

BUFFERING AGAINST VICISSITUDES: THE ROLE OF SOCIAL  
INSURANCE IN THE COVID-19 PANDEMIC AND IN  
MAINTAINING ECONOMIC STABILITY

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Thank you for the opportunity to participate in this conference on the important topic of “The Future of Global Health Governance.” I commend the Dean Rusk International Law Center at the University of Georgia School of Law, and the editors and staff of the *Georgia Journal of International & Comparative Law*, for convening this symposium to examine the response of global institutions to the COVID-19 pandemic and to consider mechanisms for improving international cooperation in the future. Participating on a panel involving so many esteemed colleagues is a special honor. In addition, I am especially grateful to my friend and health law colleague Elizabeth Weeks for the invitation to participate in this discussion and for incorporating into this conference a consideration of the role that social insurance plays in mitigating the economic impacts of pandemic public health measures on the lives of people and families.<sup>1</sup> The title of this panel—“The Role of Federal Governments in Pandemics: How Can Governments Design Social Safety Nets to Reduce the Individual, Societal, and Global Impact of A Pandemic?”—recognizes the essential role of government-guaranteed economic security in sustaining the health of individuals and populations in times of crisis, as well as normalcy. This essay will explore how social insurance programs in the United States serve as mechanisms to buttress public health and healthcare measures to smooth the disruptive vicissitudes occurring under contemporary economic and environmental conditions.

Professor Ho<sup>2</sup> concluded her presentation with the observation that the emergence of the COVID-19 pandemic found a nation with inequality as its preexisting condition.<sup>3</sup> The COVID-19 pandemic exposed preexisting inequality in access to health care and health insurance, and in income. These inequalities have a cascading impact resulting in inequalities in housing, food, transportation options, educational access, working conditions, environmental conditions, internet connectivity, and myriad other aspects of life. Concomitantly, the COVID-19 pandemic exposed weaknesses in the existing unemployment, workers’ compensation, disability insurance, Medicare, Medicaid, long-term care, and family leave components of this infrastructure. In addition, the COVID-19 pandemic exposed gaps in these programs—nontraditional workers in the gig economy were ineligible for unemployment insurance, provision for caregiving is largely absent as a component of U.S. social insurance structures, the association of health insurance with employment left many workers vulnerable with lost jobs, and the administrative mechanisms through which many programs operated were not adequate to the high demand that COVID-19 occasioned. Some people who

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<sup>1</sup> University of Georgia Associate Provost for Faculty Affairs and Charles H. Kirbo Chair in Law at the School of Law.

<sup>2</sup> Professor Christina S. Ho, Rutgers Law School.

<sup>3</sup> Christina S. Ho, *The Future of Global Health Governance: The Role of Federal Governments in Pandemics* (Jan. 25, 2021).

contracted COVID-19 may continue to experience effects of the disease which may limit their ability to work or care for their families. Finally, the COVID-19 emergency required federal and state officials to institute measures to overcome longstanding barriers to health insurance coverage for delivery of healthcare services remotely.

This conference took place shortly after the Biden Administration assumed office. According to the Economic Policy Institute, the economic downturn resulting from the institution of public health measures during COVID-19 affected 25.7 million workers.<sup>4</sup> Of that number, 11.1 million were unemployed, 7.0 million were employed but experiencing a cut in pay and hours, 3.1 million were misclassified as employed or not in the labor force, and 4.5 million dropped out of the labor force.<sup>5</sup> Most economists would say that the official unemployment measures often understate the problem because of the lag in data collection.<sup>6</sup> Workers also may not be captured by these surveys of unemployment because COVID-19 business closures classified work absence as “employed but absent from work” instead of “unemployed on temporary layoff.”<sup>7</sup>

The dislocation resulting from these massive levels of unemployment is significant. Using the Census Bureau Household Pulse Survey for December 9–21, 2020, the Center for Budget and Policy Priorities (CBPP) found that households of nearly one in five adults with children lacked sufficient food in the last seven days.<sup>8</sup> Mirroring the disproportionate impact of the COVID-19 virus, black and Latinx households were more likely to experience food insufficiency during the pandemic.<sup>9</sup> Nearly one in five renters were not caught up on rent during the pandemic, with renters of color facing greatest hardships.<sup>10</sup> One quarter of renters

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<sup>4</sup> *What Economy Will President-Elect Biden Inherit?*, ECON. POL’Y INST., <https://www.epi.org/multimedia/what-economy-will-president-elect-biden-inherit/> (last visited Mar. 20, 2021).

<sup>5</sup> See Shahar Ziv, *Don’t Be Fooled by Official Unemployment Rate of 14.7%: The Real Figure is Even Scarier*, FORBES (May 10, 2020), <https://www.forbes.com/sites/shahar-ziv/2020/05/10/dont-be-fooled-by-official-unemployment-rate-of-147-the-real-figure-is-even-scarier/?sh=19bb375d55dd>.

<sup>6</sup> *Id.*

<sup>7</sup> Rakesh Kochhar, *Unemployment Rate Is Higher Than Officially Recorded, More So for Women and Certain Other Groups*, PEW RSCH. CTR. (June 30, 2020), <https://www.pewresearch.org/fact-tank/2020/06/30/unemployment-rate-is-higher-than-officially-recorded-more-so-for-women-and-certain-other-groups/>.

<sup>8</sup> CTR. ON BUDGET & POL’Y PRIORITIES, *Tracking the COVID-19 Recession’s Effects on Food, Housing, and Employment Hardships*, <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> (last updated Mar. 22, 2021). The Census Bureau began a new experimental Household Pulse Survey to collect and use data on how the coronavirus pandemic affected people’s lives in April 2020. The data presented here are the data available at the time of the conference.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

living with children were not caught up on rent.<sup>11</sup> More than one-third of adults surveyed had trouble paying for usual household expenses in the last week.<sup>12</sup> Job losses were largest in low-wage industries. The unemployment rate disproportionately affected women, immigrants, young adults, and less educated workers.<sup>13</sup>

These effects of the COVID-19 recession layered disruption on a society characterized by economic inequality.<sup>14</sup> Research based on the census found that the top 20% of earners with incomes of \$130,001 or more in 2018 captured more than 50% of all U.S. income.<sup>15</sup> This Pew Research Center report found that income inequality in the United States is the highest of all G7 nations.<sup>16</sup> Income gaps between Black and white people have also persisted in recent decades, with median Black household income being 61% of white household income in 2018.<sup>17</sup> From 1989 to 2016, the wealth gap between the nation's wealthiest and poorest families more than doubled, and, since the Great Recession, only families with a median net worth in the top 20% increased their wealth between 2007 and 2016.<sup>18</sup> Finally, middle-class incomes have not grown at the same rate as have upper-tier incomes.<sup>19</sup>

Median household incomes continue to vary by race and ethnicity even though incomes for all households increased in 2019.<sup>20</sup> Median household incomes in 2019 were as follows: \$98,174 for Asian American households, \$76,057 for

<sup>11</sup> *Id.*

<sup>12</sup> Claire Zippel, *Latest Data: Nearly 1 in 3 Adults Having Trouble Paying Expenses*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 7, 2020), <https://www.cbpp.org/blog/latest-data-1-in-3-adults-having-trouble-paying-expenses>.

