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SMALL BUSINESS RELIEF IN THE TIME OF COVID-19: DESERVINGNESS JUDGMENTS LEAD THE PPP TO FAILURE

BLAIR HENDRICKS

INTRODUCTION

In 2020, going to the grocery store or getting a bite to eat looked a little different than usual: normal outings in 2020 required masks¹ and temperature checks,² among other safety precautions. As if patronizing businesses was not difficult enough, operating a business in 2020 could have been downright tragic. In December 2020, Steven Klein, the owner of Vision Lanes Bowling Alley, posted a tribute on his Facebook page to his beloved business. The following is an excerpt from that post:

This is NOT a political post. My sources are telling me an extension is going to be announced. May God help her.

My business, my livelihood, my invention, [and the] baby that I have nursed from birth, called Vision Lanes is in jeopardy.

¹ Masks were widely required by many stores and businesses, both large and small, as a condition of entry. *E.g.*, Gillian Friedman, *McDonald's Joins Walmart and Dozens of Other Chains With Mask Mandates*, N.Y. TIMES (Jul. 29, 2021), <https://www.nytimes.com/article/which-stores-require-masks.html>.

² *E.g.*, Melissa Repko, *As Coronavirus Cases Grow, Some of the Largest US Employers Including Walmart and Amazon Turn to Thermometers as Detection Tool*, CNBC (Apr. 4, 2020, 9:04 AM), <https://www.cnbc.com/2020/04/04/coronavirus-walmart-amazon-turn-to-thermometers-as-detection-tool.html>.

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She is barely conscious. She is dying slowly. She is watching her loyal staff and caretakers go find other sources of income because she can't provide for her family any longer.

Her customers are finding other places to bowl. The people she loves are being forced to bowl in another State just to do what they love doing with her at her house. But, she is not conscious. She is not available to them. She is dying. Something is killing her and she is being told that she needs to be sacrificed. Her death will save lives.

She sees the mailbox continue to fill up with bills. Bills that have never stopped coming. The bills are as unrelenting as a shark that smells blood in the water. The end is near.

There isn't anything her Daddy can do to save her. He is helpless. It's killing him. So when you see her Daddy, and he doesn't have that same sparkle in his eyes or same love in his heart understand he is watching his baby die, right in front of his eyes.

Those of you who say, "Oh we will be there when she gets better."

Its time to relinquish to the fact that she won't be alive when she is allowed to be open again[] when she is allowed to be conscious. . . .

Goodbye girl. I love you and I will miss you.

With much love and respect.

Signed by Your Daddy³

Unlike the many social media posts mourning lost loved ones taken by Covid-19, Klein's post was about his dying bowling alley, Vision Lanes, which he had built up himself and run lovingly for

³ *A Good Story of the Shutdown*, HUNTING IND. (Dec. 18, 2020, 1:32 PM), <https://hunt-indiana.com/thread/67410/good-story-shutdown>.

seventeen years.⁴ Vision Lanes was first forced to close in March of 2020 due to the Michigan governor’s executive order; it reopened in September of 2020 but closed again just two months later.⁵ For Klein, Vision Lanes was more than just a business—he was “her dad.”⁶ According to Klein, the closure cost him \$25,000 a month.⁷ In response to Klein’s emotional tribute, the community set up a GoFundMe page to fight Vision Lanes’ permanent closure.⁸ Klein hopes that his bowling alley can survive.⁹

To help small businesses face economic hardship because of the pandemic, the federal government enacted the Paycheck Protection Program (“PPP”).¹⁰ The PPP was part of a larger Act called the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), which was passed by Congress on March 27, 2020.¹¹ Despite the enactment of the PPP, many small business owners had experiences like Klein’s.¹² Indeed, many businesses were initially unable to get the promised funds because the money for the program ran out in *thirteen days*.¹³ Additionally, many small businesses did not receive the loans they were promised or

⁴ *Michigan Man Writes ‘Obituary’ to His Beloved Bowling Alley*, TRISTATE HOMEPAGE (Dec. 16, 2020, 1:21 PM), <https://www.tristatehomepage.com/news/coronavirus-watch/michigan-man-writes-obituary-to-his-beloved-bowling-alley/#/questions>.

⁵ *Id.*

⁶ *Westland Bowling Center Owner Writes Obituary for Dying Business*, FOX 2 DETROIT (Dec. 16, 2020), <https://www.fox2detroit.com/news/westland-bowling-center-owner-writes-obituary-for-dying-business>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,811 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 120) (stating that the PPP, which is part of the Coronavirus Aid, Relief, and Economic Security Act, was passed to help small businesses to provide emergency assistance to businesses struggling through the pandemic due to public health measures which mandated the closing of many businesses).

¹¹ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

¹² See Robert Fairlie, *The Impact of COVID-19 on Small Business Owners: Evidence from the First Three Months After Widespread Social-distancing Restrictions*, J. OF ECON. & MGMT. STRATEGY, 1, 1–2 (2020), <https://doi.org/10.1111/jems.12400> (noting the loss of 3.3 million active business owners from just February through April 2020, which constituted the “largest drop on record” in active business ownership).

¹³ “Not only did that first pot of PPP money run out in 13 days, but self-employed people . . . were only able to apply one week after the program opened. That put them well behind other businesses in the first-come, first-served program.” Danielle Kurtzleben et al., *Here’s How the Small Business Loan Program Went Wrong in Just 4 Weeks*, NAT’L PUB. RAD. (May 4, 2020), <https://www.npr.org/2020/05/04/848389343/how-did-the-small-business-loan-program-have-so-many-problems-in-just-4-weeks>.

were unable to use the loans in ways that helped their struggling businesses.

Despite legislation designed specifically to assist struggling small businesses through the pandemic, the Covid-19 pandemic still wreaked havoc on small businesses, many of which were unable to survive. As of this writing, official data and reports about permanent business closures are not yet finalized by the Bureau of Labor Statistics,¹⁴ but early results are bleak. According to a study from the University of California Santa Cruz, the United States lost 3.3 million active business owners from February to April 2020, a drop of about 22 percent.¹⁵ This was the largest decline in active business owners *ever recorded*, and the number of active business owners stayed low throughout the summer months of 2020.¹⁶

After the PPP had been around for about a year, many small business owners and other critics identified correctable flaws in the program. For example, critics argued that the loan conditions were too restrictive to be helpful to many businesses because they severely limited the way PPP funds could be used.¹⁷ Many also criticized the fact that large businesses and chain restaurants were able to take advantage of funds designed for small business relief.¹⁸ While these structural problems could be rewritten in a future economic relief statute, doing so would ignore the true nature of the problem: deservingness judgments.

Deservingness judgments are value judgments based on cultural and sociological factors (such as history, politics, or psychology) that influence decisions about who *deserves* resources and assistance.¹⁹ These deservingness judgments can be seen in

¹⁴ See Fairlie, *supra* note 12, at 1 (“The early effects of COVID-19 on small business and entrepreneurs are not well known because of the lack of timely business-level data released by the government.”).

¹⁵ *Id.* at 2 (“The loss of 3.3 million active business owners . . . was the largest drop on record.”).

¹⁶ *Id.* at 11. Despite a few small rebounds, the drop in active business owners of 15 percent from February to May, and a drop of 8 percent from February to June. *Id.* at 4.

¹⁷ See Kurtzleben et al., *supra* note 13 (“75% of the forgiven amount on the loans must be spent on payroll. The rest can only be spent on a few categories: rent, mortgage interest or utilities.”).

¹⁸ *Id.* (“Large companies, we now know, got loans.”).

¹⁹ See Michael Bang Petersen et al., *Who Deserves Help? Evolutionary Psychology, Social Emotions, and Public Opinion About Welfare*, 33 POL. PSYCHOL. 395, 396 (2012) (stating that deservingness judgments lead people across all cultures to spontaneously judge the motivations of those in need when deciding whether or not to give assistance, and

other welfare programs²⁰ throughout history.²¹ Recognizing deservingness judgments in the law can sometimes be difficult because individuals do not actively decide what their values are.²²

Common influences of American deservingness judgments in welfare policies include Calvinism and the Protestant Work Ethic, Rugged Individualism and Westward Expansion, and social emotions regulating resource allocation.²³ These influences on our deservingness judgments can be seen in the flawed structure of the PPP.²⁴ Some failings of the PPP include an overly restrictive set of allowable expenses that businesses may spend their funds on, overly restrictive criteria to have loans forgiven, not accounting for external factors (such as a business's ability to adapt to state health orders), and a high cap that allowed businesses with up to 500 employees to take funds designated for relieving small businesses.²⁵ Deservingness judgments can be seen in each of these failures. For example, the cap on 500 employees for a "small business" is reflective of the Protestant Work Ethic, because this high cap illustrates the desire to keep as many people working as possible.²⁶ In allowing these deservingness judgments to drive the

that these judgments can be influenced by psychology, political ideology, and culturally-learned values).

²⁰ The PPP is a welfare program because it assists struggling businesses during a time of economic hardship. Encyclopedia Britannica defines a "social welfare program" as "any of a variety of governmental programs designed to protect citizens from the economic risks and insecurities of life"—the PPP was designed to do just that. ENCYCLOPEDIA BRITANNICA, *Social Welfare Program*, <https://www.britannica.com/topic/social-welfare-program> (last visited Mar. 2, 2021).

²¹ Some of the earliest American social welfare programs, beginning in the 1930s, contained deservingness judgments, such as including strict work requirements to receive assistance, or a focus on education and work training programs rather than on "hand outs." See Robert A. Moffitt, *The Deserving Poor, the Family, and the U.S. Welfare System*, 52 DEMOGRAPHY 729, 732–733, 746 (2015).

²² See Arjo Klamer, *A Pragmatic View on Values in Economics*, 10 J. OF ECON. METHODOLOGY 1, 2 (2003).

²³ These influences will be discussed in further detail in Section III.

²⁴ These influences will be discussed in further detail in Section IV.

²⁵ See, e.g., Danielle Kurtzleben, *Small Businesses Say Rescue Loans Come with Too Many Strings Attached*, NAT'L PUB. RAD. (Apr. 28, 2020), <https://www.npr.org/> (search the title of the article in the "search" bar) (discussing the lack of clarification regarding "how the forgiven amount will be calculated and how the total number of employees on payroll will be counted"); Kurtzleben et al., *supra* note 13 (discussing the general flaws of the PPP).

²⁶ The Protestant Work Ethic is a cultural influence that emphasizes the value and near holiness of hard work; the 500 cap to define "small businesses" in the PPP is reflective of the Protestant Work Ethic because it aims to keep employees working, even though the average American small business does not have 500 employees. See Clinton Amos et al., *Hardworking as a Heuristic for Moral Character: Why We Attribute Moral Values to Those Who Work Hard and its Implications*, 158 J. BUS. ETHICS 1047, 1047–49, (2017) (discussing the impact of the Protestant Work Ethic on Western culture); U. S. CENSUS BUREAU, *US*

structure of the PPP, the PPP has been largely ineffective in saving small businesses.

Effective legislation and economic policy should be more heavily influenced by objective data (such as industry statistics) than by unconscious cultural influences. When cultural factors, rather than objective data, form the foundations of economic policies, those policies are then based not on how the world *actually* works, but rather on how policymakers think it *should* work.²⁷ The failures of the PPP demonstrate how cultural and psychological influences can become the drivers in welfare policies and lead to program failures. Even though deservingness judgments may not always be inherently bad, deservingness judgments become problematic when they influence the provisions of a statute more than important objective data. Part I of this note will discuss the history and construction of the PPP. Part II of this note will explore some of the cultural and psychological makeups of deservingness judgments that may have impacted the PPP. Part III of this note will analyze the unconscious deservingness judgments in the context of the PPP and propose that welfare statutes, such as the PPP, should incorporate more objective data to combat the negative effects of deservingness judgments.

