

Federalism and the New Rights

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"It is indeed a constitutional moment."¹ Thus spoke Senator Moynihan in his stinging critique of the first version of that was to become the welfare reform act of 1996. Certainly enactment of welfare reform by the 104th Congress and President Clinton was a highly significant political event. The legislation not only gave more control to the states, but demonstrated that cutting entitlements is not politically infeasible. But does this policy shift rise to the level of *constitutional* change? Does Senator Moynihan's statement

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1. S. REP. NO. 96, 104th Cong., 1st Sess. 65 (1995).

reflect his extraordinary prescience on matters related to public assistance—or his equally characteristic flair for rhetorical overstatement?

Senator Moynihan used the term *constitutional* not in the cramped conventional manner—i.e. how the United States Supreme Court interprets the Fourteenth Amendment and the Bill of Rights—but in an older and broader sense: the beliefs and practices that constitute the foundation of the American regime. Throughout American history no political beliefs have been more important than those concerning the nature and protection of individual rights; and few practices more important than the way we distribute power among national, state, and local governments.

A curious feature of American politics has been the way in which debates over individual rights have gone hand-in-hand with debates over federalism. At the Founding the Antifederalists warned that a stronger federal government would extinguish liberty; the Federalists convincingly countered that only a more powerful national government could protect it. States' rights later became the primary barrier to the protection of the civil rights of African-Americans. Protection of private property was allied with a broad reading of the federal government's power to regulate interstate commerce in the Marshall era, and with a narrow reading in the period of substantive due process. The Warren Court's incorporation of the Bill of Rights and its diverse efforts to root out segregation required an unprecedented assault on the traditional prerogatives of state and local governments.

In short, in the US debates about federalism are seldom merely matters of efficiency, management, or finding the most convenient means for achieving agreed-upon ends. These debates are often proxies for broader arguments about the proper role of government. This should make us ponder what the current trend toward devolution of authority means for the way we define and enforce individual rights.

Since 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. Not surprisingly, most current efforts to return more power to state and local governments are tied to proposals for limiting the size and reach of the public sector. The slippery term “devolution” is now politically popular precisely because it can mean either reducing the size of government or redistributing power within government.

The close connection between federalism and rights should lead us to ask what the current debate over federalism tells us about the future of the American welfare state and, conversely, what popular attachment to a broad understanding of individual rights tells us about the future of federalism. This Article addresses these questions first by examining the beliefs and political practices that have contributed to centralization of political authority and expansion of positive rights, and then by showing how support for this regime

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has eroded over the past fifteen years.

I. THE REGIME OF PROGRAMMATIC RIGHTS

Elsewhere I have argued that the period stretching roughly from 1964 to 1994 can be characterized as a regime of “programmatic rights.”² Programmatic rights are a hybrid in several senses. Although they are not constitutional in the strict sense of the word, they are more than simply statutory. They are the product of both congressional enactment and extensive judicial interpretation—interpretation usually informed by constitutional precedents and values. Moreover, many (though not all) are administered jointly by state, local, and federal governments. Unlike the rights of free speech, religion, property, and privacy, which set limits on the power of government officials, programmatic rights require extensive public programs rather than private autonomy, a welfare state rather than limited government.

The paradigm for programmatic rights can be found in the civil rights established through legislative, judicial, and administrative action starting in 1964. In 1963 President Kennedy described the legislative proposal that eventually became the Civil Rights Act of 1964 as “sound public constitutional policy.”³ This was an apt description since the act’s purpose was to define and protect what most of us consider rights established by the 14th and 15th Amendments. At the time Alexander Bickel described the act as “a fundamentally new departure in federal legislation,” and noted that Kennedy’s phrase jointed two previously distinct categories: constitutional law (the realm of the courts) and public policy (the realm of the legislative and executive branches).⁴

After passage of the civil rights legislation of the 1960s, the line between constitutional law and public policy became all the more attenuated. For many years the courts interpreted the Civil Rights Act and the Voting Rights Act liberally to conform with evolving interpretations of the 14th and 15th Amendments and changing understandings of the nature of racial discrimination. Indeed, judges were often willing to be more aggressive in expanding statutory rights, not because they believed they were following legislative intent but because they considered it prudent to package innovation as statutory—and thus reversible by Congress—rather than as set in constitutional stone. Administrative agencies in turn interpreted statutory phrases to conform with court rulings. The courts both deferred to agency expertise and expanded upon administrative action. The agencies then used judicial validation to protect

2. R. Shep Melnick, *The Court, Congress, and Programmatic Rights*, in *REMAKING AMERICAN POLITICS* (Richard A. Harris & Sidney M. Milkis eds., 1988); R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 13-19 (1993) [hereinafter MELNICK, *BETWEEN THE LINES*].

3. Alexander M. Bickel, *The Civil Right Act of 1964*, 38 *COMMENTARY* 33, 33 (1964) (quoting 1963 press conference with President Kennedy).

4. *Id.*

themselves from political attack. Separation of powers thus produced a ratcheting up of regulatory requirements as each branch built slowly and quietly on the initiatives of the others.

In school desegregation, for example, the Office of Civil Rights (OCR) in the Department of Health, Education, and Welfare issued controversial guidelines with precise quotas and deadlines for southern school systems. As Steven Halpern has shown, the OCR borrowed these standards from previous rulings of the Fifth Circuit. According to Halpern,

[A]ppropriating the 'objective' constitutional standards of courts gave HEW policies the imprimatur of legality, adding badly needed legitimacy, credibility, and authority to HEW's fledgling efforts to enforce Title VI. . . . HEW officials realized that federal courts were a good ally, and the agency had few allies in beginning the politically touchy task [of desegregation] . . . [I]n meetings with angry southern educators HEW officials could claim that their hands were tied—that court decisions and hence, indirectly, the Constitution itself, required HEW to be as insistent as it was.⁵

One finds a similar ratcheting up of federal rules and movement toward proportional representation under the Voting Rights Act.⁶

In subsequent legislation Congress created new protected classes and expanded the administrative and judicial remedies available to victims of discrimination. Yet it did little to clarify the meaning of the key term "discrimination." As judges and administrators quietly replaced the Civil Rights Act's "color-blind" understanding of civil rights with a de facto requirement of proportional representation, Congress remained silent. When the Supreme Court adopted a narrow reading of civil rights in cases such as *City of Mobil v. Bolden*,⁷ *Grove City College v. Bell*,⁸ and *Wards Cove Packing Co. v. Antonio*,⁹ Congress wrote ambiguous new legislation that attempted to reestablish the status quo ante.

Far from an isolated example, civil rights became a model for emulation. Since the requirements and evolution of many of these nondiscrimination statutes are well known, it will suffice simply to list some of them: Title IX of the 1972 Education Amendments (gender), section 504 of the Rehabilitation

5. STEPHEN C. HALPERN, ON THE LIMITS OF LAW 73 (1995). See HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 452-62 (1990); JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION (1996).

6. See ABIGAIL THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987).

7. 446 U.S. 55 (1980) (finding no racial discrimination in voting arrangements without evidence of invidious intent).

8. 465 U.S. 555 (1984) (limiting applicability of Title VI).

9. 490 U.S. 642 (1989) (holding evidence of statistical disparity in hiring cases does not establish prima facie case under Title VII).

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Act of 1973 (disability), the Age Discrimination Act, and the Americans with Disabilities Act. For better or worse, one of the most important governmental consequences of this new form of joint "constitutional policymaking" by the courts, Congress, and the executive branch is expanded federal control over state and local school systems, voting procedures, employment practices, and institutions for the retarded and mentally ill.

A similarly complex combination of legislative, judicial, and administrative action created extensive rights to a safe workplace and a healthy environment. Such rights were not abstract statements of general policy, but judicially enforceable promises of governmental assistance. Congress made sure of this by writing citizen suit provisions that allowed any citizen to sue either private parties who violate state and federal rules or federal officials who fail to perform nondiscretionary duties. In his frequently quoted opinion in *Environmental Defense Fund, Inc. v. Ruckelshaus*—which announced the arrival of the "new administrative law"—Judge David Bazelon explained that the "fundamental personal interests in life, health and liberty" have "a special claim to judicial protection"—unlike mere "economic interests."¹⁰ Not surprisingly, for many years a principal theme of the Sierra Club was that "[e]very American has a right to a safe and healthy environment." In 1995 the Club issued a report asserting that "Newt Gingrich's Contract is about taking away our rights to clean water, clean air, and clean food."¹¹ Out with the old-fashioned property rights, in with the new civil and social rights.

A third category of programmatic rights—the one on which this Article will focus—is entitlements. *Entitlement* is a slippery term, the meaning of which is frequently manipulated for tactical political reasons. Perhaps the most useful definition comes from the Congressional Budget Act: "Authorizations for entitlements constitute a binding obligation on the part of the Federal Government, and eligible recipients have legal recourse if the obligation is not fulfilled."¹² Entitlements predate the New Deal: Civil War and Revolutionary War pensions, land grants, pensions for the widows of federal employees—all these were recognized as entitlements much earlier.¹³ Well before the alleged "demise of the rights-privilege distinction" in the 1960s, federal judges frequently ordered federal administrators to pay benefits promised by statute.¹⁴

10. 439 F.2d 584, 598 (D.C. Cir. 1971).

