

# HIGH COTTON AND THE LOW ROAD: AN UNRAVELING FARM BILL COALITION AND ITS IMPLICATIONS

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*At the center of this conversation is the United States Congress, the only institution in which representatives from throughout the nation come together to hash out national policy. In the 1850s, a crisis over fundamental American values and institutions—the slavery crisis—eroded the process of debate and compromise that gives Congress its purpose and power. In 2018, a crisis over different fundamentals—immigration, the rule of law, the status and safety of women and people of color—is doing much the same. If Congress’s checkered past teaches us anything on this score, it teaches this: A dysfunctional Congress can close off a vital arena for national dialogue, leaving us vulnerable in ways that we haven’t yet begun to fathom.*

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1. Joanne B. Freeman, *The Violence at the Heart of Our Politics*, N.Y. TIMES, Sept. 7, 2018, <https://perma.cc/FC32-BLX9>.

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#### ABSTRACT

*The farm bill is a traditionally bipartisan effort to authorize vast federal benefits to wide-ranging groups of citizens. Rooted in the societal tumult of the Great Depression, Congress has reauthorized farm bill legislation more than twenty times over the course of eighty-five years of legislative and political history in post-New Deal America. The Agricultural Improvement Act of 2018 represents the latest iteration, but it also represented another difficult, highly partisan effort. The 2014 and 2018 farm bill debates have both involved a level of dysfunction that has no historical precedent; marked by increasingly partisan, ideological and seemingly irreconcilable differences between Democrats and Republicans, these bills seem to expose bigger problems in Congress and profound concerns for American government. This Article offers one method for exploring partisan Congressional dysfunction as it has engulfed the traditionally bipartisan farm bill by tracing the intertwined history of reform for farm program payments and low income food assistance. It then applies political thought and theory to this history in an attempt to derive a better understanding of the use of power in the Congressional process. With this application, the article concludes by analyzing the abuse of factional power in the legislative process, highlighting questions and concerns for further research and analysis. The high-cotton-low-road farm bill in 2018 provides a unique case study given the history and political dynamics contained within it and this article seeks to add perspective to difficult matters in troubling times.*

#### I. INTRODUCTION

Tumult in society may be a symptom of illness in the body politic. Seismic shifts or tectonic movements in the political landscape cause social upheaval and disruption. Political storm clouds on the horizon complicate navigating the ship of

state. Are we a polarized nation that is inflicting damage in the hyper-connected digital age on the grand experiment in self-government crafted out of the enlightenment? The metaphor and the microscope—devices we often use to understand complicated, difficult issues—may be necessary at this difficult moment. We can take deep dives and get down in the weeds. We might wrestle with profound, complex challenges that are often far larger than, but connected to, ourselves.

This Article is an attempt at developing a better understanding of current political challenges through a specific set of policy issues that are contained within the sprawling, complex omnibus authorizing legislation commonly referred to as the farm bill.<sup>3</sup> Farm bills may provide a unique window into Congress, the American policymaking process, and our ever-evolving efforts at self-government. Rooted in the societal tumult of the Great Depression, Congress has reauthorized farm bill legislation more than twenty times over the course of eighty-five years of legislative and political history in post-New Deal America.<sup>4</sup> The farm bill has changed much over this time, changes wrought by complicated coalitional politics over the course of many legislative efforts.

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2. See, e.g., *Is Democracy Dying?*, ATLANTIC (Oct. 2018), <https://perma.cc/EXY7-2CPE>; Peter Baker, *Obama Lashes Trump in Debut 2018 Speech. President's Response: "I Fell Asleep,"* N.Y. TIMES, Sept. 7, 2018, <https://perma.cc/9ZDC-TW5E>.

3. Specifically, a farm bill is multi-year authorizing legislation. It authorizes mandatory spending for entitlement programs for farmers, as well as low-income persons and households. Entitlement programs establish basic criteria for eligibility and any person meeting that criteria is entitled to the benefits of the program, which are budgeted as mandatory or direct spending. These bills also authorize various appropriations accounts that are funded through the annual appropriations processes, budgeted as discretionary spending. The term 'farm bill' is somewhat of a misnomer as more than 70% of all spending authorized in the bill goes to low income persons and households to assist with the purchase of food, and much of the appropriated funds are to programs that do not provide direct assistance to farmers, such as rural economic development. The term 'farm bill' has become lodged in the policy and political lexicon. See, e.g. Neil D. Hamilton, *The 2014 Farm Bill: Lessons in Patience, Politics, and Persuasion*, 19 DRAKE J. AGRIC. L. 2, 37 (2014); RENEE JOHNSON & JIM MONKE, CONG. RESEARCH SERV., RS22131, WHAT IS THE FARM BILL?, <https://perma.cc/YF9F-JXUN> (2018).

4. JONATHAN COPPESS, *THE FAULT LINES OF FARM POLICY: A LEGISLATIVE AND POLITICAL HISTORY OF THE FARM BILL 6* (University of Nebraska Press, 2018). Prior to the 2018 effort, the most recent farm bill was the 2014 Farm Bill which provided billions in payments to farmers of more than a dozen listed covered commodities, assistance with crop insurance and in response to natural disasters, as well as for assistance with the conservation of natural resources. It is referred to as an omnibus bill because it has grown to encompass foreign food aid, international trade development, assistance to low income individuals for food purchases, rural economic development, research, horticulture and organic production, crop insurance and renewable or bio-based energy and products. See generally Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014).

Part II of this Article seeks to analyze dysfunction in Congress using the unraveling farm bill coalition exhibited by the reauthorization process for the farm bill in 2018. Part III builds the high-cotton-low-road farm bill case study by getting into the weeds of farm program payments and eligibility requirements, food assistance program basics, and the controversial provisions in the 2018 House Farm Bill. Part IV adds context to the high-cotton-low-road case study with a deeper dive into the intertwined history of the controversies and policy developments for both farm payments and food assistance. Finally, Part V seeks to develop an understanding of the implications of the high-cotton-low road case study, applying principles of political thought about the American system to the farm bill political landscape.

## II. EVIDENCE OF DYSFUNCTION, 2018: AN UNRAVELING FARM BILL COALITION AND STALEMATE

Farm bills have expiration dates that create an artificial deadline for Congress to act by either extension or reauthorization. Failure to do so means billions in programmatic authorities could expire or, in the case of farm support programs, revert to antiquated and unworkable programs from 1949.<sup>5</sup> An obvious political gimmick, it forces Congress to act and sets the workings of the interest groups that form the farm bill coalition in motion. The farm bill coalition is built upon the interests receiving mandatory or entitlement funding: (1) farm commodity interests; (2) environmental and conservation interests; and (3) low-income persons or households and the public interest groups that advocate on their behalf; like much of the current American system of government, all three their trace roots to the New Deal efforts implemented to combat the Great Depression.<sup>6</sup>

### *A. Expiration and Reauthorization of a Farm Bill, the Coalition's Work*

The Agricultural Act of 2014 (the 2014 Farm Bill), expired with the 2018 crop, calendar, and fiscal years depending on the program.<sup>7</sup> Expiration means

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5. Among these expirations, those of the commodity support programs are the most unique in that each farm bill's Title I suspends operation of the Agricultural Act of 1949 (1949 Act) for the duration of the bill. Known as permanent law, the 1949 Act provides for a complicated set of price support through market-distorting non-recourse loans. *See* JIM MONKE ET AL., CONG. RESEARCH SERV., R45314, EXPIRATION OF THE 2014 FARM BILL 2, <https://perma.cc/M9GG-ZXFT> (2018); Agricultural Act of 2014, Title I, Subtitle A, §1601-02.

6. *See* COPPESS, *supra* note 4, at 5-8, 47-52.

7. Expiration of an omnibus suite of statutory authorities is complicated by the sheer number of programs operating across different budget rules (e.g., mandatory and discretionary spending). For example, the direct commodity support programs in Title I of the 2014 Farm Bill expire with the 2018 crop year, which can differ by crop. The authorities for natural

different things for the three members of the farm bill coalition. The commodity support programs revert to 1949 Act policy, conservation authorities expire. The benefit authorities for low-income food assistance in the Supplemental Nutrition Assistance Program (SNAP) are generally permanent but certain aspects of program operation expire with the fiscal year.<sup>8</sup> The programs authorized with discretionary accounts expire with the federal fiscal year (September 30); without a new farm bill, an extension of the 2014 Farm Bill, or some other action by Congress, the funding and authorities for these programs are at risk.<sup>9</sup>

Enactment of the 2014 Farm Bill required a long, tumultuous, and challenging process that consumed three calendar years across two Congresses. Conflicts in both chambers exposed the two main fault lines in the farm bill coalition.<sup>10</sup> From 2011 to 2013, the debate featured two successive defeats in the House due to the partisan political dispute involving SNAP.<sup>11</sup> The Republican-led House first refused to consider the bill on the floor during a contentious 2012 election year; the House followed with an excruciating vote against the bill on the House floor in 2013.<sup>12</sup> Prior to 2013, a farm bill had been defeated on the House floor only once before, in 1962.<sup>13</sup>

The Democratically led Senate passed a farm bill with large, bipartisan majorities in two successive years and Congresses, but the Senate version of the farm bill struggled with a regional dispute among farm interests over the

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resource conservation programs in Title II expired with the 2018 federal fiscal year (FY), September 30, 2018; contracts in existence prior to the end of FY 2018 will continue as those funds are considered obligated. Most of the authorities in the federal crop insurance program are permanent and do not expire. *See* Agricultural Act of 2014, Title I - Title II; *See generally* JIM MONKE, FARM BILL PROGRAMS WITHOUT A BUDGET BASELINE BEYOND FY2018, CONG. RESEARCH SERV., R44758 (2018), <https://perma.cc/92TM-8KLS>.

8. *See id.*

9. Programs authorized for appropriations continue operating by passage of a continuing resolution or other appropriation bill. If a continuing resolution passes thirty-nine programs with mandatory funding of \$2.8 billion, (over five years) will lapse at the end of the fiscal year unless Congress passes a new farm bill or extends the current farm bill. *See id.*

10. *See* COPPESS, *supra* note 4, at 7-8; Hamilton, *supra* note 3, at 7-18.

11. *See* COPPESS, *supra* note 4, at Ch. 8; Hamilton, *supra* note 3, at 34; Jill Lawrence, *Profiles in Negotiation: The 2014 Farm and Food Stamp Deal*, BROOKINGS, Oct. 22, 2015, <https://perma.cc/XQ43-ZAHC>.

12. A complicated, partisan strategy rescued the bill by separating the nutrition assistance provisions from the rest of the bill, passing both on strict party-line votes and then recombining them for conference with the Senate. *See* COPPESS, *supra* note 4, at 8 and chapter 8.

13. Jonathan Coppess et al, *Initial Review of the House 2018 Farm Bill*, U. ILL.: FARMDOC DAILY, (Apr. 26, 2018), <https://perma.cc/T6DC-3JQ4>.

commodity support programs that crossed party lines.<sup>14</sup> Success for the bill only came about through conference concessions by the House on the partisan changes to SNAP, permitting a compromise on the regional farm program dispute.<sup>15</sup>

Procedural struggle and the rancorous, partisan debate raised many uncomfortable questions for the farm bill, not the least of which was the viability of the long-running coalition deemed necessary for success in the difficult Congressional process.<sup>16</sup> It was a short five years to expiration of the 2014 Farm Bill, during which time partisanship and polarization arguably became more intense and concentrated; a situation the 2016 election cycle exacerbated further.<sup>17</sup>

Timely reauthorization in 2018 appeared complicated from the start.<sup>18</sup> One of the lessons from the 2014 debate was that partisan fights over SNAP overly complicate the ability for Congress to produce a farm bill, especially in the House. The House Ag Committee farm bill contained controversial changes to SNAP that divided the committee along partisan lines in a mid-term election year.<sup>19</sup> Democrats on the committee objected to the proposed changes to low-income assistance and other program changes but the committee reported the bill to the House with all Republicans voting in favor and no Democrats; partisan dispute followed the bill to the House floor where it was initially defeated.<sup>20</sup>

By comparison, the 2018 Farm Bill debate in the Senate was a more traditional bipartisan and collegial undertaking. The Senate Ag Committee avoided a repeat of the regional conflict over farm program policy. More importantly, the Senate eschewed the bitter partisan dispute over SNAP, which had so plagued the House effort.<sup>21</sup> The result was a near-unanimous vote in committee to report the bill

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14. Coppess, *supra* note 4, at 275-82.

15. *Id.* at 265-67.

16. *See id.* at 261-63.

17. *See, e.g.* Clare Foran, *America's Political Divide Intensified During Trump's First Year as President*, ATLANTIC, (Oct. 5, 2017), <https://perma.cc/9T6J-7BFX>

18. *See* Jonathan Coppess, et al, *Thoughts: 2016 Election Results and the Next Farm Bill*, U. ILL.: FARMDOC DAILY (Nov. 11, 2016), <https://perma.cc/GNT3-U6H3> [hereinafter *Thoughts*]; *see also* Jonathan Coppess, & Todd Kuethe, *Mapping the Farm Bill: House Ag Committee and the 2018 Debate*, U. ILL.: FARMDOC DAILY (Feb. 23, 2017), <https://perma.cc/UY83-Q8Z2>.

19. Coppess et al., *supra* note 13.

20. The defeat was largely the result of opposition from Democrats that permitted a faction of House Republicans to hold the bill hostage for votes on immigration legislation. *See* Jonathan Coppess & Todd Kuethe, *Mapping the Fate of the Farm, 2018 House Edition*, U. ILL.: FARMDOC DAILY (May 24, 2018), <https://perma.cc/GK3M-FG3M> [hereinafter *2018 House Edition*].

21. Jonathan Coppess et al., *Initial Review of the Senate Ag Committee's Draft 2018 Farm Bill*, U. ILL.: FARMDOC DAILY (June 12, 2018), <https://perma.cc/6NTT-8J7T> [hereinafter *Senate Ag Committee's Draft*].

to the Senate.<sup>22</sup> The Senate floor debate was also relatively swift and devoid of partisan conflict. The Senate passed its farm bill by one of the largest vote totals in farm bill history, a week after the House rescued its farm bill from its earlier defeat.<sup>23</sup>

The 2018 effort stalled in conference and the 2014 Farm Bill expired with neither extension nor reauthorization. The House and Senate stalemate in conference carried over into the lame duck Congress after the 2018 mid-term elections in which Democrats won a major victory, recapturing the House majority.<sup>24</sup> Loss of the majority meant a change in the chair of the House Ag Committee as well as great risk in starting the farm bill debate in the new Congress, which eliminated any remaining negotiation leverage for the House, leading to a quick deal as the House conceded on the controversial SNAP provisions.<sup>25</sup> While ultimately successful, the 2018 reauthorization effort was troubling in its own right; a perspective magnified because it followed on the heels of such intense partisan disputes in the previous effort, including defeat on the House floor in 2013. The 2014 and 2018 debates have produced a level of dysfunction on the farm bill that has no historical precedent.<sup>26</sup> Farm bill dysfunction is marked by

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22. Jonathan Coppess et al., *Progress and Potential Hurdles for the 2018 Farm Bill* U. ILL.: FARMDOC DAILY (June 19, 2018), <https://perma.cc/8RGG-LUQL> [hereinafter *Progress and Potential*].

23. The Senate voted to pass the bill by eighty-six to eleven on June 28, 2018, preceded by the House passing its version by a narrow margin (213 to 211) and without a single Democratic vote. Jonathan Coppess et al., *2018 Farm Bill: Two Big Steps Forward & the Top Five Issues for Conference*, U. ILL.: FARMDOC DAILY (July 3, 2018), <https://perma.cc/C3PE-GRQL> [hereinafter *2018 Farm Bill*]. A review of farm bill history indicates that the only bill that passed by a higher vote (93 to 2) count was in 1956, but it was ultimately vetoed by President Eisenhower. Some farm bills have passed by voice vote, indicating little opposition. COPPESS, *supra* note 4, at 367.

24. See, e.g., Jeremy Peters et al., *Midterm Election Results: 4 Key Takeaways*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/election-news.html>; Brakton Booker, *How the Midterms And Lame-Duck Session Are Pushing The Farm Bill To A Deal*, NAT'L PUB. RADIO (Nov. 20, 2018), <https://www.npr.org/2018/11/20/669544401/how-the-midterms-and-lame-duck-session-are-pushing-the-farm-bill-to-a-deal>.

25. See, e.g., Helena Bottemiller Evich & Catherine Boudreau, *Farm bill headed to Trump after landslide House approval*, POLITICO (Dec. 13, 2018), <https://perma.cc/8PSA-AUAF>; Jonathan Coppess et al., *The Agriculture Improvement Act of 2018: An Initial Review*, FARMDOC DAILY, <https://perma.cc/9UT3-7W9F>.

26. The debates throughout the 1950s and, especially, the 1962 effort provide the closest comparisons but all predate the full coalition with food assistance; the breakdown culminating in the 1962 defeat was largely responsible for the farm-food assistance alliance. See COPPESS, *supra* note 4, at Ch. 4. Adding to concern is that the 2018 mid-terms featured large losses by Republicans in suburban districts, further limiting rural districts to single party, Republican—

increasingly partisan, ideological and seemingly irreconcilable differences between Democrats and Republicans in the House over SNAP. These are achingly familiar challenges in this polarized era.

### *B. Overview of the Farm Bill Coalition*

Although the farm bill coalition and its programs are all rooted in the Great Depression and the New Deal, it was the farm interests that formed a coalition first. The traditional farm coalition consists primarily of corn interests from the Midwest, cotton interests in the South, and wheat interests in the western Great Plains and Pacific Northwest; it has been the most significant force behind farm bills and the development of federal food and agricultural policy.<sup>27</sup> Once commonly referred to as the farm bloc, it was constructed in the decade leading up to the Great Depression as regional commodity interests combined to push for heavy federal involvement in the commodity economy to help farmers.<sup>28</sup>

The Agricultural Adjustment Act of 1933 is considered to have permanently altered the farm sector and its relationship to the federal government.<sup>29</sup> What began as unspecified emergency authorities developed into a complex system that combined price-supporting loans with attempts at limiting or controlling commodity production in order to improve prices in the marketplace.<sup>30</sup> That system broke down over decades of surplus production after World War II and was partially replaced by a system of direct income support payments.<sup>31</sup> A second farm economy crisis in the 1980s resulted in massive federal expenditures for farm program payments, followed by substantial reforms in 1996.<sup>32</sup> Some of the reforms

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and now minority—representation. This is a topic for much further exploration and analysis related to, but beyond the scope of, this Article.

27. This is an incomplete coalition perspective, as it does not include dairy interests or sugar interests, both important players in a farm bill. COPPESS, *supra* note 4, at 8; see Jonathan Coppess & Todd Kuethe, *Mapping the Farm Bill: the Traditional Farm Coalition and Current Production*, U. ILL.: FARMDOC DAILY (August 11, 2016), <https://perma.cc/L442-MME8> [hereinafter *Traditional Farm Coalition*]. This delineation also does not include all commodities supported by the programs in a farm bill. See Jonathan Coppess & Todd Kuethe *Mapping the Farm Bill: Expanding the Traditional Farm Coalition*, U. ILL.: FARMDOC DAILY (Aug. 25, 2016), <https://perma.cc/QU3N-SY7M> [hereinafter *Expanding*].

28. This coalition fought unsuccessfully for federal intervention during a farm economic depression that began soon after World War I and carried through the 1920s; success came only when the Great Depression dislodged an entrenched political status quo. COPPESS, *supra* note 4, at 13.

29. See *id.* at 32-35.

30. See *id.*

31. See *id.* at 70.

32. The target price/deficiency system was initially eliminated by the 1996 Farm Bill which, additionally, decoupled farm income support payments from actual planting decisions,



were reversed in 2002, as Congress created an expensive, multi-program payment system; status quo held through the 2008 farm bill, but was upended by budget pressures in 2014.<sup>33</sup>

Food assistance to struggling families was a New Deal response to “widespread unemployment, hunger, and malnutrition” during the Great Depression.<sup>34</sup> Unlike farm assistance, food assistance was initially a creation of the United States Department of Agriculture (USDA) and not directly authorized by Congress.<sup>35</sup> Complicated to administer, it required people to purchase stamps and USDA ended it in 1943 because World War II had reduced unemployment and commodity surpluses.<sup>36</sup> Congress finally authorized a food stamp program with the Food Stamp Act of 1964, but it required years of fighting in the House against Southern Democrats allied with Republicans against the legislation.<sup>37</sup>

The 1970s brought about the most consequential developments for food stamps.<sup>38</sup> The program expanded significantly during a time of stagflation and Congressional reforms that made it easier for low income people and families to receive assistance.<sup>39</sup> This set in motion a conservative backlash and catalyzed Republican efforts to cut the program during the Reagan Administration.<sup>40</sup> Those

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meaning that payments were determined by historical records rather than acres planted. *See id.* at 191-94.