I. BACKGROUND OF THE PAYCHECK PROTECTION PROGRAM: HISTORY, STATUTORY CONSTRUCTION, AND PURPOSE

Covid-19 was first reported in Wuhan, China, on December 31, 2019.²⁸ Within a few weeks, the virus spread throughout China; within a month, the virus spread to other areas of the world,

and States, NAICS Sectors, Small Employment Sizes Less Than 500 (May 28, 2021), <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html> (illustrating that the majority of small businesses in the United States have 20 or fewer employees).

²⁷ Many social welfare programs throughout history serve a “specific type” of population in need, and usually provides benefits to those that have worked in the past. This structure illustrates a collective push to support those who have been productive and avoid supporting those who have not similarly contributed to society. See Moffitt, *supra* note 21, at 745–47 (“In the eyes of the American voter, those who are deserving are those who work, who are married or at least widowed, and who have children. Those who are undeserving are those who do not work, who are single parents, and who do not have children.”).

²⁸ Jingchun Fan, et al., *Epidemiology of Coronavirus Disease in Gansu Province, China, 2020*, 26 EMERGING INFECTIOUS DISEASES J. 1257, 1257 (2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0251_article.

including Europe and the United States.²⁹ To combat the virus, state and local governments issued stay-at-home orders.³⁰ Generally, these stay-at-home orders were issued in March of 2020.³¹ While stay-at-home orders varied from state to state,³² they generally required all non-essential businesses³³ to close in-person operations and continue working remotely.³⁴

These executive orders and new health and safety rules severely limited people's ability to live the way they did before the virus. Covid-19 restrictions, such as executive orders forcing non-essential businesses to operate remotely, stay-at-home orders, social distancing requirements, and gathering restrictions made it extremely difficult for small businesses to continue to operate profitably during the pandemic. To illustrate, social distancing requirements reduced the total amount of customers allowed in a store or a restaurant at one time, rendering many businesses unable to operate at full capacity.³⁵ One specific example includes Philadelphia's famous Reading Terminal Market, which relied on a GoFundMe fundraiser in light of the loss of foot traffic resulting

²⁹ *Id.*

³⁰ CTR. FOR DISEASE CONTROL AND PREVENTION, *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1–May 31, 2020, Morbidity and Mortality Weekly Report* (Sep. 4, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6935a2.htm>.

³¹ *Id.*

³² Compare Fla. Exec. Order No. 20-91 (Apr. 1, 2020) (listing houses of worship as an “essential activity”) [hereinafter *Florida Executive Order*], with Press Release, Governor Cuomo Issues Guidance on Essential Services Under The ‘New York State on PAUSE’ Executive Order, (Mar. 20, 2020) <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order> (recommending strongly that people in New York do not congregate at houses of worship even though they were not closed) [hereinafter *PAUSE Press Release*].

³³ Essential retail businesses generally included grocery stores, pharmacies, gas stations, hardware stores, convenience stores, and restaurants and bars for takeout and delivery only. Other essential businesses generally include healthcare facilities, manufacturing, and other industrial occupations, utilities, energy production, food production, and law enforcement. See *PAUSE Press Release*, supra note 32; *Florida Executive Order*, supra note 32 (illustrating what is considered an essential work in an advisory memorandum from the Department of Homeland Security that is attached to this executive order).

³⁴ See *PAUSE Press Release*, supra note 32 (discussing directive that all non-essential businesses cease “in-office personnel functions”).

³⁵ *Working Lunch: Can the Restaurant Business Model Survive Social Distancing Restrictions?*, NATION'S RESTAURANT NEWS (May 29, 2020), <https://www.nrn.com/workforce/working-lunch-can-restaurant-business-model-survive-social-distancing-restrictions>.

from stay-at-home orders.³⁶ The government recognized these challenges and passed the CARES Act, which includes the PPP.³⁷

A. History and Basic Construction of the PPP

The Paycheck Protection Program (“PPP”) is section 1102 of the CARES Act.³⁸ It allows qualifying small businesses to take out loans from the Small Business Administration to use during the economic disruption caused by Covid-19.³⁹

Under the PPP, businesses with fewer than 500 employees qualify to receive a loan.⁴⁰ Qualifying businesses under the 500 employee cap can include sole proprietorships, independent contractors, self-employed people, private non-profit businesses, tribal businesses under 31(b)(2)(C), and 501(c)(19) veterans organizations.⁴¹ For chain businesses in food service or hospitality,⁴² the 500-employee cap applies to each franchise

³⁶ The businesses faring the best in Reading Terminal at the moment are only achieving about 50 percent of their normal sales due to the pandemic. See Jennifer Joyce, *GoFundMe Created to Help Reading Terminal Businesses Struggling Amid COVID-19 Pandemic*, FOX 29 NEWS (Oct. 15, 2020), <https://www.fox29.com/news/gofundme-created-to-help-reading-terminal-businesses-struggling-amid-covid-19-pandemic>.

³⁷ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,811 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 120) (noting that the CARES Act and the PPP were passed in response to the economic crisis caused by the Covid-19 pandemic).

³⁸ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, 134 Stat. 281, 286 (2020).

³⁹ The SBA has funding and authority to both modify existing loans and create new loans to help small businesses deal with the Covid-19 pandemic. Section 1102 of the CARES Act temporarily permits the SBA to guarantee 100 percent of 7(a) loans under the PPP. Business Loan Program Temporary Changes; Paycheck Protection Program, —*Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules*, 85 Fed. Reg. 38,304, 38,305 (June 26, 2020) (codified at 13 C.F.R. pt. 120).

⁴⁰ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

⁴¹ *Id.*

⁴² These franchises are usually classified under NAICS (North American Industry Classification System) code 72, which corresponds to the food service industry, including full-service restaurants, fast food and takeout restaurants, caterers, mobile food service places, and drinking places. See *What is a NAICS Code and Why Do I Need One*, NAICS ASS’N (Jan. 18, 2017), [https://www.naics.com/what-is-a-naics-code-why-do-i-need-one/#:~:text=A%20NAICS%20\(pronounced%20NAKES\)%20Code,related%20to%20the%20US%20Economy;Industries%20at%20a%20Glance:Food%20Services%20and%20Drinking%20Places:NAICS%20722](https://www.naics.com/what-is-a-naics-code-why-do-i-need-one/#:~:text=A%20NAICS%20(pronounced%20NAKES)%20Code,related%20to%20the%20US%20Economy;Industries%20at%20a%20Glance:Food%20Services%20and%20Drinking%20Places:NAICS%20722), BUREAU OF LAB. STAT. (Dec. 18, 2020), <https://www.bls.gov/iag/tgs/iag722.htm>.

location.⁴³ Businesses apply for a loan through a federally insured depository institution or credit union, or another regulated and approved lender participating in the program.⁴⁴

The maximum amount of a PPP loan is 2.5 times the business' average monthly payroll and is capped at a maximum of \$10 million.⁴⁵ The average monthly payroll amount is calculated using payroll data from the previous year.⁴⁶ However, calculations for the average monthly payroll amount for new businesses are based on payroll data from January and February 2019.⁴⁷ Maximum loan amounts are also calculated differently for seasonal businesses. Seasonal employers may calculate the maximum amount of their loan as (1) the average total monthly payroll payments for the twelve-week period beginning on February 15, 2019, or the period beginning March 1, 2019, and ending June 30, 2019; or (2) the average total monthly payroll payments for any twelve-week period between May 1, 2019, and September 1, 2019.⁴⁸ The maximum interest rate on the loan is four percent.⁴⁹ If an eligible business receives a loan, the funds must be spent on certain categories to be forgiven.⁵⁰ These will be referred to throughout this note as "allowable expenses" or "allowable expense categories." Loans are to be spent on payroll costs (inclusive of employee benefits), rent, mortgage interest, interest on other debt obligations, and utilities.⁵¹ Payroll costs as defined

⁴³ "During the covered period, any business concern that employs not more than 500 employees per physical location of the business concern and that is assigned a North American Industry Classification System code beginning with 72 at the time of disbursement shall be eligible to receive a covered loan." Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, § (a)(2)(D)(iii), 134 Stat. 281, 288 (2020).

⁴⁴ U.S. SMALL BUS. ADMIN., *Paycheck Protection Program*, <https://www.sba.gov/> (hover over "funding programs" and click on "Covid-19 relief options," then click on "cross-program eligibility," and then click on "PPP recipient") (last visited Mar. 3, 2020).

⁴⁵ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, § (a)(2)(E), 134 Stat. 281, 289-90 (2020).

⁴⁶ In the statute under Section (E) Maximum Loan Amount, the average monthly payroll is calculated using the payroll costs from the one-year period before the date on which the loan was made. *Id.*

⁴⁷ *Id.*

⁴⁸ Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Criterion for Seasonal Employers, 85 Fed. Reg. 23,917, 23,918 (Apr. 30, 2020) (codified at 13 C.F.R. pt. 120).

⁴⁹ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, § (a)(2)(L), 134 Stat. 281, 291 (2020).

⁵⁰ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

⁵¹ *Id.*

by the PPP include (but are not limited to) “salar[ies], wage[s], commission[s] . . . tip[s],” or other earnings up to \$100,000; “payment for vacation, parental, medical, family, or sick leave”; separation allowance; group healthcare benefit payments, including insurance premiums; retirement benefits; and state and local taxes.⁵² If the entirety of the PPP loan is spent on allowable expense categories, the entirety of the loan is forgiven.⁵³ Forgiven loan amounts are considered “canceled” by an authorized lender.⁵⁴ Loans made from the start of the program through June 30, 2020, are eligible to be forgiven.⁵⁵

B. Purpose and Legislative Goals of the PPP

Many small business owners were counting on the PPP funds to help them through the economic hardship caused by Covid-19.⁵⁶ Because there is no stated goal in the PPP itself, methods of statutory interpretation⁵⁷ demonstrate that there is evidence that assisting businesses facing hardship is a goal of the PPP. However, this is not the only goal of the PPP. Maintaining employment was also a goal of the PPP.⁵⁸ While these two goals may not initially be at odds, the uneven structuring of the PPP led to a policy that has arguably failed on both fronts.⁵⁹

⁵² *Id.*

⁵³ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1106, 134 Stat. 281, 297 (2020).

⁵⁴ “Amounts which have been forgiven under this section shall be considered canceled indebtedness by a lender authorized under section 7(a) of the Small Business Act (15 U.S.C. 636(a)).” *Id.*

⁵⁵ Business Loan Program Temporary Changes; Paycheck Protection Program—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. 33,010, 33,011 (June 1, 2020) (codified at 13 C.F.R. pt. 120).

⁵⁶ See Nick Leiber, *Frustrated Business Owners Struggle to Access Rescue Dollars*, BLOOMBERG BUSINESSWEEK (Apr. 14, 2020, 11:00 AM), <https://www.bloomberg.com/news/articles/2020-04-14/frustrated-business-owners-try-to-use-ppp-and-eidl>.

⁵⁷ While Purposivism and Textualism are the two predominant approaches to statutory interpretation, there are multiple different ways to characterize these approaches. See STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS, CONG. RSCH. SERV. (Updated Apr. 5, 2018) (discussing these methods and how judges who adhere to them go about discerning the meaning of statutes).