11. Al Kamen, *The Sierra Club's Hidden Agenda*, WASH. POST NAT'L WKLY., Mar. 18-24, 1996, at 15; see also *Current Developments*, 25 ENVIRONMENTAL REPORTER 1691 (1995).

12. U.S. GENERAL ACCOUNTING OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS (1980) reprinted in HOUSE COMM. ON THE BUDGET, 95TH CONG., 2D SESS., THE CONGRESSIONAL BUDGET PROCESS: A GENERAL EXPLANATION (Comm. Print 1981).

13. See Laura S. Jensen, *The Early American Origins of Entitlements* (1996) (unpublished paper, on file with author).

14. See MELNICK, *BETWEEN THE LINES*, *supra* note 2, at 48-58.

What *was* new in the 1960s was the willingness of the courts to take an independent, expansive reading of the benefits owed to individuals, and in effect to transform grants-in-aid to the states into entitlements for individuals. Two programs that expanded rapidly in the 1960s and 1970s—education for disabled children and Aid to Families with Dependent Children (AFDC)—illustrate the subtle ways in which a shift in judicial doctrines on federalism and statutory interpretation can alter the size and character of entitlements programs. These two programs differ substantially. In the case of education for disabled children, Congress wrote a new law based on lower federal court interpretations of the constitutional rights of disabled children. In the case of AFDC, the courts used a novel interpretation of an existing statute (Title IV of the Social Security Act of 1935) to redesign a perennially unpopular program. In both instances, though, the combination of court and congressional action forced sub-national governments to obey the commands of national officials and to pick up a substantial part of the tab as well.

II. RIGHTS AS MANDATES: EDUCATION FOR DISABLED CHILDREN

Public education in the United States is notoriously decentralized. Before 1970, education of disabled students was the province of state and local governments. As a result, some severely retarded or incapacitated students were excluded from public school altogether. Others were herded into classes for “slow learners.” All too often minority students were misdiagnosed as retarded.¹⁵ In the late 1960s a few members of Congress began to push for increased funding for special education. But facing determined opposition from the White House, they made little headway.

The political landscape shifted significantly as a result of two federal district court rulings of the early 1970s, *Pennsylvania Association for Retarded Children v. Pennsylvania* [hereinafter *PARC*] and *Mills v. Board of Education*.¹⁶ These decisions required school systems to provide all handicapped students with an “appropriate” education, and established elaborate procedures to determine what “appropriate” means for each child. *PARC* and *Mills* provided the policy model and the political catalyst for a major federal law, the Education for All Handicapped Children Act of 1975 [hereinafter *EAHCA*].¹⁷

This law requires local school systems to provide each handicapped child with “a free appropriate public education”¹⁸ and to offer “related services”

15. *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972) (enjoining use of IQ tests for assigning minority students to classes for retarded).

16. *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

17. Pub. L. No. 94-142 (1975) (codified as amended at 20 U.S.C. § 1400-1461 (1994)); see also MELNICK, BETWEEN THE LINES, *supra* note 2, at 135-178.

18. 20 U.S.C. § 1400(c) (1994).

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such as transportation, physical therapy, psychological counseling, and even residential care in psychiatric hospitals.¹⁹ To safeguard these new rights, the law requires school officials to consult with parents in devising a legally enforceable "individualized educational program,"²⁰ and gives parents the right to appeal schools' decisions first at an "impartial due process hearing" and ultimately in federal court.²¹ The 1975 law is a classic unfunded mandate: the cost of complying with these requirements is probably around \$40 billion per year, but the federal government only contributes about \$3 billion annually.²²

Supporters of the bill explained that they were simply trying to help states comply with widely recognized constitutional requirements. According to the Senate Report, "[c]ourt action and State laws throughout the Nation have made clear that the right to education of handicapped children is a present right, one which is to be implemented immediately."²³ The Act's chief sponsor, Senator Harrison Williams, told his colleagues that "what we are trying to do . . . [is provide] the means to carry out the fundamental law of the land."²⁴

Despite repeated claims about their authoritative nature, *PARC* and *Mills* were surprisingly shaky legal precedents. One was a consent decree and the other was based primarily on local law in the District of Columbia. Soon after these two court rulings, the Supreme Court announced in *San Antonio Independent School District v. Rodriguez* that the courts should not use the Equal Protection Clause to establish novel educational policies.²⁵ If Congress had not passed the EAHCA, it is quite likely that *PARC* and *Mills* would have become exhibits in the museum of Warren-era initiatives abandoned by the Burger Court.

Recognizing this, groups representing the disabled avoided appellate review and used their success in the lower courts to push for congressional action. As one advocate put it, the strategy was "to cook the school districts until they came to Congress demanding the funds that we [need] to provide appropriate programs."²⁶ The strategy worked. *PARC*, *Mills*, several state court decisions

19. 20 U.S.C. § 1401(a)(17) (1994); see also MELNICK, *BETWEEN THE LINES*, *supra* note 2, at 136.

20. 20 U.S.C. § 1415 (b)(1)(A) (1994); see 20 U.S.C. § 1401(a)(19).

21. 20 U.S.C. § 1415(b)(2), (c), (e) (1994).

22. Jeffrey Katz, *Policy on Disabled is Scrutinized Over Discipline Problems*, *COST*, 54 CONG. Q. WKLY. REP. 1295 (1996).

23. S. REP. NO. 168, 94th Cong., 1st Sess. 17 (1975).

24. *Education for All Handicapped Children: Hearings before the Subcommittee on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 312 (1975). The committee's ranking Republican, Senator Robert Stafford, later wrote that "the law codified the rights already spelled out in earlier court decisions." Senator Robert Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 76 (1978).

25. 411 U.S. 1 (1973).

26. Quoted in Jack Tweedie, *The Politics of Legalization*, in *SPECIAL EDUCATION POLICIES* 53 (Jay G. Chambers & William T. Hartman eds., 1983).

adopting their reasoning, and the threat of further litigation led states to increase expenditures for special education from \$900 million in 1972 to over \$2 billion in 1975.²⁷ State and local school officials demanded that Congress provide more money to fund these requirements and clearer guidelines to reduce the threat of extended litigation. According to Paul Peterson and his coauthors, "[n]either the pressures of interest groups nor the general receptivity of Congress would have been sufficient to pass the 1975 Act without two court decisions that greatly altered the states' responsibility for education of the handicapped."²⁸

School officials' hopes for more federal money and less litigation were quickly dashed. Not only did proceedings within the schools become more court-like and adversarial, but federal judges played an even greater role in evaluating school policies. Although the Supreme Court directed lower courts to show deference to rulings of school officials, many federal district and circuit courts adopted an expansive interpretation of "appropriate education" and "related services."

Over the past twenty years, Congress has neither clarified the substantive mandates of the EAHCA nor provided enough money to cover state costs. Congress, however, twice passed legislation overturning Supreme Court decisions that made it more difficult for parents to bring and win suits against school officials.²⁹ Despite grumbling about the inflexibility of the law, Republicans in the 104th Congress recommended only minor changes in the statute.³⁰ The law is not affected by the unfunded mandate legislation passed in 1995, which applies only to subsequent legislation. Congress has been quite happy to allow the courts to define the content of the federal right and to let state and local school systems bear almost all of the cost. The strategy of rights employed by advocates for the disabled thus allows members of Congress to claim credit for protecting benefits while avoiding blame for raising taxes.

III. FEDERAL STRINGS AND CONGRESSIONAL SILENCE: THE EXPANSION OF AFDC

The AFDC program originally created by Title IV of the Social Security Act of 1935 currently provides income support for 14.5 million poor women and children at a cost of about \$25 billion annually split roughly equally

27. William Wilkin & David Porter, *State Aid for Special Education: Who Benefits?*, 1976 LEGISLATORS' EDUCATION ACTION PROGRAM, NATIONAL CONFERENCE OF STATE LEGISLATORS 1 (1976).

28. PAUL PETERSON, BARRY RABE & KENNETH WONG, WHEN FEDERALISM WORKS 56 (1986).

29. See Handicapped Children Protection Act of 1986, and Education of the Handicapped Act Amendments of 1990 (codified as amended at 20 U.S.C.A. § 1400 (1994)).

30. Jeffrey L. Katz, *Panel OKs IDEA Revision Despite Controversies*, 54 CONG. Q. WKLY. REP., June 1, 1996, at 1532.

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between the federal government and the states.³¹ For many years it has also been a primary gateway for Medicaid and other benefits.