33. Congress reinstated deficiency payments and target prices in 2002 in addition to annual direct payments and loan benefits. Budget and political pressures in 2014 eliminated the direct payments. *See id.* at 208-219.

34. VICTOR OLIVEIRA ET AL., ECON. RESEARCH SERV., DESIGN ISSUES IN USDA’S SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: LOOKING AHEAD BY LOOKING BACK, 17, <https://perma.cc/7NTC-HFQ4> (2018).

35. The first food stamp program was a later addition to USDA efforts to reduce surplus commodities by having the government purchase surplus and donate them to the needy. *Id.* Section 32 of the 1935 Act gives broad authority to the USDA, authorizing the use of customs revenues to improve the commodity markets and dispose of surpluses used to establish the program. *See* John Ferejohn, *Logrolling in an Institutional Context: A Case Study of Food Stamp Legislation*, in CONGRESS AND POLICY CHANGE 220, 227-28 (Gerald. C. Wright, Jr., Leroy N. Rieselbach, and Lawrence C. Dodd, eds., 1986) (ebook).

36. OLIVEIRA ET AL., *supra* note 34, at 18-19 ((citing JEFFREY M. BERRY, FEEDING HUNGRY PEOPLE: RULEMAKING IN THE FOOD STAMP PROGRAM (Rutgers U. Press 1984) (explaining that an estimated that 25% of all benefits were abused)).

37. COPPESS, *supra* note 4, at 124; *see* Ferejohn, *supra* note 35, at 233; Sam Rosenfeld, *Fed by Reform: Congressional Politics, Partisan Change, and the Food Stamp Program, 1961-1981*, 22 J. POL’Y HIST. 474, 478 (2010) (explaining that during the 1950s and 1960s the “chief obstacle [was] the potent opposition of southern Democratic leaders in the congressional Agriculture Committees”).

38. Rosenfeld, *supra* note 37, at 475-76.

39. *Id.* at 474-507

40. *Id.*

partisan efforts returned with new vigor after Republicans retook Congress in the mid-1990s and sought to reform welfare programs. That push waned somewhat in the early 2000s as Congress eased complexity and administrative burdens, including through the nationwide implementation of the electronic benefit transfer (EBT) card system in place of paper coupons by 2004.<sup>41</sup> The 2008 Farm Bill renamed it SNAP and the Great Recession resulted in substantial increases in participation and spending.<sup>42</sup>

Conservation assistance was also part of the New Deal, but was birthed by the second great disaster of the era, the Dust Bowl.<sup>43</sup> Great Plains settlers, forced to reckon with the natural consequences of intensive wheat production in that wind-swept, drought-prone region, turned to Congress and USDA for help.<sup>44</sup> It was the 1980s before conservation became a full coalitional partner in the farm bill. Consequences from expanded farm production in the 1970s, a second farm economic crisis, and renewed environmental concerns about farming and its consequences for soil erosion and water quality were driving factors.<sup>45</sup> The political catalyst was the Reagan Administration's intense emphasis on federal budgeting and deficit reduction which solidified the role of conservation in the farm bill coalition.<sup>46</sup> The farm bill coalition was strengthened and reinvigorated by the

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41. OLIVEIRA ET AL., *supra* note 34, at 31.

42. The American Recovery and Reinvestment Act of 2009 temporarily increased benefit levels for SNAP; this ended in November 2013 “but from FY 2008 to FY 2013, SNAP caseloads increased 81 percent, which resulted from a combination of the economic downturn during the Great Recession, policy changes such as the temporary benefit increase in SNAP benefits due to ARRA, and other policies designed to increase access to the program, particularly among the working poor.” *Id.* at 31-32.

43. COPPESS, *supra* note 4, at 47-52.

44. The response was combining commodity assistance with soil conservation, but conservation policy spent decades in a subsidiary role to supporting crop prices and farm incomes. *Id.* at 47-52.

45. Important too were the substantial political victories in the 1970s for environmental interests which pushed for protection of environmentally-sensitive lands that included penalizing farmers who did not comply with conservation requirements. *See generally* Linda Malone, *Conservation at the Crossroads: Reauthorization of the 1985 Farm Bill Conservation Provisions*, 8 VA. ENVTL. L. J. 215 (1989); Jonathan Coppess, *A Return to the Crossroad: Farming, Nutrient Loss, and Conservation*, 39 U. ARK. LITTLE ROCK L. REV. 351 (2016) [hereinafter *Crossroad*].

46. Using obscure budget authorities as an offensive weapon against federal programs and, especially mandatory entitlement spending, President Reagan and his allies in Congress attacked both farm programs and food stamps. The goal was to split them apart in a divide-and-conquer strategy that would render both politically vulnerable to reform, reduction or elimination. *See* COPPESS, *supra* note 4, at 168-72; William Greider, *The Education of David Stockman*, ATLANTIC, (December 1981), <https://perma.cc/8S9Z-J8HU>. *See also* DAVID A. STOCKMAN, *THE TRIUMPH OF POLITICS: HOW THE REAGAN REVOLUTION FAILED* (1986).

addition. Each farm bill since 1985 has featured this coalition's widespread, bipartisan vote counts to succeed in Congress, although the political dynamics have shifted.<sup>47</sup>

Overall, program authorities and spending have generally expanded and increased under this coalition. Bipartisan votes occupy a vast middle swath of the ideological spectrum. This middle swath covers the rural and conservative traditionalist farm interests along with a combination of farm and non-farm environmental or conservation interests. Most important for vote-counting is the alliance with urban and suburban districts and interests in the form of food and nutrition assistance. The coalition has also provided for the addition of a large array of smaller but important coalitional partners, such as rural economic development, fruit and vegetable producers, as well as bio-based energy interests.

In this historical and political context, the dysfunction and stalemate in 2018 is both troubling and puzzling. Important is the juxtaposition of the House treatment of farm programs, especially cotton, with SNAP and conservation. There is little precedent in farm bill history for two consecutive defeats on the House floor; even less because of the same partisan attack on a vital coalition partner's program and its participants simultaneously corresponding to a vast expansion of assistance for one commodity. A minority interest within the minority partner in the legislative coalition was willing and able to collect the spoils while attacking the other coalitional partners. This provides a troubling precedent that may portend more problems to come.

### III. HIGH COTTON AND THE LOW ROAD

The phrase high cotton is generally understood to mean things are going well; good crops and high prices bring strong profits.<sup>48</sup> If there is a low road in a farm bill debate, the House Ag Committee took it in 2018.<sup>49</sup> The result was a striking display of partisanship for a farm bill.<sup>50</sup> The Congressional Budget Office

47. See generally COPPESS, *supra* note 4.

48. See, e.g. Sarah Riggs Stapleton, *Oral traditions, changing rural landscapes, and science education*, 12 CULTURAL STUD. SCI. EDUC. 189 (2017).

49. The low road can be a base, mean, contemptible or dishonorable path usually corrupted by zealous self-interest, but one that, ironically, can be a catalyst for better outcomes when the political fever breaks. See generally Greg Conti, *Hume's Low Road to Toleration*, 36 HIST. POL. THOUGHT 165 (2015); see *infra* Section VI.

50. The farm bill was barely voted out of committee and initially defeated on the House floor, before subsequently passing with a two-vote margin (213 to 211). No Democrat voted for the bill in committee or on the floor. Larry Dreiling, *House passes 2018 farm bill by two votes*, HIGH PLAINS/MIDWEST AG J. (JUNE 23, 2018), <https://perma.cc/F5LZ-3UEJ>; see Philip Brasher, *House Panel Advances GOP Farm Bill Over Democratic Anger*, AGRI-PULSE, (April

(CBO) has been the nonpartisan, official scorekeeper for federal legislation and policy since 1974.<sup>51</sup> CBO forecasts spending for existing statutes and programs over a ten-year window, as well as estimates the costs of bills and amendments.<sup>52</sup> CBO scorekeeping will provide some of the measurements for high cotton and help map the low road of the bitter dispute over the House's proposed revisions to the SNAP.

#### A. Strong Revenue and Spending on Cotton

By multiple measures, 2018 looked like high cotton; a windfall to most cotton farmers due to good crops, strong market prices, and large federal payments.<sup>53</sup> The expectations are cotton farmers will achieve better revenue per acre than the other supported crops, relative to recent history.<sup>54</sup> Of political importance, cotton farmers projected to receive more than \$1.1 billion in payments

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18, 2018), <https://www.agri-pulse.com/articles/10870-house-panel-advances-gop-farm-bill-over-democratic-anger>.

51. See Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 COLUMBIA L. REV. 702, 706 (2000); Laurellen Porter, *Congress and Agricultural Policy, 1977*, in *THE NEW POLITICS OF FOOD* 15-22 (Don F. Hadwiger and William P. Browne, eds., 1978); Alan S. Walter, *Impacts of the Congressional Budget Process on Agricultural Legislation*, in *THE NEW POLITICS OF FOOD* 37-42 (Don F. Hadwiger and William P. Browne, eds., 1978); See also *Introduction to CBO*, CONG. BUDGET OFF., <https://perma.cc/EG7E-U28M> (archived Dec. 17, 2018).

52. When Congress writes legislation (including amendments considered by committees and on the respective chamber floors) and amends existing statutes, CBO provides estimates for the increases or decreases in spending from the legislation, known as the score. See *Frequently Asked Questions*, CONG. BUDGET OFF., <https://perma.cc/YMY4-GKFE> (archived Dec. 21, 2018); George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 188-94 (2009) (discussing "official cost" of legislation); Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L. J. 1555, 1573-75 (2007) (discussing CBO scorekeeping).

53. Of the major commodities that receive support from a farm bill, cotton was expected to have arguably the best year in terms of market prices; cotton farmers were expected to harvest a bumper crop with strong yields per acre. See Jonathan Coppess et al., *The Farm Bill Stalemate, Part I: Commodity Assistance*, FARMDOC DAILY (Sept. 27, 2018), <https://perma.cc/SLB4-E45Q> [hereinafter *Stalemate, Part I*]; Carl Zulauf et al., *The Tariff Conflict and Change in Value of Production of U.S. Field Crops*, FARMDOC DAILY (Aug. 16, 2018), <https://perma.cc/F34U-DU9Z>.

54. Specifically, estimated cotton revenues for 2018 (as estimated during the farm bill debate) were \$661 per acre compared to \$563 in recent years and \$506 in 2014. Only wheat was close with revenues above the most recent five years but below 2014. See *Stalemate, Part I*, supra note 53; Jonathan Coppess et al., *2018 Farm Bill Updated: Conference Negotiations Begin*, FARMDOC DAILY (Aug. 9, 2018), <https://perma.cc/QX4Y-SYZE> [hereinafter *Farm Bill Updated*].

for the 2018 cotton crop.<sup>55</sup> The federal payments to cotton farmers are made in three separate deliveries, none of which were authorized by Congress in the 2014 Farm Bill and two were initiated by USDA without specific authorization from Congress.<sup>56</sup> In March, USDA announced it would make special cotton ginning cost share payments estimated to amount to over \$200 million.<sup>57</sup> In August and December, USDA announced payments in response to escalating trade conflicts with key agricultural export markets in the form of tariffs and retaliatory tariffs.<sup>58</sup> Cotton farmers were scheduled to receive \$553.8 million.<sup>59</sup>

It is Congressional action that stands out, especially in light of the fact that Congress eliminated farm program payments for cotton in the 2014 Farm Bill,

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55. This amount is calculated by the author from information reported by CBO and USDA. USDA announced a Market Facilitation Program (MFP) payment for cotton and other commodities in response to the trade conflict initiated by President Trump, with cotton to receive an estimated \$553.8 million in payments. Press Release, U.S. Dept. Agric., USDA Launches Second Round of Trade Mitigation Payments, (Dec. 17, 2018), <https://perma.cc/H6SA-WEC5>. In addition, CBO's May 2019 Baseline reported \$216 million for FY 2018 Cotton Ginning Cost Share Payments and \$409 million in total payments for cotton, which would be mostly for the 2018 crop (but reported for FY2020). See CONG. BUDGET OFFICE, USDA'S MANDATORY FARM PROGRAMS—CBO'S MAY 2019 BASELINE 8 (May 2, 2019), <https://perma.cc/ST59-EQZ5>. This is \$401 million more than CBO reported for cotton in its June 2017 Baseline for FY2020, the last estimate before Congress added seed cotton to the farm payment programs. See CONG. BUDGET OFFICE, CBO'S JUNE 2017 BASELINE FOR FARM PROGRAMS (June 29, 2017), <https://perma.cc/WR22-LHT7>. Note that farm bill commodity programs contain timing shifts that push payments into a different fiscal year. Thus, payments for the 2018 crop year will not be made until after October 1, 2019, which would be FY2020. *Id.*; See Gary Schnitkey et al., *ARC-CO Payment Timing and Cash Rent Bidding*, FARMDOC DAILY (NOV. 22, 2016), <https://perma.cc/VNG3-SDSE>.

56. See Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 § 1111(6) (upland cotton not included in the list of "covered commodities" that receive payments) and § 1111(9) (definition of "Generic Base Acres" which were former upland cotton base acres); see *infra* p. 26 and note 69; H.R. REP. NO. 113-333, at 11 (2014) (Statement of Managers, Title I—Commodities, (1) "Repeal of Direct Payments" explains that upland cotton was ineligible for farm payment programs).

57. While the payments use 2016 production records, the sign up for them was in 2018 and payments were to be made in 2018. See *Cotton Ginning Cost Share Program*, FARM SERV. AGENCY, <https://perma.cc/CP66-SNLE>. CBO estimated the payments to be \$216 million for FY 2018. See *CBO May 2019 Baseline*, *supra* note 55. CONGRESSIONAL BUDGET OFFICE, USDA'S MANDATORY FARM PROGRAMS - CBO'S APRIL 2018 BASELINE 9 (2018), <https://perma.cc/SH9T-8FFP>.

58. See USDA Press Release, *supra* note 55.

59. It should be noted that cotton was not the only beneficiary of the trade assistance, however; a total of \$9.6 billion was promised to farmers of multiple crops, most of it for soybeans. See *id.*

replacing them with a heavily-subsidized insurance product.<sup>60</sup> Crop prices which had been spiking when the 2014 Farm Bill was being written and debated declined significantly once it became law.<sup>61</sup> Cotton farmers, unhappy with being removed from the farm payment programs in the 2014 Farm Bill, demanded they be returned.<sup>62</sup> In February, Congress revised farm programs to allow cotton to once again receive payments beginning with the 2018 crop year.<sup>63</sup> It was an unusual move, opening farm programs in their final year of operation and outside of the farm bill reauthorization process.<sup>64</sup> Comparing CBO estimates, cotton farmers are expected to receive over \$300 million in additional payments each fiscal year beginning with the 2018 crop, topping \$400 million in at least two years.<sup>65</sup>

### B. Payments and Policy

In the farm bill, Congress designs payment programs for those farmers with a history of planting a specific group of commodities; USDA makes billions in direct cash payments to farmers every fiscal year.<sup>66</sup> These are entitlement payments;

60. A successful dispute initiated by Brazil against U.S. cotton supports before the World Trade Organization resulted in a settlement agreement that included eliminating cotton payments in the 2014 Farm Bill. COPPESS, *supra* note 4, at Ch. 7.

61. *Cotton Prices - 45 Year Historical Chart*, MACROTRENDS, <https://perma.cc/SF8C-CXCZ> (archived March 18, 2019). For example, the National Agricultural Statistics Services at USDA reports the average prices received by farmers during the marketing year and upland cotton prices peaked at \$0.94 per pound in August 2011. By June 2016, when USDA announced the ginning cost share assistance, cotton prices had fallen by over 30%, averaging \$0.6723 per pound in May 2016. Corn and soybean prices peaked in August of 2012 and were down 52% and 40%, respectively, by May 2016. See Quick Stats, NAT'L AGRIC. STATS. SERV., <https://perma.cc/EBN9-Q7VD>.

62. See, e.g., *Cotton Ginning Cost Share Program*, *supra* note 57; Forrest Laws, *Cotton Council Continuing Push to Win Assistance for Cotton Producers*, DELTA FARM PRESS, (Feb. 26, 2016), <https://perma.cc/RD9P-HJF4>.

63. This new covered commodity would receive payments based on a calculation that combined prices and production for cotton lint (upland cotton) and cottonseed, an oilseed produced as a byproduct of the ginning process. See Jonathan Coppess et al., *Farm Bill Round 1: Dairy, Cotton and the President's Budget*, U. ILL.: FARMDOC DAILY (Feb. 14, 2018), <https://perma.cc/W2SA-U6A5>.

64. Congress added seed cotton as a covered commodity in the Bipartisan Budget Act of 2018. See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64, Division F, §60101 (2018).

65. This estimate was calculated by comparing total direct cash payment forecasts made by CBO in the June 2017 Baseline with those in the May 2019 Baseline, before and after (respectively) Congress added seed cotton to the list of covered commodities. See CONGRESSIONAL BUDGET OFFICE, *supra* note 57.

66. Technically, USDA makes payments through the Farm Service Agency (FSA) using authorities and funding of the Commodity Credit Corporation (CCC). See, e.g.,

so long as a person meets the eligibility requirements and assistance is triggered, that person is entitled to receive the benefits. Congressional program design determines who gets the payments, what events cause payments, and, in general terms, how much a farmer can receive.<sup>67</sup> The bottom line is these payments represent farm income. As such, they create economic incentives for recipients' behavior, including for farm operations to try to maximize the payments received.<sup>68</sup> What has evolved over time is a complex system for determining eligibility to receive payments, as well as a definitive limit on the amount an individual farmer is permitted to receive.

Congress limits eligibility to those persons or legal entities that qualify as "actively engaged" in farming.<sup>69</sup> To be actively engaged, the person (or legal entity separately) must make significant contribution to the farm from each of two categories: (1) capital, equipment or land contributions; and (2) personal labor or active personal management.<sup>70</sup> In addition, the "share of the profits or losses from the farming operation" must be both "commensurate with the contributions of the

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CONGRESSIONAL BUDGET OFFICE, *supra* note 57; JUNE 2017 BASELINE, *supra* note 55. In addition, the USDA's Office of Budget and Program Analysis (OBPA) provides detailed spending records to Congress as part of the annual Presidential Budget in the explanatory notes for USDA's fiscal year budgets. See *USDA Budget Congressional Justifications*, OFF. BUDGET & PROGRAM ANALYSIS, <https://perma.cc/4TQG-NKBA> (archived Dec. 23, 2018).

67. Specifically, these are income support payments made to farmers of a select group of covered, bulk, storable commodities (defined as covered commodities) through three existing programs: Agriculture Risk Coverage (ARC); Price Loss Coverage (PLC); and Marketing Assistance Loans (MAL), which includes Loan Deficiency Payments (LDP). ARC and PLC were created by Congress in the 2014 Farm Bill. See Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649, Title I, Subtitle A, Part II (2014).

68. Importantly, ARC and PLC are "decoupled" farm program payments, meaning that neither the payment nor do their amounts depend on current crop production decisions by the farmer. See generally ECONOMIC RESEARCH SERVICE, DECOUPLED PAYMENTS: HOUSEHOLD INCOME TRANSFERS IN CONTEMPORARY U.S. AGRICULTURE (2003), <https://perma.cc/6VEB-WCQ7>; James B. Whitaker, *The Varying Impacts of Agricultural Support on U.S. Farm Household Consumption*, 91 AM. J. AGRIC. ECON., 569 (2009).

69. See 7 U.S.C. §1308-1(b) (2018) (section 1001A of the Food Security Act of 1985, Title X—General Commodity Provisions). The statute defines a person as "a natural person [that] does not include a legal entity" and a legal entity as one created pursuant to Federal or State law that owns an agricultural commodity or produces an agricultural commodity. See 7 U.S.C. §1308(a)(3)-(4) (2018) (also, section 1001 of The Food Security Act of 1985, Title X—General Commodity Provisions).

