

WORKING 9 TO 5? EQUAL PROTECTION AND STATES' EFFORTS TO IMPOSE WORK REQUIREMENTS FOR MEDICAID ELIGIBILITY

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Since the election of Donald Trump, states' efforts to reform and ultimately curtail the welfare state have flourished. Following the lead of the federal government, many states are actively attempting to reshape the mechanisms by which low-income Americans apply for and receive services. One such program under threat is Medicaid, a jointly funded federal-state effort to provide access to healthcare for needy individuals. Many states are trying to impose a monthly work requirement for beneficiaries to remain eligible within the program. The imposition of work requirements threatens to disenroll thousands of previously eligible individuals across the country. While these efforts are currently tied up in federal court, the implications for those in poverty and for the welfare state writ large are momentous.

Using efforts to institute a work requirement for Medicaid, this Comment argues that those experiencing poverty ought to be afforded greater protections from the courts and deserve some level of heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. By tracing the Court's jurisprudence around wealth as a protected class, this Comment finds an opening by which the Court should extend protections to those experiencing poverty. Specifically, within the context of Medicaid, this Comment argues that requiring Medicaid enrollees to work to remain covered via section 1115 waivers

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impermissibly discriminates based on economic status and violates the intent and purpose of Medicaid. These requirements impermissibly discriminate based on economic status because policies affecting those experiencing poverty demand heightened scrutiny, or at least a “rational basis plus bite” analysis, and do not further a legitimate government objective, thus making them unconstitutional. Even if such work requirements withstand a Fourteenth Amendment challenge, promoting better health outcomes, saving the state money, and encouraging self-sufficiency at the risk of disenrolling innumerable, otherwise qualified people, contravenes the intent and purpose of Medicaid. Extending any variant of Fourteenth Amendment protections to those in poverty presents profound implications for the American welfare state and would fundamentally alter the social safety net. This Comment argues that now more than ever is the time to do so.

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But there is another tradition that we share today. It calls upon us never to be indifferent toward despair. It commands us never to turn away from helplessness. It directs us never to ignore or to spurn those who suffer untended in a land that is bursting with abundance.

—Lyndon B. Johnson¹

INTRODUCTION

The election of Donald Trump in 2016 furthered a longstanding yearning amongst Republicans to institute generational welfare reform. The Trump administration is in the process of reshaping the fundamental mechanisms by which the government provides life-saving assistance.² One such program under siege is Medicaid, a jointly funded federal-state effort to expand access to healthcare for low-income Americans, that has never required employment for beneficiaries to retain eligibility. Under section 1115 of the Social Security Act,³ states can request “Demonstration Waivers” to use federal Medicaid funds to implement “experimental, pilot, or demonstration projects” in coverage approaches.⁴ The Secretary of Health and Human Services (HHS) has discretion to approve waivers if the program or proposal furthers the objectives of Medicaid.⁵ In January 2018, in response to a growing number of states requesting waivers to impose work requirements for Medicaid recipients, the Centers for Medicare and Medicaid Services (CMS) sent a letter to state Medicaid directors providing guidance as to the parameters for

1. President Lyndon B. Johnson, Remarks with President Truman at the Signing in Independence of the Medicare Bill (July 30, 1965) (transcript available at <https://www.presidency.ucsb.edu/node/241296> [<https://perma.cc/LVM3-LZTAW>]).

2. Juliet Linderman, *Food Stamps: Trump Administration Moves to Tighten SNAP Work Requirements*, CHI. TRIB. (Dec. 20, 2018), <https://www.chicagotribune.com/business/ct-biz-food-stamps-snap-work-requirements-20181220-story.html> [<https://perma.cc/5985-8RAJ>]; Andrew Restuccia et al., *Behind Trump's Plan to Target the Federal Safety Net*, POLITICO (Dec. 11, 2017), <https://www.politico.com/story/2017/12/11/trump-welfare-reform-safety-net-288623> [<https://perma.cc/WBM3-K8BB>].

3. 42 U.S.C. § 1315(a) (2012).

4. *About Section 1115 Demonstrations*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.medicaid.gov/medicaid/section-1115-demo/about-1115/index.html> [<https://perma.cc/U8MR-3QAR>].

