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Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design

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Abstract. This article explores how to build political support for law reform designed to achieve economic redistribution. Specifically, I analyze and compare reforms that aim to redistribute by targeting benefits at low-income individuals through an income or means test, versus those that emphasize “universal” allocation of benefits, not conditioned on poverty. I argue that notwithstanding that we should expect universal provision (by definition) to achieve less redistribution than means testing, universalist policies ultimately may be more effective in achieving this goal because they are likely to be more politically durable, and—more intriguingly—to create social conditions that increase toleration for redistribution. I support this argument by drawing upon the growing body of research in psychology and economics suggesting that people have a mixture of self-regarding and other-regarding impulses, and that some forms of social organization are more likely than others to elicit pro-social behavior. Universalist programs, I argue, plausibly increase preferences for redistribution by tapping social norms of reciprocity, generating group identity effects based on a sense of common vulnerability, and serving as a “policy frame” that de-emphasizes the salience of low-income people as an undeserving “out-group.” I use a case study of recent social insurance legislation as a springboard for developing an empirical research agenda that would help evaluate the strength of my thesis. The analysis offered by this article has implications for contemporary intellectual debates in such areas as tax policy, public finance, behavioral law and economics, distributive justice, law and psychology, health law.

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I. Introduction

How does one win popular support for laws designed specifically to redistribute economic wealth? One can hardly gainsay that this is a—perhaps *the*—defining issue for domestic policy in the age of Obama. Even as the current financial crisis has exposed the need for a reliable social safety net, attempts to respond through the political and legislative arenas have triggered increasingly hostile responses among conservatives, populists, Massachusetts voters, and incipient tea partiers. The puzzle of how to attract and preserve public support for law reform aimed at redistribution—of both income and risk—is of no small significance at this critical juncture of unsettled public sentiment and a motivated (though perhaps increasingly reticent) presidential administration.

If this is an issue for the moment, however, it is also an issue for the ages. Public debates have always been particularly contentious when they involve redistributive social policy. The questions of how to spread social risks and who should receive state largesse have, to cite just a few recent examples, fueled controversies over whether proposals for national health care reform ought to incorporate means testing, i.e., targeted transfers based on low income or means,¹ as well as sharp disagreements over expansions of coverage for Medicaid, the federal program that supplies health insurance to low-

¹ John Aloysius Farrell, *Obama Hides Medicare Means-Testing in Plain Sight – In His Big Budget*, U.S. NEWS & WORLD REPORT (March 9, 2009); Shailagh Murray, *Democrats Stung by Dissenters*, WASH. POST, p. A01 (March 10, 2009) (discussing recent debates over whether Medicare drug benefits ought to be means-tested).

income Americans,² and the Children’s Health Insurance Program (CHIP), the federal program that subsidizes health insurance for the children of low-income families.³

In recent years, a number of scholars from law and social sciences have advocated expanding social insurance and other aspects of the “social safety net,” with particular attention to the needs of low-income citizens.⁴ Much academic work offers compelling normative arguments for intervention, paired with proposals for law reform. Nevertheless, the strikingly slow progress of redistributive law reform during Obama’s first year in office suggests that advocates of such initiatives failed to attend to more practical questions of how redistributive policies can garner and retain robust public support, particularly when perceived to redirect resources away from politically engaged individuals who fear they will emerge economically worse off (embodied canonically by Joe the Plumber in the 2008 election).⁵

This article aims to help provide those pragmatic insights. In particular, it analyzes and compares law reforms that purport to redistribute by targeting benefits at poor individuals through an income or means test, with those that rely more heavily on “universally” allocated benefits, not conditioned on poverty. I argue that notwithstanding the more muted effects of universal provision on redistribution relative to means testing,

² Jeffrey L. Stoltermann, *Medicaid and the Middle Class: Should the Government Pay for Everyone’s Long-Term Health Care?* 1 ELDER L. J. 251 (1993); Colleen M. Grogan & Eric M. Patashnick, *Universalism within Targeting: Nursing Home Care, the Middle Class, and the Politics of the Medicaid Program*, SOCIAL SERVICE REV. 52 (March 2003).

³ See, e.g., *Bush Vetoes SCHIP Expansion*, WASH. TIMES (October 4, 2007) (emphasizing deep ideological divide between President Bush and Senator Obama with respect to Democratic bill to increase federal outlays on SCHIP by roughly \$30 billion, with Bush explaining that “Their proposal would result in taking a program meant to help poor children and turning it into one that covers children in households with incomes up to \$83,000 a year” and Obama responding that “Washington’s failure shows a callousness of priorities that is offensive to the ideals we hold as Americans.”). The Obama administration made restoration of the bill an early legislative priority. *Obama Views Children’s Health Bill as Step One: President Signs Bill Extending Coverage to 4 Million More Kids*, ASSOCIATED PRESS (Feb. 4, 2009) (bill authorized spending an added \$32.8 billion to expand the health coverage program to include about 4 million more children).

⁴ To cite just a few sources, see e.g., David Charny, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601, 1636-43 (1996) (arguing for collectivization of risk through public-based social insurance pools); JACOB S. HACKER, *THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE, AND RETIREMENT AND HOW YOU CAN FIGHT BACK* 182-91 (2006) (advocating stronger social protection through a combination of state-provided social insurance and employer mandates); MICHAEL J. GRAETZ AND JERRY L. MASHAW, *TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE* 281-305 (1999) (developing a proposal for comprehensive reform of social provision using a social insurance model); KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004) at 243-57 (describing changes in the traditional career model of employment and accompanying “collapse of the private welfare state.”).

⁵ Joe the Plumber was a moniker that the McCain-Palin campaign bestowed on Joseph Wurzelbacher, who famously confronted Barack Obama during the 2008 presidential campaign about the perceived deleterious effects that Obama’s tax policy would have on his business. See Larry Rohter, “Plumber From Ohio Is Thrust Into Spotlight”. *New York Times* (Oct. 15, 2008). Interestingly, it appeared that Mr. Wurzelbacher would likely have been a net beneficiary from the proposed Obama tax plan. *Id.*

Although the focus of my essay is the support by the mass public, other kinds of political constraint are also very significant— e.g., support by businesses on whom regulations might be imposed, or insurers concerned about their product being crowded out by state provision.

universalist policies ironically may be more effective at achieving this goal due to greater political durability, and—more intriguingly—by catalyzing social toleration for redistribution. I support this argument by drawing upon the growing body of research in psychology and economics suggesting that people have a mixture of self-regarding and other-regarding impulses, and that some forms of social organization are more likely than others to elicit pro-social behavior. Universalist programs, I argue, plausibly increase preferences for redistribution by tapping social norms of reciprocity, generating group identity effects based on a sense of common vulnerability, and serving as a “policy frame” that de-emphasizes the salience of low-income people as an undeserving “out-group.” I use a case study of recent social insurance legislation as a springboard for developing an empirical research agenda that will help evaluate the strength of my thesis.

Although a great deal of legal scholarship concerns itself with questions of inequality and redistribution, the legal academy has largely overlooked the question of means-testing versus universalism. This is so notwithstanding that it is a key lever of institutional design and an issue that has long consumed the attention of political scientists, economists, and public policy experts. This article tries to correct this lacuna by analyzing, in depth and from an interdisciplinary perspective, this policy device that ought to command a key place in the toolkit of legal scholars and law reformers.

A second contribution of this article is at the level of theory. Recent years have seen a surge of interest among legal scholars in social cooperation, particularly in the study of the Internet,⁶ and the behavioral and cultural mechanisms by which social preferences evolve or can be “nudged”.⁷ Although existing legal scholarship has begun to explore applications of these insights, their theoretical development and policy extensions are far from exhausted. This article aims both to extend the grasp of our theoretical understanding on social psychology, social cooperation, and law, and also to extend current legal scholarship into a new legal arena, that of reforming the social safety net. As such, it contributes to a lively and growing discourse within legal scholarship pertaining not only to distributive justice and social welfare law, but also to tax policy / public finance, legislation, health law, environmental law, work law, and administrative law.

Third, this article forms part of a larger project that aims to reorient the legal study of social welfare programs to account for the political impact of legal design. Legal scholarship on problems of distributive justice has a tendency—understandable, given the challenges of doing careful theoretical work—to stop short of tackling gritty questions of political feasibility. A familiar refrain—one I myself have invoked in prior work—is to identify questions of feasibility as “beyond the scope of this article,” or “a task for political actors.” In many ways, this article aims less to retrace the normative case for redistribution than to make the case that such an endeavor cannot stand wholly apart from pragmatic challenges of cultivating political support and sustainability. This article,

⁶ E.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (Yale University Press 2006).

⁷ E.g., Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL’Y REV.* 147 (2006); RICHARD H. THALER AND CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

through analysis and illustration, invites legal scholars to make use of what social scientists have to say about the emergence and evolution of social preferences and develop a scholarly, well-informed approach to sustainable legal reform. Understanding the role that social cooperation can play in building politically sustainable redistributive programs is important, timely, and critical.

* * *

From the standpoint of efficacy, the contest between means-testing and universalism as instruments of redistribution would seem to be over before it has begun. Means-testing is, both on its face and by design, the most direct and administratively efficient way to redistribute resources. Some have argued, however, that universal forms of provision might actually be more effective in achieving meaningful redistribution. The “paradox of redistribution” theory posits that regimes with more universal provision across economic groups may achieve greater redistribution and poverty reduction in the long run because they generate more political support.⁸ There are a number of reasons to think this theory is plausible.

First, “middle-class”⁹ beneficiaries of a universalist regime might, of course, exert their political influence on the administration of universal programs to favor the well-off at the expense of the less well-off. Nevertheless, universal provision might still achieve more redistribution than mean-testing because improvements that benefit the middle class will in some instances improve the lot of everyone. Some years ago, a co-author and I critically evaluated special education reforms in American public education.¹⁰ Part of our argument was that middle-class parents have used their sharp elbows and political clout to direct educational resources towards their own children.¹¹ Nonetheless, as time has passed, it seems plain that advocacy (largely by middle-class parents) on behalf of their own children succeeded in shifting the baseline—relative to the *status quo ante*—of publicly provided services for all children with disabilities. Special education has been transformed in ways that benefit both wealthy and poor children with special needs—albeit perhaps not in equal measure—even if partially the result of spill-over from the largely self-interested efforts of middle-class parents.

Second, universal provision might increase redistribution by “beneficially” crowding out a system of private and quasi-private welfare provision that *increases*

⁸ Walter Korpi & Joakim Palme, *The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries*, 63 AM. SOC. REV. 661 (1998).

⁹ This term often remains undefined in discourse about means-testing and universalism, although it is typically used simply to denote those who are in the middle range of the income distribution and whose income falls above the cut-off point for means-tested benefits. For present purposes I also use the term in this shorthand way, although it bears emphasis that there are very difficult conceptual and empirical questions in defining the “middle class,” e.g., whether it should be culturally, educationally, occupationally, or economically defined, whether a sharp line can be drawn between it and adjacent “classes,” and so on.

¹⁰ MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* (1997).

¹¹ *Id.*, at 85-92 (describing relative success of middle- and upper-income parents, as compared with parents of lower socioeconomic status, in securing special educational resources for their own children in American public schools).

economic inequality. Even if universal programs facially redistribute less efficiently than means-tested programs, in the aggregate they may do a better job because *some* redistribution through a universal program is better than no redistribution at all.

Third, and perhaps most intriguingly, I argue that universalism may cultivate public support in a way that transcends mere strategic “leveraging” of middle- and upper-income citizens’ pursuit of their own egoistic interests. Rather, I explore the possibility that the degree of universality of a social assistance program might *itself* influence public preferences for redistribution. Standard “median voter” accounts of mass political behavior, grounded in traditional rational choice theory, have little to say about the potential for policies to *shape* or alter citizen preferences. Institutionally-oriented theorists within political science, law, and comparative welfare studies, by contrast, believe that the design of social policies can have a significant influence on the formation of social preferences. Institutionally-oriented theories tend, however, to be imprecise about the psychological mechanisms by which this might occur.

In this article, I undertake to refine existing accounts of how policies can shape political preferences about redistribution by drawing upon the growing body of research in psychology and economics suggesting that people have a mixture of self-regarding and other-regarding impulses, and that some forms of social organization are more likely than others to elicit pro-social behavior. One finding is that people may be generous, even at personal cost, when participating in a cooperative enterprise in which they are satisfied that others are reciprocally cooperating. Second, beliefs about desert, and hence redistribution, are influenced by context and by how an issue is presented. Third, people tend to be more generous towards others whom they perceive as belonging to their own group, and identification with a particular group can be made more or less salient depending on context.

I argue that more universal protection against economic insecurity, because all contribute and all might receive benefits, fits more readily with reciprocity ideals than a program that taxes some citizens and transfers benefits to others. If participants feel that others are contributing and cooperating, they might more readily tolerate redistribution within the scheme, even at personal cost.¹² Conversely, means-testing, by making poverty-based group status highly salient, might undermine public generosity. In targeted programs, some citizens must be singled out as needy. Public debate over who is in and who is outside the group that “deserves” benefits might only sharpen public focus on fraud and abuse at the eligibility margin, and among those who tend to have a strong belief in a “just world,” cue the cognitive schema by which they make sense of the persistence of poverty by attributing blame to those who are needy. Under a more

¹² The concept of reciprocity has sometimes been used as a way to justify work requirements or other “quid pro quo” devices that require recipients of means-tested benefits to earn their entitlements. See, e.g., Amy Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 L. & CONTEMP. PROB. 257, 291 (2000). See also Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA. L. REV. 373, ____ (2006) (analyzing the analytic foundations of such arguments). My argument takes a different tack by emphasizing the ways in which universally-allocated benefits can *themselves* satisfy reciprocity ideals and in doing so, increase tolerance of redistribution within universal programs.

universal system, boundary questions disappear and thus poverty-based “out-group” perceptions—and with them, attributions of blame and opportunism that undermine trust in fellow citizens—become less salient. Aspects of identity that all citizens share— anxiety about common life-cycle risks—become more salient. Moreover, to the extent that a more universal beneficiary class perceives itself as being “in this together,” and having a common vulnerability, it is possible that more universalist welfare institutions could facilitate a type of social learning that alters social preferences in a more stable way over time, evolving towards greater tolerance of redistribution.

Let me emphasize that I do not mean to advocate the use of “tricks” from behavioral psychology to make redistribution opaque and thus lull citizens who might not otherwise support redistribution into voting for progressive social policies. My normative ideal is to design institutions in a way that increases public tolerance for redistribution without obscuring its existence.

If my thesis is plausible, how might we think about law reform moving forward? Following exposition of my core analytic claims, I sketch out an illustrative case study of recent legislation in California that established a program of paid family leave insurance that offers wage replacement to workers who must take leaves of absence to care for infants or seriously ill family members. I do not present the illustration as a sample “success story.” On the contrary, I believe (and we should predict) that it is too early to know. Instead, I use it as an opportunity to think about a research agenda that would help evaluate the strength of my thesis.

The article proceeds as follows. Part II sets out some operating definitions to lay the groundwork for my argument. In Part III, I explore economic and political arguments in favor of universalist provision. I explain how standard economic justifications for universal social insurance do not incorporate any particular normative commitment to income redistribution and how on the face of it, targeting would seem more efficient despite certain distinct costs that may dampen that efficiency. I then turn to arguments that efficiency aside, political considerations may—paradoxically—favor universal provision for achieving redistribution. However, I argue, existing theory on the politics of universalism and wealth redistribution has failed to offer a sufficiently particularized account for the motivational underpinnings of this phenomenon. In Part IV, I introduce a parallel literature from psychology and behavioral economics that enriches our understanding of redistributive motivation. Bringing this literature to bear on the political account from Part III, I contend, enables us to think in a more nuanced way about the political and institutional conditions under which the public might support redistributive social policy. Part V illustrates this argument by discussing some specific institutional design dilemmas and explains why some choices might be better than others for achieving redistribution. In Part VI, I push my thesis even further by considering whether universal welfare benefits might change attitudes on more than merely a transitory basis, inculcating what is variously referred to as “social solidarity,” fellow-feeling, or sense of collective responsibility. Part VII concludes.

II. Defining Terms.

Before I develop my substantive thesis, I wish to clarify some key terms. As used in this essay, the term “welfare state” broadly refers to government intervention in the economy to facilitate provision of cash benefits, health care, education, food, housing, and other goods associated with health and well-being.¹³ The goal of the welfare state is in part to enhance the welfare of the poor (including the working poor), largely through “vertical” redistributive transfers from well-off citizens to less well-off citizens, and in part to facilitate coordination, where private markets fail, of risk pools against common social risks and consumption smoothing across the life-cycle. It is also sometimes argued that another objective of the welfare state is to enhance an aspect of community that might variously be referred to as social cohesion, social solidarity, or sense of collective responsibility.

Welfare states may use different mixes of private versus public provision, direct versus indirect regulation of behavior, cash versus in-kind benefits, and—of particular importance for this essay—universal versus targeted allocations of benefits.¹⁴ Although the welfare state spans many different areas of social policy, e.g., public education, housing, environmental protection, my focus here is the various institutions that protect income security—“social insurance” in the broad sense. I make this my focus in part because it is a major aspect of the welfare state, and in part because I view it as a challenging case, in some respects, for the ultimate themes I wish to explore about the possibilities for shaping preferences more tolerant of redistribution.

The very broad definition of social insurance offered by Professors Michael Graetz & Jerry Mashaw is helpful for framing the central trade-off I wish to evaluate. Graetz & Mashaw define social insurance as a collective means for providing income security against a set of common risks that span the life cycle – youth, old age, illness, disability, death, involuntary unemployment, illness or infirmity of one’s dependents.¹⁵ They include within the scope of this broad definition three kinds of social provision: (i) means-tested, noncontributory programs; (ii) mandatory contributory (usually wage-

¹³ A helpful overview is provided in NICHOLAS BARR, *THE ECONOMICS OF THE WELFARE STATE*, FOURTH ED. 6-13 (2004).

