] assistance as a right” and listing the relevant provisions of the Social Security Act); Memorandum from the Bureau of Pub. Assistance to the Exec. Dir., Soc. Sec. Bd., Money Payments to Recipients of Old-Age Assistance, Aid to Dependent Children, and Aid to the Blind (Jan. 7, 1944) (on file with NARA II, HEW Records, 235/75/Regional Miscellaneous – Folder 21 (Memoranda) (January–December) (1944)) (enumerating the Social Security Act provisions “directed toward the objective of preserving and maintaining the rights of individual[.]” applicants and recipients); *see also* Jane M. Hoey, *The Contribution of Social Work to Government*, 1941 PROC. NAT’L CONF. SOC. WORK 3, 13 (listing various provisions of the Act and celebrating “the rights . . . inherent” therein).

18. *See* CHARLOTTE TOWLE, COMMON HUMAN NEEDS: AN INTERPRETATION FOR STAFF IN PUBLIC ASSISTANCE AGENCIES, PUBLIC ASSISTANCE REPORT NO. 8, at 36 (1945) (“Whatever the limitation in our present programs, we can take heart in our labors in the realization that we are pioneers taking the first steps in the effort to make real man’s claim of right on society.”).
19. *Id.* at iii. This reference to human rights suggests a link between the administration of domestic social welfare laws and efforts to articulate and defend a set of international human rights. That link is outside the scope of this Article, but for suggestive reading, *see* ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD: AMERICA’S VISION FOR HUMAN RIGHTS (2005); MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001); and SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).
20. Memorandum from the Bureau of Pub. Assistance to the Exec. Dir., *supra* note 17. The federal agency circulated this document, along with MARCUS, *supra* note 17; TOWLE, *supra* note 18; and others, to all the state agencies, with hopes that they would redistribute them to their local administrative units.
21. *See infra* note 82.
22. *See infra* note 32 and accompanying text.

support.²³ And when they did, federal administrators were not conversant in the dialect.²⁴

This Article²⁵ supports aspects of that account, while also fundamentally revising the story. It demonstrates that in fact, from the late 1930s through the late 1940s, some administrators within the federal social welfare bureaucracy persistently characterized public assistance as a right and its recipients as rights-holders. But they did not direct this rights language²⁶ at courts or the poor, inviting as that story may be. Rather, this Article argues, government officials targeted the thousands of workers administering public assistance at the ground level, the state and local government employees whom they could not control but who were crucial to making the New Deal public assistance programs a meaningful reform.

As New Deal administrators saw it, these low-level workers were inclined to operate under an old poor law framework, under which those who received public aid were paupers. Paupers, by definition, sacrificed personal liberty, civil and political rights, and reputation in exchange for material support. To borrow the words of citizenship theorist T.H. Marshall, traditional poor relief “treated the claims of the poor, not as an integral part of the rights of the citizen, but as an alternative to them—as claims which could be met only if the claimants ceased to be citizens in any true sense of the word.”²⁷ Federal

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23. In most accounts, “welfare rights” emerge as an “invention” of the 1960s. See, e.g., KORNBLUH, *supra* note 8, at 14–38. To be fair, Kornbluh’s focus is the “collective and openly political” articulation of welfare rights; she does not deny the existence of earlier efforts to pair rights with need-based support. *Id.* at 17.
 24. This piece of conventional wisdom derives mainly from narratives of the litigation side of the welfare rights movement. See, e.g., DAVIS, *supra* note 9, at 81.
 25. For an exploration of other key questions, including the connection between the rights language that is the focus of this Article and the rights language of welfare rights activists and poverty lawyers of the 1960s and 1970s, see Tani, *supra* note 13.
 26. This phrase is meant to invoke the work of Stuart Scheingold, Hendrik Hartog, Richard Primus, and others who have described the deep historical roots and many possible valences and utilities of the term “rights” in American history. See *infra* Section V.A.
 27. T.H. Marshall, *Citizenship and Social Class* (1949), reprinted in T.H. MARSHALL, CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT 30 (1964), quoted in CHAD ALAN GOLDBERG, CITIZENS AND PAUPERS: RELIEF, RIGHTS, AND RACE, FROM THE FREEDMEN’S BUREAU TO WORKFARE 2 (2007); see also HUGH HECLIO, MODERN SOCIAL POLITICS IN BRITAIN AND SWEDEN: FROM RELIEF TO INCOME MAINTENANCE 1 (1974) (describing paupers as “a group who paid for the support of the community by being stigmatized and set apart as something less than full citizens”); FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 166 (Vintage Books 1993) (1971) (noting that in England, “relief recipients were denied the franchise until 1918,” and that as late as 1934, fourteen U.S. states “deprived recipients of the right to vote or hold office”).

administrators hoped that by explaining the new public assistance program in rights terms, whether the language of “legal” rights, “citizenship” rights, or “social” rights, they would trigger a shift in the mindset of local welfare workers.²⁸ Proper administration would follow. In other words, federal administrators did not use rights language to mobilize rights-holders, to demand resources from the state, or to press rights claims in court, as has been the focus of an abundant “rights talk” literature. Rather, they used that language as an administrative tool, a substitute for more formal mechanisms of influencing the myriad administrative decisions occurring on the ground. That is this Article’s primary claim.

This Article also advances a second, more theoretical claim: it offers the practices of New Deal-era welfare administrators as an example of how rights language could be useful to the regime of governance that scholars have come to call the modern liberal state. With the distance of time, the character of this regime is clear: it is one of centralized power, dominant national authority, and expansive administrative capacities; it assumes both “positive” and “negative” obligations toward state subjects.²⁹ How that regime came to be—specifically, how it overcame the forces opposing it—is less clear.³⁰ This Article suggests that attention to rights, often described as characteristic of the modern liberal state,³¹ was also part of what made that state possible. Government-issued rights language, trickling down from federal administrators to local welfare

28. I do not contend that these differences are merely semantic. As I argue elsewhere, particular administrators had good reasons for emphasizing one type of right over another. See *infra* note 112. The important point, for the purpose of this Article, is that all these variations were antithetical to the old poor law framework.

29. See William J. Novak, *The Legal Origins of the Modern American State*, in LOOKING BACK AT LAW’S CENTURY 249, 264 (Austin Sarat, Bryant Garth & Robert A. Kagan eds., 2002). By talking about the state in this way, I join those scholars who have jettisoned the quest to determine whether the United States has an ideal-type state (and if so, when that state developed) and instead examine changes in the complicated compound of institutions, rules, discourses, and powers that, together, govern the equally complicated entity known as “society.” See, e.g., THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES (Margaret Weir, Ann Shola Orloff & Theda Skocpol eds., 1988); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982).

30. See JAMES T. SPARROW, WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT 10 (2011) (“[W]e have little sense of how the extraordinary state-building of the [mid-century] period was accomplished with so little opposition.”).

31. See, e.g., ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 170 (1995) (identifying “a preoccupation with ‘rights’” as a defining feature of post-World War II liberalism).

workers, helped central-state authority expand into new domains. Simultaneously, the language of federal welfare rights marked poor individuals—still accustomed to thinking of themselves as state and local subjects—as citizens of a beneficent nation-state (even if the federal government was not yet prepared to defend those rights in the courts).

This Article proceeds as follows. Part I provides an introduction to the federally subsidized public assistance programs that the Social Security Act created. These programs have been criticized, rightfully, for institutionalizing an inferior “track” in a discriminatory “two-track” welfare state. According to welfare state scholars, national-level insurance-based programs, such as old-age insurance and unemployment insurance, were designed to allow their beneficiaries (white, male industrial workers and their dependents, predominantly) to maintain a privileged status; the programs did this through generous and regular payments and less stigmatizing administrative procedures. Public assistance programs, by contrast, were based on an invasive system of “means testing” and allowed meager, irregular payments. They thereby signaled that their beneficiaries (disproportionately women and racial minorities) deserved less.³² Without disputing that point, this Article emphasizes the underappreciated ways in which New Deal public assistance programs attempted to improve on existing efforts. These programs were a progressive³³ attempt to modernize poor relief by shifting responsibility for the

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32. See generally LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935*, at 4-5 (1994) (identifying social insurance with the highest stratum of the welfare state and AFDC with the lowest); ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* (1998) (exposing how racial divisions and anxieties shaped the institutional structure of several New Deal social welfare policies); SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY* (1998) (identifying the gender biases embedded in New Deal social welfare and labor policies); SKOCPOL, *supra* note 29 (chronicling the rise, and subsequent marginalization, of mothers’ pensions); Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen’s Compensation and Mothers’ Aid*, in *WOMEN, THE STATE, AND WELFARE* 123 (Linda Gordon ed., 1990) (using workmen’s compensation and mothers’ pensions to discuss the underpinnings of the “two-channel welfare state”).
33. I use “progressive” in the historical sense. In my view, the term conveys a set of beliefs that, while never completely coherent or consistent, captivated middle-class and professional Americans between the late nineteenth century and the mid-twentieth century. Outspoken moralizing sometimes intersected with these beliefs, but the core was a deep faith in the beneficence of expert knowledge, rational governance, and objective decisionmaking, and a conviction that all social problems could be solved. See DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998); see also SIDNEY FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901* (1956) (tracing the progressive movement back to a system of thought which rejected the theory of *laissez faire* in favor of a theory of interventionist government,

poor from the local level, which reformers associated with incompetence and irrationality, to the state and federal levels.

Parts II and III draw on deep archival research to illustrate two aspects of administrative law in action. Part II offers early glimpses of an administrative discourse of welfare rights. It shows that, contrary to existing accounts of the Social Security Act and its administration, concepts of rights were part of federal administrators' original understanding of the public assistance program—and therefore part of their “tool kit” when a difficult administrative problem emerged. That problem, the focus of Part III, was the endurance of localism: dispatches from the field from the late 1930s and early 1940s made clear that, despite the federal administrators' efforts to redistribute power inward (toward a central agency) and upward (toward the state level), local administrators continued to run the show. Further, many local welfare workers operated according to the norms of the old poor law, rather than the dictates of “modern” public assistance administration.

Part IV recovers the indirect ways in which federal administrators tried to communicate with local welfare workers. In these communications, the notion of “right” was prominent, and was used as a point of contrast with the “gratuities” given under the “antiquated” poor relief tradition. This interpretation diverges significantly from those of the two scholars who have noted rights language within New Deal public assistance administration. William Simon's revisionist (now classic) welfare rights article called attention to the rights language in a number of federal public assistance documents from the 1940s. But Simon's interest was the value of this rights discourse as “jurisprudence,” and specifically, as a lost alternative to the jurisprudence that animated the welfare rights test cases of the late 1960s and 1970s. He was not interested in questions about the nature or function of rights in the New Deal administrative state.³⁴ Historian Linda Gordon has cited some of this administrative rights language but has characterized it as a convenient rhetorical mask for the “needs talk” that she believes dominated social work, differentiating members of that overwhelmingly female profession from the predominantly male labor economists who joined them in crafting New Deal

committed to solving social problems); SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920*, at 265 (Atheneum 1975) (1959) (associating the conservation movement, and progressivism more generally, with scientific management and rational planning).

34. William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 *MD. L. REV.* 1 (1985). Simon's limited source base also led him to conclude that this rights language was exclusively the province of government social workers. *Id.* at 3-4. In fact, lawyers were deeply invested in the same language.

social welfare policy.³⁵ This Article, by contrast, looks closely at the *audience* that federal administrators targeted when they sent rights language into the world. The result is the novel concept of rights language as an administrative tool.

Part V explores the significance of this finding for broader understandings of the role of rights in the development and legitimization of America's modern liberal state. An abundant "rights talk" literature provides the starting point for this journey, but not the ending point, for ultimately the rights language in this Article does not evidence the hopes and beliefs of claimants so much as it suggests the "benevolent imperialism"³⁶ of national state-builders. Through rights language, distributed through administrative channels, they attempted to extend the jurisdiction of the nation-state and articulate new claims to local citizens. The Conclusion reflects on the possible consequences of these efforts and, finally, shifts the lens from rights articulators to rights deniers.

I. THE SOCIAL SECURITY ACT OF 1935: A NEW DEAL FOR POOR RELIEF

The Social Security Act of 1935, best known for initiating a national system of old-age insurance, was in fact a major piece of welfare legislation, one that attempted to alter significantly the landscape of public provision for the poor. Until the Great Depression, poor relief was largely the responsibility of private charity and local government, with each locality following its own course. Some persons looked to a county-level agency for relief, while others turned to a town or municipal unit; in some places, multiple public entities claimed jurisdiction over the poor, while in others there was nothing more than a single official to process charity cases. States played a limited role. On the eve of the Depression, less than a third of states had experimented with poor relief, and only eight had created state-level welfare departments to coordinate activities.³⁷ A bird's-eye view of American poor relief would have resembled a crazy quilt, with a limited number of fabrics but "an amazing diversity of patterns."³⁸

35. Linda Gordon, *Social Insurance and Public Assistance: The Influence of Gender in Welfare Thought in the United States, 1890-1935*, 97 AM. HIST. REV. 19, 33-35 (1992).

36. I borrow this term from David Miller, who has used it to describe a hypothetical system in which one nation intervenes to protect the basic rights of the members of another nation. DAVID MILLER, ON NATIONALITY 76-78 (1995).

37. MARIETTA STEVENSON, PUBLIC WELFARE ADMINISTRATION 9-13 (1938).

38. Fred K. Hoehler, *Public Welfare Administration Under the Social Security Act*, 3 LAW & CONTEMP. PROBS. 279, 279 (1936); see also MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 216-17 (rev. ed. 1996) ("a confused, bewildering administrative pattern"). For a compilation of poor law materials

The Depression changed everything. Local governments went broke as their revenue sources dried up. Private agencies saw their caseloads rise and their resources wane. Millions of Americans fell into poverty and grew restless. Into that picture entered the federal government, first via the Federal Emergency Relief Administration (FERA), which offered billions of dollars in temporary aid to states to distribute to their needy citizens, and then through the Social Security Act, which provided tens of millions of dollars per year to states in matching funds. These funds were not for general use, however. They were set aside for the relief of certain “unemployables”: the elderly (Old-Age Assistance (OAA));³⁹ the children of fatherless homes (Aid to Dependent Children (ADC));⁴⁰ and the blind (Aid to the Blind (AB)).⁴¹ Contemporaries understood this scheme as President Roosevelt’s way of quitting “this business of relief”⁴²—by which he meant direct relief to all needy persons, regardless of ability to work—while both assuaging demands for old-age pensions and filling the gaps left by traditional purveyors of support.⁴³

The Act’s public assistance titles bore the imprint of their drafters: the labor economists, lawyers, public welfare administrators, and social workers whom President Roosevelt called upon to bring the New Deal to this historically local realm.⁴⁴ Perhaps best understood as “sober” or “mild”

from different states, dating from the late nineteenth century to the 1930s, see 1 EDITH ABBOTT, *PUBLIC ASSISTANCE: AMERICAN PRINCIPLES AND POLICIES* (1966).

39. Social Security Act of 1935, Pub. L. No. 74-271, tit. I, § 1, 49 Stat. 620, 620.
40. *Id.* tit. IV, § 401, 49 Stat. at 627.
41. *Id.* tit. X, § 1001, 49 Stat. at 645. Other titles provided for old-age insurance (initially called “federal old-age benefits”), maternal and child welfare, and public health work. *Id.* tit. II, 49 Stat. at 622; *id.* tit. V, 49 Stat. at 629; *id.* tit. VI, 49 Stat. at 634. For able-bodied men, the Act included an unemployment insurance title. *Id.* tit. III, 49 Stat. at 626. The federal government also continued to provide work relief through the Works Progress (later, Work Projects) Administration. KATZ, *supra* note 38, at 236.
42. This oft-quoted (and misquoted) phrase is from President Roosevelt’s January 4, 1935, message to Congress, in which he stated that “[t]o dole out relief in this way”—i.e., on an emergency and undifferentiated basis—was “to administer a narcotic, a subtle destroyer of the human spirit. It is inimical to the dictates of sound policy. It is in violation of the traditions of America.” He demanded that work, not relief, be given to “able-bodied but destitute workers.” President Franklin D. Roosevelt, Annual Message to Congress (Jan. 4, 1935), <http://www.presidency.ucsb.edu/ws/index.php?pid=14890>.
43. ARTHUR J. ALTMAYER, *THE FORMATIVE YEARS OF SOCIAL SECURITY* 16 (1966). On the demands for old-age pensions, see *infra* note 87.
44. Labor economists on President Roosevelt’s Committee on Economic Security designed the Old-Age Assistance (OAA) title, which in turn became the model for the lower-profile Aid to the Blind (AB) title. Federal Emergency Relief Administration (FERA) administrator Harry Hopkins and members of his staff designed ADC, with input from the Children’s Bureau and the upper echelons of the social work community. ROBYN MUNCY, *CREATING A*

progressives,⁴⁵ these professionals agreed that the object was not to improve poor individuals or rouse community sympathy, as earlier crusaders had attempted. Rather, it was to use federal legislation to convert the nation's poor relief operations—which reformers often described as “antiquated”⁴⁶ and “archaic”⁴⁷—into a modern public welfare system. They planned to accomplish this through centralization, bureaucratization, standardization, expert leadership, and, of course, the power of the federal government's purse.⁴⁸

Political realities constrained the drafters. They quickly learned that creating a national standard for benefit levels⁴⁹ would incense influential Southern Democrats and thereby threaten the Act's adoption.⁵⁰ While eager for federal funds, Southern senators were anxious to protect their region's racially stratified socioeconomic structure. A national floor meant that local administrators had no discretion; discretion was precisely what, historically,

FEMALE DOMINION IN AMERICAN REFORM, 1890-1935, at 151-52 (1994); EDWIN E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 3-61 (1962); Gordon, *supra* note 35, at 48; Interview by Peter A. Corning with Arthur Altmeyer, in Madison, Wis. (June 29, 1967) (transcript on file with Oral History Collection of Columbia University), <http://www.ssa.gov/history/ajaoral4.html>.

45. DAVID CIEPLEY, LIBERALISM IN THE SHADOW OF TOTALITARIANISM 68-69 (2006) (referring to the “sober” aspects of the progressive agenda); JAMES T. PATTERSON, THE NEW DEAL AND THE STATES: FEDERALISM IN TRANSITION 7 (1969) (referring to “mild progressives”); cf. EDGAR KEMLER, THE DEFLATION OF AMERICAN IDEALS: AN ETHICAL GUIDE FOR NEW DEALERS 101-30 (1941) (labeling these New Dealers as “deflated” progressives).
46. Edith Abbott, *Abolish the Pauper Laws*, 8 SOC. SERV. REV. 1, 10 (1934); Barbara Nachtrieb Armstrong, *The Nature and Purpose of Social Insurance*, 170 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 1 (1933); Ellen C. Potter & Blanche L. La Du, *Co-ordination of State and Local Units for Welfare Administration*, 7 SOC. SERV. REV. 383, 393 (1933).
47. Arthur Dunham, *Pennsylvania and Unemployment Relief, 1929-34*, 8 SOC. SERV. REV. 246, 251 (1934); Frank W. Goodhue, *Report of the Committee on Uniform Settlement Laws and the Transfer of Dependents*, 5 SOC. SERV. REV. 395, 397 (1931); Marietta Stevenson, *Standards of Public Aid*, 70 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 57 (1934).
48. See DERTHICK, *supra* note 1, at 18-19 (observing that their draft bill “intended to encourage what the professionals thought was progressive in state assistance administration and to suppress what they thought was not . . . to bring order out of the state and local chaos”). This history supports Daniel Rodgers's insight that “to a striking degree the New Deal enlisted its ideas and agenda out of the progressive past.” RODGERS, *supra* note 33, at 415.
49. Copying from the Massachusetts and New York old-age assistance laws, they suggested “a reasonable subsistence compatible with decency and health.” WITTE, *supra* note 44, at 144.
50. On the power of Southern Democrats in Congress during this period, see Ira Katznelson, Kim Geiger & Daniel Kryder, *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 POL. SCI. Q. 283 (1993).

had kept poor blacks working for low wages in fields and homes.⁵¹ The Act's drafters also had to abandon dreams of imposing federal standards on state administrative personnel. Personnel selection was a particularly cherished state prerogative,⁵² and recent intrusions in this area had left states with a sour taste.⁵³

But the drafters of the Social Security Act had no intention of allowing the American system of poor relief to limp along familiar tracks, a point sometimes lost amidst scholarly condemnations of its shortcomings. First, the Act locked out private relief providers, such as the Red Cross, from distributing any part of the new grants-in-aid.⁵⁴ The drafters did not object to voluntary relief efforts, but, embracing a tenet of the burgeoning field of public administration, they believed that public employees, accountable to the public, should

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51. See BLANCHE D. COLL, *SAFETY NET: WELFARE AND SOCIAL SECURITY, 1929-1979*, at 31-32 (1995); LIEBERMAN, *supra* note 32, at 48-56; WITTE, *supra* note 44, at 143-44. On other New Deal policies that systematically disadvantaged African Americans, see Michael S. Holmes, *The New Deal and Georgia's Black Youth*, 38 J. S. HIST. 443 (1972); Melissa Walker, *African Americans and TVA Reservoir Property Removal: Race in a New Deal Program*, 72 AGRIC. HIST. 417 (1998); and Adam Gordon, Note, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186 (2005).
52. LANSDALE ET AL., *supra* note 1, at 273. The issue famously reared its head again in the Burger Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which held that the Tenth Amendment prohibited Congress from regulating the wages, hours, and benefits of state employees.
53. FERA required at least one professional social worker in every agency. These "pantry snoopers" were widely disliked. See HAROLD P. LEVY, *A STUDY IN PUBLIC RELATIONS: CASE HISTORY OF THE RELATIONS MAINTAINED BETWEEN A DEPARTMENT OF PUBLIC ASSISTANCE AND THE PEOPLE OF A STATE* 29 (1943) (noting that in Pennsylvania the term "social worker" was "anathema"); Wilma Van Dusseldorp, *The In-Service Training of Public Welfare Workers*, 17 SOC. FORCES 60, 61 (1938) (noting that in Georgia, social workers faced "such derogatory terms as 'pantry snooping,' 'nosing into peoples' private affairs,' 'exerting excessive and unwarranted control over lives of other people,' etc."); Interview by Jacqueline K. Parker with Helen Valeska Bary, in S.F., Cal. (1973) (transcript on file with Regional Oral History Office, Bancroft Library, University of California, Berkeley), <http://content.cdlib.org/view?docId=kt6zo9n8m9> (noting that the Governor of Colorado "thoroughly detested" social workers).