70. 7 U.S.C. §1308-1(b)(2)(A)(i) (Determining whether the contribution is significant is based upon the total value of the farming operation).

person to the farming operation” and the risk.<sup>71</sup> Persons and legal entities must also meet the eligibility requirement of less than \$900,000 in income.<sup>72</sup>

If a person or legal entity is eligible for farm program payments they are subject to limitations on the total amount they can receive. For all covered commodities other than peanuts, the total amount of payments a person or legal entity can receive to for any crop year is \$125,000; peanuts are subject to a separate \$125,000 limit.<sup>73</sup> This limitation does not apply to legal entities that are joint ventures or general partnerships; joint ventures and general partnerships are subject to a limitation which is equal to the individual limit (\$125,000) multiplied by the number of persons or legal entities that make up the joint venture or general partnership.<sup>74</sup>

In 2018, the House and Senate went in opposite directions on the issue of restricting farm program payments. The Senate farm bill continued existing payment limits and reduced the AGI eligibility standard to \$700,000.<sup>75</sup> Senators also agreed to tighten eligibility requirements for individuals who can claim to be eligible for payments by contributing to the management of the farm operation.<sup>76</sup> The Senate provisions would limit a farm from collecting additional farm program

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71. 7 U.S.C. §1308-1(b)(2)(A)(ii)-(iii). Legal entities (other than general partnerships or joint ventures) must separately make a significant contribution of capital, equipment or land. 7 U.S.C. §1308-1(b)(2)(B)(i). In addition, the stockholders or members of the entity must collectively make a significant contribution of personal labor or active personal management to the operation. 7 U.S.C. §1308-1(b)(2)(B)(ii). For general partnerships or joint ventures each partner or member who makes a significant contribution of either labor or active personal management is considered actively engaged with respect to the farm operation. 7 U.S.C. §1308-1(b)(2)(C).

72. 7 U.S.C. §1308-3a(b) (2018). In general, the person or entity is ineligible for payments in any year (crop, fiscal or program) in which the person or legal entity had average adjusted gross income (AGI) in excess of \$900,000. For this requirement, AGI is determined by averaging AGI (or comparable measure) for the person or entity over the “3 taxable years preceding the most immediately preceding complete taxable year.” Regarding eligibility for payments for the 2015 crop year, for example, this requirement would average the farmer’s AGI from tax years 2011, 2012, and 2013. *See* 7 U.S.C. §1308-3a(a)(1).

73. *See* 7 U.S.C. §1308(b)-(d) (2018).

74. 7 U.S.C. §1308(e)(3)(B)(ii) (2018). The statute requires that all payments be directly attributed to a person based the direct and indirect ownership interests that the person has in any legal entity. 7 U.S.C. §1308(e)(2). The statute provides for four levels of attribution for embedded legal entities. *See* 7 U.S.C. §1308(e)(4).

75. *See* Agriculture Improvement Act of 2018, S.3042, 115th Cong. § 1704 (2018).

76. *See* S. 3042. Known as the management loophole, it permits some individuals to qualify for payments based on only contributing management to the farm operation; the Senate bill closed it, allowing only one person to qualify as a manager.



payments by adding managers to the operation, historically a method for abusing the programs that builds on similar efforts in the 2014 Farm Bill debate.<sup>77</sup>

By comparison, the House farm bill proposed to allow farms to increase program payments by adding cousins, nieces and nephews to the list of those individuals considered a member of the farm operation.<sup>78</sup> Adding family members would permit farm operations to increase the total payments received; each new family member would bring with them the potential for another \$125,000 in payments. The House also eliminated payment limits for some farm programs.<sup>79</sup> Finally, the House added exceptions to the rules for a “Qualified Pass Through Entity” farm operation.<sup>80</sup> In effect, the House would expand the existing exception for general partnerships and joint ventures to more kinds of entities and such entities would be able to increase payments based on each additional person or entity added to the operation. The House bill would also exempt qualified pass through entities from the AGI eligibility requirement.<sup>81</sup>

### *C. Payments and Farming*

As further background to this discussion, consider that farming in America has undergone substantial changes since the advent of this system of federal support for farmers in the 1930s. Generally, during the first half or longer of farm bill history “farm households averaged lower household incomes than nonfarm households, and poverty was more prevalent among farm than non-farm households.”<sup>82</sup> Farms have consolidated over the years resulting in fewer but larger and more sophisticated farms with greater household incomes, which also receive

77. *See id.*

78. Agriculture Improvement Act of 2018, H.R. 2, 115th Cong. § 1603 (2018).

Currently, farms where a majority of the participants are family members, defined to include those related “as lineal ancestor, lineal descendant, sibling, spouse, or otherwise by marriage,” each adult family member contributing labor or active personal management is considered to be actively engaged. *See* 7 U.S.C. § 1308(a)(2).

79. Specifically, it excluded from the payment limit (\$125,000), any gains from the MAL program or any LDP. *See* H.R. 2 §§ 1201 & 1205. The 2014 Farm Bill included those in the overall limit on Title I assistance to farmers. *See* Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014).

80. *See* H.R. 2 § 1604(b)(3). What qualifies is determined based on the tax code and would include general partnerships, joint ventures, limited liability corporations, and S corporations.

81. *Id.*

82. JONATHAN MCFADDEN & ROBERT A. HOPPE, ECON. RESEARCH SERV., THE EVOLVING DISTRIBUTION OF PAYMENTS FROM COMMODITY, CONSERVATION, AND FEDERAL CROP INSURANCE PROGRAMS 1, (Nov. 2017), <https://perma.cc/Y3M8-YSKY>; *see generally* Daniel A. Sumner, *American Farms Keep Growing: Size, Productivity, and Policy*, 28 J. OF ECON. PERSPECTIVES 147 (2014).

larger farm program payments.<sup>83</sup> The amount of land in farming has changed little, however, and there has been a major and continuing shift of the cropland into larger operations.<sup>84</sup> A complex set of shifts in farm consolidation, has been most notable since the last major farm economic crisis in the 1980s.<sup>85</sup>

Larger farms receive bigger payments which may also impact consolidation by driving up rental rates and forcing out smaller, less profitable farmers.<sup>86</sup> In addition, programs that are designed to trigger relatively larger payments per acre for some crops can result in payment limits that become binding at smaller acres for farmers of those crops; cotton, rice and peanuts typically receive the largest payments on a per-acre basis.<sup>87</sup> Farms likely to face the limits have a strong motivation to oppose payment limits, seek loopholes from Congress and work with lawyers and accountants to devise entities and other schemes to avoid payment limits. Similarly, higher revenues on larger farms could lead those farms closer to the AGI requirements.

Potentially the most politically-challenging fact, is that larger farms tend to have higher incomes while receiving a larger share of the payments, as well as more payments per-acre and per farm.<sup>88</sup> These farms do, however, experience incomes that fluctuate by significant amounts from year-to-year, some with an

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83. *See id.* at 2.

84. Farms that have at least 2,000 acres under production. Midsized farms have been found to have declined the most while the number of very small farms have increased in number but have limited acres under production (e.g., less than 50 acres). *See id.* at 20. In classifying farms, ERS categorizes farms with sales of \$350,000 to \$999,999 as mid-sized farms and they made up 6% of all farms; large-scale farms are \$1 million or more in sales and make up 3%. *Id.* at 6.

85. Among the reasons for this consolidation is technology and the fact larger farms are generally more profitable and able to increase their size, although margins are often tight and financial performance can fluctuate substantially in a given year regardless of the size of the farm. *Id.* at 23.

86. Because “commodity and insurance indemnity payments follow production” and the covered commodities are trending towards larger operations. *See id.* at 14-20 (explaining research has found that “some of the benefits of higher program payments accrue to landlords who rent their land through cash leases and who realize higher rents”).

87. “For example, soybeans have an average estimated payment per payment acre of \$6 and it would take over 20,000 soybean payment acres to reach the cap. By comparison, rice averages \$146 per payment acre and would only require 854 payment acres to reach the limit.” *Progress and Potential*, *supra* note 22.

88. In fact, the median income for farm households exceeded that for all U.S. households in 2015 and most farms with program crops had median income more than double or triple that for all U.S. households. The median operator household income in 2015 was \$193,000 with gross cash farm income between \$500,000 and \$999,999. By comparison, for farms with gross cash farm income above \$1 million, the median operator household income was nearly double at \$360,000. *See MCFADDEN & HOPPE*, *supra* note 82, at 27.

average income swing of \$86,000.<sup>89</sup> Researchers expect that these trends will continue, that farms will consolidate and larger farms will have higher incomes while receiving larger payments.<sup>90</sup>

#### *D. Uncomfortable Comparisons with SNAP; Program Basics*

SNAP benefits are for low-income persons and households; income-supplementing benefits that can only be used to purchase food. Specifically, most participants must meet two income-based eligibility requirements and an assets limit: (1) gross monthly income below 130% of the Federal poverty standard; and (2) net monthly income, minus certain deductions, below 100% of the Federal poverty standard.<sup>91</sup> More than 80% of households participating in SNAP have monthly incomes that were below the poverty line and over 40% are considered in deep poverty with incomes less than or equal to 50% of poverty.<sup>92</sup> Nearly two-thirds of SNAP participants are children, elderly and non-elderly adults with disabilities

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89. *Id.* at 10-12 (consistent with other research that “income is more volatile for commercial farm households than for nonfarm households” with median changes that are “roughly eight times higher for commercial farm households”).

90. For example, the 50th percentile of payment recipients had income in 1991 that was \$60,717 (2015 dollars), but by 2013, it was \$207,417 in 2015 (50% of payments). The 75th percentile of payment recipients had income at \$127,818 in 1991 and increased to \$504,984 by 2015 (25% of payments), and the 90th percentile at \$257,530 in 1991 but \$1.078 million in 2015 (10% of payments). *See id.* at 29.

91. For an individual under the age of 65 in 2017, the national weighted average poverty threshold was \$12,752 or \$1,063 per month; the SNAP gross monthly income eligibility standard in 2017 was therefore \$1,381 per month or \$16,578 per year. In addition, there are also limits on assets of less than \$2,000 excluding home and retirement. *See* Peter Ganong & Jeffrey B. Liebman, *The Decline, Rebound, and Further Rise in SNAP Enrollment: Disentangling Business Cycle Fluctuations and Policy Changes 5* (Harvard Kennedy Sch., Working Paper 13-037, 2013), <https://perma.cc/5JLE-58BJ> (\$1,211 per month for an individual or \$2,498 per month for a four-person household in 2013); Matthew S. Rutledge & April Yanyuan Wu, *Why Do SSI and SNAP Enrollments Rise in Good Economic Times and Bad?* 4 (Ctr. for Ret. & Research at Boston Coll., Working Paper 2014-10, 2014), <https://perma.cc/U9CG-M8L8> (\$1,640 gross monthly income for a two-person household in 2012 and \$1,261 per month net income); Parke Wilde, *The New Normal: The Supplemental Nutrition Assistance Program (SNAP)*, 95 AM. J. AGRIC. ECON. 325, 325 (2012) (in 2011, this was \$2,422 per month for a family of four, gross; approximately \$1,863 for a family of four net). Similarly, the poverty threshold for a two-person household (under 65) was \$16,493 (\$1,374 per month). *See Poverty Thresholds*, U.S. CENSUS BUREAU, <https://perma.cc/6CV4-HL4L> (archived Dec. 22, 2018) (select 2017).

92. Monthly incomes less than or equal to 50 percent of the poverty guideline would have been less than \$6,376 for an individual, or \$531 per month, in fiscal year 2015. *See* OLIVEIRA ET AL., *supra* note 34, at 1.

and they receive 60% of SNAP benefits, but more than 30% of SNAP households had earned income and are considered “the working poor.”<sup>93</sup>

Like farm programs, SNAP is an entitlement program.<sup>94</sup> It is considered an automatic stabilizer; counter-cyclical to the economy at large because it responds to downturns, particularly labor market problems and unemployment.<sup>95</sup> It provides benefits that are “intended to fill the gap between a needs standard and cash resources available to purchase food” for those below the poverty thresholds.<sup>96</sup> SNAP is effective in helping alleviate food insecurity for adults and children, as well as improving health outcomes.<sup>97</sup> SNAP can also help lift families out of poverty, especially deep poverty and for children.<sup>98</sup> It does so despite benefits that are not overly generous and that are reduced by \$0.30 for every \$1.00 of net income.<sup>99</sup>

Politically, SNAP is a large program that provided \$63.6 billion in benefits to more than 42 million people in fiscal year 2017.<sup>100</sup> As an automatic stabilizer,

93. Notably, these two numbers include some overlap in that some working poor households include children, elderly or disabled members. *See id.*

94. An entitlement program is one where any person or household meeting the qualifications is entitled to receive the benefits and cannot be denied them due to a lack of Federal funds. Thus, “the number of participants can rise in response to declines in economic conditions” with eligibility based on the financial situation of the person or household, making “program participation inherently countercyclical . . . and serve as an automatic stabilizer” during economic downturns or worse. *See id.* at 25.

95. *See* Ganong & Liebman, *supra* note 91, at 25; KELLY D. EDMISTON, FED. RESERVE BANK OF KANSAS CITY, STRUCTURAL AND CYCLICAL TRENDS IN THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM 59 (March 29, 2018), <https://perma.cc/4FCD-AB5N> (The program is “should be viewed as an ‘automatic stabilizer,’ directly in response to unemployment or as a deliberate fiscal policy in response to recession”).

96. EDMISTON, *supra* note 95, at 60.

97. JAMES P. ZILIAK, THE HAMILTON PROJECT, MODERNIZING SNAP BENEFITS 5 (May 2016), <https://perma.cc/F2SL-7UGX>.

98. In 2014, SNAP benefits raised 4.7 million people out of poverty, a number that includes 2.1 million children. In terms of the depth and severity of poverty, during 2000 to 2011, SNAP lowered the poverty rate by an average of 4.9% and lowered depth of poverty rates by 11% and severity of poverty rates by 14.0%. OLIVEIRA ET AL., *supra* note 34, at 12. For children, SNAP reduces the depth of poverty rate by 16.4% and the severity of poverty by 22.3%. *See id.*

99. Monthly benefits averaged \$255 per household (\$126 per person) in 2016 and the maximum available SNAP benefit is based upon USDA’s estimate of the cost of food that can meet a nutritious diet on limited resources. *See* OLIVEIRA ET AL., *supra* note 34, at 1, 8; ZILIAK, *supra* note 97, at 5; Ganong & Liebman, *supra* note 91, at 6; Wilde, *supra* note 91, at 329.

100. FOOD & NUTRITION SERV., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM PARTICIPATION AND COSTS (March 8, 2019), <https://perma.cc/SZP2-TE24>.

however, SNAP spending and participation are also highly variable in response to changing economic conditions and revisions to policy.<sup>101</sup> Specifically, participation increases as poverty increases and poverty spiked during the Great Recession.<sup>102</sup> Unemployment is, of course, a major factor in both poverty and SNAP participation, but it is not the only factor. Low wages, job insecurity, disability and other life events, as well as program operation and population growth, all contribute to poverty and SNAP participation levels.<sup>103</sup>

SNAP participation also demonstrates a “lagged relationship” with the unemployment rate—potentially slower by as many as two years.<sup>104</sup> Accordingly, participation peaked in 2013 in the wake of the Great Recession and, while it has declined each year since, it has not fallen below pre-recession levels leading some researchers to conclude that larger issues in the economy may be holding participation at higher levels.<sup>105</sup> The Great Recession, in fact, appears to have

101. SNAP participation reached its all-time high in fiscal year 2013 when the monthly average participation exceeded 47 million people but has decreased at an increasing pace since then. Participation decreased by two percent in fiscal years 2014 and 2015, by almost 4% in fiscal year 2016 and 5% in fiscal year 2017. See OLIVEIRA ET AL., *supra* note 34, at 4.

102. Poverty “has increased at an annual rate of 1.3 percent per year” and that in 2016 there remained “40.6 million people were in households below the poverty threshold.” EDMISTON, *supra* note 95, at 65. A 7% increase in poverty resulted in a 6% increase in SNAP participation from 2015 to 2016 and a “10 percent increase in the number of people in poverty is associated with 8.8 percent higher SNAP participation. In 2016, 46.2 million people were in poverty, while 44.4 million people participated in SNAP (in March).” *Id.* at 71. The “number of people in poverty grew from 43.123 million in December 2015 to 46.247 million in December 2016, a 7.2 increase” and that this was “associated with a 6.3 percent change in SNAP participation” for an “additional 2.9 million participants” and that the “results suggest that had the number of people in poverty not increased over this period, SNAP participation might have fallen further to 40.3 million people instead.” *Id.* at 74.

103. For example, “adjusted for population, annual growth in SNAP from 1974 to 2016 declines from 3.1 percent to 2.1 percent.” *Id.* at 64. Wages for workers in the middle and bottom of the wage distribution have been relatively flat, as has the poverty threshold; the labor force participation rate continues to decline, which has been a trend that dates to the late 1990s. See PAMELA LOPREST & DEMETRA NIGHTINGALE, URBAN INST., *THE NATURE OF WORK AND THE SOCIAL SAFETY NET 3* (July 2018), <https://perma.cc/UT5G-3NW9>; EDMISTON, *supra* note 95, at 64 (“the poverty threshold has remained around \$19,730 (in 2017 dollars) since 1986”).

104. EDMISTON, *supra* note 95, at 68; Robert Moffitt, *The U.S. Safety Net and Work Incentives: The Great Recession and Beyond*, 34 J. POL’Y ANALYSIS & MGMT., 458, 463 (2015) Moreover, SNAP participation has been found to be more closely linked to long-term unemployment and exhibits much less of a relationship to short-term unemployment; long-term unemployment “typically peaks after short-term unemployment.” EDMISTON, *supra* note 95, at 73.

105. At over 47 million, this represented a substantial increase over the modern low of 17 million in 2000. EDMISTON, *supra* note 95, at 59.

provided a uniquely challenging case study in SNAP participation.<sup>106</sup> The poverty rate did not fall in the years leading up to the downturn and SNAP participation increased during a time of economic growth; a first in the program's history.<sup>107</sup> One conclusion from this is that SNAP participation "may never return to its prerecession levels."<sup>108</sup>

Finally, because SNAP assists with the purchase of food and responds to economic problems, it provides benefits in society. For one, it has a multiplier effect in the economy by "augment[ing] the incomes and spending" of low-income persons and families; money freed from food purchases can be used for other needs.<sup>109</sup> USDA research has concluded that SNAP "supports macroeconomic spending and production" with a multiplier of 1.73 or 1.79, meaning that "an increase of \$1 billion in SNAP benefits increases GDP by \$1.73 to \$1.79 billion" and it "results in an increase of 8,900 to 17,900 full-time equivalent jobs."<sup>110</sup> Important to the farm bill discussion, SNAP also has indirect benefits for farmers because it results in increased total expenditures on food. USDA research estimates that every \$1.00 increase in SNAP benefits increases food spending between a conservative low of \$0.17 to potentially as much as \$0.69.<sup>111</sup> USDA research has also stated that every \$1.00 in food purchases delivers \$0.148 back to farmers, known as the "farm share of the food dollar" based on sales of commodities.<sup>112</sup> In other words, for every \$1.00 increase in SNAP, between \$0.03 to \$0.10 makes its way to the farmer.<sup>113</sup>

#### *E. The Controversy in Changes to SNAP*

Because it serves a vastly larger constituency than farm programs, and it involves issues of poverty and hunger, changes to SNAP can be difficult and controversial in any farm bill debate. The House demanded many changes to SNAP—most notably eligibility requirements, allowances for energy assistance

106. *Id.* at 69-70.

107. From 2003 to 2007, SNAP caseloads increased (24% from 21 million to 26 million) during a time of economic recovery and growth, which was the first time in the program's history that this happened. The poverty rate did not fall with unemployment during these years, which increased the portion of the population that was eligible for the program. *See* Rutledge & Wu, *supra* note 91, at 1.

108. Moffitt, *supra* note 104, at 463.

109. *See* OLIVEIRA ET AL., *supra* note 34, at 4.

110. *Id.* at 4.

111. *Id.* at 13.

112. *See Food Dollar Series*, ECON. RESEARCH SERV., <https://perma.cc/LV97-MF5H> (archived Dec. 22, 2018).

113. *See* Jonathan Coppess et al., *The Farm Bill Stalemate, Part 2: The SNAP Question*, U. ILL.: FARMDOC DAILY (Oct. 4, 2018), <https://perma.cc/55AS-K942> [hereinafter *Part 2*].

and more stringent work requirements—at a time when both participation in the program and spending on benefits had fallen.<sup>114</sup> CBO estimated that participation and spending would continue to decline for most of the next ten years.<sup>115</sup>

The House revisions to SNAP were controversial for additional reasons. Foremost among them was the conclusion by CBO that over a million people would lose benefits from the program, which included many households with children, while also causing 265,000 children to lose access to free school lunch.<sup>116</sup> Magnifying the controversy, CBO estimated that the House bill would reduce the number of people receiving benefits and reduce benefits received per household but increase the administrative costs of the program; a result that gives the appearance that increased administrative spending was offset by cuts in benefits to people.<sup>117</sup> Much of the controversy involved the House's demand for more stringent eligibility requirements based on employment-related criteria.<sup>118</sup> As discussed below, SNAP currently includes work requirements and the ideological view underlying the House's demand for changes carries significant historical baggage.<sup>119</sup>

By comparison, CBO estimated that the Senate bill would spend a total of \$6 million less over ten years on Title IV Nutrition programs (including SNAP) through minor revisions to SNAP, including to the existing work requirements.<sup>120</sup> Where the House featured an unprecedented and unusually partisan farm bill debate, the Senate effort was bipartisan and largely devoid of controversy.