¹⁴ “Welfare state” intervention can be implemented using a wide variety of actors and instruments. First the government can directly provide services, e.g., education, cash social assistance (what we generally think of as “welfare”), job training, old-age pensions, unemployment insurance, health insurance, hospitals, and so on. Second, it can impose monetary taxes or subsidies on behaviors to increase or decrease the marginal cost of specified behaviors, for example taxes on consumption of cigarettes, alcohol, and gasoline, and subsidies or tax credits on investments in low-income housing, health insurance, dependent care, mortgage interest, charitable donations, corporate health benefits, and retirement plans. Third, it can regulate behavior directly: prohibit sales of alcohol to minors, prohibit discrimination in housing and employment, or mandate that employers provide workers’ compensation. Finally, the government may finance private provision, for example the subsidization of private entities that offer prescription drug insurance to disabled and elderly individuals.

¹⁵ GRAETZ & MASHAW, *TRUE SECURITY*, *supra* note ____ at 56. More precisely, they define social insurance as “collectively-determined and legally binding promises to pay defined amounts to or on behalf of particular beneficiaries given the occurrence or continuation of an event or condition that impairs the adequacy of current family income.” *Id.*, at 57.

financed) programs with benefits calibrated to earnings—what people conventionally mean when they use the term “social insurance”; and (iii) voluntary employer-sponsored pension plans, health insurance, and other fringe benefits subsidized by government tax expenditures. In this essay, I often use the term “social insurance” in the conventional sense – to mean something most closely resembling (ii) – although the broader view is helpful for sorting through the spectrum of social provision designed to protect income security.

Means- or income-tested programs restrict eligibility to individuals whose personal or family income is below some threshold. The specific formula for defining the eligibility cut-off differs across programs. Examples of such programs include Temporary Assistance for Needy Families (TANF, the current manifestation of what was known, between 1935 and 1996, as Aid to Families with Dependent Children, or AFDC), the Earned Income Tax Credit, Supplemental Security Income (SSI) (directed at low-income elderly and disabled people), Medicaid, Food Stamps, Head Start, the National School Lunch Program, the Special Supplemental Nutritional Program for Women, Infants and Children, and housing programs for the poor. These programs are funded by direct expenditures from general tax revenues, rather than earmarked contributions by beneficiaries. Many of these programs also condition eligibility on other factors as well—e.g., the presence of children in the family or earned income.

A key feature of programs commonly understood to be universal is that eligibility for benefits is not conditioned on income. Eligibility is typically based on a prior record of contributions, and triggered by some specific contingency, such as unemployment, disability, or retirement after reaching a particular age. The major federal and state social insurance programs, such as Social Security (a federal program funded by payroll taxes that provides retirement income, survivors’ benefits, and disability coverage for eligible workers and their dependents) and Medicare (a federal program funded by payroll taxes and general revenues that provides hospital and medical benefits for persons age 65 and older and people with certain disabilities), fall in this category.

The rhetorical juxtaposition of “targeting versus universalism” risks overstating the distinction between them. It would be possible, for example, to characterize means-tested programs as a form of “universal insurance against experiencing severe poverty” (and moreover we might underestimate the number of citizens or households that at some point will fall below the means threshold for traditional welfare benefits). Conversely, just as we might overstate the narrowness of targeting of a means-tested program, so too might we overstate the universality of “universal” provision. Most transfer programs involve a degree of conditionality. For example, universal programs insure everyone, regardless of means, against loss of income resulting from the common risks of age, illness, disability, and so forth, but a collective desire to stem “moral hazard” – the risk that insurance will reduce citizens’ efforts to plan for future hazards and avoid preventable income loss—typically results in the imposition of eligibility conditions such as current or past work effort or sufficient incapacity. Nevertheless, means-tested and universal transfer programs occupy a different place on the spectrum of inclusiveness of beneficiary class. Thus it is probably most accurate to speak of *degrees* of universality.

Still, it is insufficient to define “universal” programs exclusively by the absence of formal means-testing. A substantial proportion of government social spending to increase income security is in the form of tax expenditures: subsidies, tax deductions, and the like. These kinds of benefits tend to be functionally, although not expressly, targeted at middle- and high-income individuals.¹⁶ For example, the beneficiaries of voluntary employer-based health and welfare programs subsidized by tax expenditures (Category (iii) in Graetz & Mashaw’s definition of social insurance) are disproportionately salaried, high-earning employees with stable, full-time jobs.¹⁷

In sum, then, although I argue that a greater emphasis on universalistic social insurance programs may increase progressive redistribution, my argument depends on how they are designed, more specifically, their *practical* coverage of a broadly inclusive class of persons that includes relatively low-income individuals or families as well as others who have greater means. For reasons I will elaborate more fully below, expanding universality might require efforts to cover the lowest wage-earners while not severing entirely the wage-earning link that can help avoid problems of moral hazard that might otherwise undermine the public legitimacy of the cooperative enterprise of social insurance. While there may be consensus on the utility of such devices, the devil is in the details: the stringency of eligibility criteria can vary widely, thus influencing the functional inclusivity of a given program, especially with respect to those whose attachment to the labor force is more precarious. This, in turn, will affect the degree to which a given non-means tested social insurance program is capable of progressive income redistribution.¹⁸

It also bears emphasis that I do not argue for the elimination of means-tested programs. Some hazards that are hard to define – incapacities that fall short of disability but impede wage earning, the ill fortune that may undermine opportunity or erode community or family support systems—may interfere with one’s wage-earning capacity in ways that are difficult or impossible to overcome.¹⁹ If expanding universal programs is successful in facilitating income redistribution to low-income citizens, we would expect the size of the population that experiences severe poverty to decline, but that does not mean it will disappear. There remains an important role for protection of those who incur

¹⁶ See Christopher Howard, *The Hidden Side of the American Welfare State*, 108 POL. SCI. Q. 403, 413, 416 (1993) (concluding that “the middle- and upper-income classes are the main beneficiaries of the hidden welfare state,” citing data showing that federal budget outlays on tax expenditures in 1990 was roughly one-third of what the government spent on traditional social insurance and means-tested social programs, and that the tax expenditures subsidizing corporate pensions and health insurance are among the largest in the American welfare state).

¹⁷ See Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 100-101 (1998) (describing the common exclusion of workers from employment-based fringe benefits such as pensions and health plans on the basis of insufficient past earnings or hours or lack of sufficient work history with one employer).

¹⁸ See, e.g., Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 337-38, 348, 389 (2001) (discussing the stringency of eligibility criteria for unemployment insurance and its functional effect of excluding many low-wage workers).

¹⁹ Graetz & Mashaw, *supra* note ____ at 64 (describing varieties of difficult-to-categorize hazards to income adequacy).

risks or hardships that are beyond the grasp of even more encompassing universal programs.

III. Economic and Political Arguments in Favor of Universal Social Insurance

Both economists and political scientists have offered arguments favoring universal provision of social insurance. In this Part I review these arguments in turn. An understanding of existing arguments from both disciplines will help situate my subsequent arguments as to the ways in which standard accounts are incomplete, or at least not specific enough, in explaining human motivation and the formation of social preferences.

a. The Efficiency Case for Social Insurance: Overcoming Market Failures

Mainstream public finance theory views social insurance as predominantly a mechanism for correcting or surmounting information and collective action problems that impede private risk pooling. Under this account, redistribution between rich and poor, if it occurs at all, is treated as largely epiphenomenal. Rather, if vertical redistribution (redistribution from rich to poor) is normatively desirable, it is best accomplished through the use of targeted transfers conditioned on means.

Social insurance can be seen as merely a large-scale version of mutual insurance, a mechanism for protection against uncertain future losses that operates by pooling the resources of individuals who face uncertainty. Pooling makes it possible to estimate the probability of loss in situations where it may be impossible to determine whether a given individual will incur a loss. To the extent people tend to be risk averse, insurance increases social welfare by reducing the psychological burden of uncertainty.

Certain risks, such as illness or unemployment, or loss of wage-earning capacity in old age, are common to many people over their life cycle. Given the potentially unexpected nature of illness and unemployment, an individual (or family) may be unable to accumulate an adequate savings buffer (and unable to obtain a loan) to absorb the losses. Insurance in these instances would increase social welfare by helping buffer against income interruptions with unexpected timing, and helping to smooth consumption over the life cycle.²⁰

Competitive insurance markets typically rely on a number of conditions, many of which depend on the availability of accurate information.²¹ For example, an insurer needs

²⁰ See, e.g., Zvi Bodie, *Pensions as Retirement Income Insurance*, 28 J. ECON. LIT. 28 (1990).

²¹ Private market insurance sets the price an individual must pay to participate (the premium) according to the probability they will incur a loss. Stated formally (and very simply), the competitive (or “actuarial”) insurance premium is $\pi_i = p_i L + T$, where p_i is the probability of the insured event occurring, L is the magnitude of the insured loss, and T is transaction costs. If accurate information as to the factors in the equation cannot be obtained, then it may be impossible to set an efficient price. See generally, John Hirshleifer & John G. Riley, *The Analytics of Uncertainty and Information—An Expository Survey*, 17 J. ECON. LIT. 1375, 1389–91 (1979); Michael Rothschild & Joseph Stiglitz, *Equilibrium in Competitive*

to be able to quantify risk in order to set an actuarially fair (and therefore efficient) price, but certain kinds of social hazard—such as risk of unemployment, longevity, long-term health, or future costs of health care—can be very difficult to quantify.²²

Private insurers also need accurate information about the risk characteristics of potential claimants. If there are significant information asymmetries between insurers and consumers, private insurance may be impossible.²³ Suppose, for example, that prospective insurance buyers have systematically better information about their own health risks, unobservable to insurers (i.e., there is *adverse selection*). Without means to distinguish between “high risk” and “low risk” consumers, a private insurance provider might charge a premium that is actuarially competitive *on average*, effectively presuming the presence of both high and low risk consumers. But such a practice is unlikely to be a viable business strategy: In particular, low-risk consumers may balk at that average premium (which implicitly subsidizes high-risk consumers), choosing simply to exit the market. If all such individuals exit, the private market provider will (at least eventually) realize that all its clients are high risk. The resulting outcome (sometimes referred to as the market for “lemons”)²⁴ is that a private market will supply insurance only to the high risk individuals (at an actuarially fair rate for that group), with all others inefficiently failing to purchase insurance.

Another information-based problem that affects insurance markets concerns private information about actions (i.e., *moral hazard*), whereby an individual who is fully insured will reduce efforts to avoid injury (*ex ante* moral hazard) or to mitigate costs, e.g., consumption of health care services, after occurrence of a covered harm (*ex post* moral hazard).²⁵ The insurer’s inability to monitor behavior perfectly means that it is unable to adjust prices to account for level of precaution. Consequently, it will charge rates that reflect an expectation that consumers will (inefficiently) reduce efforts to avoid loss.²⁶

Compulsory social insurance can provide the benefits of risk pooling to all who potentially value it more cheaply than private providers because it obviates the necessity

Insurance Markets: An Essay on the Economics of Imperfect Information, 90 Q.J. ECON. 629, 633–34 (1976); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 198 (1987) (reviewing information problems that interfere with efficient insurance).

²² See, e.g., Lester, *Unemployment Insurance*, *supra* note ___ at 364 (discussing this problem in the context of unemployment risk).

²³ See generally Mark V. Pauly, *Overinsurance and Public Provision of Insurance: The Roles of Moral Hazard and Adverse Selection*, 88 Q.J. ECON. 44 (1974).

²⁴ George A. Akerlof, *The Market for “Lemons”: Quality, Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970) (classic demonstration that where the quality of used cars cannot be ascertained, sellers with higher quality cars, because they cannot be fully rewarded, will exit the market leaving behind a “market for lemons”).

²⁵ See generally Pauly, *supra* note ___ at 56. There may also be moral hazard by intermediaries who provide services, e.g., a doctor who prescribes more services than are necessary knowing that the cost of her services will be indemnified by insurance.

²⁶ Steven Shavell, *On Moral Hazard and Insurance*, 93 Q. J. ECON. 541 (1979) (modeling the optimal insurance policy, where the cost of insurance factors in the ability of the insurer to observe level of care by the insured).

of sorting individuals based on unobservable or only partially observable characteristics.²⁷ Compulsory participation also improves the ability of the insurer to adjust *ex post* the cost of insurance if there are unexpected changes in risk of hazard or cost of losses. The costs imposed by moral hazard are more organic to the provision of insurance generally, and government provision may have no clear comparative advantage in addressing this problem.²⁸ As a result, social insurance contains devices designed to reduce moral hazard parallel to those used in private insurance, such as copayments, deductibles, and so forth. Compulsory provision can also address bargaining failures that may impede efficient provision such as myopia, signaling problems, collective action failures on the part of workers, and the like.²⁹

Within standard public finance analysis, the major efficiency risk of public mandates is crowd-out. Where a private market for goods or services already exists, introduction of universal government provision at no or reduced cost to public consumers might crowd out consumption of private goods and lead to a net depletion in supply. Of course, the private income freed up may be spent on things that are socially beneficial, and therefore it is possible that universal provision will increase social welfare. However, it is also possible that wealth or labor substitution effects will occur that reduce social welfare: some of those whose wealth increases may substitute leisure for labor and thus reduce productivity. Simultaneously, assuming the need to balance the budget, more universal provision will require an increase in marginal tax rates and those who bear the increase may have reduced incentive to work. If social consumption of a good is low or non-existent before government provision, crowd-out of private market provision is not likely to be significant. But here, instead, government intervention might crowd out “self-insurance,” i.e., private savings, or reliance on church, family, and friends for social support.³⁰

²⁷ Similar arguments can be made for the efficiency of compulsory intergenerational transfers (e.g., public pensions) financed either through accumulation of reserves, or pay-as-you-go financing, whereby current workers finance the pensions of current retirees. Here, state intervention enables efficient life-cycle income smoothing as a buffer against various risks by virtue of its capacity for a larger mutualization both between and within cohorts.

²⁸ Can cite claims as to comparative advantage on both sides; evidence modest at best of any government advantage.

²⁹ For general reviews of the extensive literature on bargaining failures in labor markets, see RICHARD EDWARDS, *RIGHTS AT WORK: EMPLOYMENT RELATIONS IN THE POST-UNION ERA* 42–76 (1993); PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 74–78 (1990); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1476–79 (1998). See also Deborah Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 *U. CHI. L. REV.* 1275, 1297–1311 (1991) (discussing savings failures caused by myopia, time-inconsistent preferences, and impulsiveness); David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 *Q. J. ECON.* 443 (1997); Joseph Bankman, *Tax Policy and Retirement Income: Are Pension Plan Antidiscrimination Provisions Desirable?*, 55 *U. CHI. L. REV.* 790, 808–09 (1988) (suggesting that rank-and-file employees may place less value on pension benefits, at the expense of salary, than more highly compensated employees).

³⁰ Note that crowd-out is not necessarily undesirable. The state might decide to create public programs with the goal of inducing “crowd out” of private insurance in instances where private provision results in either significant market failure (see above) or significant distributional inequities. However, if government provides a good at a quality that is lower or price that is higher than an individual could have obtained by purchasing it privately, there may be loss of welfare.

A key point here is that conventional efficiency-based justifications for compulsory universal social insurance tend to focus on market failure correction rather than on redistribution. True, those who make claims on the pool receive transfers that those who do not make claims do not. But from an *ex ante* perspective, people do not know whether they will suffer a loss; the decision to join the pool is based on a rational prediction that the utility from reducing uncertainty equals or exceeds the cost of membership. It is true that by mandating participation by individuals who would exit from a private insurance market, public insurance effectively redistributes resources from low-risk to high-risk populations relative to the market. Public pensions, for example, tend to redistribute resources from young to older generations (assuming pay-as-you-go financing), and from people with short to long life spans. These forms of horizontal and temporal redistribution may or may not reduce poverty or income inequality, depending on whether higher-risk people tend also to have low incomes. To the extent one has the normative goal of vertical redistribution (from rich to poor), means-testing is conventionally viewed as more direct and efficient.

b. Target Efficiency

Where redistribution is one's goal, orthodox economic theory would suggest that means-tested transfers of goods, services, or cash is the most efficient method. Means-based targeting, however, has its own inefficiencies, with economists disagreeing on whether they tip the balance of net efficiency.³¹

For example, efforts to target social transfers toward only low-income citizens are bedeviled by a number of administrative costs. Setting aside questions (having both administrative and normative dimensions) as to where to draw the eligibility line, how to measure need, what social unit (e.g., individual versus family) ought to be used for measuring one's resources, and the relevant time period over which to measure resources and needs, implementation of a targeted scheme faces certain administrative costs that accompany the use of an income "cut-off." For example, there can be problems of both over- and under-inclusiveness. Those who fall above the benefits cut-off may have incentives to conceal information in order to claim eligibility, giving rise to administrative costs associated with monitoring "leakage" outside the class of intended beneficiaries. On the flip side, there may be problems of incomplete take-up of benefits by intended beneficiaries due to lack of awareness of benefits, administrative difficulties associated with verifying eligibility, and avoidance of the perceived stigma of collecting benefits.³²

³¹ See generally, Ravi Kanbur & Nick Stern, *Transfers, Targeting and Poverty*, 2 ECON. POL'Y 111, 124-25 (1987) (reviewing empirical studies that try to evaluate this question); Nicholas Rowe & Frances Wooley, *The Efficiency Case for Universality*, 32 CAN. J. ECON. 613 (1999) (arguing that universal provision is more efficient in alleviating poverty than means-testing); Timothy Besley, *Means Testing Versus Universal Provision on Poverty Alleviation Programs*, 57 ECONOMICA 119 (1989) (arguing the opposite).