The Act ultimately provided that although a federal agency had power to prescribe "methods of administration," that power excluded methods "relating to selection, tenure of office, and compensation of personnel." Social Security Act of 1935, Pub. L. No. 74-271, tit. I, § 2(a)(5), 49 Stat. 620, 620; *id.* tit. IV, § 402(a)(5), 49 Stat. at 627; *id.* tit. X, § 1002(a)(5), 49 Stat. at 645.

54. Here the drafters followed a path blazed by the Children's Bureau in its administration of the Sheppard-Towner Maternity and Infancy Act, Pub. L. No. 67-97, 42 Stat. 224 (1921), see MUNCY, *supra* note 44, at 108, 121, and further worn by FERA, see COLL, *supra* note 51, at 21-22.

administer public funds.⁵⁵ They also wanted states to recognize welfare as “an important, respectable, large scale function of government.”⁵⁶ (Most charities, themselves crippled by the Depression, were in no position to object.⁵⁷) Second, the Act permitted federal funds to flow only to states that administered public assistance through, or under the supervision of, a central-state organ.⁵⁸ Administering public assistance from Washington, as was the plan with old-age insurance, was never really on the table, at least not after the federal emergency relief experiment, in which FERA administrator Harry Hopkins and his subordinates so dramatically alienated state and local officials.⁵⁹ The drafters’ goal was simply to amass authority at some kind of center, to minimize the mischief and waste that they believed accompanied unbridled local discretion.⁶⁰ Third, the Act required that every state public assistance plan apply uniformly across the state. For political and legal reasons, the Act’s designers could not compel interstate uniformity, but they could address the intrastate variability that had marked—and in their view, marred—previous

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55. See COLL, *supra* note 51, at 21 (describing how public welfare reformers, in order to “assure accountability to the taxpayers,” “preached the equation: public funds = public agency”); JAMES LEIBY, *A HISTORY OF SOCIAL WELFARE AND SOCIAL WORK IN THE UNITED STATES* 225 (1978) (documenting Harry Hopkins’s influential decision, as FERA administrator, that public agencies alone spend federal funds).
56. Interview by James R.W. Leiby with Frank Bane, in Berkeley, Cal., 154-55 (Jan. 1965) (transcript on file with Regional Oral History Office, Bancroft Library, University of California, Berkeley), <http://ia600504.us.archive.org/21/items/pubadminpubwelfareoobanerich/pubadminpubwelfareoobanerich.pdf>.
57. See ANDREW J.F. MORRIS, *THE LIMITS OF VOLUNTARISM: CHARITY AND WELFARE FROM THE NEW DEAL THROUGH THE GREAT SOCIETY* 3-34 (2009). Catholic charities were a partial exception. See DOROTHY M. BROWN & ELIZABETH MCKEOWN, *THE POOR BELONG TO US: CATHOLIC CHARITIES AND AMERICAN WELFARE* 152 (1997) (arguing that Catholic charities managed to preserve an important role for themselves within the new public welfare programs, but had to cede control of much of their terrain to public agencies).
58. Social Security Act tit. I, § 2(a)(3), tit. IV, § 402(a)(3), tit. X, § 1002(a)(3); COLL, *supra* note 51, at 68-69.
59. See PATTERSON, *supra* note 45, at 50-75 (chronicling the myriad conflicts between FERA officials and state and local authorities).
60. See Hoehler, *supra* note 38, at 287 (explaining that the centralization requirement was about providing “adequate supervision” and “maintain[ing]” “standards,” not directing the program from above). The “single State agency” provision also had the effect of disentangling the judiciary from localized webs of social welfare provision. For example, juvenile courts in some jurisdictions had long administered mothers’ pensions, a vestige of what political scientist Stephen Skowronek famously labeled a nineteenth-century “state of courts and parties.” SKOWRONEK, *supra* note 29, at 39. The “single State agency” provision suggested that when it came to federally subsidized public assistance programs, administrative authority would have to reside elsewhere. STEVENSON, *supra* note 37, at 115-16; R. CLYDE WHITE, *ADMINISTRATION OF PUBLIC WELFARE* 51-52 (2d ed. 1950).

relief efforts.⁶¹ Fourth, the Act required state plans to provide all aggrieved applicants an opportunity for a “fair hearing” at the state level. This provision was a check on the local officials making first-order decisions about whom to aid. Some guarantee of review by an “objective” state administrator would theoretically prevent irrational customs or outmoded attitudes about poverty from dictating decisions about people in need.⁶²

While these four conditions signaled to state and local governments that power over poor relief must shift inward, toward one ultimate decisionmaker, and upward, toward the state and federal governments, other conditions demanded a break with old poor law traditions. For example, one provision prohibited states from channeling their grants into the public institutions (poorhouses, orphanages, asylums) that had become favored repositories for the indigent.⁶³ Another provision mandated that assistance be in cash rather than in kind (clothes, grocery orders, etc.).⁶⁴ A third provision undermined the principle of “settlement,” under which towns, and later states, accepted responsibility for those with an established attachment to the locality and warned out others.⁶⁵ Public assistance must “be administered on a much higher plane than that of the old poor laws,” the drafters insisted.⁶⁶

In sum, much remained the same—too much, from the perspective of some reformers—and yet the Act initiated fundamental changes in public responsibility for the poor. Before its enactment, most poor Americans garnered only discretionary handouts, issued from local centers of power and governed by local notions of desert. After the Act, if all went as planned, large swaths of this population would receive regular, if not generous, payments, still tied to local attitudes, but supervised by states and bounded by state and federal law. Such modernizing reforms had already reached communication, manufacturing, transportation, and health. Finally, they were coming to poor relief.⁶⁷

61. Social Security Act tit. I, § 2(a)(1), tit. IV, § 402(a)(1), tit. X, § 1002(a)(1).

62. *Id.* tit. I, § 2(a)(4), tit. IV, § 402(a)(4), tit. X, § 1002(a)(4). The administration of the fair hearing provision is taken up in more detail in Tani, *supra* note 13, at 115-66.

63. Social Security Act tit. I, § 3(a)(1), tit. X, § 1003(a)(1).

64. *Id.* tit. I, § 6, tit. IV, § 406(b), tit. X, § 1006.

65. *Id.* tit. I, § 2(b)(2), tit. IV, § 402(a), tit. X, § 1002(b)(1) (prohibiting states from enforcing residency standards that excluded a person who had spent five of the previous nine years residing in a state).

66. COMM. ON ECON. SEC., REPORT TO THE PRESIDENT 45 (1935).

67. These reforms reflected an understanding of federalism that came to prominence only in the Progressive Era. “[T]he idea,” historian Harry Scheiber has explained, was “that the distribution of responsibilities between the national government and the states ought to be

Congress created an independent agency, the Social Security Board (SSB), to administer the Act and gave it both a carrot and a stick to use in its dealings with the states. The carrot was money: the SSB had the power to give federal funds to states that submitted appropriate public assistance plans.⁶⁸ The appropriation for the first year was relatively modest—\$77.5 million—but this figure grew steadily over subsequent years, and was nonetheless a boon to the cash-strapped states.⁶⁹ The stick was also money: the SSB had the right to defund states that failed to adhere to federal requirements.⁷⁰ In other words, it was a scheme of monetary incentives, directed exclusively at the states. It was also a prime example of what contemporary scholars have labeled “cooperative federalism”: rather than regarding the national government and the states as separate sovereigns (“dual federalism”), Edward Corwin has explained, policymakers had started to treat them as “mutually complementary parts of a single governmental mechanism.”⁷¹

Federal administrators trod carefully, wary of being accused of federal overreaching as they attempted to guide states toward fundable public assistance schemes. In fact, though, the SSB was operating from a position of strength. Recognizing that the time-honored providers of relief were bankrupt and that state coffers were next, state officials were eager to access federal funds and willing to follow federal guidance.⁷² With a handful of exceptions, they

based upon a pragmatic, realist standard as to congruence and appropriateness—rather than being based upon immutable doctrines embodied in formal constitutional constructs.” Harry N. Scheiber, *Federalism and the States*, in *ENCYCLOPEDIA OF THE UNITED STATES IN THE TWENTIETH CENTURY* 427, 430 (Stanley I. Kutler ed., 1996).

68. Social Security Act tits. I, IV, X.
69. On the swift increase in federal funding, see Division of Public Assistance Research, Bureau of Research & Statistics, *Sources of Funds Expended for the Special Types of Public Assistance in 1939*, *SOC. SECURITY BULL.*, July 1940, at 45, 45, which notes that in 1939, federal expenditures for the three categorical assistance programs amounted to over \$243 million.
70. Social Security Act tit. I, § 4, tit. IV, § 404, tit. X, § 1004.
71. Edward S. Corwin, *The Passing of Dual Federalism*, 36 *VA. L. REV.* 1, 19 (1950). The foundational work on this “new federalism” is JANE PERRY CLARK, *THE RISE OF A NEW FEDERALISM: FEDERAL-STATE COOPERATION IN THE UNITED STATES* (1938). On how American federalism has evolved since the New Deal, see Martha Derthick, *How Many Communities? The Evolution of American Federalism*, in *DILEMMAS OF SCALE IN AMERICA’S FEDERAL DEMOCRACY* 125 (Martha Derthick ed., 1999); and Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 *U. TOL. L. REV.* 619, 649-76 (1978).
72. See Interview with Frank Bane, *supra* note 56, at 203 (recalling that states “clamor[ed]” for guidance in the early years); Interview with Helen Valeska Bary, *supra* note 53, at 208 (recalling that governors, administrators, and lawyers “flock[ed] in” from “nearly all the states” to learn how to apply). It is also true, as political scientist Kimberley Johnson has observed, that by 1935, all parties were familiar with cooperative federalism and its

built their plans on a federally approved foundation and adjusted them to SSB specifications.⁷³ States also operated their plans with federal requirements in mind. Every quarter, each state looked to the SSB to confirm its expenditures for the previous months and approve its projections for the next. At this point the SSB could, and often did, take “audit exceptions,” refusing to reimburse the state for payments not made in conformity with federal rules.⁷⁴ These were sharp reminders of federal authority. The SSB could also suspend entire grants (audit exceptions involved just fractions), a power that the agency exercised rarely but alluded to frequently.

The more formidable administrative problem, federal officials began to suspect, was the lack of federal *or* state control over what happened at the local level, where public assistance funds passed into the hands of the poor. Again, the prevailing paradigm before the Depression was local dominance. In 1930, the vast majority of expenditures for public aid—an estimated 91%—came from local funds.⁷⁵ That percentage diminished over time—from 82% in 1931, to 24% in 1933, to between 9% and 11% in the last half of the decade—but in dollar amounts, local contributions consistently surpassed 1930 levels.⁷⁶ Further, irrespective of the source of the funds, distribution to the poor had long been a matter of local discretion. In short, the federal and the state governments were new players on a very old field. What’s more, the Social Security Act’s pragmatic drafters let the old players keep playing: the new

techniques. KIMBERLEY S. JOHNSON, *GOVERNING THE AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM, 1877-1929*, at 163 (2007); *accord* DAVID B. WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON* 76-91 (1995).

73. Within months of the Act’s adoption, the SSB had distributed instructions and convened a conference in Washington to explain to states how to prepare their plans. The SSB’s main private-sector ally, the American Public Welfare Association (APWA), also drafted and circulated Board-approved model bills. *See* COLL, *supra* note 51, at 69; Interview with Helen Valeska Bary, *supra* note 53, at 210-11. In at least one instance, a state secured even more tailored assistance: after a Board emissary told the Governor of Colorado that the SSB intended to reject his state’s plans, he ordered her to sit down with the state’s deputy attorney general and legislative reference counsel, “write laws that she did like,” and have them on the desks of state legislators the following morning. Interview with Helen Valeska Bary, *supra* note 53, at 231-37; *see* JOSEPHINE CHAPIN BROWN, *PUBLIC RELIEF, 1929-1939*, at 408 (1940); COLL, *supra* note 51, at 76.
74. Mark P. Hale, *The Federal Role in Public Assistance 208-10* (June 1956) (unpublished Ph.D. dissertation, University of Chicago) (on file with the University of Chicago).
75. BUREAU OF PUB. ASSISTANCE, FED. SEC. AGENCY, *PUBLIC ASSISTANCE REPORT NO. 4, PUBLIC ASSISTANCE 1941*, at 21 (1941). Public aid here includes both work relief and subsistence grants. *Id.*
76. *Id.* at 21-22; *see* William Haber, *Problems of State Administration, 1937* PROC. NAT’L CONF. SOC. WORK 445.

federal-state public assistance programs sat atop, rather than supplanted, the diffuse collection of local agencies and officials that had been tending to the poor.⁷⁷

The Act did require state oversight—a departure from the past—but in fact states could choose between administering the public assistance plan and merely supervising. Most states chose the latter, meaning that administration remained largely a local matter.⁷⁸ The result was “decentralized centralization,” to borrow the apt characterization of one state welfare director,⁷⁹ an arrangement that fulfilled federal goals only if state centers had the ability to exert meaningful control over actors on their peripheries. Federal administrators soon had reason to doubt whether such control existed—and had no formal mechanism for addressing the problem.⁸⁰ They would respond by attempting to influence the local level informally and indirectly, including through the language of rights.

II. SECURITY THROUGH RIGHTS

President Roosevelt’s eloquent declarations of social and economic rights are a hallmark of the New Deal era. Historians agree, however, that his Administration took a more cautious position on support payments to the poor.⁸¹ Prevailing accounts of those payment programs emphasize the Social Security Board’s repeated declarations that whereas social insurance benefits were the right of those who qualified, public assistance payments were something less; like traditional poor relief, they were given as a pittance, and

77. For a detailed account of the administration of the Social Security Act, focusing especially on the organization and operation of the Social Security Board, see CHARLES MCKINLEY & ROBERT W. FRASE, *LAUNCHING SOCIAL SECURITY: A CAPTURE-AND-RECORD ACCOUNT, 1935-1937* (1970).

78. STEVENSON, *supra* note 37, at 90.

79. David C. Adie, *Responsibility of the State in the Supervision of Public Welfare Programs*, 13 *SOC. SERV. REV.* 611, 618 (1939).

80. While their enforcement machinery established clear links between the federal agency and the states, it presumed no relationship between the federal and the local. The best that the SSB could do was use its carrot and stick to persuade the state governments to create the sort of machinery that could bring local units into line. See COLL, *supra* note 51, at 68-69.

81. See, e.g., ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 201 (1998) (noting that President Roosevelt initially attempted to meet the challenges of the Depression through economic reform and emergency relief; only later did he turn to permanent programs of income support); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940*, at 124 (1963) (documenting President Roosevelt’s reluctance to provide direct support payments, at least to employable persons, and his clear preference for work relief).

only upon a humiliating confession of dependency on the state.⁸² The reality was more complicated: even as top administrators sold social insurance as an “earned right” and by implication denigrated public assistance, mid-level administrators and their professional colleagues just outside the agency developed a competing discourse. Concepts of rights, far from being off-limits, were integral to their understandings of New Deal public assistance.

A. An “Earned Right”: Social Insurance

The preceding Part, detailing the reformist goals underlying the drafting of the Social Security Act, emphasized the Act’s public assistance titles. In practice, federal administrators rarely thought about assistance—old-age assistance (OAA), in particular—without contemplating possible repercussions for old-age insurance. In the months following enactment, the Social Security Board took great pains to sell the public on the latter, and specifically to explain why some form of “pension,” disconnected from prior earnings, was not as good. Yes, the Social Security Act included a public assistance component, Board Chair John Winant explained to the readers of the *Atlantic Monthly* in 1936, but public assistance benefits “are based upon the need of the recipient,” whereas old-age *insurance* benefits “are available to an eligible individual as a matter of right.”⁸³ The SSB took the same message on the road. “The benefits paid under the federal old-age insurance system will be paid as a matter of right irrespective of need,” read one of Board member Arthur Altmeyer’s typical speeches, while OAA payments would depend on “proven need”—i.e., continual means testing by a government worker.⁸⁴ These comments reflect a deep fear and a strategic choice: the SSB initially refused to refer to public assistance payments as a right because it recognized the appeal of OAA and did not want Americans’ enthusiasm for that program to prevent them from developing the proper affection for Old-Age Insurance, OAA’s pointy-headed cousin.

This fear was well founded. Since the 1910s, support for government-

82. JERRY R. CATES, *INSURING INEQUALITY: ADMINISTRATIVE LEADERSHIP IN SOCIAL SECURITY, 1935-54*, at 26-31 (1983); GORDON, *supra* note 32, at 5; MOLLY C. MICHELMORE, *TAX AND SPEND: THE WELFARE STATE, TAX POLITICS, AND THE LIMITS OF AMERICAN LIBERALISM* 13 (2012); JAMES T. PATTERSON, *AMERICA’S STRUGGLE AGAINST POVERTY 1900-1980*, at 76 (1981); Alice Kessler-Harris, *In the Nation’s Image: The Gendered Limits of Social Citizenship in the Depression Era*, 86 J. AM. HIST. 1251, 1263-65 (1999).

83. John G. Winant, *An Approach to Social Security*, ATLANTIC MONTHLY, July 1936, <http://www.theatlantic.com/magazine/archive/1936/07/an-approach-to-social-security/4020>.

84. Arthur Altmeyer, Speech to the Annual Meeting of National Conferences of Catholic Charities (1938), *quoted in* CATES, *supra* note 82, at 30.

funded old-age pensions had been on the rise. Dedicated campaigning by the Fraternal Order of the Eagles and organized labor produced old-age pension schemes in seventeen states by 1932.⁸⁵ Several years of Depression living increased that count. Older workers who had lost their jobs discovered that, owing to age discrimination, their plight was rarely temporary; adult children faced their own economic woes and were unable to support their parents. Around the nation, people banded together in pension associations and annuity leagues, prompting eleven more states to enact old-age pension plans over the next two years.⁸⁶ Meanwhile, hundreds of thousands of Americans supported proposals for a national plan, such as Dr. Francis Townsend's call for \$200 a month for every citizen over age sixty⁸⁷ and Senator Huey Long's alluring plan for the country to "share our wealth."⁸⁸ By one federal government estimate from 1935, one million elderly citizens were in urgent need and many more were barely better off.⁸⁹

The drafters of the Social Security Act presented Old-Age Insurance (now known simply as "Social Security")⁹⁰ as the answer to the problem. In their view, the need-based OAA program existed solely to meet interim needs—insurance benefits were not scheduled to pay out until 1942—and to provide a modicum of security to the elderly whom the insurance-based program excluded (such as domestic and agricultural workers and the self-employed). From most other vantage points, however, the assistance program was the

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85. JILL QUADAGNO, *THE TRANSFORMATION OF OLD AGE SECURITY: CLASS AND POLITICS IN THE AMERICAN WELFARE STATE* 66-72 (1988).
86. EDWIN AMENTA, *BOLD RELIEF: INSTITUTIONAL POLITICS AND THE ORIGINS OF MODERN AMERICAN SOCIAL POLICY* 70 (1998) (reporting twenty-eight states with old-age pension laws on the books by the end of 1934).
87. See generally EDWIN AMENTA, *WHEN MOVEMENTS MATTER: THE TOWNSEND PLAN AND THE RISE OF SOCIAL SECURITY* (2006) (describing the advocates of Townsend's government-funded pension plan as a highly influential social movement); QUADAGNO, *supra* note 85 (tracking support for old-age pensions from the late nineteenth century through the post-World War II period).
88. ALAN BRINKLEY, *VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN, AND THE GREAT DEPRESSION* 72-74 (1982) (describing Long's mass appeal and his call for wealth redistribution).
89. See COMM. ON ECON. SEC., *supra* note 66, at 24 (finding more than one million elderly citizens receiving public charity).
90. The precise name during the period 1935 to 1939 was "Federal Old-Age Benefits," but in 1937, "Old-Age Insurance" became federal administrators' moniker of choice. CATES, *supra* note 82, at 32-33. The program officially became "Old-Age and Survivors Insurance" in September 1939, when Congress extended benefits to dependents and survivors of covered earners. COLL, *supra* note 51, at 94; FED. SEC. AGENCY, *FOURTH ANNUAL REPORT OF THE SOCIAL SECURITY BOARD* 1939, H.R. DOC. NO. 76-610, at 18 n.1 (3d Sess. 1940).

main event and the insurance program the experimental sideshow. Congress focused more on assistance than insurance. The broader public did as well. Those Americans who were aware of the insurance program tended to dismiss it as “the self-interested work of experts,”⁹¹ or view it as part of a general “pension” program for the elderly poor.⁹² Meanwhile, enthusiasm for OAA soared. For example, thousands of prospective recipients converged on Missouri’s old-age pension boards—1,500 in St. Louis alone—on the day the state’s enabling legislation went into effect.⁹³ Enthusiasm for a still more generous Townsend-type alternative was even greater. Less than a month after President Roosevelt signed the Social Security Act into law, a group called the Old Age Pension Association, claiming fifteen to twenty million members, asked Congress to provide \$5.5 billion per year for \$30-per-month old-age pensions.⁹⁴ Around the same time, thousands of delegates from local Townsend Clubs—which urged even larger pensions—descended on Chicago for their first national convention.⁹⁵

With conservative critics gnashing their teeth and competitors scratching at the door, the executives atop the Social Security Board dedicated themselves to establishing a loyal constituency for the insurance program. They embraced rights rhetoric. Thus, at a 1936 Board viewing of the script for a short public relations film, one Board member urged the scriptwriter to use the concept of rights to draw a sharper distinction between the recipients of Old-Age Insurance and those of OAA, and, further, to make the “insured” citizens clearly better off: “Show the superior advantages of this spinster lady and self-respecting man getting checks as a matter of right, which perhaps will enable them to go to the seashore or have a hunting lodge, or something like that,” he

91. BERKOWITZ, *supra* note 2, at 37; *see also id.* at 29-37 (describing general views of unemployment compensation programs).