<sup>13</sup> Rakesh Kochhar, *Unemployment Rose Higher in Three Months of Covid-19 Than in Two Years of the Great Recession*, PEW RSCH. CTR. (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>.

<sup>14</sup> See, e.g., JACOB S. HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* 192 (2006) (cautioning that setting Americans adrift, unmoored from the protection against economic risks that equitable social insurance programs provide, posed "a threat to our nation's future, and to the vision of America that generations of Americans have held dear").

<sup>15</sup> Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RSCH. CTR. (Feb. 7, 2020), <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/>.

<sup>16</sup> *Id.*

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

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (finding that from 1970 to 2018, middle-class incomes increased 49% whereas upper-level incomes increased 64% during that time and the share of adults who live in middle-income households decreased from 61% to 51% between 1971 to 2019).

<sup>20</sup> Valerie Wilson, *Racial Disparities in Income and Poverty Remain Largely Unchanged Amid Strong Income Growth in 2019*, ECON. POL'Y INST. (Sept. 16, 2020, 10:49 AM), <https://www.epi.org/blog/racial-disparities-in-income-and-poverty-remain-largely-unchanged-amid-strong-income-growth-in-2019>.

white households, \$56,113 for Hispanic households, \$46,073 for Black households.<sup>21</sup> Job losses due to the pandemic have significantly undercut these income levels, with job losses disproportionately affecting Black and Hispanic workers.<sup>22</sup> Poverty rates also are unequal when analyzed by race: 18.7% for Blacks, 15.7% for Hispanics, 7.3% for Asian Americans, and 7.3% for whites.<sup>23</sup>

Existing social insurance programs mitigate poverty among the beneficiary populations. The Social Security Disability Insurance (SSDI) program has approximately 8.2 million beneficiaries, plus 1.4 million children.<sup>24</sup> The average amount of benefits is \$1100 per month or \$13,200 per year.<sup>25</sup> Most beneficiaries, especially people who are not married, rely on SSDI for most of their income.<sup>26</sup> These modest benefit payments represented “at least half of total family income for” 47% of beneficiaries in 2010, and 20% of beneficiaries relied on benefits for 90% or more of their income.<sup>27</sup> For 71% of unmarried beneficiaries, SSDI benefits represent half or more of annual income.<sup>28</sup>

Approximately 8 million people, including 1.1 million children, rely on the Supplemental Security Income (SSI) program for support, with more than half receiving the basic monthly benefit of \$794 per month in 2021—approximately

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<sup>21</sup> *Id.* For comparison, the 2021 Federal Poverty Guidelines for the 48 contiguous states and the District of Columbia specify an income level of \$26,500 for a family of four. *2021 Poverty Guidelines*, OFF. ASSISTANT SEC’Y FOR PLAN. & EVALUATION (Jan. 26, 2021), <https://aspe.hhs.gov/2021-poverty-guidelines>.

<sup>22</sup> Valerie Wilson, *Racial Disparities in Income and Poverty Remain Largely Unchanged Amid Strong Income Growth in 2019*, ECON. POL’Y INST. (Sept. 16, 2020, 10:49 AM), <https://www.epi.org/blog/racial-disparities-in-income-and-poverty-remain-largely-unchanged-amid-strong-income-growth-in-2019>.

<sup>23</sup> *Id.* (“The Supplemental Poverty Measure (SPM), an alternative to the long-running official poverty measure, provides an even more accurate measure of a household’s economic vulnerability.”) In addition to capturing before-tax cash income, the SMP also considers non-cash benefits and tax credits, and takes into account geographic variations in the cost of living. Compared to the SMP, the official poverty measure understates poverty among all groups except for Blacks where the measures are very close.

<sup>24</sup> *Chart Book: Social Security Disability Insurance*, CTR. ON BUDGET & POL’Y PRIORITIES (Feb. 12, 2021), <https://www.cbpp.org/research/social-security/chart-book-social-security-disability-insurance>.

<sup>25</sup> *Chart Book: Social Security Disability Insurance*, CTR. ON BUDGET & POL’Y PRIORITIES (Feb. 12, 2021), <https://www.cbpp.org/research/social-security/chart-book-social-security-disability-insurance>.

<sup>26</sup> *Id.*

<sup>27</sup> Melissa M. Favreault, Richard W. Johnson, and Karen E. Smith, *How Important is Social Security Disability Insurance to U.S. Workers?*, at 4–5, Urban Institute, June 2013, <https://www.urban.org/sites/default/files/publication/23731/412847-how-important-is-social-security-disability-insurance-to-u-s-workers-.pdf>.

<sup>28</sup> *Id.*

three-quarters of the federal poverty line.<sup>29</sup> SSI beneficiaries also have access to the Medicaid programs.<sup>30</sup>

The Social Security retirement benefit provides the majority of income to most elderly Americans.<sup>31</sup> For half of seniors, it provides at least 50% of their income and for about 25%, it provides at least 90% of income.<sup>32</sup> In June 2020, the average monthly benefit was \$1514—about \$18,170 per year.<sup>33</sup> With this modest level of benefits, adequacy is an issue and a concern exacerbated for workers who have to claim benefits before the full retirement age because they can no longer find work or because they work in physically demanding jobs which they can no longer perform.<sup>34</sup> As a percentage of earnings, Social Security benefits in the United States rank just outside of the bottom third of OECD countries.<sup>35</sup>

Despite these trends in inequality and economic vulnerability, recent government policies and proposals tended toward deregulation and the undermining of social insurance, health care, and other programs that provide economic support and opportunity for “ordinary citizens.”<sup>36</sup> Among the examples of a weak

<sup>29</sup> Policy Basics, Supplemental Security Income, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 8, 2021), [https://www.cbpp.org/research/social-security/supplemental-security-income#:~:text=The%20vast%20majority%20of%20SSI,severe%20disability%20\(including%20blindness\).&text=Because%20recipients%20typically%20have%20no,and%20%241%2C191%20for%20a%20couple](https://www.cbpp.org/research/social-security/supplemental-security-income#:~:text=The%20vast%20majority%20of%20SSI,severe%20disability%20(including%20blindness).&text=Because%20recipients%20typically%20have%20no,and%20%241%2C191%20for%20a%20couple). The federal poverty level in 2021 for a one-person household is \$12,880 per year—or approximately \$1074 per month.

<sup>30</sup> *Id.* Introduction to the Supplemental Security Income (SSI) Program, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/introduction-to-the-supplemental-security-income-ssi-program> (last updated Feb. 27, 2014).