⁵⁸ Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Criterion for Seasonal Employers, 85 Fed. Reg. 23,917, 23,919 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 120).

⁵⁹ This will be outlined in detail in section IV of this note.

When looking at the statute through the Purposivism lens,⁶⁰ both the statute itself and other government materials provide insight into the goal and meaning of the statute. For example, in Interim Final Rule 1, the background section states that the CARES Act, which includes the PPP in section 1102, was passed “to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic.”⁶¹ The Interim Final Rules guide the implementation of the PPP, and those rules describe how it works.⁶² This statement about assisting businesses affected by the pandemic in the outside materials might indicate that one purpose of the PPP is to help businesses remain operational during the economic crisis.

The text of the statute presents evidence of another purpose, however. Section 1102, which is the section of the CARES Act that houses the PPP, falls under Title I of the CARES Act—the “KEEPING AMERICAN WORKERS PAID AND EMPLOYED ACT.”⁶³ Additionally, the text of the statute describes how 60 percent of PPP funds⁶⁴ must be spent on payroll costs.⁶⁵ This text suggests that the primary purpose of the PPP may not necessarily be to assist struggling businesses but to combat unemployment by incentivizing businesses to keep employees working.

⁶⁰ The Purposivist approach often looks to the legislative process and tries to interpret the statute by asking how it solves a particular problem identified by Congress and may look to other materials such as may include confirmation hearings, appropriation hearings, authorization hearings, oversight hearings, and investigations, committee reports, etc. See STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS, *supra* note 57, at 11–12 (“Purposivists often focus on the legislative process, taking into account the problem that Congress was trying to solve by enacting the disputed law and asking how the statute accomplished that goal. They argue that courts should interpret ambiguous text ‘in a way that is faithful to Congress’s purposes.’”) (quoting Robert A. Katzmann, *Judging Statutes* 31 (2014)).

⁶¹ Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,811 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 120).

⁶² There are 27 Interim Final Rules from the Treasury that cover topics such as revisions to the program, eligibility, loan forgiveness, loan review procedures, etc. See U.S. DEPT OF THE TREASURY, *The CARES Act Provides Assistance to Small Businesses*, <https://web.archive.org/web/20210109012255/https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses> (last visited Jan. 9, 2021).

⁶³ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, 134 Stat. 281, 286 (2020).

⁶⁴ The Paycheck Protection Program Flexibility Act passed on June 5, 2020, amended the original requirement of 75 percent of PPP funds being spent on payroll costs to 60 percent. Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, sec. 3, § (b)(2)(B), 134 Stat. 641, 642 (codified at 15 U.S.C. § 636m(d)(8)).

⁶⁵ *Id.*

While a statute may be able to embrace more than one goal, the PPP's attempt to both assist businesses during the pandemic and use business assistance as a means to keep workers employed during the pandemic has led to a largely ineffective policy. What brought on such a conflict in the statute? The answer is that deservingness judgments—influenced by culture and history—likely fostered the need to keep as many people working as possible,⁶⁶ restricted the type of aid available to struggling businesses,⁶⁷ and failed to differentiate aid for different types of businesses with different cost structures and needs.⁶⁸ If the PPP was more heavily influenced by objective data rather than these deservingness judgments, the goals of the statute would not conflict so severely.

II. DESERVINGNESS JUDGMENTS

Many business owners have voiced complaints about the PPP program regarding restrictions on loans that reduce the usefulness of the funds, the ability of large companies to take PPP funds that they may not truly need, and the overemphasis on the payroll spending requirement.⁶⁹ But what is the root of these problems? The failures of the PPP may be explained by deservingness judgments; when writing the PPP, legislators may have written the program to align with judgments of who *deserves* funds rather than who *needs* funds. Deservingness judgments are the

⁶⁶ This is the influence of the Protestant Work Ethic. See *infra* Section III.B.1.

⁶⁷ This is the influence of Rugged Individualism, which values self-help over assistance from others, often to an unhelpful and unhealthy degree. See Jhumpa Bhattacharya & Anne Price, *The Power of Narrative in Economic Policy*, INSIGHT CTR. FOR CMTY. ECON. DEV. (Nov. 8, 2019), <https://medium.com/economicsecproj/the-power-of-narrative-in-economic-policy-27bd8a9ed888>.

⁶⁸ The failure to differentiate the aid to match the different needs of different businesses is also an influence of Rugged Individualism, which values less assistance over more assistance; basically, a business should be able to make do with the same amount of aid given to any other business. See Samuel Bazzi et al., *Frontier Culture: The Roots and Persistence of "Rugged Individualism" in the United States* 1, 1 n.1, BOSTON UNIV. (Nov. 2017), <https://www.bu.edu/econ/files/2017/03/Frontier-Culture-The-Roots-and-Persistence-of-%E2%80%9CRugged-Individualism%E2%80%9D-in-the-United-States-2.pdf>.

⁶⁹ See Kurtzleben, *supra* note 25; Bob Davis & Heather Haddon, *How Ruth's Chris Got an Extra Helping of Small Business Aid Money*, WALL ST. J. (Apr. 19, 2020, 3:29 PM), <https://www.wsj.com/articles/how-ruths-chris-got-an-extra-helping-of-small-business-aid-money-11587312001>.

judgments people make on how to allocate resources based on criteria other than need.⁷⁰ The criteria used in deservingness judgments may reflect collective values or cultural norms, may be unconscious, and may be influenced by history, psychology, and other socio-political factors.⁷¹ Deservingness judgments have been a part of the criteria for welfare assistance in the United States throughout history,⁷² and the failures of the PPP may be another example.

While deservingness judgments in and of themselves may not be problematic,⁷³ deservingness judgments become problematic when they become the main drivers of policy. Lawmakers tend to make assumptions about the needs and experiences of welfare beneficiaries, or favor values and norms over objective data when writing policy.⁷⁴ The following examples will illustrate some of the origins of deservingness judgments in the United States and their historical impacts on welfare policies. As this section will demonstrate, deservingness judgments can be deeply rooted in welfare policy—and this may also be the case with the PPP.

⁷⁰ See Petersen et al., *supra* note 19, at 395–96 (explaining that people, even on the individual level, make judgments about those in need before assisting others, like deciding when to lend exam notes or help a drunk person on the subway).

⁷¹ Various authors have explored the impacts of cultural, historical, political, and psychological factors on welfare policies, which will be discussed in more detail in the following subsections. See generally Michelle E. Martin, *Philosophical and Religious Influences on Social Welfare Policy in the United States: The Ongoing Effect of Reformed Theology and Social Darwinism on Attitudes Towards the Poor and Social Welfare Policy and Practice*, 12 J. OF SOC. WORK 51, 52–54 (2012); Petersen et al., *supra* note 19, at 395–98.

⁷² An article by Robert A. Moffitt demonstrates how social welfare policies in the United States have historically emphasized and valued working and employment, using employment and income criteria to prevent people from relying on welfare benefits in place of work, and policies that embody rugged individualism in the War on Poverty programs. See Moffitt, *supra* note 21, at 731–34.

⁷³ Unconscious deservingness judgments can reflect cultural norms and collective values; values, even in economics, are nearly unavoidable. Further, when groups compete for scarce resources (in this context, millions of small businesses compete for a limited amount of PPP funds), there must be some type of criteria to decide how to divvy out funds. See Klamer, *supra* note 22, at 191–209.

⁷⁴ “The ideological and philosophical themes are often reflected in social welfare policy, which makes various assumptions about its beneficiaries and the cause of the problems they experience.” Martin, *supra* note 71, at 52–53.

A. Political Ideology

One of the more visible influences of deservingness judgments is political ideology. Political ideology can be seen both in the parties' respective approaches to creating and structuring welfare policies and the reactions of individuals to such welfare policies.⁷⁵ Moreover, political ideology can shape deservingness judgments by shaping what an individual considers to be "fair."⁷⁶ For example, if a person's idea of fairness is giving financial assistance to those that need it the most, then the person may consider someone in need as deserving assistance because that is what is "fair."⁷⁷

Liberal ideologies tend to embrace need as the main driver for fairness and deservingness.⁷⁸ Under liberal ideology, it is fair to give to those who are most in need, and as such those who deserve assistance are those who need it.⁷⁹ Alternatively, conservative ideology embraces proportionality as the main driver for fairness and deservingness: to them, it is fair to receive benefits when you have contributed something, and thus those who have contributed something are the ones who deserve assistance.⁸⁰

To illustrate, the differences in deservingness judgments can explain the political parties' responses and criticisms to Elizabeth Warren's proposed student debt relief plan.⁸¹ Liberal reactions to Warren's plan were generally favorable.⁸² Why? Because under

⁷⁵ See Dan Meegan, *Conservatives Have a Different Definition of 'Fair,'* THE ATL. MAG. (Apr. 30, 2019), <https://www.theatlantic.com/ideas/archive/2019/04/why-conservatives-hate-warrens-loan-debt-relief-plan/588322/> (discussing the differences between and impacts of a liberal-conservative divide where the former believe in allocating resources based on need and the later believe in allocating resources based on what one has earned).

⁷⁶ See *id.*

⁷⁷ See *id.* (discussing "who is deserving of what" in the economic policy context based on political ideologies, the liberal ideology of which finds that those in need deserve assistance by their need in the first place).

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ Warren's plan includes canceling \$50,000 in student debt for every person with household income under \$100,000, providing substantial debt cancellation for every person with income between \$100,000 and \$250,000, making private student debt eligible for cancellation, and streamlining the debt forgiveness process. Zack Friedman, *Elizabeth Warren: Here's My Plan to Cancel Student Loan Debt*, FORBES (June 17, 2019, 8:32 AM), <https://www.forbes.com/sites/zackfriedman/2019/06/17/elizabeth-warren-student-loan-debt-forgiveness/?sh=1fcb40685e7b>.

⁸² See Meegan, *supra* note 75 (discussing the "eruption" of "outrage and mockery" on

the liberal ideology, the plan is fair because those who *need* loan forgiveness from crushing amounts of student debt receive relief.⁸³ According to liberal ideology, students deserve loan forgiveness because they have a need for it.

On the other hand, conservative reactions to Warren's student debt relief plan were much less favorable.⁸⁴ Under conservative ideology, Warren's student debt relief plan is unfair because those who have already paid off their student debts receive nothing, while those who have not expended their resources receive a benefit (loan forgiveness).⁸⁵ According to conservative ideology, students do not deserve debt relief because they receive a benefit without contributing something in return. This is merely one example of how political ideology can impact deservingness judgments and how deservingness judgments can affect policy considerations.

The example of Elizabeth Warren's student debt forgiveness proposal demonstrates the interaction between economic policy and deservingness judgments influenced by opposing ideologies. Economic and welfare policies that are heavily influenced by political ideologies are positioned to fail because they may invite backlash from those whose deservingness judgments are driven by different influences,⁸⁶ or they may lead to conflicting goals.⁸⁷ Although some policies can get approval from conflicting ideologies when they embrace aspects of more than one political ideology,⁸⁸ this is not guaranteed. The potential for failure in economic

Twitter when Warren's plan was criticized by a right-leaning journalist and the deeper reasons why liberals approve of policy proposals like Warren's).

⁸³ *See id.*

⁸⁴ *See id.* (illustrating the reaction of a right-leaning journalist to the announcement of Warren's plan and the reasons generally why conservatives are skeptical of plans like Warren's).