Originally, Title IV provided federal financial support for mothers' pension programs already established by many states. When the Committee on Economic Security's proposal came before Congress in 1935, the only issue debated was the extent of federal control. A provision stating that benefit levels must be "reasonable" was amended to require states to provide assistance "as far as practicable under the conditions of such State."³² The Senate was particularly adamant about removing all vestiges of federal dictation. Both the House and Senate Reports explained that a state could "impose such other eligibility requirements—as to means, moral character, etc.—as it sees fit."³³ The Senate Report added, "[l]ess Federal control is provided than in any recent Federal aid law."³⁴

Title IV established a grant-in-aid program which would reimburse states for payments made for the care of children who were both "needy" according to state standards and "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent."³⁵ Only a few additional conditions were attached to federal grants: state programs were to assure the confidentiality of clients' files and had to be administered by a single state agency; states could not impose residency requirements of more than one year or use waiting lists to ration benefits; and applicants denied benefits or recipients whose benefits were cut were guaranteed an administrative hearing. Federal administrators were never happy with their lack of control over the states, but soon resigned themselves to the fact that they could do little but offer professional advice and encouragement to induce state administrators to change state rules. Over the next forty years a variety of legislative efforts to rationalize and nationalize AFDC all met with failure.³⁶

The legal assistance program created by Lyndon B. Johnson's War on Poverty spearheaded an ambitious effort to reform AFDC through litigation rather than legislation. The first, constitutional phase of the welfare rights campaign produced two notable decisions, *Goldberg v. Kelly*³⁷ and *Shapiro*

31. Vee Burke, CONGRESSIONAL RESEARCH SERVICE, CRS ISSUE BRIEF: WELFARE REFORM (October 2, 1995).

32. 42 U.S.C. § 601 (1994).

33. S. REP. NO. 628, 74th Cong., 1st Sess. 4, 36 (1935); H.R. REP. NO. 615, 74th Cong., 1st Sess. 24 (1935).

34. S. REP. NO. 628, 74th Cong., 1st Sess. 36 (1935).

35. 42 U.S.C. § 606(a) (1994).

36. MELNICK, BETWEEN THE LINES, *supra* note 2, at 67-75.

37. 397 U.S. 254 (1970) (holding Due Process Clause requires hearing before termination of welfare benefits).

v. Thompson.³⁸ In two subsequent AFDC cases, *Dandridge v. Williams*³⁹ and *Jefferson v. Hackney*,⁴⁰ a majority of the Court refused to find a right to welfare in the Constitution. At that point, statutory interpretation became the chief tool of legal reformers.

In a series of decisions issued between 1968 and 1972, the Supreme Court transformed AFDC into an individual entitlement by eliminating a variety of state eligibility rules and substantially increasing the federal government's control over the states. The Court's *King-Townsend-Remillard* trilogy⁴¹ reversed the presumption about AFDC eligibility that had guided policymaking for the preceding thirty years: prior to 1968 state and federal officials had assumed that states could impose any rule not explicitly prohibited by federal statute; now the Court held that the states could not impose restrictions on eligibility unless the statute explicitly authorized them to do so. According to Justice Brennan's opinion in *Townsend*,

[I]n the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.⁴²

A year later, Justice Douglas's majority opinion in *Carleson v. Remillard* maintained that Congress "intended to provide a program for the economic security and protection of *all* children."⁴³

Since the statute was silent on almost all eligibility issues, the Court's interpretation cast doubt on the validity of a wide array of state rules. The Senate Finance Committee later complained:

These decisions have used the very broadness of the Federal statute (intended to allow States more latitude) against the States by saying sometimes that anything the Congress did not expressly prohibit it must have intended to require—and sometimes that what Congress did not expressly permit it must have intended not to permit.⁴⁴

38. 394 U.S. 618 (1969) (holding state prohibition on welfare benefits to residents of less than one year violates Equal Protection Clause of the Fourteenth Amendment).

39. 397 U.S. 471 (1970).

40. 406 U.S. 535 (1972).

41. *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968).

42. *Townsend*, 404 U.S. at 286.

43. *Carleson v. Remillard*, 406 U.S. at 604.

44. S. REP. NO. 1230, 92d Cong., 2d Sess. 16 (1972).

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Legal services attorneys flooded the federal courts with cases contesting nearly every facet of state programs.

Although the Supreme Court was not always consistent in its adherence to this strict presumption of eligibility, the lower courts were quick to apply and extend the logic of the *King-Townsend-Remillard* trilogy. Federal circuit and district courts struck down state rules requiring AFDC mothers to identify the father of their children and cooperate in child support prosecutions by the state;⁴⁵ requiring recipients to accept various types of work;⁴⁶ disqualifying those previously found guilty of fraud;⁴⁷ and requiring stepparents to disclose their income.⁴⁸ The lower courts also prohibited states from automatically reducing benefits to families receiving Social Security benefits,⁴⁹ child support payments,⁵⁰ tax refunds,⁵¹ or income from a stepparent.⁵²

The high point of judicial expansion of AFDC came when five circuit courts ordered states to treat a fetus as a dependent child under the act, thus making pregnant women eligible for benefits. The First Circuit explained that "a finding of eligibility for the unborn is consistent with the purposes and policies of the Social Security Act. The Supreme Court has declared the 'paramount goal' of the AFDC program to be the protection of needy children. Payments to the unborn are an appropriate, if not essential, measure to that end."⁵³ Although the Supreme Court reprimanded the five appellate courts for their "departure from ordinary principles of statutory interpretation,"⁵⁴ it periodically reverted to its previous habit of establishing a virtually irrebuttable

45. Doe v. Gillman, 479 F.2d 646 (8th Cir. 1973); Doe v. Carleson, 356 F. Supp. 753 (N.D. Cal. 1973); Doe v. Flowers, 364 F. Supp. 953 (N.D. W. Va. 1973); Doe v. Ellis, 350 F. Supp. 375 (D.S.C. 1972); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1972); Storey v. Roberts, 352 F. Supp. 473 (M.D. Fla. 1972); Doe v. Schmidt, 330 F. Supp. 159 (E.D. Wis. 1971); Doe v. Swank, 332 F. Supp. 61 (N.D. Ill. 1971); Meyer v. Juras, 327 F. Supp. 759 (D. Or. 1971); Saddler v. Winstead, 332 F. Supp. 130 (N.D. Miss. 1971); Taylor v. Martin, 330 F. Supp. 85 (N.D. Cal. 1971); Doe v. Harder, 310 F. Supp. 302 (D. Conn. 1970); Woods v. Miller, 318 F. Supp. 510 (W.D. Pa. 1970). The Supreme Court issued a brief affirmance of some of these decisions in *Shirley v. Lavine*, 420 U.S. 730 (1975).

46. Davis v. Reagan, 485 F. Supp. 1255 (S.D. Iowa 1980); McLean v. Mathews, 458 F. Supp. 524 (E.D. Va. 1973); Woolfolk v. Brown, 358 F. Supp. 524 (E.D. Va. 1973); Woolfolk v. Brown 325 F. Supp. 1162 (E.D. Va. 1971); Anderson v. Burson, 300 F. Supp. 401 (N.D. Ga. 1968). The Supreme Court established a surprisingly lenient standard of review for work requirements in *New York Dep't. of Social Servs. v. Dublino*, 413 U.S. 405 (1973). See MELNICK, *supra* note 3, at 93-94, 100.

47. J.A. v. Ritti, 377 F. Supp. 1046 (D.N.J. 1974); Owen v. Roberts, 377 F. Supp. 45 (M.D. Fla. 1974); Cooper v. Laupheimer 316 F. Supp. 264 (E.D. Pa. 1970).

48. Rosen v. Hursh, 464 F.2d 731 (8th Cir. 1972).

49. Riddick v. D'Elia, 626 F.2d 1084 (2d Cir. 1980); Nelson v. Likins, 510 F.2d 414 (8th Cir. 1975); Johnson v. Harder, 438 F.2d 7 (2d Cir. 1975); Howard v. Madigan, 383 F. Supp. 351 (D.S.D. 1973).

50. Swift v. Toia, 461 F. Supp. 578 (S.D.N.Y. 1978); Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971), *aff'd without opinion*, 409 U.S. 807 (1972).

51. Kaisa v. Chang, 396 F. Supp. 375 (D. Haw. 1975).

52. Archibald v. Whaland, 555 F.2d 1061 (1st Cir. 1977); Solman v. Shapiro, 300 F. Supp. 409 (D. Conn. 1970).

53. Carver v. Hooker, 501 F.2d 1244, 1247 (1974). The other lower court decisions are cited in *Parks v. Hardin*, 504 F.2d 861, 863 n.4 (5th Cir. 1974).