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114. Spending on SNAP in 2017 was over \$12 billion below spending from its peak in 2013. Additionally, participation has decreased by more than 8 million persons since peaking in December 2012. *See id.*; *Farm Bill Updated*, *supra* note 54.

115. *See* JUNE 2017 BASELINE, *supra* note 55.

116. CBO explained further that it estimated that a total of 1.2 million fewer people would receive SNAP benefits in an average month under the revisions and that fully 62% of those individuals would be adults between the ages of 18 and 49 who live in households with children over 6 years of age. CONG. BUDGET OFFICE, COST ESTIMATE H.R. 2 AGRICULTURE AND NUTRITION ACT OF 2018 12 (May 2, 2018), <https://perma.cc/7R6Y-KQ22>.

117. CBO scored 23 different changes to the nutrition title programs and estimated that the House bill would result in a net reduction in benefits of nearly \$16 billion (\$23 billion reduction offset by a \$7 billion increase) while increasing funds for administering the program by over \$16 billion (fiscal years 2019 to 2028). Specifically, the changes that fall under the general description of “workforce solutions” further highlight the controversy. CBO estimates that they would reduce benefits by more than \$9 billion over the 10-year window and, at the same time, increase spending on the administration of these requirements by almost \$8 billion. *Id.*; *2018 Farm Bill*, *supra* note 23; Coppess et al., *supra* note 4.

118. *2018 House Edition*, *supra* note 20.

119. *See* 7 U.S.C. §2015(d)(1)(A), (o) (2018); OLIVEIRA ET AL., *supra* note 34, at 17.

120. *See* CONG. BUDGET OFFICE, COST ESTIMATE S. 3042 AGRICULTURE IMPROVEMENT ACT OF 2018 (June 21, 2018), <https://perma.cc/K4XV-Y6PG>.

Notably, 68 Senators voted to defeat an amendment that would have added the House's SNAP provisions.<sup>121</sup> More emphatically, 86 Senators voted to pass a farm bill without the controversial changes to SNAP, but with tighter limits on payment eligibility.<sup>122</sup>

#### IV. A TANGLED, TROUBLED HISTORY ALONG THE LOW ROAD

As two of the three pillars of the farm bill coalition, farm programs and food assistance are both entitlement programs rooted in the New Deal, but they serve very different constituencies. To over simplify, farm programs provide large benefits to a small constituency that tends to be relatively more affluent. Food assistance provides relatively small benefits to a large constituency that is, by definition, at or below Federal poverty levels. Both programs have complex eligibility requirements that evolved out of fraud and abuse, both actual and perceived. This section reviews a history of the intertwined development of the eligibility issues for both, highlighting further, important differences.

##### *A. History of Protecting High Cotton*

Controversy courses through the history of farm policy; it was present at the start when USDA paid cotton farmers to plow under 10 million acres of growing cotton.<sup>123</sup> Arguably, the most troubling controversy—and the most consequential over the long run—occurred in the cotton producing regions of the South. Covering decades of efforts to reduce cotton acres in hopes of improving prices, farm policies were used by large landowners in the South to drive poor, often African-American, sharecroppers out of subsistence-level cotton farming; Federal assistance used to underwrite mechanization, decrease labor needs and costs, as well as consolidate landholdings.<sup>124</sup> It is not difficult to connect this episode to Southern opposition to food stamps with the same dark thread that runs through the current contretemps in the House farm bill over work requirements.

In addition to the treatment of sharecroppers, political problems for farm program benefits were exposed in 1936 by opponents of the New Deal who

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121. See Roll Call Vote 115<sup>th</sup> Congress - 2<sup>nd</sup> Session, No. 141, U.S. SENATE, (June 28, 2018), <https://perma.cc/59CC-JBPG>.

122. See Roll Call Vote 115<sup>th</sup> Congress - 2<sup>nd</sup> Session, No. 143, U.S. SENATE, (June 28, 2018), <https://perma.cc/59CC-JBPG>.

123. See generally COPPESS, *supra* note 4.

124. See generally GILBERT FITE, COTTON FIELDS NO MORE: SOUTHERN AGRICULTURE, 1865-1980 (1984); BILL WINDERS, THE POLITICS OF FOOD SUPPLY: U.S. AGRICULTURAL POLICY IN THE WORLD ECONOMY (2009); David Eugene Conrad, *The Forgotten Farmers: The Story of Sharecroppers in the New Deal*, 52 J. AM. HIST. 860 (1965).



grabbed a political opportunity handed to them by the Supreme Court.<sup>125</sup> Congress required USDA to produce a report in 1936 that uncovered large payments to farm entities under the 1933 Act and focused a bright political spotlight on a particularly problematic example, the Delta & Pine Land Company (D&PL), a British-controlled 50,000-acre cotton plantation in Mississippi.<sup>126</sup> The President of D&PL was Oscar G. Johnston who had also been appointed the Finance Director of the Agricultural Adjustment Administration at USDA, vice president of the Commodity Credit Corporation, and managed the Federal Cotton Producer's Pool for USDA.<sup>127</sup> This was a glaring conflict of interest. His farms received an outsized infusion of Federal cash during the Depression, the equivalent of more than \$2 million per year in today's dollars.<sup>128</sup> At the time, Johnston held a prominent role for crafting and implementing USDA cotton policy, while directly benefiting from the policy.<sup>129</sup> Although not exclusive to them, the issue was undeniably concentrated in cotton but Southerners in Congress did not back down.<sup>130</sup> Their defense exposed

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125. In January 1936, the Supreme Court invalidated the 1933 AAA, concluding it was beyond the powers of Congress to regulate agricultural production. *See generally U.S. v. Butler*, 297 U.S. 1, 74-75 (1936); COPPESS, *supra* note 4; Lawrence J. Nelson, *Oscar Johnston, the New Deal, and the Cotton Subsidy Payments Controversy, 1936-1937*, 40 J. S. HIST., 399, 402 (1974).

126. The Senate Resolution of March 23, 1936 required USDA to report all 1933 AAA payments over \$10,000 for each contract year. *See* 80 CONG. REC. 6172-75 (1936). For one, the high level of bankruptcies in the Depression had resulted in over 100 insurance companies and 170 banks receiving farm payments and the second highest beneficiary of AAA payments for 1933 was the Mississippi State Penitentiary at \$75,600. *See* SECRETARY OF AGRICULTURE, PAYMENTS MADE UNDER THE AGRICULTURAL ADJUSTMENT PROGRAM, S. DOC. NO. 274 at 9 (1936). For D&PL, a majority of its stock was owned by the Fine Spinners and Doublers Association of Manchester England. *See* Nelson, *supra* note 125, at 402; *see generally* LAWRENCE J. NELSON, KING COTTON'S ADVOCATE: OSCAR G. JOHNSTON AND THE NEW DEAL (1999).

127. *See* 80 CONG. REC. 6172-75; COPPESS, *supra* note 4; Nelson, *supra* note 125, at 403.

128. In a letter dated June 19, 1936, Secretary Wallace submitted the payment information as required under the Senate Resolution. *See* S. Doc. 274, *supra* note 126. The report listed two farms affiliated with Johnston (D&PL and Delta Farms Co.) and indicated that Johnston's farms received \$146,542 in 1933, which is \$2,715,416 in 2018 dollars. In 1934, Johnston's farms (Delta and D&PL) received \$126,038.19 in total payments, or another \$2.1 million in today's dollars. Finally, in 1935, Johnston's farms received a third round of assistance in the amount of \$123,692.07, or nearly \$2.3 million in today's dollars. *See* S. DOC. NO. 274 (compiled from tables 17, 18 and 19). The conversion to 2018 dollars was made using the CPI Inflation Calculator available online from the *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, <https://perma.cc/89MH-222G> (archived Dec. 17, 2018).

129. Records released by USDA indicated that D&PL was one of the largest recipients of farm assistance in 1933, 1934 and 1935. *See* S. DOC. NO. 274.

130. For example, more than \$50,000 to a Montana wheat farmer. In 1933 and 1934, 18 producers received wheat assistance above \$10,000 and 22 corn-hog farmers in 1934. *See* S.

dynamics that remain important to farm assistance politics today.<sup>131</sup> Such inauspicious beginnings did little to derail farm program development, however, and the issue of payment limits largely receded into the background during the emergencies of the Great Depression and World War II, as well as during the strong post-war economy.<sup>132</sup> The complex design of farm support—acreage controls on large farms were deemed necessary to avoid problems created by price-supporting loans—remained a relatively-effective defense throughout this era, although farm interests increasingly found the Senate floor a difficult arena.<sup>133</sup>

Farm programs and the farm coalition were self-destructing by the 1960s and Congress moved towards direct deficiency payments to farmers triggered by low prices.<sup>134</sup> This shift in policy also altered the political dynamics for payment limits; traditional defenses weakened once farmers began to receive a clear, easy-to-understand paper trail of payments.<sup>135</sup> Traditional lines of defense also suffered substantial damage as controversies continued to impact the political debates, fueled in part by the uncovering of a Texas-sized fraudulent scheme that implicated USDA and cast further harsh lights on Federal assistance in cotton country.<sup>136</sup>

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DOC. NO. 274. Defending large payments to their farmers during the Depression included claiming that opposition was merely partisan and hypocritical. *See* Cong. Rec., April 27, 1936, at 6172 (Senate Majority Leader Joseph Robinson (D-AR)).

131. Compare e.g., 80 CONG. REC. 6172 (Senate Majority Leader Joseph Robinson (D-AR)), there was “nothing surprising, nothing amazing, to any intelligent person, even though he be a Senator, that large payments were made in the course of the administration of the act”); 80 CONG. REC. 6175 (Senator Vandenberg asked, “should we not sharply concentrate the benefits upon the average, small, individual farmer, speaking loosely, upon the family farm, and progressively decrease the rate of benefits for the large farm and the corporation farm?”); 80 CONG. REC. 6180 (1936) (Senators Alben Barkley (D-KY) and Joseph Robinson (D-AR)); Nelson, *supra* note 125, at 410 (the Mississippi and the Delta Chamber of Commerce threatened that “such a policy of discrimination” would result in the large farmers refusing to participate in the program and thus increasing their cotton acres).

132. Limiting payments briefly reappeared during the post-war debates, for example, and in the 1950s Senate floor debates, although the Agriculture Committees resisted the policy. *See generally* COPPESS, *supra* note 4; *see also* 102 CONG. REC. 6127 (1956). (as explained by House Ag Committee Chairman Harold Cooley (D-NC), the conferees unanimously agreed to remove the payment limitation provisions from the Senate-passed).

133. For example, the Senate easily agreed to limit Acreage Reserve payments to \$25,000 per person and reluctantly placed a limit on loans at \$100,000. *See, e.g.*, 102 CONG. REC. 4337 (1956).

134. *See* COPPESS, *supra* note 4, at Ch. 5.

135. This had long been a concern of Southern interests and had helped fuel their initial resistance to direct payments to farmers. *See generally* COPPESS, *supra* note 4.

136. The Committee on Government Operations in the House began investigating west Texas cotton farmer Billie Sol Estes in spring 1962, the day following his arrest. Estes owned, controlled or had significant interest in over 65 businesses and used at least 80 different bank

By 1969, payment limits had begun to attract renewed levels of political attention, including in Congress, with reports that some entities were receiving million-dollar farm payments.<sup>137</sup> The interest in this issue also coincided with substantial increases in government spending on assistance to farmers, highlighted by large payments to a few large farms, concentrated in cotton.<sup>138</sup>

Analysis at the time concluded that payment limits would impact relatively few farmers and save the government little.<sup>139</sup> Because large, sophisticated farmers would simply reorganize their farm entities to avoid the limits, the effort was considered unlikely to be worth the administrative complexities and costs.<sup>140</sup> The continued transition to direct payments in the 1970s, however, kept the issue front-and-center in farm bill debates.<sup>141</sup> Congress grudgingly accepted a \$55,000 payment

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accounts. *See* H.R. REP. NO. 89-196, 1-2 (1965). In addition to cotton, Estes was involved in the construction of storage facilities financed by USDA loans, most were claimed to be for grain or cottonseed but were “actually being used for housing of Mexican farmworkers (braceros) in violation of program regulations.” *Id.* at 11. He began his schemes for cotton allotments when Congress re-established allotments in 1954. *Id.* at 13; *see also*, S. REPT. NO. 88-1607 (1964).

137. The Congressional Research Service (CRS) reported on the issue, noting that in 1967, 5 producers received over a \$1 million each and 387 received payments over \$100,000 each, but that 72% of recipients received payments of less than \$1,000. A payment of \$100,000 in 1967 is the equivalent of \$765,976 in 2018 dollars, while \$1 million would be \$7.7 million. *See* WALTER W. WILCOX, CONG. RESEARCH SERV., LARGE FARM PROGRAM PAYMENTS AND IMPLICATIONS OF PROPOSALS FOR LIMITATIONS. (Feb. 19, 1969). In May 1969, the House adopted an amendment to the agriculture appropriations bill that limited payments to \$20,000 under all programs beginning in 1970 but it was dropped. *See id.*

138. Costs in 1968 totaled \$3.5 billion and would be \$3.7 billion in 1969, with 65% of the spending for supply management and 35% for income transfer payments. Of the 9,789 producers expected to be affected by a \$20,000 limit, 8,157 of them (83 percent) were in the cotton program (3,304 in wheat and 4,878 in feed grains/corn). *See id.* at 5-8. In 1968, over 15,000 cotton producers received payments in excess of \$10,000 compared with 5,428 feed grain producers and 4,861 wheat producers; combined these producers accounted for \$515 million in payments. *See* WALTER W. WILCOX, CONG. RESEARCH SERV., ECONOMIC ASPECTS OF FARM PROGRAM PAYMENT LIMITS at 1, 4-7 (Nov. 6, 1969).

139. For example, CRS reported that 88% of cotton producers, 93% of wheat producers and 95% of feed grain producers received payments that were less than \$3,000 each in 1968 (equivalent of \$22,171 in 2018). A \$20,000 limit was estimated to impact about 10,000 producers in 1968. *See id.* at 6, 13.

140. *See* WILCOX, *supra* note 138, at 11-13.

141. Because compensatory payments could be tracked to the person or entity that received the payment, opponents could latch onto large payments made to specific individuals and, in some cases, large companies such as Standard Oil of California. *See* 116 CONG. REC. 27459-60 (1970). Both the House and Senate Ag Committees had included a \$55,000 per crop limit on payments as a purely defensive move to protect against tougher reforms. *See* 116 CONG. REC. 27137 (1970) (Representative May (R-WA)); 116 CONG. REC. 27141 (1970) (Representative Conte); 116 CONG. REC. 27453 (1970) (Representatives Conte and Allard

limit pushed by Midwesterners over Southern objections in 1970 and tightened the limits in 1973 with the inclusion of direct deficiency payment policy.<sup>142</sup>

USDA continued to report that the payment limits were ineffective because most farmers who received large payments responded by reorganizing their farm operations to avoid application of the limit.<sup>143</sup> At the close of the 1970s, the House Ag Committee remained skeptical of payment limit policy and raised limits in spite of political pressure to tighten them.<sup>144</sup> During this time, new concerns began to arise in the Senate about “the increasing corporate acquisition of farm land” and purchases by “non-farm speculators and large non-farm corporations” that were driving up land prices and making it difficult for family farmers to compete.<sup>145</sup> A USDA report in 1979 was unable to find much to be concerned about, even as it acknowledged that corporate farms and general partnerships were far larger than family farms, as well as the strong economic incentives to maximize payments by these farms (especially for cotton payments).<sup>146</sup>

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Lowenstein (D-NY)); 116 CONG. REC. 27460-61 (1970) (Representative Abernethy); 116 CONG. REC. 31624 (1970); 116 CONG. REC. 31783 (1970) (Chairman Ellender); 116 CONG. REC. 3778 (1970) (Senator Ralph Smith (R-IL) amendment); 116 Cong. Rec. 31785-88 (1970) (Senator John Williams (R-DE)).

142. Technically, the 1970 limit was three limits of \$55,000 per crop (\$366,879 in 2018) and a farmer growing all three crops could receive a total limit of \$165,000 or more than a million dollars today. *See* Agricultural Act of 1970, Pub. L. No. 91-524, 84 Stat. 1358 §101(1) (1970); *CPI Inflation Calculator*, *supra* note 128; 116 CONG. REC. 27132-89 (1970) (Representative Findley (R-IL)); 116 CONG. REC. 31783-90 (1970) (Chairman Ellender (D-LA) and Senator Herman Talmadge (D-GA)). After efforts to both tighten and loosen payment limits in the process, Congress settled on a payment limit of \$20,000 for the “total amount of payments which a person shall be entitled to receive under one or more of the annual programs” created by the bill. *See* Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, 87 Stat. 221 §101(1) (1973).

143. Avoiding the limits was also concentrated in cotton country and with sophisticated operations capable of the management challenges necessary, according to a study in response to Senate Resolution S. 153 (dated July 15, 1971). USDA found that 77% of the farmers who received more than \$55,000 in 1970 payments reorganized their farms for 1971. *See* STAFF OF DEP’T OF AGRIC., 92D CONG., FARM PAYMENT LIMITATIONS 2-3 (Comm. Print 1972).

144. *See* H.R. REP. NO. 95-348, at 54 (1977) (it considered limits “relatively unimportant” from a “program-operation aspect” but acknowledged that “from a political standpoint, they were an outward indication of the change in the political climate”).

145. S. Rep. No. 95-180, at 8, 44 (1977) (discussing the policy to “further restrict (and in some cases prohibit) the making of payments to corporations and certain other entities” but increased the limit because of “inflation and greatly increased costs of production, as well as the increased size of the average farming operation”). *See also*, Food and Agriculture Act of 1977, Pub. L. No. 95-113, 91 Stat. 913 (1977).

146. USDA noted the strong economic incentive to maximize payments—especially for cotton with payments almost 100% of the value of production in 1967 and nearly 80% in 1966, 1969, 1970 and 1971—it nonetheless concluded that payments had not “given impetus

With the farm economic crisis in the 1980s, payments to farmers increased significantly and Congress responded by both increasing payment limits and initiating attempts to rein in payments to corporate and other entities.<sup>147</sup> In 1985, however, the U.S. General Accounting Office (GAO) reported that many farmers were exceeding the limit by reorganizing their farms to avoid it and that such reorganizations could add more than 22,000 farmers at a cost of more than \$1 billion.<sup>148</sup> By 1987, GAO was explaining to Congress that reorganization to avoid payment limits was too easy under existing rules and the logical result of the large increase in payments because bigger payments meant more farmers reached the limit creating incentives to reorganize to avoid them.<sup>149</sup>

GAO's findings in 1987 were stunning. Some farm operations brought in outside investors for no reason other than increasing payments, with some family operations reorganizing to add family members and receive more payments.<sup>150</sup> The

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for a surge in investment by those not primarily engaged in farming" and was not driving more corporations or partnerships into farming. See STAFF OF U.S. DEP'T OF AGRIC., 96<sup>th</sup> CONG., PROHIBITING COMMODITY PROGRAM PAYMENTS TO NONFARM CORPORATIONS 2-6 (Comm. Print 1979).

147. The Agricultural and Food Act of 1981, Pub. L. No. 97-98, 95 Stat. 1213 §1101 (1981) (limit increased to \$50,000). The Food Security Act of 1985 continued payment limits at \$50,000 per person for wheat, feed grains, cotton and rice payments and disaster payments limited to \$100,000. Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 §1001 (1985).

148. Notable because it coincided with an economic crisis and a spike in farm bankruptcies, GAO found that the number of producers receiving payments from 1984 to 1986 had increased by 49%. The number of new producers that resulted from reorganizations went from 1,400 in 1984 to 5,700 in 1986, all because they were getting close to the payment limit. See U.S. GEN. ACCOUNTING OFF., GAO/RCED-87-120BR, FARM PAYMENTS: FARM REORGANIZATIONS AND THEIR IMPACT ON USDA PROGRAM COSTS (1987); see also *The Administration and Enforcement of the \$50,000 per Person Payment Limitation for Farm Programs Before the S. Subcomm. on Nutrition & Investigations of the S. Comm. On Agric. Nutrition, And Forestry*, 100th Cong. 56-57 (1987) (statement of Robert W. Beuley, Inspector General, U.S Department of Agriculture).