⁸⁵ *See id.*

⁸⁶ As seen in this case where conservatives heavily criticized and did not support Warren's student debt policy proposal. *See id.* (examining the negative conservative reaction to Warren's student debt policy, a policy that would have provided economic benefits to people in proportion to their economic need, rather than based on any financial contributions they made towards their student loans, or any other merit-based factor).

⁸⁷ As seen in the case of the PPP, where the goal is to provide small businesses with economic relief, but also to keep workers employed regardless of the business' economic needs. *See infra* Part IV.

⁸⁸ For example, both liberals and conservatives can support the Social Security and Medicare programs, because the programs are both need-based, which aligns with the liberal ideology, and have a proportional income-to-benefit ratio, which aligns with the conservative ideology. *See Meegan, supra* note 75.

policies that are too heavily influenced by deservingness judgments, such as political ideology, demonstrates why economic and welfare policies should be written with objective facts and data in mind.

B. History and Culture

History and culture also shape deservingness judgments by shaping collective values.⁸⁹ In the United States, the impacts of history and culture on deservingness judgments can be seen in Calvinism and Westward Expansion. These cultural influences have had historical impacts on American social and economic policies⁹⁰ and may continue to impact policy today. And importantly, historical and cultural impacts on deservingness judgments in policies may be harder to address because, unlike political ideologies, these influences may be more unconscious.⁹¹

i. Puritan Values and the Protestant Work Ethic

For the United States, attitudes about social policies are impacted by the Protestant Work Ethic and Calvinism.⁹² Calvinism and the Protestant Work Ethic are Puritan ideals that hold that hard work is a sign of faithfulness and morality.⁹³ Therefore, according to this ideology, tireless work is equated with

⁸⁹ “Culture, in its general anthropological sense, is often defined as the values that a group of people share[s] and with which they distinguish themselves from other cultures.” See Klamer, *supra* note 22, at 198.

⁹⁰ See Martin, *supra* note 71, at 52 (stating that there is significant evidence that economic and social policies have been influenced by different political and religious ideologies, philosophies, and cultural mores).

⁹¹ See Klamer, *supra* note 22, at 2 (stating that when we think about our values, we often do so indirectly).

⁹² See Martin, *supra* note 71, at 53–54 (describing how the Protestant Work Ethic and Calvinism established a strong relationship between poverty and perceptions of immorality).

⁹³ See *id.* at 53 (“In time, particular endeavors became certain indicators or signs of one’s eternal fate—behaviors that were reflective of Calvinist theology. Most notably among these behaviors were hard work and good moral conduct. The high value placed upon hard work, what Weber referred to as the Protestant ethic, is reflective of Calvin’s belief that one was called to a particular vocation and should work tirelessly as a sign of faithfulness.”).

good character,⁹⁴ and the poor are often viewed harshly as lazy and deserving of punishment.⁹⁵

The influence of the Protestant Work Ethic and Puritan values can be seen in social programs that require work to obtain benefits. For instance, before 1956, no program directly assisted people with disabilities; instead, benefits were provided to women and children whose husbands, the providers, had become disabled.⁹⁶ Congress was hesitant to create a program that provided benefits directly to people with disabilities out of fear that people with disabilities who were able to work would take advantage of the program instead of working.⁹⁷ In 1956, Congress created the Social Security Disability Insurance⁹⁸ (“SSDI”) program to provide benefits directly to individuals with disabilities.⁹⁹ To assuage the fears of those who believed that the program would be abused, the SSDI program was designed to serve only those with severe disabilities to ensure that only those who truly could not work would benefit from the program.¹⁰⁰

The early social welfare programs were designed to prevent those without jobs from being able to take advantage of the benefits. The criterion of having a job to obtain welfare benefits illustrates the Puritan values in American programs: those who are working, and thus those who are moral, are those who deserve

⁹⁴ See *id.* at 53–54 (describing how “material success in response to hard work . . . and high moral conduct . . . became the universally accepted signs among mainstream (i.e. respectable) society of those predestined for eternal salvation[.]”).

⁹⁵ See *id.* at 52 (stating that pre-Colonial European philosophy took a punitive attitude toward the poor).

⁹⁶ “Rather than reflecting a sympathetic view of the poor in general, however, the [Aid to Dependent Children] program was instead intended to support widows with children and women whose husbands had become disabled. In some sense, it was not unlike a social insurance program because it presumed that the husband had provided income to the mother and the children—income that they had lost involuntarily.” See Moffitt, *supra* note 21, at 731.

⁹⁷ “[I]ntense debate in Congress starting in 1936 centered on whether a program for the disabled should be included along with [the Social Security Program, the Unemployment Insurance system, and the Aid to Dependent Children program]. . . . There was strong opposition to its inclusion because Congress believed that such a program would serve too many men who were not really disabled and who could obtain a job.” *Id.*

⁹⁸ The 1956 version of the program provided benefits directly to individuals with disabilities rather than just their dependent families. Social Security Amendments of 1956, Pub. L. No. 84-880, 70 Stat. 807, 807 (1956); Moffitt, *supra* note 21, at 731–32.

⁹⁹ See Moffitt, *supra* note 21, at 731–32.

¹⁰⁰ “However, this program covers only the severely disabled to reduce the probability that recipients would be capable of employment.” *Id.* at 732.

benefits. Likewise, those who do not work are undeserving of assistance from society.

Moreover, the impacts of Puritan ideals are felt in American culture in the present day. For instance, a study conducted by Clinton Amos, Lixuan Zhang, and David Read illustrates that people equate those described as “hard-working” with being honest, trustworthy, and accountable.¹⁰¹ However, the writers point out that workaholics may not necessarily have superior character; although they may be working diligently towards a goal, workaholics are often praised without any thought about whether their motivations are ethical.¹⁰² Being overburdened with work and working long hours is seen as a “badge of honor” to many Americans, illustrating how valued work is in American society.¹⁰³ Another study conducted by the Insight Center for Community Economic Development demonstrates that Americans equate full personhood with having full-time work.¹⁰⁴

Calvinism and the Protestant Work Ethic are problematic foundations for deservingness judgments because they base policy on assumptions: the policy writers make assumptions about the benefit recipients obtain and the causes of their problems;¹⁰⁵ the policy writers are also making assumptions about the morals and character of people who are working, without questioning their motivations or end goals,¹⁰⁶ or questioning the accuracy of their assumptions. Any policy that is based on multiple layers of assumption will likely be neither accurate nor effective. These examples collectively show that working is not merely embraced in social welfare policies and highly valued in American culture, but that these old Puritan values are still indirectly punishing those today who may need assistance.¹⁰⁷

¹⁰¹ See Amos et al., *supra* note 26, at 1047.

¹⁰² “[W]orkaholics are often praised in society . . . regardless of the driving force of their workaholic tendencies or the consequences of such behavior.” *Id.*

¹⁰³ “I’m so busy I eat lunch at my desk is a common badge of honor in American workplaces.” Bhattacharya & Price, *supra* note 67.

¹⁰⁴ *Id.*

¹⁰⁵ “The[] ideological and philosophical themes are often reflected in social welfare policy, which makes various assumptions about its beneficiaries and the cause of the problems they experience.” See Martin, *supra* note 71, at 52.

¹⁰⁶ See Amos et al., *supra* note 26, at 1047 (pointing out that “workaholics” are often praised without any critical thought about their goals or motivations).

¹⁰⁷ The idea that work is equated with “full personhood” is also “why we have seen an uptick of work requirements tacked on to public assistance programs. You want help from

ii. Westward Expansion and Rugged Individualism

Westward Expansion is another historical and cultural factor that shapes American deservingness judgments. Generally, Westward Expansion refers to the American settlement of the West from colonial times through about 1890.¹⁰⁸ Westward Expansion in the United States shaped deservingness judgments through its emphasis on individual responsibility and self-reliance.¹⁰⁹ For those living on the frontier, there was an opportunity for profit due to the abundance of land; however, there was also an abundance of dangers, such as blizzards, crop failures, droughts, and attacks from wild animals.¹¹⁰ As such, people living on the frontier often had to fend for themselves.¹¹¹

Rugged Individualism is the American collection of preferences for individualism and opposition to government assistance and is a byproduct of American Westward expansion.¹¹² Merriam-Webster defines Rugged Individualism as “the practice or advocacy of individualism in social and economic relations emphasizing personal liberty and independence, self-reliance, resourcefulness, self-direction of the individual, and free competition in [commercial] enterprise[s].”¹¹³ The Rugged

the government? You have to earn it through work, regardless of your ability to do so.” Bhattacharya & Price, *supra* note 67.

¹⁰⁸ Westward expansion began in colonial times, but the speed of westward expansion varies from decade to decade. See Samuel Bazzi et al., *Frontier Culture: The Roots and Persistence of “Rugged Individualism” in the United States* 5, 42 (Nat’l Bureau of Econ. Rsch., Working Paper No. 23997, 2020), <https://www.bu.edu/econ/files/2017/03/Frontier-Culture-The-Roots-and-Persistence-of-%E2%80%9CRugged-Individualism%E2%80%9D-in-the-United-States-2.pdf>. The 19th Century is known as a period of westward expansion. See *id.* at 4–5. Research suggested that “the frontier closed by 1890.” *Id.* at 5.

¹⁰⁹ See Samuel Bazzi et al., *Individualism and Opposition to Redistribution in the US: The Cultural Legacy of the Frontier*, VOX EU (Dec. 23, 2017), <https://voxeu.org/article/individualism-and-opposition-redistribution-us> (discussing how “discipline and self-reliance were essential” on the frontier).

¹¹⁰ See *id.* (explaining how, as a result of the difficulty and isolation of life on the frontier, people living on the frontier had to fend for themselves against a myriad of perils, “including droughts, blizzards, plagues, crop failures, attacks from wild beasts, and conflict with Native Americans”).

¹¹¹ See *id.*

¹¹² See Bazzi et al., *supra* note 68, at 1.

¹¹³ *Rugged Individualism*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/> (search “Rugged Individualism” in the search bar) (last visited Oct. 17, 2021).

Individualism of Westward Expansion led to the concept of “bootstrapping,”¹¹⁴ which is still present in modern-day political rhetoric.¹¹⁵ Bootstrapping refers to the expression “lifting oneself up the social and economic ladder through individual effort, hard work[,] and personal responsibility[.]”¹¹⁶ The central figure in the bootstrap narrative is the individual: it is the individual who creates a better life for herself through hard work, and she does not rely on the assistance of others.¹¹⁷ Although the west has been settled in the United States, Westward Expansion still impacts deservingness judgments through Rugged Individualism and the bootstrap narrative: those not helping themselves do not deserve to receive assistance.

A prominent example of Rugged Individualism and bootstrapping in American welfare policy is President Johnson’s War on Poverty in the 1960s. The War on Poverty focused on education, healthcare, and other training programs.¹¹⁸ For example, Johnson’s legislation for the War on Poverty created the Head Start early education program and increased funding for K-12 schools, creating job training programs such as VISTA and Job Corps.¹¹⁹ These types of programs focused on “hand-up[s,]” not “hand-out[s,]” and were designed to help the poor help themselves.¹²⁰ Even though welfare programs expanded during this era,¹²¹ the programs were not focused on providing benefits so much as *resources* to help the poor.

¹¹⁴ See Bhattacharya & Price, *supra* note 67 (noting that the idea of the “Great American Pioneer” evolved into the “bootstraps and American Dream narratives”) (internal quotation marks omitted).