³² See generally, A. B. ATKINSON, INCOMES AND THE WELFARE STATE: ESSAYS ON BRITAIN AND EUROPE 247-55 (1995); Janet Currie, *The Take-Up of Social Benefits*, in AUERBACH ET. AL, PUBLIC POLICY AND THE INCOME DISTRIBUTION 80-148 (2006) (arguing that administrative barriers are more significant than stigma in explaining incomplete take-up of means-tested benefits).

Perhaps the central efficiency-based case against means-tested transfers as a method for reducing poverty is its potential effect on labor supply. Means-testing functionally imposes a marginal tax rate (the proportion of the last dollar of income taxed by the government) of 100% on all whose resources fall short of the transfer threshold.³³ The resulting disincentive for program beneficiaries to increase their earnings can lead to a “poverty trap”: to the extent work effort falls, incomes fall, and even more resources will be required to fill the gap between existing resources and minimal sufficiency. This will mean an even higher tax on those above the poverty line – which will, in turn, adversely affect their work incentives. The government can try to reduce the implicit marginal tax rate on the poor, but assuming the need to balance the budget, this requires either reducing the size of the pool that receives transfers, or increasing the tax imposed on the public to pay for the benefit. The trade-offs here are either fewer people whose poverty is reduced (due to the lower transfer threshold) or, again, reduced work effort by those who must pay higher taxes to offset the reduced marginal tax rate for the poor. This example is deliberately simple, but sufficient to illustrate the general point that means-tested redistribution schemes are susceptible to certain endogenous costs associated with the establishment and maintenance of a benefits cut-off based on income.

In sum, compulsory social insurance may be efficient but not especially redistributive, and means-tested provision may be redistributive in theory, but not especially efficient in practice. As a distinct matter, however, political considerations may augur in favor of universal provision for achieving redistribution.

IV. Political Arguments for Universal Provision

Political theories of why greater redistribution might occur within more universal regimes fall within several categories. One tradition hypothesizes that the variety of forms of welfare states reflects cultural differences between nation-states, for example, between the more “egalitarian” western European democracies and more “individualistic” democracies such as the United States. The argument is that more egalitarian cultures will choose welfare states that are more encompassing and more redistributive. America’s absence of a feudal past, putative commitment to social mobility, and relative lack of class consciousness have been offered to explain its parsimonious welfare state.³⁴ In a conceptually similar vein, some explanations turn on cross-national differences in racial and ethnic makeup. The relative (at least historically)

³³ Anthony B. Atkinson, *On Targeting Social Security: Theory and Western Experience with Family Benefits*, in D. VAN DE WALLE AND K. NEAD, PUBLIC SPENDING AND THE POOR 25-68, 59-63 (2001).

³⁴ See, e.g., SEYMOUR MARTIN LIPSET, THE FIRST NEW NATION: THE UNITED STATES IN HISTORICAL AND COMPARATIVE PERSPECTIVE (1963) and AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1996); ERZO F.P. LUTMER & MONICA SINGHAL, CULTURE, CONTEXT, AND THE TASTE FOR REDISTRIBUTION, NBER WORKING PAPER NO. 14268 (AUGUST 2008). The “American exceptionalism” thesis is the subject of considerable debate. See, e.g., William Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1118-25 (historical analysis arguing that the standard account of the 19th Century American labor movement overlooks elements of class-conscious and radicalism that ultimately bowed to the triumph of voluntarism in the face of a constraining legal order).

racial and ethnic homogeneity of western European states has been hypothesized to exert an important influence on welfare state generosity when compared to the United States whose legacy of slavery and progressive waves of immigration have produced a more racially and ethnically divided society.³⁵

Another approach applies median voter models in the rational choice tradition. Median voter models begin with the assumption that voter preferences and incentives are aligned around rational self-interest. On this assumption, these models predict—under various conditions—that policy choices will tend to be “middle of the road” or moderate, and ignore strong preferences of voters on one side or the other side of the spectrum.³⁶ Where most voters fall within a particular demographic group or class stratum, policy choices will be dominated by the middle-of-the road view within that class.³⁷ This reasoning has led to the hypothesis, for example, that the “poorer” the median voter relative to the average income available for redistribution, the stronger the median voter’s support for higher taxes and social spending.³⁸ If the median voter is in the middle of the income distribution, programs that benefit middle-income voters are both more likely to be created and more likely to survive than means-tested programs that tax but do not benefit the middle. One implication of this is the so-called “paradox of redistribution”: although means-testing would appear to be a more direct and efficient way to redistribute income, the poor may be better off with universalist provision.³⁹

³⁵ ALBERTO ALESINA & EDWARD GLAESAR, *FIGHTING POVERTY IN THE U.S. AND EUROPE : A WORLD OF DIFFERENCE* (2004); Gary M. Klass, *Explaining America and the Welfare State: An Alternative Theory*, 15 BRIT. J. POL. SCI. 426, 449-50 (1985); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 7 (1994).

³⁶ See generally, Roger D. Congleton, *The Median Voter Model*, in *ENCYCLOPEDIA OF PUBLIC CHOICE* (2003).

³⁷ I am setting aside, for simplicity’s sake, a number of alternative assumptions, such as “double-peaked” preferences, multiple- rather than single-issue elections, and the fact that collective decision-making is often mediated by institutions of representative democracy rather than direct democracy, can make the model less useful in predicting outcomes. See *id.* Moreover, some scholars debate the predictive power of the median voter model as compared with other rational choice models of preference formation, such as interest-group models. See, e.g., Sultan Ahmed & Kenneth V. Greene, *Is the Median Voter a Clear-Cut Winner? Median Voter Theory and Competing Theories in Explaining Local Government Spending*, 105 PUB. CHOICE 207 (2000); James R. Baumgardner, *Tests of Median Voter and Political Support Maximization Models: The Case of Federal/State Welfare Programs*, 21 PUB. FIN. REV. 48 (1993).

³⁸ Allan H. Meltzer & Scott F. Richard, *A Rational Theory of the Size of Government* 89 J. POL. ECON. 914 (1981) (arguing that the higher the ratio of the mean to median income, the stronger the median voter’s support for higher taxes and social spending). Efforts to verify this thesis empirically have produced mixed results. See, e.g., Branko Milanovic, *The Median Voter Hypothesis, Income Inequality and Income Redistribution*, 16 EUR. J. POL. ECON. 367 (2000) (finding strong correlation between income inequality and wealth redistribution, but questioning whether the median-voter model explains this phenomenon given doubts as to whether middle-income groups are net beneficiaries of redistribution); Robert Moffitt, *et al.*, *The Decline of Welfare Benefits in the U.S.: The Role of Wage Inequality*, 68 J. PUB. ECON. 421 (1998) (finding negative, rather than positive, correlation between income inequality and welfare spending and exploring explanations within median voter paradigm).

³⁹ Korpi & Palme, *supra* note ___ (finding negative correlation between degree of welfare state targeting and size of redistributive budget in 11 OECD countries); Walter Korpi, *Approaches to the Study of Poverty in the United States: Critical Notes from a European Perspective*, in V. T. COVELLO, ED., *POVERTY AND PUBLIC POLICY* 287-314 (1980); Karl Ove Moene & Michael Wallerstein, *Targeting and Political Support for Redistribution*, 2 ECON. GOV. 3 (2001) (modeling proposition that with self-interested voting, narrow

Middle-class⁴⁰ voters might, of course, exert their considerable influence on administration of universal programs to favor the well-off at the expense of the less well-off.⁴¹ This might be true, for example, where there is room for regional variation in the quality of services. Even assuming rent-seeking by well-off beneficiaries, however, redistribution might occur through universal welfare provision in several ways. Some universal benefits will have public goods-like features—public childcare, hospitals, schools, and the like—such that poor as well as non-poor citizens will collectively benefit. Non-poor citizens, acting in their own interests and having more social capital than the poor, have an incentive to ensure the programs are high quality.⁴² Alternatively, it may be practically impossible to prevent “spill-over” of benefits to the extent that local actors who administrator programs may exercise their discretion in a way that spreads resources more broadly.⁴³

This line of analysis raises the inevitable question of “compared to what?”. The counterfactual can be very difficult to evaluate, especially given relatively limited state-to-state variations in practice in a number of areas of social provision, and the limitations of comparability between nation-states.⁴⁴ If the only real choice is between a program that extends benefits to the middle class and no program at all, the former may be preferable from the perspective of distributive justice. Alternatively, the choice may be between a program that has middle- and high-income citizens receiving benefits through a system of quasi-private ordering subsidized by tax expenditures that in turn are financed by general revenues, while low-income citizens depend on means-tested benefits that are ungenerous, short-term, and administratively burdensome to qualify for. In such event, universal provision might increase redistribution by “beneficially” crowding out private social provision that would produce even *more* income inequality.⁴⁵

A third major theoretical tradition views differences through a structural or “institutional” lens. Perhaps most famous is Gøsta Esping-Andersen’s three-part typology

targeting may so reduce the probability of receiving benefits for the majority that the majority prefers to eliminate benefits altogether).

⁴⁰ The studies I describe typically use the term “middle class” without defining it. Please see my comments at *supra*, note ____, on “middle class” definitional issues.

⁴¹ See, e.g., ROBERT GOODIN & JULIEN LEGRAND, NOT ONLY THE POOR: THE MIDDLE CLASSES AND THE WELFARE STATE 210-211 (1987) (arguing that if the middle class are included as beneficiaries of welfare programs they will use their influence to expand services that benefit themselves and contract services for the poor); KELMAN & LESTER, *supra*, note ____.

⁴² Albert Weale, *Equality, Social Solidarity, and the Welfare State*, 100 ETHICS 473, 484 (1990).

⁴³ KELMAN & LESTER, *supra*, note ____ at 97-102 (describing the spill-over, sometimes deliberate, of the services of special education teachers in mainstreamed classrooms).

⁴⁴ As noted earlier, empirical efforts to quantify the relative efficiency of poverty reduction of means-tested versus universal social welfare benefits within countries have produced mixed findings. See *supra*, note ____.

⁴⁵ Korpi & Palme, *supra* note ____ at 681 (finding more redistribution in regimes where high-income earners receive *earnings-related* rather than flat-rate benefits, and speculating that it results from the combination of the appeal for the middle class of earnings-linked benefits and the subsequent crowd-out of even less redistributive private market insurance).

of welfare regimes.⁴⁶ The origins of different welfare states, in this view, evolved from both struggles and coalitions between social classes with competing interests.⁴⁷ Different kinds of alliances between the working class and farmers, the working and middle classes, and the middle and upper classes led to different welfare state trajectories in different nations, including with respect to degrees of universalism and redistribution.⁴⁸ A key tenet of the institutional view is that once in place, these different institutional structures had a profound impact on the future trajectory of a welfare state, with more universal schemes tending to cultivate different “fabrics” of social structure.⁴⁹

The United States, Canada and Australia fall within the “liberal” regime type, characterized by state encouragement of private social provision, state provision as a residual strategy taking the form of means-tested assistance with strict eligibility requirements and modest benefits, modest universal transfers, and modest social insurance plans.⁵⁰ The liberal regime-type is contrasted with the highly universalistic “social-democratic” regime-type dominated by the Nordic countries and the hybrid “conservative” or “corporatist” regime of countries such as Austria, France, Germany and Italy.⁵¹ Efforts to measure the redistributive effects at the national level of different ideal regime-types using both longitudinal and cross-national comparisons have found support for the hypothesis that social-democratic regimes are the most effective in reducing both poverty (raising the “floor”) and inequality (reducing the difference between the top and bottom) along a range of conventional measures.⁵²

⁴⁶ GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990). A large literature has emerged around refining the regime types proposed, although Esping-Andersen’s original typology remains highly influential. See W. Arts & J. Gelissen, *Three Worlds of Welfare Capitalism or More? A State-of-the-Art Report*, 12 J. EUR. SOC. POL’Y 237 (2002) (reviewing the range of regimes types that have been proposed).

⁴⁷ A classic articulation of the “power resource” model is WALTER KORPI, *THE DEMOCRATIC CLASS STRUGGLE* (1983).

⁴⁸ *Id.* See also PETER BALDWIN, *THE POLITICS OF SOCIAL SOLIDARITY: CLASS BASES OF THE EUROPEAN WELFARE STATE, 1875-1975* 29-30 (1990) (arguing interest group politics explains the rise of social insurance programs in Europe, where socialists saw an opportunity to buy political support by including the middle class and the middle class recognized the personal advantages of security against risk).

⁴⁹ Esping-Andersen, *supra*, note ___ at 58.

⁵⁰ *Id.*, at 26-27. Four-fifths of the money the U.S. government spends on social protection goes to non-means tested social insurance schemes, but when compared with other countries, the U.S. relies much more heavily than other countries (three times the OECD average) on means-tested benefits. ROBERT E. GOODIN ET AL., *THE REAL WORLDS OF WELFARE CAPITALISM* 11 (1999).

⁵¹ The social-democratic type is characterized by universal social insurance schemes covering a wide swath of both cash and in-kind social provision, including many services (such as child and elder care) traditionally provided by the family, benefits graduated according to accustomed earnings, and a purported goal of “decommodification,” or crowding out market provision. The corporatism regime combines state provision of social insurance and occupational fringe benefits with a commitment to the preservation of the traditional family, thus subsidizing women’s traditional roles in the home and significantly limiting state provision of childcare and other services traditionally performed by the family. *Id.* at 27-28. The categories are, however, not exclusive. For example, within the states generally categorized as ‘liberal’ are some institutions that are quite universalistic, social democratic states have not wholly avoided means-testing, and some states elude categorization into one type of another.

⁵² See, e.g., GOODIN ET AL., *supra* note ___ at 152-86, 260 (finding consistent support for the regime-type hypothesis using a range of conventional measures of equality and poverty reduction); Korpi & Palme, *supra* note ___ at 677-78 (finding negative correlation between degree of welfare state targeting and size of

Another institutional line of analysis focuses on “lock-in” following initial adoption of particular institutional arrangements. Policies may encourage individuals to develop certain kinds of skills, make certain kinds of investments, and forge certain kinds of social networks that become “sunk” costs, thus making more difficult the adoption of other policies that might have been possible at an earlier juncture.⁵³ This can occur at the level of political elites, who might resist deviation from existing institutions as a result of existing skills and bureaucratic infrastructure.⁵⁴ It can also operate at the level of mass publics. Political scientist Paul Pierson give the examples post-WW II housing and transportation policies that encouraged particular spatial patterns of work, consumption and residence, and Social Security’s pay-as-you-go structure under which each generation becomes deeply invested in maintaining the existing system so as to avoid the possibility of double payment in the event of a switch to private provision.⁵⁵

A variant on this view is the “policy-feedback” hypothesis that not only do interest groups create policy, but policies can create interest groups: the establishment of a new policy provides resources and incentives for mobilization of political actors and groups, who may come to define themselves in *response* to policies and act to reinforce them.⁵⁶ Examples are studies tracing the mobilization of veterans as an interest group in response to civil war pensions,⁵⁷ and the effect of Social Security on the formation of a group identity among older Americans as “senior citizens” and subsequent creation of lobby organizations such as the AARP (which in turn pressured political parties to maintain Social Security).⁵⁸

Some scholarship in the policy-feedback vein has addressed the feedback effects of universal versus means-tested benefits. Political scientist Theda Skocpol has chronicled the failure of a number of targeted welfare programs in the United States, such as poorhouses, pensions for poor mothers, and the 1960s and ’70s “war on poverty” of

redistributive budget in 11 OECD countries). *See also* Gøsta Esping-Andersen & John Myles, *Economic Inequality and the Welfare State*, in WIEMER SALVERDA, ET AL. (EDS.), OXFORD HANDBOOK OF ECONOMIC INEQUALITY (forthcoming, 2009) (stressing the importance of breaking down “ideal-type” welfare regimes into more specified institutional characteristics such as taxation, direct income transfers, and services and calling for further development of this empirical agenda).

⁵³ Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 *WORLD POLITICS* 595, 608 (1993).

⁵⁴ *Id.*, at 603-605 (explaining how policies could influence political elites’ development of administrative skills that in turn make it easier for them to maintain bureaucratic structures created by the initial policy).

⁵⁵ *Id.*, at 608-609. *See also* JACOB HACKER, *THE DIVIDED WELFARE STATE* (2002).

⁵⁶ Pierson, *id.*, at 599-601.

⁵⁷ *See, e.g.*, THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1995) (arguing that Civil War pensions led to the self-conscious mobilization of veterans to demand improved benefits).

⁵⁸ ANDREA LOUISE CAMPBELL, *HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE* (2003) (showing how the development of Social Security led to the increased participation and organization of senior citizens as an interest group, mobilized around the preservation and improvement of Social Security benefits). *Cf.* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 *CARDOZO L. REV.* 2685 (2008) (arguing that employment laws that provide minimum standards or prohibit discrimination can incubate solidarity among workers protected by those laws and potentially stimulate labor mobilization more generally).

the Kennedy, Johnson and Nixon administrations.⁵⁹ She contrasts these with the other programs that have offered benefits across income groups, such as civil war benefits, health education services for mothers and babies, and Social Security. She argues that programs targeted at the poor have tended to be politically unpopular, receive low levels of public investment, or suffered public backlash and been eliminated or scaled back over time, whereas programs with more universal benefits have had greater political success and survival. An important part of Skocpol's argument is that in each of the cases of universal benefits she studied, there was some progressivity or targeting of benefits *within* the universal scheme—what she calls “targeting within universalism”—and yet the programs maintained significant support from the mass public.⁶⁰

Andrea Louise Campbell emphasizes the role of political participation in policy feedback, arguing that the effects of universal programs such as Social Security, Medicare, and the G.I. Bill on political participation tend to be positive, whereas they tend to be negative with targeted programs like welfare.⁶¹ Citing the importance of individuals' material resources to their ability to participate in politics, Campbell argues that the generosity of universal programs like Social Security and Medicare as compared with targeted welfare programs significantly explains these effects.⁶² Furthermore, noting that major universal programs such as Social Security, Medicare and the G.I. Bill have redistributed benefits towards the poor,⁶³ she argues that they have disproportionately boosted the participation of low-income recipients compared with other recipients, thus democratizing participation within client groups.⁶⁴ At the same time, she argues, the sizeable benefits that universal programs confer on middle-class and affluent beneficiaries crucially undergird the programs' overall political support.⁶⁵ In sum, Campbell argues, universal programs give both high- and low-income beneficiaries “the means and the motive” to participate concerning the programs.⁶⁶

⁵⁹ See, e.g., THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES 253-74 (1995).