5. *Id.* CMS operates under a six-pronged framework to determine whether the state's proposal is within the fundamental objectives of Medicaid. For example, CMS will approve a section 1115 waiver if the proposed program is designed to “promote efficiencies that ensure Medicaid's sustainability over the long term.” *Id.*

what would pass muster.⁶ As of November 2019, eighteen states have requested a section 1115 waiver with six gaining final approval by HHS.⁷

The position of CMS and HHS represents a notable shift in federal policy. In the past, states' requests to impose a work requirement on Medicaid recipients were rejected by CMS and HHS.⁸

With the Trump administration's more favorable attitude toward waivers, Kentucky decided to impose a work requirement on its Medicaid recipients. The State of Kentucky's decision to impose work requirements upended what had been an undeniably successful

6. U.S. Dep't Health & Human Servs., Ctrs. Medicare & Medicaid Servs., SMD: 18-002, Letter to State Medicaid Directors RE: Opportunities to Promote Work and Community Engagement Among Medicaid Beneficiaries (Jan. 11, 2018) [hereinafter State Medicaid Directors Letter], <https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf> [<https://perma.cc/K7N5-T2E5>].

7. *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State*, KAISER FAM. FOUND. (Sept. 18, 2019), <https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state> [<https://perma.cc/HR7T-9CLQ>]. Of the states that have requested waivers, most follow similar guidelines that require approximately eighty hours of employment or volunteering and include exceptions for certain groups of people like those who are pregnant or disabled. *Id.*; see also Hannah Katch et al., *Taking Medicaid Coverage Away from People Not Meeting Work Requirements Will Reduce Low-Income Families' Access to Care and Worsen Health Outcomes*, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 13, 2018), <https://www.cbpp.org/research/health/taking-medicaid-coverage-away-from-people-not-meeting-work-requirements-will-reduce> [<https://perma.cc/XMB6-KSBT>] (explaining that CMS guidance allows states to apply work requirements to nearly all non-elderly adult Medicaid enrollees thereby subjecting them to burdensome administrative requirements). Legislators are grappling with the will of their electorates in deciding whether to impose work requirements. See, e.g., Joe Lawlor, *Maine Gov. Mills Rejects Work Requirements LePage Sought for Medicaid*, PORTLAND PRESS HERALD (Jan. 23, 2019), <https://www.pressherald.com/2019/01/22/mills-rejects-work-requirements-lepage-sought-for-medicaid-beneficiaries> (explaining the new Democratic governor's decision to reject the previous administration's imposition of work requirements).

8. See Nicole Huberfeld, *Can Work Be Required in the Medicaid Program?*, 378 NEW ENG. J. MED. 788, 788–91 (2018) (highlighting how Medicaid, unlike welfare, has never emphasized work). The attachment of work requirements to welfare programs reflects a long-standing desire of the political right to fuse personal responsibility and entitlements, as seen in the welfare reform of the 1990s. See Vann R. Newkirk II, *The Trouble with Medicaid Work Requirements*, ATLANTIC (Mar. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/03/why-work-requirements-in-medicaid-wont-work/520593> [<https://perma.cc/MQC6-GWY4>]; see also Allyson Baughman, *A History of Work Requirements*, PUB. HEALTH POST (Feb. 12, 2018), <https://www.publichealthpost.org/viewpoints/history-of-work-requirements> [<https://perma.cc/U3GQ-UPFU>] (tracing the history of work requirements to the Reagan administration).

Medicaid expansion within the state in 2014.⁹ The State's particular waiver mandates that all Kentucky HEALTH (the name of the State's Medicaid program) enrollees without exemptions participate in eighty hours of employment or community engagement activities and provide documentation as a condition of continued eligibility.¹⁰ These requirements have remained unchanged since Kentucky first requested a section 1115 waiver in 2017.¹¹

Kentucky residents immediately challenged the State's waiver request in federal district court.¹² In the resulting litigation, *Stewart v.*

9. In January 2014, Kentucky chose to expand its Medicaid program to include the newly authorized ACA-covered population group (133% of the Federal Poverty Line), leading to over 375,000 residents enrolling in the state program and a number of positive public health outcomes. See DELOITTE, COMMONWEALTH OF KENTUCKY: MEDICAID EXPANSION REPORT 2014 at 10, 46, 52, 68 tbl.32 (2015), https://jointhehealthjourney.com/images/uploads/channel-files/Kentucky_Medicaid_Expansion_One-Year_Study_FINAL.pdf [<https://perma.cc/X6W8-B4F5>] (finding that in the first year alone, 232,000 enrollees had a non-annual office visit, 160,000 received medication monitoring, over 89,000 had their cholesterol checked, over 80,000 received preventative dental services, and 13,000 sought treatment for a substance abuse disorder); see also Benjamin D. Sommers et al., *Changes in Utilization and Health Among Low-Income Adults After Medicaid Expansion or Expanded Private Insurance*, 176 JAMA INTERNAL MED. 1501, 1505–06 (2016) (detailing increased use of preventative services, greater access to medications, reduced out-of-pocket healthcare expenses, and improved self-reported health metrics).