92. In February 1937, the executive director of the President’s Committee on Economic Security reported disapprovingly that “[p]opularly . . . old age assistance is called ‘old age pensions,’ and there is a widespread notion that everyone who reaches a specified age is entitled to a pension and a still more prevalent notion that all eligible persons should receive the same grants.” Edwin E. Witte, *Old Age Security in the Social Security Act*, 45 J. POL. ECON. 1, 10 (1937). For an example of confused media coverage, see *How Security Bill Aids Aged and Idle*, N.Y. TIMES, Aug. 15, 1935, at 4.

93. Louis LaCoss, *Missourians Rush for Old-Age Grant*, N.Y. TIMES, Sept. 8, 1935, at E7.

94. Associated Press, *Urges Big Pension Fund*, N.Y. TIMES, Sept. 8, 1935, at 32.

95. *2,000 Townsend Aides Assemble in Chicago*, N.Y. TIMES, Oct. 24, 1935, at 22. Thousands more waited back home. Townsend once calculated that his organization had more members nationwide than voted for Hoover in 1932. *Politicians Worry over Townsendism*, N.Y. TIMES, Nov. 24, 1935, at N10. The movement claimed 750,000 dues-paying members in California alone. George P. West, *Townsend’s Plan Widely Supported*, N.Y. TIMES, Nov. 3, 1935, at E7.

reportedly said. “Emphasize that it is not necessary for them to be ‘down and out’ in order to get this fixed income.”⁹⁶ Rights here operated in the same way as the image of the luxury getaway: they distinguished a “superior” program and clientele from an inferior one. The SSB hoped to convey that, under the rights-based program, the state asked no questions and thereby left the recipient’s self-respect intact, while under the need-based program, the state demanded a demeaning display of destitution. For the same reason, the SSB encouraged states to limit OAA to the truly needy (by applying rigorous means testing) and discouraged them from promising grants that were more liberal than the federal government had anticipated. “Obviously,” one staff member explained in 1939, “if liberal old-age assistance payments are to be made to all persons reaching 65, contributory old-age insurance becomes futile.”⁹⁷

B. From Need to Right: Rights Language in Public Assistance Administration

The Social Security Board’s usage of rights language to differentiate the insurance population from the assistance population is by now well known. Less acknowledged is the fact that Arthur Altmeyer and his co-appointees at the top of the agency represented just one site of power in a social welfare bureaucracy that had several. Although the three-member Board made all major tactical decisions, it relied heavily on support staff at the “mezzo level,” Daniel Carpenter’s term for the monitors, planners, and managers operating just below an agency’s executive positions.⁹⁸ This was especially true in regard

96. CATES, *supra* note 82, at 29 (internal quotation marks omitted). The Board member was Arthur Altmeyer.

97. Alvin Roseman, *Old-Age Assistance*, 202 ANNALS AM. ACAD. POL. & SOC. SCI. 53, 58 (1939).

98. DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928*, at 19-21 (2001). Carpenter makes a strong case for the power of mezzo-level actors during the period he studies. Most important was their durability (they were not flushed out of office with every change in presidential leadership). This, in turn, allowed for stable relations with Congress, party elites, professions, and other organized interests. Stable relations enhanced the likelihood that these actors would have the ability to innovate. *Id.* The Social Security Board postdates Carpenter’s period, but many of its mezzo-level actors share the same characteristics. Bureau of Public Assistance Director Jane Hoey remained in place until 1953; opponents were able to extract her only by reclassifying her career civil service position as a political one. Hoey’s right-hand woman, Kathryn D. Goodwin, worked for the Agency from around 1940 until 1962, eventually assuming Hoey’s position. (On the precise date of Goodwin’s start, see *Kathryn D. Goodwin Dies; Headed Family Service Unit*, WASH. POST, Feb. 19, 1968, at B10. *But see Beauty Beaten Senseless and Robbed of \$25*, WASH. POST, Feb. 3, 1938, at 1 (suggesting that she started consulting for the agency as early as 1938).) In the Agency’s Office of the General Counsel, lead lawyer Tom Eliot quickly moved on, but Jack

to public assistance, a policy area that none of the Board members knew particularly well.⁹⁹ Before reaching the Board, most public assistance matters went through (1) the Bureau of Public Assistance (BPA), headed by the warm but formidable social worker Jane Hoey; and (2) the Office of the General Counsel (GC), which—consistent with other accounts of New Deal agencies¹⁰⁰—loudly and persistently voiced its views.¹⁰¹ This devolution and

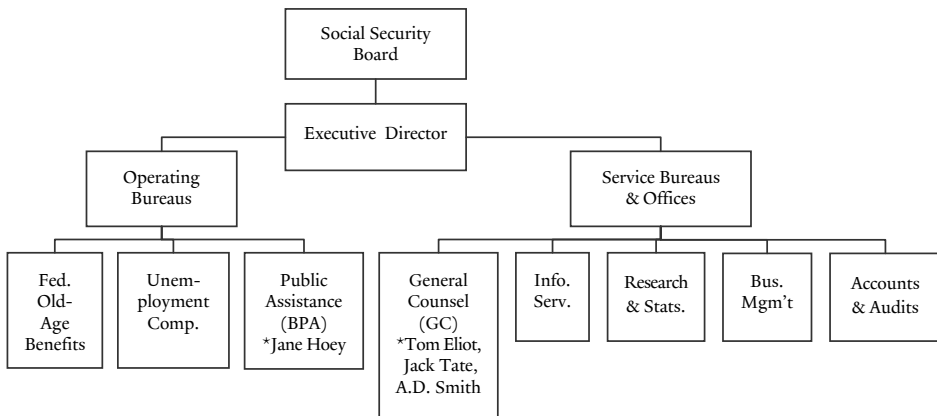
Tate occupied the top spot from 1937 to 1939 and again from 1940 to 1947. Assistant General Counsel A. Delafield Smith stayed put for seventeen years. Lawyer Bernice Bernstein remained with the Agency from 1935 to 1977, with the exception of brief periods spent caring for her children or doing wartime work for other federal agencies. The list goes on. In any case, the point is not that these administrators enjoyed the precise level of autonomy that Carpenter famously found; it is that their expertise and their relative insulation from political pressures, combined with the sheer magnitude of the task at hand, allowed them to advance their own interpretations of the Social Security Act and pursue their own strategies for achieving the Act's goals.

99. John Gilbert Winant, the Board's first chair, governed New Hampshire for three terms and had strong progressive credentials, but was no public welfare aficionado. Contemporaries remembered him as kind and intelligent, but not "particularly informed about the problems of social security." Interview with Helen Valeska Bary, *supra* note 53, at 206. The earnest and brilliant Arthur Altmeyer, who had headed Wisconsin's Department of Industrial Relations and had come to Washington to serve as Assistant Secretary of Labor, was first and foremost a labor economist. He devoted most of his attention to the Act's insurance-based programs, which he believed would one day swallow up most public assistance recipients in their benevolent embrace. Vincent Miles, a former Democratic Party official from Arkansas, had come to the Board on the recommendation of the Senate Majority Leader. Himself a political appointee, he took a greater interest in filling Old-Age Insurance (OAI) posts with members of the American Legion than in making policy. Interview with Peter A. Corning with Albert Henry Aronson, former Dir. of Pers., Soc. Sec. Bd., in Washington, D.C. 8-11, 90-91, 99-100 (Feb. 18, 1965) (transcript on file with Oral History Collection of Columbia University); Interview with Helen Valeska Bary, *supra* note 53, at 206-07. (To the Roosevelt Administration's credit, Secretary of Labor Frances Perkins asked Grace Abbott, one of the nation's preeminent social workers, to serve on the Board, but she declined. LELA B. COSTIN, *TWO SISTERS FOR SOCIAL JUSTICE: A BIOGRAPHY OF GRACE AND EDITH ABBOTT* 226 (1983).)
100. Jerold Auerbach famously characterized the New Deal as "a lawyers' deal" because "[l]awyers' skills—drafting, negotiation, compromise—and lawyers' values—process divorced from substance—permitted its achievements, yet set its boundaries." Jerold S. Auerbach, *Lawyers Who Govern*, 1 REVS. AM. HIST. 146, 148 (1973); see also PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982) (arguing for lawyers' importance to the National Recovery Administration, the Agricultural Adjustment Administration, and the National Labor Relations Board). A related body of scholarship has noted how heavily the New Deal relied not simply on lawyers, but also on law and legal discourse. See, e.g., RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* (1995); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 154-60 (1985).

By making the case for lawyers' power within the SSB, I do not mean to imply that the lawyers there were as important as they were in, for example, the Agricultural Adjustment Administration, the National Recovery Administration, or the National Labor Relations

diffusion of power created space for interpretations of the public assistance program that differed from the Board's. One point of divergence was the program's relationship to the concept of rights: while Board members all but refused to use "public assistance" and "right" in the same sentence,¹⁰² administrators at the mezzo level embraced rights language as they gave form and substance to the new program.

Figure 1.
THE ORGANIZATION OF THE SOCIAL SECURITY BOARD



Within the upper echelons of professional social work, from which the BPA drew most of its staff members, the language of rights was familiar. Those coming from the Catholic Charities tradition, such as director Jane Hoey,

Board. The variability of lawyerly dominance across the New Deal is a topic that merits greater study. I also do not intend to generalize about the "New Deal lawyer." As Michele Landis Dauber has observed, for every high-flying Frankfurter protégé there were hundreds of "older, more anonymous government lawyers" who "treated representing the New Deal as ordinary legal work." Michele Landis Dauber, *New Deal Lawyers*, in 3 *ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES* 399, 401 (David S. Tanenhaus ed., 2009); see also Karen M. Tani, *Portia's Deal*, 87 *CHI.-KENT L. REV.* 549 (2012) (spotlighting the careers of three important but lower-profile women lawyers of the New Deal).

101. "I felt that a great number of hostile critics were just waiting, ready to pounce if the board made a single mistake," recalled Thomas Eliot, a Labor Department lawyer who helped draft the Act and who became the first GC. It was Eliot's "duty to keep the board on the straight and narrow path." THOMAS H. ELIOT, *RECOLLECTIONS OF THE NEW DEAL: WHEN THE PEOPLE MATTERED* 126-27 (1992). Eliot and his assistant attorneys insisted on participating in all Board meetings, which, according to one attendee, the Board "didn't entirely like." Interview with Jack B. Tate, *supra* note 1, at 6-7.

102. Altmeyer would later change his tune. See *infra* note 227 and accompanying text.

imbibed the teaching that a minimum subsistence was man's natural right; the individual in need thus had a legitimate claim to the wealth of those around him.¹⁰³ Further, Catholic reformers worked hard to enshrine this ethical obligation in positive law: the influential teacher and clergyman John A. Ryan, for example, campaigned for wage and hour legislation, unemployment insurance, protection for labor organizing, and provision against accident, illness, and old age.¹⁰⁴ Hoey, Ryan's former pupil, showed her roots when she declared man's "right to these essentials which arise out of his intrinsic nature" and government's "obligation to see that essential human needs are met and that the rights of the individual are protected."¹⁰⁵

Not everyone involved in relief giving felt this way—some vigorously resisted social welfare legislation on the very ground that it would turn charity into right¹⁰⁶—but by the mid-1930s, the professional social workers with the closest relationship to the New Deal could be heard using the language of rights to describe the most enlightened and desirable social policy. For example, as policymakers puzzled over how to approach the relief problem in the years leading up to the Social Security Act, the American Association of

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103. See, e.g., WILLIAM J. KERBY, *THE SOCIAL MISSION OF CHARITY: A STUDY OF POINTS OF VIEW IN CATHOLIC CHARITIES* (1921); Henry E. Manning, *A Note on Outdoor Relief*, 43 FORT. REV. 153 (1888).
104. See, e.g., JOHN A. RYAN, *DISTRIBUTIVE JUSTICE: THE RIGHT AND WRONG OF OUR PRESENT DISTRIBUTION OF WEALTH* (1916); JOHN A. RYAN, *A LIVING WAGE: ITS ETHICAL AND ECONOMIC ASPECTS* (1906); JOHN A. RYAN, *A PROGRAMME OF SOCIAL REFORM LEGISLATION* (1909). Hoey trained under Monsignors Ryan and Kerby at Trinity College in Washington, and their teachings are evident in her speeches and writings. For more on Catholic-social-work and Catholic-welfare thought in this period in U.S. history, see BROWN & MCKEOWN, *supra* note 57, at 51-85.
105. Jane M. Hoey, *Social Work Concepts and Methods in the Postwar World*, 71 PROC. NAT'L CONF. SOC. WORK 35, 36-37 (1944). This quotation suggests a way in which a natural rights framework could survive comfortably within an agency (and a larger Administration) that embraced legal positivism. Catholic social worker and high-ranking Bureau of Public Assistance (BPA) administrator Rose McHugh made similar statements. See BROWN & MCKEOWN, *supra* note 57, at 179 (describing a 1939 presentation in which McHugh cited with approval both the Catholic teaching of the right to subsistence and the Social Security Act's legal guarantees).
106. See, e.g., *Report on Outdoor Relief*, 1877 PROC. NAT'L CONF. CHARITIES 46, 48-49, 51 (decrying "the pernicious notion that the State is bound to support all who demand assistance" because such a notion leads the recipient of relief "to accept it without gratitude," "use it without discretion," and eventually "demand[] [it] defiantly as a right"), *quoted in* JUNE HOPKINS, *HARRY HOPKINS: SUDDEN HERO*, BRASH REFORMER 94 (1999); see also SKOCPOL, *supra* note 29, at 426 (describing charity officials' fears that mothers' pensions, like Civil War veterans' pensions, would be construed as public obligations and result in ever-larger expenditures).

Social Workers Division on Government and Social Work advocated a national program under which “assistance shall be accorded . . . as a *right*,” a right protected by process (It “may eventually be claimed in a court of appeal.”) and exercised freely (It “shall not result in any loss of civil or political rights.”).¹⁰⁷ Similarly, Harry Hopkins, Roosevelt’s influential relief czar, used rights language to explain why state-level widows’ pensions represented an “enlightened” model of caring for poor families: “Widows’ pensions in most states took on the character of a ‘right,’” he opined in 1935; as a result, they gave the recipients “a type of security” and “an independence in the community” that they would not have enjoyed from traditional poor relief or private charity.¹⁰⁸ This was American social policy at its best.

Influential professional social workers also used, as negative referent, programs and program administrators that failed to provide relief as a matter of right. For example, William H. Matthews, Harry Hopkins’s former

107. Memorandum from Hertha Kraus to the Comm. To Outline a Nat’l Soc. Welfare Program, Am. Ass’n of Soc. Workers, Discussion of Social Welfare Programs in the Federal, State, and Local Governments 2 (Nov. 23, 1934) (on file with University of Minnesota, Elmer E. Andersen Library, Social Welfare History Archives, National Association of Social Workers Records, 15/201). Kraus, an early advisor to the Social Security Board, hailed from Germany, where government income support arguably had wider acceptance. Beate Bussiek, *Hertha Kraus: Quaker Spirit and Competence: Impulses for Professional Social Work in Germany and the United States*, in HISTORY OF SOCIAL WORK IN EUROPE (1900-1960): FEMALE PIONEERS AND THEIR INFLUENCE ON THE DEVELOPMENT OF INTERNATIONAL SOCIAL ORGANIZATIONS 53, 53, 59 (Sabine Hering & Bertheke Waaldijk eds., 2003). There is evidence of similar statements, however, from American-born social workers. For example, writing for the same American Association of Social Workers division the following year, Joanna Colcord urged that the Association “hold [as] self-evident that whenever a citizen is genuinely unable to provide for his own subsistence and that of his dependents through his own efforts, he has a right to look for it to government.” Joanna C. Colcord, Chairman, Comm. on Current Relief Program, Div. on Gov’t & Soc. Work, The Responsibility of Government for Relief 1 (May 1935) (on file with University of Minnesota, Elmer E. Andersen Library, Social Welfare History Archives, National Association of Social Workers Records, 1/19/210); see also Div. on Gov’t & Soc. Work, *Outline for a Federal Assistance Program*, in AM. ASS’N OF SOC. WORKERS, THIS BUSINESS OF RELIEF 162, 164 (1936) (“When there is no job and when resources are gone, relief is a right to be availed of without hesitation or bad conscience.”).

108. HOPKINS, *supra* note 106, at 196 (quoting a manuscript written for *Collier’s*). Historians of mothers’ pensions would disagree with the factual content of Hopkins’s statement—most states did not treat these benefits as “rights.” See SKOCPOL, *supra* note 29, at 465-79 (finding that in practice, recipients of progressive-era mothers’ pensions were subject to behavioral restrictions, discrimination, and uneven, often inadequate grants); SUSAN M. STERETT, PUBLIC PENSIONS: GENDER & CIVIC SERVICE IN THE STATES, 1850-1937, at 124-26 (2003) (describing women’s failure to convince courts that state mothers’ pensions programs created legal entitlements). Nonetheless, the quotation exemplifies how positively federal government social workers viewed social welfare policies that treated recipients as rights-holders.

colleague at the Association for Improving the Condition of the Poor, loudly criticized the existing poor relief system for “br[ea]k[ing] the spirits of people,” by making them beg for the assistance that “they had a right to ask for” and “should have received at once.”¹⁰⁹ Similarly, New York School of Social Work professor (Amy) Gordon Hamilton used rights language to redirect wayward relief caseworkers: each client had “a right . . . to relief if he needs it,” she cautioned, as well as “a right to handle his own problems” if he so chose.¹¹⁰ Such statements¹¹¹ show that social workers in and around the Roosevelt Administration relied on rights language—certainly not exclusively, but substantially. Far from rejecting the pairing of welfare and rights, they used rights language to talk about the extent of society’s obligation to the poor, the desired contours of legislation, and the best practices of those tasked with carrying out the law.

Rights language also proved important to the lawyers hired to advise the Social Security Board on public assistance matters.¹¹² One of the first tasks that the Board gave its Office of the General Counsel was to explain a provision in the Social Security Act that no one seemed to know much about, and hence no one knew how to interpret to the states: the requirement that all state public assistance plans guarantee applicants “an opportunity for a fair hearing.”¹¹³ The Act’s drafters seem to have envisioned an appeal process that would both defuse applicant dissent and encourage objective, uniform decisionmaking.¹¹⁴

109. ‘Respectable’ Base for Relief Urged, N.Y. TIMES, May 17, 1935, at 6.

110. Gordon Hamilton, *Case-Work Responsibility in the Unemployment Relief Agency*, 1934 PROC. NAT’L CONF. SOC. WORK 393, 393.

111. Both examples in this paragraph come from New York social workers, which would seem to limit the power of this evidence. It is relevant to note, however, that those tasked with designing and implementing the New Deal relief programs often came directly from New York-based charities, agencies, and schools. WILLIAM W. BREMER, *DEPRESSION WINTERS: NEW YORK SOCIAL WORKERS AND THE NEW DEAL* 126-41 (1984).

112. This Article emphasizes the themes cutting across administrators’ rights language. On the significant differences between the “rights talk” of agency social workers and that of lawyers, see Tani, *supra* note 13, at 135-47.

113. See *supra* note 62 and accompanying text.

114. See BROWN, *supra* note 73, at 373 (claiming that “the widespread practice of hearing complaints and petitions of organized and unorganized groups of relief clients and project workers in the offices of the Federal Emergency Relief and Works Programs” set “informal precedents” for the fair hearing requirement); Jules H. Berman, *The Administration of the Appeal Provisions of the Public Assistance Legislation Enacted Under the Social Security Act in Illinois and Certain Other States* 1 (1937) (unpublished M.A. thesis, University of Chicago School of Social Service Administration) (on file with University of Chicago Library) (speculating that the Framers thought the provision would protect recipients against arbitrary and unfair decisionmaking).