⁶⁰ *Id.*

⁶¹ Andrea Louise Campbell, *Targeting, Universalism, and Participation*, in JOE SOSS, JACOB S. HACKER & SUZANNE METTLER (EDS.), REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY ON AN AGE OF INEQUALITY 121-40, 123 (2007).

⁶² *Id.*, at 129-30. Campbell also suggests that differences in the way state agents interact with clients tend to differ in systematic ways—with some exceptions—between universal social insurance schemes and means-tested programs so as to influence clients' sense of esteem and efficacy. *Id.*, at 127-28. On this point, see also, e.g., Joe Soss, *Lessons of Welfare: Policy Design, Political Learning, and Political Action*, 93 AM. POL. SCI. REV. 363 (1999) (arguing, in comparing AFDC, Head Start, and Social Security Disability Insurance recipients, that attitudes towards demand-making are shaped by the design of different welfare institutions and that this has a spill-over effect into their sense of efficacy in the political sphere more generally).

⁶³ *Id.* at 129 (noting that low-income Social Security beneficiaries receive higher benefits as a proportion of their pre-retirement incomes than higher-income workers; low-income Medicare beneficiaries over a lifetime receive more benefits because on average they are sicker and less likely to have supplemental insurance; and the G.I. Bill made more of a difference to World War II veterans from modest backgrounds in providing educational opportunities than it did to more affluent veterans). I consider the complex question of progressivity of Social Security and Medicare benefits in more detail at *infra*, ____.

⁶⁴ *Id.*, at 129.

⁶⁵ *Id.*, at 129-30.

⁶⁶ *Id.*, at 130.

The draw the strands of this part of my analysis together, one can give a number of plausible political explanations for why welfare states with a richer mix of universal, as compared with means-tested, income security programs might be more successful in achieving meaningful redistribution. Middle-class pressure for improvements to social programs from which they stand to benefit might “raise all boats,” with those gains inevitably spilling over to the benefit of others, broader inclusion might increase the resources and incentives for mobilization of cross-class interest groups that can bring pressure to bear to preserve their “spoils” and in the process strengthen programs that have progressive features, and social provision of universal social insurance might beneficially crowd out less egalitarian alternatives. Each of these possibilities, if true, might improve the normative case for a richer mix of universalist, as compared with targeted, transfers (either conditioned on low income, or functionally targeted at middle- and high-income people through the use of tax-subsidized private-employer based provision). These might be reasons enough to put a thumb on the scale for universalist social policy, even if no other arguments are offered in their defense.

And yet, the purpose of my inquiry—to explore the question of how a public might come to support social benefits that involve redistribution—brings me to the further question of the relationship between welfare state universalism and the attitudes of mass publics towards redistribution. A distinct theme in, for example, Esping-Andersen’s work is the idea that different regimes help foster different *attitudes* about social justice.⁶⁷ If he is right, we would predict that public support for redistribution will vary systematically across states, with higher support in generous, universalistic, welfare states and lower support in liberal regimes. Early empirical efforts to test this hypothesis based on Esping-Andersen’s regime types produced mixed results.⁶⁸ More recent efforts have used more finely specified independent variables (e.g., moving away from nation-state ideal types towards specification of policy characteristics), and dependent variables. These more finely specified studies find a more consistent positive relationship between more universalistic welfare provision and public support for redistribution.⁶⁹

The question is what underlying mechanisms might explain this phenomenon assuming it exists. It seems plausible, indeed probable, that pre-existing “culture” plays a role. At the same time, the evidence discussed earlier of the dialectic relationship between institutions and public behavior suggests that welfare institutions themselves—including their degree of universality—could influence the very legitimacy of economic redistribution in the public consciousness. This is distinct from the spill-over, interest-

⁶⁷ Esping-Andersen, *supra* note ___ at ___.

⁶⁸ See Mads Meier Jaeger, *Welfare Regimes and Attitudes Towards Redistribution: The Regime Hypothesis Revisited*, 22 EUR. SOC. REV. 157, 157-58 (2006) (reviewing studies).

⁶⁹ Christian Albrekt Larsen, *The Institutional Logic of Welfare Attitudes: How Welfare Regimes Influence Public Support* 41 COMP. POL. STUD. 145, 146-47 (2008); Jaeger, *id.*, at 165 (finding this relationship, but also finding that when regime characteristics are broken down into still finer subcategories, e.g., degree of cash versus in-kind benefits, and level of replacement rate of unemployment benefits, the relationships are less clear-cut); Katerina Linos and Martin West, *Self-Interest, Social Beliefs, and Attitudes to Redistribution: Re-Addressing the Issue of Cross-National Variation*, 19 EUROP. SOCIOLOG. REV. 393 (2003) (introducing demographic variables and other missing data and finding explanations for cross-national variation that are more nuanced but still consistent with a regime-type hypothesis).

group mobilization, and beneficial crowd-out arguments. The question here is whether public perception of the legitimacy of spreading economic risks and endowments is endogenous to the design of welfare institutions. If so, how does it work? Here, there is much speculation, but little specification.

At this point, I turn to a parallel literature from psychology and economics on altruism, cooperation, and other-regarding behavior. This area of research enriches our understanding of the micro-foundations of redistributive motivation. Bringing this literature to bear on institutional theories of welfare state evolution can help us think in a more nuanced way about the conditions under which the public might support redistributive welfare policy, and in particular, whether the degree of universalism might make a difference.

IV. Empirical Observations of Other-Regarding Behavior

While self-interest remains an important—perhaps the predominant—human motivator, altruism is also a distinct motivation that influences human sociality.⁷⁰ This suggests that models of political preferences may be better able to predict behavior with an enlarged conception of motivation. In the next section I discuss selected research on cognitive foundations of pro-social behavior that, if valid, might lead us to deviate from conventional rational choice predictions about how the public makes policy decisions, particularly with respect to redistribution. I focus on three clusters of phenomena that have particular relevance for the practical problem of designing welfare institutions likely to garner public support: social norms of reciprocity, empathy-altruism and its connection to in-group favoritism, and beliefs about deservingness and their context-dependency.

At the outset, however, let me caution that one must be careful when moving from the laboratory to realm of social planning. Experimental studies on motivation can be very useful in weeding out bad ideas.⁷¹ Which among ideas that have *not* been weeded out should guide policy is a more difficult question and requires an appropriate degree of modesty by scholars seeking to marshal experimental insights in the service of policy design.

Experimental research on other-regarding and pro-social behavior helpfully illuminates the limits of the assumption of exclusively self-interested rational agency. Rationality appears to encompass a more complex utility function than mainstream economic models presume. Evidence from simple experiments conducted in controlled

⁷⁰ See generally, Jane Allyn Piliavin & Hong-Wen Charng, *Altruism: A Review of Recent Literature*, 16 ANNU. REV. SOCIOLOGY 27 (1990); Ernst Fehr & Klaus M. Schmidt, *The Economics of Fairness, Reciprocity and Altruism – Experimental Evidence and New Theories*, in SERGE-CHRISTOPHE KOLM & JEAN MERCIER YTHIER (EDS.), HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY [hereinafter, KOLM & YTHIER, HANDBOOK], vol. 1 615-691 (2006); Ernst Fehr & Herbert Gintis, *Human Motivation and Social Cooperation: Experimental and Analytic Foundations*, 33 ANN. REV. SOC. 43 (2007).

⁷¹ McCaffery & Baron, *supra* note ___ at 6-7; Colin Camerer & Eric Talley, *Experimental Study of Law*, in A. MITCHELL POLINSKY AND STEVEN SHAVELL, HANDBOOK OF LAW AND ECONOMICS VOL. 2 1619-1650, 1644 (2007).

laboratory settings suggests that individuals do not always act as they should if strictly motivated by self-interest.⁷² One such experiment is the “ultimatum game.”⁷³ In this game, a pair of subjects, the “proposer” and the “responder”, must agree on how to divide a sum of money. The proposer can make one proposal as to how to divide the amount. The responder then has the choice of whether to accept or reject the proposal. If the responder accepts it, the players divide the money as proposed. If the responder rejects it, the players forfeit the whole amount.

If we hypothesize that both players are rational and care only about maximizing the amount of money they get, and that the proposer knows that the responder is rational and selfish, we would expect the proposer to offer the smallest amount of money possible: for the responder, any amount of money is better than no money, and for the proposer, such an offer will maximize the amount he gets to keep for himself. This prediction is not borne out. Across hundreds of experiments, the great majority of proposers offer the responder between 40 and 50% of the money.⁷⁴ Furthermore, offers below 20% are rejected in 40-60% of cases.⁷⁵ A common interpretation of these findings, and what responders themselves report, is that responders reject low offers because they feel hurt by an offer they believe to be unfair, and are willing to induce forfeiture—even at a cost to themselves—to express their disapprobation.

It is perhaps easier to explain the proposers’ behavior in terms of conventional self-interest. Proposers, anticipating responders’ reactions, may be motivated by a self-interested calculation that the responder will reject too low an offer and thus cause forfeiture for both parties. Experiments that compare the ultimatum game with another game called the “dictator game” help to test this hypothesis. The dictator game removes the responder’s option to reject; the responder must accept whatever the proposer offers. Self-interest would predict an allocation of zero, but proposers allocate an average of 10-25% to responders.⁷⁶ The fact that these allocations are lower than in the ultimatum game suggests that at least part of the explanation for proposers’ generous offers in the ultimatum game is a fear of forfeiture. But the fact that proposers offer anything at all in the dictator game suggests that pecuniary self-interest is not the entire explanation. It seems at least partly motivated by people’s desire to abide by social norms of fairness.⁷⁷

Proposal-response experiments have tended to use students as subjects, controlled laboratory settings, and low stakes. This raises questions about the generalizability of the

⁷² For reviews, see Fehr & Schmidt, *supra*, note __; Christine Jolls, *et. al*, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1489-93 (1998).

⁷³ See Werner Guth, Rolf Schmittberger & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982); Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators, and Manners*, 9 J. ECON PERSP. 209 (1995).

⁷⁴ *Id.*, at 371-72.

⁷⁵ *Id.*

⁷⁶ R.L. Forsythe, *et al.*, *Fairness in Simple Bargaining Games*, 6 GAMES AND ECON. BEHAV. 347 (1994).

⁷⁷ A real-world example given by Robert Sugden is the practice of tipping a taxi-driver. Even in a one-time interaction where we have no chance of seeing the driver again, we know that the driver expects a tip and that we will feel uneasy if we don’t fulfill that expectation. ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION, AND WELFARE* 152-53 (1986).

findings. Subsequent research has found the results robust to fairly large increases in stakes,⁷⁸ and to subjects from varied demographic groups,⁷⁹ and cultures.⁸⁰

Some researchers have hypothesized that the results of the ultimatum game reflect bounded rationality leading to mistakes, and that self-interested actors will learn of their mistakes over repeated games. Simulation experiments do find convergence towards self-interested rational actor predictions over repeat games, but if there is learning, it is very slow indeed; it often takes thousands of iterations before parties' behavior begins to approximate standard predictions – and these are very simple games.⁸¹

However the fundamental puzzle of the personal utility function might be resolved, there is a significant accumulation of evidence that people in fact are willing to help others and that altruism is at least part of the explanation. It appears, at minimum, that people can have tastes for redistribution together with tastes for maximizing pecuniary self-interest, and that the manifestation of these preferences is influenced by social context.

a. Social Norms of Reciprocity

Another way to characterize the above observations is that a norm of reciprocity governs and enables coordination in social relations. Although some forms of reciprocity can be seen as consistent with a motive of pure self-interest—by doing something to increase the welfare of others, the giver can expect to be rewarded in turn—it is clear that some reciprocity dynamics incorporate a more complex set of motivations that include people's willingness to be generous or vengeful in response to others' willingness to abide by norms of fairness and other moral norms, even where no gains to self can be expected to result from the reward or punishment behavior.⁸² *Trust*, or lack of trust, in others' willingness to cooperate appears to be vital to reciprocal cooperation.⁸³

⁷⁸ See e.g., L.A. Cameron, *Raising the Stakes in Ultimatum Games: Experimental Evidence from Indonesia* 37 ECON. INQUIRY 47 (1999) (replicating effects using stakes as high as three months' income).

⁷⁹ Fehr and Schmidt, *supra* note ___ at 626 (reviewing studies).

⁸⁰ *Id.*, at 626-28 (reviewing studies and finding some cultural variation but substantial consistency).

⁸¹ Fehr & Schmidt, *supra* note ___ at 628-29.

⁸² Scholars from different disciplines have converged on parallel concepts, although giving it different names. See, e.g., SUGDEN, *supra*, note ___ at 159-61 (contrasting tit-for-tat strategies of experimental game theory based purely in self-interest from conventions of reciprocity based on a moral ethic of cooperation); Samuel Bowles and Herbert Gintis, *The Evolution of Strong Reciprocity: Cooperation in Heterogenous Populations*, 65 THEORETICAL POPULATION BIOLOGY, 17 (2004) (contrasting self-interested forms of cooperation that biologists label reciprocal altruism with a form of norm-enforcement and sharing that they term "strong reciprocity"); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003) (defining the "logic of reciprocity" as the social process by which when they perceive that others are behaving cooperatively, individuals are moved by honor, altruism, and like dispositions to contribute to public goods even without the inducement of material incentives); Orjan Widegren, *Social Solidarity and Social Exchange*, 31 SOCIOLOGY 755, 762-63 (1997) (distinguishing self-interested "social exchange" from "social solidarity," the latter being characterized by group members' willingness to promote the interests of the collective, even without expectations of material gain, provided they perceive similar attitudes among others in the group).

⁸³ Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 146 (2000).

The “public goods” game further illuminates the importance of reciprocity and trust. In the basic paradigm, subjects are given an initial endowment and told they must secretly choose how much of their allotment to contribute to a common pool.⁸⁴ The experimenter then gives each player an amount proportional to the total contributions to the pool -- e.g., the pot might be equally split among participants, or the experimenter can multiply that amount to increase each player’s return. Each subject thus ends up with whatever amount they kept of their initial endowment plus the additional amount that every player received. A player will do best by contributing nothing, regardless of what other members of the group contribute. Each person in the group will do best, however, if everyone contributes their whole endowment. Experimenters consistently find that although some players contribute nothing, most people make substantial contributions – on average about half of their endowment in the first round.

Over repeat iterations of the public goods game, the level of contributions gradually decays. Some have suggested that this is consistent with simple self-interest: people only learn over time that they will maximize their gains by contributing nothing. A rival explanation, however, is that most people hate to feel that others are taking advantage of them, and withholding cooperation on subsequent rounds is a way to avoid being (or feeling like) a “sucker” once it becomes apparent that others failed to cooperate in previous rounds.⁸⁵ In related fashion, reducing contributions in subsequent rounds is the only practical way to punish past non-cooperators.⁸⁶ If the game enables players to punish free-riders without reducing their own contributions in subsequent rounds, players tend to choose direct punishment, even when it is personally costly to do so.⁸⁷ Thus, as in the case of two-player proposal-response games, social norms of reciprocity appear to mediate multi-player cooperative behavior: people’s willingness to contribute depends on their belief that other people are also contributing. Note, with respect to this as well as the other experimental findings I have discussed in this part, that the reciprocity dynamic is *self-conscious*. People are aware that they are engaged with others in a mutually cooperative (or non-cooperative) interaction, and this awareness governs their behavior.

A critical question for considering the applicability of these findings to social welfare policy is how the presence of state regulation (as compared with the context of pure private charity) might influence cooperation and generosity. Experimental and field studies have found that the introduction of motives that rival pure voluntary cooperation, for example material incentives, can cue people that others will not spontaneously

⁸⁴ For a review of the literature on public-goods experiments, see Toh-Kyeong Ahn & Marco Janssen, *Adaptation v. Anticipation in Public Goods Games*, cite; J.O. Ledyard, *Public Goods: A Survey of Experimental Research*, in J.H. KAGEL AND A.E. ROTH (EDS.), *HANDBOOK OF EXPERIMENTAL ECONOMICS* 111-194 (1995).

⁸⁵ Kahan, *supra* note ____ at 73.

⁸⁶ See Ernst Fehr & Simon Gächter, *Cooperation and Punishment*, 90 AM. ECON. REV. 980 (2000) (describing experimental evidence); Bowles & Gintis, *id.* (describing ethnographic evidence).

⁸⁷ Fehr & Gächter, *id.*, at ____; J. Andreoni, *Cooperation in Public Goods Experiments: Kindness or Confusion?* 85 AM. ECON. REV. 891 (1995).

cooperate, as well as mask and crowd out people's altruistic dispositions.⁸⁸ If for some people, altruism springs from their desire to demonstrate (to themselves and others) that they are willing to sacrifice material gain for the public good, the introduction of material incentives can undermine motivation.⁸⁹ Once some people stop sacrificing for the greater good, reciprocity dynamics may lead others to stop, and so on, *ad infinitum*, until the cooperative equilibrium breaks down. This might lead one to conclude that cooperative norms can only evolve in the absence of incentives. As it turns out, this is not so. The *selective* use of incentives might actually maximize cooperation. "Targeted retaliation"—a regulatory system that simultaneously assures the public that *most* people are cooperators, but also that the minority of people who are non-cooperators will be penalized—avoids the cueing, masking, and motivational crowd-out effects associated with cross-the-board incentive regimes, while at the same assuring cooperators that they will not be exploited.⁹⁰

In sum, behavior in experimental social dilemmas suggests that people are willing to be generous, even to strangers, and even at personal cost, and that their generosity is influenced by expectations of others' cooperation and adherence to social norms.

b. Empathy-Altruism and In-Group Favoritism

The social psychology literature typically distinguishes between norms of fairness, which have been the focus of the discussion thus far, and empathy-altruism.⁹¹ Social norms create a benchmark against which people judge the actions and motives of others. Empathy-altruism provides no benchmark; instead it provides a partial identification with another's welfare.