10. Amy Goldstein, *Trump Administration Again Permits Kentucky to Impose Work Requirement for Medicaid Recipients*, WASH. POST (Nov. 20, 2018), https://www.washingtonpost.com/national/health-science/trump-administration-again-permits-kentucky-to-impose-work-requirement-for-medicare/2018/11/20/04a097c0-ed2b-11e8-96d4-0d23f2aaad09_story.

11. *Id.*

12. ANUJ GANGOPADHYAYA & GENEVIEVE M. KENNEY, URBAN INST., UPDATED: WHO COULD BE AFFECTED BY KENTUCKY'S MEDICAID WORK REQUIREMENTS, AND WHAT DO WE KNOW ABOUT THEM? 1 (2018), https://www.urban.org/sites/default/files/publication/96576/3.26-ky-updates_finalized_1.pdf [<https://perma.cc/9N8V-G57F>]; Amy Goldstein, *New Lawsuit Challenges Trump Administration's Support for Medicaid Work Requirements*, WASH. POST (Aug. 14, 2018), https://www.washingtonpost.com/national/health-science/new-lawsuit-challenges-trump-administrations-support-for-medicare-work-requirements/2018/08/14/dde88462-9ff0-11e8-8e87-c869fe70a721_story.html?utm_term=.55e067372ea9.

Work requirements in Arkansas were initially implemented before a judge could rule on their propriety, thereby causing immediate harm to beneficiaries who no longer had access to healthcare. See Amy Goldstein, *A Job-Scarce Town Struggles with Arkansas's First-in-Nation Medicaid Work Rules*, WASH. POST (Mar. 27, 2019) [hereinafter Goldstein, *Job-Scarce Town Struggles*], https://www.washingtonpost.com/national/health-science/a-job-scarce-town-struggles-with-arkansas-first-in-nation-medicare-work-rules/2019/03/26/f551c352-5012-11e9-8d28-f5149e5a2fda_story. (highlighting the confusion amongst many former

Azar,¹³ Judge James E. Boasberg of the U.S. District Court for the District of Columbia remanded waiver back to HHS for review, holding that the Secretary's decision was arbitrary and capricious because the agency had not adequately accounted for substantial disenrollment in the program.¹⁴ The court also expressed significant unease with the idea that work requirements adhered to the intent and purpose of Medicaid.¹⁵ After the remand and a mandated public comment period, on November 20, 2018, CMS reapproved Kentucky's work requirements after the state made only minor technical adjustments.¹⁶ CMS again asserted that the program fell within the objectives of Medicaid, but plaintiffs subsequently challenged the revised work requirement in court.¹⁷ While efforts in Kentucky were challenged, the State of Arkansas successfully implemented a work requirement on Medicaid recipients before a suit was brought against it in the same court as the Kentucky case.¹⁸ The same judge heard both states' cases, and on March 27, 2019, Judge Boasberg struck down the validity of both states' work requirements.¹⁹ Judge Boasberg invalidated work requirements under

Medicaid beneficiaries as to how to comport with Arkansas's program). Medicaid beneficiaries also recently filed suit in New Hampshire. Michelle Hackman, *Third Lawsuit Filed Over Medicaid Work Requirements*, WALL ST. J. (Mar. 20, 2019), <https://www.wsj.com/articles/third-lawsuit-filed-over-medicaid-work-requirements-11553120783>.

13. (*Stewart I*), 313 F. Supp. 3d 237 (D.D.C. 2018).

14. *Id.* at 243.

15. *Id.* at 271–72.

16. Letter from Paul Mango, Chief Principal Deputy Admin. & Chief of Staff, U.S. Dep't Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., to Carol H. Steckel, Comm'r, Dep't for Medicaid Servs., Commonwealth of Ky. (Nov. 20, 2018), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/ky-health-ca.pdf> [<https://perma.cc/NB34-W4Z8>] (creating a community engagement requirement for beneficiaries between nineteen and sixty-nine years old).

17. *Id.*

18. See *Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019); Dylan Scott, *16,932 People Have Lost Medicaid Coverage Under Arkansas's Work Requirements*, VOX (Dec. 18, 2018), <https://www.vox.com/policy-and-politics/2018/12/18/18146261/arkansas-medicaid-work-requirements-enrollment> [<https://perma.cc/R2WS-B7RV>].