<sup>31</sup> Policy Basics: Top Ten Facts About Social Security, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 13, 2020), <https://www.cbpp.org/research/social-security/top-ten-facts-about-social-security>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* Kathy Ruffing, Social Security Disability Insurance is Vital to Workers With Severe Impairments, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 10, 2012), <https://www.cbpp.org/research/social-security-disability-insurance-is-vital-to-workers-with-severe-impairments>; Eric Kingson & Monique Morrissey, Can Workers Offset Social Security Cuts by Working Longer?, ECON. POL'Y INST., at 1 (May 30, 2012), <https://files.epi.org/2012/bp343-social-security-retirement-age.pdf>. See also Press Release, National Academy of Social Insurance, Task Force on Older Workers Launches at the National Academy of Social Insurance (Feb. 22, 2021), <https://www.nasi.org/press/releases/2021/02/task-force-older-workers-launches-national-academy-social> (“We are delighted to continue partnering with the [National Academy of Social Insurance] to identify effective strategies to support older workers who can no longer continue in jobs that are physically demanding or because their health has declined,” said Debra Whitman, Executive Vice President and Chief Public Policy Officer at AARP).

<sup>35</sup> *Policy Basics: Top Ten Facts About Social Security*, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 13, 2020), <https://www.cbpp.org/research/social-security/top-ten-facts-about-social-security>.

<sup>36</sup> JACOB S. HACKER & PAUL PIERSON, LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY 56, 59, 164–66 (2020). Eric Kingson & Monique Morrissey,

commitment to crucial government supports for lower-income families are proposals to replace Social Security with private investment accounts, the failure of a dozen states to adopt the Medicaid expansion, state requests for waivers to condition Medicaid benefits on work requirements, proposals to tighten eligibility for Supplemental Nutrition Assistance Program (SNAP) or food stamp benefits, and contentious and divergent views about the size and nature of continued relief to ameliorate the effects of the pandemic.<sup>37</sup>

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Can workers offset Social Security cuts by working longer?, *ECON. POL'Y INST.*, at 1 (May 30, 2012), <https://files.epi.org/2012/bp343-social-security-retirement-age.pdf> (characterizing the raising of the eligibility age for full Social Security retirement benefits from 65 to 67 as a benefit cut and proposals to raise the age of full retirement further as “another benefit cut that would impose significant additional hardship on many older workers”); Frank J. Thompson, *Six Ways Trump Has Sabotaged the Affordable Care Act*, *BROOKINGS* (Oct. 9, 2020), <https://www.brookings.edu/blog/fixgov/2020/10/09/six-ways-trump-has-sabotaged-the-affordable-care-act/> (describing reductions in outreach to promote insurance enrollment, reductions in subsidies to insurance companies, making it possible for people to purchase lower quality health insurance, promoting waivers, discouraging legal noncitizen immigrants from enrolling in Medicaid by characterizing it as a negative factor in immigration status decisions, and, along with numerous states, pursuing a constitutional challenge to the validity of the ACA); Status of State Medicaid Expansion Decisions: An Interactive Map, *KFF* (Apr. 13, 2021), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/> (noting that twelve states have failed to adopt the Medicaid expansion available through the ACA); Dorothy Rosenbaum & Zoë Neuberger, *President's 2021 Budget Would Cut Food Assistance for Millions and Radically Restructure SNAP*, *CTR. ON BUDGET & POL'Y PRIORITIES*, 1 (Feb. 18, 2020), <https://www.cbpp.org/sites/default/files/atoms/files/2-18-20fa.pdf> (describing proposed cuts through the budget process and regulatory action to Supplemental Nutrition Assistance Program (SNAP) with impact on unemployed workers, elderly individuals, people with disabilities, and low-income working families with children).

<sup>37</sup> Henry J. Aaron, *Privatizing Social Security: A Bad Idea Whose Time Will Never Come*, *BROOKINGS* (June 1, 1997), <https://www.brookings.edu/articles/privatizing-social-security-a-bad-idea-whose-time-will-never-come/> (stating that proposals to allow private savings accounts to replace all or part of Social Security retirement programs would shift the risk to the worker); Status of State Medicaid Expansion Decisions: An Interactive Map, *KFF* (June 7, 2021), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/> (noting that twelve states have failed to adopt the Medicaid expansion available through the ACA); MaryBeth Musumeci, *Medicaid Work Requirements at the U.S. Supreme Court*, *KFF* (Feb. 11, 2021), <https://www.kff.org/policy-watch/medicaid-work-requirements-at-u-s-supreme-court/> (documenting state requests for federal approval to condition Medicaid eligibility on work requirements); Dottie Rosenbaum & Zoë Neuberger, *President's 2021 Budget Would Cut Food Assistance for Millions and Radically Restructure SNAP*, *CTR. FOR BUDGET & POL'Y PRIORITIES* (Feb. 18, 2020), <https://www.cbpp.org/research/food-assistance/presidents-2021-budget-would-cut-food-assistance-for-millions-and> (describing Trump administration proposing budget cuts in SNAP funding and restructuring eligibility to exclude many families). The Biden administration curtailed plans to implement these program cuts. See, e.g., Aimee Picchi, *USDA Drops Trump Plan to Cut Food Stamps for 700,000 Americans*, *CBS NEWS* (Apr. 1, 2021), <https://www.cbsnews.com/news/food-stamps-work-requirement-trump-rule-abandoned/>; Luke Broadwater & Jim Tankersley, *Republicans Pitch Biden on Smaller Aid Plan as Democrats Prepare to Act Alone*, *N.Y. TIMES* (Feb. 1, 2021),

As the income levels presented earlier indicate, work often does not secure an adequate living. The increasing globalization of labor markets creates instability. Similarly, the nature of work is evolving, weakening the employer-employee relationship. Many workers are classified as independent contractors, have only contingent work arrangements with time-limited work and irregular and unpredictable schedules, and must rely on online labor platforms.<sup>38</sup> These work arrangements expose workers to risks that create economic vulnerability. Risks include income risk due to the loss of access, inadequacy, or volatility of income; health risk due to the lack of employer-based insurance—mitigated by the provisions of the Affordable Care Act; retirement risk because of the absence of private pensions and nonparticipation in the Social Security system; unemployment risk; injury risk because of no access to workers' compensation benefits; tax compliance risk; and the lack of paid leave for health or caregiving, or other reasons.<sup>39</sup> To be economically secure, individuals and families need to be protected from these vicissitudes in the lifespan.<sup>40</sup>

The job loss and disruption brought about by the public health measures imposed in response to the COVID-19 pandemic expose the preexisting weaknesses in the social insurance infrastructure and the weak consensus about the role of government in addressing the impacts of this type of disruption, or those effects caused by environmental or other disasters. Responses in the United States and Europe have differed.<sup>41</sup> This country's unemployment insurance system, like the public health surveillance system, has been plagued by underinvestment and inconsistencies because of the key role states play in the system.<sup>42</sup> Responses are

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<https://www.nytimes.com/2021/02/01/us/politics/republicans-biden-coronavirus-stimulus.html> (“A coalition of 10 Republican senators took a stimulus counterproposal to the White House on Monday evening, urging President Biden to scale back his ambitions for a sweeping \$1.9 trillion pandemic aid package in favor of a plan less than one-third the size . . .”).