However, they provided little formal guidance, and the provision attracted no attention during congressional review. In 1935, several members of the SSB's growing legal staff were tasked with identifying the bounds of interpretive possibility, and, in the process, began considering the character of the public benefits involved.

Staff attorney Emmett Delaney took the first crack, reporting to GC Tom Eliot that the term "fair hearing" was closely associated with judicial process and the related notion of "due process."¹¹⁵ Due process, in turn, seemed to depend on the right that was at stake. (Before giving content to the "term[s] 'fair hearing' and 'opportunity to be heard,'" Delaney explained, one must decide "*what right is involved* in the hearing under consideration."¹¹⁶) In fact, Delaney was unsure how a court would categorize payments under the Act and seemed uncomfortable with the terms he knew. He pondered the distinction between "public right" and "private right"; he toyed with the phrase "gift by the government"; and he analogized the public assistance payment to the grant of a professional license¹¹⁷ (as Charles Reich would do, to different effect, nearly thirty years later¹¹⁸).

Delaney's thought process owed something to the "loose[]" ways in which lawyers and judges in the first decades of the twentieth century talked about rights, privileges, powers, and liberties,¹¹⁹ but it also reflected a larger confusion. At that moment, a jurisprudence based on individual rights to contract and to property—the jurisprudence that has since borne the name of the infamous *Lochner* decision¹²⁰—was falling out of fashion, and its replacement was not yet clear.¹²¹ Finding his law school textbooks outdated and Supreme Court decisions muddled, Delaney apparently thought it best to assume that individual rights of some sort were at stake. He then outlined the procedures that seemed to offer adequate protection: these were not necessarily coextensive with "judicial process," but included notice, a full opportunity to present facts, an impartial tribunal, and application of established rules rather

115. Memorandum from Emmett P. Delaney to T.H. Eliot, An Opportunity for a Fair Hearing 4-5 (Oct. 23, 1935) (on file with NARA II, HEW Records, 235/10/G—Fair Hearing (1935-1938)).

116. *Id.* at 2 (emphasis added).

117. *Id.* at 3, 8.

118. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

119. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

120. *Lochner v. New York*, 198 U.S. 45 (1905).

121. See RISA LAUREN GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 16-24 (2007).

than mere discretion.¹²² Attorney Sue White offered Eliot a similar opinion three weeks later. Although “[b]earing] in mind that the aids . . . are gratuities from the State,” she found that “so long as the funds exist and the laws of a State provide for payments to qualified individuals,” such individuals “have a right” to those payments. “[T]o avail themselves” of that right, she continued, “they may invoke ‘due process of law.’”¹²³

The lawyers grew increasingly attached to the fair hearing provision over the following months, and increasingly confident about the rights beneath its surface. In the spring of 1936, when the Board considered recommending that Congress scratch the requirement (some states had complained, and the Board had no strong sympathy for legalism), Assistant General Counsel Jack Tate informed his superiors that an opportunity for a fair hearing was “a constitutional requirement” and could not be legislated away.¹²⁴ So long as the Act remained in force, Tate explained, its beneficiaries had “vested rights” in the benefits provided; vested rights, in turn, entitled beneficiaries to “due process.”¹²⁵ In reality, the legal picture was much muddier. Just six months earlier, staff attorney Delaney’s diligent research had suggested that some sort of process was required, but that the legal status of the underlying benefits was open to speculation. Attorney White, who had called the benefits “gratuities” and “right[s],” took a similar position.¹²⁶ With the distance of time, it is also

122. Memorandum from Emmett P. Delaney, *supra* note 115, at 2-6.

123. Like Delaney, White found that due process in this context did not mean “strict adherence” to the rules that would apply in court, but did likely include adequate notice and the opportunity to present and refute evidence. Memorandum from Sue S. White, Attorney, to T.H. Eliot, Gen. Counsel, Soc. Sec. Bd., Brief on “FAIR HEARING” 1 (Oct. 14, 1935) (on file with NARA II, SSB Records, 47/236/632.52).

124. Memorandum from Jack B. Tate, Assistant Gen. Counsel, Soc. Sec. Bd., to Soc. Sec. Bd., Opportunity for a Fair Hearing 1 (Apr. 27, 1936) (on file with NARA II, SSB Records, 47/96/632.2); *see* Tani, *supra* note 13, at 45-46.

125. Memorandum from Jack B. Tate, *supra* note 124, at 1.

126. Memorandum from Sue S. White, *supra* note 123, at 1. Tellingly, the lawyers were just as unsure about the legal status of OAI benefits—the ones that the Board had championed as rights. In May 1936, in response to a query about the legal remedies available to OAI claimants, lawyer Edward J. Rourke wrote to his colleague Leonard C. Calhoun that he did not know how to characterize OAI benefits. As “rights”? As “gratuities”? As a “vested right”? Or a “contract right”? Memorandum from Edward J. Rourke to Leonard C. Calhoun, The Nature of, and Legal Remedies Available to an Individual To Obtain Benefits Provided by Title II, Sections 202, 203, 204 and 205 of the Social Security Act 2 (May 27, 1936) (on file with the NARA II, HEW Records, 235/2/OAB—Benefits). He chose to draw “[n]o legal conclusion . . . from the many references” to rights that attended the enactment of the law, “as it seems clear that this word was used in a non-technical sense.” *Id.* at 14. He also found no “competent decisions” from any court on the question. *Id.* at 48. Ultimately, he suggested “that as to benefits that have been certified for payment at a date already

clear that the debate was far from resolved. Two years later, attorneys in Tate's office would be trading memos about "the character and nature of the relief given under the public assistance laws"; ten years later, the GC would be arguing the point with the states; and not for decades would the courts lend firm support to Tate's position (some might question whether they ever did).¹²⁷ Yet in his memo to the Board, Tate's tone was assertive and insistent: rights were on the line.

It is unclear why Tate, who came to the Agency from the National Recovery Administration and was considered a more "flexible" representative of his profession,¹²⁸ stood so firm. Perhaps he was protecting the Social Security Act,¹²⁹ perhaps his Agency,¹³⁰ perhaps his profession.¹³¹ Perhaps he

expired," the claimant had an "interest . . . such that subsequent legislation cannot constitutionally destroy or substantially impair it." *Id.* He admitted, however, that his conclusion was "little more than a guess." *Id.* The Supreme Court would not weigh in on the issue until 1960, when it ruled that accrued Social Security benefits were neither property nor contract, but some sort of "noncontractual governmental benefit." *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

127. Memorandum from Robert Johnston to A. Delafield Smith, *The Character and Nature of the Relief Given under the Public Assistance Laws* (Mar. 28, 1938) (on file with NARA II, HEW Records, 235/8/PA—Administration (1935-1938)).
128. Interview with Helen Valeska Bary, *supra* note 53. A colleague described Tate as "sensitive" to the "social philosophy" behind the New Deal programs. Interview by Peter Corning with Bernice Lotwin Bernstein, in *New York, N.Y.* 73 (Apr. 1965) (transcript on file with Oral History Collection of Columbia University). He was a lawyer who would give "a 'yes' answer" when GC Tom Eliot was inclined to say "no." Interview with Frank Bane, *supra* note 56, at 196.
129. The Social Security Act, like much New Deal legislation, was vulnerable to judicial evisceration. When Tate wrote his memo in 1936, the legality of the Act had not been tested before the Supreme Court, but a court challenge appeared inevitable. On complaints about the Act, see SHERYL R. TYNES, *TURNING POINTS IN SOCIAL SECURITY: FROM "CRUEL HOAX" TO "SACRED ENTITLEMENT"* (1996); and Memorandum from Robert Huse to Frank Bane (June 18, 1936) (on file with NARA II, SSB Records, 47/4/513 Litigation), which recounts complaints. On the perception that a court challenge was inevitable, see Jack B. Tate, *The Social Security Act*, 3 *FED. B. ASS'N J.* 41 (1937) (defending the constitutionality of the Act); and Interview with Jack B. Tate, *supra* note 1, at 78 (recounting that "there was a great deal of trepidation" about the risk of strict judicial interpretation).
130. Tate was aware that conservative elements in the legal community, such as the powerful American Bar Association and the increasingly ornery Roscoe Pound, were skeptical about agency decisionmaking and likely to use the Due Process Clause as a weapon. By interpreting the Act in rights terms, Tate may have been trying to head off such attacks. Historians have found that such thinking motivated other New Deal lawyers. See, e.g., TOMLINS, *supra* note 100, at 154 (noting that the NLRB chose a legalistic model for enforcing the Wagner Act, in part because GC Charles Fahy wanted "the best chance of success in establishing the constitutionality" of the controversial act); Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 *J. POL'Y HIST.* 379,

believed that procedural protections were vital to achieving the Act's goals¹³² and that references to rights would lend authority to his interpretation. The important point, for our purposes, is that these conversations and debates planted within another pocket of the Agency the notion that rights were not anathema to the public assistance program; in fact, they were at its very core. In subsequent years, when public assistance seemed to be slipping back in time to the "old poor law," bureaucrats from across the mezzo level would turn to rights language to attempt to reclaim it for the New Deal.

III. THE ENDURING PROBLEM OF THE LOCAL

Several years into the program, the Social Security Board still employed its carrot-and-stick approach, described in Part I, to encourage more modern state public assistance plans. But increasingly, the content of those plans was not the SSB's biggest problem. "[T]he actuality is worse than the plan," came the refrain from federal agents in the field.¹³³ It was enough to give even Frank Bane, the SSB's Executive Director and a longtime leader of public welfare reform, cause for reflection. "[N]o nation can wisely legislate beyond its

388 (2008) (noting that many advocates of administration saw voluntary adoption of rigorous procedural protections as a way to minimize judicial review of agency decisions).

131. It is possible that Tate was eager to preserve a space for lawyers within the crowded New Deal bureaucracy and therefore thought it important to stand his ground when dealing with a term that was quintessentially legal. As Tate once observed in an address to other federal government lawyers, there were many terms in the Social Security Act—"need," "employer"—that other experts in the bureaucracy (e.g., social workers or accountants) could interpret just as well as lawyers. But other terms—e.g., "contract of hire"—were within the lawyer's exclusive jurisdiction. Jack B. Tate, *The Problem of Advice in the Administration of Social Security Laws*, 3 FED. B. ASS'N J. 319, 320 (1939); see also A. Delafield Smith, *A Department of Public Welfare and the Office of the State's Attorney-General*, 12 SOC. SERV. REV. 216, 225 (1938) (noting the distinction between most issues for agency determination and those that presented "pure questions of law"). This insight relies generally on ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988).
132. Evidence supporting this theory includes the fact that in addition to citing case law, Tate's memo defended fair hearings in terms that invoked the Act's underlying aims. Tate described fair hearings as "perhaps the most effective instrument" for maintaining adequate state supervision of local units, "one of the most efficient methods of protecting an individual from abuse or misuse of administrative authority," and an antidote to local prejudice and variance. Memorandum from Jack B. Tate, *supra* note 124, at 2.
133. Memorandum from A.D. Smith, Principal Attorney, Office of Gen. Counsel, Fed. Sec. Agency, to Jane M. Hoey, Dir., Bureau of Pub. Assistance, Standards Implementing the Fair Hearing Requirement of the Social Security Act (Oct. 24, 1939) (on file with NARA II, HEW Records, 235/12/PA Fair Hearing #1 (1939-1943)).

capacity to administer,” he conceded in 1939.¹³⁴ This Part details how federal administrators came to perceive their local counterparts as the central roadblock to achieving the Social Security Act’s goals and explains why direct administrative levers proved insufficient to meet the challenge.

As discussed in Part I, most states were eager to cooperate with the SSB (at least during the early years).¹³⁵ But the SSB quickly became concerned about states’ capacities to fulfill their end of the bargain. State officials came to the table with all the right props and promises—pleasing charts of bureaucratic authority and detailed diagrams of their line-and-staff organizations. The emerging truth, however, was that the thin dendrites on these organizational charts had far more power than the visual aids implied. The BPA estimated that of the 45,000 persons employed in state and local public assistance administration in June 1943, some 38,500, or 86%, worked in offices established in county, city, or other local government units.¹³⁶ States delegated great authority to these units, which processed applications, investigated needs and resources, and delivered benefits.

States purported to control these local administrators, but federal officials expressed both increasing uncertainty about the adequacy of that supervision and increasing certitude about the importance of decisions made at the ground level. “[V]ery good laws and plans” are not self-executing, BPA director Jane Hoey observed in 1937; their success depends entirely on “the understanding, sympathy, knowledge, and skill of those who actually come in contact with persons in need.”¹³⁷ Local workers, another experienced public welfare administrator agreed, were the ones who would see that the laws served their intended beneficiaries or who would instead “prostitute[.]” those laws “to ulterior political or personal ends.”¹³⁸ Just what were they doing?

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134. Frank Bane, *The Social Security Board and State Organizations*, 202 ANNALS AM. ACAD. POL. & SOC. SCI. 137, 144 (1939).
135. As the Louisiana episode suggests, and as I have argued elsewhere, state intransigence became a major problem for the federal agency in the 1950s and early 1960s. See Tani, *supra* note 13.
136. Jack Charnow & Saul Kaplan, *Public Assistance Personnel, Jan.-June 1943*, 7 SOC. SECURITY BULL. 20, 20 (1944); see also Div. of Statistics & Analysis, Bureau of Pub. Assistance, Soc. Sec. Admin., *Personnel in State and Local Public Assistance Agencies, June 1949*, 13 SOC. SECURITY BULL. 7, 7 (1950) (reporting similar figures for 1949).
137. Jane M. Hoey, *The Federal Government and Desirable Standards of State and Local Administration*, 1937 PROC. NAT’L CONF. SOC. WORK 440, 442.
138. Donald S. Howard, *Who Shall Be Granted Public Aid? How Much? In What Form?*, in THE PUBLIC ASSISTANCE WORKER: HIS RESPONSIBILITY TO THE APPLICANT, THE COMMUNITY, AND HIMSELF 41, 44 (Russell H. Kurtz ed., 1938).

These anxieties stemmed in part from history.¹³⁹ Anecdotes from the years of the Federal Emergency Relief Administration, the intrepid federal intervention immediately preceding the Social Security Act, revealed, first, that the machinery of local poor relief was extensive, convoluted, and not at all uniform.¹⁴⁰ Second, the people running the show at the local level were accustomed to the old paradigm of poor relief. They had not participated in drafting the new social welfare schemes and many did not share the New Dealers' basic worldview. FERA officials somewhat snobbishly described the local administrators they encountered as amateurs who tended to the poor "merely as a part-time or extra duty."¹⁴¹ The best were well meaning but inept; the worst were corrupt; most were "indifferen[t]."¹⁴² FERA's issuance of personnel standards helped the federal perspective make inroads, according to reports, but could not raise the supply of adequately trained persons.¹⁴³ Third, not all states proved capable of imposing any kind of standards on local workers. As late as the 1920s, according to public welfare expert and FERA administrator Josephine Brown, "[f]ederal and state agencies had little or no

139. This paragraph focuses on experiences under the federal relief program immediately preceding the Social Security Act, but other historical examples abound. For example, Robert Post has detailed similar state and local intransigence in his account of the administration of Prohibition. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 24-26 (2006).

140. For example, the Council of Social Agencies reported in 1937 that in just one county in Illinois, there were forty-one independent authorities administering categorical public assistance (aid to dependent families, needy mothers with children, the blind, veterans, and the aged), and that in the state at large there were 1,860 local administrative authorities distributing public funds and services for those falling within these categories of need. Wilfred S. Reynolds, *Public Welfare Administration a Patchwork in Illinois*, 11 SOC. SERV. REV. 1, 6 (1937). For an excellent account of the complexities of overlaying federal social welfare policies on existing state and local relief machinery in one state, see SUSAN STEIN-ROGGENBUCK, *NEGOTIATING RELIEF: THE DEVELOPMENT OF SOCIAL WELFARE PROGRAMS IN DEPRESSION-ERA MICHIGAN, 1930-1940* (2008).

141. BROWN, *supra* note 73, at 14.

142. *Id.* at 14-16; see also FRANK Z. GLICK, *THE ILLINOIS EMERGENCY RELIEF COMMISSION: A STUDY OF ADMINISTRATIVE AND FINANCIAL ASPECTS OF EMERGENCY RELIEF* 11-12 (1940) (describing the myriad "inadequacies" that Illinois emergency relief officials found at the county level, including unqualified administrators, inefficient handling of "even the clerical aspects of the job," and slipshod record keeping); LEVY, *supra* note 53, at 23 (describing nepotism, graft, and political manipulation of relief orders as "fairly common practice" among Pennsylvania poor directors).

143. BROWN, *supra* note 73, at 221, 278; Dorothy C. Kahn, *Problems in the Administration of Relief*, 176 ANNALS AM. ACAD. POL. & SOC. SCI. 40, 43 (1934); Marjorie Anne Merrill, *Lessons Learned in Personnel Selection and Management in Emergency Relief Administration*, 1936 PROC. NAT'L CONF. SOC. WORK 538.

official relationship with local public outdoor relief.”¹⁴⁴ Especially in rural areas, communities perceived federal and state emergency relief efforts as “foreign” invasions.¹⁴⁵ “We accept [the directives from Washington]” because people are starving, an old county judge warned one FERA official, “but . . . the time is coming when we feel that we must again get back into the picture.”¹⁴⁶

The federal administrators’ anxieties about the local were not just rooted in history, however. After the enactment of the Social Security Act and the approval of state plans, SSB representatives traveling around the nation reported that local public assistance workers ignored, resisted, or simply failed to encounter state authority, while they regularly felt the influence of town and county. One BPA official reported in 1937 that, despite state intervention, towns in Massachusetts refused to pay Aid to Dependent Children to some families that were clearly eligible. Local officials were administering the program in the same way that they had administered mothers’ pensions; namely, by limiting it to families who had been “settled” in the town for some time and who met local standards of appropriate conduct.¹⁴⁷ (Families deemed ineligible for ADC might receive public aid, but it would be from “general relief,” a category that was not federally subsidized and hence not subject to federal rules about fairness and uniformity.) Similar reports came from the federal officials monitoring public assistance litigation. A court case in Kansas revealed to them that a county welfare board—without state agency approval—

144. BROWN, *supra* note 73, at 52.

145. *Id.*; see also V.O. KEY, JR., THE ADMINISTRATION OF FEDERAL GRANTS TO STATES 272 (1937) (“Township and county officials regretted the loss of their historic perquisites as dispensers of relief.”); STEIN-ROGGENBUCK, *supra* note 140, at 76-96 (documenting local resistance in Michigan).

146. Interview by Peter A. Corning with Loula Dunn, Fed. Emergency Relief Admin., in Wash., D.C. 18 (Aug. 3, 1965) (transcript on file with Oral History Collection of Columbia University).

147. Memorandum from Rose J. McHugh, Chief, Admin. Surveys Div., to A.D. Smith, Office of the Gen. Counsel, Massachusetts Aid to Dependent Children Program (Nov. 1, 1937) (on file with NARA II, HEW Records, 235/3/Massachusetts—Aid to Dependent Children); Memorandum from Rose J. McHugh, Chief, Admin. Surveys Div., to A.D. Smith, Office of the Gen. Counsel, Massachusetts Aid to Dependent Children Program (Nov. 6, 1937) (on file with NARA II, HEW Records, 235/3/Massachusetts—Aid to Dependent Children); see also Margaret Leahy, *Intake Practices in Local Public Assistance Agencies*, SOC. SECURITY BULL., Oct. 1941, at 3, 5 (reporting that in some counties, applicants who would have been eligible for ADC were first placed on general assistance and observed to ensure ability to “manage cash,” employability, maintenance of a “suitable’ home,” etc.); Gertrude Springer, *New England Grass Roots*, PUB. WELFARE NEWS, Sept. 1939, at 2, 3 (reporting that in New England, “[o]ld folks getting assistance, mothers receiving aid for dependent children, are not especially stigmatized provided they meet the time-honored test of being ‘worthy’ and keeping a tidy house”).

had adopted a regulation making automobile ownership grounds for rejecting applications; county officials removed the plaintiff from the old-age assistance rolls after finding that his son owned a car.¹⁴⁸ Other surveys confirmed the trend. As a BPA Field Division report summarized in 1941, the establishment of state supervision was “a slow and tedious process”; “[l]ocal autonomy” remained “an important factor”; and community “attitudes and pressures” resulted in “wide variations” in local agency practices.¹⁴⁹

Other accounts revealed the political clout of local officials vis-à-vis the states. “It is . . . a new and not a welcome experience,” Michigan’s state relief administrator explained in 1937, for local units to apply to the state for funds and open themselves to state scrutiny.¹⁵⁰ Where local units were powerful, they made their disaffection known. The General Counsel’s office reported in 1940 that when the California state agency attempted to withhold funds from Los Angeles County to discipline it for neglecting state requirements, the County drafted a bill depriving the agency of its power. Only federal pressure, the GC implied, prevented the state legislature from acting.¹⁵¹ County resistance in another instance—this time, to a state decision regarding an individual ADC case—was so strong that the same state agency sought a court order compelling the county auditor to pay the claim.¹⁵² Reaction against state direction was not unique to California. Local public welfare commissioners in New York “jealously guarded” their autonomy.¹⁵³ Local government units frightened

148. Memorandum from Litig. Section to Leonard J. Calhoun, Assistant Gen. Counsel, Soc. Sec. Bd., *Litigation in Region IX (Kansas, Oklahoma, Missouri and Arkansas)* 2-3 (Sept. 22, 1939) (on file with NARA II, HEW Records, 235/15/Litigation—Region I through XII—General (1936-)).