149. Farm program payments had more than doubled from \$4.2 billion in 1984 to approximately \$8.8 billion in 1986, and meant that it took fewer acres to reach the \$50,000 limit and thus more and more farms were getting close to the limit. U.S. GEN. ACCOUNTING OFF., GAO/RCED-87-176, FARM PAYMENTS: BASIC CHANGES NEEDED TO AVOID ABUSE OF THE \$50,000 PAYMENT LIMIT 2, 11, 16, 18 (1987).

150. GAO discussed "how a six-member joint venture increased the payment limit for its operation from \$300,000 in 1985 to \$1,050,000 in 1986 by forming a series of [15] corporations and entering into a new joint venture with the corporations." See *id.* at 22-27. In another example, 11 new persons were added to a farm operation and received \$392,000 in 1986. See *U.S. Department of Agriculture's Recommendations and GAO Report on Farm Program Payment Limitations: Hearing Before the Subcomm. on Cotton, Rice, & Sugar H. Comm. On Agric.*, 100th Cong. 7 (1987).

Ag Committees held hearings and drafted the Farm Program Payments Integrity Act, enacted as part of the Agricultural Reconciliation Act of 1987, which limited eligibility based on being actively engaged in farming.<sup>151</sup> The 1987 legislation added requirements that persons demonstrate they were actively engaged in farming to be eligible for payments, and it also limited the number of entities through which an individual could receive payments to three.<sup>152</sup> It did, however, permit managers to qualify as actively engaged in farming and eligible for farm program payments.<sup>153</sup>

While lawmakers continued to make minor changes to payment limits, neither Congress nor USDA were able to resolve the reorganization and farm entity issues.<sup>154</sup> The 2002 Farm Bill required USDA to produce a report on the implications of payment limits, which reviewed data on farm consolidation, income and payment trends but found little impact on the payment limit.<sup>155</sup> The report provided further indication that reorganization remained an effective strategy for payment-limit avoidance.<sup>156</sup> In 2004, GAO continued to uncover schemes to avoid payment limits through entity organization, concluding that the existing rules were inadequate to prevent circumvention of payment limits in part because they failed to adequately address the ability of entities to add managers and increase payments.<sup>157</sup> For example, GAO reported on farm general partnerships

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151. See, e.g., Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987); *Payment Limitation Provisions: Hearing Before the Subcomm. on Nutrition & Investigations of the S. Comm. on Agric., Nutrition, & Forestry*, 100th Cong. 1 (1987). (statement of Senator Harkin, Member, S. Comm. On Agric., Nutrition, & Forestry); *GAO Report Concerning the Maximum Payment Limitation: Hearing Before the Subcomm. on Wheat, Soybeans, & Feed Grains of the H. Comm. On Agric.*, 100th Cong. 2 (1987) (statement of Rep. Dan Glickman & Rep. Glenn English).

152. See OFFICE OF THE CHIEF ECONOMIST, REPORT OF THE COMMISSION ON THE APPLICATION OF PAYMENT LIMITATIONS FOR AGRICULTURE 34-35 (2003); U.S. GEN. ACCOUNTING OFF., GAO-04-407, FARM PROGRAM PAYMENTS: USDA NEEDS TO STRENGTHEN REGULATIONS AND OVERSIGHT TO BETTER ENSURE RECIPIENTS DO NOT CIRCUMVENT PAYMENT LIMITATIONS 1-2 (2004).

153. See *id.* at 36.

154. See Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 §1111 (1990) (limit lowered to \$75,000 per person); Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 §1115 (1996) (limit lowered to \$40,000); Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 §1603 (2002) (limit of \$40,000 for direct payments, \$65,000 for counter-cyclical payments and \$75,000 for loan deficiency payments).

155. The \$40,000 limit on direct payments in the 2002 farm bill was expected to reduce payments by \$185 million (3-4 percent) but FSA indicated only 1.6 percent impacted, indicating further reorganizations to avoid the limits. See OFFICE OF THE CHIEF ECONOMIST, *supra* note 152, at 2, 76.

156. See *id.* at 76.

157. See U.S. GEN. ACCOUNTING OFF., *supra* note 152, at 5-6.

with 11 to more than 20 partners collecting \$700,000 to \$1 million in payments in 2001.<sup>158</sup> And by 2006, the problem had expanded to the point that the Washington Post reported more than \$15 billion had been spent over five years on “wasteful, unnecessary and redundant” payments.<sup>159</sup> Among the most egregious findings was that of the “cowboy starter kit” that involved mostly former rice farms that had been developed into subdivisions—residential plots large enough to collect direct payments costing \$1.3 billion for people who didn’t farm.<sup>160</sup>

In 2013, GAO again exposed the extent to which some farm entities were avoiding the eligibility requirements and suggested that Congress revise the “actively engaged in farming” requirement.<sup>161</sup> Specifically, GAO reported on the management loophole to the actively engaged requirement and found that farms organized as general partnerships or joint ventures were able to maximize payments because the entities included many people claiming to be managers of the farm.<sup>162</sup> In the 2014 Farm Bill, the Senate sought to close this loophole but the House resisted and the issue was handed to USDA.<sup>163</sup> USDA revised its regulations limiting payments to no more than three managers per entity.<sup>164</sup> As Congress began work on the 2018 farm bill, however, GAO again reported problems - general partnerships continued to receive outsized payments despite being less than a quarter of all farm entities.<sup>165</sup> This history sheds difficult light on the House Ag

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158. *See id.* at 8-9; 17-18.

159. *See* Dan Morgan et al., *How to Spend an Extra \$15 Billion*, WASH. POST, <https://perma.cc/N25V-VBJ6> (archived Dec. 21, 2018), <http://www.washingtonpost.com/wp-srv/nation/interactives/farmaid/>.

160. Dan Morgan et al., *Farm Program Pays \$1.3 Billion to People Who Don’t Farm*, WASH. POST (July 2, 2006), <https://perma.cc/E3QK-9YBP>. The 2008 Farm Bill sought to eliminate base acres that could be used as cowboy starter kits. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 §1603-04 (2008).

161. U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-781, FARM PROGRAMS: CHANGES ARE NEEDED TO ELIGIBILITY REQUIREMENTS FOR BEING ACTIVELY INVOLVED IN FARMING, 36 (2013).

162. *See id.* at 32 (“general partnerships received 97 percent of their total farm program payments based on individual members’ claims of contributing active personal management and 99 percent for joint ventures”).

163. The 2014 Farm Bill adjusted the payment limits to \$125,000 for all payments (except for peanuts which receives a separate \$125,000 limit), including marketing loan gains or loan deficiency payments, and an AGI (three-year average) of \$900,000. Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 §§1603, 1605 (2014).

164. *See* Jonathan Coppess, *Reviewing the USDA Proposal to Limit Farm Program Payment Eligibility*, U. ILL.: FARMDOC DAILY (April 8, 2015), <https://perma.cc/A7UC-83UN>.

165. The GAO report indicates that the most recent data available was from 2015 which was the year USDA released the final rule on actively engaged, thus it is unlikely to have had much of an impact. The top payment recipients averaged almost 14 members with 8

Committee's decision to loosen these eligibility requirements; more so when juxtaposed with the effort to impose tighter eligibility requirements on SNAP recipients.

### *B. History of Working Against Food Assistance*

Congress overcame the long alliance between Southern Democrats and many Republicans in opposition to federal food assistance policy when it passed the Food Stamp Act of 1964.<sup>166</sup> Among the reasons for Southern opposition to food stamps was a concern that providing food assistance would harm poor people's initiative to work, especially able-bodied men that might be needed for farm work.<sup>167</sup> There is much to unpack from this perspective considering that Southerners had long used cotton policy to drive poor sharecroppers out of farming, treating them as surplus labor standing in the way of mechanization, modernization and consolidation.<sup>168</sup> At the very least, it exposed difficult connections between ideological opposition to food assistance and the more troubling views on race so long predominant in the South—connections that continue to haunt the farm bill discussions to this day.<sup>169</sup>

Developments in the 1970s would prove most consequential for food stamps. In 1971, House Agriculture Committee Chairman W.R. Poage (D-TX) attached

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qualifying as managers. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-384R, FARM PROGRAMS: INFORMATION ON PAYMENTS [REISSUED WITH REVISIONS JUNE 5, 2018] 8 (2018).

166. The 1964 defeat can be seen as the result of significant weaknesses for Southern Democrats in particular and largely due to: (1) changing national demographics that altered representation in Congress, including larger urban voting blocs; (2) policy failure and internecine conflict among farm interests; and (3) vulnerability to attack on commodities only grown in the south such as tobacco and peanuts. See COPPESS, *supra* note 4, at Ch. 4; Ferejohn, *supra* note 35, at 220-252.

167. For example, Representative E.C. Gathings (D-AR) raised concerns in a 1963 House Ag Committee hearing about disincentives to work caused by food aid which would hurt farmers who "need these people so badly on farms to cultivate and harvest our crops." See *Food Stamp Plan: Hearing Before the H. Comm. on Agric.*, 88th Cong. 35 (1963); Rosenfeld, *supra* note 37, at 479 (quoting Gathings remarks at the hearing).

168. See FITE, *supra* note 124, at 1-29; WINDERS, *supra* note 124; Conrad, *supra* note 124; NELSON, *supra* note 125; Pete Daniel, *The Crossroads of Change: Cotton, Tobacco, and Rice Cultures in the Twentieth-Century South*, 50 J. S. HIST., 429-456 (1984); Jack Temple Kirby, *The Transformation of Southern Plantations c. 1920-1960*, 57 AGRIC. HIST. 257 (1983); Warren C. Whatley, *Labor for the Picking: The New Deal in the South*, 43 J. ECON. HIST. 905 (1983); Harold D. Woodman, *Post Civil-War Southern Agriculture and the Law*, 53 AGRIC. HIST. 319 (1979); Harold Hoffsommer, *The AAA and the Cropper*, 13 SOCIAL FORCES 494 (1935); Rupert B. Vance, *Human Factors in the South's Agricultural Readjustment*, 1 LAW & CONTEMP. PROBS. 259 (1934); see also COPPESS, *supra* note 4.

169. See Rosenfeld, *supra* note 37.



the first work requirement to food stamps.<sup>170</sup> Food stamps were granted entitlement program status in fiscal year 1972.<sup>171</sup> The program was combined formally with farm programs in the 1973 Farm Bill, although Southern Democrats put up a significant fight over concerns about striking workers being able to receive assistance.<sup>172</sup> 1974 was the most pivotal year for food stamps in the decade—and maybe the program’s entire history—because Congress reformed the legislative process to implement fiscal and budgetary disciplines.<sup>173</sup> In the wake of Watergate, large Democratic victories in the mid-term elections that year would also result in additional reforms in Congress, such as changes to committee seniority rules; Chairman Poage’s fellow Democrats removed him from his chairmanship because of his opposition to food stamps.<sup>174</sup> A dramatically changed House Agriculture Committee, backed by a new Democratic President in Jimmy Carter, would go on to eliminate the purchase requirement in 1977.<sup>175</sup>

The 1970s would also prove pivotal to food stamps for another reason—the political environment changed, bringing a heightened level of partisanship and ideological opposition.<sup>176</sup> Coinciding with “the era of stagflation,” national economic problems helped produce a partisan backlash against food stamps over spending on the program and partisan claims of waste, fraud, and abuse of food

170. See, e.g., OLIVEIRA ET AL., *supra* note 34, at 24-25, 57.

171. Ronald F. King, *Capping Entitlements*, 18 J. PUB. POL’Y 133, 143 (1998).

172. Notably, this coincided with the shift in farm policy to direct deficiency payments which would increase scrutiny on payment amounts and help drive policy demands for tighter limits. See Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, 87 Stat. 221 §101(1) (1973); COPPESS, *supra* note 4; Ferejohn, *supra* note 35.

173. Budget discipline’s profound impact on food stamps would take some time to materialize, however. See Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974); see also Garrett, *supra* note 51, at 705; Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 502 (1998) [hereinafter *Harnessing Politics*].

174. See Rosenfeld, *supra* note 37, at 487-88 (“an unprecedented overturning of long-standing norms and practices”). Poage was replaced by Representative Tom Foley (D-WA), a strong supporter of food stamps. See *id.* 497 (“the victory stood as a striking illustration of the substantive impact of congressional reform . . . to implement a liberalization of the program even during a period of intense public controversy concerning the policy”).

175. Removing the purchase requirement was the “last major barrier to participation for low-income people” and after 1979 all eligible persons received the benefits for free. See, e.g., OLIVEIRA ET AL., *supra* note 34, at 24-26; King, *supra* note 171, at 143; Rosenfeld, *supra* note 37, at 495-98.

176. See Rosenfeld, *supra* note 37, at 490 (a more “cohesive Democratic activism” and “heightened partisanship,” including in the House Ag Committee, which “stemmed partly from demographic changes related to southern partisan realignment and gradual Dixiecrat attrition”).

stamp benefits.<sup>177</sup> Once again led by a political alliance between Southern Democrats and conservative Republicans, this backlash ignored the economic problems that were driving participation and costs, and instead blamed what they saw as an overly generous program that helped people who didn't need the assistance, plagued by fraud and error.<sup>178</sup> Democrats tried to point out that participation had increased because of unemployment and inflation, not because of programmatic problems, but Republicans remained convinced that the program was too generous and attacked it to score conservative political points.<sup>179</sup>

While fraud existed, it was relatively minor. Because it had been complicated to administer, the early program was "plagued" by reports of fraud and abuse - reports against "smaller, family-owned stores" under pressure from desperate, long-term customers to trade stamps for cash or for foods not on the list of approved foods.<sup>180</sup> Food stamps as created by Congress, however, experienced less than 1,000 prosecutions between 1964 and 1975—although erroneous payments were notable.<sup>181</sup> Politically, a few high-profile and attention-grabbing incidents of

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177. The unemployment rate went from 5.5% to 8.9% from summer 1974 to summer 1975 and USDA data indicates food stamp participation went from 12.8 million monthly average to 17 million from 1974 to 1975 and spending increased from \$2.7 billion to \$4 billion. *See id.* at 477 and 491-93. Notably, "the number of people participating in the program fell" in 1977 and 1978 because of "growth of the country's economy" but participation demand increased after 1978, especially during recessions in 1980 and 1981 to 1982. *See OLIVEIRA ET AL.*, *supra* note 34, at 27 ("period of deteriorating economic conditions" brought on increased participation but opponents of the program "alleged that cheating and fraud were widespread and that overly generous eligibility standards permitted undeserving high-income participants to qualify because their large deductions resulted in low net incomes").

178. *See Food Stamp Reform: Hearing Before the Subcomm. on Agric. Research & Gen. Legis. on S. Comm. Agric. & Forestry*, 94th Cong. 2 (1975) (statements of Senator James B. Allen); *id.* at 50-51 (Senator Clifford Hansen (R-WY)); Rosenfeld, *supra* note 37, at 493.

179. *See Food Stamp Reform: Hearing Before the Subcomm. on Agric. Research & Gen. Legis. on S. Comm. Agric. & Forestry*, 94th Cong. 46 (1975) (statements of Senator George McGovern and Senator Milton Young (R-ND)); Rosenfeld, *supra* note 37, at 477.

180. The first use of food stamps that could be exchanged by needy families for food was in 1939. That program used a two-color stamp by which orange stamps were purchased with cash and could be used to purchase food at value, and blue stamps that were bonus and worth half of the orange stamps, which could be used to purchase only surplus commodities. *See OLIVEIRA ET AL.*, *supra* note 34, at 18 (adding that 25% of all benefits were estimated to have been abused and citing J.M. BERRY, FEEDING HUNGRY PEOPLE: RULEMAKING IN THE FOOD STAMP PROGRAM (1984)); *see also* FOOD & NUTRITION SERV., *A Short History of SNAP*, <https://perma.cc/U3HE-DUD5> (archived Dec. 22, 2018) (Nick Salzano the first caught violating the program); Emelyn Rude, *The Very Short History of Food Stamp Fraud in America*, TIME (March 20, 2017), <https://perma.cc/SK2R-LY5D> (reporting that the first case was Nick Salzano, caught mischarging customers paying with stamps).

181. Information submitted for the record indicated that as of June 30, 1975, there were 791 prosecutions for violations regarding food stamps since passage of the 1964 Food Stamp

trafficking, fraud, and abuse were used by partisans to fuel the perceptions of a program that was out-of-control.<sup>182</sup> California Governor Ronald Reagan promoted the most notorious example—Linda Taylor of Chicago dubbed the Cadillac-driving, “welfare queen” who used dozens of names to defraud food stamps and other assistance programs.<sup>183</sup> As President in 1981, the legend of the welfare queen helped drive support for Reagan’s plans for cutting the program and spending.<sup>184</sup> Working with a Republican majority in the Senate, the Reagan Administration pushed tighter eligibility requirements, including a household gross income test.<sup>185</sup>

Attacking food stamps was part of the Reagan blueprint for cutting taxes while at the same time attempting to “abruptly sever[] the umbilical cords of dependency that ran from Washington to every nook and cranny of the nation” even if it “hurt millions of people in the short run.”<sup>186</sup> Said blueprint included cutting farm programs, but Reagan’s spending reform agenda was somewhat constrained by a series of deals with conservative, southern “Boll Weevil” Democrats in the

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Act. Quality control program data revealed that “approximately \$264 million in bonus coupons were issued in error to the nonpublic assistance segment of the total food stamp caseload during calendar year 1974.” *Food Stamp Reform: Hearing Before the Subcomm. on Agric. Research & Gen. Legis. on S. Comm. Agric. & Forestry*, 94th Cong. 64-65, 87, 93 (1975). Senator Henry Bellmon (R-OK) noted, however, that “the facts are that of some 9 million recipients 600 cases of fraud have been prosecuted. *Id.* at 93.

182. See Rude, *supra* note 180 (“Throughout the 1970s, and 1980s, USDA agents uncovered food-stamp trafficking rings in Chicago, St. Louis, and Philadelphia” but that from 1981 to 1983 a 900-person federal task force produced 1,390 convictions).

183. See Josh Levin, *The Welfare Queen*, SLATE (December 19, 2013), <https://perma.cc/P4YK-7VR9>.

184. See, e.g., Steven V. Roberts, *Food Stamps Program: How It Grew and How Reagan Wants to Cut It Back; The Budget Targets*, NY TIMES (April 4, 1981), <https://perma.cc/MZ89-7G5J>.

185. The Reagan Administration threatened to reverse Democratic reforms in the post-Watergate 1970s and heightened partisan conflict around the program. Rosenfeld, *supra* note 37, at 499 (calling the late 1970s an “early harbinger of more general patterns of legislative conflict during the coming Reagan years”).

186. This is the view of former Office of Management and Budget (OMB) Director in the Reagan Administration, David Stockman, who has written about the goals of the Reagan Administration to cut spending as part of a “radical economic program” that included two tax cuts that would bring “an end to inflationary bracket creep and a 30 percent rate cut on top.” STOCKMAN, *supra* note 46, at 11 (“To make a revolution . . . meant complete elimination of subsidies to farmers and businesses . . . end to welfare for the able-bodied poor” and “ruthless dispensation of short-run pain in the name of long-run gain”). He concluded that the beneficiaries “were getting more than they deserved, needed, or were owed” and that for the “Reagan Revolution to add up, they had to be cut off. The blueprint was thus riddled with the hardship and unfairness of unexpected change.” *Id.*

House who President Reagan needed to pass budget and tax cuts.<sup>187</sup> Reagan's push for reform stalled by the time Congress wrote and debated the 1985 Farm Bill because Democrats in Congress demanded better treatment of food stamps in order to get their votes - a formidable threat in the depths of the farm economic crisis.<sup>188</sup> This blueprint, although it achieved limited success at the time, would provide the Republican and conservative operational views going forward. It created an important precedent through the far-reaching, novel use of an obscure budget procedure created by the 1974 budget act, called reconciliation.<sup>189</sup>

The new Republican majority in Congress that came to power after the 1994 mid-term elections returned to the Reagan blueprint, and in 1996 they pushed through reforms to social assistance or welfare programs that included a first-ever time limit on food stamp benefits for able-bodied adults without dependents (ABAWDs)—requirements that conditioned benefits on whether the person met specific employment metrics or approved work-related activities.<sup>190</sup> Participation declined by 32% in the wake of the 1996 Act (from 1995 to 1999), which was due in part to a strong economy where both unemployment and poverty fell.<sup>191</sup> Data from the era indicates that food stamp participation fell faster than did poverty.<sup>192</sup>

Arguably, the 1996 changes represented a different direction for food stamp policy—one that codified often difficult, ideological views. It moved the policy focus in favor of work requirements, placing priority on the removal of “persons capable of self-support” from assistance instead of a priority on “assuring that

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187. COPPESS, *supra* note 4, at Ch. 5; Garrett, *supra* note 51, at 705; *Harnessing Politics*, *supra* note 173, at 502. Program participation decreased after 1981 in spite of the recession (July 1981-November 1982) which stands as the only instance where participation decreased in a recession. See OLIVEIRA ET AL., *supra* note 34, at 28.