54. Burns v. Alcala, 420 U.S. 575, 580 (1975).

presumption of eligibility. In 1979, for example, Justice Marshall, writing for a unanimous court, stated that a "participating State may not deny assistance to persons who meet eligibility standards defined in the Social Security Act unless Congress clearly has indicated that the standards are permissive."⁵⁵ Three years later, a district court again departed from "ordinary principles of statutory interpretation," explaining that "*King v. Smith* and its progeny have erected a fundamental principle of AFDC jurisprudence: that the Social Security Act will not countenance depriving needy children of benefits because of factors beyond their control, and unrelated to their need."⁵⁶

Reinterpretation of Title IV began in cases from the South that revealed overt, egregious racial discrimination.⁵⁷ It quickly evolved into an even more ambitious effort to remake means-tested programs for whites as well as blacks, in the North as well as the South. The goal was to make welfare more humane, generous, and rule-bound, and less stigmatizing, intrusive, and moralistic. Henry Aaron's description of a view of welfare popular in the late 1960s and early 1970s catches the essential elements of the understanding of poverty that informed many court decisions:

If poverty is believed to be the resultant of forces exogenous to the poor, then the attachment of unpleasant conditions to assistance is a gratuitous cruelty inflicted upon the already victimized. Indeed, this conception of poverty suggests that welfare should be regarded as a right—as a form of just compensation for a kind of casualty loss, the accident of poverty. This view, or something very much like it, lay behind the drive in the early 1970s, to deliver welfare payments in dignified settings, with rights of appeal and the assurance of due process, and without any coercion or requirements that the recipients of aid do anything in return for it.⁵⁸

In short, "[c]ash should be provided on the basis of economic need and without strings."⁵⁹

The political high-watermark of this version of welfare reform came in the early 1970s, when President Nixon's Family Assistance Plan came close to becoming law. Shortly thereafter, Congress began to move in the other direction, imposing more federal restrictions relating to work and child

55. *Miller v. Youakim*, 440 U.S. 125, 133 (1979).

56. *Simpson v. Miller*, 535 F. Supp. 1041, 1050 (N.D. Ill. 1982).

57. MARTHA DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-73*, ch. 5 (1993).

58. Henry Aaron, *Six Welfare Questions Still Searching for Answers*, *BROOKINGS REV.* 13-14 (Fall 1984).

59. *Id.*

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support.⁶⁰ Ronald Reagan and other governors looked for ways to circumvent the court rulings. Meanwhile, most states allowed inflation to eat away at AFDC benefits. Conservatives in the Senate tried to overturn the federal judiciary's interpretation of Title IV, but their efforts were routinely blocked in the House. Stalemates in Congress in effect left the courts in charge of eligibility rules.⁶¹

What angered conservatives was not just expansion of federal and judicial power, but the courts' substantive understanding of entitlements. Court rulings established a strong presumption that benefits should be based on need alone, rather than on the behavior of recipients. Although popular in academic circles, this non-judgmental view of welfare had little support among voters or members of Congress.⁶²

IV. POLITICAL FOUNDATIONS OF THE RIGHTS REGIME

As different as these two case studies are, both demonstrate the importance of a particular form of "rights talk."⁶³ In each instance the rights defined by the combined action of Congress and the courts required both national uniformity and government protection of disadvantaged individuals. Of course government protection of the disadvantage and greater national uniformity were also cardinal principals of the New Deal and Great Society. Indeed, one of the earliest and most cogent presentations of the principles behind programmatic rights appears in the "Second Bill of Rights" announced by Franklin Roosevelt in his 1944 State of the Union address and subsequent campaign speeches. FDR may have sought a subservient judiciary, but he also announced an Economic Bill of Rights to supplement the "sacred Bill of Rights of our Constitution." This "Second Bill of Rights" included "the right to earn enough to provide adequate food and clothing and recreation"; the right to "adequate medical care, "a decent home," and "a good education"; and "the right to adequate protection from the economic fears of old age, sickness, accident and unemployment." Each of these rights, Roosevelt added, "must be applied to all our citizens, irrespective of race, creed or color." "What all this spells," he claimed, "is security."⁶⁴ Fifty years later, President Clinton consciously

60. See LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* (1992); LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* (1986).

61. MELNICK, *BETWEEN THE LINES*, *supra* note 2, at 112-26.

62. FAY LOMAX COOK & EDITH J. BARRETT, *SUPPORT FOR THE AMERICAN WELFARE STATE: THE VIEWS OF CONGRESS AND THE PUBLIC 58-145* (1992); STEVEN M. TELES, *WHOSE WELFARE?: AFDC AND POLITICAL ELITES* (1996); MELNICK, *supra* note 3, at 54-61, 116-18.

63. I borrow the term from Mary Ann Glendon. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

64. 1944 State of the Union Address, in 13 FRANKLIN D. ROOSEVELT, *PUBLIC PAPERS AND ADDRESSES* 41 (1950).

echoed this theme in presenting his comprehensive health care bill, which he titled the Health Security Act.⁶⁵

Eighteenth-century liberalism promised security from civil war, anarchy, and arbitrary government action. Its cornerstone was the protection of a realm of private autonomy from government intervention. Contemporary liberalism promises a broader security—security against the vagaries of the business cycle and other hazards created by dynamic capitalism; against the prejudices of private citizens and the consequences of three centuries of racism; against the risks of congenital handicaps and inevitable old age; and against the consequences of poverty and of family decomposition. There is more here than hollow campaign rhetoric. According to legal historian Lawrence Friedman, one super-principle of contemporary legal culture is “the general expectation that somebody will pay for any and all calamities that happen to a person, provided only that it is not the victim’s ‘fault,’ or at least not solely his fault.”⁶⁶

Protecting traditional rights (such as private property, free speech, and religious liberty) required courts to limit the reach of government. The First Amendment, for example, commands Congress to “make no law” abridging freedom of speech or establishing religion. The courts’ job was to prevent the government from improperly interfering in this private realm. The new understanding of rights, in contrast, has led the judiciary to use constitutional and statutory interpretation to enlarge government’s responsibilities. As the examples of AFDC and education for the disabled illustrate, the courts have both placed new issues on the public agenda and expanded programs created by the other branches of government. Because they so often took these steps under the guise of legislative intent, their contribution to the development of the welfare state has not been sufficiently appreciated.

The institutional patterns one finds in enactment of the EAHCA and reconstruction of AFDC are obviously a far cry from New Deal politics. To put the matter starkly, the New Deal envisioned a forceful president, a powerful executive branch, a compliant Congress, and a quiescent judiciary. Most programmatic rights of the recent period were the product of an active judiciary, an entrepreneurial Congress, an ambivalent federal bureaucracy, and a foot-dragging president. After the election of Richard Nixon, those who shared Roosevelt’s vision of the Second Bill of Rights had little choice but to switch institutional partners. They were aided by the previous transformation of the Supreme Court from defender of property to protector of “discrete and insular minorities.” In short, the regime of programmatic rights rested on four

65. For a comparison of the Social Security Act and Clinton’s Health Security Act, see Theda Skocpol, *From Social Security to Health Security?*, 19 J. HEALTH POL., POL’Y. & L. 239 (1994).

66. LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE: WHAT AMERICANS WANT FROM THE LEGAL SYSTEM AND WHY* 43 (1985).

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pillars, which are outlined below.

1. *Activist federal courts.* Under the Warren Court, judicial efforts to protect “discrete and insular minorities” often took the form of innovative interpretations of equal protection and due process. Policymaking through statutory interpretation fit the more cautious, ad hoc balancing style of the Burger Court. It also facilitated coalition-building on that badly splintered bench. Lower court judges steeped in the ways of the Warren Court found they could best protect themselves from Supreme Court review by relying on expansive readings of statutes rather than on novel interpretations of the Constitution. Although the form and locus of decisionmaking changed—from constitutional law to statutory interpretation, from the Supreme Court to the lower courts—the push for expanded government programs and national uniformity remained constant.⁶⁷

Few court rulings expanding programmatic rights attained the notoriety of judicial decisions on busing, abortion, or school prayer. Decisions expanding programmatic rights were usually tied to arcane, seemingly technical shifts in judicial doctrine on private rights of action,⁶⁸ the use of legislative history and broad statements of purpose in statutory interpretation,⁶⁹ and the scope of judicial review of administrative action.⁷⁰ Since they were not explicitly based on constitutional law, these rulings allowed the judges to avoid direct confrontation with elected officials at the national level.

2. *Divided government.* If liberal Democrats had continued to control the presidency and the Congress as they did in 1935 and 1965, the complex, indirect, incremental form of policymaking described above would not have been necessary. If conservative Republicans or a coalition of Republicans and Dixiecrats had controlled both branches, such policymaking would not have been possible—especially if conservatives were able to place their comrades on the federal bench. Since 1968 Democrats have controlled the presidency and both houses of Congress for only six years. The last time the Republicans captured all three was 1952. Once the exception, divided government is now the norm.

Divided government not only intensified conflict between the executive and legislative branches over the meaning of statutes, but impelled Congress to

67. MELNICK, *BETWEEN THE LINES*, *supra* note 2, at 36-59.

68. *See, e.g.*, *Maine v. Thiboutout*, 448 U.S. 1 (1980) (finding private right of action for state deprivation of constitutional and other legal rights, privileges and immunities); *King v. Smith*, 392 U.S. 309 (1968); *J.I. Case v. Borak*, 377 U.S. 426 (1964) (finding private right of action for derivative and direct stockholders under Security Exchange Act of 1934).

69. *See, e.g.*, *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989); *Steelworkers v. Weber*, 443 U.S. 193 (1979).