19. *Stewart v. Azar (Stewart II)*, 366 F. Supp. 3d 125, 156 (D.D.C. 2019) (Kentucky); *Gresham*, 363 F. Supp. 3d at 175 (Arkansas). The day after the decisions, Arkansas Governor, Asa Hutchinson, called for HHS to immediately appeal the decision, and the Trump administration quickly followed suit on April 10th. Amy Goldstein, *Trump Administration Appeals Rulings That Blocked Medicaid Work Requirements*, WASH. POST (Apr. 10, 2019), <https://www.washingtonpost.com/national/health-science/trump-administration-appeals-rulings-blocking-medicaid-work->

the same arbitrary and capricious standard in rejecting both states' arguments that the financial solvency of the states' individual programs and the financial self-sufficiency of Medicaid recipients were appropriate objectives of the Medicaid program.²⁰ Further, the court noted it was wary of the likely substantial disenrollment of beneficiaries from the programs, and the HHS Secretary's inadequate contemplation of such an effect rendered the section 1115 waivers invalid.²¹ On appeal to the United States Court of Appeals for the D.C. Circuit in October of 2019, during oral arguments, a panel of judges expressed similar skepticism of the states' justifications for their respective waivers.²² The Appeals Court has yet to issue its decision, but the ultimate question of work requirements may well reach the Supreme Court.

This Comment will analyze the validity of Medicaid work requirements in the context of the Supreme Court's equal protection jurisprudence and examine the broader validity of various states' efforts to impose requirements through section 1115 of the Social Security Act. It will argue that requiring Medicaid enrollees to work to remain covered via section 1115 waivers impermissibly discriminates based on economic status and violates the intent and purpose of Medicaid. These requirements impermissibly discriminate based on economic status because policies affecting those experiencing poverty demand heightened scrutiny, or at least a rational basis plus bite analysis, and do not further a legitimate government objective, thus making them

requirements/2019/04/10/689024f6-5bb9-11e9-a00e-050dc7b82693_story.; Amy Goldstein, *Arkansas Governor Seeks Appeal of Decision Voiding Medicaid Work Rules*, WASH. POST (Mar. 28, 2019), https://www.washingtonpost.com/national/health-science/arkansas-governor-seeks-appeal-of-decision-voiding-medicaid-work-rules/2019/03/28/7d88461c-516f-11e9-a3f7-78b7525a8d5f_story.html?utm_term=.057c8ede7e54.

20. *Stewart II*, 366 F. Supp. 3d at 148, 154–55; *Gresham*, 363 F. Supp. 3d at 181. Judge Boasberg noted his displeasure with repeated attempts to impose requirements, most recently finding New Hampshire's efforts to impose work requirements invalid, writing, "we have all seen this movie before." *Philbrick v. Azar*, No. 19-773 (JEB), 2019 WL 3414376, at *2 (D.D.C. July 29, 2019); see Amy Goldstein, *Federal Judge Strikes Down New Hampshire's Medicaid Work Requirements*, WASH. POST (July 29, 2019), https://www.washingtonpost.com/health/federal-judge-strikes-down-new-hampshires-medicaid-work-requirements/2019/07/29/a8e7fb6c-b237-11e9-951e-de024209545d_story.

21. *Stewart II*, 366 F. Supp. 3d at 141–43; *Gresham*, 363 F. Supp. 3d at 175; *Philbrick*, 2019 WL 3414376, at *1.

22. Amy Goldstein, *Appeals Panel Expresses Skepticism About Medicaid Work Requirements*, WASH. POST (Oct. 11, 2019), https://www.washingtonpost.com/health/appeals-panel-expresses-skepticism-about-medicaid-work-requirements/2019/10/11/a8357c4e-eb8a-11e9-9c6d-436a0df4f31d_story. [<https://perma.cc/T3ES-BLLE>].

unconstitutional. Even if such work requirements withstand a Fourteenth Amendment challenge, promoting better health outcomes, saving the state money, and encouraging self-sufficiency at the risk of disenrolling innumerable, otherwise qualified people contravenes the intent and purpose of Medicaid. Rather, the primary purpose of Medicaid is to furnish medical care for indigent populations.