149. Leahy, *supra* note 147, at 3-4.

150. Haber, *supra* note 76, at 445-46.

151. Memorandum from Fowler V. Harper, Gen. Counsel, Fed. Sec. Agency, to Paul V. McNutt, Adm’r, Fed. Sec. Agency, *Monthly Report*, February, at 11 (Mar. 11, 1940) (on file with NARA II, HEW Records, 235/12/G—Report (Monthly) #4 (1940)).

152. Memorandum from Fowler V. Harper, Gen. Counsel, Fed. Sec. Agency, to Paul V. McNutt, Adm’r, Fed. Sec. Agency, *Monthly Report for May, 1940*, at 25 (June 11, 1940) (on file with NARA II, HEW Records, 235/12/G—Report (Monthly) #4 (1940)). Helen Valeska Bary, who spent 1935 to 1948 representing the federal agency to the Western states, first as a field representative and then a regional administrator, confirmed that this was no aberration: the county welfare directors in her home state of California were a powerful group well into the 1940s and “had a general tendency to resist the state.” Interview with Helen Valeska Bary, *supra* note 53, at 175.

153. Richard T. Gilmartin, *An Effective Working Team: State-Local Cooperation*, 2 PUB. WELFARE 115, 118 (1944).

Minnesota's state agency into sitting on its hands.¹⁵⁴ Other state agencies may not have acted out of fear, but administrators in Indiana, Utah, and Oklahoma, for example, were so concerned about intruding on local prerogatives that when asked to review a local decision, they took extraordinary measures to resolve disputes through back channels or to dissuade claimants from going forward.¹⁵⁵

The records of state welfare directors, social work educators, and others immersed in public welfare administration convey the problem's deep and tangled roots. One Georgia public welfare official, Wilma Van Dusseldorp, reported to the Southern Sociological Society in 1938 that local workers were "in the center of almost overwhelming pressures." "There are hundreds of applicants—each presenting his need according to his conception of his rights"; "[t]here is the County Board—composed of people whose interests reflect the insight and aim of the local and state political factions"; there are the other county officials "bearing down upon the local workers"; and there are the "expectations and criticisms" of the "general community."¹⁵⁶ County officials in Alabama, for example, impressed one touring public welfare consultant with their eagerness to know whether the public funds granted to "Mr. Jones" were going to "Ole Man Jones with the farm across Hokey Creek" or to "Peg-leg Jones who lived on this side of the creek since his wife died last summer."¹⁵⁷

154. Edward W. Weidner, *State Supervision of Local Government in Minnesota*, 4 PUB. ADMIN. REV. 226, 229-30 (1944).

155. Memorandum from Laurence Dimsdale to Martha E. Phillips, Reg'l Representative, Bureau of Pub. Assistance, Indiana—Public Assistance Fair Hearings—Procedure and Time Lapse Between Request and Date of Hearing (Nov. 4, 1946) (on file with NARA II, HEW Records, 235/69/Region V Public Assistance (1944)); Memorandum from Max K. Mangum, Reg'l Attorney, Region IX, to Riley E. Mapes, Reg'l Representative, Bureau of Pub. Assistance, Utah Fair Hearing Procedures (Dec. 31, 1946) (on file with NARA II, HEW Records, 235/71/Region IX Public Assistance #2 1944-1946); Memorandum from Reg'l Attorney to Luna B. Brown, Assoc. Reg'l Representative, Bureau of Pub. Assistance, PA Oklahoma—Fair Hearings (Sept. 30, 1944) (on file with NARA II, HEW Records, 235/70/Region VII Public Assistance #2); *see also* Memorandum from Reg'l Attorney to Phyllis Osborn, Reg'l Representative, Bureau of Pub. Assistance, PA Kansas—Current Study of Fair Hearing Problem (Mar. 22, 1944) (on file with NARA II, HEW Records, 235/70/Region VII Public Assistance #2) (describing cases in which, after holding a hearing but before making a decision, the state board sent a private warning or had private communications with the county director).

156. Van Dusseldorp, *supra* note 53, at 62.

157. *Alabama Entertains "Miss Bailey,"* PUB. WELFARE NEWS, Apr. 1940, at 2. "Miss Bailey" was a fictional character invented by writer Gertrude Springer and deployed in monthly columns in the *Survey Midmonthly*, a social welfare journal. Springer based her columns on trips into the field, as well as her own experience as a welfare worker and her extensive network of professional contacts. Beverly A. Stadum, *Gertrude Hill Springer*, in BIOGRAPHICAL

Anonymous “Friend[s],” “Citizen[s],” and “Taxpayer[s]” reportedly sent public relief agencies daily batches of letters “yelping for the scalp of some poor client who is suspected of chiseling”: “Mr. Jones has a 1937 Chevrolet”; “How come a person on widow’s pension can buy diamonds and wrist watches for her children?”; “Mrs. Jones is just like a prostitute.”¹⁵⁸ Neighborly concern, these anecdotes suggest, could lead to what one administrator described as a feeling of constant community surveillance.¹⁵⁹ Van Dusseldorp recalled one county director who had spent six months studying social work and hence “had some ideals about what good practice in public welfare work was,” but confided that because of the pressures of the job, she might soon be administering aid in the “old poor relief” manner—federal administrators’ biggest fear.¹⁶⁰

State agency reinforcement of “good practice” in public welfare likely helped some well-intentioned county directors, but in many locations state agencies could not or would not intervene. Massachusetts, for example, contained 355 administrative units dealing with relief in 1938, and local units “adamant[ly] refus[ed] to give up functions even to the next largest subdivision, the county.”¹⁶¹ With so many recalcitrant jurisdictions, effective state supervision was challenging. The GC’s general review of fair hearing records confirmed “a strong parochial influence” in particular areas. Examining appeals to state agencies from local decisions, the lawyers learned that rather than issuing uniform regulations or clarifying opinions, state administrators allowed local boards to decide many matters of “general significance.”¹⁶²

Of course, federal officials could have brought pressure to bear on these

DICTIONARY OF SOCIAL WELFARE IN AMERICA 683 (Walter I. Trattner ed., 1986). This particular column was written by a staff member of the Alabama Department of Welfare on the heels of Springer’s visit to the state. *Alabama Entertains “Miss Bailey,” supra*, at 2.

158. Michael Aronson, *The Anonymous Complaint in the Public Relief Agency*, 4 PUB. WELFARE 36, 36, 39 (1946); see also C.W. Geile, *County Administrators Discuss Welfare Needs*, PUB. WELFARE NEWS, Apr. 1939, at 1, 2 (reporting that when county agencies in Indiana attempted to adhere to the SSB’s “money payment” principle, they were criticized “for granting old age assistance to alcoholics, gamblers and spendthrifts”; they quickly rejected the federal guidance).
159. Leahy, *supra* note 147, at 4.
160. Van Dusseldorp, *supra* note 53, at 61-62.
161. William Haber & Herman M. Somers, *The Administration of Public Assistance in Massachusetts*, 12 SOC. SERV. REV. 397, 410 (1938); accord GLICK, *supra* note 142, at 226-27 (describing Illinois’s public assistance system as “scattered and unco-ordinated,” and state supervision as “ineffective or non-existent”).
162. Memorandum from Jack B. Tate, Gen. Counsel, Fed. Sec. Agency, to Paul V. McNutt, Adm’r, Fed. Sec. Agency, Monthly Report—April, 1941, at 22 (May 12, 1941) (on file with NARA II, HEW Records, 235/12/G—Report (Monthly) #5 (1941)).

states by cutting off federal grants (the “stick”), but the limits of this enforcement tool became apparent soon after the SSB approved the first round of state plans. In 1937, after hearing whispers that Oklahoma was not supervising its local units, the SSB sent a task force to investigate. The federal envoys quickly confirmed the rumors. In one county, Executive Director Frank Bane recalled, the task force found over 125% of all persons sixty-five years and older receiving OAA grants.¹⁶³ “[T]hey were giving out [payments] to names of tombstones and that sort of thing,” recalled GC Jack Tate.¹⁶⁴ The SSB suspended Oklahoma’s grant, finding that the state’s Public Welfare Commission had caved to county pressure. But it was in no one’s interest to keep funds from needy individuals. The sanction lasted only as long as it took for Oklahoma officials to arrange, on paper, for improved state administration. With that done, the SSB quickly reinstated the state’s grant (and in fact made it retroactive, so that the state lost only a month’s worth of federal funds).¹⁶⁵ The lesson was not lost on other states.

Personnel standards also failed to bring adequate understanding of the public assistance programs to local welfare work. Such standards were once the SSB’s great hope: in 1939, at the SSB’s urging, Congress amended the Social Security Act to allow the SSB to prescribe “methods relating to the establishment and maintenance of personnel on a merit basis,” overriding a provision in the original Act that explicitly denied the Board this power.¹⁶⁶ Almost immediately, the SSB issued guidance on how to revise existing merit systems, or in many cases, create them from scratch. Failure to comply with federal standards, the SSB warned, could result in de-funding. The merit amendment strengthened the SSB’s hand in dealing with the many states that were “still in the clutches of the spoils system.”¹⁶⁷

163. Interview with Frank Bane, *supra* note 56, at 218.

164. Interview with Jack B. Tate, *supra* note 1, at 27.

165. V.O. Key, Jr., *State Administration of the Social Security Act*, 202 ANNALS AM. ACAD. POL. & SOC. SCI. 153, 154 (1939); Richard E. McEvoy, *State-Federal Public Assistance, 1935-1946*, at 126-55 (1980) (unpublished Ph.D. dissertation, University of Maryland) (on file with the author). In general, McEvoy is the best source for the details of federal-state public assistance skirmishes between 1935 and 1946. The dissertation describes persistent sources of intergovernmental tension; the uses, limits, and evolution of federal government enforcement power; and change over time in state administration. McEvoy, *supra*.

166. Social Security Act Amendments of 1939, Pub. L. No. 76-379, tit. I, § 101, 53 Stat. 1360, 1360; *id.* tit. IV, § 401, 53 Stat. at 1379; *id.* tit. VII, § 701, 53 Stat. at 1397.

167. Hoehler, *supra* note 38, at 283. Fred Hoehler, a public welfare administrator and then the director of the APWA, counted thirty-eight states so afflicted in 1936. *Id.* Two years later, the situation was not much improved: another APWA staff member reported that there were formal, state-wide merit systems in only fourteen states. STEVENSON, *supra* note 37, at

Yet the arrangements that federal officials negotiated with these states were of limited use at the local level. Most significantly, not all state legislatures believed that they had the power to impose merit requirements on local employees, much less the power to delegate that authority to a state agency. By November 1940, after negotiating with states for over a year, the GC's office was confident that states had a solid *legal* basis for extending state merit rules to the local level (local personnel were arguably "engaged in matters of state-wide concern"), yet lawyers reported "compromise legislation and home-rule influence" in many states. This was understandable: up to that point, most local government units had been "untouched by organized merit systems."¹⁶⁸ In a few states, the issue was so fraught that the legislature would not enact anything, instead foisting the issue upon the state attorney general or state supreme court.¹⁶⁹ The resulting merit systems often appeared to have bite but were accompanied by toothless administration.¹⁷⁰

The deeper problem was that merit requirements were a crude tool for securing the sort of workers that federal administrators wanted, namely those who were skilled in the science of public administration and who had a clear understanding of the new assistance programs. Professional social workers fit

191-94. And anecdotes suggest that not all systems were working well. For example, Elizabeth Wishner, president of the American Association of Schools of Social Work, reported in 1937 that one state civil service commission "threw out its merit system of appointment" when choosing the Commissioner of Public Welfare. It selected "the field manager of a cotton growers association because 'he lent assistance to 40,000 members of the cotton growers association and that is essentially what the commission is doing—lending assistance.'" Elizabeth Wishner, *Training for Public Welfare*, PUB. WELFARE NEWS, Nov. 1937, at 2, 2-3. The public welfare community was likewise outraged when Pennsylvania's merit system failed to protect Philadelphia director Dorothy Kahn, who was, by public welfare standards, extremely competent and qualified. *Civil Service and the Case of Dorothy Kahn*, 12 SOC. SERV. REV. 697, 698 (1938); *Philadelphia and the Merit System*, PUB. WELFARE NEWS, Nov. 1938, at 7. On the more rigorous merit system in place for federal civil service employees, see PAUL F. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 376-77 (1958).

168. STEVENSON, *supra* note 37, at 191-94.

169. Memorandum from Jack B. Tate, Gen. Counsel, Fed. Sec. Agency, to Paul V. McNutt, Adm'r, Fed. Soc. Agency, Monthly Report for October (Nov. 12, 1940) (on file with NARA II, HEW Records, 235/12/G—Report (Monthly) #4 (1940)).

170. For example, the merit system legislation would nominally accord power to the state agency but deny the agency the right to set procedures for the selection of employees or the ability to control compensation and tenure. Memorandum from Jack B. Tate, *supra* note 169; see also Memorandum from Jack B. Tate, Gen. Counsel, Fed. Sec. Agency, to Paul V. McNutt, Adm'r, Fed. Sec. Agency, Monthly Report—April, 1941, at 23 (May 12, 1941) (on file with NARA II, HEW Records, 235/12/G—Report (Monthly) #5 (1941)) (reporting that in Georgia, "[t]he tenure of county directors is by law now subject both to the will of the county welfare boards and to the will of the Governor but not to the State agency as such").

the bill, but the SSB was in no position to set the standard so high. Such professionals were relatively few in number, were unevenly distributed geographically, and often could make better salaries elsewhere, especially during the war years.¹⁷¹ Furthermore, they remained unpopular.¹⁷² Setting more realistic standards for education and experience helped get bodies in the door, but hardly guaranteed the type of workers that the SSB envisioned. Reports from the field indicated that the average worker joining public assistance staffs in the late 1930s and early 1940s was relatively well educated but had little to no familiarity with social work or public assistance administration.¹⁷³ As one staff supervisor tactfully put it, the worker came to the job with “at least a few misunderstandings about the agency’s function,” some misconceptions about “why certain individuals are poor,” and “certain reservations about the client’s worthiness.”¹⁷⁴ Left to their own devices, the reports implied, these workers would not administer, but judge—a function that they were not qualified to perform.

IV. TO ADMINISTER PUBLIC ASSISTANCE AS A MATTER OF RIGHT

The previous Part emphasized the close watch that federal administrators kept on state public assistance programs in the early years of federal funding, and their eagerness to see modernity wash over outmoded poor relief operations. This Part is about what happened next: faced with perceived parochialism in administration and states that refused to assert forceful leadership, federal administrators began exploring other options to achieve

171. Charnow & Kaplan, *supra* note 136, at 20; Stuart K. Jaffary, *The Profession of Social Work in the South*, 17 SOC. FORCES 226, 230 (1938) (reporting that as of late 1937, professional social workers were concentrated in the “Atlantic and North East-Central states”); Dorothy Lally, *Staff Training To Meet Personnel Needs of Public Welfare Agencies*, SOC. SECURITY BULL., Feb. 1943, at 3; Memorandum from Jack B. Tate, Gen. Counsel, Fed. Sec. Agency, to Paul V. McNutt, Adm’r, Fed. Sec. Agency, Monthly Report—February 1942 (Mar. 10, 1942) (on file with NARA II, HEW Records, 235/12/G—Report (Monthly) #6 (1942)).

172. COLL, *supra* note 51, at 101.

173. See, e.g., Ellen Forder, *Induction of the New Worker into the Agency*, PUB. WELFARE NEWS, July 1942, at 2, 2 (cautioning against extended discursions on social work laws and trends with the new worker, as “new visitors do not have enough knowledge of the field to carry on any worthwhile discussion”); Springer, *supra* note 147, at 4 (describing the welfare worker in one “fairly typical” New England town as “a young home-state girl who left the state university for a job in the state welfare office and later ‘went off’ for a few months to a school of social work”).

174. Anna A. Cassatt, *Some Considerations in the Orientation of the Inexperienced Worker Who Is Untrained*, 2 PUB. WELFARE 264, 265 (1944).

sound administration at the local level. Law and custom prevented them from training local employees directly: communications were supposed to go from federal officials to state officials and, at the state's discretion, from states to the local level.¹⁷⁵ But federal administrators could educate local caseworkers indirectly, by channeling messages and materials through appropriate mediators, such as state agencies and schools of social work. This tactic was no secret: given that the Act deferred to the states on day-to-day administrative matters, Jane Hoey explained to one social work audience, her Bureau relied on "counseling and special services" to achieve adequate programs.¹⁷⁶ By imbuing their "counseling and special services" with a robust discourse of rights, federal administrators attempted to challenge the old poor law ideology animating local welfare practice, and at the same time to acculturate local workers to federal norms.¹⁷⁷

A. Administration by Indirection

Starting in the late 1930s, federal administrators opened up at least four indirect means of communicating with local personnel. First, they wrote long statements interpreting particular legal provisions. These statements were as philosophical as they were technical, venturing into the history of social responsibility, the causes of dependency, and the psychology of those in need.¹⁷⁸ The Agency could not distribute these circulars directly to local agencies, but they sent copies to all state agencies, with the hope that state supervisors and field agents would educate the public welfare workers in their orbit.

Second, they offered to help train welfare workers. They were frank about their motives and blunt in their assessment of local skill. As one BPA official told the National Conference on Social Welfare, "the need for in-service training"—which everyone agreed was great—"stands in inverse ratio to the

175. COLL, *supra* note 51, at 112.

176. Hoey, *supra* note 137, at 440.

177. Cf. Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (arguing that when a group of states or institutions attempts to influence the behavior of a "bad actor" member, options include not only coercion and persuasion, but also acculturation, a process that causes the "bad actor" to feel pressure to assimilate or conform to the norms or expectations of the group). I thank Katerina Linos for this reference.

178. See, e.g., FED. SEC. AGENCY, MONEY PAYMENTS TO RECIPIENTS OF OLD-AGE ASSISTANCE, AID TO DEPENDENT CHILDREN, AND AID TO THE BLIND 3-5 (1944).

adequacy of professional competency of the staff.”¹⁷⁹ The BPA’s Division of Technical Training, headed by a former professor of social work, wrote guides emphasizing the importance of staff development, listing appropriate reading materials, identifying “basic problems and current trends” in public assistance, and outlining topics for worker-orientation sessions.¹⁸⁰ These guides were distributed to state agencies around the nation for use in their own training programs. Technical Training staff also made themselves available as consultants to state agencies. In the Division’s first year alone, representatives visited twenty-two states and the District of Columbia, some jurisdictions more than once.¹⁸¹

Third, federal administrators took advantage of their strong connections to social work schools. Most BPA staff members were graduates of such schools and rooted their professional identities in the training they received there. Meanwhile, a number of social work educators, such as Edith Abbott and Sophonisba Breckinridge, maintained tight ties to the federal welfare bureaucracy. They drafted legislation, served as advisors and consultants to the federal agency, and funneled students into government service.¹⁸² Not many of those on the front lines of public assistance administration—those taking applications, visiting homes, and working with clients—had degrees in social work, but social work education still could exert a strong influence on them. Through educated supervisors and agency directors, values and lessons trickled down to the low-level worker. State and local agencies also brought in social work educators as consultants and sent staff to occasional educational “institutes.” With federal encouragement, some agencies even made funds available for local workers to enroll in classes.¹⁸³

Fourth, federal administrators attempted to reach local personnel through professional circuits—for example, speeches at state, regional, and national

179. Agnes Van Driel, *In-Service Training*, 1937 PROC. NAT’L CONF. SOC. WORK 426, 428.

180. Agnes Van Driel, *Staff Development in the Public Assistance Programs*, 14 SOC. SERV. REV. 224, 233 (1940).

181. *Id.* at 224-26.

182. See Univ. of Chi., Sch. of Soc. Serv. Admin., Announcements: The School of Social Service Administration for the Sessions of 1941-1942 XLI, no. 13 (May 25, 1941) (on file with University of Chicago School of Social Science Service Administration Records, Special Collections Research Center, University of Chicago, box 3) (listing the placements of students who received higher degrees over the past decade).

183. FERA pioneered this practice. From 1934 to 1935, FERA funds allowed 912 emergency workers to attend schools of social work for one semester or two quarters. See Josephine C. Brown, *What We Have Learned About Emergency Training for Public Relief Administration*, 1935 PROC. NAT’L CONF. SOC. WORK 237, 238; Wishner, *supra* note 167, at 3. On federal encouragement of social work education, see, for example, Lally, *supra* note 171, at 7.

meetings of public welfare and social work organizations, and publications in professional journals. Most local welfare workers did not attend such meetings or read such journals, but many higher-ranked state and county personnel did, and they had access to the workers at the ground level. In short, without other mechanisms of control, federal administrators pursued whatever lines of influence they had.

Often, Agency records show, they stressed rights. Public assistance, in these various communications, was portrayed as the right of those who were eligible: the government was obligated to give it to those who met the statutory requirements, and no one could restrict or otherwise interfere with the claimant's payments. All those who sought payment, even those who were not eligible, were also rights-holders: they had the rights to apply, to receive prompt consideration of their application, and to seek an appeal should they be dissatisfied. Once on the rolls, an individual had a right to confidentiality: his or her reliance on the state could not be broadcast to the public, or used to solicit votes.¹⁸⁴ This language of rights appeared nowhere in the Social Security Act itself, yet it pervaded the guidance that federal officials directed at untrained local administrators.