70. *See, e.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 412 (1971).

reorganize itself. The reformed Congress of the 1970s passed a large number of laws opposed by the Republican administration and created an elaborate record of the intent of Congress, or at least the intent of its increasingly numerous and powerful subcommittees.

Republican presidents countered by expanding the size and responsibility of the White House staff, strengthening the Office of Management and Budget, and selecting sub-cabinet officials on the basis of ideological consistency with the administration. Their goal was clear: to force the bureaucracy to take orders from the White House rather than from subcommittees.

Congress scrambled to find new methods for insuring agency fidelity to congressional intent. It inserted legislative vetoes into an array of statutes. It held hundreds of oversight hearings. Members of Congress wrote more and more detailed legislation, and in a variety of ways, encouraged the courts to scrutinize the activities of the executive branch. They wrote liberal judicial review provisions, eliminated jurisdictional barriers, made it easier for plaintiffs to receive attorneys fees, and at times gave courts rather than agencies the primary responsibility for carrying out new programs.⁷¹ Framing programs in terms of rights enforced and often defined by the courts proved a successful strategy for congressional entrepreneurs seeking to bypass the president.

3. *Politically weakened states.* As the history of the EAHCA demonstrates, in the 1970s and 1980s state and local governments were often forced to bear the costs of programs that federal officials created and from which they derived considerable political credit. A wide variety of groups discovered the advantage of including more strings and mandates in federal statutes.

In 1956, for example, Congress established the interstate highway system in an act only 28 pages long; the federal government placed very few constraints on the use of federal funds. By 1991 the law's 293-page successor, the Intermodal Surface Transportation Efficiency Act, required state and federal administrators not just to finish the remaining highways and improve public transit, but to "relieve congestion, improve air quality, preserve historic sites, encourage the use of auto seat belts and motorcycle helmets, control erosion and storm runoff," reduce drunk driving, promote recycling, hire more women, Native Americans, and members of other disadvantaged groups, and even "control the use of calcium magnesium acetate in performing seismic retrofits on bridges."⁷² Prior to the mid-1960s the federal government had used its tax dollars to help states pursue projects they had selected. After the

71. MELNICK, *BETWEEN THE LINES*, *supra* note 2, at 31-35.

72. James Q. Wilson, *Can the Bureaucracy be Deregulated? Lessons from Government Agencies*, in *DEREGULATING THE PUBLIC SERVICE: CAN GOVERNMENT BE IMPROVED?* 43 (John J. DiIulio, Jr. ed., 1994).

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mid-1960s it pursues a wide variety of objectives which often conflict with state and local priorities.⁷³

Although one might have expected this trend to weaken in the Reagan years, huge federal deficits made the strategy of passing costs along to the states even more appealing to members of Congress. According to the Advisory Commission on Intergovernmental Relations, Congress created no mandates in either the 1940s or the 1950s, 12 in the 1960s, 22 in the 1970s, and 27 in the 1980s.⁷⁴ Despite the Reagan administration's proclaimed goal of returning power to the states, "the pace of administrative rulemaking and of new regulatory and preemptive enactments picked up as the decade progressed. The end result was an accumulation of new requirements roughly comparable to the record-setting pace of the 1970s."⁷⁵ In short, before the 1960s the states received federal money with few strings; in recent years they have received less money with far more strings.

There are many reasons for the declining political influence of sub-national governments. Geographic mobility and the higher visibility of national policies have reduced the public's attachment to state and local governments. Today only about 60% of Americans live in the state of their birth.⁷⁶ The civil rights revolution not only discredited the old battle-cry of states rights, but also reinforced what Alice Rivlin has described as "the escalating perception. . . . [that] states were performing badly even in areas that almost everyone regarded as properly assigned to them."⁷⁷

Moreover, members of Congress pay less attention to the interest of state governments now that state parties no longer play a significant role in their election. State administrators often form a powerful alliance with interest groups, federal administrators, and congressional committees to protect and expand federal regulation.⁷⁸ As a result, Martha Derthick reports, each of the mechanisms used by the federal government to influence states—court decrees, legislative regulations, preemptions, and conditional grants-in-aid—has "grown significantly more coercive in the past half century." "The rise of the affirmative command, occurring subtly and on several different fronts, constitutes a sea-change in federal-state relations."⁷⁹

73. PETERSON, RABE & WONG, *supra* note 26, at ch. 1.

74. JOHN J. DI IULIO, JR. & DONALD F. KETTL, BROOKINGS INSTIT., *FINE PRINT: THE CONTRACT WITH AMERICA, DEVOLUTION, AND THE ADMINISTRATIVE REALITIES OF AMERICAN FEDERALISM* 40-44 (1995).

75. Timothy J. Conlan, *And the Beat Goes On: Intergovernmental Mandates and Preemption in an Era of Deregulation*, 21 *PUBLIUS* 44, 44 (1991).

76. DI IULIO & KETTL, *supra* note 68, at 6.

77. ALICE M. RIVLIN, *REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES, AND THE FEDERAL GOVERNMENT* 86-7 (1992).

78. PETERSON, RABE & WONG, *supra* note 26, at ch. 7.

79. Martha Derthick, *Federal Government Mandates: Why the States Are Complaining*, *BROOKINGS REV.* 50, 51-52 (Fall 1992).

4. *New public expectations.* The cumulative effect of the steady growth of entitlement programs after 1932 was to change public expectations about the role of government in general, and of the federal government in particular. Social and economic hardships become public problems to be solved rather than private woes to be endured. For most of their history Americans seeking government assistance looked first to those governments closest at hand and to the national government only if all else failed. Today, in contrast, even Republicans allegedly committed to decentralization impatiently push for aggressive federal action on such traditionally state and local matters as crime control, tort reform, child support payments, and abortion.

Increased expectations about government assistance, of course, do not prevent Americans from complaining about taxes or the quality of government services. The opposite is the case: the more we expect, the more we complain. As Republicans are now learning, the converse is true as well: complaining about Washington does not prevent us from expecting more and better services. For example, eighty percent of the American public agrees that "government should be responsible for providing medical care for people who are unable to pay for it."⁸⁰ Apparently they just will not agree to accept the higher taxes or expanded regulation necessary to do so.

V. END OF AN ERA?

Merely to list these four pillars of the old regime is to raise doubts about its continued vitality. Each has either disappeared or come under sustained assault. This being the case, how could a regime of programmatic rights long endure?

1. *Federal courts.* In a variety of ways the Rehnquist Court has made it more difficult for beneficiaries of government programs to prevail in cases against state, local, and federal officials. Supreme Court decisions have required judges to show more deference to the decisions of administrators,⁸¹ raised standing requirements,⁸² narrowed the definition of "nondiscretionary duties,"⁸³ and taken a hard line against implied private rights of action.⁸⁴

Above all, the Rehnquist Court has emphasized its role as protector of federalism. Last spring, for the first time in sixty years, the Court ruled that a federal restriction on private action exceeded congressional power under the

80. Robert Samuelson, *The Medicaid Morass*, WASH. POST NAT'L WKLY., Feb. 19, 1996, at 5 (citing research by Karlyn Bowman of AEI); see generally ROBERT SAMUELSON, *THE GOOD LIFE AND ITS DISCONTENTS* (1995).

81. *Chevron, U.S.A. v. Natural Resources Def. Council*, 467 U.S. 837 (1984).

82. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1996).

83. *Heckler v. Chaney*, 470 U.S. 821 (1985).

84. *Suter v. Artist M.*, 503 U.S. 347 (1992).

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Commerce Clause.⁸⁵ Less dramatic, but probably more important, is the Court's reluctance to find legally binding commands in federal statutes. According to Chief Justice Rehnquist, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."⁸⁶ Justice O'Connor has argued that this "clear statement rule is not a mere canon of statutory interpretation. . . . The rule protects the balance of power between the States and the Federal Government struck by the Constitution."⁸⁷ The change in legal culture is so great that it is now possible to find respectable defenders of state and local governments at Yale Law School—though probably not yet at Harvard.

2. *The Republican Congress.* In a variety of instances in the 1980s and early 1990s, the Court adopted a narrow interpretation of a rights-based statute, and Congress reversed the Court. The most notable examples were the *Grove City* bill and the Civil Rights Act of 1991. As the history of the EAHCA shows, there were others as well.

No one would expect the Congress elected in 1994 to act similarly. One of the few elements of the Contract for America to become law was legislation restricting unfunded mandates. The agenda of the current congressional leadership includes converting categorical grants into block grants, reducing social regulation, ending affirmative action, and cutting federal spending. Congress may not succeed in enacting legislation, but committee leaders are certainly not going to engage in the sort of entrepreneurial activity that has expanded programmatic rights.

Just as importantly, the Republican Congress has taken a variety of actions that limit the ability of federal judges to promote programmatic rights. Most obvious are the restrictions placed on the Legal Services Corporation by the appropriations bills passed by Congress. These bills not only make drastic cuts in the Legal Services budget, but also prohibit its attorneys from filing class action suits, representing immigrants, or commenting on proposed regulations.