¹¹⁵ Politicians and prominent figures such as Chris Christie, Michelle Obama, Marco Rubio, and Elizabeth Warren have talked about the humble beginnings of their ancestors and their hard work to get where they are now. Noliwe M. Rooks, *The Myth of Bootstrapping*, TIME MAG. (Sept. 7, 2012), <https://ideas.time.com/2012/09/07/the-myth-of-bootstrapping/>.

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ See Anna Maria Santiago, *Fifty Years Later: From a War on Poverty to a War on the Poor*, in 62 SOCIAL PROBLEMS 2, 2–3 (2015) (discussing the goals of the War on Poverty and the legislation passed to achieve the goals).

¹¹⁹ *See id.*

¹²⁰ “Interestingly, President Johnson intended the War on Poverty to be focused on education, training, and health programs for the poor, not welfare programs—or, in his words, a ‘hand up’ and not a ‘hand out.’” Moffitt, *supra* note 21, at 732 (quoting President Johnson).

¹²¹ Social welfare programs expanded in the 1960s and 1970s. *See id.*

While the overall goals of the War on Poverty policies were to reduce poverty, the policies to “cure it” and “above all, prevent it”¹²² through educational programs and employment training programs reveal an unconscious preference to give to those who are willing to become educated and work for themselves. Further, these attempts to alleviate poverty through helping the poor to help themselves did not achieve major success; although the number of elderly poor has declined, the poverty rates for working-age adults and children have steeply increased since the 1960s.¹²³ People experiencing poverty now include “the college[-]educated, suburbanites, and homeowners.”¹²⁴ Despite the failure of the programs embodying Rugged Individualism, many Americans still believe that welfare policies foster entitlement and laziness for those in poverty, “reduc[ing] [individuals’] initiative.”¹²⁵

Rugged Individualism and bootstrapping are problematic because they ignore important external factors that are beyond the individual’s control. Over-valuing the effort of an individual in improving their well-being can become toxic and unrealistic in deservingness judgments.¹²⁶ For example, in embodying the American value of independence and self-sufficiency, many assistance programs have a “near-obsession” with teaching financial literacy as a means of reducing the wealth gap.¹²⁷ However, what these programs ignore is the structural, financial inequality in the United States that caused the wealth gap: “the typical white household owns 41 times more wealth than the typical Black household, and 22 times more than the typical Latinx household”; unemployment rates are consistently higher for Black people than other racial groups; and women of color account for a disproportionately high number of the employees in

¹²² President Lyndon B. Johnson, State of the Union Address (Jan. 8, 1964) (“Our aim is not only to relieve the symptom of poverty, but to cure it and, above all, to prevent it.”).

¹²³ See Santiago, *supra* note 118, at 3.

¹²⁴ See *id.*

¹²⁵ Erin McClam, *Many Americans Blame ‘Government Welfare’ for Persistent Poverty, Poll Finds*, NBC NEWS (June 6, 2013, 12:18 PM) <https://www.nbcnews.com/feature/us-news/many-americans-blame-government-welfare-persistent-poverty-poll-finds-nvna18802216> (demonstrating that in 2013, 24 percent of Americans polled by NBC News and the Wall Street Journal ranked “too much government welfare that prevents initiative” as the top reason for continuing poverty).

¹²⁶ See Bhattacharya & Price, *supra* note 67 (referring to the hyper valuation of individuality as “toxic individualism”).

¹²⁷ *Id.* (describing how the current narratives of the wealth gap ignore the reality of wealth inequality).

low paying jobs.¹²⁸ These statistics are just a few examples demonstrating that Americans are overly-focused on fixing the individual, rather than the economic system, and this may be the product of Rugged Individualism and bootstrapping.

Other studies show the importance of external factors that are ignored in the Rugged Individualism mindset, and that individual effort is not always enough to escape poverty. According to the Pew Study on the American Dream from 2012, social mobility for the lowest economic and middle classes has become increasingly difficult, if not impossible.¹²⁹ Essentially, those born into poverty and the lowest classes stay there, and those born into the wealthiest classes also stay there.¹³⁰ As such, the people whom Americans believe should be bootstrapping themselves into a better situation can only try to do so in vain.¹³¹ Other factors, such as “technological change, globalization, and [the decline in the] . . . minimum wage” also contribute to income inequality.¹³² In fact, in 2020, the upper classes were the ones experiencing income growth, as opposed to the middle and lower classes.¹³³ Thus, income and wealth are concentrated in those that already have it. Income growth has been the greatest for the most affluent 5 percent of families in the United States since the 1980s.¹³⁴

While Rugged Individualism emphasizes the need for people to work their way out of poverty, there are many factors outside of their control that may make it nearly impossible. Although the bootstrap narrative and Rugged Individualism are a historical part of American culture and values, these statistics and studies show that these mindsets are unrealistic. Thus, embracing

¹²⁸ *Id.*

¹²⁹ THE PEW CHARITABLE TRS. *Pursuing the American Dream: Economic Mobility Across Generations* 9, 15–16 (July 2012), https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/economic_mobility/pursuingamericandreampdf.pdf (finding that 41 percent of Americans raised at the bottom of the wealth ladder “are stuck there as adults, and 66 percent” of adults “never make it to the middle rung”).

¹³⁰ *See id.* at 15.

¹³¹ *See id.* at 9, 15 (describing how many born into lower economic classes are unable to move up into higher classes despite experiencing some absolute economic gains).

¹³² Juliana M. Horowitz et al., *Trends in Income and Wealth Inequality*, PEW RESEARCH CTR. (Jan. 9, 2020), <https://www.pewsocialtrends.org/2020/01/09/trends-in-income-and-wealth-inequality/>.

¹³³ *See id.* (“The growth in income in recent decades has tilted to upper-income households. At the same time the U.S. middle class . . . is shrinking. Thus a greater share of the nation’s aggregate income is now going to upper-income households and the share going to middle and lower-income households is falling.”).

¹³⁴ *See id.*

deservingness judgments influenced by Rugged Individualism in welfare policies will likely lead to ineffective, overly restrictive welfare policies that are not serving those who need them.

C. Psychology

Deservingness judgments are also based on psychology and “social emotions.”¹³⁵ “Social emotions” are emotions that evolved to help humans regulate resource distribution at a time when food was unable to be stored for long periods.¹³⁶ When humans were hunter-gatherers, it was not certain that any one hunter or gatherer would find enough food to feed his kin; alternatively, other hunters acquired more food than they could consume before it went bad, due to lack of proper storage.¹³⁷ Sharing resolved this issue.¹³⁸ By redistributing food from those who had too much to those who had too little, clans of hunter-gatherers could more efficiently manage the food source by avoiding waste and better assuring the survival of all members.¹³⁹

However, this redistribution was not purely altruistic; social emotions governing redistribution serve the important function of safeguarding against cheating.¹⁴⁰ Humans developed an expectation that if they shared food with others, others would share food with them in the future.¹⁴¹ This expectation of reciprocity prevents others from being able to reap the benefits of another’s work without putting in any work themselves.¹⁴²

The impact of social emotions on deservingness judgments is still present today in those who fear that people who do not have a job will become dependent on welfare benefits,¹⁴³ and thus

¹³⁵ See Petersen et al., *supra* note 19, at 396 (“While [ideological explanations] [are] highly plausible, several observations suggest that [deservingness judgments] . . . [are the result of] psychological processes that preexist ideology.”).

¹³⁶ See *id.* at 398, 399 (finding that “social emotions . . . such as sharing . . .” evolved in light of the limited “capacity to store excess food . . . through the imposition of reciprocal sharing obligations . . .”).

¹³⁷ See *id.* at 399.

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 399–400.

¹⁴¹ See *id.* at 399.

¹⁴² See *id.*

¹⁴³ See Santiago, *supra* note 118, at 3 (stating that critics of welfare programs argue

“profit” off those who are working.¹⁴⁴ As such, social emotions impact deservingness judgments by impacting people’s ideas of efficient and fair resource distribution. For example, social emotions can be seen in the first SSDI program.¹⁴⁵ Before Congress established the SSDI program in 1956, funds were only provided to the women and children of men who were unable to work and provide for them due to disability.¹⁴⁶ However, even though the 1956 SSDI program finally provided benefits directly to those with disabilities, it provided benefits only to those with the most severe disabilities.¹⁴⁷ This program design prevented those who *could* work from using the program’s funds.¹⁴⁸ Thus, the first SSDI program embodied social emotions by preventing the exploitation of others’ labor.

As seen in the first SSDI program, social emotions regulating deservingness judgments to prevent cheating are problematic because they are overly restrictive. If the bar to receive assistance is set prohibitively high or the nature of assistance is too limited in efforts to deter potential cheaters, a program may underserve the population it was created to help. For example, the Food Stamp Program is the only program that serves low-income families, regardless of income.¹⁴⁹ However, the Food Stamp program still embodies the social-emotional fear of cheating because it provides an extremely limited form of assistance. Other programs, such as the Temporary Assistance for Needy Families (“TANF”)¹⁵⁰ or SSDI programs provide more flexible assistance because they assist with general living expenses.¹⁵¹ However, the

that large social safety nets foster “a culture of dependency” and perpetuate “current levels of poverty”).

¹⁴⁴ See Bhattacharya & Price, *supra* note 67.

¹⁴⁵ See Moffitt, *supra* note 21, at 731–32 (“The SSDI program is yet another social insurance program: only those who have worked and earned enough in the past are eligible.”).

¹⁴⁶ See *id.* at 731.

¹⁴⁷ See *id.* at 731–32.

¹⁴⁸ See *id.* at 732 (emphasis added).

¹⁴⁹ See *id.* at 732, 737.

¹⁵⁰ See *id.* at 731 (discussing that the Temporary Assistance for Needy Families (“TANF”) program is the current name for the Aid to Families with Dependent Children (“AFDC”) program); 42 U.S.C. § 601(a) (stating TANF’s purpose, which is to “provide assistance to” parents and “end the[ir] dependence . . . on government benefits . . . [through] job preparation[and] work . . .” and “encourage the formation and maintenance of two-parent families . . .”).

¹⁵¹ See Moffitt, *supra* note 21, at 731 (highlighting the fact that TANF provides benefits to “widows with children and women whose husbands had become disabled”).

TANF and SSDI programs provide assistance based on paid-in contributions to the program.¹⁵² The paid-in contributions set a higher bar to receive assistance and do not help those who still require assistance with living expenses.¹⁵³ By providing either limited assistance or assisting only a limited population, these programs allow many people who need assistance to fall through the cracks.

The deservingness judgments in welfare policies become problems when they are the *main* drivers of the policy. Deservingness judgments alone are not always bad; they can reflect culture and shared values¹⁵⁴ and induce efficient resource allocation.¹⁵⁵ What each of these examples shows, however, ranging from history and culture to psychology, is that policies based heavily on deservingness judgments without equal consideration for objective facts lead to ineffective welfare programs.

III. CRITICISMS OF THE PPP AND THE ROLE OF DESERVINGNESS JUDGMENTS

While one goal of the PPP might have aimed to alleviate the economic hardship of small business owners caused by the pandemic,¹⁵⁶ many business owners felt the aid was ineffective.¹⁵⁷ Several of the major complaints about the PPP can be tied to deservingness judgments: (1) the structure of the PPP loan

¹⁵² See *id.* (distinguishing TANF and SSDI from Social Security and Unemployment Insurance, which are “social insurance” programs that base eligibility on having worked a sufficient amount and having had a sufficient level of earnings to qualify”).