<sup>38</sup> See NAT. ACAD. OF SOC. INS., REPORT TO THE NEW LEADERSHIP AND THE AMERICAN PEOPLE ON SOCIAL INSURANCE AND INEQUALITY [HEREINAFTER, REPORT TO THE NEW LEADERSHIP] 186–94 (Benjamin W. Veghte et al. eds., 2018), [https://www.nasi.org/sites/default/files/research/Report\\_to\\_New\\_Leadership\\_and\\_American\\_People\\_web.pdf](https://www.nasi.org/sites/default/files/research/Report_to_New_Leadership_and_American_People_web.pdf) (discussing the challenges nonstandard work create for workers).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 194.

<sup>41</sup> Steven Erlanger, *Who Will Recover Faster From the Virus? Europe or the U.S.?*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/world/europe/coronavirus-europe-usa.html>. The author takes note of “the flexible nature of the American economy, quick both to fire workers but also to hire them again. Europe, with built-in social insurance, tries to keep workers from layoffs through subsidies to employers, making it harder to fire and more expensive to rehire.” In addition, the article identifies “Europe’s existing social welfare system” with “[i]ts ‘automatic stabilizers’” that “kick in to support the poor and unemployed, without the need, as in the United States, to pass ad hoc legislation”).

<sup>42</sup> Federal Neglect Leaves State Unemployment Systems in State of Disrepair, NAT'L EMP. LAW PROJECT (Nov. 5, 2013), <https://www.nelp.org/publication/federal-neglect-leaves-state-unemployment-systems-in-a-state-of-disrepair/>; REPORT TO THE NEW LEADERSHIP, *supra* note

not nimble in a crisis because congressional authorization is required to extend the duration of benefits, extend benefits to workers who do not qualify because of their work status, make one-time payments to individuals, increase access to paid leave, and provide payroll subsidies to employers.<sup>43</sup> At the time of the conference, Congress had enacted two pandemic relief measures<sup>44</sup> and was considering a third piece of legislation since enacted.<sup>45</sup> The temporary nature of these measures creates uncertainty because the public cannot rely on the assistance to continue for the duration of the economic disruption. Finally, the application process for employers seeking assistance was onerous and not transparent, causing delays and exacerbating disparities.<sup>46</sup>

In contrast, European countries have focused on maintaining employment, which avoids the long-term consequences of losing a job.<sup>47</sup> Some of these countries have automatic triggers for unemployment assistance, so no delay occurs while legislatures authorize relief. The replacement amount of unemployment insurance is higher—60% compared to 50% in the United States.<sup>48</sup> The provision for universal health insurance meant that one less issue had to be addressed in

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38, at 128–30, [https://www.nasi.org/sites/default/files/research/Report\\_to\\_New\\_Leadership\\_and\\_American\\_People\\_web.pdf](https://www.nasi.org/sites/default/files/research/Report_to_New_Leadership_and_American_People_web.pdf).

<sup>43</sup> REPORT TO THE NEW LEADERSHIP, *supra* note 38, at 118–23, [https://www.nasi.org/sites/default/files/research/Report\\_to\\_New\\_Leadership\\_and\\_American\\_People\\_web.pdf](https://www.nasi.org/sites/default/files/research/Report_to_New_Leadership_and_American_People_web.pdf).

<sup>44</sup> Pub. L. No. 116-136, Coronavirus Aid, Relief and Economic Security Act (CARES Act) (2020) (March 27, 2020); Pub. L. No. 116-260 Consolidated Appropriations Act of 2021.

<sup>45</sup> Pub. L. No. 117-2, American Rescue Plan Act of 2021 (Mar. 11, 2021).

<sup>46</sup> Stacy Cowley & Emily Flitter, *Frenzy and Desperation as Small Businesses Grab for Government Aid*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/business/sba-loans-coronavirus.html>; Emily Cochrane, *House Overwhelmingly Approves Revisions to Small Business Program*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/05/28/us/politics/house-paycheck-protection-program-changes.html> (“Since its inception, the Paycheck Protection Program has been plagued by problems and controversy.”); Emily Flitter, *Black Business Owners Had a Harder Time Getting Federal Aid, Study Finds*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/07/15/business/paycheck-protection-program-bias.html>.

<sup>47</sup> Steven Erlanger, *Who Will Recover Faster From the Virus? Europe or the U.S.?*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/world/europe/coronavirus-europe-usa.html>; Peter S. Goodman, Patricia Cohen, and Rachel Chaundler, *European Workers Draw Paychecks. American Workers Scrounge for Food.*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/07/03/business/economy/europe-us-jobless-coronavirus.html>.

<sup>48</sup> Heather Long & Andrew Van Dam, *As U.S. Unemployment Soared, Germany's Barely Budgeted. Is America's Safety Net Enough?*, WASH. POST (Oct. 13, 2020), <https://www.washingtonpost.com/business/2020/10/13/germany-unemployment/> (noting a benefit to “the German model is that it kicked in swiftly and automatically” and that during the pandemic, temporary benefits in the United States and Germany raised the replacement rates of unemployment insurance to higher levels); *see also* Eduardo Porter, *How the American Unemployment System Failed*, N.Y. TIMES (Jan. 21, 2021), <https://www.nytimes.com/2021/01/21/business/economy/unemployment-insurance.html>.

the crisis. German and French recovery plans are for ten years—not the short-term approach that the United States has taken.<sup>49</sup> The pay gap between college-educated and less-educated workers since 1980 had not increased in Germany, unlike the preexisting condition of increasing inequality which was the situation in the United States at the start of the crisis.<sup>50</sup>

The lack of consensus in the United States about what role the government should play in responding to the health and economic crises of the COVID-19 pandemic reflects a historical divide. Two competing visions characterized the founding—a belief that energetic government at the federal and state levels would propel the nation's prosperity competed with a distrust of a strong national government, conceding to only the minimal level of government power necessary for a functioning economy and foreign policy.<sup>51</sup> In the early days of government, the Federalists were proponents of robust federal power under the Constitution. The Anti-Federalists and their successors sought to limit the reach of federal power, leaving most governing to the states and the economy in the control of private actors.<sup>52</sup> The contemporary major political parties have replicated this dichotomy, with Democrats advocating for a more active government role in ensuring access to health care and other forms of economic security and Republicans resisting a robust role for the federal government, defaulting to the states and relying on private markets.

The history of the nation's social insurance infrastructure reflects these overarching theories about the role of government. In his comprehensive work *A History of American Law*, Lawrence M. Friedman identifies the roots of the modern

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<sup>49</sup> Heather Long & Andrew Van Dam, *As U.S. Unemployment Soared, Germany's Barely Budgeted. Is America's Safety Net Enough?*, WASH. POST (Oct. 13, 2020), <https://www.washingtonpost.com/business/2020/10/13/germany-unemployment/> (quoting Simeon Djankov, senior fellow at the Peterson Institute for International Economics and former finance minister of Bulgaria, on the uncertainty resulting from the temporary nature of pandemic aid measures in the United States: "The German and French recovery plans are for 10 years. In the U.S., the initiatives have been temporary.").

<sup>50</sup> *Id.*

<sup>51</sup> Daniel A. Farber, William N. Eskridge, Philip P. Frickey & Jane S. Schacter, *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* 4, 8 (6th ed. 2019).