3. *States Resurgent.* In recent years, returning responsibilities to state and local governments has become more politically popular and intellectually respectable. Public opinion polls indicate that people think they get better service from state and local governments than from the national government—a

85. *United States v. Lopez*, 115 S. Ct. 1624 (1995).

86. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (citations omitted).

87. *Hilton v. South Carolina Pub. Ry. Comm'n.*, 112 S. Ct. 560, 567 (1991) (O'Connor, J., dissenting).

sharp reversal from previous trends.⁸⁸ A variety of studies indicate that decentralization improves the quality of public education and crime control.⁸⁹ State governments have proven themselves to be thoughtful innovators in areas ranging from health care to environmental protection.

In the 1960s the federal government benefitted from the disrepute of state and local governments: Expanding the power of the central government was seen as the only way to deal with racist, corrupt, malapportioned, and unprofessional sub-national government. Today, in contrast, state and local governments are viewed as an alternative to an allegedly bloated, untrustworthy, and unaccountable federal government. In 1972 nearly half the public considered local property tax the "worst tax"; only 19% gave that label to the federal income tax. Today, in contrast, 36% consider the federal income tax the worst tax—ten percent more than the property tax.⁹⁰

The new-found clout of state governors has been particularly apparent in the debate over welfare and Medicaid. Congress has followed the lead of the National Governors Association, which in the past seldom took a clear position on such controversial issues. New Republican governors have been particularly forceful, and perhaps foolhardy, in demanding increased state authority even when it means accepting fewer federal dollars. This push for greater state control has not come from rural and southern states, but from such traditionally progressive states as Wisconsin, California, Massachusetts, Illinois, New Jersey, and Michigan.

4. *The collapse of confidence in government.* One cannot read a newspaper without being told that the public no longer trusts the federal government. Just because journalists believe this is true doesn't necessarily mean that it is false. A wide variety of polls show that public confidence in government—and in almost every other institution—has declined steadily since the late 1960s.⁹¹ In the mid-1960s three-quarters of the American public thought the federal government would do the right thing most of the time. Today only two of ten offer this view. Eighty percent rate the value they get from federal taxes as fair or poor.⁹² A recent CNN-Time magazine poll found that fifty-five percent of the public agrees that "the federal government has

88. WILLIAM G. MAYER, *THE CHANGING AMERICAN MIND* 82, 83, 447-50 (1993).

89. See, e.g., JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990); Mark Moore, *Policing: Deregulating or Redefining Accountability?*, in *DEREGULATING THE PUBLIC SECTOR: CAN GOVERNMENT BE IMPROVED* (John J. DiIulio ed., 1994); David Osborne, *A New Federal Compact: Sorting Out Washington's Proper Role*, in *MANDATE FOR CHANGE* 237 (Will Marshall & Martin Schram eds., 1993).

90. Karlyn Bowman & Everett Carl Ladd, *Opinion Pulse*, AM. ENTERPRISE, March/April 1995, at 102.

91. The best study is SEYMOUR M. LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP* (1987).

92. DI IULIO & KETTL, *supra* note 68, at 59 (citing data from the Roper Center for Public Opinion Research); Bowman & Ladd, *supra* note 90, at 103.

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become so large and powerful that it poses a threat to the rights and freedoms of ordinary citizens.”⁹³ About half the public believes that government policies increase economic inequality; more than a third believe that government programs have increased the number of single-parent families and the rate of violent crime. Only one voter in ten believes that the federal government has ameliorated these problems.⁹⁴

In 1994 President Clinton’s health care proposal foundered on the shoals of public fear of government bureaucracy. The budget battles of the past two years have hardly restored public faith. Two years after promoting the right to health security the President told the American people “the era of big government is over.”⁹⁵

VI. ENDING ONE ENTITLEMENT AS WE ONCE KNEW IT

Nowhere are the consequences of these political shifts more apparent than in welfare policy. Given the perennial political weakness of AFDC and the explosive recent growth of Medicare, it is hardly surprising that these were among the first targets of House Republicans. In December, 1995, Congress sent the President a budget reconciliation bill that converted both AFDC and Medicaid into block grants, freezing federal spending for the former and limiting the latter to five percent annual increases. President Clinton twice vetoed the Republicans’ welfare reform proposals, but eventually signed a bill restructuring AFDC. This legislation deserves our attention not only because it will affect the lives of millions of poor families, but because it may be a harbinger of a revitalized federalism to come.

The new law switches AFDC funding from a matching grant to a block grant, and gives states sweeping control over eligibility rules and benefit levels. Not leaving anything to chance—or the vagaries of judicial interpretation—section 401(b) proclaims, “NO INDIVIDUAL ENTITLEMENT.—This part shall not be interpreted to entitle any individual or family to assistance under any State program funded by this part.”⁹⁶ The law prohibits families from receiving public assistance for more than five years, then announces the rule of interpretation that federal restrictions “shall not be interpreted to require any State to provide assistance to *any* individual for *any* period of time under the State program under this part.”⁹⁷ The legislation attempts to circumvent the Supreme Court’s ruling in *Shapiro v. Thompson* by explicitly permitting states to pay less to new residents than to those who have lived in the state for more

93. William Schneider, *When Politics As Usual Isn’t Enough*, NAT’L J., Nov. 18, 1995, at 2902.

94. Thomas B. Edsall, *The GOP Gains Ground as Trust in Government Erodes*, WASH. POST NAT’L WKLY., Feb. 12, 1996, at 12 (citing poll conducted by Harvard and Kaiser Foundation).

95. 1996 State of the Union Address, *reprinted in* 54 CONG. Q. WKLY. REP. 258 (1996).

96. Pub. L. No. 104-725, § 401(b) (1996).

97. Pub. L. No. 104-725, § 408(a)(2)(D) (1996) (emphasis added).

than a year.

Although the new Temporary Assistance for Needy Families block grant establishes few federal rules on who *must* receive benefits, it establishes a variety of rules stating who *cannot* receive federal funds. Adults receiving aid must begin working within two years, either in the private sector or in public service jobs. Eligibility ends completely after five years. Unwed teenage mothers cannot receive benefits unless they live with their parents and stay in school. Immigrants—legal as well as illegal—are ineligible.

Like the existing AFDC statute, the new law makes no provision for legal suits by beneficiaries against the states or the federal government. An amendment to provide for such judicial review was defeated in the Senate Finance Committee by a vote of 4-16, never to appear again.⁹⁸ Interestingly, a Medicaid plan passed by both houses of Congress in both 1995 and 1996—which included more guarantees of coverage than the AFDC plan—prohibited beneficiaries and providers from bringing suits against the states.⁹⁹

This legislation did not appear out of the blue. Rather, it represents the culmination of a twenty-five year effort by conservative critics of federal policies to impose more restrictions on recipients. As noted above, the Senate has repeatedly passed legislation to overturn the courts' interpretations since 1970. Until 1981 this legislation was routinely blocked by the House. The election of Ronald Reagan altered this political dynamic. The budget reconciliation bills of 1981, 1982, and 1985 contained a variety of provisions reversing court rulings and tightening eligibility. Yet no legislation—including the Family Support Act of 1988, which made extensive changes in AFDC—addressed forthrightly the long-simmering issue of the authority of the states and the federal government.

Meanwhile, two developments outside Congress slowly pushed the pendulum toward state control. First, the Rehnquist Court has backed away from the *King-Townsend-Remillard* trilogy. Since 1984 it has decided six AFDC cases, each time upholding state restrictions on eligibility and benefits.¹⁰⁰ Although Legal Services and their clients have won occasional cases in the lower courts, the new-found consistency of the Court has substantially reduced the influence of the federal judiciary on AFDC.

The second development is the opening of the "waivers" loophole by the White House and HHS. Included in a set of amendments Congress adopted in 1962 was a little noted provision to allow the Secretary of HEW to waive state

98. S. REP. NO. 96, 104th Cong., 1st Sess. 41 (1995).

99. Colette Fraley, *Key Medicaid Provisions*, 53 CONG. Q. WKLY. REP. 3540 (1995); Jeffrey Katz, *Committee Gives Party Vote to Welfare, Medicaid Plan*, 54 CON. Q. WKLY. REP. 1877 (1996). Neither bill became law.

100. The most recent case is *Anderson v. Edwards*, 115 S. Ct. 1291 (1995); see also MELNICK, *supra* note 3, at 104-08.

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compliance with federal statutory requirements in the case of “any experimental, pilot, or demonstration projects which, in the Commissioner’s judgment, are likely to assist in promoting the objectives” of the statute.¹⁰¹ Waivers were seldom granted before the twilight of the Reagan Administration when states proposed, and HHS approved, AFDC eligibility and benefit rules well outside the confines of what federal judges and administrators had deemed acceptable over the previous fifteen years.¹⁰²

The trickle of waivers that began in 1986 became a flood during the Bush and Clinton Administrations. Many of these waivers allowed states to impose time limits on receipt of AFDC; others penalized families in which children failed to attend school and mothers who gave birth to children while receiving AFDC. Only one federal court has deemed a federal waiver invalid.¹⁰³ Generally the courts have given HHS wide berth in applying the waiver provision.¹⁰⁴

The new welfare law contains elements of two quite different approaches to restructuring assistance to the poor. It both increases the states’ control over eligibility and imposes nationally uniform rules designed to force recipients to find jobs. The Republicans’ desire to return power to sub-national governments is tempered by their desire to force states (especially traditionally liberal states such as New York, Connecticut, and Minnesota) to get tough with recipients. It is filled with strings and mandates which intrude on state autonomy far more than the original Title IV of the Social Security Act. Ironically, it was liberals and moderates in the Senate who argued for state control over the eligibility of teenage mothers and women bearing children while receiving AFDC benefits. Conservatives, especially those in the House, demonstrated the depth of their commitment to state control by pushing hard for rigid federal mandates.