Part I examines the history and structure of the Medicaid program and discusses the program's intent and purpose by scrutinizing legislative history and case law. This Part will also explore the history and use of section 1115 waivers, and the current landscape surrounding work requirements. Part II traces the Supreme Court's equal protection jurisprudence, particularly the Court's treatment of poverty as a protected class. Part III argues that work requirements are invalid because they constitute impermissible economic status discrimination against those experiencing poverty, and, at minimum, would fail a traditional "rational plus bite" review. In the alternative, even if the Court were to reject the equal protection claim, section 1115 waivers petitioning for work requirements violate the intent and purpose of the Medicaid program and thus should be categorically denied.

This Comment concludes by affirming the pivotal role Medicaid plays in bridging historic inequities in access to healthcare and the devastating effect work requirements have on those living in poverty. By considering the consequences of targeting the poor by implementing work requirements, this Comment argues states have a responsibility to ensure access to basic needs. And finally, as part of a broader recognition of the vulnerability of those living in poverty, this Comment will urge the Court to take a more protective view of economic status and fulfill the promises inherent within the Constitution.

I. THE HISTORY OF THE MEDICAID PROGRAM

This Part will provide a background discussion of the history and structure of the Medicaid program. It will explore previous efforts to reform healthcare, the political context of the era, and the legislative history regarding Medicaid. This analysis shows that human dignity was a chief concern of the drafters and that the drafters never contemplated work requirements as a component of eligibility. This Part continues with a glance at where Medicaid stands today, an explanation of section 1115 waivers, and the current landscape of requested changes among the states.

A. *Legislative History of Medicaid*

John F. Kennedy's victory in the 1960 election marked a transformative moment in American politics, as the Democratic platform eschewed the laissez-faire economics of the 1950s and confronted the scourge of deep poverty throughout America.²³ Beginning with President Kennedy and continuing with President Johnson, the executive branch embarked on an ambitious national effort to mitigate economic inequality.²⁴ These initiatives endure in the collective American consciousness with names such as the New Frontier, Great Society, and the War on Poverty.²⁵ Integral to this effort was the passage of Medicare and Medicaid through the Social Security Amendments of 1965 (Title IX).²⁶ This was the culmination of a bruising political battle, as broader comprehensive health insurance programs had eluded Democratic presidents since the Franklin Roosevelt administration.²⁷ Earlier attempts faced widespread opposition from interest groups like the American Medical Association (AMA) and bills attempting to pass old-age health insurance failed in every year from 1952 to 1965.²⁸ After recognizing that the system in place under the Kerr-Mills Act of 1960²⁹ inadequately covered needy individuals, congressional action converged around two separate federal-state programs.³⁰ The Johnson administration then helped push through

23. See Carl M. Brauer, *Kennedy, Johnson, and the War on Poverty*, 69 J. AM. HIST. 98, 99–101 (1982) (tracing the evolution of the Democratic Party's embrace of anti-poverty efforts as contrasted with Republicans' celebration of free enterprise and the "people's capitalism").

24. For a further discussion of the political moment and a collection of different scholarly works, see BRODIE ET AL., *POVERTY LAW, POLICY, AND PRACTICE* 75–77 (2014).

25. See *id.*

26. Pub. L. No. 89-97, § 121, 79 Stat. 286, 288 (1965).

27. Julian E. Zelizer, *How Medicare Was Made*, THE NEW YORKER (Feb. 15, 2015), <https://www.newyorker.com/news/news-desk/medicare-made> [<https://perma.cc/4KU7-PU84>]; see also Wilbur J. Cohen & Robert M. Ball, *Social Security Amendments of 1965: Summary and Legislative History*, SOC. SECURITY ADMIN. BULL., Sept. 1965, at 3, 4, 9, <https://www.ssa.gov/policy/docs/ssb/v28n9/v28n9p3.pdf> [<https://perma.cc/QC P8-Q98P>].

28. *Id.* The words of Representative John Dingell during debate reflect the intensity of the prolonged fight from entrenched opponents to Medicare and Medicaid reform: "What we are doing today is adequate proof that high pressure lobbying tactics and huge expenditures of funds cannot prevail against the will of the American people where the need is as clear as that which cries for enactment of H.R. 6675." 111 CONG. REC. 7442 (1965) (statement of Rep. Dingell).