B. Rights Language in Context

Federal administrators were in some sense simply speaking the language of the day: rights language pervaded the cultural and political discourse of the time. Some of the more memorable examples come from the middle and late 1940s—President Roosevelt's "Second Bill of Rights" (1944),¹⁸⁵ the rights-based report of President Truman's historic Committee on Civil Rights (1947),¹⁸⁶ the U.N. General Assembly's Universal Declaration of Human Rights (1948)¹⁸⁷—but rights language was in the air earlier. As federal administrators muddled through the Social Security Act's first years, President Roosevelt used rights language to launch war preparations. He called Americans to duty by reminding them of cherished freedoms from oppression and declaring newer affirmative rights, such as rights to government protection

184. For direct quotations and specific citations, see *infra* Section IV.C.

185. President Franklin D. Roosevelt, Message on the State of the Union (Jan. 11, 1944), in 13 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32, 40–42 (1950).

186. PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947), <http://archive.org/details/tosecuretheserigoounit>.

187. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

against poverty and insecurity.¹⁸⁸ He made similar pronouncements in the midst of the Great Depression, when he urged voters to place their faith in him. Americans, he assured them, had the “right to live.”¹⁸⁹

Even more important than these high-flying rhetorical banners, however, was the way that rights language had come to operate in conversations about dependence and freedom. Americans had long perceived these conditions as incompatible. The former slave who depended on his old master for land and farming implements was not truly free; nor was the pauper in the almshouse, or the wage-earner whose company fed and clothed him. Reliance on another for the necessities of life undermined one’s claim to personal autonomy.¹⁹⁰

By the 1930s, rights language seemed to offer a way out of this dilemma. Using rights language, groups representing organized labor and racial minorities sought the protection of the government—arguably a sign of dependence¹⁹¹—while maintaining their independence.¹⁹² They used it to

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188. THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 54 (2008); President Franklin D. Roosevelt, Address to Congress (Jan. 6, 1941), in 87 CONG. REC. 44 (1941); see also William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1833 (2001) (quoting Senator Robert Wagner’s 1935 statement that “[a]t the very hub of social security is the right to have a job”).
189. President Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency (June 27, 1936), in 5 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 185, at 234 (declaring the “right to work” and the “right to live”); see also President Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club (Sept. 23, 1932), in 1 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 185, at 742, 754 (“Every man has a right to life,” meaning “a right to make a comfortable living.”); President Franklin D. Roosevelt, Message to the Congress Reviewing the Broad Objectives and Accomplishments of the Administration (June 8, 1934), in 3 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 185, at 287, 292 (stating that “the security of the home, the security of livelihood, and the security of social insurance” “constitute a right which belongs to every individual and every family willing to work”).
190. STERETT, *supra* note 108, at 19–20, 25–33. For extensive discussions of this topic, see generally ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 16–17 (1970), which demonstrates how critics of capitalist labor relations successfully deployed the rhetoric of “wage slavery” in the nineteenth century, and how an ideology of “free labor,” keyed to independence and social mobility, emerged in response; and DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (rev. ed. 1999), which argues that white wage laborers cultivated and embraced a sense of “whiteness” in response to their fear of “wage slavery” and their desire to distinguish themselves from free blacks.
191. See, e.g., *More About the Right to Alms*, CHI. DAILY TRIB., Nov. 16, 1932, at 12 (“[A man] cannot expect the state to support him in adversity if he does not surrender to the state the right to command his labor and reward it in the measure that the politicians in control deem right.”).

accept government aid without conceding their freedom. For example, even as he condemned the federal government for allowing local New Deal administrators to restore African Americans to the conditions of slavery, *Chicago Defender* founder Robert S. Abbott urged his substantial African American readership to fight for government aid. There was nothing wrong, he implied, with aid programs that treated participants as “full-fledged citizens with guaranteed privileges and respected rights.”¹⁹³ A. Philip Randolph used rights language to similar effect in 1941 when he called African Americans to march on Washington to demand fair employment practices. Seeking this sort of state protection could be understood as a sign of dependence, yet Randolph turned it into a campaign for freedom: “We would rather die on our feet fighting for Negroes’ rights,” he declared, “than to live on our knees as halfmen, as semi-citizens, begging for a pittance.”¹⁹⁴

To speak in terms of rights, in other words, was not just a way of characterizing something as important or sacred; it was a way of seeking government protection and intervention without assuming the posture of the supplicant, the slave, or the ward.¹⁹⁵ This was the chain of meaning that federal administrators tugged behind them as they spread the language of rights into remote corners of the welfare state.

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192. Susan Sterett’s work on public pensions (for soldiers, firemen, and other public servants) is suggestive of how Americans came to understand reliance on government payments as compatible with independence. See STERETT, *supra* note 108.
193. Robert S. Abbott, *New Deal Proves To Be No Deal for Us, Says Editor Abbott*, CHI. DEFENDER, Oct. 6, 1934, at 11; see also Forrester B. Washington, *Race Workers out of Jobs Add to Ranks of Relief Rolls*, CHI. DEFENDER, June 9, 1934, at 11 (observing that “[a]bout the only source to which the Negro can look for real aid today is the United States Government,” but that aid must not be given on terms that suggest “ward[ship]”). On the circulation and influence of the *Defender*, see Lee Finkle, *The Conservative Aims of Militant Rhetoric: Black Protest During World War II*, 60 J. AM. HIST. 692, 693-94 (1973).
194. HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE* 316 (1978).
195. LIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939* (1990) (arguing that Chicago’s industrial workers were able to accept state aid without qualms because, through their participation in the political process, they developed a sense of entitlement, and approached the state as rights-holders). *But see* Risa L. Goluboff, “*Won’t You Please Help Me Get My Son Home*”: *Peonage, Patronage, and Protest in the World War II Urban South*, 24 LAW & SOC. INQUIRY 777 (1999) (noting that some members of disadvantaged groups continued to find it more useful to talk in terms of patronage than in terms of rights).

C. Rights Language in Administration

Of the many federal administrators who spoke of rights in the late 1930s and 1940s, the most vocal was Assistant General Counsel A. Delafield Smith, the lawyer who supervised the GC's public assistance work from 1938 to 1955. Like many of his colleagues, Smith was well educated (Princeton, Harvard Law) and eager to defend the New Deal. But he stood out for being "very intense" and "very dedicated."¹⁹⁶ To make a point during a Board meeting, he once walked across the room on his hands.¹⁹⁷ On another occasion, he reportedly asked his heavily pregnant secretary, when she finally told him she had to stop work, "[C]an't you put that off a little while?"¹⁹⁸ One of Smith's firmest convictions was that the public assistance programs had a distinct legal and philosophical basis. A second belief was that many administrators, most especially those outside of federal employ, failed to understand this basis. He dedicated much of his career to correcting their misapprehensions, often using the language of rights. The "principles" animating the new public assistance laws could and must be stated "in very simple terms."¹⁹⁹

A typical example is Smith's 1939 speech to the Annual Meeting of the American Association of Schools of Social Work, the organization most directly responsible for educating future public assistance leaders. Smith characterized the social work notables in the audience, as well as their trainees, as mediators between public assistance laws and the poor. He described their day-to-day work in rights terms. They were the ones, he explained, who would provide "daily interpretation" of the new rights that modern social legislation had created.²⁰⁰ On their skills the New Deal would succeed or fail.

Similar themes animated a paper that Smith presented at the 1941 meeting of the National Conference of Social Work and later published in the *Social Service Review* (the premier academic journal in the social welfare field). Increasingly, Smith pointed out, government guaranteed the basic security of individuals, both through programs called "insurance" and others not so named. In *all* such programs, new rights were created. Smith encouraged his audience to think of these rights as trusts and to think of modern

196. Interview with Jack B. Tate, *supra* note 1, at 118.

197. Interview by Peter A. Corning with Maurine Mulliner, Exec. Sec'y to the Soc. Sec. Bd., in Wash., D.C. (Apr. 26, 1967) (transcript on file with Oral History Collection of Columbia University), <http://www.ssa.gov/history/mulliner2.html>.

198. Interview with Jack B. Tate, *supra* note 1, at 118.

199. Smith, *supra* note 15.

200. *Id.*

administrative agencies as trust fund managers.²⁰¹ Although agencies did not dictate the value of the trusts, their principles and procedures confirmed to claimants that the government's word was good. He urged his social work audience never to forget that the legislation was designed "to create adequate sanction for these rights, [and] to secure certainty and regularity in their operation."²⁰² As Smith put it in a later publication, a sense of social and economic security "requires the knowledge that what we obtain we obtain as of right."²⁰³ It was a knowledge that local welfare workers were uniquely situated to impart.

Smith hit the same notes when helping draft guidance to states that would, in turn, influence state-local interactions. In correspondence with the Bureau of Public Assistance in 1940 about a manual for BPA field personnel, Smith suggested introducing the section on fair hearings with an observation about the "new rights" that recent social legislation had created. This would impress on the reader, Smith hoped, the importance of treating beneficiaries justly, equitably, and objectively.²⁰⁴ Smith also suggested supplementing the manual with the reminder "that each individual shall be entitled as a matter of right to the uniform application of the State's criteria of eligibility and standard of need."²⁰⁵ Such language made clear that, in contrast with the old poor law, the Act generated an individual right to "equitable treatment."²⁰⁶

In short, Smith was making what he once described as "an appeal for an

201. A. Delafield Smith, *The Need for Legal Concepts in the Formulation of Administrative Procedures*, 15 SOC. SERV. REV. 444, 447-50 (1941) [hereinafter Smith, *Legal Concepts*]; see also A. Delafield Smith, *Judicial Trends in Relation to Public Welfare Administration*, 15 SOC. SERV. REV. 242, 242 (1941) [hereinafter Smith, *Judicial Trends*] (describing the "new forms of social legislation" as "the positive type" because "[t]hey create new rights and draw heavily upon the public revenues to achieve their objectives").

202. Smith, *Legal Concepts*, *supra* note 201, at 451.

203. A. Delafield Smith, *Elements of the Judicial in Security Programs*, 17 SOC. SERV. REV. 424, 426 (1943).

204. Memorandum from A.D. Smith, Principal Attorney, Office of the Gen. Counsel, Fed. Sec. Agency, to Gertrude Gates, Chief, Div. of Plans & Grants, Bureau of Pub. Assistance, Fair Hearings and Standards 1-2 (July 11, 1940) (on file with NARA II, HEW Records, 235/1/2).

205. Memorandum from A.D. Smith, Principal Attorney, Office of the Gen. Counsel, Fed. Sec. Agency, to Gertrude Gates, Chief, Div. of Plans & Grants, Bureau of Pub. Assistance, Suggested Manual Provision with Respect to Equitable Treatment (Feb. 14, 1940) (on file with NARA II, HEW Records, 235/1/2).

206. *Id.*

attitude,” an attitude different from what had been the norm.²⁰⁷ He wanted to show welfare workers that even though the means of delivering public assistance might resemble traditional poor relief, in terms of personnel, location, and payment amounts, a basic divide had formed. On one side was the old poor law, with its haphazard administration, discretionary payments, and capricious and condescending charity mindset. Custom was certainly on this side, and yet, Smith hoped to convey, it was not a good place to be. On the other side was the new legislation, based on rational, scientific administration and payments as a matter of right. Smith wanted welfare workers to know that when they dealt with poor individuals in the protected categories, they must stand on the progressive, modern side of the divide, and further, that they should feel proud of where they stood.²⁰⁸ When workers know that they are “administering to legal rights” rather than doling out charity, Smith insisted to a colleague, they fulfill their responsibilities with “zeal” and “conscientiousness.”²⁰⁹ In short, rights do what neither state supervision nor remote threats of federal defunding could make them do.

Other federal administrators turned with equal enthusiasm to the language of rights, both to explain the nature of the individual’s claim on the state and to clarify how each claimant ought to be treated. At the National Conference of Social Work in 1941, for example, BPA director Jane Hoey called attention to the Social Security Act’s guarantees of a fair hearing, cash payment, and confidentiality.²¹⁰ The common denominator, she hoped that agencies would

207. Memorandum from A.D. Smith, Assistant Gen. Counsel, Office of the Gen. Counsel, to Jane Hoey, Dir., Bureau of Pub. Assistance, Fair Hearing 1 (July 6, 1943) (on file with NARA II, HEW Records, 235/1/2).

208. See Smith, *supra* note 203, at 425-26 (associating the “guaranties of equality and due process,” embedded “for the first time” in a government social program, with “the sense of security, the attitude of self-reliance, and hence the morale of our succeeding generations”); Smith, *supra* note 15, at 6 (opining that “the effective realization of personal rights and real security for large numbers of people” depended on social workers’ rational application of their expertise); Smith, *Legal Concepts*, *supra* note 201, at 450-51 (praising modern social legislation for “creat[ing] adequate sanction” for beneficiaries’ rights, and for replacing “caprice” with “predictability”).

209. Memorandum from A.D. Smith, Assistant Gen. Counsel, Office of Gen. Counsel, to Mary E. Austin, Chief, Field Div., Bureau of Pub. Assistance, Fair Hearing Decisions, Reporting (Sept. 26, 1941) (on file with NARA II, HEW Records, 235/1/2).

210. Congress added provisions regarding confidentiality to the Act in 1939, after federal administrators observed state and local officials using information from public assistance agencies to buy votes, either from poor beneficiaries or from disgruntled taxpayers. See Social Security Act Amendments of 1939, Pub. L. No. 76-379, tit. I, § 101, 53 Stat. 1360, 1361 (mandating that state plans “provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the

soon appreciate, was a commitment to the right to assistance and the rights of the individuals who applied for and received aid; rights were “inherent” in Congress’s policy choices.²¹¹ At the same meeting, BPA field worker Margaret Leahy reported that such an appreciation was indeed building: she saw “the concept of assistance as a right” gradually replacing “the old poor-law traditions”—thanks in part, she emphasized, to “continuous interpretation and leadership.”²¹² A similar message reached state agencies, and through them, local agencies, via a 1944 BPA circular on “Money Payments.” The requirement that assistance take the form of cash, the circular explained, could be boiled down to “the basic principle underlying the act”: “[T]hat assistance comes to needy persons as a right,” a right that brings with it the freedom to go about life in the same way as other community members.²¹³

But the most direct example of rights language in public assistance administration was Public Assistance Report No. 8, or *Common Human Needs: An Interpretation for Staff in Public Assistance Agencies*.²¹⁴ The BPA’s Division of Technical Training commissioned it in 1944, after what it described as “frequent requests” for training materials.²¹⁵ Public assistance supervisors badly needed a text to “interpret[] [the] basic philosophy of the program” and to help local welfare workers “develop constructive attitudes in dealing with people in need.”²¹⁶ For authorship, the BPA tapped psychiatric social worker Charlotte Towle, who had taught at the University of Chicago School of Social Service Administration and had recently developed a textbook of social case records.²¹⁷

administration of [the assistance programs]”); *id.* tit. IV, § 401, 53 Stat. at 1380 (same); *id.* tit. VII, 53 Stat. at 1397 (same); Ida C. Merriam, *The Protection and Use of Information Obtained Under the Social Security Act*, 4 SOC. SECURITY BULL. 13 (1941).

211. Hoey, *supra* note 17, at 13.

212. Leahy, *supra* note 147, at 3.

213. FED. SEC. AGENCY, *supra* note 178, at ii. Hoey published a similar document in the *Social Security Bulletin*, where other public welfare administrators presumably read it. Jane M. Hoey, *The Significance of the Money Payment in Public Assistance*, 7 SOC. SECURITY BULL. 3 (1944).

214. TOWLE, *supra* note 18.

215. Memorandum from Agnes Van Driel, Chief, Technical Training Serv., Bureau of Pub. Assistance, to Jane [M]. Hoey et al., Draft (Nov. 1, 1944) (on file with NARA II, HEW Records, 235/215/672.1 Need Project).

216. *See id.*

217. Wendy B. Posner, *Common Human Needs: A Story from the Prehistory of Government by Special Interest*, 69 SOC. SERV. REV. 188, 192-94 (1995); *Guide to the Charlotte Towle Papers 1915-1968*, UNIV. OF CHI. LIBRARY (2007), <http://www.lib.uchicago.edu/e/scrc/findingaids/view.php?eadid=icu.spcl.towle>.

Local welfare workers were the report's intended targets, and again, rights were the language of choice. As Jane Hoey wrote in the report's foreword, the Agency hoped that the material would aid in securing "a staff with conviction regarding the social purpose of this government service based on human rights."²¹⁸ The report itself devoted many pages to understanding human behavior and psychology, but Towle made clear that the notion of "right" was at the heart of the public assistance programs. She opened the report by declaring that "public assistance services achieve their broad social purpose only when" administrators understand the notion of "sound individualization in a program *based on right*."²¹⁹ And throughout her discussions of "basic needs," "human motives," and "personality growth,"²²⁰ was the message that the worker must treat each assistance applicant as a rights-bearing individual: regardless of the applicant's deportment, the worker's discomfort, or the community's attitude, all eligible persons have a right to financial assistance. The administrator must approach all cases with "genuine conviction as to the applicant's rightful claim on society in time of need."²²¹ The report went to press in the summer of 1945, and the BPA distributed the first run—five thousand copies—to regional public assistance offices, for redistribution to state and local agencies. Two years later, the report was in its third printing and was on its way to becoming a classic text in social work education.²²²

These statements arguably contradicted the federal agency's ongoing campaign to build support for Old-Age Insurance, a campaign that depended

218. Jane M. Hoey, *Foreword* to TOWLE, *supra* note 18, at iii, iii.

219. TOWLE, *supra* note 18, at vii (emphasis added). Another report commissioned in 1944, which the Bureau distributed to public assistance agencies in 1946, urged similar views on its readers. In *The Nature of Service in Public Assistance Administration*, author Grace Marcus describes "administering assistance as a right" as the agency's responsibility; caseworkers had an obligation "to see that the right to assistance acquires meaning and value to each individual." MARCUS, *supra* note 17, at 4-5. This report received a more hesitant endorsement from the BPA because in addition to emphasizing rights, Marcus downplayed services. COLL, *supra* note 51, at 138. (She described services as but "the instrument through which [an individual's] need may be met as a matter of right" and encouraged social workers not to foist them on people. MARCUS, *supra* note 17, at 11.) Not wanting to provoke those in the social work community who saw services as a necessary complement to money, Hoey distributed Marcus's report with the preface that the analysis "indicated need for further study" and that the report was "not an official publication of the Administration." Jane M. Hoey, *Foreword* to MARCUS, *supra* note 17, at iii, iii; see COLL, *supra* note 51, at 138.

220. TOWLE, *supra* note 18, at viii.

221. *Id.* at 23.

222. Posner, *supra* note 217, at 200. Subsequently, the report would gain infamy. See Tani, *supra* note 13, at 115-66 (using the conservative backlash against the report as an example of how rights discourse came to seem dangerous to social workers by the late 1940s).

on the exclusivity of rights language and the downgrading of citizens' claims to assistance.²²³ But legally, public assistance administrators felt that they were on solid ground. In a 1937 memo to the SSB's Informational Service, Assistant General Counsel Leonard Calhoun warned that "[a] *needy* person may have just as much *right* to assistance under Title I as a qualified individual has to benefits under Title II," payment of contributions notwithstanding.²²⁴ Attorney A. Delafield Smith echoed this view in a 1940 article in the *Social Security Bulletin*, the monthly periodical of the Social Security Board. "[T]he function of the State is fundamentally the same in relation to both insurance and assistance programs," he explained to his fellow government technocrats. In both instances, the legislation creates "an actual right."²²⁵

Still, one might predict that the leadership of the SSB would muffle public assistance administrators' uses of rights language, regardless of how descriptively accurate or administratively useful that language was. But that is not what happened. Perhaps it was because the audience, public welfare workers, did not overlap with the population that the Agency's Old-Age Insurance campaign aimed to reach, namely, the working men and women who might be tempted to press for a more radical alternative to social insurance. Perhaps the war made the Agency reluctant to take any stand that appeared unfriendly to individual rights. Perhaps, having convinced Congress in 1939 to extend Old-Age Insurance payments to wage earners' survivors (a dramatic and important extension, as historian Alice Kessler-Harris has noted²²⁶), top-level administrators believed the program was politically secure. In any case, Agency leadership in the 1940s tolerated and then cautiously supported the notion that public assistance came to recipients as a matter of right and brought with it certain legal protections. In 1944, SSB chairman Arthur Altmeyer said outright that "both types of payments—assistance grants and insurance benefits—are received as a matter of statutory right." The difference was simply that the insurance beneficiary, by reason of his

223. See *supra* Section II.A.

224. Memorandum from Leonard Calhoun, Assistant Gen. Counsel, Office of the Gen. Counsel, to Louis Resnick, Federal Old-Age Benefits Approved Terminology (Mar. 10, 1937) (on file with NARA II, HEW Records, 235/4/OAI Informational Service).

225. A. Delafield Smith, *Citizenship and Family Security*, 3 SOC. SECURITY BULL. 3, 8 (1940); see also Report of the Regional Attorneys Conference, *supra* note 14, at 80 (recording statements by federal agency attorneys that the "rights of the individuals" in both OAI and OAA "arise from the same source and are of precisely the same character," and that "the time ha[d] come" to consider both programs as "parts of a single, so-called security program").