Both liberals and conservatives have described the new law as a major step toward the wholesale restructuring of the American welfare state. Robert Dole crowed, “[w]e are not only fixing welfare; we are revolutionizing it. We are writing truly historic landmark legislation, legislation that ends—ends—a sixty-year entitlement program.”¹⁰⁵ Senator Carol Moseley-Braun warned that we are going “back to the days of street urchins and friendless foundlings and

101. Public Welfare Amendments of 1962, Pub. L. No. 87-543, 76 Stat. 205 (codified as amended at 42 U.S.C. § 1310(b)(1)(1994)).

102. Teles, *supra* note 62, at ch. 7.

103. *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994).

104. *See, e.g., C. K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995) (granting summary judgment and upholding waiver). For a critique of the courts’ laissez-faire attitude toward waivers, see Lucy A. Williams, *The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard*, 12 YALE L. & POL’Y REV. 8, 24 (1994) (“HHS has turned a carefully regulated federal entitlement program into a group of highly discretionary state programs.”). One might add that the courts’ interpretation of section 1115 is almost as implausible as the previous rulings of the Supreme Court, which had turned a group of highly discretionary state programs into a extensively regulated federal entitlement program.

105. *Remarks From the Floor*, 53 CONG. Q. WKLY. REP. 2909 (1995).

homeless half-orphans.”¹⁰⁶ Representative Charles Rangel described the law as a “cruel monstrosity,” “the most radical and mean-spirited attack against the poor that I have witnessed during my service in Government.”¹⁰⁷ Senator Moynihan went even further, calling the law “the most brutal act of social policy since Reconstruction.” He warned,

It is the first step in dismantling the social contract that has been in place in the United States since at least the 1930s. Do not doubt that Social Security itself . . . will be next.¹⁰⁸

House Ways and Means Committee Chair Bill Archer shared Moynihan’s diagnosis but did not mourn the loss: he described passionate objections to welfare reform legislation as “the dying throes of the federal welfare state.”¹⁰⁹

The previous discussion of the history of AFDC should make us wary of such hyperbole: the sixty-one-year-old entitlement was always something of a phantom. Individual entitlements were created by the federal courts, which have backed away from many of their earlier decisions. Advocates of national uniformity for AFDC have never put together a majority in Congress and have been steadily losing support for years. In many respects, the new law resembles both the original version of Title IV and the bill passed by the Senate in 1970 to overturn the Supreme Court’s interpretation. One major difference between the original Title IV and the new program is that the latter establishes more federal restrictions, especially in regard to time limits and work requirements.

In a calmer moment Senator Moynihan, perhaps the only current member of Congress to understand the history of AFDC, offered this candid and accurate account of the entitlement created by Title IV:

The Federal law enacted in 1935 provided the several States with a Federal guarantee that whatever amount they provide by way of support for dependent children will be matched, according to formula, by the Federal government. *This* is what we mean when we speak of welfare as an entitlement. It is an entitlement of the several States to support from the Federal government.¹¹⁰

106. *Id.*

107. *Quoted in* N.Y. TIMES, Aug. 1, 1996, at A23.

108. *Quoted in* N.Y. TIMES, Aug. 2, 1996, at A16, A19. Moynihan even predicted that “the effect of this on New York could be something approaching the Apocalypse.” *Id.* at A16.

109. Jeffrey L. Katz, *House Passes Welfare Bill; Senate Likely to Alter It*, 53 CONG. Q. WKLY. REP. 872 (1995).

110. S. REP. NO. 96, 104th Cong., 1st Sess. 64 (1995).

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Although the block grants created in 1996 continue the guarantee of federal support to the states, it creates a much different incentive structure. Instead of paying half or more of the cost of each new recipient, the new arrangement provides each state with a fixed amount of money, with no adjustments for increases or decreases in caseloads. This means that states must cover 100% of the marginal costs of the program—and retain 100% of the possible savings. The fiscal incentives for states to reduce spending become even stronger when one considers the combined effect of AFDC and food stamps.¹¹¹

Given the states' current control over the AFDC standards of need, the Rehnquist Court's deference to state rules, and the proliferation of federal waivers, we have a pretty good idea what states will do in the short run under the new law. More work requirements, more time limits, wedfare, learnfare, residency requirements of dubious constitutionality—all these will proliferate.¹¹² As long as the economy and state revenues continue to grow, draconian cuts are unlikely.

Making long-run predictions is considerably more difficult. Economic downturns simultaneously decrease state revenues and increase the number of people eligible for public assistance. In the early 1980s, many states increased spending on means-tested programs to compensate for the decline in federal spending. But the fiscal incentives created by the block grant scheme would make this more difficult. Not only do we have little idea how states will react to these new incentives, but we do not know to what extent their programs will move recipients from welfare to work, discourage out-of-wedlock births, and collect child support payments from absent fathers. If states fail to make significant inroads on work, child support, and out-of-wedlock births, the pressure to cut benefits will be very strong.

Current public and congressional support for devolution is more pragmatic than heartfelt. It is not sustained by an abiding attachment to local communities or by that old prop of states' rights, naked racism. Block grants present members of Congress with an easy way to cut spending without directly reducing benefits. According to Martha Derthick, Republican governors were able to sell their plan to Congress in 1995

111. Under the current system, when one combines AFDC and food stamp expenditures, a low-income state receives a marginal inflow of \$1.80 in federal dollars when it raises state spending by \$1.00, and a net outflow of \$1.80 when it reduces spending by one dollar. A high-income state currently increases federal spending by \$0.40 when it increases spending by one dollar, and loses \$0.40 for each dollar it cuts from state spending. Under the new law, in contrast, increasing spending by a dollar in both low-income and high-income states would *reduce* federal contribution by \$0.30. Cutting state spending by a dollar would *increase* federal spending in the state by \$0.30. Robert D. Reichauer & R. Kent Weaver, *Financing Welfare: Are Block Grants the Answer?*, in *LOOKING BEFORE WE LEAP: SOCIAL SCIENCE AND WELFARE REFORM* (R. Kent Weaver & William T. Dickens eds., 1995).

112. Center on Social Welfare Policy & Law, *The New Welfare Cutbacks and Litigational Responses*, 26 CLEARINGHOUSE REV. 760 (1992).

because they claimed to know what to do about one of the great unsolved dilemmas of public policy—the persistence of a dependent population in an era when everyone, even a woman with children, is expected to work. [They] were ready to tell newly empowered congressional Republicans just what they wanted to hear about welfare—that work programs and family caps and time limits were a fix.¹¹³

Senator John Breaux has warned that the block grant legislation “simply puts the welfare problems in a box and ships it to the states. When the states open the box, they’re going to find a whole lot of problems and less money to help solve them.”¹¹⁴

Unfortunately, decades of research suggest that “overcoming the employment and other problems of long-term welfare recipients is a costly and slow process that yields only modest increases in earnings and the very opposite of immediate budgetary savings.”¹¹⁵ What will happen when, as seems likely, state governments do not achieve their goals of reducing costs and moving people from welfare to work? Let me suggest a likely chain of events: substantial cuts for people who are clearly needy; multiple court suits; media attention and growing popular concern about the adequacy of the “safety net”; state demands for more federal funding; more federal strings added to what were billed as block grants; and renewed judicial efforts to enforce these federal mandates. Liberals will demand federal protections for recipients and conservatives will demand stronger federal measures to combat dependency. Sound familiar?

VII. MIXED MESSAGES

The larger, even more difficult question lurking behind this discussion of welfare reform is whether the 1996 law represents an isolated attack on a soft target, or (to continue the military metaphor) a full-scale assault that strikes first at the soft underbelly of the welfare state. What, if anything, does this struggle tell us about the future of other entitlements programs? In thinking about this question, it is important to keep four factors in mind.

First, President Clinton’s opposition to Republicans’ efforts to turn Medicaid and food stamps over to the states preserved these programs as federal entitlements. Not only did Democrats demonstrate that it is possible to defend some means-tested programs without committing political suicide, but

113. Martha Derthick, *The Governors and Welfare Reform*, BROOKINGS REV., Spring 1996, at 44-45.

114. S. REP. NO. 96, 104th Cong., 1st Sess. 73 (1995).

115. Hugh Heclo, *Poverty Politics*, in CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE 396, 417 (Sheldon H. Danziger, Gary D. Sandefur & Daniel H. Weinberg eds., 1994).