29. Pub. L. No. 86-778, § 601, 74 Stat. 924, 925 (1960).

30. Only twenty-eight states adopted the Kerr-Mills Act of 1960 which provided means-tested health insurance to elderly citizens. See Cohen & Ball, *supra* note 27, at 6. Further, the guidelines for participation sharply limited eligibility leading to only one

the 1965 Amendments that created the Medicare and Medicaid programs finally administering access to healthcare for individuals over the age of sixty-five and certain indigent individuals regardless of age.³¹

The legislative history reflects an abiding concern over the inadequacies of the current system and a desire to provide a basic safety net for seniors and indigent individuals.³² Shepherded by President Johnson, and buoyed by the results of the 1964 presidential election, Congress ultimately settled on a bill that combined hospital insurance paid for by Social Security taxes, a voluntary program covering physicians paid for by general government revenue, and an expanded version of Kerr-Mills that aimed to provide access to all needy individuals.³³ The crux of Medicaid—while not conceived as a mandatory federal program—then and now is in its cooperative arrangement between the states and the federal government, where the federal government sets minimum requirements that each state must comply with to receive funding for Medicaid.³⁴ The drafters of the 1965 Amendments did not contemplate work requirements for Medicaid; rather, the drafters' principal concern

percent of potential beneficiaries actually receiving benefits. Zelizer, *supra* note 27. By providing states with considerable leeway to create their own eligibility standards, Kerr-Mills led to substantial disparities in the respective quality of the programs; it became generally true that the poorer the state, the poorer the welfare system. Judith D. Moore & David G. Smith, *Legislating Medicaid: Considering Medicaid and Its Origins*, 27 HEALTH CARE FINANCING REV. 45, 46-47 (2006). By 1965, three states accounted for 45% of the total number of participants across the country. *Id.* at 47. The House Ways and Means Committee concluded on the state of healthcare,

[a]lthough your committee believes that the Kerr-Mills legislation as a whole has been very beneficial to the needy aged in our country, it has now concluded that the overall national problem of adequate medical care . . . has not been met to the extent desired . . . because of the failure of some States to implement to the extent anticipated.

H.R. REP. NO. 89-213, at 20 (1965).

31. Zelizer, *supra* note 27.

32. In congressional debates over the 1965 legislation, California Representative Roosevelt and Hawaii's Senator Hiram Fong both emphasized the important role of the legislation in fighting against poverty and preserving the dignity of all Americans. 111 CONG. REC. 7356 (1965) (statement of Rep. Roosevelt); 111 CONG. REC. 18512 (1965) (statement of Sen. Fong).

33. While participation in the Medicaid program was optional for states, the program improved on Kerr-Mills by imposing a categorical obligation on states to cover every public assistance category and evenly distribute benefits. Moore & Smith, *supra* note 30, at 49.

34. CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: INTRODUCTION TO MEDICAID 3-4 (2016) [hereinafter POLICY BASICS], https://www.cbpp.org/sites/default/files/atoms/files/policybasics-medicaid_0.pdf [https://perma.cc/VZS4-62RJ].

was the expansion of a healthcare system that ensured adequate access to medical services for many more Americans.³⁵

B. Medicaid Today

Medicaid has undergone a number of changes since 1965. Congress has expanded federal minimum requirements, provided new coverage options for states, and allowed the program to help pay for healthcare premiums.³⁶ The program gives individual states the flexibility to administer Medicaid so long as it is within the federal guidelines.³⁷ States do not have to participate in Medicaid; but, to receive matching federal funding, those that do participate “must comply with all provisions of the federal Medicaid statute and its implementing regulations, except insofar as individual requirements may be waived by the federal government.”³⁸ In its current form, Medicaid lists eighty-three separate requirements that states must comport with to receive matching federal funding.³⁹ Specifically, state programs must cover mandatory population groups dictated by the federal government, individuals within these groups who meet the minimum financial eligibility criteria, the state’s residents, U.S. citizens, and other eligible immigrants.⁴⁰ Further, the program must cover: children, parents and certain relatives (who are not elderly, blind, or disabled), pregnant women, the elderly, people with disabilities, and individuals under the age of twenty-six who were in foster care until the age of eighteen.⁴¹ For

35. See, e.g., STAFF OF S. COMM. ON FINANCE, 89TH CONG., REP. ON SOCIAL SECURITY AMENDMENTS OF 1965 at 23 (Comm. Print 1965) (“In addition, the committee recommends . . . a strengthening of . . . the Social Security Act so that adequate medical aid may be provided for needy people.”); see also *id.* at 4 (“The committee’s bill would also add a new title XIX to the Social Security Act which would provide a more effective Kerr-Mills program for the aged and extend its provisions to additional needy persons.”).

36. POLICY BASICS, *supra* note 34, at 2–3.

37. *Id.* at 1.

38. *J.K. v. Dillenberg*, 836 F. Supp. 694, 696 (D. Ariz. 1993) (citing *Beltran v. Myers*, 701 F.2d 91, 92 (9th Cir. 1983) (per curiam)).