<sup>52</sup> Early cases like *McCulloch v. Maryland* and *Gibbons v. Ogden* reflect the divide. See *McCulloch v. Maryland*, 17 U.S. 316 (1819) (preventing a state from taxing a federal bank); *Gibbons v. Ogden*, 22 U.S. 1 (1824) (discussing Congress's right to regulate navigation under the Commerce Clause). This divide became more pronounced in the pre-New Deal era cases invalidating federal attempts to regulate hours, wages, and conditions of work to produce goods that would enter the stream of interstate commerce. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (disallowing labor laws as interfering with an individual's right to contract under the Fourteenth Amendment).

welfare system in the poor laws of the colonies.<sup>53</sup> Descended from laws of Elizabethan England with the same label, colonial law established a system of “discriminat[ing] against unfortunate strangers.”<sup>54</sup> New England towns would “warn[] out” new arrivals to disclaim any responsibility if the newcomer fell on hard times and to place “the burden of support back on the former place of settlement.”<sup>55</sup> After independence, this practice continued, fixing responsibility on local government units for maintaining their own poor.<sup>56</sup> Friedman notes that some argued that relief for the poor only encouraged idleness—that such assistance indulges the idleness of the apocryphal “sturdy beggar,” presaging current reservations of some about enhanced unemployment benefits during the COVID-19 pandemic<sup>57</sup> private charity from church groups, extended family, and friends provided inadequate relief for “the helpless.”<sup>58</sup>

By the nineteenth century, the federal government established a tradition of disaster relief, and “[t]he general public, like Congress, tended to be relatively generous to sufferers who were socially defined as blameless—the sick, the old, the deaf and dumb, the insane,” but the pauper, particularly the stranger, “had no such claim on public sympathy.”<sup>59</sup> Some thought relief laws should be punitive to make poverty unpalatable.<sup>60</sup>

Fast forward to the twentieth century, and the federal policy took a big leap ahead in providing programs to help vulnerable populations with the enactment of the Social Security Act in 1935, which created the familiar pension plan for

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<sup>53</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 49–50 (3d ed. 2007); *see also* Renée M. Landers, *Race (and Other Vulnerabilities) in Healthcare and Administrative Law*, *YALE J. ON REGUL.: NOTICE & COMMENT* (September 1, 2020) <https://www.yalejreg.com/nc/race-and-other-vulnerabilities-in-healthcare-and-administrative-law-by-renee-m-landers/> (discussing previous treatment of the history of social insurance and support programs).

<sup>54</sup> FRIEDMAN, *supra* note 53, at 50.

<sup>55</sup> *Id.* This idea of tying assistance to the former place of residence appeared in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (informally known as the Clinton-era welfare restructuring statute) which purported to authorize states to limit welfare benefits for new residents to the level of the benefits to which the residents would be entitled in the state from which they had moved for one year. In reviewing a challenge to a California law embodying this practice, the U.S. Supreme Court invalidated the concept as a violation of the right to travel protected by the Privileges and Immunities Clause of the Fourteenth Amendment. *Saenz v. Roe*, 526 U.S. 489 (1999).

<sup>56</sup> FRIEDMAN, *supra* note 53, at 150.

<sup>57</sup> *Id.* Contemporary popular culture uses this trope of the “sturdy beggar.” For example, PBS airs a British comedy called “Keeping Up Appearances” with a character, Onslow, who resides in council housing and occupies himself by watching racing on television, while his frustrated wife brings him the occasional beer. *Keeping Up Appearances* (BBC One 1990–1995). Onslow prides himself on being “bone idle.” *See, e.g., Keeping Up Appearances*, QUOTES.NET, [https://www.quotes.net/movies/keeping\\_up\\_appearances\\_103697](https://www.quotes.net/movies/keeping_up_appearances_103697) (“I’m workshy, bone-idle, and out of condition!”) (last visited May 27, 2021).

<sup>58</sup> FRIEDMAN, *supra* note 53, at 150.

<sup>59</sup> *Id.* at 151.

<sup>60</sup> *Id.* at 152.

senior citizens and other programs to help people with vision impairment and other disabilities.<sup>61</sup> In the 1960s assistance expanded significantly with the creation of the Medicare program to provide health care to persons over 65 and people with disabilities, and the Medicaid program to serve low-income people—signature accomplishments of President Lyndon Johnson.<sup>62</sup>

This brief and telescoped history of social insurance and welfare programs offers an explanation for current exclusions of “the other” from government protection and investment. In addition to the “stranger” or “new arrival,” the “other” has long included people of color, people who do not conform to conventional sex-role stereotypes, and the noncitizen immigrant.<sup>63</sup> Today’s racially disparate income inequalities and disparities in health care and health status due to race, gender, and other characteristics are among the predictable results of this history. The disparate impact of the COVID-19 crisis on communities of color has sharpened the focus on the health inequities, income disparities, and myriad other social determinants of health, such as lack of access to quality education, housing, transportation, healthy food, and healthy environment that stunt the potential of people of color.<sup>64</sup>

The Social Security Act of 1935 famously excluded about half the workers in the American economy from coverage—notably agricultural and domestic workers—a large percentage of whom were African Americans.<sup>65</sup> Scholars debate whether the exclusions of these categories of workers reflected racial animus or a concern for avoiding administrative complexity.<sup>66</sup> Regardless of the motivation, the disparate impact on Black workers reduced their access to retirement benefits available to other workers for some time. Amendments to the statute in the 1950s extended coverage to some among these categories of workers.<sup>67</sup>

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<sup>61</sup> Social Security Act of 1935, Pub.L. 74–271, 49 Stat. 620, enacted August 14, 1935, 42 U.S.C. §§ 301-1305 (Suppl. 4 1934).

<sup>62</sup> Friedman, *supra* note 53, at 508.

<sup>63</sup> Landers, *supra* note 53.

<sup>64</sup> See generally Bethany Cole, *The Impact of the COVID-19 Pandemic on Access to Health Care*, Health Policy Brief no. 17, NAT'L ACAD. SOC. INS. (July 2020), <https://www.nasi.org/sites/default/files/research/Brief%20-%20Pandemic's%20Impact%20on%20Access%20to%20Care.pdf> (describing the impact of the pandemic on health care and on the social determinants of health); see also AHANA Alumni Advisory Council *Racial Disparities and COVID-19*, B.C. (Aug. 13, 2020), <https://www.bc.edu/content/bc-web/offices/alumni/sites/ahana-alumni-advisory-council/events.html> (panel discussion examining the disparate impact of the pandemic on people of color).

<sup>65</sup> Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SEC. BULL. 49, 49 (2010).

<sup>66</sup> *Id.*

<sup>67</sup> William J. Nelson, *Employment Covered Under the Social Security Program, 1935-84*, 48 SOC. SEC. BULL. 33, 34 (1985), <https://www.ssa.gov/policy/docs/ssb/v48n4/v48n4p33.pdf>.