226. Alice Kessler-Harris, "Designing Women and Old Fools": *The Construction of the Social Security Amendments of 1939*, in U.S. HISTORY AS WOMEN'S HISTORY 87 (Linda Kerber, Alice Kessler-Harris & Kathryn Kish Sklar eds., 1995).

contributions, was more likely to feel “confiden[t] about his right.”²²⁷

By the mid-1940s, references to rights—contrasted inevitably with the stigmatizing gratuities of the old poor law—were a staple of federal public assistance communications. As one regional attorney commented in a routine internal memo, federal administrators were “striving to establish the principle that, where one meets the requirements of the law, assistance to him is a matter of right rather than a matter of pleasure to be given by the State.”²²⁸ Or as she put it in the next sentence, they were guarding against “reversion to the philosophy that assistance is charity”—a philosophy that still seemed to have a hold in communities where low-level welfare administrators lived and worked.²²⁹ The nonattorneys working for the federal government spoke in the same language; this was not simply lawyers speaking in the language they knew best. For example, at their 1944 conference, members of the BPA’s Regional Staff congratulated trained social workers (which they all were) for accepting and spreading the principle of “public assistance as a right” throughout public welfare administration. At the same gathering, they discussed how to overcome the irrational “feelings and attitudes” that prevented lower-level staff workers from truly embracing the rights concept.²³⁰

State and local records came to reflect this sustained federal effort. The Idaho welfare department’s July 1942 “Manual of Policies and Procedures” stated that it was “the legal and democratic right of any person to make application for assistance, to receive equitable consideration of his application, and to receive assistance provided he is eligible.”²³¹ Oklahoma’s 1944 orientation materials explained that the welfare worker’s job was “to see that people eligible under the law get [assistance],” and thereafter to respect the client’s spending choices.²³² By the mid-1940s, agency heads well outside of

227. Arthur J. Altmeyer, *Persistent Problems in Social Security*, 2 PUB. WELFARE 258, 259 (1944). Board member George Bigge made a similar comment in a 1944 piece in the *Social Security Bulletin*. The public assistance titles were indeed based on the concept of right, he observed. The problem was that existing laws and administrative practices made that right “quite ethereal.” George E. Bigge, *Looking Ahead in Public Assistance*, 7 SOC. SECURITY BULL. 4, 8 (1944).

228. Memorandum from Lillian L. Poses, Reg’l Attorney, to Alice J. Weber, Reg’l Representative, Bowe Case (Feb. 15, 1946) (on file with NARA II, HEW Records, 235/68/Region II—Public Assistance 1944-1946).

229. *Id.*

230. [Cordelia] Trimble, Comments on Money Payments at Regional Staff Conference, Bureau of Public Assistance (May 12, 1944) (transcript available at NARA II, SSA Records, 47/193).

231. McEvoy, *supra* note 165, at 292-93.

232. Bureau of Pub. Assistance, Conference of Reg’l Staff, Personnel, May 13, 1944, at 45 (on file with NARA II, SSA Records, 47/193).

Washington could be heard referring to “the right to assistance” as the program’s “fundamental premise.”²³³ It was both the essence of modern poor relief and, in its implications, a shorthand for appropriate administrative practices.

V. RIGHTS AS A LANGUAGE OF THE STATE

Reflecting on the effect of their educational campaigns, some federal administrators reported remarkable success. In a session at the University of Pennsylvania School of Social Work, a member of the SSB’s regional staff witnessed a group of Maryland public assistance workers go “wild” when a representative of a private family agency confessed to giving out relief in kind rather than in cash.²³⁴ They “all but tore her apart and almost tossed her out the window,” leaving her with “a great feeling of inferiority.”²³⁵ This demonstrated, in the observer’s view, an acceptance of the rights-based philosophy that federal administrators had labored so hard to entrench in state and local agencies.²³⁶

Although suggestive, this evidence falls far short of proving that such understanding truly permeated public welfare administration. As anthropologist James C. Scott has cautioned, “We must never assume that local practice conforms with state theory.”²³⁷ Likewise, it is difficult to ascertain whether welfare recipients heard and embraced the rights language that federal administrators channeled into their local welfare departments. Some observers insisted that client attitudes had changed,²³⁸ while others emphasized the many ways in which public assistance administrators and the broader public made

233. Margaret Kincaid Bishop, *County Participation in a Public Assistance Program*, 3 PUB. WELFARE 270, 270 (1945).

234. Bureau of Pub. Assistance, Reg’l Staff Conference, May 12, 1944, at 10 (comments of Miss Hastings) (on file with NARA II, SSA Records, 47/193).

235. *Id.* at 10–11.

236. *Id.* at 10.

237. JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 49 (1998).

238. *See, e.g.*, STEIN-ROGGENBUCK, *supra* note 140, at 182 (concluding, based on a review of county-level ADC records in Michigan, that recipients “sought to maintain an active role in the planning of their cases” and that “many believed that their own circumstances or behavior entitled them to state aid”); Charles F. Ernst, *Clients Aren’t What They Used To Be*, 74 SURVEY 142, 142 (1938) (“[T]he clients aren’t what they used to be No longer do they supplicate for charity, pleading ‘worthiness’ in their own behalf. Today they assert their rights as human beings and as members of the body politic—their worthiness is their own business.”).

recipients feel ashamed, undeserving, and impotent. What the previous Parts of this Article do establish is that scholars have overlooked a vibrant discourse of rights within the welfare state—not within the administration of Social Security, a program long recognized as one based on entitlement and directed at rights-bearing individuals, but within the administration of public assistance, a program often associated with ignominy and inferior status.

This finding invites a broader inquiry into the role of rights language in American history. To some extent, this is an old question, which has by now received its scholarly due. Yet existing work has almost uniformly focused on the rights language of claimants or their advocates, a language targeted at judges, legislators, or the court of public opinion. In Section V.A, this Article lends new insights to that tradition, by pairing it with historians' observations about twentieth-century state-building and its discontents. But the Article's most important contribution is in Section V.B, where the focus shifts to "rights as a language of the state": the rights language in this Article is notable for emanating from federal government officials and targeting local bureaucrats, to whom it sent a message about the ambitions of the nation-state and the fate of local citizens.

A. *Rights as Quid Pro Quo?*

"Rights talk" is, by now, a well-worn topic. Scholarly interest dates to the 1960s, when the proliferation of rights-based social movements and the hollowness of previous rights victories raised questions about Americans' seeming preoccupation with legalism and rights-claiming.²³⁹ By the 1980s, following Stuart Scheingold, many scholars agreed that rights claims were a "political resource," similar to "money, numbers, status, and so forth," which could be deployed in or out of courts.²⁴⁰ Beyond that, however, "rights talk" scholars diverged.

One set of scholars debated whether the use of rights language was "good"

239. Formative scholarship includes MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964); JUDITH SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (1964); Lawrence M. Friedman, *Legal Culture and Social Development*, 4 *LAW & SOC'Y REV.* 29 (1969); and Clifford Geertz, *Ideology as a Cultural System*, in *IDEOLOGY AND DISCONTENT* 47 (David E. Apter ed., 1964).

240. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 7 (1974). On the influence of *The Politics of Rights*, see Michael Paris, *The Politics of Rights: Then and Now*, 31 *LAW & SOC. INQUIRY* 999, 1016 n.24 (2006) (reviewing STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (Univ. of Mich. Press 2004) (1974)), which offers a preliminary list of "work strongly influenced by Scheingold."

or “bad”—progressive or conservative, stimulating or stunting, a realistic tool for achieving change or an empty promise. The fierceness of the debate reflected forces internal and external to the academy: on the outside, the continued popularity of rights-focused political strategies in the 1970s and 1980s, the perceived expansion of judicially recognized rights, and the endurance of the injustices that rights purported to address; on the inside, the “linguistic” or “cultural turn,” which called into question whether rights had any “real” content or objective foundation, and the insistence, by some legal and political philosophers, that rights be “taken seriously” as a basis for jurisprudence.²⁴¹

241. Conservative voices charged that rights were expanding beyond their legitimate bounds, and that excessive talk of rights destroyed community and disabled institutions. “Responsive communitarians” articulated a powerful variant of this argument later, in the early 1990s. Critics on the left, such as some critical legal studies (CLS) scholars, claimed that rights legitimated existing structures of power, channeling the less powerful toward formal rather than substantive equality. Postmodern theorists argued that rights were indeterminate, unstable, and ephemeral, and that rights discourse was merely politics by another name. For conservative criticism, see, for example, FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* (1970); and RICHARD E. MORGAN, *DISABLING AMERICA: THE “RIGHTS INDUSTRY” IN OUR TIME* (1984). For “responsive communitarian” criticism, see, for example, AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* (1993); and MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14-15 (1991). For CLS criticism, see, for example, CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 *SIGNS* 421 (1987); and Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *MINN. L. REV.* 1049 (1978). For the postmodern critique, see, for example, Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363 (1984). An exhaustive overview of the “two-fronted war on rights waged by right-wing and left-wing critics” can be found in Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *YALE L.J.* 1860, 1862 (1987). For a more recent take, written with the distance of time, see Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 *WM. & MARY L. REV.* 713, 714-15, 719-21 (2011).

Defenders of rights also advanced on multiple fronts. In response to Nietzschean critiques of rights, intellectual historian Thomas Haskell noted that “[w]hether or not we have objective knowledge of natural rights, we continue to talk as if we did.” Thomas L. Haskell, *The Curious Persistence of Rights Talk in the “Age of Interpretation,”* 74 *J. AM. HIST.* 984, 994, 1004-06 (1987). This “curious persistence” proved that rights talk is “a valuable cultural practice,” *id.* at 984, and that rights themselves are “durable” if not eternal conventions “capable of commanding rational allegiance” and thereby “provid[ing] public life with sufficient order and continuity,” *id.* at 1005. Other defenders—often women and racial minorities—urged that rights had been and could be useful, despite their inadequacies. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323 (1987); Minow, *supra*, at 1911; Elizabeth M. Schneider, *The Dialectic of*

A second set of “rights talk” scholars engaged in a similarly wide-ranging, albeit less contentious, dialogue about the role of rights language in the American past and its likely place in the American future. Some emphasized the ways in which the “rights talk” of the modern era was unique, even revolutionary. They sought to explain the “rights revolution” and chart its trajectory.²⁴² Others took a longer view, identifying “rights talk” as “a relatively stable and permanent social convention.”²⁴³ Change over time occurred, they agreed, but it was in the groups of Americans that deployed rights language and the content, both practical and aspirational, of their claims.²⁴⁴

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- Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589, 590 (1986); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 405 (1987). A final defense came from civil libertarians, such as Charles Reich. Long after his famous call for recognition of new forms of property, Reich maintained that rights were necessary to protect individuals from “the aggressively advancing invasion of the organized sector.” Charles A. Reich, *The Individual Sector*, 100 YALE L.J. 1409, 1411 (1991).
242. See, e.g., LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985) (sketching out a rising expectation of complete recompense); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (arguing that by the late twentieth century, governmental policies, institutions, bodies of law, and the legal profession had induced a “legalistic” type of governance that channeled disputes toward formal, adversarial processes, and hence toward a language of legal rights); JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* (2002) (emphasizing the importance of rights to America’s image during the Cold War and describing the institutionalization of this commitment in particular federal agencies).
243. Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* 74 J. AM. HIST. 1013, 1015-16 (1987).
244. See, e.g., RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* (1999) (citing episodes from the Founding, the Reconstruction era, and the post-World War II period to demonstrate that Americans turn to rights in response to adversity, and that when they do, they cause new rights to accrue and old rights to transform); JOHN P. REID, *THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986) (showing that a powerful rights discourse animated the American Whig cause); Elizabeth B. Clark, “*The Sacred Rights of the Weak*”: *Pain, Sympathy, and the Culture of Individual Rights in Antebellum America*, 82 J. AM. HIST. 463, 463, 490, 492 (1995) (connecting the tactics of nineteenth-century abolitionists to the recognition of a new right, the right to be free from deliberately inflicted pain, and the delegitimization of the husband/parent/master’s customary right to exert private violence); Hartog, *supra* note 243, at 1016-17 (explaining how rights are vulnerable to “reimagin[ation], repossess[ion], and redistribut[ion],” even as they carry with them the baggage of previous rights claimers); Felicia Kornbluh, *To Fulfill Their “Rightly Needs”: Consumerism and the National Welfare Rights Movement*, 69 RADICAL HIST. REV. 76, 78 (1997) (using an episode in welfare rights activism to “reveal[] the elasticity and utility of rights discourse in U.S. history”); Daniel T. Rodgers, *Rights Consciousness in American History*, in *THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS* 3, 3-17 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993) (identifying four key moments of heightened rights consciousness and massive rights invention in American history).

The result of these two streams of scholarship—the explicitly normative and the more historical—is a fractious, voluminous “rights talk” literature. Yet in one sense the literature coheres: it assumes that rights language is the tool of the rights claimer. Such language articulates what the speaker believes is, or should be, a right, whether due process or a decent home. And it is directed at the public or the institution capable of vindicating the putative claim.

One might characterize the rights language uncovered in this Article as a novel variation on this theme. Welfare recipients in this era did not grasp onto rights language and march into court, as they did in the 1960s, but they might have extracted from it an important claim: a claim against an expanding and potentially overbearing state. Historian William Novak hints at this possibility in a 2001 essay on “the legal origins of the modern American state.”²⁴⁵ He argues that Americans could tolerate the rise of a powerful, central government only if an expansion of individual rights accompanied it: “An expanded zone of private protection and individual autonomy was quid pro quo for the radical extension of state power”; new rights against the state (for example, to privacy, personhood, civil liberty, and social protection) “were an indispensable part of the new balance” of power.²⁴⁶ Historian James Sparrow has advanced a similar theory in his recent study of World War II-era state-building: “[R]ights claims directed at the federal government became an increasingly pervasive, even paradigmatic feature of politics,” he suggests, because national power had expanded in ways that were hidden from view and difficult for the ordinary person to understand.²⁴⁷ Grants of individual rights, the new “coin of that realm,”²⁴⁸ helped Americans “c[o]me to terms with massive structures of national power.”²⁴⁹

This quid pro quo theory maps onto the evidence from the welfare context—to a point. First, there is no doubt that in the 1930s and 1940s, as a consequence of forceful depression and wartime governance, the national state became exponentially more powerful and controversial. Americans witnessed robust executive leadership and sweeping legislative reforms, many involving an expansion of national administrative capacities and direct interferences with

245. Novak, *supra* note 29, at 265.

246. *Id.*; see also R. Shep Melnick, *Federalism and the New Rights*, 14 YALE L. & POL’Y REV. 325, 326 (1996) (observing that “[s]ince the New Deal, centralization of authority has gone hand-in-hand with the expansion of a particular type of individual rights—positive rights guaranteeing government benefits and protections”).

247. SPARROW, *supra* note 30, at 259.

248. *Id.* at 260.

249. *Id.* at 9-10.

daily life.²⁵⁰ Abroad, Nazi Germany and the Soviet Union provided potent examples of the dangers of strong central states.²⁵¹ Second, New Deal public assistance programs shared with other expansions of central-state authority certain alarming features. Had Roscoe Pound, for example, turned his eye to these programs, he would have found yet another invitation to “administrative absolutism.”²⁵² Public assistance administration appeared to commingle adjudicative, legislative, and executive functions with little regard for the American tradition of separation of powers.²⁵³ Third, rights language was an increasingly obvious antidote to anti-statists’ accusations of an overly powerful central-state government. America’s commitment to rights, leading political and intellectual figures testified, kept totalitarian impulses in check and American democracy healthy. By according all citizens, as a matter of right, fair treatment, participation in government, and a free airing of opinion, the United States could never become like its enemies.²⁵⁴

We might therefore assume that federal administrators’ rights language was, at bottom, a quid pro quo: by offering rights claims—claims on the government’s treasury and against abusive state power—administrators attempted to make palatable the central government’s expansive new role. And yet the rights language from the welfare context does not quite fit, because in this policy arena, the federal government was not a threat to the American people; its power remained concealed.²⁵⁵ As the earlier Parts of this Article

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250. AARON L. FRIEDBERG, *IN THE SHADOW OF THE GARRISON STATE: AMERICA’S ANTI-STATISM AND ITS COLD WAR GRAND STRATEGY* 40-61 (2000); SPARROW, *supra* note 30, at 4-11; Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in *TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II*, at 185, 188-95 (Daniel Ernst & Victor Jew eds., 2002).
251. By March 31, 1938, the combination of President Roosevelt’s Court-packing attempt, a series of stunning Nazi gains, and an impending executive branch reorganization prompted such concern that he felt compelled to issue—at one o’clock in the morning—a statement disavowing his interest in using central-state power for dictatorial purposes. CIEPLEY, *supra* note 45, at 143.
252. Daniel R. Ernst, *Law and American Political Development, 1877-1938*, 26 *REVS. AM. HIST.* 205, 207 (1998); Roscoe Pound, *For the “Minority Report,”* 27 *A.B.A. J.* 664, 667 (1941).
253. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 217-20 (1992); Roscoe Pound, *The Recrudescence of Absolutism*, 47 *SEWANEE REV.* 18, 27 (1939).
254. CIEPLEY, *supra* note 45, at 194-200; HORWITZ, *supra* note 253, at 255-58. The foundational work on this topic remains EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).
255. See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 13 (2009) (describing Americans’ longstanding

demonstrate, local authorities, under the supervision of state agencies, administered public assistance benefits.²⁵⁶ Surely they noted the federal government's burgeoning influence, because they had to comply with new federal rules and accede to federal oversight. But the poor, the purported beneficiaries of the new rights, would not have perceived a domineering federal presence. In other words, the overall growth of the national state was undoubtedly frightening during this period, but in this particular policy area, ordinary Americans had little reason to perceive a threat. Without a motive for exchange, the quid pro quo theory fails to make sense of the rights language that appeared so persistently in welfare administration during this period.

B. Rights as the Language of an Ambitious National State

Rather than forcing this administrative rights language into the enduring and powerful "rights talk" tradition, we should consider whether a different phenomenon is at work. The rights language here is not the language of would-be claimants, for it articulates the rights claims of others without necessarily involving the claimants themselves. It is the language of the state. It expresses the ambitions of the national government, this Section argues, or rather, the ambitions of those who, with varying degrees of intentionality, encouraged that government to take an ever greater role in governing the American people.

A basic insight provides the starting point: articulating a rights claim conveys a message about the relationship between the speaker—here, agents of the federal government—and the purported rights-holder. In the 1930s and 1940s, the federal government, states, and localities were jockeying for influence over the individuals within their borders; the federal government was ascendant, but important pockets of state and local authority remained. One such pocket was poor relief.²⁵⁷ The rights language emanating from federal

preference to keep the "General Government" out of sight and explaining the ways in which exercises of federal power were hidden and masked in the nineteenth century).

256. See *supra* note 78 and accompanying text.

257. I have borrowed the idea of "pockets" of the American state from Daniel Carpenter. Carpenter urges agency-specific and subject-matter-specific studies of state-building as a necessary complement to the more synthetic studies of scholars like Skowronek. CARPENTER, *supra* note 98, at 6. Other policy areas that remained tightly tied to the local level at this time included education and policing. See TRACY L. STEFFES, *SCHOOL, SOCIETY, AND STATE: A NEW EDUCATION TO GOVERN MODERN AMERICA, 1890-1940*, at 11 (2012) (arguing that in the first several decades of the twentieth century, schools were "a local and state project," "national in scope" but still characterized by local control); David H. Bayley, *Police Function, Structure, and Control in Western Europe and North America: Comparative and*

agencies warned that even this terrain would be contested: if poor relief came with federally guaranteed rights, then state and local governments could no longer treat their poor citizens however they liked, nor could they command exclusive loyalty.²⁵⁸

This theory may seem unintuitive. In the United States today, membership in the national polity is of primary importance. Whether because of the success of contemporary civil rights movements,²⁵⁹ the orientation of citizenship theorists,²⁶⁰ or the contemporary allure of belonging to a nation-state,²⁶¹ “membership in the federal polity” now appears to “trump[] all subordinate memberships and uniformly regulate[] the general rights and duties of all citizens.”²⁶² For much of American history, however, “subordinate” relationships—to communities, associations, religious organizations, households, and corporations—performed the work of governance and shaped individuals’ understanding of their place in the world. Together with the common law, these relationships established what each individual owed to the collective, and what that individual was entitled to expect in return.²⁶³

Historical Studies, 1 CRIME & JUST. 109, 125-26, 131 (1979) (characterizing policing in the United States as extremely decentralized and locally controlled).