Social cognition is made possible through the learned human capacity to take the perspective of others.⁹² Perspective-taking might take the form of true identification or empathy with another—mentally imagining oneself to be the other—but absent a fair degree of knowledge about the other person, this may be difficult or impossible. More commonly, people take the perspective of others by "projection," i.e., imagining what oneself would have done and thought if put in the role of the other.⁹³ As a judgmental

⁸⁸ Kahan, *supra* note ___ at 76. The classic demonstration of this was Richard TITMUS, THE GIFT RELATIONSHIP ___ (1971) (finding people more willing to donate blood when asked to volunteer than when offered payment). Bruno Frey.

⁸⁹ Kahan, *id.*

⁹⁰ *Id.*, at 79 (making this argument and offering examples that include regulating tax compliance, securing local public support for siting public facilities such as hazardous waste dumps, and encouraging the sharing of creative ideas and technology). See also, Samuel Bowles & Sung-Ha Hwang *Social Preferences and Public Economics: Mechanism Design when Social Preferences Depend on Incentives* (unpublished manuscript dated 26 February, 2009) (modeling optimal explicit incentives in the presence of both crowding in and crowding out, and discussing example of sanctions for non-cooperators in public goods settings as a way to enhance civic-minded behavior).

⁹¹ Louis Levy-Garboua, Claude Meidinger & Benoit Rapoport, *The Formation of Social Preferences: Some Lessons from Psychology and Biology*, in KOLM & YTHIER, HANDBOOK, vol. 1, 545-613, 595 (2006).

⁹² *Id.*, at 573-81.

⁹³ *Id.*, at 574-75.

heuristic, self-projection enables people to make predictions about others that are often accurate.⁹⁴

Both forms of social cognition can give rise to pro-social behavior. Just as affective responses to others' adherence to social norms drive individuals to reward or punish them, so too can empathy in response to the needs or distress of others drive individuals to help (or decline to help). Here, as before, researchers debate whether what appears to be other-regarding behavior truly reflects pure altruism. For example, voluntarily helping someone in need might reflect a truly empathic, other-oriented response, or it may reflect an egoistic desire to reduce personal distress induced by seeing another in distress.⁹⁵ Nevertheless, an egoistic explanation of the motivation to relieve others' distress does not explain away the underlying existence of distress at another's hardship. Regardless of the precise mix of egoism and altruism that drives it, the fact remains that some portion of the population *can* be motivated to help others without promise of pecuniary reward.

The cognitive mechanism of self-projection carries over to the group level. "Social identity theory" posits that people's identity is significantly organized around their membership in salient groups.⁹⁶ People are more likely to project onto others who are in their own social group than they are onto people from different groups.⁹⁷ Self-anchoring may lead them to reason that similar others will think and behave more like themselves than dissimilar others.⁹⁸ The use of the self-projection heuristic at the group level gives rise to a number of social phenomena. People perceive more cohesion, expect more reciprocal behavior, and are, in turn, likely to be more generous and cooperative towards members of an in-group.⁹⁹

Importantly, social groups can be defined in different ways – they can be defined narrowly, at the level of classmate or neighborhood, or more broadly, at the level of nation. Any given person will belong to multiple groups, and membership in a particular group will have salience in some contexts but not others. This phenomenon can be morally problematic; indeed, much of the literature on groupism has focused on its role in the formation of racist attitudes. American benevolent societies, which created some of the first forms of social insurance, were premised on the formation of an identity that excluded those outside the brotherhood of members.¹⁰⁰ A key finding of the research, however, is that group status is mutable: in-group favoritism can be altered depending on

⁹⁴ Note, however, that the egocentric foundation of the heuristic may lead people to overestimate the extent to which others have the same beliefs, the so-called "false consensus" effect. *Id.*, at 576.

⁹⁵ Robert B. Cialdini, *et al.*, *Empathy-Based Helping: Is it Selfishly or Selflessly Motivated?* 52 *J. PERSONALITY AND SOC. PSYCH.* 749 (1987) (offering examples an egoistic motive of distress-reduction).

⁹⁶ H. Tajfel & J.C. Turner, *The Social Identity Theory of Intergroup Behavior*, in S. WORCHEL & W.G. AUSTIN (EDS.), *PSYCHOLOGY OF INTERGROUP RELATIONS* 7-17 (1986).

⁹⁷ *See generally*, Jordan M. Robbins & Joachim I. Kreuger, *Social Projection to Ingroups and Outgroups: A Review and Meta-Analysis*, 9 *PERSONALITY & SOC. PSYCH. REV.* 32 (2005).

⁹⁸ Levy-Garboua, *et al.*, *supra*, at 589.

⁹⁹ Levy-Garboua *et al.*, at 593; Robbins & Kreuger, at 43-44.

¹⁰⁰ Brian J. Glenn, *Understanding Mutual Benefit Societies, 1869-1960*, 26 *J. HEALTH POLITICS, POL'Y & L.* 638, 645 (2001).

the level at which groups and social categories are made salient.¹⁰¹ This has important implications for policy, which I will develop in more detail in Part V.

c. Beliefs about Deservingness and the Context-Dependency of Social Preferences

People express stronger support for redistribution if they believe that the recipient's need is caused by circumstances beyond his or her control.¹⁰² In surveys, people express stronger support for social transfers if they are told that the recipient's hardship is caused by disability, for example, and less generous if told that the recipient is not looking for work, or is picky about which work to accept.¹⁰³ In dictator games, proposers give about three times as much when they are told the recipient is the American Red Cross than when the subject is anonymous, and when told the recipient is a welfare recipient, give significantly more if also told the subject has expressed a strong interest in working than if told the recipient has expressed only a weak preference for working.¹⁰⁴ Cross-national studies have found a fairly consistent pattern consonant with the idea that locus of control is important to people: those deemed most "deserving" across cultures tend to be the elderly, followed by the sick and disabled, followed by needy families with children and the unemployed.¹⁰⁵ Able-bodied individuals on public assistance are fairly consistently seen as the least deserving group.¹⁰⁶

Beliefs about the causes of poverty are also important to support for redistribution. At a societal level, people who believe in structural explanations (discrimination, bad economy, inadequate schools) or fatalistic explanations (bad luck) for poverty are more likely to support redistributive policies than people who believe poverty is caused individual effort (or lack thereof).¹⁰⁷ Psychologists have labeled the

¹⁰¹ Robbins & Kreuger, *supra*, at 42; S.L. Gaertner, J. Mann, A. Murrell & J.F. Dovidio, *Reducing Intergroup Bias: The Benefits of Recategorization*, in M.A. HOGG AND D. ABRAMS (EDS.), *INTERGROUP RELATIONS: ESSENTIAL READINGS* 356-69 (2001) (reviewing literature on recategorization of social groups); PENELOPE J. OAKES, S. ALEXANDER HASLAM & JOHN C. TURNER, *STEREOTYPING AND SOCIAL REALITY* 147-51 (1994) (reviewing studies on the role of context, or frame of reference, in self-categorization).

¹⁰² Jeffrey A. Will, *The Dimensions of Poverty: Public Perceptions of the Deserving Poor*, 22 *SOC. SCI. RES.* 312, 329 (1993) (polling American subjects); Wim van Oorschot, *Who Should Get What and Why? On Deservingness Criteria and the Conditionality of Solidarity Among the Public*, 28 *POL'Y & POLITICS* 33, 38-39 (2000) (polling Dutch subjects, whether the recipient had control over his needy status was the most significant factor among several in its influence on support for welfare transfers).

¹⁰³ Will, *id.*, at 329.

¹⁰⁴ Christina Fong, Samuel Bowles & Herbert Gintis, *Strong Reciprocity and the Welfare State*, in *KOLM & YTHIER, HANDBOOK*, vol. 2 1439-64 at 1448.

¹⁰⁵ A classic study is RICHARD M. COUGHLIN, *IDEOLOGY, PUBLIC OPINION, AND WELFARE POLICY: ATTITUDES TOWARDS TAXES AND SPENDING IN INDUSTRIAL SOCIETIES* (1980). *See also* Larsen, *supra* note _____ at 47-48.

¹⁰⁶ Larsen, *id.*

¹⁰⁷ *See, e.g.*, Gregory Mitchell, Philip E. Tetlock, Barbara A. Mellers & Lisa D. Ordonez, *Judgments of Social Justice: Compromises Between Equality and Efficiency*, 65 *J. PERSONALITY & SOC. PSYCH.* 629 (1993) (finding that rather than having a stable set of preferences – for example, either egalitarian or meritocratic – experimental subjects' beliefs about how to set an income distribution in a hypothetical

latter construct a belief in a “just world”: the idea that people “get what they deserve and deserve what they get.”¹⁰⁸ Moreover, individuals who have a strong belief in a just world may systematically interpret what they observe so as to preserve this belief, making it difficult to dislodge.¹⁰⁹ The literature on this subject is large, but three observations seem particularly relevant to the present inquiry: belief in a just world is not merely a proxy for self-interest, the public is heterogeneous in strength of belief in a just world, and people’s beliefs about a just world and corollary beliefs about redistribution are context-dependent.

Personal income influences people’s explanations for poverty: low-income people are more likely than middle-class people to attribute poverty to structural factors or luck rather than individualistic factors, and high-income people have stronger than average beliefs in the role of self-determination.¹¹⁰ The poor are also the strongest supporters of redistribution, and the well-off its strongest opponents.¹¹¹ In light of these parallels, it seems plausible that beliefs about the causes of poverty, and therefore desert, are simply justificatory constructs that replicate people’s underlying self-interested motives with respect to redistribution.

As it turns out, the correlation between personal income and beliefs about the causes of poverty is quite imperfect: a large fraction of the poor opposes redistribution

society depended on whether they were told that rewards were tightly or loosely linked with effort in that society); Fong, *supra* note ___ at 232 and Table 2 (2001).

¹⁰⁸ See generally, M.J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* (1980); Z. Rubin and A. Peplau, *Who Believes in a Just World?* 31 *J. SOCIAL ISSUES* 65 (1975); C. Dalbert, *Coping with an Unjust Fate: The Case of Structural Unemployment*, 10 *SOC. JUSTICE. RES.* 175 (1998); L. MONTADA & M.J. LERNER (EDS.), *RESPONSES TO VICTIMIZATIONS AND BELIEFS IN A JUST WORLD* (1998); Roland Benabou & Jean Tirole, *Beliefs in a Just World and Redistributive Politics*, 121 *Q. J. ECON.* 699 (2006).

¹⁰⁹ See, e.g., Lauren D. Appelbaum, Mary Clare Lennon & J. Lawrence Aber, *When Effort is Threatening: The Influence of a Belief in a Just World on Americans’ Attitudes Toward Antipoverty Policy*, 27 *POLITICAL PSYCH.* 387 (2006) (using a vignette involving a poor mother trying to improve her situation, found that survey respondents with a strong belief in a just world were paradoxically *less* likely to support public aid for the mother the more effort she made; authors interpreted this as their effort to reconcile a challenged belief system, i.e., a woman who is making efforts but still can’t get ahead); Charity Scott, *Belief in Just World: A Case Study in Public Health Ethics*, 38 *HASTINGS CENTER REP.* 16 (2008) (drawing similar conclusions in a case study of negative reader reactions to an Atlanta newspaper article describing a struggling low-income family that received benefits under Georgia’s state children’s health insurance program). See generally, Benabou & Tirole, *supra* note ___ at 705 (reviewing studies in both laboratory and natural settings).

¹¹⁰ Heather E. Bullock, *Attributions for Poverty: A Comparison of Middle-Class and Welfare Recipient Attitudes*, 29 *J. APPLIED SOC. PSYCH.* 2059, 2066-68 (1999) (finding welfare recipients more likely than middle-class respondents to attribute poverty to structural rather than individualistic factors and that the reverse was true for middle-class respondents); Christina Fong, *Social Preferences, Self-Interest, and the Demand for Redistribution*, 82 *J. PUB. ECON.* 225, 232-33, Table 1 (2001) (finding high-income sample of people has stronger average beliefs that self-determination rather than luck causes poverty than the general population).

¹¹¹ GILENS, *supra*, note ___ at 52-54, figs. 2.5, 2.6; Yeseskel Hasenfeld & Jane Raffety, *The Determinants of Public Attitudes Toward the Welfare State*, 67 *SOC. FORCES* 1027, 1041-42 (1999) (finding socioeconomically vulnerable groups more likely than others to support means-tested welfare programs and concluding that self-interest plays an important role in welfare attitudes).

and a large fraction of the rich supports it.¹¹² This implies that people may have beliefs about the causes of poverty and deservingness that are independent of material self-interest. One way to test this hypothesis is to measure the strength of the relationship between people's support for redistribution and their beliefs about the causes of poverty while controlling for income and other factors that may be proxies for self-interest. Several studies that have endeavored to do this have found respondents' beliefs robust to controls for self-interest.¹¹³ In other words, self-interest alone cannot explain people's beliefs about the causes of poverty.

Much is made of the fact that in the United States, individualistic, "personal responsibility"-oriented explanations for poverty tend to prevail over structural or fatalistic explanations.¹¹⁴ However, structural or fatalistic beliefs about the causes of poverty also exist among Americans, and this may help explain other core commitments Americans persistently express, the values of egalitarianism (equality of opportunity, treatment, and status) and humanitarianism (the belief that we have an ethical obligation to help those in need).¹¹⁵ Most Americans hold some mix of these core values, leading to a fundamental ambivalence in forming attitudes about redistribution.¹¹⁶ People may feel a desire to help the poor, for example, but also feel that the poor should take some personal responsibility for overcoming their misfortune.

¹¹² Fong, *et al.*, *supra* note __ at 1441-42 (reporting based on survey data that 24 % of respondents with income of at least \$150,000 say that government should "redistribute wealth with heavy taxes on the rich", and that among respondents with incomes below \$10,000 and who do not expect their situation to improve in the next five years, 32% say that government should not redistribute wealth with heavy taxes on the rich, and 23% say that poor people should help themselves rather than having the government "make every possible effort to improve... the position of the poor.").

¹¹³ See, e.g., Fong, *Social Preferences*, *supra*, note ___ at 225, 236-37 and Fig. 1 (2001) (finding highly significant effect of beliefs about the role of self-determination versus exogenous-determination of poverty on support for redistribution, controlling for income and various other proxies for self-interest, and also finding these beliefs robust to controls for the incentive effects of taxation, *id.*, at 240-41); Giacomo Corneo & Hans Peter Gruner, *Individual Preferences for Political Redistribution*, 83 J. PUB. ECON. 83 (2002) (regression analysis of international survey data consistent with hypothesis that preferences for government redistribution are driven only partly by selfish pecuniary incentives and that beliefs about the link between individual effort and social standing, as well as social rivalry, also significantly influence preferences).

¹¹⁴ Classic studies reporting this belief are J. FEAGIN, *SUBORDINATING THE POOR: WELFARE AND AMERICAN BELIEFS* (1975) and JAMES R. KLEUGEL & ELIOT R. SMITH, *BELIEFS ABOUT INEQUALITY: AMERICA'S VIEWS OF WHAT IS AND WHAT OUGHT TO BE* (1986). See also, ALBERTO ALESINA, EDWARD GLAESER & BRUCE SACERDOTE, *WHY DOESN'T THE U.S. HAVE A EUROPEAN-STYLE WELFARE STATE?*, HARVARD INSTITUTE OF ECONOMIC RESEARCH DISCUSSION PAPER NO. 1933 (November 2001) (contrasting European and American beliefs about reasons for poverty and their relationship to attitudes about redistribution).

¹¹⁵ Stanley Feldman & Marco R. Steenbergen, *The Humanitarian Foundation for Public Support for Social Welfare*, 45 AM. J. POL. SCIENCE 658 (2001).

¹¹⁶ Stanley Feldman & John Zaller, *The Political Culture of Ambivalence: Ideological Responses to the Welfare State*, 36 AM. J. POL. SCIENCE 268 (1992); Erin O'Brien & Joe Soss, *Public Opinions/Attitudes: Contemporary*, in GWENDOLYN MINK AND ALICE O'CONNOR, EDs., *POVERTY IN THE UNITED STATES: AN ENCYCLOPEDIA OF HISTORY, POLITICS, AND POLICY* 601-605, (2004); J.H. KUKLINSKI, *CITIZENS AND POLITICS: PERSPECTIVES FROM POLITICAL PSYCHOLOGY* (2001); James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, in ARTHUR LUPA, MATHEW MCCUBBINS, AND SAMUEL POPKIN, EDs., *ELEMENTS OF REASON* (2000).