Social Security reduces overall poverty rates among individuals over age 65.<sup>68</sup> Without Social Security, 38% would live in poverty, but including Social Security income, the level drops to 10%.<sup>69</sup> The racial disparity in retirement wealth remains substantial. Among people in that age group, 7% of Whites, 19.5% of Latinos, and 19% of Blacks face poverty.<sup>70</sup> Even with access to Social Security, these disparities persist because people of color are more likely to work in low-wage jobs with little opportunity for savings and to participate in private pension programs.<sup>71</sup> Pointing out these disparities is a critique of the continued racial disparities in employment opportunities and the statutory design of Social Security, perhaps enabled by weak administrative enforcement in employment and related areas. The role of the agency in producing data is essential to identifying the problems and proposing policies to address the disparities. Eliminating the payroll taxes that fund the Social Security and Medicare Trust Funds as former President Trump proposed in the guise of pandemic relief is *not* among the ways to address these problems.<sup>72</sup>

The Medicaid program makes provision for access to healthcare for low-income populations. Originally, it covered only the aged, blind, persons permanently and totally disabled, and caretakers of dependent children.<sup>73</sup> Later, pregnant women and all low-income children were added.<sup>74</sup> These eligibility criteria reflected historical efforts to identify the “deserving” or “worthy” poor.<sup>75</sup> The ACA expanded Medicaid coverage to include all low-income persons having incomes less than or equal to 138% of the federal poverty line—the expansion population.<sup>76</sup> The concept was to require states to expand their participation in the Medicaid program to include all low-income populations and to establish the principle that merely being poor was sufficient to qualify for government help. The Supreme Court famously ruled in *National Federation of Independent Business v. Sebelius*, however, that conditioning the traditional Medicaid payments to states on coverage of the expansion population was unconstitutionally

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<sup>68</sup> *Policy Basics, Top Ten Facts About Social Security*, CTR. ON BUDGET & POL’Y PRIORITIES (Aug. 10, 2020), <https://www.cbpp.org/research/social-security/top-ten-facts-about-social-security> (“Fact #6: Social Security Lifts Millions of Elderly Americans Out of Poverty.”)

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (“Fact # 8: Social Security is Particularly Important for People of Color.”)

<sup>71</sup> *Id.*

<sup>72</sup> Alan Rappeport, *White House Wants Companies to Foot Payroll Tax Bill for Workers*, N.Y. TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/27/us/politics/trump-payroll-tax-coronavirus.html>.

<sup>73</sup> BARRY R. FURROW ET AL., *THE LAW OF HEALTH CARE ORGANIZATION AND Finance* 443 (8th ed. 2018) [hereinafter Furrow, et al.].

<sup>74</sup> *Id.*

<sup>75</sup> David Orentlicher, *Medicaid at 50: No Longer Limited to the “Deserving” Poor?*, 15 YALE J. HEALTH POL’Y L. & ETHICS 185, 185 (2015).

<sup>76</sup> Furrow, et al., *supra* note 73, at 446.

coercive.<sup>77</sup> As a result of making adoption of the expansion optional, to date, twenty-eight states plus the District of Columbia have expanded, seven states have expanded with a waiver—more on that shortly—three recently adopted expansions through a ballot initiative, and twelve states have not expanded.<sup>78</sup> The states that have not expanded include Texas and the southern states east of it, except for Louisiana and Arkansas, as well as Kansas, South Dakota, Wisconsin, and Wyoming.<sup>79</sup> Studies show that the Medicaid expansion improves access to care, affordability of care, and financial security among low-income populations.<sup>80</sup> Many states that did not adopt the expansion have some of the highest populations of Blacks and Hispanics in the country and some of the poorest measures on general population health.<sup>81</sup> While the Families First Coronavirus Response Act contains a provision for a 6.2% increase in federal Medicaid funding for qualifying states and federal support for other COVID-19 expenditures, the disruption and increase in the Medicaid population due to unemployment will outstrip these appropriations.<sup>82</sup>

Nationally, the Medicaid population is 41% White, 20% Black, 30% Hispanic, 4% Asian/American or Pacific Islander, and 1% Native American.<sup>83</sup> The 2019 Census figures for the total population indicate that nationally, Whites comprise 76.3%, Blacks 13.4%, Native Americans 1.3%, Asian Americans 5.9%, Native Hawaiians/Pacific Islanders 0.2%, Hispanic or Latino 18.5%, and non-Hispanic Whites 60.1%.<sup>84</sup> These statistics mean that although Whites comprise a majority of Medicaid recipients, Blacks and Hispanics are overrepresented in the

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<sup>77</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580, 585 (2012).

<sup>78</sup> *Status of State Medicaid Expansion Decisions: An Interactive Map*, KFF (Apr. 13, 2021), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/> (noting that twelve states have failed to adopt the Medicaid expansion available through the ACA).

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

<sup>80</sup> Trudy Liberman, *Even as COVID-19 Rages, Some States Refuse to Expand Medicaid to Their Poorest Residents*, July 28, 2020, <https://centerforhealthjournalism.org/2020/07/27/even-covid-19-rages-some-states-refuse-extend-health-insurance-their-poorest-resident-https://publichealth.wustl.edu/wp-content/uploads/2019/09/Medicaid-Expansion-Brief-final-PDF.pdf>

<sup>81</sup> Jesse Cross-Call and Matt Broaddus, *States That Have Expanded Medicaid Are Better Positioned to Address COVID-19 and Recession*, CTR. ON BUDGET & POL'Y PRIORITIES (July 14, 2020), <https://www.cbpp.org/research/health/states-that-have-expanded-medicaid-are-better-positioned-to-address-covid-19-and>.

<sup>82</sup> Cole, *supra* note 64.

<sup>83</sup> *Distribution of the Nonelderly with Medicaid by Race/Ethnicity*, KAISER FAM. FOUND. (2018), <https://www.kff.org/medicaid/state-indicator/medicaid-distribution-nonelderly-by-raceethnicity/>.

<sup>84</sup> *Quick Facts*, U.S. CENSUS (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

Medicaid population in relation to their representation in the population as a whole.<sup>85</sup> Of course, these percentages vary considerably by state, consistent with the composition of a state's population. For example, in Iowa, 70% of Medicaid recipients are White, 11% are Black, and 12% are Hispanic.<sup>86</sup> In Arkansas, 61% are White, 24% Black, and 10% Hispanic.<sup>87</sup> The Alabama Medicaid population is 46% White, 43% Black, and 7% Hispanic.<sup>88</sup> In Massachusetts, 47% are White, 12% are Black, and 30% are Hispanic.<sup>89</sup> Approximately 4% of the population, or 11.4 million people, are undocumented immigrants who are ineligible for Medicaid or any other federal public health program, except emergency care.<sup>90</sup> Other lawfully present immigrants also are not eligible or qualified to receive Medicaid and other federal benefits.<sup>91</sup> This absence of resources is a threat to the entire country when a highly communicable disease is circulating.<sup>92</sup>

State Medicaid programs exhibit a great deal of variation. Additionally, the Medicaid statute makes a provision for states to apply for waivers from certain program elements for demonstration projects.<sup>93</sup> States have used waivers to experiment with different coverage options, financing, and delivery reforms.<sup>94</sup> The statute authorizes the Secretary to approve "any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives" of Medicaid.<sup>95</sup> During the Trump administration, the Centers for Medicare and Medicaid Services in HHS approved state requests to

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<sup>85</sup> Compare these overall population statistics with statistics on racial distribution of Medicaid population *supra* note 83 and accompanying text.