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Republicans discovered (once again) the political dangers of attacking health care and nutrition programs. Indeed, despite the alleged Reagan Revolution, means-tested programs have not fared badly over the past decade and a half. Consider the following:

* Even after the cuts imposed in 1995 and 1996, food stamp spending will stay over \$20 billion per year. Ten years ago food stamp appropriations were \$10 billion per year.

* The 1995 budget reconciliation bill made modest cuts in the Earned Income Tax Credit. The cost of the EITC grew from zero in 1975 to \$13 billion in 1992 to \$26 billion in 1996.¹¹⁶ In his 1995 veto message President Clinton singled out the EITC reductions as particularly objectionable.¹¹⁷

* The 1995 reconciliation bill set federal Medicaid spending at approximately \$97 billion for 1996, rising to \$127 billion in 2002.¹¹⁸ Compare that with spending over the past decade and a half. *Total* (state plus federal) spending on Medicaid was approximately \$30 billion in 1980, \$54 billion in 1988, and is estimated to have reached \$152.4 billion in 1994. Medicaid spending has increased 17.8% per year since 1988, well above the rate of health care inflation.¹¹⁹

In 1981 and 1982 the Reagan Administration pushed through significant budget cuts for AFDC, food stamps, and other means-tested program. But, according to Robert Greenstein of the Center for Budget Priorities, “even by 1982 the political tide had begun to turn. The administration achieved less than one-fifth of the additional reductions in means-tested entitlement reductions it requested that year, and after 1982, the federal reductions virtually ceased. Indeed, several of these programs once again began to expand, in some cases significantly.”¹²⁰ After the initial cuts, public sentiment shifted toward doing more to help the needy, and Democrats in Congress took advantage of this opportunity to criticize the Reagan Administration and to expand benefits. In short, the alleged war on the poor—which itself is an attack on a very small portion of the welfare state—has so far produced meager results.

Second, Republicans in Congress have been understandably timid when

116. Alissa J. Rubin, *Low-Income Workers' Tax Credit Among GOP Budget Targets*, 53 CONG. Q. WKLY. REP. 3055, 3057 (1995). The author notes that the plan would reduce benefits by 18% over the next seven years. *Id.* at 3362.

117. *Presidential Veto Message of the 1996 Budget Reconciliation Bill (H.R. 2491)*, 53 CONG. Q. WKLY. REP. 3762 (1995).

118. Colette Fraley, *supra* note 94, at 3540.

119. Colette Fraley, *The Blossoming of Medicaid*, 53 CONG. Q. WKLY. REP. 1638 (1995).

120. Robert Greenstein, *Universal and Targeted Approaches to Relieving Poverty: An Alternative View*, in *THE URBAN UNDERCLASS 440* (Christopher Jencks & Paul E. Peterson eds., 1991).

talking about cuts in *middle-class* entitlements. Social security, by far the largest entitlement and a fiscal problem which will dwarf all others in the next century, was "off the table" during the 104th Congress.¹²¹ Modest cuts in Medicare—most of which directly affected providers not beneficiaries—seriously damaged the Republicans in the polls. Republicans' unsuccessful efforts to scale back environmental regulation produced bitter divisions within the Party and serious damage to the Republican's popularity. Republican pollster Frank Lutz warned that "Even the GOP faithful—who trust us implicitly on everything else—have conceded the issue to the Democrats."¹²² This led Speaker Gingrich to urge his troops to pursue a kinder, gentler environmental policy.¹²³

Third, many recent Supreme Court decisions on such matters as federalism, private rights of action, review of agency action, and interpretation of civil rights protections have been five to four votes. If President Clinton is reelected, his selections could shift the Court's direction. President Clinton has already appointed a significant number of district and circuit court judges, but it is too early to know how different their decisions will be from those of Reagan and Bush appointees.

It requires considerably less speculation to predict that *state* courts will play an increasingly important role in many areas, especially welfare. Some state courts will probably follow that of New York in finding a right to welfare in the state constitution.¹²⁴ Many others will be called upon to interpret broadly worded state statutes. As the states gain more control over welfare policy, lawyers for aid recipients will focus attention on the requirements and ambiguities of state laws.¹²⁵ Even if the federal entitlement disappears, the state entitlement will remain.

Among the issues that state courts will inevitably face is the extent to which states can shift costs to county governments and municipalities. Most states have the authority to impose unfunded mandates on local governments. Moreover, by slashing some programs (such as institutionalized care of the retarded and disabled) they can force other levels of government (such as local schools) to pick up the slack. As one county official has put it, "The political equation for any governor, particularly a conservative governor, is going to be to cut taxes. . . . If more people are eligible, the only way to cover it is to

121. Julie Kosterlitz, *Touching the Rail*, 27 NAT'L J. 3136 (1995).

122. Quoted in Allan Freedman, *Regulatory Overhaul Stymied By Internal Doubt*, Division, 54 CONG. Q. WKLY RPT. 613 (1996).

123. See Allan Freedman, *Republicans Concede Missteps in Effort to Rewrite Rules*, 53 CONG. Q. WKLY. RPT. 3645 (1995); Allan Freedman, *GOP Trying to Find Balance After Early Stumbles*, 54 CONG. Q. WKLY. REP. 151 (1996).

124. *Jiggetts v. Grinker*, 553 N.E.2d 570 (N.Y. 1990); *Tucker v. Toia*, 371 N.E.2d 449 (N.Y. 1977).

125. See, e.g., Barbara Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367 (Aug./Sept. 1988); Center for Social Welfare Policy & Law, *supra* note 112, at 756.

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have someone else raise taxes. That's why this whole decentralizing strategy forces taxing authority to the local level."¹²⁶ According to SUNY Professor Beryl Radin, "Every time the governors have gotten carried away with arguing for all this generic power, they get stuck holding the bag. But a lot of these [current] governors aren't going to hold the bag."¹²⁷ Cost shifting is a game everyone can play.

One of the underlying assumptions of this paper is that the American public both demands extensive government benefits, services, and protections, and feels angry about taxes, bureaucracy, and regulation. They expect a lot from government, yet do not think that their government is doing a very good job. Indeed, they fear that government programs multiply rather than solve social problems. For example, every year over the past decade, more than sixty percent of Americans have told pollsters that we are spending too little on assistance for the poor.¹²⁸ Only ten percent say we are spending too much. But sixty-nine percent believe that "the welfare system does more harm than good, because it encourages the breakup of the family and discourages work."¹²⁹ Large majorities favor balancing the budget, but few voters support cuts in social security or medical benefits nor do many favor tax increases.¹³⁰

These conflicting public views are a prime cause of divided government. As William Schneider has pointed out, Democrats are good at enunciating what the public thinks government *should* do. Republicans are equally good at voicing the public's doubts about what government *can* do well.¹³¹ For many years voters elected Republican presidents to guard against tax increases and onerous regulation, and Democratic members of Congress to protect their entitlements. Over the past two years this institutional pattern has been turned upside down. Although Democrats are experts at snatching defeat from the jaws of victory, it seems quite possible that we will have another four years of a Democratic president and a Republican Congress. Some political scientists call this "cognitive Madisonianism," meaning that the public distrusts both parties and therefore elects a government in which each party checks the other.¹³² One could be more blunt and call it a collective running away from the apparent results of each previous election.

It is easy to imagine a second Clinton Administration vetoing major legislation passed by a Republican Congress and using rulemaking, administra-

126. Rochelle L. Stanfield, *Just Do It*, 28 NAT'L J. 692, 701-02 (1996) (quoting Danes County (Wisconsin) Executive Richard Philips).

127. Quoted in *id.* at 702.

128. Reichauer & Weaver, *supra* note 105, at 113; COOK & LOMAX, *supra* note 58, at 27.

129. Reichauer & Weaver, *supra* note 105, at 112-13.

130. Mayer, *The Changing American Mind*, at 444, 486, 468.

131. William Schneider, Thomas P. O'Neill Lecture, Boston College, December, 1995.

132. Everett Carl Ladd, *The 1988 Election: Continuation of the Post-New Deal System*, 104 POL. SCI. Q. 1, 1-18 (1989).

tive discretion, and careful management of litigation to protect and slowly expand a variety of programmatic rights. One can also imagine a Republican Congress taking aggressive steps to block these initiatives. Many of these disputes would end up in court. Meanwhile the Clinton Administration will fill a number of vacancies on the Supreme Court and on the lower courts. A slightly modified regime of programmatic rights may thus survive.

Over the years politicians have been drawn to a number of gimmicks that seem to reconcile the inconsistent demands of the public: block grants, "reinventing government," the flat tax, "managed competition," and supply-side economics. Programmatic rights are more than a gimmick. But they, too, are a reflection of the public's desire to square the circle of more public aid with less government interference. Programmatic rights are at one and the same time claims upon the government and limits on the discretion of bureaucrats. They enlarge the government while seeming to empower the individual. They trumpet benefits while disguising costs. In a polity as volatile and cross-pressured as ours, they are too serviceable to fade into the sunset.