¹⁵³ See *id.* (explaining how poor individuals, who “tend to have spotty employment histories and low earnings[]” are unlikely to qualify for these social insurance programs).

¹⁵⁴ See Martin, *supra* note 71, at 52 (noting that “philosophical and ideological movements” have influenced social welfare policy).

¹⁵⁵ See Petersen et al., *supra* note 19, at 4, 6 (recalling that social emotions, a foundation of deservingness judgments, may have helped our ancestors share food efficiently before there were means to store it, and prevented cheating by emphasizing reciprocity in society).

¹⁵⁶ See Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,811 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 120) (stating that the CARES Act, which includes the PPP, intends to assist businesses during the time of economic hardship created by the pandemic).

¹⁵⁷ See *Small Businesses Say Rescue Loans Come with Too Many Strings Attached*, *supra* note 25 (highlighting several concerns of business owners about the PPP, including restrictions on loan uses that are too narrow to be truly useful to struggling businesses).

forgiveness program was overly restrictive and did not allow businesses to effectively use the money they received to keep businesses afloat; (2) the 500 employee limit was too large and allowed large companies to violate the spirit of the law; and (3) the program did not adequately account for external factors, such as industry differences and the ability of a business to adapt to healthcare guidelines. The connections between the failures of the PPP and deservingness judgments demonstrate how deservingness judgments become problematic when they are the main drivers of welfare policy.

A. The Restrictions on Loan Forgiveness Overemphasized Work, Reduced Overall Usefulness of the Loan, and Allowed Large Companies to Exploit Funds

One of the major complaints of the PPP is that the allowable uses of the PPP funds are too restrictive to be useful for small business owners.¹⁵⁸ The restrictions on allowable uses of PPP funds, particularly the requirement that 60 percent of loan funds¹⁵⁹ be spent on payroll costs, prevented business owners from spending the PPP funds on other important business expenses.¹⁶⁰ These restrictions can be connected to deservingness judgments, specifically the protestant work ethic, which overvalues work.

Under the PPP, a business must spend 60 percent of the loan on payroll costs to have the loan forgiven.¹⁶¹ However, other important expenses, such as inventory, cannot be forgiven under the loan.¹⁶² For some businesses, this requirement is nearly

¹⁵⁸ See *id.* (discussing how PPP loans restrict the way small business owners use the funds).

¹⁵⁹ See Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, sec. 3, § (b)(2)(B), 134 Stat. 641, 642 (codified at 15 U.S.C. § 636m(d)(8)).

¹⁶⁰ See Kurtzleben et al., *supra* note 13 (explaining how, because of the PPP's restrictions, small business owners believe they can "use the money in the ways they see as best").

¹⁶¹ See Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, sec. 3, § (b)(2)(B), 134 Stat. 641, 642 (codified at 15 U.S.C. § 636m(d)(8)).

¹⁶² See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1106, §§ (a)(7), (b), 134 Stat. 281, 297–98 (2020) (illustrating that other expenses outside those expressly listed by the statute, such as inventory, are not eligible to be forgiven); Kurtzleben et al., *supra* note 13 ("Among [small businesses'] biggest complaints: 75% of the forgiven amount on the loans must be spent on payroll.").

useless if the business cannot open due to health restrictions or if employers do not have much work for employees to do.¹⁶³ Further, employee expenses and costs are listed multiple times in the list of allowable uses of PPP funds in the statute: in the list of allowable uses of the covered loan in section 1102(F), “payroll costs” are listed first, and “employee salaries, commissions, and other similar compensations” are listed third.¹⁶⁴ However, the definition of “payroll costs,” according to the statute, *includes* salary, wages, commissions, or similar compensations.¹⁶⁵ Out of the seven categories of allowable expenses, two are essentially the same, and they both relate to keeping employees hired; given that one of the major complaints of small business owners was the overly restrictive categories of expenses, it is unproductive to include duplicate categories. This is especially true when the demand for labor in small businesses is already low.¹⁶⁶ Of the allowable uses for PPP funds, payroll costs are emphasized both in the text of the statute itself and outside materials such as the SBA guidelines and the Treasury’s Interim Final Rules.¹⁶⁷

Like the Food Stamps program, the PPP is not an effective form of assistance for small business owners, because the relief provided to them is restricted to seven allowable expenses.¹⁶⁸ The

¹⁶³ See, e.g., Michael Ruiz, *New NYC Coronavirus Shutdown to Prompt Restaurant Layoffs Right Before Holidays, Restaurateur Warns*, FOX BUS. (Dec. 11, 2020), <https://www.foxbusiness.com/lifestyle/nyc-coronavirus-shutdown-restaurants-layoffs-holidays> (explaining that the shutdown caused a restaurant owner to lay off up to 90% of his staff); Spencer Kimball, *NYC Restaurants Face Mass Layoffs as Coronavirus Cripples Economic Life: ‘This is a Crushing Blow,’* CNBC, <https://www.cnbc.com/2020/03/21/coronavirus-nyc-restaurants-face-mass-layoffs.html> (last updated Mar. 21, 2020, 8:10 PM) (describing how restaurants, who were only allowed to do takeout or delivery, did not have enough work to keep staff on board, and that demand from customers was further limited by customers fears of catching the virus from delivery workers).

¹⁶⁴ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, § (a)(2), 134 Stat. 281, 290 (2020).

¹⁶⁵ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, § (a)(2), 134 Stat. 281, 287 (2020).

¹⁶⁶ “Even if there’s not much work to do, he says, the point is to make it as easy as possible to jump-start the economy again.” See Kurtzleben et al., *supra* note 13.

¹⁶⁷ The PPP states that 60 percent, over half, of the loan must be spent on payroll costs to be forgiven. See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, 134 Stat. 281, 286 (2020). This requirement is also highlighted in the SBA guidelines and the Treasury’s Interim Final Rules. See *Paycheck Protection Program*, *supra* note 44.

¹⁶⁸ The Food Stamp program, which is one of the only welfare programs that serve low-income families equally regardless of income, assists with only food, and no other living expenses. See Moffitt, *supra* note 21 at 7–8. This restriction reduces the overall usefulness of the program when compared to other programs that account for income contributions but have fewer to no restrictions on what the funds may be spent on, such as the SSI program.

uselessness of these restrictive categories is especially apparent when considering the wide amount of different major expenses that small businesses may incur depending on the nature of their industry.¹⁶⁹

B. The 500 Employee Limit was too High and Allowed Large Companies to Violate the Spirit of the PPP

Additionally, this focus on employee costs led to the PPP's failure by allowing larger businesses to exploit the PPP structure to the detriment of other smaller businesses; since the PPP required businesses to spend 60 percent of the funds on payroll costs, businesses that fell just under the 500 employee cap were able to obtain and spend PPP funds on enormous payroll costs before other smaller businesses could obtain funds.¹⁷⁰ Under the PPP, a business is eligible to receive funds if it has fewer than 500 employees.¹⁷¹ Chain businesses were also able to take advantage of PPP funds since the 500-employee cap applies to each business location, and not the company as a whole.¹⁷²

Because of this high cap, large companies like Ruth's Hospitality Group Inc., Chris Steakhouse, Shake Shack, and the Los Angeles Lakers Basketball team qualified for PPP funds and took loans.¹⁷³ Meanwhile, non-chain and mom-and-pop small businesses were unable to obtain funds due to confusion and PPP funds running out in just thirteen days.¹⁷⁴ Naturally, companies with high numbers of employees are more easily able to spend 60 percent of the PPP funds on payroll costs than a mom-and-pop shop with twenty employees or fewer; the emphasis on payroll costs to keep

See id.; Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, § (a)(2), 134 Stat. 281, 290 (2020).

¹⁶⁹ For example, rent makes up the majority of various businesses' expenses, while other businesses have supplies, inventory, or labor constitute the majority of their expenses. *See Small Businesses Say Rescue Loans Come with Too Many Strings Attached*, *supra* note 25.

¹⁷⁰ *See* Davis & Haddon, *supra* note 69; Kurtzleben et al., *supra* note 13.

¹⁷¹ *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, 134 Stat. 281, 288 (2020).

¹⁷² *See id.*

¹⁷³ *See* Davis & Haddon, *supra* note 69; Kurtzleben et al., *supra* note 13.

¹⁷⁴ *See* Kurtzleben et al., *supra* note 13.

people working is a detriment to millions of other small business owners.

The emphasis on using PPP funds for payroll costs to keep employees working is closely connected to the Protestant Work Ethic and Puritan values. The Protestant Work Ethic equates morality and virtue with work;¹⁷⁵ it follows that rewarding PPP funds to businesses that are keeping workers employed is a policy aligned with these Puritan values, especially given its prevalence in American history and welfare policy.¹⁷⁶

C. The PPP Did Not Adequately Account for External Factors Impacting Small Business Operations During the Covid-19 Pandemic

Another major issue of the PPP was the lack of accounting for important external and differentiating factors between businesses.¹⁷⁷ The PPP had one set of criteria for spending funds and loan forgiveness, which did not account for industry differences among businesses, the different regional laws they had to abide by, or the business's ability to adapt operations to health and safety guidelines.¹⁷⁸ This lack of differentiation can be tied to Rugged Individualism: just as Rugged Individualism expects individuals with different needs to make do with the same resources,¹⁷⁹ so too does the PPP expect businesses to make do with the same criteria to obtain a loan and the same form of assistance during the Covid-19 pandemic.

Industry differences between small businesses had major impacts on how useful the PPP funds could be and how much

¹⁷⁵ See Martin, *supra* note 71, at 51, 53; Amos et al., *supra* note 26, at 1047.

¹⁷⁶ See Martin, *supra* note 71, at 53, 55.

¹⁷⁷ Business owners have voiced their concerns that the number of restrictions on using the PPP loan reduces how useful the loan is to help maintain their operations during the pandemic. See Kurtzleben et al., *supra* note 13. These concerns include the fact that the amount of allowable expense categories is narrow and the fact that they are pushed to keep workers on despite there not being a need for labor. See *id.*

¹⁷⁸ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, § (a)(2), 134 Stat. 281, 290 (2020).

¹⁷⁹ Recall that rugged individualism is a product of westward expansion. See Bazzi et al., *supra* note 109. Living on the frontier required extreme discipline and self-reliance without the assistance of others. See *id.* This attitude has carried over into culture today. See *id.*

economic hardship these businesses may face in the pandemic. For example, different industries have different costs; although both a gym and a restaurant have payroll costs, a restaurant will have higher costs for inventory.¹⁸⁰ The pandemic also presented a new form of industry differences that had a significant impact on small businesses: “essential” and “non-essential” classifications.¹⁸¹ Some industries, such as restaurants and certain retail shops, may be considered “essential”¹⁸² and were allowed to operate during shutdowns and stay-at-home orders, while other businesses were not.¹⁸³ The importance of the “essential” label is illustrated by the losses in the number of active business owners. In April, the loss in the number of active “essential” business owners was 17 percent compared to a loss of 38 percent in active “non-essential” business owners.¹⁸⁴ Although the numbers of active business owners for both essential and non-essential businesses partially rebounded, the rebound rates for essential businesses were higher than the rebound rates for non-essential business owners.¹⁸⁵

Additionally, small businesses are impacted by inconsistencies in state legislation—a factor outside of business owners’ control. This was especially apparent in the Fall of 2020, when states, such as Florida, suspended all restrictions on business operations,

¹⁸⁰ See Kurtzleben, *supra* note 25 (discussing how Brew Drinkery in Granbury, Texas, had a lot of beer, kombucha, and other perishable food that were not usable or able to be preserved while the bar was closed).