<sup>86</sup> See *Distribution of the Nonelderly with Medicaid by Race/Ethnicity, FY 2019*, KAISER FAM. FOUND., <https://www.kff.org/medicaid/state-indicator/medicaid-distribution-nonelderly-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22collid%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited May 27, 2021).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States, January 2015*, U.S. DEP'T HOMELAND SEC. POPULATION ESTIMATES, 1 (Jan. 2021), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop\\_Estimate/UnauthImmigrant/unauthorized\\_immigrant\\_population\\_estimates\\_2015\\_-\\_2018.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf).

<sup>91</sup> Tanya Broder, Avideh Moussavian, and Jonathan Blazer, *Overview of Immigrant Eligibility for Federal Programs*, NAT'L IMMIGR. LAW CTR. 1–4, (Dec. 2015), <https://www.nilc.org/wp-content/uploads/2015/12/overview-immeligfedprograms-2015-12-09.pdf> (describing relationship between immigration status and eligibility for federal benefit programs). According to a recent study, "[a]pproximately 5 million undocumented immigrants were uninsured in 2017." Report to the New Leadership, *supra* note 38, at 20.

<sup>92</sup> See Liberman, *supra* note 80.

<sup>93</sup> Furrow et al., *supra* note 73, at 447–49.

<sup>94</sup> *Id.*

<sup>95</sup> Social Security Act § 1115, 42 U.S.C. § 1315(a) (2014).

attach work requirements to the eligibility criteria for Medicaid.<sup>96</sup> The notion of work requirements echoes the efforts since colonial times to ensure that public support is not expended on the “sturdy beggar,” “the able-bodied adult,” or the freeloader who just chooses not to maintain gainful employment. In February 2020, the United States Court of Appeals for the District of Columbia Circuit in *Gresham v. Azar* invalidated the waiver approved by HHS Secretary Alex Azar which authorized Arkansas to impose work requirements.<sup>97</sup> The court ruled that work requirements were inconsistent with the primary purpose of the Medicaid statute.<sup>98</sup> The statute provides that the purpose of Medicaid is:

to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care. . . .<sup>99</sup>

The HHS letter approving the Arkansas waiver identified three objectives that Secretary Azar asserted Arkansas Works would promote: improving health outcomes; addressing behavioral and social factors that influence health outcomes; and incentivizing beneficiaries to engage in their own health care and achieve better health outcomes.<sup>100</sup> The approval letter opined that the Arkansas community engagement requirements would encourage beneficiaries to obtain and maintain employment or other activities that correlate with improved health and wellness.<sup>101</sup>

In an opinion by Judge Sentelle, the D.C. Circuit panel rejected the agency’s argument that the Secretary’s discretion in granting waivers was unreviewable, citing *Citizens to Preserve Overton Park, Inc., v. Volpe*<sup>102</sup> and *Department of Commerce v. New York*<sup>103</sup> for the proposition that the APA “exception from judicial review for an action committed to agency discretion is ‘very narrow.’”<sup>104</sup> The court stated that the Medicaid statute reflected Congress’s clear purpose to provide health care coverage, and that under *Chevron*, the agency was required

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<sup>96</sup> *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State*, KAISER FAM. FOUND. (Mar. 18, 2021), <https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/>.

<sup>97</sup> *Gresham v. Azar*, 950 F.3d 93, 100 (D.C. Cir. 2020).

<sup>98</sup> *Id.*

<sup>99</sup> 42 U.S.C. § 1396-1 (1984).

<sup>100</sup> *Gresham*, 950 F.3d at 97.

<sup>101</sup> *Id.* at 103–02.

<sup>102</sup> *Citizens to Pres. Overton Park, Inc., v. Volpe*, 401 U.S. 402, 410 (1971).

<sup>103</sup> *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2568 (2019).

<sup>104</sup> *Gresham*, 950 F.3d at 98.

to give “effect to the unambiguously expressed intent of Congress.”<sup>105</sup> The opinion rejected an effort to characterize the Secretary’s approval as helping the Medicaid population gain financial resources to purchase insurance as a “post hoc rationalization” citing *Motor Vehicles Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*<sup>106</sup>

The final part of the court’s opinion concluded that the approvals of the Arkansas work requirements were arbitrary and capricious for failure to address important aspects of the problem, again relying on *State Farm*.<sup>107</sup> Here, the court noted the agency’s failure to account for loss of coverage as “a matter of importance under the statute.”<sup>108</sup> About 25% of persons subject to work requirements lost coverage in five months.<sup>109</sup> The court noted that while “it is not arbitrary or capricious to prioritize one statutorily identified objective over another, it is an entirely different matter to prioritize non-statutory objectives to the exclusion of the statutory purpose.”<sup>110</sup> Efforts to condition Medicaid eligibility on work requirements that Congress did not authorize continues the four-hundred-year-old practice of trying to reserve government support for the worthy poor.

The linked economic and health crises of the pandemic coupled with the racial reckoning engendered by police killings of people of color provide an opportunity to reexamine existing practices across many public policy realms. These crises especially call upon the country to reinforce the social insurance infrastructure so that it provides adequate economic security in ordinary times, and to ensure that it rises to the occasion to support people in times of crisis. The recently enacted stimulus legislation, the American Rescue Plan Act,<sup>111</sup> contains the seeds for larger reform. Signed by President Biden on March 11, 2021, the COVID-19 stimulus builds upon many of the measures in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)<sup>112</sup> from March 2020 and in the Consolidated Appropriations Act, 2021<sup>113</sup> from December 2020.

The American Rescue Plan Act provides \$1400 stimulus checks to individuals making under \$75,000 and \$1400 per dependent.<sup>114</sup> People with incomes above

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<sup>105</sup> Gresham, 950 F.3d at 100 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

<sup>106</sup> *Id.* at 101 (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 50 (1983))

<sup>107</sup> *Id.* at 102 (citing *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>108</sup> Gresham, 950 F.3d at 103.

<sup>109</sup> *Id.* at 102–03.

<sup>110</sup> *Id.* at 104.

<sup>111</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 247.

<sup>112</sup> CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

<sup>113</sup> Consolidated Appropriations Act, Pub. L. 116-260 (2021).

<sup>114</sup> Pub. L. No. 117-2, § 6428B (providing 2021 recovery rebates to individuals).