39. 42 U.S.C. §§ 1396-1, 1396a (2012). Medicaid coverage requirements include inpatient and outpatient services, physician, midwife, and nurse practitioner services, laboratory and x-ray services, nursing and home health care, screening for children under twenty-one, family planning, and rural health centers. See ROBIN RUDOWITZ ET AL., KAISER FAMILY FOUND., 10 THINGS TO KNOW ABOUT MEDICAID: SETTING THE FACTS STRAIGHT 4 (2019), <http://files.kff.org/attachment/Issue-Brief-10-Things-to-Know-about-Medicaid-Setting-the-Facts-Straight> [<https://perma.cc/PV56-DJNU>] (listing the populations that Medicaid covers).

40. § 1396a(a)(10)(A), (b)(2)–(3).

41. § 1396a(a)(10)(A)(i).

states that participate in Medicaid and fulfill the federal requirements, the federal government will compensate all of the state's medical assistance expenses under the state's plan.⁴² The reimbursement is based on the state's relative per capita income.⁴³

Every state in the country has elected to participate in Medicaid, making it the largest public health insurance program in the United States.⁴⁴ It covers roughly 20% of all Americans, mostly consisting of children, people with disabilities, and seniors.⁴⁵ Children account for 43% of all Medicaid beneficiaries while the elderly and people with disabilities combined account for about 25%.⁴⁶ The most prominent change to the Medicaid program came in 2010 with the passage of the Affordable Care Act⁴⁷ (ACA), which broadened eligible recipients to include all nonelderly citizens making within 133% of the Federal Poverty Line (FPL).⁴⁸ Although the Supreme Court declined to require states to expand their programs to cover the newly eligible populations, it allowed states the option to expand coverage on their own and noted that Congress amended Medicaid to exist as part of a "comprehensive national plan to provide universal health insurance coverage."⁴⁹ As of September 2019, thirty-seven states and the District of Columbia have expanded their respective Medicaid programs.⁵⁰

42. §§ 1396b(a)(1), 1396d(b).

43. §§ 1396b(a)(1), 1396d(b).

44. *Medicaid*, NAT'L CONF. ST. LEGISLATURES (June 7, 2018), <http://www.ncsl.org/research/health/medicaid-home-page.aspx> [<https://perma.cc/K9TR-3DMQ>].

45. RUDOWITZ ET AL., *supra* note 39.

46. *Id.*

47. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10201(i), 124 Stat. 119, 922 (codified at 42 U.S.C. § 1315(d)).

48. *Medicaid*, *supra* note 44.

49. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 583 (2012) (striking down the ACA's required Medicaid expansion as running afoul of Congress' spending power due to its coercive elements).

50. *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (Sept. 1, 2019), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map> [<https://perma.cc/EUW8-42VS>].

C. Section 1115 Waivers and the Intent and Purpose of the Medicaid Program

There is an inherent tension embedded within the administration of Medicaid given the dual role for states and the federal government.⁵¹ Still, as noted above, states must follow Medicaid regulations only so far as required by the federal government.⁵² The Social Security Act's section 1115 waivers are a prominent release valve for this tension.⁵³ Section 1115 waivers allow states to petition the Secretary of HHS to approve an "experimental, pilot, or demonstration project"⁵⁴ that waives compliance of some part of the Medicaid Act "to the extent and for the period he finds necessary" to implement the project.⁵⁵ Congress conceived of section 1115 waivers as a way to "test out new ideas and ways of dealing with the problems of public welfare recipients."⁵⁶ However, the Secretary of HHS has limited authority and can only approve a waiver under finite guidance.⁵⁷ Since gaining prominence in

51. Laura D. Hermer, *Federal/State Tensions in Fulfilling Medicaid's Purpose*, 21 ANNALS HEALTH L. 615, 615–17, 636 (2012) (tracing opposition to Medicaid and bemoaning the restrictions placed on beneficiaries as antithetical to the program). Scholars have expressed unease at states' abilities to tinker with Medicaid to placate the political machinations within each state. See Nicole Huberfeld, *Federalizing Medicaid*, 14 UNIV. PA. J. CON. L. 431, 435 (2011) (arguing for the federalizing of Medicaid due to the "political whims" of states infringing upon the purpose of the program); Judith M. Rosenberg & David T. Zaring, *Managing Medicaid Waivers: Section 1115 and State Health Care Reform*, 32 HARV. J. ON LEGIS. 545, 546 (1995) (reflecting on the enormity of the federal government's effort to transform the healthcare system and the states' responses).