188. See COPPESS, *supra* note 4, at Ch. 5; OLIVEIRA ET AL., *supra* note 34, at 28-29; Ganong & Liebman, *supra* note 91, at 7 (in 1991, “families with children accounted for 84% of SNAP recipients, households with adults (and no children) were 11% of recipients and households with seniors were 5% of recipients”).

189. COPPESS, *supra* note 4, at Ch. 5; Garrett, *supra* note 51, at 705; *Harnessing Politics*, *supra* note 173, at 502.

190. In 1996, Congress worked out, and President Clinton signed, the Personal Responsibility and Work Opportunities Reconciliation Act of 1996 (otherwise known as welfare reform). It included requirements for food stamps based on age (18-49) and sufficient work or work-related activities (20 hours of work) to avoid limits on benefits (3 months out of 36). It also reduced maximum food stamp benefits to 100% of the food plan. See Elizabeth G. Patterson, *Work Expectations and the Able-Bodied Adult: Myths and Realities In Food Stamp Reform*, 8 WAKE FOREST J. L. & POL'Y 364, 372 (2018).; OLIVEIRA ET AL., *supra* note 34, at 29.

191. *Id.* at 371.

192. See Part 2, *supra* note 113.

needy persons had access to adequate nutrition.”<sup>193</sup> As such, it represented a more politically fraught perspective linked directly to a troubled history, as well as ideological concerns that these benefits contributed to dependency or reduced personal responsibility and should be reserved for the “deserving poor” only.<sup>194</sup> In turn, these views relied upon an assumption that “those who were able to work could in fact work—that jobs existed into which they could be hired if they made the effort.”<sup>195</sup> They appear to present a distortion, however, of the less controversial perspective that work is “the preferred means for meeting one’s subsistence needs, but also as a moral imperative—an expression of the deep-seated belief in personal responsibility and a source of human dignity.”<sup>196</sup>

The return to an ideological focus on work requirements could also be an indication that fraud and abuse as an argument against the program had lost some of its political punch. Trafficking is one of the primary types of SNAP fraud, and it had declined to under 4% by 1993, a trend that would continue in a downward direction throughout the 1990s.<sup>197</sup> The trafficking rate fell to 1% by the early 2000s and has remained at 1.5% or less even with the increase in participation and spending due to the Great Recession.<sup>198</sup> One key reason for the decrease and

193. Patterson, *supra* note 190, at 371.

194. *See id.* at 371-72; Khiara M. Bridges, *The Deserving Poor, the Underserving Poor, and Class-Based Affirmative Action*, 66 EMORY L. J. 1049, 1074-79 (2017); Robert A. Moffitt, *The Deserving Poor, the Family, and the U.S. Welfare System*, 52 DEMOGRAPHY 729, 739 (2015). Congress subsequently backtracked on some of this, particularly for elderly, disabled, and child immigrants but the 1996 act also allowed states to apply for waivers from the limits for areas with high unemployment (over 10%) or an area lacking sufficient jobs. *See OLIVEIRA ET AL.*, *supra* note 34, at 29.

195. Patterson, *supra* note 190, at 372.

196. *Id.* at 373 (citing David T. Ellwood, *Poor Support: Poverty in the American Family* (1988)).

197. Fraud is an intentional act that breaks federal or state laws and thus is different from errors in program payments or administration (mistakes). There are basically four types of SNAP fraud: (1) trafficking of benefits (illegal sale) by either retailers or recipients; (2) retailer application fraud by ineligible stores; (3) intentional violation of program rules in applying for benefits; and (4) state agency fraud and misconduct on quality control. *See RANDY ALISON AUSSENBERG, CONG. RESEARCH SERV.*, R45147, ERRORS AND FRAUD IN THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) (2018), <https://perma.cc/SYF5-CRJS>. In 2003, USDA reported that about \$395 million was diverted by trafficking during 1999 to 2002, which was a decrease from \$660 million diverted between 1996 and 1998 and from \$815 million in trafficking in 1993. *See THEODORE F. MACALUSO, FOOD & NUTRITION SERV.*, FSP-03-TRAF, THE EXTENT OF TRAFFICKING IN THE FOOD STAMP PROGRAM: 1999-2002, (2003), <https://perma.cc/VSC5-FUJP>.

198. Trafficking declined from 1993 to 2005 but increased beginning in 2006 to 2008; growth in SNAP participation in 2009 to 2011 contributed to increased trafficking (by \$528 million) at a time when redemptions doubled from \$32.1 billion to \$63.7 billion. For the first

continued low rate of trafficking has been the nationwide adoption of the Electronic Benefit Transfer (EBT) card system in place of paper coupons.<sup>199</sup> A related reason is that the vast majority of SNAP benefits are redeemed at large groceries and supermarkets where sophisticated equipment and monitoring help keep trafficking rates extremely low.<sup>200</sup> With EBT usage, especially at large retailers, SNAP trafficking, errors, and other problems have remained relatively insignificant even though partisan pressure and attacks on the program returned after the Great Recession.<sup>201</sup>

After the welfare reform push, Congress began to reverse course, providing more flexibility to states to administer the program and then expanding the program in the 2002 Farm Bill.<sup>202</sup> During the recession that began in 2001, the George W. Bush Administration raised concerns that administrative burdens and complexity were a deterrent to participation by eligible persons, particularly working families.<sup>203</sup> The Administration eased administrative burdens and enrollment in the program increased as unemployment decreased, but the program

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years of the Great Recession, USDA reported trafficking diverted \$848 million in SNAP benefits annually from 2009 to 2011, or about 1.3% of total benefits. RICHARD MONTOVANI ET AL., FOOD & NUTRITION SERV., THE EXTENT OF TRAFFICKING IN THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: 2009-2011 (Aug. 2013), <https://perma.cc/VEH7-W2KK>. Trafficking from 2012 to 2014 was found to be about 1.5% of total SNAP benefits (\$1.077 billion annually out of \$72 billion in annual redemptions). The 1.5 % rate was an increase over the 1.3% trafficking rate from the 2009 to 2011 period. See JOSEPH WILLEY ET AL., FOOD & NUTRITION SERV., THE EXTENT OF TRAFFICKING IN THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: 2012-2014 (Sept. 2017), <https://perma.cc/UKU8-EG4Q>.

199. Adopted nationally by 2004, EBT provides for electronic data tracking to make it easier to detect fraud and abuse and reduce administrative costs; plus removed stigma on participants using in stores. See, OLIVEIRA ET AL., *supra* note 34, at 30-31; see also *What is SNAP Fraud?*, FOOD & NUTRITION SERV., <https://perma.cc/B4ER-TPDP> (archived Dec. 23, 2018)(fraud has dropped substantially since adoption of the EBT, “from about 4 cents on the dollar in 1993 to about 1 cent in 2006-08 (most recent data available)”); MALCALUSO, *supra* note 197, at 15.

200. See MONTOVANI ET AL., *supra* note 198, at 6-7. Large stores and supermarkets have low trafficking rates (0.10%) on large redemptions while small groceries have higher rates (21.14%), as do convenience stores (17.67%) on lower redemptions. See WILLEY ET AL., *supra* note 198, at 8-9.

201. See U.S. DEP’T OF AGRIC., DETECTING POTENTIAL SNAP TRAFFICKING USING DATA ANALYSIS, (Jan. 2017), <https://perma.cc/3GDM-NN44>. Note that per the quality control system, the national overpayment error rate was 3% in 2011 and underpayment error rate was 0.8%. See Ganong & Liebman, *supra* note 91, at 6.

202. OLIVEIRA ET AL., *supra* note 34, at 29-30.

203. Not all persons or households eligible for SNAP enroll in the program; known as the take-up rate, it reached a low in 2001 when only 54% of eligible individuals were participating in the program. See Ganong & Liebman, *supra* note 91, at 13-14 (quoting USDA under Secretary Eric Bost in 2001 testimony to the House Ag Committee).

also became more dynamic with more people moving in and out of it.<sup>204</sup> Easing program and administrative burdens made it easier for working families to participate and Congress continued that trend in the 2008 Farm Bill, as well as temporarily increasing benefits in the wake of the Great Recession.<sup>205</sup>

The economy's collapse into the Great Recession just months after the 2008 Farm Bill went into operation provided a catalyst for the partisan upheaval of the following decade.<sup>206</sup> With participation and costs ballooning, SNAP occupied a central role in the ensuing conflicts waged by an increasingly ideologically rigid House of Representatives.<sup>207</sup> Where research finds systemic and structural problems in the economy that leave millions below the poverty line, Republicans see government overreach, out-of-control spending, and a culture of dependency.<sup>208</sup> In 2013, the farm bill coalition was torn apart on the House floor over work requirements for SNAP but repaired in conference with the Senate.<sup>209</sup> Despite declining participation and spending, the House Agriculture Committee reignited

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204. *Id.* at 13-14 (noting that 1.1% of the U.S. population was entering and leaving SNAP each quarter in 2000 but that increased to 1.5% in 2005).

205. Among other things, the 2008 Farm Bill renamed the program SNAP and changed eligibility, including indexing asset limits to inflation. The American Recovery and Reinvestment Act of 2009 temporarily increased benefit levels for SNAP, which ended in November 2013. From FY 2008 to FY 2013, "SNAP caseloads increased 81 percent, which resulted from a combination of the economic downturn during the Great Recession, policy changes such as the temporary benefit increase in SNAP benefits due to ARRA, and other policies designed to increase access to the program, particularly among the working poor." *Id.* at 31-32.

206. See, e.g., Theda Skocpol & Alexander Hertel-Fernandez, *The Koch Network and Republican Party Extremism* 14 PERSPECTIVES ON POL. 681 (2016); *Is Democracy Dying?*, *supra* note 2.

207. See, e.g., PAUL RYAN H.R. COMM. ON THE BUDGET, THE PATH TO PROSPERITY: RESTORING AMERICA'S PROMISE 10 (April 15, 2011) <https://perma.cc/PQC2-SFPU> ("a government that promotes dependency and undermines the institutions of faith and family will inevitably weaken the nation's greatest strength; the exceptional character of its entrepreneurial, self-reliant, and hard-working citizens"); PAUL RYAN H.R. COMM. ON THE BUDGET, THE PATH TO PROSPERITY: A BLUEPRINT FOR AMERICAN RENEWAL (March 20, 2012), at 14 ("to ensure that America's safety net does not become a hammock that lulls able-bodied citizens into lives of complacency and dependency"); PAUL RYAN H.R. COMM. ON THE BUDGET, THE PATH TO PROSPERITY: A RESPONSIBLE, BALANCED BUDGET (March 2013), at 8 ("empowers recipients to get off the aid rolls and back on the payroll") & 27 ("Empowerment is a powerful alternative to dependency . . . because the best welfare program is temporary and ends with a job and a stable, independent life for the beneficiary").

208. Compare *supra* note 207 and accompanying text, and COPPESS, *supra* note 4, at Chs. 8 & 9 with Ganong & Liebman, *supra* note 91, at 5; Rutledge & Wu, *supra* note 91, at 4; and Wilde, *supra* note 91, at 325.

209. COPPESS, *supra* note 4, at Ch. 8.

the SNAP conflagration in 2018 with predictable results.<sup>210</sup> By adding another chapter in this long, difficult history the House farm bill re-exposed connections between food assistance and social reforms while leaving in its wake great uncertainty.<sup>211</sup>

#### V. VIEWING THE FARM BILL THROUGH POLITICAL THOUGHT

Viewed from a perspective rooted in conventional wisdom, the 2013 experience in the House should have been enough to caution against another divisive farm bill fight over SNAP —a cursory understanding of the historical baggage, particularly for work requirements, would have provided a much sterner warning. And yet, the House Agriculture Committee elected the most divisive path possible in a farm bill debate, persisting with stalemate in conference until an overwhelming electoral defeat altered the political calculations.<sup>212</sup> If Congressional dysfunction has potentially profound implications for American society, as well as government, the farm bill reauthorization process may serve as a harbinger.<sup>213</sup> The manner and method of an impact could be instructive, providing lessons for the farm bill and, potentially from the farm bill, for the larger questions raised by dysfunction. This section analyzes the intersection of Congressional dysfunction and the farm bill by seeking to apply political thought or theory in an attempt to

210. See *Senate Ag Committee's Draft*, *supra* note 21; 102 CONG. REC. 4481-4507 (1956).

211. Particularly notable is the connection of food stamps with civil rights and the political activism of organized labor. See Rosenfeld, *supra* note 37, at 480 (“the actual impetus for serious expansion of the program came from social movements outside Congress and congressional advocacy outside the agricultural panels” including “civil rights- and labor-affiliated activists”). See also, *id.* at 479 (referencing the 1963 House Ag Committee hearing in which Representative George Grant (D-AL) pushed back on a USDA official over food stamps asking, “Is that not civil rights legislation?”).

212. For example, prior to the mid-term results, Chairman Conaway publicly and unilaterally demanded an unprecedented partisan threshold for the farm bill conference report: the final negotiated bill had to be acceptable to a majority of the Republican caucus in the House despite the vote results in the Senate and the traditionally more bipartisan work of a conference committee. See Ryan McCrimmon, *Ag and Congress mixed on new NAFTA*, POLITICO (Oct. 2, 2018), <https://perma.cc/97SB-KPT8>; *Open Mic Interview House Ag Committee Chairman Mike Conaway*, AGRI-PULSE (Sept. 30, 2018), <https://www.agri-pulse.com/media/podcasts/85-agri-pulse-open-mic-interview/play/9436-house-ag-committee-chairman-mike-conaway>; *Part 2*, *supra* note 113.

213. See Freeman, *supra* note 1; JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* 57-58 (1994) (“[n]o institution, it is argued, better recreates the conflict of interests present in American society or is more suited for the peaceful resolution of this conflict through bargaining than the U.S. Congress”).



derive a better understanding about the implications of the high-cotton-low-road effort in 2018.

### *A. First Principles of Political Thought*

All first principles must flow from an understanding of power; controlling power is the primary challenge in designing a system of government.<sup>214</sup> Government is necessary because “the passions of men will not conform to the dictates of reason and justice.”<sup>215</sup> The preference was for a system of representative self-government whereby the citizens (the governed) work out amongst themselves the rules by which they will be governed.<sup>216</sup> Vital to this social project was the rule of law, such that “bad government became the exercise of power in the interest of the rulers, and that good government the use of power in the interest of the ruled.”<sup>217</sup>

Among other things, the American conception of the rule of law is “to insist on being ruled by a process that answers to the institutional articulation” designed in the Constitution.<sup>218</sup> The American system consolidated immense power on a

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214. Colin Hay, *Divided by a Common Language: Political Theory and the Concept of Power*, 17 *POLITICS* 45, 45 (1997) (the “single most important organising concept” because “power is politics and politics is power”); THE FEDERALIST NO. 15 (Alexander Hamilton) (“Power controlled or abridged is almost always the rival and enemy of that power by which it is controlled or abridged”); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. R.* 2311, 2316-17 (2006) (“According to the political theory of the Framers, the greatest problem to be solved was to design governance institutions that would afford practical security against the excessive concentration of political power”); *but see*, Maynard Smith, *Reason, Passion and Political Freedom in the Federalist*, 22 *J. POL.* 525 (1960) (“What is missing in The Federalist is a thorough and explicit analysis of ambition for power in relation to its objects, for it is these objects which determine whether the ambition is useful”).

215. THE FEDERALIST NO. 15 (Alexander Hamilton).

216. A system of self-government rests on expressions of popular political will as among equal citizens in an “ongoing social project of authorship of a country’s fundamental laws by the country’s people” as a method for ruling themselves. Frank I. Michelman, *How Can the People Ever Make Laws? A Critique of Deliberative Democracy*, in *DELIBERATE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 146-147, (James Bohman & William Rehg, eds., 1997) (the citizens should be “the authors of the laws that constitute their polity . . . government by the governed . . . [that] leaves the country’s people under their own rule”).

217. Hannah Arendt, *The Great Tradition: I. Law and Power*, 74 *SOC. RES.* 713, 713, 725-26 (2007); (the experience of equal power is the “fundamental experience upon which republican laws are founded and from which the actions of citizens spring” and that the “[l]aws in a republic, therefore, are not laws of distinction but of restriction; they are designed to restrict the strength of each citizen so that room may be left for the strength of fellow citizens”).

218. Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 *B.C.L. REV.* 433, 459 (2013) (“there must be law-making before there is adjudication or administration,

national scale into a central government. At the same time, it was designed to break that power within the system in an attempt to control it; procedural hurdles placed in the path of governmental action “reflect[] the foundational decision that the exercise of such power should be deliberate and limited.”<sup>219</sup> The system begins with Congress, which is the first among three separate, equal branches, where all legislative powers of the federal government are vested.<sup>220</sup> A bicameral legislative body, representing different constituencies and serving different terms “prescribes the rules by which the duties and rights of every citizen are to be regulated.”<sup>221</sup> In this, the Framers sought to strike a “balance between republican liberty, in which popular preferences would generate laws, and stability, in which laws would reflect deliberation among many perspectives and would not yield abrupt changes in social policy.”<sup>222</sup>

Foremost among the concerns of the Founders about consolidating power in a centralized republican government was “the violence of faction” which they considered among “the mortal diseases under which popular governments have

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there must be adjudication, and the due process which that entails, before there is the enforcement of any order”).

219. Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1347 (1988) (“The multiple constitutional prerequisites for government activity are checks upon the exercise of government power...”); see also Waldron, *supra* note 218, at 437 (“The principle of the separation of powers has a powerful place in the tradition of political thought long accepted as canonical among us”).

220. See U.S. CONST. art. 1, §1; see also William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992) (“); Levinson & Pildes, *supra* note 214, at 2313 (discussing the Founders view that “separation of powers would harness political competition into a system of government that would effectively organize, check, balance, and diffuse power . . . the system would be self-enforcing, relying on inter branch competition to police institutional boundaries and prevent tyrannical collusion”); THE FEDERALIST NO. 9 (Alexander Hamilton) (“[r]egular distribution of power into distinct departments . . . are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided”).

221. THE FEDERALIST NO. 78 (Alexander Hamilton); see Eskridge & Ferejohn, *supra* note 220 at 560 (“the House, Senate, and President all reflect popular desires, but with different constituencies: the President is the main nationally elected official, Senators hail from states, and House members are elected from small, internally more homogeneous districts”); Stith, *supra* note 219, at 1358 (“The appropriations requirement implements not only the idea of ‘not taxation without representation,’ but also the foundational premise of a federal government which is limited to constitutionally authorized activities.”). The point is to funnel public power and activity through the legislative body to make certain “that there will be a legislative authorization for all activity undertaken in the name of the United States.” *Id.* at 1354.

222. Eskridge & Ferejohn, *supra* note 220, at 528.

everywhere perished.”<sup>223</sup> No system of government could ever remove the causes of faction; the Founders sought to manage it through an enlarged republic with a multitude of competing factions.<sup>224</sup> In this—a system of government that pitted interests against each other—they claimed to have found “a republican remedy for the diseases most incident to republican government.”<sup>225</sup> Accordingly, an important consideration in the Constitutional design of Congress was how the mechanics of a complex, bicameral legislative process could preclude—or serve as a check on—the power of faction.<sup>226</sup>

Process and rules of procedure are fundamental to the operation of the legislative body. They establish the boundaries for decisions and shape the choices presented to lawmakers. They may even work to “shift power from one group of legislators to others.”<sup>227</sup> Legislative rules should be designed so as to “promote well-informed and cognitively undistorted congressional deliberation” in a transparent process that makes the best use of legislative resources.<sup>228</sup>

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223. Madison defined faction as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulses of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” THE FEDERALIST NO. 10 (James Madison) (explaining that the “most common and durable sources of factions has been the various and unequal distribution of property”).

224. See NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT 68-105* (2017) (for example, Madison’s original conception that larger societies become “broken into a greater variety of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert”).