\$80,000 receive no payment.<sup>115</sup> The law continues the \$300-per-week increase in unemployment benefits.<sup>116</sup> Other provisions increase tax subsidies for insurance under the Affordable Care Act and provide subsidies for COBRA extensions of health insurance for workers who become unemployed.<sup>117</sup> In addition, the bill temporarily expands the child tax credit from a maximum of \$2000 per child to \$3600 for children up to age 5 and as much as \$3000 for children 6 to 17.<sup>118</sup> Low-income people who are currently not eligible for any part of the credit would receive the full value of the credit.<sup>119</sup> In the second half of 2021, the federal government will send advance payments of the credit in installments.<sup>120</sup> The advance payments would serve as a form of guaranteed income for families with children.<sup>121</sup>

Among the cities in the United States that are experimenting with payments to families to increase their incomes are Stockton, California and Chelsea, Massachusetts.<sup>122</sup> The Stockton demonstration began in 2019 and has made payments of \$500 per month to 125 randomly selected families.<sup>123</sup> A recent study found that the Stockton payments reduced income volatility, that families tended to spend the money on essentials, and that recipients were able to handle unexpected expenses better, to pay down their debts, and help friends and relatives.<sup>124</sup>

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<sup>115</sup> Pub. L. No. 117-2, § 6428B. See Marc Finer, *A Summary of the Key Individual and Business Tax Provisions of the American Rescue Plan Act*, JDSUPRA (Mar. 18, 2021), <https://www.jdsupra.com/legalnews/a-summary-of-the-key-individual-and-1641542/> (“The payments are phased out for single filers with adjusted gross incomes between \$75,000 and \$80,000 (between \$150,000 and \$160,000 for married persons filing jointly).”).

<sup>116</sup> Pub. L. No. 117-2, § 9013 (amending Section 2104(b)(3)(A)(ii) of the CARES Act (15 U.S.C. 9023(b)(3)(A)(ii)) to extend these additional unemployment benefits until September 6, 2021).

<sup>117</sup> Pub. L. No. 117-2, § 9662 (modifying tax credits for qualifying health insurance coverage).

<sup>118</sup> Pub. L. No. 117-2, § 9611(a)(i)(3) (increasing child tax credits for 2021).

<sup>119</sup> Pub. L. No. 117-2, § 9611(a)(i)(1) (providing for refundable tax credit).

<sup>120</sup> Pub. L. No. 117-2, § 7527A (providing for periodic payment of credit).

<sup>121</sup> Thomas Kaplan, *What's in the Stimulus Bill? A Guide to Where the \$1.9 Trillion Is Going*, N.Y. TIMES, <https://www.nytimes.com/2021/03/07/us/politics/whats-in-the-stimulus-bill.html> (updated Mar. 17, 2021).

<sup>122</sup> See Annie Lowrey, *Stockton's Basic-Income Experiment Pays Off*, ATLANTIC (Mar. 3, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/stocktons-basic-income-experiment-pays-off/618174/> (describing study of impact of Stockton, California, pilot); Shirley Leung, *Chelsea Is About to Become the Country's Biggest Experiment in Giving out No-strings-attached Checks*, BOSTON GLOBE (Oct. 17, 2020), <https://www.bostonglobe.com/2020/10/17/business/chelsea-is-about-become-countrys-biggest-experiment-giving-out-no-strings-attached-checks/> (reporting on announcement of Chelsea, Massachusetts pilot).

<sup>123</sup> Lowrey, *supra* note 122.

<sup>124</sup> *Id.*

In addition, the payments to Stockton families did not discourage work.<sup>125</sup> In November 2020, Chelsea used money from a foundation to begin giving about 2,000 low-income families \$200 to \$400 a month, money that can be used for anything from food to paying bills.<sup>126</sup> These demonstration projects promise to provide concrete evidence about the efficacy of measures to increase the incomes of low-income families.<sup>127</sup> The results may also dispel concerns about whether providing cash assistance with no strings attached will discourage work participation, an objection frequently raised to traditional welfare and cash support programs.

During the Great Recession of 2008, Rahm Emanuel, then Chief of Staff to former President Obama, borrowed an expression credited to Sir Winston Churchill to spur innovative responses: “Never let a good crisis go to waste.”<sup>128</sup> The United States needs to accept that challenge now.

The social insurance infrastructure of the country needs to be augmented to meet the risks that the contemporary economy and the threat of pandemics and environmental disaster pose. In early March 2020, I attended the annual policy conference of the National Academy of Social Insurance (the Academy)—the last trip I took by plane before the pandemic—the centerpiece of which was the release of a report examining approaches for using Medicare to expand health insurance coverage.<sup>129</sup> The American Rescue Act provisions that subsidize the cost of private insurance and that provide incentives to states that have not yet adopted the Medicaid expansion have the potential to advance the goal of universal coverage. Recently, the Academy released the preliminary working paper examining ways to use the social insurance and public benefits infrastructures to ensure that all individuals and families in the United States have sustainable levels of income.<sup>130</sup> Provisions in the American Rescue Act that expand support to families with children, albeit temporary, represent progress along that path. Finally, the enhancements to the unemployment insurance system in the American Rescue

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<sup>125</sup> *Id.*

<sup>126</sup> Leung, *supra* note 122.

<sup>127</sup> Lowrey, *supra* note 122 (observing that “[t]he best way to get people out of poverty is just to get them out of poverty; the best way to offer families more resources is just to offer them more resources”). The article also makes reference to a coalition of mayors who support the concept of guaranteed incomes and the proposal by Senator Mitt Romney, a Republican from Utah, to replace the Temporary Assistance to Needy Families program with a child allowance.

<sup>128</sup> *Never Waste a Good Crisis*, KLOUDLEARN (Apr. 27, 2020), <https://kloudlearn.medium.com/never-waste-a-good-crisis-8018c7d93e17>.

<sup>129</sup> ELIZABETH DOCTEUR, RENÉE M. LANDERS, BETHANY COLE, MARILYN MOON & CORI UCCELLO, *EXAMINING APPROACHES TO EXPAND MEDICARE ELIGIBILITY: KEY DESIGN OPTIONS AND IMPLICATIONS* (2020), <https://www.nasi.org/research/2020/examining-approaches-expand-medicare-eligibility-key-design>.

<sup>130</sup> *Assured Income for the 21st Century*, NAT’L. ACAD. SOC. INS. (2021), <https://secure.nasi.org/assured-income/>.

Act recognize that the fortunes of workers who become unemployed due to a pandemic, a natural disaster, or some other circumstance out of their control should not rest with uneven systems operated by states.<sup>131</sup>

The American Rescue Act represents a down payment on future reforms and must not be the last word.<sup>132</sup> Thank you, again, for this opportunity to participate in this important symposium.

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<sup>131</sup> The National Academy of Social Insurance's Unemployment Insurance Task Force is examining options for reform of this key support for vulnerable workers. *See* Elaine Weiss, *Initial Meetings of Unemployment Insurance Task Force Highlight Concerns About the Disproportionate Share of Women and Workers of Color in Precarious Jobs*, NAT'L ACAD. SOC. INS. (Feb. 24, 2021), <https://www.nasi.org/discuss/2021/02/initial-meetings-unemployment-insurance-task-force-highlight>.

<sup>132</sup> The National Academy of Social Insurance has launched a Task Force on the potential impacts of COVID-19 on the population, the economy, and social insurance in the United States recognizing that the current crisis is unlikely to be the last. *See also* William Rodgers, III & Renée M. Landers, *American Rescue Plan Strengthens the Nation's Social Insurance System*, NAT'L ACAD. SOC. INS. (Mar. 17, 2021), <https://secure.nasi.org/civicrm?civiwp=Civi-CRM&q=civicrm%2Fmailing%2Fview&reset=1&id=4128>.