Meanwhile, context also matters. It is well established that people will express different social preferences depending on how an issue is presented or “framed.”¹¹⁷ Consonant with this phenomenon, people’s preferences may depend on which core values are “activated” or cued when they are asked to make a judgment. References to “welfare” elicit particularly negative reactions. Martin Gilens, in a study of American attitudes towards welfare policies, found that most Americans say they favor increased government spending on the welfare state, and think that the government is not doing enough to help the poor.¹¹⁸ However, when asked about “welfare” in particular—means-tested cash transfers to the able-bodied, working-age poor—and “welfare recipients,” Americans’ attitudes are much more negative.¹¹⁹ Gilens’ interpretation of this apparent paradox is that it is driven principally by people’s beliefs about the deservingness of the *people* they think receive welfare.¹²⁰

More particularly, Gilens argues that media discourse on poverty and welfare in the 1960s created an exaggerated linkage between African-Americans and poverty, and that this media frame remains highly salient in the American public imagination, powerfully influencing attitudes towards welfare.¹²¹ Today, people overestimate the proportion of welfare recipients who are African-American, and they equate African-Americans who receive welfare with a lack of commitment to the work ethic.¹²² In essence, according to Gilens, people’s beliefs about the deservingness of welfare recipients are associated with stereotypes about the race of welfare recipients, and the work ethic of African-Americans.¹²³

Research on the use of opposing media frames in mobilizing public support (or opposition) finds that on average, support for social spending is significantly higher when

¹¹⁷ See generally Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L. J. 1, 42-43 (2004); Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOLOGIST 697, 702-703 (2003) (describing his research with Amos Tversky in the 1970s and 1980s that illustrated the effects of framing); Edward J. McCaffery & Joel Slemrod, *Toward an Agenda for Behavioral Public Finance*, in EDWARD J. MCCAFFERY AND JOEL SLEMROD (EDS.), BEHAVIORAL PUBLIC FINANCE 1-31 at 7-12 (2006); RICHARD H. THALER AND CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008). See also Yoram Amiel, Frank Cowell, Liema Davidovitz & Avraham Polovin, *Preference Reversal and the Analysis of Income Distributions*, 30 SOC. CHOICE & WELFARE 305 (2008).

¹¹⁸ MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 2-3 (1999).

¹¹⁹ *Id.*

¹²⁰ *Id.*, at 61-67.

¹²¹ GILENS, *supra* note ___ at 102-132. See also SHANTO IYENGAR, IS ANYONE RESPONSIBLE? HOW TELEVISION FRAMES POLITICAL ISSUES (2001) (describing how the ways in which poverty is presented on television significantly influences the causal attributions viewers make).

¹²² *Id.*, at 77-78. See also Alesina *et al.*, at 28-33 (arguing that Americans’ reluctance to support redistributive policies compared with Europeans is significantly linked with racial heterogeneity in the U.S., the racial animosity of many Americans, and the belief by most Americans that redistribution favors racial minorities).

¹²³ See also Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, HARV. CIV. RTS – CIV. LIB. REV. 413, 444-47 (Summer 2006) (developing idea of a “blame frame” within which Americans justify racism based on a combination of belief in a just world and belief that people, including victims, are free to choose and bear responsible for their choices).

described in ways that emphasize “responsible economic planning” rather than appealing to people’s compassion and sympathy for the poor.¹²⁴ Personal narratives of the able-bodied poor may trigger negative reactions in people who have strong beliefs in a just world, and who may interpret the person’s failure as reflecting a lack of personal responsibility.¹²⁵ By contrast, frames that emphasize structural economic challenges facing the nation, values of responsibility, independence, stewardship, and the collective responsibility of the citizenry, have been found effective in eliciting support for social spending.¹²⁶

To summarize Part IV, people will be generous to others in ways that cannot always be explained in terms of simple accounts of self-interest, but their willingness to be generous is conditional on their belief in others’ compliance with social norms, and is influenced by their capacity to empathize or take the perspective of others, by their belief in the relationship between effort and reward, and by the context in which their preferences are elicited. A key observation is that people are *heterogeneous* in the extent and manner in which these different factors influence their motives and beliefs, and thus an important challenge for institutional design, assuming the normative goal of facilitating vertical redistribution, find a way to enable other-regarding preferences to dominate.

In particular, we might take into account:

- **Reciprocity.** *Where cooperation is required, cooperation by other participants matters a great deal to people’s willingness to contribute. The ability to selectively punish (or reward) others based on their compliance with norms of fairness can facilitate trust and cooperation.*
- **Empathy-Altruism and Groupism.** *People tend to empathize or identify more with people they perceive as belonging to their own group, and will be more generous to people in their own group. Group identification, however, can cut across many dimensions, and which dimensions will be most salient at a given time depends on context.*
- **Beliefs about Deservingness and the Importance of Context.** *People express stronger support for redistribution if they believe that the poverty is caused by circumstances beyond the recipient’s control. People’s beliefs about desert, and hence redistribution, are influenced by context and by how an issue is presented.*

V. Lessons for Program Design

This Part considers how we might marshal the richer motivational account developed in Part IV for thinking about program design where redistribution is one’s

¹²⁴ MATTHEW C. NISBET, COMMUNICATING ABOUT POVERTY AND LOW-WAGE WORK: A NEW AGENDA 15-19 (2007), available at <http://www.inclusionist.org/files/USUKPaper.pdf>; Meg Bostrom, cite.

¹²⁵ See *supra*, note ____.

¹²⁶ Nisbet, *supra*.

goal. I do so by further developing the ideas in the general context of social insurance, and then by offering an extended illustration in one area of current social policy change—paid family leave—of how we might develop an agenda for research that would evaluate the validity of my thesis.

If reciprocity theory is correct, individuals' willingness to contribute to a program depends on the cooperation of other participants (or at least the perception thereof). People might signal their cooperation through financial contributions, or by some past behavior that indicates that they have conformed to relevant social norms in a way that makes them trustworthy. Social insurance, by the very nature of its facial universality of taxes and spending – most everyone contributes, and most everyone receives benefits or at least has the potential to receive benefits – comports more readily with reciprocity ideals than a program that taxes some citizens and transfers benefits to others.¹²⁷ Distribution of benefits conditional on low income is more difficult square with reciprocity ideals absent the incorporation of additional features designed to make members of the target group “earn” the entitlement to benefits.¹²⁸

Popular opinion polls consistently find that people prefer payroll taxes to other kinds of taxes, including income taxes and property taxes.¹²⁹ This arguably flows from the reciprocity-like features of programs financed with payroll taxes. Payroll taxes are structured as a fixed percentage of earnings, often with a floor and/or ceiling on the wage base that is taxed. They typically have an earmarked purpose, thus creating a link (or perceived link) between contribution and benefits that is lacking with programs financed by direct spending from general revenues. Payroll taxes are less progressive than income taxes, however—indeed, they may be regressive—not only because of the absence of progressivity in the rate structure, but also because of the common (but not universal) practice of capping the taxable wage base, and the fact that payroll taxes tax only earned

¹²⁷ See, e.g., Paul M. Romer, *Preferences, Promises, and the Politics of Entitlement*, in VICTOR FUCHS (ED.), *INDIVIDUAL AND SOCIAL RESPONSIBILITY: CHILD CARE, EDUCATION, MEDICAL CARE, AND LONG-TERM CARE IN AMERICA 195-220, 198-99, 213-17* (1996) (arguing rational choice assumptions of political preferences that reflect self-interest cannot fully explain the popularity of social insurance compared with means-tested transfers, and theorizing that the former's popularity is can be explained by the sense of entitlement that benefits perceived as “earned” give citizens to punish politicians who attempt to retrench benefits in future periods); C. EUGENE STEURLE & JON M. BAKIJA, *RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY: RIGHT AND WRONG APPROACHES TO REFORM 25–27* (1994) (noting that the “earned benefit” feature of unemployment insurance likely increased popular support); Andrea Louise Campbell & Kimberly J. Morgan, *Financing the Welfare State: Elite Politics and the Decline of the Social Insurance Model in America*, 19 *STUD. IN AM. POL. DEV.* 173, 174-75 (2005) (arguing that social insurance programs have proven popular in advanced industrial states because of the link they create between contributions and entitlement); BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES 118-25* (1992) (contrasting high and stable public support over time for spending on Social Security, with consistently low support for spending on welfare, and arguing that an important reason for this is that Social Security actually or potentially includes most of the population as beneficiaries).

¹²⁸ Amy Wax, *supra* note ___ (arguing that proposals advocating unconditional rights to cash welfare benefits face popular resistance because they run counter to social norms of reciprocity, and that work requirements satisfy participants' expectation that beneficiaries are contributing by making an effort to improve their situation).

¹²⁹ Campbell & Morgan, *supra* note ___, at 184-90, tbl.2.

income. For this reason, in a program financed by payroll taxes, any desired progressivity is usually accomplished on the benefits side of the equation. The ratio of contributions to benefits is a matter of program design and can lead to more or less progressivity.

Take, for example, the case of Social Security. The payroll tax that finances the program – while functionally universal –is almost certainly regressive: it imposes a flat tax rate (of around 15%) of payroll, but the marginal tax rate is zero for any wages that exceed the Social Security wage base (of just under \$107,000). Nonetheless, the net effect of the financing and benefits structure is progressive. The formula for calculating Social Security benefits is weighted so that low earners receive proportionately greater returns than high earners. In addition, a floor on benefits operates to redistribute to low earners. The net result is that individuals in the bottom earnings quintile receive more benefits than they pay in taxes over their lifetimes; individuals with earnings in the middle range pay taxes about equal to the benefits they receive, and those in the top quintile pay more taxes than they receive in benefits. The benefit-to-tax ratio for the bottom quintile is almost three times that for the top quintile.¹³⁰ The increased generosity of Social Security benefits in the post-World War II period had a dramatic effect in reducing poverty among the elderly—a combined result, presumably, of its role in mandating intergenerational cross-subsidies and its progressivity.¹³¹ Social Security remains very popular, despite its net progressivity.

It is possible that support for Social Security is due in part to citizens' belief that the program is not, in fact, redistributing income.¹³² It is noteworthy, however, that until

¹³⁰ Challenges to an earlier consensus view as to the progressivity of Social Security have emerged in the past decade. The reexamination was prompted in part by a well-known study which suggested that simply comparing the replacement rates of wealthy and poor recipients may be misleading because the greater longevity of wealthy people will tend to offset their lower replacement rates. See JEFFREY B. LIEBMAN, REDISTRIBUTION IN THE CURRENT U.S. SOCIAL SECURITY SYSTEM, NBER WORKING PAPER 8625 (December, 2001). However, more recent studies using a broader array of methods and taking into account a range of offsetting factors—longevity as well as others—suggest that Social Security is still quite income-redistributive (see, e.g., ANDREW G. BIGGS, *ET AL.*, A PROGRESSIVITY INDEX FOR SOCIAL SECURITY, UNITED STATES SOCIAL SECURITY ADMINISTRATION ISSUE PAPER NO. 2009-01 (January, 2009); Noah Meyerson & John Sabelhaus, *Is Social Security Progressive?* Congressional Budget Office Economic and Budget Issue Brief, December 2006; C. Eugene Steuerle *et al.*, *How Progressive is Social Security and Why?* Urban Institute, May 2004). There is also a lively debate about the progressivity of Medicare. Compare Kathleen McGarry, *Inter- and Intra-Generational Aspects of Medicare*, Gerontological Society of America Interest Group Newsletter, Fall, 2002) (finding that Medicare redistributes across groups in a variety of ways but disproportionately benefits higher-income relative to lower-income individuals) with Darius Noshir Lakdawalla & Jay Bhattacharya, *Does Medicare Benefit the Poor?* 90 J. PUB. ECON. 277 (2005) (arguing that Medicare is an “extraordinarily progressive public program,” and that previous research concluding the contrary has used inadequate proxies for economic disadvantage) and Campbell, *supra* note ___ (characterizing Medicare as progressive).

¹³¹ Gary V. Englehardt & Jonathan Gruber, *Social Security and the Evolution of Elderly Poverty*, in AUERBACH ET. AL (EDS.), PUBLIC POLICY AND THE INCOME DISTRIBUTION, *supra* note ___ at 258-87, 280-82, 285 (analysis finding substantial declines in fraction of elderly household and families below the federal poverty level between 1967 and 2000 and arguing that it can be explained entirely by increases in Social Security benefits during that time).

¹³² Although researchers have revealed ways in which people misunderstand some aspects of Social Security, I have been unable to find a study that directly tests the question of the degree to which public support for the program depends on a perception that the program is non-redistributive. Cf. Howell E.

recently, social scientists believed it was *more* progressive than it is.¹³³ It is possible that the broad “extensive margin” (i.e., reach of participation) of the program has played a distinct role, catalyzing mutual support by citizens. This conjecture begs the overarching normative question of whether I advocate achieving policy change by using techniques from behavioral psychology to, in essence, mislead people into believing that a program is less redistributive than it is. The answer is no: to advocate such a position would be troubling from the perspective of democratic legitimacy.

At the same time, it isn’t obvious to me that citizen awareness of the precise distributional features of Social Security or any other universal program is critical to the legitimacy of consent. For example, if people support redistribution within Social Security because they don’t know where they sit in the distribution – whether they will be beneficiaries or not –that does not undermine the legitimacy of their consent. This article does not advance a theory of distributive justice, but many people would judge as highly legitimate a system in which people supported redistribution behind a proverbial “veil of ignorance” as to whether they would be a net payor or beneficiary. Another possibility is that people are unaware of the redistributive features of Social Security simply because they have stopped paying close attention to where they fall in the distribution. Neither does this strike me as a bad thing. There is a difference between a person who fails to understand because information is withheld and one who fails to understand because she trusts the system.

People may also have more confidence in a program in which “cooperation” and “defection” can be monitored, as well as rewarded or punished. The kinds of behavior that might serve as a signal of cooperation would vary depending on the purpose of the program. An easy example is veterans’ benefits, which can be seen as a reward for past service to one’s country.¹³⁴ For other programs, however, *ex ante* cooperation may be harder to demonstrate and checks on over-use of benefits might therefore be more important as a device for satisfying reciprocity norms. Involuntary unemployment, for example, might easily be mistaken for shirking. Unemployment insurance benefits are conditioned on a minimal pre-unemployment work history, proof of discharge without fault and continuing efforts by the recipient of benefits to search for a new job. These criteria of initial and continuing eligibility—past work effort and present efforts to restore employment—might be seen as a signal of cooperation and trustworthiness.

Lessons about groupism and framing might also be incorporated into program design. As noted earlier, group status is mutable and context-dependent. A person’s membership in a particular group can be made more salient in some contexts, and less so in others. Perceptions of group status can, in turn, influence people’s support of welfare

Jackson, *Accounting for Social Security Benefits*, in MCCAFFERY & SLEMROD, *supra* note ___ at 261-303 (arguing that the combination of a confusing benefit disclosure form and cognitive biases leads Social Security beneficiaries to underestimate the value of their participation in Social Security and the extent of their benefits).

¹³³ See *supra* note ___ (tracing recent debates among economists as to the progressivity of Social Security).

¹³⁴ Campbell, *supra* note ___ at 130.

policies.¹³⁵ Framing a social problem around risks that are common across income groups—e.g., vulnerability to job loss in a bad economy, risk of unexpected illness, or the difficulty of balancing work and family care—might not only make common life-cycle risks *more* salient, but also reduce the salience of perceived “taxpayer” versus “beneficiary” group status.

Designing a program of targeted benefits requires deciding the dual questions of which citizens belong in the needy group, and how much they need. Political theorist Bo Rothstein argues that the very act of deciding these “boundary” questions creates a moral logic that singles out some citizens as socially inferior, “maladjusted,” or “other,” and thereby undermines egalitarian principles.¹³⁶ Public debate over these questions can very quickly devolve into questions about which poor are “deserving” and which are not.¹³⁷ Under a more universal system, by contrast, the extensive boundary questions largely dissolve and the moral logic changes: “the question becomes not ‘how shall we solve *their* problem?’ but rather ‘how shall we solve our *common* problem...?’”¹³⁸

Drawing on the analysis in Part IV, Rothstein’s “moral logic” might be reformulated in terms of its *cognitive* logic: universal provision might ameliorate the potentially distorting effects of groupism, related assessments of deservingness, and distrust-based resistance to forms of cooperation that might otherwise activate altruism. Recalling that people are more generous towards people they perceive to be in their own group, programs that target benefits selectively may dampen public generosity. The necessity of policing the boundaries of a means-eligibility threshold could serve to sharpen the public’s focus on “fraud and abuse” by recipients, reinforce the salience of distinctions between taxpayers and beneficiaries, and prime stereotyped beliefs about the beneficiary class and whether they are worthy. Among those who hold a strong belief in a “just world,” debates about who should receive benefits might cue the cognitive schema by which they *make sense* of persistent poverty by attributing blame to people who can’t seem to overcome it.¹³⁹

Universal social insurance programs are by definition organized around a common risk from which they buffer pooled participants. Thus, for example, the need for income continuity when illness or caregiving disrupt work can be understood as not a poor people’s problem, nor an old people’s problem, nor a young family’s problem, nor a women’s problem— but as a basic human challenge everyone faces, if not now, then some time in their lives.¹⁴⁰ Insofar as redistribution might occur *within* universal programs,

¹³⁵ Erzo F.P. Luttmer, *Group Loyalty and the Taste for Redistribution*, 109 J. POL. ECON. 500 (2001) (finding individuals increase their support for welfare spending as the share of local recipients from their own racial group rises), GILENS, *supra*.

¹³⁶ BO ROTHSTEIN, JUST INSTITUTIONS MATTER: THE MORAL AND POLITICAL LOGIC OF THE UNIVERSAL WELFARE STATE 158-59 (1998).

¹³⁷ *Id.* at 159.

¹³⁸ *Id.*, at 160.

¹³⁹ See Larsen, *supra* note 53 (arguing that selective benefits make more salient who benefits from the welfare state and who loses).

¹⁴⁰ In this vein, the disability rights movement has embraced the concept of the “temporarily able-bodied”: we are all going to be disabled eventually. See, e.g., David Ferleger & Penelope A. Boyd, *Anti-*

such redistribution would alleviate some of the burden on means-tested programs to combat poverty, and thus produce the double effect of also reducing the number of people vulnerable to categorization as “undeserving” in the collective imagination.

The state of the economy can also serve as a frame that triggers context-dependent beliefs about deservingness. Support for welfare spending tends to increase in economic recessions.¹⁴¹ This may be because more people start to feel as though they could end up needing public support, but beliefs about deservingness are likely also at play. When the economy prospers, people tend to blame poverty on the poor for not trying hard enough and when times are bad, people are more likely to attribute poverty to factors beyond people’s control.¹⁴² Emphasizing the current widespread perception of a need for buffers against larger structural forces that might lead to economic insecurity – the current financial crisis would be an excellent example—can draw the perceiver’s attention away from vulnerable groups who might potentially be seen to have brought misfortune upon themselves, and direct it towards vulnerabilities that cut across class, race, and generation.