225. THE FEDERALIST NO. 10 (James Madison); Neal Riemer, *James Madison’s Theory of the Self-Destructive Features of Republican Government*, 65 ETHICS 34, 36 (1954) (“Madison’s answer to this crucial query constitutes the greatest contribution yet made to republican theory in the modern world.”); FELDMAN, *supra* note 224, at 180-190 (*Federalist* No. 10 is “the single most influential account of the constitution and its basic structure” and that Madison charted a “new and more noble course . . . a revolution which has no parallel in the annals of human society . . . the fabrics of government which have no model on the face of the globe”); see also THE FEDERALIST NO. 51 (Alexander Hamilton & James Madison) (“Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority”).

226. See WILLIAM N. ESKRIDGE ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 84 (2d. ed. 2006) (discussing *The Federalist* No. 10).

227. Garrett, *supra* note 51, at 705; see *Harnessing Politics*, *supra* note 173, at 502 (By shaping “the choices that are presented to lawmakers,” this structure sets “the bounds of the allocational decisions...” codified in law).

228. Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHIC. L. REV. 361, 363 (“should minimize the principal-agent problems inherent in legislative

The legislative process helps “minimize factional abuse not by mandating outside review, but by raising the costs of assembling the necessary faction.”<sup>229</sup> Among these rules and procedures, voting is critical to achievements in a deliberative, political process because: (1) it facilitates group decision-making for often large and complex societal problems; and (2) it promotes decisions on how to address them given the realities of disagreement.<sup>230</sup> Vote-counting takes place in the real world, not the theoretical or philosophical. It is transparent, winners and losers are clearly able to determine which view won and by how much. It also provides each vote equal weight or power in the process.<sup>231</sup> Not only does voting validate the result of the process, it also provides for strategic response by the losing side within the system thereby maintaining order and peace, while also offering the possibility to change the outcome.<sup>232</sup>

Legislation that is enacted into law represents an “achievement of concerted, cooperative, coordinated, or collective action in the circumstances of modern life” by a diverse citizenry undertaking difficult matters.<sup>233</sup> It is important that it is “action-in-concert in the face of disagreement” which earns legislation the respect of those subject to its provisions and provides some measure of dignity to the government and the governed.<sup>234</sup> The existence of disagreement is important.<sup>235</sup> Taking collective action in the face of disagreement is “the circumstances of politics.”<sup>236</sup> Permitting good faith disagreement to peacefully coexist with legislated outcomes without being lost to—or suppressed by—them is vital to the health of the body politic.<sup>237</sup> Opponents always retain the ability to revisit or re-litigate a

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representation and should encourage technically efficient use of constrained legislative resources....”), 386 (2004) (“constitutional rules of legislative procedure should be designed to minimize (the sum of) the costs of reaching decisions and the costs of errors or mistakes”).

229. *Id.* at 395 (stating it that Madison’s view “anticipat[ed] modern work on the economics of voting rules”).

230. *See* Jeremy Waldron, *Legislation, Authority, and Voting*, 84 GEO. L. J. 2185, 2205 (1996).

231. *See id.* at 2209-10 (“It attempts to give each individual’s view the greatest weight possible compatible with an equal weight for the views of each of the others”).

232. *See id.* at 2188-89.

233. *Id.* at 2198.

234. *Id.* at 2198-99.

235. *Id.* at 2201-02 (“[O]ur common basis for action in matters of justice has to be forged in the heat of our disagreements, not predicated on the assumption of a cool consensus that exists only as an ideal”).

236. *Id.* at 2197.

237. *Id.*

legislated outcome with the potential that further deliberation, persuasion, or the response of voters will produce a different outcome.<sup>238</sup>

Deliberation is important, although reality may not always measure up to the ideal.<sup>239</sup> As formulated by James Madison, faction creates problems for republican government by drowning out “the mild voice of reason, pleading the cause of an enlarged and permanent interest,” with the clamorous demands of impatient, greedy, and self-interested faction.<sup>240</sup> The American system was designed to provide room for moderation and deliberation to arrive at dispassionate and just results that advance the public interest.<sup>241</sup> It was to be achieved through political competition among various interests in Congress.<sup>242</sup> Competition requires negotiation to resolve conflicts as lawmakers work towards mutually beneficial solutions while fostering participation by individual citizens in the legislative process.<sup>243</sup>

Deliberation and negotiation also require coalition-building among interests to surmount the many “veto-gates” in the process.<sup>244</sup> Often called “logrolling,” coalition-building is the “mechanism through which partial interest can be aggregated into national policies” by trading “support for each other’s proposals” as among interest groups, constituents or legislators.<sup>245</sup> Reality, however, can be a

238. *See id.* at 2202-05 (“No one is ever required to accept a legal or political defeat as final or irreversible.” *Id.* at 2196).

239. *See* BESSETTE, *supra* note 213, at 45-46 (the Framers “sought to create not merely a deliberative government, but a deliberative democracy” that would promote reasoned and just results—instead of narrow, factional interests—and for which voters could render judgment in elections).

240. THE FEDERALIST NO. 42 (James Madison).

241. THE FEDERALIST NO. 37 (James Madison) (designed to allow an investigation with a “spirit of moderation which is essential to a just estimate” of whether the laws passed by Congress were likely to “advance or obstruct the public good”).

242. ESKRIDGE ET AL., *supra* note 226, at 86 (such undertakings presumably would produce “moderate and well-considered policies” based on “the connections among interest groups” where “overlapping memberships might provide an effective restraint on the extremism of any one group”).

243. *See generally id.*

244. *See* BESSETTE, *supra* note 213, at 27 (noting that Madison’s argument in *The Federalist* No. 51 regarding coalitions has “an obvious legislative analogy” and indicates a preference for “coalition building through reasoned appeals, as those who represent separate groups in society seek to find or fashion a common interest or principle around which a majority can form”).

245. *Id.* at 56-57 (“a group’s giving support to a proposal that may bear no relation or only the most tenuous relation to its own objectives; in return it receives similar support from the group it has assisted”). *See also* Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 20 (1991) (“Logrolling provides potential solutions to the kinds of problems” found in collective decision-making).

challenge because deliberation, negotiation and coalition-building only work in a fair negotiation where all interests are equally represented.<sup>246</sup>

The fact that the process is designed to reach deliberative, negotiated outcomes does not necessarily mean that it always does or should. In fact, the Framers are understood to have designed a system where the default outcome would be inconclusive and result in a failure to enact legislative proposals into law.<sup>247</sup> The expectation was that “a legislative stalemate would not be uncommon [and was understood as the result of] the requirement of bicameral approval [for legislation, a design that] reflects the constitutional presumption in favor of the status quo,” especially over radical or ill-considered results that could later be considered extreme.<sup>248</sup> The system protects the status quo due in part to the fact that majority vote blocs have to be “built anew at each stage” of the legislative process.<sup>249</sup>

### *B. Applying Political Thought to the Farm Bill*

Searching for, and understanding, Madison’s “republican disease” of faction in the post-New Deal administrative state is a critical effort for legal and political thought.<sup>250</sup> The New Deal fundamentally altered the relationship between Americans and the federal government; an outcome highlighted by farm policy.<sup>251</sup>

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246. See ESKRIDGE ET AL., *supra* note 226 (“Large groups representing diffuse interests typically will not form” and that “small groups have the advantage over large ones because the former can work to receive targeted benefits at the expense of the diffuse and unorganized public.”); BESSETTE, *supra* note 213, at 56-57.

247. See Eskridge & Ferejohn, *supra* note 220, at 532 (“Most social and economic problems would not generate legislation at all,” but “if the problem persisted over time, a solution in the common interest would emerge and preferences would realign...”).

248. *Id.* at 530.

249. BESSETTE, *supra* note 213, at 57-58 (“proponents of various proposals seek, through bargaining, compromise, negotiation, or ‘logrolling,’ to assemble fragments of power into winning coalitions” and “puts premium on the techniques of coalition building”).

250. See Herbert Hovenkamp, *Appraising the Progressive State*, 102 IOWA L. R. 1063, 1088 (2017) (explaining that the New Deal was the “first to use a broad combination of taxation and spending policies in order to manage economic growth and distribution”); Eskridge & Ferejohn, *supra* note 220, at 557 (Congress in crisis “willingly delegated—gave away—enormous lawmaking powers to agencies.”).

251. See generally COPPESS, *supra* note 4, at 9-37; Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 334 (1983) (“The New Deal erased for all time the rural-agrarian heritage of a circumscribed role for government . . . its agricultural portion had been converted to an urban-industrial commercial conceptualization and policy design”); Richard S. Kirkendall, “The New Deal and Agriculture,” in THE NEW DEAL VOL. 1 (Ohio State University Press, Columbus, OH 1975), edited by John Braeman, Robert Hamlett and David Brody, at 86 (“The New Dealers

With this fundamental change in our system of government, the “biggest challenge, as would be true of any government dominated by legislative and agency decision-making, is the need to limit special interest capture.”<sup>252</sup> So altered, the relationship with the federal government presents ample opportunities for special interests or factions to make use of the system for the benefit of their narrow self-interest at the expense of the common good or public interest.

It is this difficult dividing line that appears critical, as between healthy coalition-building to achieve public interest and unhealthy faction maximizing self-interest at the expense of the common good. These are two sides of the same Madisonian coin. A search for further understanding of this arguably runs through two schools of political thought. One, known as “public choice,” is clearly rooted in Madison’s observations on faction, however, development since the 1960s has had profound consequences for American politics.<sup>253</sup> The other, known as “civic republicanism,” involves theories steeped in concepts of republican virtue where government and policy seek to provide for public goods and interests.<sup>254</sup>

Public choice applies economic principles to policy, politicians, and government.<sup>255</sup> Specifically, it applies a theory of the rational calculation of self-interest as the primary method for understanding political processes and to conclude that legislators are “both vote-maximizers wishing to stay in office as long as possible and manipulators who bribe their constituents with funds from the public purse.”<sup>256</sup> At the core of the public choice perspective is the view that small,

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discarded the view that farming is a highly individualistic enterprise and insisted that it must be dealt with on a collective basis”).

252. Hovenkamp, *supra* note 250, at 1107-08 (“The continued success of the progressive state’s ability to maintain or improve its record of economic performance depends on its ability to keep special interest legislation and crony capitalism at bay . . . it must combat special interest movements in opposition to socially desirable legislation”).

253. See Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a “Reasonable Choice” Modeler*, 71 TEX. L. REV. 1541, 1542 (1993) (among the foundational texts are Kenneth J. Arrow, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963) and James M. Buchanan and Gordon Tullock, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962)). Extensive recent scholarship provides an in-depth look at the founding and development of Public Choice, tracing it from reactionary responses to school desegregation and through to a heavy reliance on special interest funding to support the modern version of libertarian ideological politics. See NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT’S STEALTH PLAN FOR AMERICA (Penguin Random House, 2017).

254. See Grofman, *supra* note 253, at 1543 (noting that it is related to “work by historians, philosophers, political scientists, and sociologists rediscovering the ‘republican virtue’ roots of modern democratic theory, and tracing these roots to both ancient and modern writers such as Aristotle, St. Augustine, Machiavelli, and Rousseau”)

255. See Rubin, *supra* note 245, at 5-6.

256. Grofman, *supra* note 253, at 1578.

clearly-defined and relatively homogeneous interest groups are more effective at securing benefits in the legislative process. Such groups are considered more efficient, with the ability to punish members of the group who cheat or “free ride” on group efforts, and because each has a relatively large stake in the outcome.<sup>257</sup> From intense lobbying to campaign contributions, these narrow interest groups (or factions) are viewed by the public choice school as being able to effectively purchase the legislation they want, often at the expense—or to the detriment—of the larger public interest.<sup>258</sup>

This economic take on Madison’s observations about factions has notably developed a very distinctive conservative ideological focus regarding the distortive effect of collective action.<sup>259</sup> Somewhat ironically, this has fueled concern and critique that emphasizes how larger groups of poor citizens undertake collective action seeking to transfer wealth.<sup>260</sup> The perspectives offered by public choice

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257. See Rubin, *supra* note 245, at 11 (able to “circumvent” the free-rider problem if “...they are able to police their members and sanction those who refuse to contribute. This is relatively easy to do when a group is small, when its members have ongoing personal or business relationships, and when each member has a relatively large stake in the outcome.”); Hovenkamp, *supra* note 250, at 1102 (“...cartels work best when they consist of homogenous members with the same set of interests, and when they are small so that each of them has a large stake in the outcome . . . able to detect ‘cheaters’ and discipline them effectively [because cheating (or free-riding)] by a member of a small group is much more disruptive and thus easier to detect than in a large group.”); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHIC. L. R. 63, 106 (1990) [hereinafter Hovenkamp, *Legislation*] (“Public choice theory suggests that small, well-organized interest groups work more efficiently than larger, more diversified groups”).

258. The economics term used is “rent-seeking” through which groups or cartels influence “vote-maximizing legislators” to deliver on narrow, self-interest demands in the process. See Grofman, *supra* note 253, at 1542; Rubin, *supra* note 245, at 21 (“dominant interest groups are organized around narrow, material self-interest and that re-election-maximizing legislators will respond exclusively to these groups . . . the combined approach [re-election maximizer and interest-group theory] suggests not only that a market for re-election exists, but that this market fails to reflect the views of the majority and instead reflects those of special interests”); Hovenkamp, *Legislation*, *supra* note 257, at 106 (“Through highly effective lobbying these small groups purchase the legislation they want, often at the expense of the rest of society”).

259. See Hovenkamp, *supra* note 250, at 1094; Rubin, *supra* note 245, at 10 (“[l]iberals and radicals believe strongly in collective action as a means of combatting the injustices that result from private orderings within a market” conservatives in the Public Choice school “tend to believe that the market’s private orderings produce desirable results” and that what collective action begets are distortions); MACLEAN, *supra* note 253.

260. Hovenkamp, *Legislation*, *supra* note 257, at 107 (noting that the “...legislation passed free of public choice biases would probably transfer more wealth from the rich to the poor than legislation now does. The real bias created by public choice favors not the poor, but



appear to be a much better fit when applied to the smaller, more homogeneous, organized, wealthier (often conservative), and powerful interest groups able to use the legislative process to both secure benefits for themselves and block benefits for others.<sup>261</sup> The developments over the last half century have pushed public choice perspectives to become too narrow, cynical, and pessimistic, especially when seeking to encapsulate all political and legislative behavior in simple terms that risk being trapped by circular logic and self-fulfilling prophecies.<sup>262</sup> It does, however, remain “a theory about why the democratic process works imperfectly [and therefore] may be quite useful for explaining why legislation often benefits relatively small groups . . . at the expense of relatively large ones.”<sup>263</sup>

By comparison, civic republicanism takes the view that “legislators have motivations other than the desire to be re-elected, that voters have motivations other than self-interest, and that even interest groups often organize around broad policy perspectives that bear little relationship to the personal well-being of their members.”<sup>264</sup> It focuses on the value of (or virtue in) deliberation as a method for achieving some form of agreement on policy that is in the public interest or for the common good.<sup>265</sup> Here the public interest is something more than simply a dividing of the political spoils among interest groups, but rather “some concept of the public

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rather the well-to-do and entrepreneurial classes. Virtually the entire literature on rent-seeking and legislative process bears this out”).

261. For example, the more realistic view that the power of interest group representation is limited to the same class of powerful and wealthy in society; a system tilted heavily in favor of organized business interests rather than that of the public good or even less advantaged citizens (like low income families). See ESKRIDGE ET AL., *supra* note 226, at 87 (“The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent. Probably about 90 percent of the people cannot get into the pressure system”). Further examples are studies of the disastrous Smoot-Hawley tariff that worsened the Great Depression. *Id.* at 88 (“70 percent of all organizations having a Washington presence and 52 percent of those having their own offices represent business” interests and organizations).

262. See Steven Kelman, *Public Choice and Public Spirit*, PUB. INTEREST, Spring 1987, at 80, 94 (“Cynics are therefore in the business of making prophecies that threaten to become self-fulfilling”); Grofman, *supra* note 253, at 1581 (“often depicts legislators as self-serving actors who are unconcerned with the public interest” but this is too narrow and “does not account for the role of the legislator as an innovator”); Rubin, *supra* note 245, at 1 (defined by a “grim landscape of vote-maximizing legislators, rent-seeking interest groups, budget-aggrandizing bureaucrats, and free-riding citizens” that purports to a comprehensive, real-world view of politics and governance) and 8 (“While collective-choice analysis yields some significant insights, it does not lead to the pessimistic conclusions about modern government that characterize public choice theory”).

263. Hovenkamp, *Legislation*, *supra* note 257, at 108.

264. Rubin, *supra* note 245, at 2.

265. See Grofman, *supra* note 253, at 1578 (“the virtues of deliberation and the possibility of disinterested pursuit of the common good”).

good that may be perceived, however dimly, by the citizenry, legislators, and judges.”<sup>266</sup>

Central to civic republicanism and achieving the public interest is deliberation and persuasion.<sup>267</sup> Understanding that not all members of the public agree on what is in the public interest, civic republicanism stresses the importance of institutional designs that slow down policymaking and open it to scrutiny.<sup>268</sup> Conceptually, persuasion and negotiation permit the forming of coalitions more likely to achieve something resembling the common good, while deliberation fosters competition amongst factions that allows ambitions to check one another.<sup>269</sup> It requires a certain measure of fairness for deliberation and negotiation to produce such outcomes, however; a contest among equals or equally-represented interests.<sup>270</sup>

If public choice can seem too cynical and pessimistic, civic republicanism risks appearing too theoretical, idealistic, and naïve.<sup>271</sup> It may fail to heed age-old understandings about power and the tendencies towards the abuse of political power; basic realities of which a constitutional, republican government was

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266. *Id.* at 1578 (“a genuine, substantive concept of the public interest that cannot be reduced to an aggregation process based on individual preferences”).

267. *See id.* at 1578.

268. *Id.* at 1578 (not all voters share “a common notion of the common interest” thus “persuasion and deliberation may have an important role in the context of preference-driven social choice”).

269. *Id.* at 1577-78 (“political deliberation, political persuasion, and the search for the public interest”). The need to “design institutions to foster deliberation and the search for the public interest that are robust enough to work in a world where not all—or even most—are committed to those values.” *Id.* at 1587; Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. R. 633, 641 (1995) [hereinafter *The Dignity of Legislation*] (“...our tacit theory of the authority of legislation [is based on] a sense that discussion and validation by a large assembly of representatives is indispensable to the recognition of a general measure of principle or policy as law”).

270. For one, the ideal works only in a fair negotiation or fight where all interests are represented equally and ably rather than a situation where some interests suffer from ineffective representation that “can lead to unfortunate policy outcomes that disserve the public interest.” ESKRIDGE ET AL., *supra* note 226, at 87.

271. *See* Grofman, *supra* note 253, at 1584-85. *See, e.g.*, Richard A. Epstein, “Modern Republicanism—Or the Flight from Substance,” 97 *Yale L.J.* 1633 (1988), at 1633 (a “pluralistic nightmare... [without] guidance as to the form that deliberation should take or the ends that it should seek . . .”); Jonathan R. Macey, “Missing Element in the Republican Revival,” 97 *Yale L.J.* 1673 (1988), at 1673 (it is missing “an appreciation of the frightening power of man to subvert the offices of government for what can only be described as evil ends.”) and 1677 (“...recognized that virtue in government was constantly threatened with corruption by modernity”).

designed to guard against.<sup>272</sup> There are limits to the benefits of deliberation and persuasion, including its effectiveness and efficiency; people can be persuaded to believe in things that are not true or accurate.<sup>273</sup> Moreover, what constitutes the public interest may be a matter of perspective and reaching a decision in the public interest can take too long and be too difficult for the need.<sup>274</sup> It could also be a concern that the common ground necessary for deliberation and reasoning through persuasion is limited in our current polarized, partisan political environment.

As applied to the farm bill, these concepts or theories expose the complex realities of legislation where the lines separating public and private interests can blur or depend on perspective.<sup>275</sup> Explaining the farm bill in terms of these two schools representing polar ends of a political spectrum would tend to align farm support policy most closely with public choice. By comparison, low income food assistance programs, such as SNAP, display a closer alignment with the characteristics described by civic republicanism.<sup>276</sup> Of course, arguments can be made from the other direction as well. To the extent that farm program payments help assist farmers with risks and losses, as well as ensure an adequate food and fiber supply, they arguably serve the public interest. Although it may seem difficult to fit advocates for SNAP into the rent-seeking interest group category, arguments against food assistance often include the cost to taxpayers, concerns about the potential for assistance to provide disincentives to work, or that the program is in the self-interest of vote-maximizing legislators distributing benefits to their constituents. These arguments become framed in terms contrary to the public interest.