258. Cf. ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876* (2005) (arguing that during the brief period in which the national government committed to enforcing civil rights statutes in the Reconstruction South, state and local authorities perceived a direct threat to their authority, and specifically, their authority over the lowest-status members of their communities).
259. William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, in *THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY* 85, 85-86 (Meg Jacobs, William J. Novak & Julian E. Zelizer eds., 2003).
260. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 23 (2006) (“Citizenship is presumed [by many scholars] . . . to be a national enterprise—a set of institutions and practices that necessarily take place within the political community, or the social world, of the nation-state.”).
261. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 15-16 (1983) (characterizing modern nation-states as “imagined political communities,” made “imaginable” by a distinct set of historical circumstances).
262. Novak, *supra* note 259, at 101; see also Martha Derthick, *Introduction to DILEMMAS OF SCALE IN AMERICA’S FEDERAL DEMOCRACY* 1, 9 (Martha Derthick ed., 1999) (observing that although “we take the existence of a powerful national government as a fact of political life,” “the idea that the nation is the primary political community” is a historical creation, built over generations).
263. Novak, *supra* note 259, at 94-105; see also Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397-98 (1993) (finding that many states accorded aliens voting rights in the nineteenth

With the struggle over slavery and the enactment of the Fourteenth Amendment, the content of national citizenship took on a new importance,²⁶⁴ but into the twentieth century, politics other than the nation-state strongly affected Americans' daily experience of governance. State and local governments made demands on individuals—tax payments, for example, and public service. To a degree that Americans often overlook, state and local governments were also rigorous regulators. In the name of the common good, they not only provided benefits, they secured crucial infrastructure, abated public nuisances, fought disease, regulated consumer goods, and policed public morality.²⁶⁵ The reality, as of 1935, was that federal government, states, and localities all governed, in different ways, the individuals within their borders. By extension, it was possible for these differentially situated individuals to understand themselves as members of a national polity and yet recognize, as one local charity executive did in 1937, that “citizens of the United States are born and live and die in a local setting.”²⁶⁶

Within this pluralism, social welfare was one area of governance that remained tied to the local level. Americans had long believed that under normal circumstances,²⁶⁷ care of the poor was a local responsibility. Funds might come from outside sources, but local authorities ought to decide which of the purportedly needy received handouts, how much they received, and on what

century, and that in doing so, they “recognize[d] mean[s] of citizenship apart from the notion of mere membership in the nation-state”).

The historical literature on citizenship in the United States is rich, and I do not do it justice here. Works that have informed my understanding of citizenship include MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* (2009); ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* (2001); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997); BARBARA YOUNG WELKE, *LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES* (2010); Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 *AM. HIST. REV.* 1440 (1998); and Linda K. Kerber, *The Meanings of Citizenship*, 84 *J. AM. HIST.* 833 (1997).

264. STERETT, *supra* note 108, at 55; Novak, *supra* note 259, at 105-12.

265. WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

266. Pierce Atwater, *The County as a Unit for Co-ordinate Planning and Service in Public and Private Social Work*, 1937 *PROC. NAT'L CONF. SOC. WORK* 369, 369.

267. In times of perceived “emergency” or “disaster,” Americans tended to be more open-minded. Michele L. Landis, *Fate, Responsibility and “Natural” Disaster Relief: Narrating the American Welfare State*, 33 *LAW & SOC'Y REV.* 257, 259-60 (1999); see Michele L. Landis, “Let Me Next Time Be ‘Tried by Fire’”: *Disaster Relief and the Origins of the American Welfare State 1789-1874*, 92 *NW. U. L. REV.* 967 (1998).

terms. If citizenship is, as some theorists argue, about an exchange of allegiance and compliance for protection,²⁶⁸ the poor were clearly local citizens first.

The Great Depression offered the federal government a prime opportunity to expand its jurisdiction: by providing social and economic protections, the federal government could build and strengthen its bonds with individuals, at the expense of state and local authority. Indeed, as political scientist Suzanne Mettler has argued, the New Deal old-age insurance program did just that. Federally administered, according to federally determined procedures and standards, Social Security encouraged recipients to consider themselves members of the national political community.²⁶⁹ On Mettler's account, the public assistance program was a missed opportunity for federal state-builders. In deference to long-held beliefs about the nature and function of poor relief, as well as to the concerns of powerful Southern senators, the federal government heavily subsidized the public assistance program but left day-to-day administration to the state and local levels, where particularized standards of deservingness reigned. These terms signaled that beneficiaries belonged to state and local polities; no federal relationship was implied.²⁷⁰

Or so it would appear on paper. While Mettler correctly diagrams the system of "divided citizenship" built into New Deal social welfare programs, her account overlooks the actual practices of federal administrators—people such as SSB executive director Frank Bane, who in 1937 toured the country to announce that "citizenship" included "allegiance not only to a certain locality and a particular State, but to the nation."²⁷¹ Using rights language, administrators seemed to be reaching for the citizens whom the statutes left

268. See PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 176 (1998) (explaining that when citizenship is deployed "as a positive concept," it "describes a relationship between individuals and the polity in which citizens owe allegiance to their polity—they must not betray it and may have to serve it—while the polity owes its citizens the fullest measure of protection that its law affords"). There are, of course, many alternative ways of understanding citizenship. See *id.* (identifying a normative conception of citizenship that exists alongside the positive one); JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 3 (1991) (identifying four meanings of citizenship: as "standing," as nationality, as "active participation or 'good' citizenship," and as "ideal republican citizenship").

269. METTLER, *supra* note 32, at 24; see also ANDREA L. CAMPBELL, *HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE* 112-14 (2003) (arguing that old-age insurance fostered an empowered, politically active senior group, which in turn helped defend old-age insurance from threats).

270. METTLER, *supra* note 32, at 24-25.

271. Frank Bane, Exec. Dir., Soc. Sec. Bd., *Social Security on the March*, Address at Randolph-Macon [Woman's] College, Lynchburg, Va. (Apr. 16, 1937) (on file with University of Virginia Library, Special Collections, Papers of Frank Bane, box 7).

behind. By telling welfare workers that rights were on the line, at least when it came to the federally subsidized forms of public assistance (Aid to the Blind, Old Age Assistance, and Aid to Dependent Children), federal administrators separated some individuals from the group over which state and local governments exerted unbridled control and could expect undivided loyalty (i.e., the recipients of state and locally funded “general relief”).²⁷² By emphasizing where those rights came from—namely, specific provisions in the Social Security Act and the U.S. Constitution—they reminded competing levels of government that these important social benefits emanated from Washington.

To be sure, this use of rights language did not signal that the federal government embraced public assistance beneficiaries in the same way that it embraced the retirees on Social Security; nor did it signal that federal officials were prepared to enforce a poor individual’s rights against state and local authorities—that would come later. But it does suggest a desire, perhaps unconscious, on the part of certain federal administrators to raise the profile of national government. Richard Schragger has argued that “localism claims—claims that certain groups should be permitted to make law for themselves—must be understood as acts of legal and spatial construction.”²⁷³ We should apply the same logic to federal administrators’ rights language, which, with or without the speakers’ intent, undercut such claims of local governance. This rights language, in effect, constructed national authority²⁷⁴ by detaching individuals from the local and, at the same time, orienting them toward a distant but beneficent central state.²⁷⁵

272. Because “general relief” remained untouched by federal policies, Susan Stein-Roggenbuck has labeled it a “third track” in the so-called “two-track” welfare state. I share her belief that scholars should devote more attention to this important and highly stigmatized category of public aid. STEIN-ROGGENBUCK, *supra* note 140, at 8.

273. Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 404 (2001).

274. There is a large literature on how individuals came to think of themselves as members of the American nation. See, e.g., COHEN, *supra* note 195, at 364-68; GARY GERSTLE, AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY 122-27 (2001); CHRISTIAN SAMITO, BECOMING AMERICAN UNDER FIRE: IRISH AMERICANS, AFRICAN AMERICANS, AND THE POLITICS OF CITIZENSHIP DURING THE CIVIL WAR ERA (2009); CARROLL SMITH-ROSENBERG, THIS VIOLENT EMPIRE: THE BIRTH OF AN AMERICAN NATIONAL IDENTITY 112-28 (2010). This Article suggests that in the mid-twentieth century, federal administrators may have been important agents of nationalization. On what is distinctive about national identity, as opposed to other forms of identity, see MILLER, *supra* note 36, at 17-47.

275. I know of no other scholar to make the argument in quite this way, but I believe it is compatible with at least two other works on rights and governance. See LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 273-82 (2009) (describing how advocates of the antebellum nullification movement in North and South Carolina used rights discourse to

In 1940, addressing an audience of immigration reformers, federal attorney A. Delafield Smith observed that “a strong personal bond between the individual and the state” was “the tangible evidence of the achievement of national identity and power.”²⁷⁶ It was also, he continued, an established “technique . . . [for] bringing about national dominance” over “tribal bonds.”²⁷⁷ Whether he and his colleagues knowingly applied that insight to their daily labors is unclear, but the words themselves ring true: the modern liberal state did not amass its authority overnight. It built that power citizen by citizen, piece by hard-fought piece.

CONCLUSION

Two decades after playing his little-known role in the welfare rights movement,²⁷⁸ legal philosopher Bob Cover penned *Violence and the Word*.²⁷⁹ The essay reminded readers that all official interpretive commitments, whether by judges or other “instruments of a modern nation-state,” “are realized . . . in the flesh.”²⁸⁰ This Article has offered an explanation for a legal interpretation that occurred within the administrative state. Parts I, II, and III demonstrate that although the Social Security Act never used the word “rights,” federal administrators spread throughout the nation the notion that the Act’s benefits were the “right” of the recipient, and that recipients themselves had ancillary rights—to fair process, equal treatment, privacy, and freedom from interference. From the federal administrators’ perspective, the focus of Part IV, this was a useful way to guide local welfare workers, whom they had no formal means of influencing and who, in many cases, appeared to operate within an “old poor law” framework. From the perspective of a more abstract governing regime, taken up in Part V, this interpretation also had value: rights language

encourage free, white men to associate with state-level authority); Marlene Wind, *Post-National Citizenship in Europe: The EU as a “Welfare Rights Generator”?*, 15 COLUM. J. EUR. L. 239, 244 (2009) (“The modern notion of citizenship is about identity and belonging to a particular national community with strongly demarcated borders. Citizens were granted rights in virtue of being part of this narrowly defined entity. In the consolidating years of the European nation state, there was therefore a natural exchange of loyalty for rights.”).

276. Smith, *supra* note 225, at 3.

277. *Id.*

278. See *supra* note 9 and accompanying text (explaining that as an intern for the Center on Social Welfare Policy and Law, Cover developed a persuasive argument for the futility of pursuing federal administrative review).

279. Cover, *supra* note 11.

280. *Id.* at 1601, 1605.

expressed a direct relationship between poor individuals and central-state authority. It signaled that the poor were no longer local citizens first. This, scholars have argued, is the very essence of the modern liberal state,²⁸¹ and yet we know precious little about how the change occurred. This Article suggests one mechanism.

Moving forward in Cover's spirit, two questions demand answers. The first is about the consequences of federal administrators' rights language. The second is about the politics of rights claiming and its uninterrogated obverse.

On consequences: one possibility, left here for another day, was the stimulation of rights-based, class-conscious activism. All rights, Judith Shklar has written, "can be forfeited, but that does not render [them] worthless. And even if it is not feasible to enforce the right fully, the consciousness of the claim can have a political effect."²⁸² Did federal administrators' rights language encourage local officials to provide more generous benefits or treat welfare recipients with more respect, perhaps fostering a sense of legitimacy and entitlement? Historically, the expansion of central-state authority has not necessarily, or even often, shifted power to society's most marginal members,²⁸³ but any rupture in the pattern of governance is a potential moment of opportunity and an impetus to reimagine what is possible.

Extrapolating further, did federal administrators' rights language instead (or in addition) trigger the "backlash" against public assistance recipients that surfaced in the early Cold War period and swept the nation in the early 1960s?²⁸⁴ In subsequent years, did echoes of that rights language (many federal administrators had moved on by then to the discourse of "rehabilitation")²⁸⁵ encourage the poor to expect more from the federal government, and, at last, to

281. See NOVAK, *supra* note 265, at 241 (characterizing the modern liberal state as one in which the society is "legally and politically oriented around the relationship of individual subjects to a central nation-state," while the previous regime of governance, by contrast, was built around "the roles of associative citizens in a confederated republic").

282. SHKLAR, *supra* note 268, at 101.

283. WELKE, *supra* note 263, at 147.

284. On the welfare "backlash" of the late 1940s and 1950s, see REESE, *supra* note 13. On the relationship between that backlash and the discourse of rights, see TANI, *supra* note 13, at 177-81. See also LISA LEVENSTEIN, A MOVEMENT WITHOUT MARCHES: AFRICAN AMERICAN WOMEN AND THE POLITICS OF POVERTY IN POSTWAR PHILADELPHIA 83 (2009) (characterizing Pennsylvania's restrictive 1950s welfare policies as a "respon[se] to women's deliberate and assertive use of ADC").

285. On the shift in the 1950s to a discourse of rehabilitation, see MITTELSTADT, *supra* note 7, at 41-43; and TANI, *supra* note 13, at 221-55.

loudly, publicly demand their due?²⁸⁶ The evidence in this Article cannot, without more, support such claims, but at the very least, it suggests clear linkages between the growth of the administrative state and the materialization of a “rights revolution.”²⁸⁷

The second question is about the political motivations of those who are most alarmed by assertions of rights to public benefits. Critics have long alleged that when benefits come with rights, or are packaged as rights, policymakers lose flexibility, taxpayers suffer, and the poor lose incentive to work.²⁸⁸ The 1996 Personal Responsibility and Work Opportunity Reconciliation Act “ended welfare as we know it”²⁸⁹ in large part by eliminating rights claims. It did this first by placing time limits on benefits, and second, by authorizing states to condition benefits on any number of behavioral requirements. Under the terms of the new law, welfare payments were an incentive, not a right; their termination was an unobjectionable form of discipline, not a rights violation.²⁹⁰ These changes generated broad support, and the law continues to receive praise,²⁹¹ despite mounting evidence that it has failed to achieve many of its stated goals.²⁹²

286. Cf. SPARROW, *supra* note 30, at 179 (noting that the Fair Employment Practices Commission’s “[f]ailure to enforce fair employment only made those claims more insistent, highlighting the government’s responsibility rather than negating it. . . . [T]he simple existence of an avenue for grievance . . . legitimized the expectations of its claimants.”).

287. If the administrative strategies described above did lay the groundwork for the welfare rights movement, irony abounds. This Article has argued that federal administrators funneled rights language into local welfare offices, attempting to legitimize New Deal welfare reform and, more generally, the modern liberal state. The welfare rights movement exposed the ugliness built into that regime of governance: its simultaneous celebration of equal treatment and deference to racial and economic injustice; its proclaimed regard for individual rights and obvious disregard for human dignity. In yet another ironic twist, conservative reaction to the welfare rights movement helped push the liberal state toward its current form, one that differs substantially from what New Deal state-builders imagined.

288. For a recent iteration of this critique, see CHARLES J. SYKES, *A NATION OF MOOCHERS: AMERICA’S ADDICTION TO GETTING SOMETHING FOR NOTHING* (2011).

289. KATZ, *supra* note 2, at 1.

290. Lucy A. Williams, *Welfare and Legal Entitlements: The Social Roots of Poverty*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 569, 570 (David Kairys ed., 3d ed. 1998). For a concise account of welfare reform in the 1990s, see KATZ, *supra* note 2, at 317-28.

291. Jason DeParle, *Welfare Limits Left Poor Adrift as Recession Hit*, *N.Y. TIMES*, Apr. 7, 2012, <http://www.nytimes.com/2012/04/08/us/welfare-limits-left-poor-adrift-as-recession-hit.html> (observing that “[p]erhaps no law in the past generation has drawn more praise than the drive to ‘end welfare as we know it’”).

292. See generally JASON DEPARLE, *AMERICAN DREAM: THREE WOMEN, TEN KIDS, AND A NATION’S DRIVE TO END WELFARE* (2004) (chronicling one extended family’s struggles in the aftermath of welfare reform); KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC*

More recently, critics have denigrated claims of a right to health care. Supporters of universal health insurance, ranging from activists²⁹³ to legislators²⁹⁴ to the President,²⁹⁵ invoked rights language in their efforts to secure the enactment of the Patient Protection and Affordable Care Act. They used other languages with even greater frequency—the languages of cost saving, fairness, and freedom, for example—but opponents seized on the notion of rights as representative of the Act’s flaws. As presidential hopeful Rick Santorum explained in a February 2012 speech, the “Obamacare” right to healthcare was in fact a tool of coercion and an invitation to dependence: “When the government gives you rights, . . . the government can take them away,” he warned, and “tell you how to exercise [them].”²⁹⁶ Other

ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011) (arguing that welfare “cheating” is virtually inevitable under today’s public assistance regime); JOEL F. HANDLER & YEHESKEL HASENFELD, *BLAME WELFARE, IGNORE POVERTY AND INEQUALITY* (2007) (showing that although welfare reform succeeded in trimming the welfare roles, it did not alleviate poverty or insecurity); RUCKER C. JOHNSON, ARIEL KALIL & RACHEL E. DUNIFON WITH BARBARA RAY, *MOTHERS’ WORK AND CHILDREN’S LIVES: LOW-INCOME FAMILIES AFTER WELFARE REFORM* (2010) (demonstrating that one piece of the welfare reform, the work requirements, has had harmful effects on poor families, owing to the nature of the work that is available to low-income women).

293. Anja Rudiger & Benjamin Mason Meier, *A Rights-Based Approach to Health Care Reform*, in *RIGHTS-BASED APPROACHES TO PUBLIC HEALTH* 77 (Elvira Beracochea, Corey Weinstein & Dabney P. Evans eds., 2011).
294. Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367, 1398-1401 (2011). For a more recent example, see Press Release, House Minority Leader, Pelosi Statement on Supreme Court Decision Upholding Healthcare Reform (June 28, 2012), <http://pelosi.house.gov/news/press-releases/2012/06/pelosi-statement-on-supreme-court-decision-upholding-health-care-reform.shtml> (“In passing health reform . . . [w]e ensured health care would be a right for all, not a privilege for the few. Today, the Supreme Court affirmed our progress and protected that right . . .”).
295. President Obama did not make rights language central to his campaign for health care reform, but when asked directly whether health care was “a privilege, a right, or a responsibility,” he responded that it should be a “right.” Jason Linkins, *Obama: Health Care Should Be a Right*, HUFFINGTON POST, Nov. 7, 2008, http://www.huffingtonpost.com/2008/10/07/obama-health-care-should_n_132831.html.
296. Rachel Weiner, *Rick Santorum’s Missouri Victory Speech: Full Transcript*, WASH. POST: ELECTION 2012 BLOG (Feb. 7, 2012, 11:45 PM), http://www.washingtonpost.com/blogs/election-2012/post/rick-santorums-missouri-victory-speech-full-transcript/2012/02/07/gIQAGcUwxQ_blog.html; see also Michele Bachmann, *Ripping Out Obamacare by the Roots: Tyranny Disguised as Health Care Reform Endangers Freedom*, WASH. TIMES, Mar. 27, 2012, <http://www.washingtontimes.com/news/2012/mar/27/ripping-out-obamacare-by-the-roots> (“Obamacare isn’t about a right to health care. It is about the government telling you what you have to do or, more precisely, what you must purchase.”). Republican Senator Rand Paul has gone one step further, arguing that not only does a “right to healthcare” limit the recipient’s freedom, but it also implies that the right-holder may conscript private

conservatives do not go so far, but agree that a government-guaranteed entitlement to healthcare is unwise and un-American.²⁹⁷

Missing from the debates, this Article suggests, is a full understanding of why some Americans are inclined to talk about national public benefits in rights terms in the first place. Surely, material gains are relevant, as is rhetorical advantage. But something more is at stake. To speak in the language of rights, this Article has argued, is to speak to central-state power in a shared language, a language that historically has bypassed state and local intermediaries to demand the perquisites of national citizenship. With this insight, we should look harder at efforts to detach public benefits from rights in the American lexicon. Surely such efforts reflect, as their proponents claim, concerns about wasting taxpayer resources and rewarding irresponsibility – but do they also manifest a desire to disaffiliate potential rights-claimers from the national government? Are they a bid to restore vulnerable Americans to the jurisdiction of other authorities, such as more proximate levels of government (as this Article has emphasized),²⁹⁸ or private charities,²⁹⁹ or the market?³⁰⁰ We still have much to learn about the language of rights, and even more to learn about those who oppose it.

physicians. In Paul's words, "It means you believe in slavery." Tony Pierce, *Rand Paul Says People Who Support Universal Healthcare "Believe in Slavery,"* L.A. TIMES: TOP OF THE TICKET (May 12, 2011, 7:17 PM), <http://latimesblogs.latimes.com/washington/2011/05/rand-paul-says-people-who-support-universal-health-care-believe-in-slavery.html>; see also Richard M. Salsman, *Memo to the Supreme Court: Health Care Is Not a Right*, FORBES, Apr. 3, 2012, <http://www.forbes.com/sites/richardsalsman/2012/04/03/memo-to-the-supreme-court-health-care-is-not-a-right> ("Consumers allegedly have a 'right' to what health care providers provide, a 'right' to say what will be provided, when, and at what price. . . . [T]his is a form of slavery.").

297. See Michael Finnegan, *Romney's Critiques of Europe Could Backfire*, L.A. TIMES, June 29, 2012, at A16 (reporting on Mitt Romney's efforts to associate public spending on healthcare with failed European-style socialism); *Glenn Beck Program* (Fox radio broadcast Dec. 31, 2010) (characterizing the "right to healthcare" as the brainchild of "Marx and Engels, not the founding fathers").
298. It is no coincidence that the 1996 welfare reform simultaneously eliminated the legal basis for rights-claiming and devolved authority to the states.
299. On the return of religious nonprofits to the front lines of social welfare, see MORRIS, *supra* note 57, at 136-47.
300. On the trend towards "privatizing" public welfare, in the sense of both embracing market models and encouraging Americans to rely on employers for benefits, see KATZ, *supra* note 2, at 171-84; and JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE* 258-75 (2003).