Let me turn, then, to an illustration based on current policy developments that might sharpen our focus: paid family leave policies.¹⁴³ I should say at the outset that I do not present this illustration as a sample “success story” or even as evidence that my thesis is correct. On the contrary, I believe (and we should predict) that it is too early to know. But the case represents an opportunity to make some early observations and isolate a number of research questions that would help us in evaluating the strength of the universality-redistribution thesis.

There is widespread consensus that balancing work and family—and in particular, managing work interruptions to care for members of one’s family—is one of the central challenges of contemporary American life. The major federal policy in this realm, the Family and Medical Leave Act of 1993 (FMLA),¹⁴⁴ grants up to 12 weeks of job-protected leave per year for workers who must take time off due to a serious health condition, to care for a newborn, or care for or family member who has a serious health

Institutionalization: The Promise of the Pennhurst Case, 31 STAN. L. REV. 717, 742 n. 107 (1979); MARTHA MINOW, MAKING ALL THE DIFFERENCE 341 (1990).

¹⁴¹ GILENS, *supra* note ___ at 45-52.

¹⁴² *Id.*

¹⁴³ Another obvious area in which my analysis might have an application is in the debate about universal health care. I do not take up this debate here. The health care debate is extremely complicated because it combines questions about universal versus means-tested provision with questions about the state versus private actors as the service provider of medical care. A large majority (~80%) of Americans believe that health care should be a collective responsibility [update figures pre-publication & cite source]. But Americans are deeply divided over the question of whether the public sector or the private sector is the best agent for actual provision of services. This public-private divide interacts with the universalism versus targeting debate in a way that makes it more difficult to discern what mix of factors is at play in shaping public opinion. In light of this cross-cutting dynamic, I am side-stepping this debate in the current analysis, although I intend to examine it more closely as part of a larger research agenda of which this article is a part.

¹⁴⁴ The Family and Medical Leave Act, Pub L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 29 U.S.C. and 5 U.S.C.).

condition.¹⁴⁵ However, the FMLA does not include wage replacement. Only 8% of private industry workers are eligible for paid family leave benefits through their employer,¹⁴⁶ and 20% have a limited number of “sick days” per year that can be used for family care.¹⁴⁷

A common criticism of the FMLA is that many lower-income workers cannot take family leave, either because they are not covered by the Act (which covers only about half of workers), or because they do not have sufficient savings to afford a needed leave.¹⁴⁸ Most of the workers who do take leave are those who have employer-based wage replacement, and these leave-takers are more educated, have higher incomes, and are more likely to earn a salary (as opposed to hourly wage) than those who do *not* take leave. Many workers who need leave do not take it or cut it short, most commonly citing that they cannot afford to suspend earnings.¹⁴⁹ For years, scholars have been advocating public provision of wage replacement for family leave on a variety of normative grounds.¹⁵⁰

Recently, there have been some major policy developments in this domain. Since 1994, three states have enacted universal paid family leave programs based on a social insurance model,¹⁵¹ and five other states are currently considering such proposals.¹⁵² These new policy developments can serve as a natural laboratory for studying the limits and possibilities for redistribution within their boundaries. California’s program is the furthest along and thus most helpful for purposes of illustration.

¹⁴⁵ *Id.* § 2612(a)(1)(C).

¹⁴⁶ U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, March 2007, at 28 tbl. 19, available at <http://www.bls.gov/ncs/ebs/sp/ebsm0006.pdf>, *supra* note ____, at 28 tbl.19.

¹⁴⁷ About 57% of private industry workers are eligible for sick leave through private employer plans, *id.*, at 28 tbl.19, and about 30% of these workers are in plans that permit sick leave to be used for family care. VICKI LOVELL, INSTITUTE FOR WOMEN’S POLICY RESEARCH, NO TIME TO BE SICK: WHY EVERYONE SUFFERS WHEN WORKERS DON’T HAVE PAID SICK LEAVE 9 tbl. 4 (2004).

¹⁴⁸ Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. GENDER 1, 3 (2005); Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERK. J. EMP. LAB. L. 1, 41-46 (2007).

¹⁴⁹ Roughly 13% of employees who reported needing to take a leave did not take it. *Id.* at 2-2 tbl.2.1, 2-14 tbl.2.14. In a 2003 survey of employed workers in California, 18.4% reported that at some point in the previous five years, they did not take a leave despite having wanted to do so. Ruth Milkman & Eileen Applebaum, *Paid Family Leave in California: New Research Findings*, in THE STATE OF CALIFORNIA LABOR 2004, at 57-58 (2004), available at <http://www.irle.ucla.edu/research/scl/pdf04/scl2004ch2.pdf>.

¹⁵⁰ Some recent examples are Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PENN. J. LABOR & EMP. L. 293 (2007); Lisa M. Keels, *Family Law: Family and Medical Leave Act* 7 GEO. J. GENDER & L. 1043, 1052 (2006). For a more comprehensive review, see Lester, *A Defense of Paid Family Leave*, *supra*, note ____, at 1, 18-33.

¹⁵¹ CAL. UNEMP. INS. CODE §§ 3300-3306; WASH. REV. CODE § 49.86 (2008); Act of May 2, 2008, 2008 N.J. Sess. Law Serv. ch. 17.

¹⁵² Arizona, Massachusetts, Minnesota, New York, and Pennsylvania. See S.B. 1199, 48th Leg., 2d Reg. Sess. (Ariz. 2008); S. 114, 185th Gen. Ct. (Mass. 2007); H.F. 2676, 2008 Leg., 85th Sess. (Minn. 2008); A. 9245, 2007 Leg. (N.Y. 2007); H.B. 1386, 2007 Gen. Assemb., Reg. Sess. (Pa. 2007). See also NAT’L P’SHIP FOR WOMEN & FAMILIES, STATE AND LOCAL ACTION ON PAID FAMILY AND MEDICAL LEAVE: 2008 OUTLOOK 1 (2008), available at http://www.nationalpartnership.org/site/DocServer/Paid_Leave_Tracking.pdf?docID=1921.

California's Family Temporary Disability Insurance (FTDI) replaces 55% of the wages, for up to six weeks in any 12-month period, of workers who must take time off to care for seriously ill family members or bond with a new child.¹⁵³ The benefit covers 90% of private-sector workers.¹⁵⁴ FTDI does not restrict eligibility based on size of the employer, and the earnings requirement is very low (37.5 hours of work --over the course of 12 months --at the prevailing minimum wage in California). There is a floor on benefits of about \$50 per week, and a ceiling of about \$900 per week.¹⁵⁵ Participation is mandatory, although an employer may opt out of the program if it offers a voluntary plan that is more generous than what the statute requires. The benefit is financed by a payroll tax on employees up to a set limit (\$86,698 for 2008).¹⁵⁶ The incremental tax imposed on each employee to finance the benefit probably averages about 70 cents per week.¹⁵⁷

The question for present purposes is whether we might use this case to focus our analysis of the influence of the psychological phenomena I described earlier—reciprocity, groupism, and framing—and their potential for generating public support, and ultimately, for achieving redistribution. Consider first the process by which public support developed around the proposal. Based on our earlier analysis, one could hypothesize that support for universal provision might be actuated around the intense constraints that poor, middle-class and wealthy workers alike face in balancing work and family. For low-income workers, availability of benefits is limited or non-existent. For middle- and high-income workers, the availability of private benefits through the workplace is increasingly precarious. Possibilities are rife for common cause across income groups in support of paid leave insofar as it promises to offer material resources for reconciling work and family.

In the period leading up to passage of the California legislation, active constituencies on both sides of the issue worked to frame the issue from their own

¹⁵³ CAL. UNEMP. INS. CODE § 3301(a)-(d) (2008). Leaves to care for ill domestic partners are included.

¹⁵⁴ Author's calculation, based on federal government data on SDI coverage and California government workforce statistics. See U.S. SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2007, at 9.9 tbl.9.C1 (2008), available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2007/supplement07.pdf>; EMPLOYMENT DEV. DEP'T, CIVILIAN LABOR FORCE, EMPLOYMENT, AND UNEMPLOYMENT (2008), available at <http://www.calmis.cahwnet.gov/htmlfile/county/califhtm.htm>. The benefit also extends caregiving benefits to domestic partners and

¹⁵⁵ For 2007, weekly benefits ranged between \$50 and \$882. EMPLOYMENT DEVELOPMENT DEPARTMENT, STATE OF CALIFORNIA, FACT SHEET: PAID FAMILY LEAVE (2007), available at http://www.edd.ca.gov/pdf_pub_ctr/de8714cf.pdf.

¹⁵⁶ *Id.* § 985; EMPLOYMENT DEV. DEP'T, DISABILITY INSURANCE – QUICK STATISTICS: TAXABLE WAGE CEILING (2008) (charting taxable wage ceiling from 1998-2008), available at http://www.edd.ca.gov/About_EDD/pdf/qsd-Taxable%20Wage%20Ceiling.pdf.

¹⁵⁷ Because the tax that finances the benefit is part of the tax that finances state short-term disability benefits, it is hard to know exactly the size of the incremental payroll tax required to finance the benefit. In 2007, SDI (including FTDI) cost an average California employee about \$6.97 per week. See OCCUPATIONAL EMPLOYMENT STATISTICS, EMPLOYMENT DEV. DEP'T, OCCUPATIONAL EMPLOYMENT (MAY 2006) & WAGE (2007 - 1ST QUARTER) DATA (2007), available at [http://www.calmis.ca.gov/file/occup\\$oeswages/Cal\\$oes.xls](http://www.calmis.ca.gov/file/occup$oeswages/Cal$oes.xls). FTDI claims accounted for about 10% of total SDI benefit expenditures. My rough estimate assumes that the portion of the tax required to finance the benefit is directly proportional to expenditures on the new program.

perspective and to communicate this message to the press and the public. The Berkeley Media Studies Group analyzed the content of approximately 300 news media pieces (television, newspapers, magazines, and radio) covering California Senate Bill 1661 as debate intensified in the period surrounding the Governor's signing the bill, from June 1 through October 31, 2002.¹⁵⁸ The researchers identified a number of different "frames" that were used to communicate about the story, and counted their frequency of appearance.¹⁵⁹

They identified six frames supportive of the bill: "Caring family, bonding moms" [which appeared in 69% percent of all media pieces], emphasizing the importance of the opportunity to care for loved ones, and featuring not only mothers caring for babies, but also men caring for spouses and infants; "Balancing work and family" [41%], emphasizing painful conflict between family and job, both to meet the needs of children, and look after ailing parents; "Business wins too" [27%], suggesting that paid family leave will help businesses profit, "Make family leave real" [17%], decrying FMLA as "a mirage" that most employees cannot afford to use, and that only the wealthy can afford to take leave; Corporate family values [9%], emphasizing that corporations have duties to families and communities beyond (or despite) their primary goal to make a profit; and Competitive advantage [6%], suggesting that paid family leave benefits the state as a whole.

Opposing frames were "Unfair burden" [59%], an emotional appeal to the plight of struggling businesses; "Competitive disadvantage" [30%], invoking an image of California losing jobs; "Tax on jobs" [29%], invoking the idea that the law imposes an unfair tax on employees because they can't opt out; and "Nanny state/slippery slope" [24%], a libertarian message that the state should not tell workers what to do, and this legislation puts California on a slippery slope to a European-style welfare state.

It is noteworthy that the supportive frames most frequently invoked by the media used universalizing themes of family love and care, and painful conflict between being a good worker and a good family member: partner, son, or daughter. The supportive frame that emphasized economic inequality was distinctly less prevalent, perhaps reflecting a judgment on the part of media advocates that a "help for the poor" message would not be as effective in generating public support. The opposing frame that appeared most frequently highlighted the plight of small business. Although the "nanny state" imagery invoked least frequently suggests that opponents had at least some reason to believe that segments of the public would respond to the threat of a "socialized" welfare state, absent were frames relating to irresponsibility, dependency, or blameworthiness of people likely to benefit from the program. Although much of the impetus for the legislation was concern about the economic struggles of those who lack savings or employer-based benefits, economic inequality did not become an organizing schema for public debate, and concepts of "deservingness" did not play any role, unlike what researchers Martin

¹⁵⁸ Berkeley Media Studies Group, Making the Case for Paid Family Leave: How California's Landmark Law was Framed in the News, Issue #14 (November 2003), available at <http://www.bmsg.org/pdfs/Issue14.pdf>.

¹⁵⁹ *Id.*, at 6-10.

Gilens and Shanto Iyengar have suggested they so often do in debates about means-tested anti-poverty programs.¹⁶⁰ Future research might investigate whether the media covered other family policies during the same time period in California that proposed more direct targeting of poor populations. If so, it would be useful to see whether “blame frames”¹⁶¹ were more prevalent than they were during the paid leave campaign.

The payroll tax financing, and broad contribution and eligibility requirements of FTDI might appeal to reciprocity norms in ways I discussed earlier. The question remains open as to whether, over time, an increased tolerance for redistribution within the program might emerge. Currently, the tax is capped, making it regressive. Wage replacement is set at a fixed percentage of pre-leave earnings (although there is a floor—a very low one—and a ceiling that corresponds with the cap on the maximum wage base taxed). Thus the net tax and benefit structure is regressive. Although evidence that the public supported the program’s creation with the belief that it would effectuate redistribution would be very powerful, the success of the reciprocity-redistribution hypothesis does not depend on it. The hypothesis contemplates that this might emerge over time. Flat benefits would have made the net tax/benefit structure more progressive, but at the stage of initial introduction, wage-proportional benefits likely had more appeal for the politically engaged public that debated passage of the law. The relatively high maximum benefit cap makes the benefit non-trivial for middle- and higher-income workers. If a flat benefit had been used instead, its amount might have been capped at a relatively low level to assuage concerns that high replacement rates would lead to moral hazard at the lowest wage levels. The resulting benefit might have been too low to generate significant public support.¹⁶² It remains to be seen whether, over time, there is the potential (or the will among political elites) for making the tax-benefit ratio more progressive—perhaps 80% wage replacement for those in the lowest quintile of earnings, 70% for the next quintile, and so forth—without raising significant resistance from participants concerned about unfairness or moral hazard due to excessive replacement rates.¹⁶³

Public opinion polls conducted one year before, and one year after, passage of the legislation found strong majority support for the idea of paid leave.¹⁶⁴ Large majorities favored paid leave in virtually every segment of the state’s population, regardless of their gender, race or ethnicity, nativity, education, or political orientation. Questions that the

¹⁶⁰ See *supra*, notes ____.

¹⁶¹ I borrow this term from Hanson & Hanson, *supra* note ____.

¹⁶² For example, implementation of the Washington state law is stalled because there has been difficulty in agreeing on a funding mechanism. Some have speculated that at least part of the difficulty is the unwillingness of the public to pay the proposed payroll tax in the absence of more generous benefits. Caroline McConnell, *Washington Stumbles Towards Landmark Paid Family Leave*, CROSSCUT (April 4, 2008).

¹⁶³ There is currently a one-week waiting period, which operates like a deductible and thus reduces moral hazard.

¹⁶⁴ Milkman & Applebaum, *supra* note ____ at 52 (reporting results of 2003 survey in which 84.9% of respondents favored the idea of paid leave when asked, “Do you favor or oppose the idea of a law that guarantees that eligible workers receive a certain portion of their pay when they take family or medical leave?” and 2001-02 survey in which 78% favored the idea).

survey did not illuminate—but which would aid the present endeavor—are whether support would change if respondents were asked whether and how much they would be willing to pay to create such a program, in what form of taxation, and whether and what ways their support might vary depending on whether benefits were flat, scaled to income, or graduated depending on income. It would be possible to design a survey that raised these and other questions designed to illuminate participants’ “tolerance for redistribution.”

Whether the program might achieve income redistribution by virtue of cross-subsidization within the risk pool is more complex, but also a worthy subject for research. Assuming the mandated risk pool incorporates low-income workers who would be excluded from private coverage, if low-income participants were to make relatively more use of the program than higher income workers, there might be an effective transfer of resources between high and low income participants.

However, the possibility for this kind of indirect progressivity would depend on take-up by low-income workers. Early polling data suggest that take-up by low-income workers is disproportionately *low*.¹⁶⁵ The reason for this is uncertain, but one explanation is lack of public awareness. In 2007, three years after implementation of FTDI, 70% of California adults did not know that the program existed.¹⁶⁶ Public awareness of the program has remained statistically unchanged since its inception,¹⁶⁷ with low-income households the least likely to know about the program.¹⁶⁸ Another possible explanation for lack of take-up is that benefits are insufficient to enable leave-taking. The 55% replacement rate might mean that for workers whose earnings just meet monthly expenses, the benefit is too low as a practical matter to enable leave-taking. A third potential explanation is that in the absence of job protection, many workers are unwilling to take leave. Almost 96% of California firms have less than 50 employees, leaving roughly 40% of workers who are eligible for FTDI ineligible for job restoration rights under the FMLA.¹⁶⁹

While the constraints on low-wage workers may be extreme, analogous constraints are hardly absent for middle-class workers. Many middle income workers—not just low-income workers—lack access to private policies to replace wages during family leaves, and operate on family budgets that produce minimal savings and minimal discretionary income.¹⁷⁰ Thus the practical challenge of taking a leave for more than a

¹⁶⁵ A 2007 California Senate report found that workers earning less than \$12,000 per year made disproportionately few FTDI claims. RONA LEVINE SHERIFF, CAL. SENATE OFFICE OF RESEARCH, *BALANCING WORK AND FAMILY 7-10* (2007).

¹⁶⁶ RUTH MILKMAN, *NEW DATA ON PAID FAMILY LEAVE 1* (2008), available at <http://www.familyleave.ucla.edu/pdf/NewData08.pdf>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 2.