That legislation and the motives of citizens or policymakers are complex and multi-faceted seems uncontroversial but also of minimal instructive value. If the

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272. See, e.g., Grofman, *supra* note 253, at 1582-83 (whether people are persuaded to believe the wrong things or the “question whether good answers tend to drive out bad, or whether there is something analogous” to adverse selection) & 1584 (noting that “Madison advocated designing institutions that check man’s selfishness rather than ones that require men to be angels”).

273. See *id.* at 1582-83 (“...deliberation also opens the possibility that people will be persuaded to believe things that are not so”).

274. See *id.* at 1582-83, (“the question of when the expected costs of deliberation outweigh the expected benefits... [because the] virtues of unchecked public deliberation can easily be exaggerated”).

275. See *id.* at 1584-85 (challenging the view that “legislators are exclusively logrolling and rent-seeking animals” and that Public Choice may offer “powerful but often incomplete insights”).

276. By addressing hunger and poverty for a large portion of the citizenry through smaller, more widely-dispersed benefits, the program and its supporters can lay claim to a close alignment with concepts of policy in the general, public interest. See, e.g., *id.* at 1549, 1577-78.

high-cotton-low-road farm bill is instructive it is because it demonstrates the mechanics of these theories in operation. Not all citizens or interests agree on what constitutes the common good or the public's interest.<sup>277</sup> The more fundamental questions involve the Madisonian system's ability to effectively promote deliberation and the search for the public interest, as well as effectively check and balance power, in those efforts.<sup>278</sup> On this, the high-cotton-low-road farm bill has much to offer.

### *C. Towards an Understanding of the Implications*

The difference between healthy coalition-building and unhealthy faction can be unclear moving from the abstract, theoretical setting to the real world of Congress-in-action.<sup>279</sup> Any distinction between counterproductive political fights and “the ambition of one group check[ing] the ambition of others” in a fair process—or the appropriate triumph of the status quo—can be equally unclear in reality.<sup>280</sup> Has the process produced well-reasoned outcomes through deliberation and fair negotiations that are designed to provide for the common good and address public interests?<sup>281</sup> Or, has it devolved into faction, producing outcomes “motivated by thoughtless passion or self-interest” and “contrary to the public good” or the public interest?<sup>282</sup> Has Madison's “mild voice of reason” prevailed in the public interest or been drowned “by the clamors of an impatient avidity for immediate and immoderate gain” by selfish factional interests?<sup>283</sup> In general, farm bills provide case studies and, in particular, the high-cotton, low-road offers a cautionary tale.<sup>284</sup>

Arguably, the criticisms of government offered by the public choice school provide the most accurate description of the high cotton situation in 2018.<sup>285</sup> The concepts of special interest capture and rent-seeking have been demonstrated throughout farm policy history and the farm interest coalition is by far smaller, wealthier, and more cohesive. Within that coalition, cotton, rice, and peanuts constitute a smaller subset of farmers with fewer acres and crops that are regionally limited to southern states. Such an argument is further strengthened by the history

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277. See, e.g., *id.* at 1578.

278. See, e.g., *id.* at 1587.

279. See, e.g., ESKRIDGE ET AL., *supra* note 226, at 87.

280. *Id.* at 86; THE FEDERALIST NO. 51 (James Madison).

281. See, e.g., *Id.* at 87; *The Dignity of Legislation*, *supra* note 269, at 641.

282. ESKRIDGE ET AL., *supra* note 226, at 84.

283. THE FEDERALIST NO. 42 (James Madison).

284. See ESKRIDGE ET AL., *supra* note 226, at 95; see generally Ferejohn, *supra* note 35.

285. It is additionally notable that the chairman of the House Agriculture Committee represents a Texas cotton producing region and the Secretary of Agriculture is from Georgia where cotton is a key crop. See generally Rubin, *supra* note 245.

of attempts to place limits on farm payments—arguably policy well within the public interest—and the successful, sophisticated efforts to evade those limits by a very small minority of farmers.<sup>286</sup>

Consider cotton's capture of New Deal legislation compared to food assistance that was created by USDA and generally operated as part of the effort to help farmers with prices weighed down by surplus.<sup>287</sup> Specifically, Oscar Johnston provided the strongest example of capture in the implementation and operation of the 1933 AAA payments; though conflicted, he managed to deliver large payments to his farm.<sup>288</sup> More troubling, cotton farmers were able to make use of the federal policies to consolidate land and kick out sharecroppers.<sup>289</sup> Given that these sharecroppers were out of work and home during the Great Depression, they were forced into deeper destitution and had to rely on public assistance.<sup>290</sup> All of the outcomes benefitted the narrowest of interests and were contrary to the public's interest or the common good.

The issue of payment limits and eligibility also provides clear examples of capture. Consider in particular the long-running failure to effectively apply payment limits because large, sophisticated (and mostly southern crop) farms were able to take advantage of the rules and loopholes to reorganize and avoid the limits.<sup>291</sup> Not only does this appear contrary to the public interest, it also had implications for other farmers within the coalition because they had to comply with the requirements and paperwork as well.<sup>292</sup> When Congress sought to address the issue in 1987, the final legislative provisions included a loophole for adding managers that was exploited at least through 2014 and is likely to continue.<sup>293</sup>

What is more striking and with little to argue for the public interest is the comparison of these examples to the history of the treatment given to food assistance. Retracing our steps through history, Southerners blocked the policy for

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286. Not only were the efforts to evade limits and restrictions contrary to the public interest, but they also impacted other farmers within the farm coalition because attempts to apply limits and eligibility compliance impact all farmers but those likely to have caused the attempts continued to use sophisticated means to avoid them. All farmers have to go through the paperwork and suffer the public criticism because of the continued efforts by a very small, sophisticated minority to maximize benefits for themselves. *See* Kelman, *supra* note 262, at 94.

287. *See generally, supra* notes 126-134 and accompanying text.

288. *See id.*

289. *See id.*

290. *See* Nelson, *supra* note 125.

291. *See supra* notes 149-166 and accompanying text.

292. *See, e.g.,* STAFF OF DEP'T OF AGRIC., 92D CONG., FARM PAYMENT LIMITATIONS 7-9 (Comm. Print 1972).

293. *See supra* notes 149-166 and accompanying text.

more than a decade.<sup>294</sup> The power of the southern farm interests had to weaken to the point that it was unable to move its bills through Congress before it formed a coalition with the group pushing for food assistance policy.<sup>295</sup> Forming that coalition required a weakening of the factional power of southern farm interests largely as a result of their own overreaching within the farm coalition. Cotton pushed policy opposed by Midwestern corn interests too far and suffered a stinging defeat on the House floor in 1962.<sup>296</sup> The deal-making that created the log-roll in 1964 was to rescue cotton and wheat policy with the Food Stamp Act of 1964.<sup>297</sup>

While it had been clear since at least 1964 that farm assistance could not pass in Congress without a coalition with food assistance, the coalition had a precarious existence due to the resistance to food assistance by the faction benefiting the most from farm assistance. During the 1973 Farm Bill southerners fought against adding food assistance and nearly derailed the entire bill after retaliation focused on cotton.<sup>298</sup> Again, it was the 1981 Farm Bill in which southern “Boll Weevil” Democrats traded support for Reagan budget cuts in return for protections for their crops; a deal that ended up harming food assistance.<sup>299</sup> This pattern was repeated in 1996 and again in 2013.<sup>300</sup> The House farm bill debate in 2018 exposed anew the significant instability in the farm bill coalition’s politics.

Combined, these issues might be where farm bills are particularly instructive. The same Agricultural Committees that viewed payment limits as unimportant also raised grave concerns about spending and fraud or abuse of food assistance.<sup>301</sup> In short, for every Linda Taylor there was a Billie Sol Estes but policymakers responded very differently and, in doing so, caused significant instability in the coalition. The differences in treatment can likely be traced to the vast differences in constituencies and benefits, making for a difficult coalition with no common members or few concurrent interests that can cool extreme positions.<sup>302</sup> Farm programs serve a smaller, more homogeneous, better organized and typically wealthier constituency. It is assistance to producers and businesses, rather than

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294. See COPPESS, *supra* note 4.

295. See, *id.*

296. See *id.*

297. See *id.*

298. See *id.*

299. See *id.*

300. See *id.*

301. See *id.*

302. Moderation in Congress is usually the result of “the connections among interest groups” where “overlapping memberships might provide an effective restraint on the extremism of any one group” but it is constantly in doubt. See ESKRIDGE ET AL., *supra* note 226, at 86.

consumers.<sup>303</sup> SNAP serves a far larger, more diverse and, by definition, poor constituency. It is assistance to consumers, rather than producers.<sup>304</sup> Farm programs are far more generous by any measure than SNAP. Within the farm coalition, moreover, the southern crops (cotton, rice, and peanuts) consistently fare better in terms of payments than the other commodities.

Beyond scoring winners and losers, the 2018 effort in the House also highlighted another concern about the Madisonian system. It repeated a consistent pattern by which a faction within a governing or legislative coalition seeks to maximize its benefits while attacking the benefits to its coalitional partner(s). The ability to do so successfully is derived from the design of the system. It limits the power of factions through procedural impediments on the ability to craft legislation favored by the factional interests that is contrary to, or at the expense of, the public interest. To overcome these impediments usually requires building and maintaining a larger legislative coalition.<sup>305</sup> In general, this favors the status quo.<sup>306</sup> It also, however, makes it easier for smaller, cohesive and powerful interest groups to block legislation than it is for them to successfully enact legislation. This feature of the system turns out to have further consequences that may or may not have been intended.

In a recent appraisal of the progressive state, Professor Herbert Hovenkamp observed that, “Madison apparently assumed that the effect of factions would show up in efforts to pass legislation, not in efforts to prevent it from being passed.”<sup>307</sup> Importantly,

...the Constitution’s constraints on bill passage are successful in limiting the power of factions if doing nothing is the baseline, and the faction wants socially harmful legislation. These same limitations are counterproductive, however, if the public interest requires legislation but a faction opposes it.<sup>308</sup>

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303. See Hovenkamp, *Legislation*, *supra* note 257, at 112 (“Utility and wealth, quite simply, are not the same thing, particularly when the well-being at issue is that of consumers rather than producers”) & 114 (“...people acting as producers are better off if they have more money [and that] welfare and well-being probably converge”).

304. *Id.* at 114 (“Many of the problems that inhere in determining the well-being of people acting as consumers can be assumed away when we analyze their behavior as producers”).

305. See, e.g., BESSETTE, *supra* note 213, at 56-57.

306. See *id.* at 27; ESKRIDGE ET AL., *supra* note 226, at 99; Eskridge & Ferejohn, *supra* note 220, at 530-33.

307. Hovenkamp, *supra* note 250, at 1097.

308. *Id.*

Madison's mechanisms to control faction are entirely structural; more to the point, they only work in one direction.<sup>309</sup> They may limit the power of a faction, acting on its own, to pass self-interested legislation but they also strengthen the power of a faction, acting on its own, to block legislation that may be important for the public interest or necessary for the common good.<sup>310</sup> Taking this a step further, if a faction can much easier prevent legislation in the public interest, then it possesses outsized leverage in the process, especially as against the less-organized, larger, diverse public interest.

This the high-cotton-low-road scenario; prevalent in the 2018 House debate, it is certainly not unique to farm bills. In fact, this structural challenge with Madison's system has long been used very effectively by southerners in Congress, especially against Civil Rights and labor policies.<sup>311</sup> Attacks on food assistance appear to have been of a piece with this long-running Southern veto in Congress. Of course, one key difference with food assistance compared with Civil Rights and labor policies, however, involves combining the power to block public interest policies with simultaneous demands by the special interest faction to achieve narrow legislative outcomes by the same legislators.

The structural leverage provided to a faction to block legislation also provides substantial leverage to that faction within a legislative coalition. It paves the low road because the more cohesive faction in the coalition can more effectively exert power over its coalitional partners. In effect, this permits the faction to hold hostage the interests of other groups within the coalition. A propensity for legislative hostage-taking has become a frequent strategy deployed in Congress and the 2018 farm bill effort in the House was another example. Cotton collected additional payments not previously authorized in the 2014 Farm Bill and the House Agriculture Committee's Southern faction attacked the SNAP program. In the same bill, the Southern faction sought to loosen eligibility requirements and payment limits on farmers while they demanded tighter eligibility and work requirements on SNAP recipients.

The structural protections against factional power, because they limit the ability to pass all legislation, can be used to empower factions in negotiations and provide opportunities for capture or legislative hostage-taking. To the extent that

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309. *See id.* ("The approach that Madison defended in *The Federalist Papers* for the problem of special interests was entirely structural. . . if the Constitution's intent was to eliminate capture with this set of structural devices, it failed . . . purely structural approach to special interest capture was 'woefully inadequate'").

310. *See id.*

311. It should not be lost that this may have been by design as well; that Southern slaveholding founders wanted to block the ability of any potential public interest from ending or restricting slavery could well have been intentional. *See* Ira Katznelson et al., *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 POL. SCI. Q. 283, 302 (1993).



the strategy is effective, it undermines Madison's republican remedy to the disease of self-government. So empowered, factions can successfully maximize their narrow interest contrary to the public interest because they can generally count on protection by the vote strength of the larger coalition. A powerful, ruthless faction can achieve the very results that Madison and the Founders tried to prevent; the high-cotton-low-road farm bill is the road map.<sup>312</sup>

Looking back over the history of Southern opposition to food assistance while simultaneously undertaking efforts to maximize assistance to Southern farmers adds yet another layer to this by providing insights on the role of ideology.<sup>313</sup> In the most oversimplified of terms, the left generally supports collective action to address injustice or inequality in a system benefitting small, powerful and wealthy factions, while the right generally views collective action as counterproductive to a functioning system that causes distortions and inefficiencies.<sup>314</sup> Ideology appears to be playing an increasingly dominant role in Congressional politics and dysfunction, something to which Madison, public choice, and civic republicanism appear to be lacking answers.<sup>315</sup> Arguably, ideology can work to drown out more diverse preferences, or more complicated views, held by individual voters such that legislative voting becomes an overly-simplified binary choice that is more often cast as a zero-sum competition.<sup>316</sup> In other words, ideology can function as a very powerful faction.

Applied to the farm bill setting, the role of ideology may serve to amplify the coalitional-factional dynamics. Consider that farm program payments and SNAP benefits are both entitlement programs, transferring funds from taxpayers

312. This be one aspect of Maynard Smith's argument that the Federalist had missed a more thorough analysis of power. See Smith, *supra* note 214, at 525-544 ("What is missing in *The Federalist* is a thorough and explicit analysis of ambition for power in relation to its objects, for it is these objects which determine whether the ambition is useful").

313. See, e.g., Rubin, *supra* note 245, at 16-17 ("...almost every legislative action can be justified as taken for the good of some abstractedly stated principle or ideology"). See also, Robert Sherril, *Why Can't We Just Give Them Food*, NY TIMES (March 22, 1970), <https://perma.cc/T7TR-W3D4> (quoting Representative Tom Foley (D-WA) discussing Chairman Poage's and Southern opposition to food stamps, "It isn't politics. They are ideologically hung up. This is their sincere view of the world, of how right and truth and justice fall into place").

314. Liberals "believe strongly in collective action as a means of combatting the injustices that result from private orderings within a market." Rubin, *supra* note 245, at 10. Conservatives "tend to believe that the market's private orderings produce desirable results" and that what collective action begets are distortions. Grofman, *supra* note 253, at 1557-58.

315. See Grofman, *supra* note 253, at 1558; Rubin, *supra* note 245, at 19.

316. In that way, ideology "becomes self-reinforcing" and the two-party system "facilitate[s] one-dimensional competition by anchoring it." Grofman, *supra* note 253 at 1559-60.

to a defined set of beneficiaries. In fact, some elements on the conservative-libertarian end of the ideological spectrum oppose both and attempt to implement a divide-and-conquer strategy to diminish or eliminate both SNAP and farm program benefits.<sup>317</sup> The coalitional power-play by the southern faction appears to leverage rigid ideological demands on the larger, more diverse side of the coalition (e.g., SNAP) while protecting the interests of its farmers as much as possible from a similar enforcement of ideological demands. SNAP becomes a convenient tactical target for opponents, diverting energy and attacks that might otherwise focus on farm program payments, particularly issues involving payment limits and eligibility reforms.

All of which provides further evidence of the power of faction but one that does not appear to have an appropriate check or balance in the system as designed. The exercises of coalitional power and the ability of a faction to leverage power both within the coalition and outside of it in the legislative process raise difficult questions. Among the first of these questions is an exploration of the specific procedural rules or aspects of the current process that may contribute to this dynamic. An important place to start, for example, would be the Congressional budgetary rules and procedures. They may play a critical supporting role as evidenced by the farm bill where the larger payments to a smaller constituency cost far less in the aggregate budget baseline than the smaller benefits to the far larger constituency.<sup>318</sup>

Congress ultimately enacted a farm bill in 2018 but it took a large defeat in the midterm election. The House debate can take its place in an often difficult and even troubling history, raising questions about the legislative process and the Constitutional system that extend beyond the high-cotton-low-road farm bill. The ability of one faction to apply ideological restrictions on others while simultaneously using the levers of power to extract outsized benefits creates a theoretically-fascinating stress test of the Madisonian designs, but one that may hold far larger and more uncomfortable implications. Where the coalition-building necessary for deliberation and successful legislative achievements in politics becomes overwhelmed by the power of a faction to manipulate it, the system

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317. See, e.g., *Agriculture*, HERITAGE FOUND., <https://perma.cc/ZM7E-59WG> (archived Dec. 22, 2018); Daren Bakst, *Congress Should Separate Food Stamps from Agricultural Programs*, HERITAGE FOUND. (Apr. 7, 2015), <https://perma.cc/H5LX-7C9S>; *American Boondoggle: Fixing the Farm Bill*, AM. ENTERPRISE INST., <http://www.aei.org/feature/american-boondoggle-fixing-the-farm-bill/> (last visited Apr. 6, 2019). This strategy dates at least to the Reagan Administration and the admitted goals of Office of Management and Budget Director David Stockman. STOCKMAN, *supra* note 46, at 11 (“My strategy is to come in with a farm bill that’s unacceptable to the farm buys so that the whole thing begins to splinter”).

318. See, e.g., Westmoreland, *supra* note 52, at 1565; Rubin, *supra* note 245, at 59.

fundamentally breaks down. The penultimate result of that breakdown is dysfunction; the ultimate result may be much worse.<sup>319</sup> To the extent that the high-cotton-low-road farm bill represents peak dysfunction in Congress it magnifies existing concerns about the institution and our system of government. In other words, if Congress cannot complete a farm bill because of factional conflict then what can we reasonably expect it to do?

## VI. CONCLUSION

If we are concerned about the implications of dysfunction in Congress for the American body politic, the high cotton-low-road farm bill in 2018 may provide an important case study. It possesses a long, complicated history that traces much of the political development in the post-New Deal system of American government. The unraveling of the farm bill coalition in 2018, following on the problems for the 2014 Farm Bill, could provide clear, powerful evidence that the mortal disease of republican self-government has taken hold in our Constitutional system of government causing or contributing to our national political dysfunction. That a minority faction (cotton) within a minority faction (farm interest community) of a much larger coalition (farm-food-conservation) undertook such a blatant ideological power-play to fulfill narrow self-interests may offer a valuable diagnosis.

Out of the esoteric details for farm program payment reforms and SNAP eligibility requirements, the mechanism by which factions exert power within the legislative process can be seen clearly and studied. If so, further exploration and analysis of the unraveling farm bill coalition likely holds potential for addressing the disease and the dysfunction more broadly. How this particular iteration of the disease took hold at this particular time in our history may offer valuable insights, as well as a better understanding of what has incubated and sustained it.

The high-cotton-low-road farm bill and the unraveling coalition may be instructive for larger questions about American governance and dysfunction but for the farm bill they are something more. A coalition that no longer works for the largest (and most public-oriented) interest within it—or worse one that has been twisted into a hostage-taking situation by political, ideological power—would tend to suggest that it has no reason to continue; its very existence called into question and doubt. A collapse of this coalition could spell the end of farm bills and the beginning of great uncertainty. On the contrary, however, the low road of a collapse could create the opportunity for a new or revised coalition to take its place; one better able to withstand the inherent factional tendencies and potentially more

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319. See Freeman, *supra* note 1.

oriented towards the public interest.<sup>320</sup> Both farm payments and food assistance provide benefits to American society and the question in the wake of any complete unraveling is whether they offer sufficient material to build anew. There is much risk in either outcome but there seems little left to sustain this coalition in its current state. For the farm bill coalition, the canary has ceased singing. From here, where does the low road lead?

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320. See, e.g., Conti, *supra* note 49, at 190.