¹⁸¹ It should be noted that the classification of “essential” vs. “non-essential” for businesses can vary from state to state depending on individual state and local health guidelines and rules. See Fairlie, *supra* note 12, at 736.

¹⁸² See *PAUSE Press Release*, *supra* note 32. The state of New York defines essential retail to include restaurants (takeout and delivery only), grocery stores, pharmacies, hardware stores, convenience stores, farmers’ markets, and gas stations. See *id.* Other essential entities include healthcare, public works, logistics, law enforcement, construction, and sanitation. See *id.*

¹⁸³ See N.Y. COMP. CODES R. & REGS. tit. 9, § 8.202.8 (2020) (“All businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize. Each employer shall reduce the in-person workforce to any work locations by 100% no later than March 22 at 8 pm. Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions. An entity providing essential services or functions whether to an essential business or non-essential business shall not be subjected to the in-person work restriction, but may operate at the level necessary to provide such service or function.”).

¹⁸⁴ See Fairlie, *supra* note 12, at 736.

¹⁸⁵ See *id.* For essential businesses, the number of active business owners was down by 10 percent in May and 5 percent in June. See *id.* For non-essential business owners, the number of active business owners was down by 28 percent in May and 17 percent in June. See *id.*

allowed indoor dining, and did not impose caps on gatherings indoors or outdoors.¹⁸⁶ Other states, such as New York and New Jersey, increased restrictions that November.¹⁸⁷

Furthermore, not all small businesses were able to adapt their operations to executive orders and health guidelines in the same way. Certain businesses were able to adapt to these restrictions easier than others. For instance, restaurants and bars could open using outdoor dining options, takeout, or delivery options.¹⁸⁸ Retail stores could use curbside pickups, limiting the number of customers allowed inside at one time, or even allowing customers to make an appointment to shop inside.¹⁸⁹

However, other businesses were unable to adapt to guidelines given the nature of their services. For example, clubs and concert venues could not circumvent restrictions on indoor gatherings.¹⁹⁰ Gyms and fitness facilities also found it difficult to adapt to executive orders and COVID-19 safety guidelines. In many places, gyms were not allowed to open in any capacity under executive orders.¹⁹¹ Although some fitness studios attempted to adapt by offering fitness classes online, some features, such as heated yoga

¹⁸⁶ Fla. Exec. Order No. 20-244 § 3 (Sept. 25, 2020); Greg Allen, *Florida's Governor Lifts All COVID-19 Restrictions on Businesses Statewide*, NAT'L PUBLIC RAD. (Sept. 25, 2020, 2:37 PM), <https://www.npr.org/search> (search the title of the article in the "search" bar).

¹⁸⁷ *E.g.*, David K. Li, *Bars, Restaurants and Gyms in New York Face New Restrictions Due to Covid-19 Increase*, NBC NEWS, <https://www.nbcnews.com/news/us-news/bars-restaurants-gyms-new-york-face-new-restrictions-due-covid-n1247447> (last updated Nov. 11, 2020, 5:24 PM). In November 2020, New York Governor Andrew Cuomo increased restrictions by limiting indoor gatherings to ten people. *Id.* Moreover, Governor Cuomo required restaurants to close by 10 p.m., with exceptions made for delivery. *Id.* New Jersey Governor Philip Murphy issued Executive Order 194, which restricted indoor dining hours from 10 p.m. to 5 a.m. with takeout and delivery exceptions. N.J. Exec. Order No. 194 (Nov. 12, 2020). Additionally, Executive Order 194 prohibited "indoor interstate" games, which includes sports and games below the collegiate level. *Id.*

¹⁸⁸ *See* Pete Wells, *To Stay Afloat, the Restaurant Business Clings to 'Contactless Delivery'*, N.Y. TIMES, <https://www.nytimes.com/2020/03/19/dining/restaurant-delivery-takeout-coronavirus.html> (last updated Apr. 6, 2020).

¹⁸⁹ *See* KEW & WILLOW BOOKS, <https://www.kewandwillow.com/> (last visited Feb. 15, 2021) (allowing customers to book an appointment on their website).

¹⁹⁰ *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8.202.74 (2020) (mandating lawful gatherings to ten or fewer people); *Coronavirus: Updated List of Tours and Festivals Canceled or Postponed Due to COVID-19*, PITCHFORK (Mar. 20, 2020), <https://pitchfork.com/news/coronavirus-updated-list-of-tours-and-festivals-canceled-or-postponed-due-to-covid-19/> (listing major events that were canceled because of the COVID-19 pandemic).

¹⁹¹ *See* Lynn Bonner, *NC Gyms Will Stay Closed for at Least 5 More Weeks. Some Owners Worry About Survival*, NEWS OBSERVER (Aug. 6, 2020, 6:03 PM), <https://www.newsobserver.com/news/business/article244773482.html>.

classes, could not be practically adapted outside of the fitness center.¹⁹²

Even the ability of certain businesses to adapt to executive orders and safety guidelines was not a guarantee that the businesses would survive the pandemic. For instance, restaurants faced widespread permanent closures despite their ability to offer takeout, delivery, or outdoor dining under COVID-19 restrictions.¹⁹³ While the true number of permanent business closures may remain unknown, the Yelp Economic Average Report¹⁹⁴ illustrated that by July 2020, about 72,842 businesses in the United States had closed permanently.¹⁹⁵ The report further measures that for every ten restaurant closures, six closed permanently.¹⁹⁶ The report also stated that about 48 percent of retail businesses had closed permanently, and other sectors such as nightlife, spas, and fitness facilities were also adversely impacted.¹⁹⁷ The widespread permanent closures of restaurants and retail businesses show that adapting to the Covid-19 restrictions was not a guarantee that the business would

¹⁹² See *id.* (describing how a heated yoga shop, which thrived off of its in-person hot yoga classes, lost many customers because clients were unable to transition to online classes).

¹⁹³ See Andrew Bender, *COVID-19 Claims Nearly 73,000 US Businesses, With No End in Sight*, FORBES, (July 29, 2020, 11:52 AM), <https://www.forbes.com/?sh=44723e392254> (search the title of the article in the “search” bar); Sharon Otterman, *Outdoor Dining is a Hit, but Restaurants Face “Apocalyptic” Times*, N.Y. TIMES, <https://www.nytimes.com/2020/08/23/nyregion/outdoor-dining-new-york.html> (last updated Dec. 15, 2020).

¹⁹⁴ See Edward L. Glaeser et al., *Nowcasting the Local Economy: Using Yelp Data to Measure Economic Activity*, 2 (Harvard Bus. Sch. Working Paper No. 18-022, 2017), https://www.hbs.edu/faculty/Publication%20Files/18-022_b618d193-9486-4de3-abc4-232e1baecbeb.pdf. A Harvard Business School study suggests that, while crowd-sourced sites such as Yelp and Google should not replace government economic reports like the U.S. census, these sites can be a useful supplement for government data, especially when measuring changes in economic activity on a local level. See *id.*

¹⁹⁵ However, Q3 data showed that business openings were beginning to rebound in 2020 by the end of October. While business reopening is economic progress, this increase in openings coincided with the summer months, when consumers had higher preferences for outdoor activities that were aligned with safety guidelines, and not with improvements or changes made to the PPP. See *Increased Consumer Interest in May Correlates with COVID-19 Hot Spots in June, According to the Yelp Economic Average*, YELP ECON. AVERAGE (July 2020), <https://www.yelpeconomicaverage.com/yea-q2-2020.html>; *Yelp Economic Average Shows New Restaurant and Food Businesses are Opening, Business Reopenings Rise Across the Country*, YELP ECON. AVERAGE (Oct. 2020), <https://www.yelpeconomicaverage.com/yea-q3-2020.html>.

¹⁹⁶ See Bender, *supra* note 193.

¹⁹⁷ See *id.*

survive,¹⁹⁸ which indicates that economic aid was necessary for businesses to survive during the height of the pandemic.

The PPP failed to account for these notable differences in the situations of small businesses. The industry and regional differences show that the executive orders and health guidelines did not impose burdens on all businesses equally. The PPP fails to account for the unequal burdens that small businesses may face: Section 1106, which details the loan forgiveness, does not account for industry differences or the abilities of businesses to adapt to the various executive orders that prevent them from operating normally.¹⁹⁹ Neither section 1102 nor section 1106 mentions extenuating circumstances or hardship that could impact a business's ability to repay the loan.²⁰⁰ All businesses applying for PPP loans are subjected to the same rules and guidelines, without consideration for important external factors that may impact the usefulness of the funding or extra hardship they may face.

The failure to account for these significant differences in circumstances may be the product of deservingness judgments, particularly Rugged Individualism. The PPP did not adjust the amount of funding that a business could obtain, adjust the categories a business may spend funds on, or adjust forgiveness conditions for businesses that had a greater likelihood of facing hardship.²⁰¹ The PPP gives one set of criteria for all businesses to obtain funding and the same set of rules to use funding, and then impliedly expects the business to sink or swim using the same resources that everyone else has. In a similar fashion, Rugged Individualism also ignores external factors and overvalues the ability of the individual to take care of oneself. Here, businesses are given the same resources and are expected to survive despite their vastly different abilities to adapt during this time of economic hardship. Like in cultural values surrounding

¹⁹⁸ *See id.* (“Many retail businesses shifted their operating models and started offering curbside pickup and online ordering,” the report noted, but “unfortunately those measures aren’t always enough to sustain their business long term.”) (quoting a Yelp Economic Average report).

¹⁹⁹ Section 1106 states that the amount of the loan eligible to be forgiven is the sum of payroll costs, mortgage interest payments, payments on covered rent obligations, and covered utility payments. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1106, 134 Stat. 281, 297–98 (2020).

²⁰⁰ *See id.*; Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, 134 Stat. 281, 286–94 (2020).

²⁰¹ *See id.*

bootstrapping and the Rugged Individualism of the west, the PPP also places a high value on the individual by ignoring these external factors. Providing the same aid to all businesses despite various circumstances faced by businesses results in a warped sense of fairness that has ultimately underserved small businesses in need during the height of Covid-19.

D. Counterargument and Solution

i. The PPP's Failures Were the Product of Rushed Legislation to Address a Global Emergency and Not the Product of Deservingness Judgments

Congress passed the PPP in response to an unprecedented global health crisis.²⁰² In passing a statute like the PPP, is it more important that lawmakers pass a statute quickly to deal with a global emergency, or take the time to write a policy that comprehensively addresses the diverse needs of businesses? Are the issues with the PPP the result of rush, rather than deservingness judgments?

These are valid questions. However, there is evidence that the issues with the PPP are the result of deservingness judgments rather than rush, which is shown by the lack of change to the PPP through the Paycheck Protection Program Flexibility Act ("PPPFA"). In June 2020, Congress passed the PPPFA to amend the PPP.²⁰³ The PPPFA reduced the payroll requirement from 75 percent to 60 percent and extended the amount of time that businesses had to use funds from 8 weeks to 24 weeks.²⁰⁴ However, nothing else about the PPP was changed: there was no increase in

²⁰² See generally Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,811 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 120) (stating that the CARES Act, which includes the PPP, was passed to provide relief to businesses experiencing economic hardship due to the Covid-19 pandemic).

²⁰³ See Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, 134 Stat. 641.