¹⁶⁹ Author’s calculations, based on data on employer-size distribution in EMPLOYMENT DEV. DEP’T, *DISTRIBUTION OF CALIFORNIA EMPLOYMENT: THIRD QUARTER 2006* (2006), available at <http://www.calmis.ca.gov/file/indsize/Chart-SOB2006.pdf>.

¹⁷⁰ ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS PARENTS ARE GOING BROKE 8-11* (discussing decline over the past several decades in the level of

few days at 55% wage replacement may touch a nerve across income groups. Will middle-class workers—even if they have no particular concern for their low-income compatriots—feel the impetus to advocate for more generous benefits, such that all boats may rise? This remains to be seen. My analysis suggests that public advocacy efforts for improvements to the program over time might do well to emphasize the importance of the issue for all Californians, not just the poor.

A related issue is the extent to which the law will crowd-out (or crowd-in) private paid leave policies, and if so, what distributional effects this might have. As discussed earlier, if a state mandate crowds out existing provision, social welfare may or may not decline for those who would have had access to private-employer benefits in the absence of the mandate (it would depend on the comparative cost and quality of the old and new benefits).¹⁷¹ Arguably, though, the broader the cross-section of the public that comes to rely on the FTDI program for paid leave, the stronger the impetus for mobilizing around program quality. The converse phenomenon—“crowd-in”—is also possible. The passage of the law may lead employers that wish to be “high road” employers to adopt policies that exceed the minimum requirements of the statute.¹⁷² If this were to happen, it could redound to the benefit of a broad cross-section of workers, or—conversely—it could mean that a quality gap persists between “low” and “high” road policies, leaving little impetus for workers who enjoy high-road policies to alter the new status quo. It is too early to gauge the presence or valence of crowding by FTDI and any distributional impact such crowding might have. Once again, however, the presence or absence of crowding is a testable phenomenon, and a research question that could shed light on the plausibility of my thesis.

A final comment about the California paid leave law is that it seems likely that the prior existence in California of a temporary disability social insurance program—something that exists in only five states—smoothed the way for FTDI. FTDI operated as an incremental expansion of the temporary disability insurance program. Perhaps the very possibility of creating similar programs in other states (assuming we were persuaded of their value) is tenuous given the rarity of a suitable preexisting social insurance apparatus (and normative mentality) on which to build. At the same time, we need not overstate the significance of the existing institutional structure. The program was not “slipped in under the radar” of an existing program. Californians were asked to pay a new tax on their earnings for a new, specific, purpose, a tradeoff about which the public debate was very explicit. Moreover, Washington State’s similar paid leave legislation was created in the

discretionary income available to middle-class families and the resulting lack of financial buffer in the event of unexpected income interruption).

¹⁷¹ See *supra*, TAN ____.

¹⁷² See, e.g., Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents’ Leave Taking*, 40 DEMOGRAPHY 191, 196 (2003). This study of the impact of unpaid leave mandates in state and federal law found an increase in the likelihood and duration of leaves taken by workers who were *not* beneficiaries of the mandate. *Id.* The authors speculate that this reflects the following spillover effect: as the laws became more generous, so too did firms covered by the laws, extending benefits even to workers they were not required to cover. *Id.* See also O’Leary, *supra* note ____ at 38 (reporting federal survey data showing an increase in unpaid leave policies within exempt firms following passage of FMLA and speculating that the statute had a positive norm-creation effect).

absence of any pre-existing similar social insurance scheme, suggesting that an existing TDI infrastructure—or mentality—was not essential. Instead, a more general emerging social norm favoring income security for family care might be evolving.

Still, the matter of working within existing institutional structures is an important one. If the initial framing effects for the public of being “in this together” and minimizing the “otherness” of beneficiaries will be more likely to set the program on a positive trajectory for sustained public support, there may be a compelling argument that a progressively motivated social planner should make every effort to start with universal provision, even if initially not redistributive, building in greater progressivity over time. However, if as some scholars suggest, institutional “lock-in” makes existing policies sticky, there may be advantages to working for incremental change even within existing means-tested programs.

An example is the State Children’s Health Insurance (CHIP) program. The program authorizes states to subsidize enrollment in private health insurance plans for the children of low-income working parents. While originally targeted only at very poor families, President Obama recently signed legislation that will enable states to raise the eligibility threshold to include middle-income families. Progressivity is built into eligibility requirements, so that poorer enrollees still receive more extensive coverage. Public opinion polls revealed strong support for program expansion. It remains to be seen whether its generosity will increase over time. Still, moves to expand targeted benefits into less poor populations, especially if financing is non-contributory (i.e., if it is funded by general revenues) run the risk of exacerbating social cleavages if public disagreements arise over “middle-class abuse” of the programs and “undeserving” beneficiaries.¹⁷³

To summarize this Part, we can speculate on a number of ways in which the motivational account developed in Part IV of this essay could guide how we think about the design of social insurance institutions. Proof of these propositions remains more elusive. I have offered the example of California’s recently adopted paid leave insurance program to illustrate the kinds of questions one might pursue as part of an agenda for empirical inquiry on the matter.

VI. Welfare State Universalism and “Social Solidarity”

The analysis to this point has argued that prudent design of social protections against economic insecurity—in particular, a preference for universalist schemes that satisfy reciprocity norms and reduce the salience of social cleavages—can facilitate the manifestation of other-regarding preferences. The exercise, in essence, is one of creating

¹⁷³ See, e.g., Grogan & Patashnik, *supra* note __ at 61, 65 (describing successful rhetorical appeals of Clinton administration to the needs of “middle class working people” to resist conservative Medicaid retrenchment initiatives, but simultaneous ambivalence of public and political elites about the use of Medicaid by relatively well-off people). See also Jeffrey L. Stoltermann, *Medicaid and the Middle Class: Should the Government Pay for Everyone’s Long-Term Health Care?* 1 ELDER L. J. 251 (1993) (example of resistance to middle-class inclusion).

the conditions for the altruistic elements of people's rational utility function to dominate the self-interested elements. It is an optimizing exercise of sorts, assuming a prior normative commitment to achieving redistribution.

The question in this Part is whether it is possible to do more than this—to create conditions that might alter people's *initial* predilections. Might some kinds of welfare institutions alter the *ratio* of self-regarding to other-regarding impulses that comprise one's rational utility function? It is possible—and many before me have argued—that a kind of preference-shaping “social learning” might occur as a consequence of the prevailing institutional context. Could universalistic social insurance against common social risks be one such context?

The notion that institutional form might generate social preferences is more familiar within sociology, and economics in the institutional vein, than it is within the mainstream public finance theory that dominates American welfare policy.¹⁷⁴ The mid-20th Century British social theorists Richard Titmuss, T.H. Marshall, and R.H. Tawney, theorized a linkage between social bonds and broad-based government social provision. Titmuss argued that Britons' second-world war experience of a mass external threat created the psychological conditions—the recognition of shared fate and the need to attend to all citizens—for the creation of universalist social policy.¹⁷⁵ In this account causality runs from an external shock, to the formation of solidarity, to the creation of welfare institutions that collectivize risk.¹⁷⁶

However, Titmuss and contemporaries also advanced a distinct *justification* for universalist provision based on the (potentially) stronger concept *social solidarity*. Means-testing, he argued, weakens the bonds of society by drawing distinctions between the worthy who are self-sufficient and the unworthy who are not.¹⁷⁷ T.H. Marshall, elaborating on his concept of “social citizenship” in his famous lectures on “Citizenship and Social Class” defended universal welfare provision as follows:

What matters is that there is a general enrichment of the concrete substance of civilized life, a general reduction of risk and insecurity, an equalisation between the more and the less fortunate at all levels—between the healthy and the sick, the employed and the unemployed, the old and the active, the bachelor and the father of a large family. Equalisation is not so much between classes as between

¹⁷⁴ Emile Durkheim famously asked “what are the bonds that unite men with one another?” ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (edition) 25 (1893). One of Durkheim's principle preoccupations was the question whether laws by which society binds itself to cooperate are a manifestation of the moral impulse toward solidarity, or instead are generative of solidarity.

¹⁷⁵ Titmuss, *War and Social Policy* at 111-112.

¹⁷⁶ For a recent argument in a similar vein, see William P. Quigley, *What Katrina Revealed*, 2 HARV. L & POL'Y REV. 361, 376-80 (2008) (arguing that the Katrina disaster, by making people recognize shared vulnerability, was a lightning rod for formation of social solidarity, and that this solidarity should in turn be marshaled in the service of advocating the creation or expansion of accountable public programs designed to support community rebuilding).

¹⁷⁷ Richard M. Titmuss, *Universal and Selective Social Services* (1967) in BRIAN ABEL-SMITH & KAY TITMUSS (EDS.), *THE PHILOSOPHY OF WELFARE: SELECTED WRITINGS OF RICHARD M. TITMUSS* 207-219 at 128-40 at 128-29 (1987).

individuals within a population which is now treated for this purpose as though it were one class. ... Even when benefits are paid in cash, this class fusion is outwardly expressed in the form of a new common experience. All learn what it means to have an insurance card that must be regularly stamped (by somebody), or to collect children's allowances or pensions from the post office.¹⁷⁸

Titmuss and Marshall were not simply positing that universalist social policy *reflected* solidarity; they distinctly argued that universalism could *foster* a normatively desirable perception of common experience, emphasizing mutual, rather than competing, interests of taxpayers and beneficiaries.¹⁷⁹

Some contemporary American scholars express a similar view. For example, Tom Baker argues that the design of insurance institutions can affect social attitudes, in particular the degree to which individuals facing risk feel social solidarity, in the form of mutual responsibility, for one another.¹⁸⁰ More tightly actuarial insurance-- in which higher risk participants are excluded -- argues Baker, is less conducive to generating this kind of mutual responsibility.¹⁸¹ Deborah Stone argues that insurance (both private and public), because it pools risk within a community, reinforces norms of altruism, collective responsibility, and mutual aid.¹⁸² Citizens, she contends, cannot escape the implicit moral lesson of altruism and collective responsibility inherent in social insurance "no matter how much they may chafe under mandatory participation."¹⁸³

A variant on this argument is that cross-class benefits may lead to social learning, as better-off people come to recognize their common humanity with others who share a common need for security against risk.¹⁸⁴ Meredith Rosenthal and Norman Daniels make this kind of argument about the empathy-generating (as well as norm-setting) possibility of universal health insurance. They argue:

The attitudes people have toward seeking collective solutions to social problems are in part a product of the institutions that they encounter. People embedded in social insurance schemes tend to sustain attitudes of social solidarity, believing sharing risks is a social obligation. Of course, cultures with social insurance schemes may have had deeper commitment to social solidarity to start with, but the stability of these institutions over the long run in many countries suggests they help shape attitudes, as well. American commitment toward solidarity in our

¹⁷⁸ T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* 56 (1950).

¹⁷⁹ Titmuss, *Art of Giving*, 115; Miller 13-14.

¹⁸⁰ E.g., Tom Baker, *Risk, Insurance, and the Social Construction of Responsibility*, in TOM BAKER AND JONATHAN SIMON, *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY* 33-51 at 46 (2002) (design of insurance, particularly degree of actuarialism, crucial to the social construction of responsibility and social solidarity).

¹⁸¹ Baker, *id.*

¹⁸² See, e.g., Deborah Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, in BAKER & SIMON *supra* note ___ at 61-63 (2002).

¹⁸³ Stone at 63. See also Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 22 *LAW & SOC'Y REV.* 772 (1988).

¹⁸⁴ See, e.g., Albert Weale, *Equality, Social Solidarity and the Welfare State*, 100 *ETHICS* 473 (1990).

Social Security and Medicare schemes—the “third rail” of politics—may be sustained by the benefits produced by the collective sharing of risks.¹⁸⁵

Theda Skocpol uses similar arguments in defense of more universalistic social policy:

Universalistic policies would also change the attitudes of more privileged Americans, which returns us to the bedrock matter of broad and sustainable support for antipoverty policies. ... If and when new public social policies begin to help American families from all social classes and all racial and ethnic groups to meet contingencies of ill health, job loss, and the challenges of balancing paid work and parental responsibilities, then a “kinder and gentler” political nation might actually emerge. With their own values and needs recognized through a revitalized public sector, larger numbers of middle-class American citizens would be prepared to go the extra mile for especially needy minorities.¹⁸⁶

These theorists seem to suggest that universal provision can lead to more permanent social change through recognition of common humanity—a kind of empathy-generative social learning process.¹⁸⁷ In all of these writings, however, the psychological mechanism by which this solidarity might emerge is only vaguely specified. How, exactly, would it work?

One hypothesis is that universalist programs lead to the social integration of middle-class and poor people who all have a stake in the program. This story may work well in the context of something like public education, where public provision has doubtless reduced economic segregation as compared with an alternative, hypothetical world in which we had never established a system of public education. The resulting face-to-face interaction, both social and constructive, between otherwise economically disparate children and adults could lead to the building of coalitions around educational values and policy, as well as other kinds of involvement that schools might coordinate, like school participation in civic events – the school parade on Earth Day. Common commitment might give rise to greater respect and identification with one another. Certain other aspects of public life resonate along this dimension – jury service, military service, some aspects of political participation.

We might recast the story about face-to-face interaction through schools (or health clinics, nursing homes, or childcare facilities, for that matter) in terms of its

¹⁸⁵ Meredith Rosenthal & Norman Daniels, *Beyond Competition: The Normative Implications of Consumer-Driven Health Plans*, 31 J. HEALTH POLITICS, POL’Y & L. 671, 681-82 (2006). See also Tony Prosser, *Regulation and Social Solidarity*, 33 J. L. & SOC’Y 364, 383 (2006) (arguing for universal state provision of health and education services as a means of “regulating for social solidarity” and reducing social fragmentation).

¹⁸⁶ SKOCPOL, SOCIAL POLICY, *supra* note ___ at 253-74.

¹⁸⁷ See also John J. Rodger, *Social Solidarity, Welfare and Post-Emotionalism*, 32 J. SOC. POL’Y 403, 412-13 (2003) (arguing that the weakening of state involvement in welfare policy that promotes reciprocal social and economic dependence between all social classes may lead to social divisions and “post-emotional” society in which the plight of the disadvantaged is manifested intellectually rather than with sincere emotion or empathy).

cognitive foundations. Provision of services on equal terms to the poor and non-poor so that people are physically using the same services might diminish the perception of group distance. A diminished perception of group status might facilitate deeper fellow-feeling between citizens.

Exploring the necessity and relative role of *face-to-face* interaction in inculcating social solidarity is part of my larger research agenda and beyond the scope of the present inquiry. My present inquiry asks what relevance (if any) this hypothesis based on “social integration” holds for public insurance. Some, to be sure, but the case is uneasy. Social insurance programs do not, for the most part, require any face-to-face interaction between citizens. Although some programs require beneficiaries to work with someone from the administrative agency (caseworker, unemployment counselor), this is not the same as face-to-face interaction between participants in the pool of contributors and beneficiaries. Technological change has meant that Marshall’s ideal of fellowship borne of the shared necessity of going to the post office to collect a pension check is no longer a descriptive reality. Cash transfers can happen through direct deposit in one’s bank account.

But still, one could tell a story, even in the relatively interpersonal arms-length context of universal social insurance, in which preference-altering social learning could happen in connection with the cognitive phenomena this essay has described. This process would go beyond simply “institutionally framing” social choices to encourage the dominance of people’s other-regarding over self-regarding preferences from within some fixed underlying mix of preferences that comprises their utility function. It might be possible to alter their dispositions—change the “mix”.

Suppose a universal social insurance program is established—largely fueled by median voters’ self-interested motives. Certain reciprocity features are built into the program to facilitate trust and encourage buy-in: contribution requirements, selective mechanisms to regulate over-use. Suppose the system works: people see ways in which the program offers common security for themselves and others who occupy different social positions. People recognize improvements in overall social conditions that they associate with the program and come to more fully recognize their value. People’s confidence in the program increases. Feeling this greater confidence, they feel more unity with other participants in their collective stewardship of the project. In this context, the salience of common group status with other participants as beneficiaries and stewards of the program dominates other aspects of their identity. Their judgment of the fairness of the distributional aspects of the program feels different now – not simply because of how their preferences are “cued” but because they feel they have learned something about the legitimacy of the program and other participants. The prospect of building more progressivity into the program does not seem unfair.

All of these things are possible. True, the story could unfold differently—public confidence could erode if the program were poorly designed or managed. My point is not to say that universal social insurance will always and inevitably lead to the evolution of more altruistic social preferences. But I have traced a plausible process by which it *could*.

VII. Conclusion

In this essay, I have drawn a connection between institutionalist theories from sociology and political science as to why universalistic welfare policy might accomplish more redistribution than selective policy, and research in economics and psychology on the complexity of motives, in particular on the conditions under which people are willing to support redistribution. I do not claim that other explanations—cultural forces, racial legacies, material self-interest, institutional “lock-in”—have no explanatory power. On the contrary, it is plausible that each of these explanations does some work, and it is hard to speculate on their relative weight.

My argument is simply that phenomena operating at the cognitive level might also do significant work: namely, welfare institutions designed around more universal distribution of benefits might serve as an “institutional frame” that increases support for—or at least reduces opposition to—redistribution *within* a universal scheme. It might do so by reinforcing reciprocity norms, reducing the salience of in-group favoritism along class and race lines, and by reducing the scope of public debate about the distinction between “deserving” and “undeserving” beneficiaries of public aid. More ambitiously, but also more speculatively, I conjecture that more universalist institutions for managing common social risks might establish the foundations for social learning that alters preferences more permanently over time.

Despite the necessarily tentative nature of my analysis, the intersection between positive political theory, behavioral science, and theories of social solidarity is an important and neglected area of inquiry. At the very least, this essay has aimed to increase awareness of its possibilities for fruitful application to social policy design.