²⁰⁴ See Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, sec. 3, § (b)(1)–(2), 134 Stat. 641, 641–42.

the number of allowable expense categories to give more flexibility to business owners in spending the funds; there was no change to the eligibility requirements that would prevent large corporations and chains from taking advantage of PPP funds; there was no change in loan forgiveness procedures to account for the differing abilities of businesses in different industries to adapt to their states' health guidelines and executive orders.²⁰⁵

By June, Congress had some indication that the pandemic would last longer than just a few weeks.²⁰⁶ Further, many business owners had voiced their concerns about the PPP in multiple newspaper articles and other media publications.²⁰⁷ Thus, by the time the PPPFA was passed, lawmakers were arguably aware of the issues with the PPP but still did not incorporate these suggestions.²⁰⁸ The only suggestion that was incorporated into the PPPFA was the minor reduction in the required payroll spend,²⁰⁹ which was still a smaller reduction than what business owners pushed for.²¹⁰

Lawmakers left most of the PPP as it was, purportedly to carry out their agenda—which was to keep people working.²¹¹ The lack of change in the PPPFA indicates that the problems of the PPP were not merely the product of a rush to get a policy out to address an emergency. When the legislators had the chance to fix the known problems with the PPP and make it more useful to struggling small business owners, they did not. Although the business owners (and private citizens in general) should not be the

²⁰⁵ See Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, 134 Stat. 641; see generally Neil Hare, *Trump Signs New Law Relaxing PPP Rules: What You Need to Know*, FORBES (June 5, 2020, 11:27 AM), <https://www.forbes.com/?sh=57555ea b2254> (search the

²⁰⁶ See, e.g., Connor Perrett, *New York Gov. Cuomo Extends Order Advising Residents to Stay at Home for at Least Another Two Weeks*, BUSINESS INSIDER (Mar. 29, 2020, 1:50 PM), <https://www.businessinsider.com/cuomo-extends-order-stay-home-for-two-weeks-2020-3>; Press Release, *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces NYS on Pause Functions Extended for Additional Two Weeks* (Apr. 6, 2020), <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-nys-pause-functions-extended-additional> (illustrating that many initial stay-at-home orders were originally supposed to last two weeks, but were extended for months after).

²⁰⁷ See, e.g., Kurtzleben et al., *supra* note 13.

²⁰⁸ See Hare, *supra* note 205.

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ This goal is outlined in section II of this note. See discussion *supra* Section II. See generally Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

sole dictators of policy, they are arguably in the best position to tell the policy writers what their needs and concerns are.²¹² Stubborn reliance on policy goals rooted in deservingness judgments instead led to a policy that arguably led to permanent damage that we cannot begin to quantify.²¹³

ii. Proposed Solution: Welfare Policies Should Incorporate More Statistics and Hard Data to Combat Deservingness Judgments as Drivers of Policy

The dangers of deservingness judgments as the drivers of policy are shown in the failures of the PPP, but how can we keep deservingness judgments from being drivers of policy, especially when they can be unconscious?²¹⁴ One solution might be to write welfare policies to be reflective of important statistics and facts of the populations they are meant to serve. In the case of the PPP, that would include using industry statistics, allowing flexibility to account for the diverse executive orders and businesses' abilities to adapt to them, and rectifying the criticisms put forth by the business owners themselves, who are in the best position to tell legislators what their needs and concerns are. While legislators failed to significantly amend the PPP when they passed the PPPFA, amending welfare policies to accurately reflect the facts and circumstances of the populations they are meant to help will ensure that facts, and not deservingness judgments, are the primary drivers of policy, and will hopefully lead to more effective outcomes.

²¹² The articles interviewing business owners about their complaints about the PPP outline in detail the problems that they are facing on the ground-level as the business owners dealing with the pandemic. *See generally* Kurtzleben, *supra* note 25.

²¹³ As of July 2020, the Yelp Economic Average report found that 72,842 business across the United States have closed permanently. *See* Bender, *supra* note 193. While studies have begun to look at the economic impacts of the pandemic and business closures on the economic, the full extent of the impact cannot yet be known while the pandemic is still ongoing. *See id.*; *see generally* Fairlie, *supra* note 12 at 1.

²¹⁴ Value judgments impacted by culture, history, or psychology can often be unconscious factors in our decision-making. *See* Klamer, *supra* note 22 at 191 ("Even if we deliberate constantly about our values, we do so indirectly.").

For example, the issue of larger companies and chains depleting PPP funds could have been addressed with a smaller cap on the number of employees for eligible businesses. Recall that businesses with 500 employees or fewer are eligible to apply for PPP funds;²¹⁵ however, the United States Census in 2017 showed that 89.34 percent of total firms with 500 employees or fewer have 20 employees or fewer.²¹⁶ This statistic demonstrates that a more accurate employee cap for eligible small businesses would have been 20 employees or fewer. While not certain, it seems likely that imposing a smaller cap that better reflected the average size of small businesses could have helped keep large companies and chains from depleting the PPP funds before many small businesses had the chance to apply for funds.

As another example, expanding the categories of allowable expenses would have better-reflected business owner concerns. If businesses were allowed to spend PPP funds on more than just the seven enumerated allowable expense categories of the PPP, business owners would have the flexibility they need to keep their businesses operating. As it stands now, many business owners feel that the PPP is merely an extension of unemployment because they are pushed to spend more on payroll costs than other categories, and other important expense categories (such as inventory for restaurants) are not forgivable categories at all.²¹⁷ Allowing business owners to have flexibility in the way they spend PPP funds could better account for the important industry differences that impact small businesses, and might have rendered PPP funds more useful to business owners.

Finally, adjusting the amount of loan a business could apply for and the forgiveness to reflect the diverse executive orders and the businesses' ability to adapt operations to comply with them could

²¹⁵ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, sec. 1102, 134 Stat. 281, 288 (2020).

²¹⁶ The total amount of firms that had 500 employees or fewer was 5,976,761. See U.S. CENSUS BUREAU, *US & States, NAICS, Detailed Employment Sizes (U.S., 6-digit and States, NAICS sectors)*, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>. Of that total number, the number of firms that had 20 employees or fewer was 5,339,918. See *id.*

²¹⁷ “The way I would think about it, he said, was you are becoming an extension of the unemployment office at this point,” Piatt, explained. In other words, this would mean [small business owners like] Piatt could wind up spending most of his money on his workers, even if they weren’t putting in that many hours.” Kurtzleben, *supra* note 25 (quoting Christian Piatt, a small business owner from Granbury, Texas).

have given non-essential businesses much-needed breathing room. While the pandemic is still ongoing and we do not yet know the full extent of permanent business closures, studies have shown that non-essential retail businesses faced more permanent closures than essential retail businesses.²¹⁸ As previously mentioned, executive orders varied from state to state,²¹⁹ and some businesses had more choices in adapting operations than others.²²⁰ Expanding categories that businesses could spend the funds on would give businesses needed flexibility without increasing the amount of funding available.

While these proposed changes come with the benefit of hindsight, they are based on the knowledge that policymakers had by the time they amended the PPP in June.²²¹ These were all changes that *could* have happened and arguably could have created a more effective policy. Instead, deservingness judgments continued to lead; the PPP's lack of flexibility and emphasis on payroll spending to keep Americans working continued to reflect the Rugged Individualism and puritan values of American culture. By allowing deservingness judgments to continue to drive small business relief policy, we have seen mass business closures that may have untold impacts on our future economy. Furthermore, the inconsistent policymaking has subverted the goal of keeping Americans working—mass unemployment still occurred²²² and some people were even incentivized to stay on unemployment.²²³

²¹⁸ “Losses in the number of active business owners are lower for essential industries at 17% in April compared with 38% among nonessential industries (as expected). Although both groups of business owners experienced partial rebounds, the number of active business owners in essential industries was down by 10% in May and 5% in June, and the number in nonessential industries was down by 28% in May and 17% in June.” See Fairlie, *supra* note 12 at 10.

²¹⁹ The differences in local laws became even more obvious in the executive orders that came out in fall 2020 and beyond, where some states began lifting mask mandates and lifting restrictions on gatherings and businesses, while other states did not. See Fla. Exec. Order No. 20-244 (Sep. 25, 2020); N.Y. COMP. CODES R. & REGS. tit. 9, § 8.202.74 (2020).

²²⁰ As previously mentioned, some businesses like gyms, yoga studios, or hairdressers had fewer ways to adapt their operations to gathering restrictions and social distancing requirements than restaurants, who had the option of offering curbside pickup and delivery. See Bonner, *supra* note 191.

²²¹ Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, 134 Stat. 641 (recalling that the PPPFA amended the PPP in June 2020).

²²² “In September, the number of permanent job losers increased by 345,000 to 3.8 million; this measure has risen by 2.5 million since February.” *Local Governments Lose Jobs as Slowdown in Recovery Begins*, NAT'L ASS'N COUNTIES (Oct. 2, 2020), <https://www.naco.org/resources/featured/sep-jobs-report>.

²²³ Some business owners have been unable to pay their employees enough to compete

While it is impossible to predict what the damage could have been if the PPP had been written differently, given the prevalence of deservingness judgments in past ineffective welfare policies, it is arguable that the PPP is another example of how problematic deservingness judgments in welfare policy can be.

CONCLUSION

The PPP was enacted to assist struggling businesses during the Covid-19 pandemic. However, the structure of the program made it extremely difficult for businesses to effectively use PPP funds to stay afloat. Some of the structural flaws in the program included the 500 employee cap, which allowed large, non-struggling businesses to take advantage of PPP funding at the expense of smaller businesses who needed it; restrictions on what businesses were allowed to spend their funds on, including a heavy emphasis on payroll costs, regardless of whether the businesses had work for employees to do; and the fact that there was little to no differentiation in the loan amounts or forgiveness requirements to reflect important industry differences, differentiation in state laws, and a business's ability to adapt its operations to new state and local health guidelines.

These criticisms and failures of the PPP are well-known at this point. However, while many business owners and news outlets have discussed the shortcomings of the program's structure, few have questioned *why* the program was structured this way. The answer may be best explained by deservingness judgments, or the value judgments we make in crafting policies to assist others, which have been historically present in many other American welfare programs.

Here, the flaws of the PPP can be tied to several influences of deservingness judgments. The heavy payroll spending requirement and the 500 employee cap may be tied to Puritan

with generous unemployment benefits offered through the pandemic, especially when many employees do not want to be at risk of contracting Covid-19 at work. See Scott Horsley, *For Many, \$600 Jobless Benefit Makes it Hard to Return to Work*, NAT'L PUBLIC RAD. (May 26, 2020, 10:14 AM), <https://www.npr.org/2020/05/26/861906616/when-returning-to-your-job-means-a-cut-in-pay>.

values and the Protestant Work Ethic because these aspects over-emphasize the importance of work and strive to keep Americans working while ignoring a business' actual need for labor. The PPP's failure to account for industry statistics, regional differences, and the business's ability to adapt to Covid-19 guidelines also reflect Rugged Individualism because it ignores important external factors beyond the business's control, and instead provides the same blanket-policy relief to all. The fact that the PPPFA did so little to address these concerns of business owners months after issues were recognized is further evidence that deservingness judgments, as opposed to a rushed policy written to address a crisis, may be to blame.

Amending the PPP without giving further thought to the deservingness judgments behind its structural problems would be a band-aid solution: it would be a temporary fix to a long-term problem. If welfare policies continue to embody deservingness judgments more than objective facts and hard data, these policies will continue to underserve the populations that need them. Though it might be difficult to ignore these cultural, historical, and psychological influences on our deservingness judgments and focus instead on facts, statistics, and industry data, doing so may lead to better-structured, more sound, and more effective welfare policies.