52. 42 U.S.C. §§ 1396-1, 1396a (2012).

53. 42 C.F.R. § 430.12(c)(ii) (2017) (noting that any "material changes" must be approved by the Secretary of HHS); see *Wood v. Betlach*, 922 F. Supp. 2d 836, 848-49 (D. Ariz. 2013) (affirming the strictures of section 1115 waivers and the requirement that the waivers must further the objectives of Medicaid); see also Ctrs. for Medicare & Medicaid Servs., *About Section 1115 Demonstrations*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/section-1115-demo/about-1115/index.html> [https://perma.cc/6QHF-2VT2].

54. 42 U.S.C. § 1315(a).

55. *Id.*

56. S. REP. NO. 87-1589, at 19–20 (1962), as reprinted in 1962 U.S.C.C.A.N. 1943, 1961-1962.

57. To approve a waiver, the project must be an experiment, be limited to provisions within the Medicaid Act, be likely to promote the objectives of Medicaid, and be timebound as to the duration of the project. NAT'L CONF. OF STATE LEGISLATURES, UNDERSTANDING MEDICAID: SECTION 1115 WAIVERS: A PRIMER FOR STATE LEGISLATORS 6 (2017) [hereinafter NCSL REPORT], http://www.ncsl.org/Portals/1/Documents/Health/Medicaid_Waivers_State_31797.pdf [https://perma.cc/MTT9-AN75].

the early 1990s, section 1115 waivers have been used for a variety of initiatives, for instance, to expand coverage to childless adults who were not eligible for coverage.⁵⁸ After passage of the ACA in 2010, aside from the thirty-one states and the District of Columbia that expanded Medicaid, seven states used waivers to expand their program and to attach provisions like charging higher premiums.⁵⁹ The waivers currently approved reflect the broad array of uses for which states have applied section 1115.⁶⁰

The waivers do not provide a blank check, as there is an expectation that the HHS Secretary will only sparingly approve projects.⁶¹ Further, waiver approvals are subject to judicial review under the Administrative Procedure Act (APA).⁶² The APA requires an “arbitrary, [and] capricious”⁶³ standard of review, where the agency must fully consider the relevant statutory authority, provide a complete administrative record, hold public comment forums on the prospective waiver, and include any conditions attached to the approval of the waiver.⁶⁴

Courts have invalidated previous waivers under the APA. As discussed above, a court struck down Kentucky’s waiver request attempting to impose work requirements on beneficiaries under the arbitrary and capricious standard.⁶⁵ Additionally, in *Newton-Nations v. Betlach*,⁶⁶ the Ninth Circuit

58. *Id.* at 4.

59. *Id.*

60. For example, Arizona used a section 1115 waiver for a Targeted Investments Program, which incentivized payments to providers for increasing physical and behavioral health integration. California implemented Medi-Cal 2020, which allowed the State to extend its safety net pool for five years and to better integrate care. *Id.* at 8.

61. See *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994) (“Rather, Congress intended that the Secretary would ‘selectively approve[]’ state projects.” (citation omitted)).

62. JANE PERKINS, NAT’L HEALTH L. PROGRAM, BACKGROUND TO MEDICAID AND SECTION 1115 OF THE SOCIAL SECURITY ACT 4 (2017), <https://9kqp4dcaw91s37koz5jx17-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/Medicaid-Section1115BG-04.03.17.pdf> [<https://perma.cc/2ffG-JXQV>].

63. 5 U.S.C. § 706(2)(A) (2012); *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (propounding that the agency must offer a satisfactory explanation that includes a “rational connection between the facts found and the choice made” (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))).

64. PERKINS, *supra* note 62, at 4–5.

65. See *Stewart v. Azar (Stewart I)*, 313 F. Supp. 3d 237, 243 (D.D.C. 2018) (finding that the Secretary’s decision to approve the waiver was “arbitrary and capricious” in not adequately taking into account the potential for substantial disenrollment in the program); see also *Newton-Nations v. Betlach*, 660 F.3d 370, 381–82 (9th Cir. 2011) (overturning a section 1115 waiver from Arizona that required mandatory co-pays because the court found it was simply a cost-saving measure and not the result of intensive health policy research).

66. 660 F.3d 370 (9th Cir. 2011).

rejected a section 1115 waiver that attempted to increase mandatory Medicaid co-payments because the record did not adequately reflect consideration of the plan's effects on beneficiaries and simply manifested an attempt by the state to save money.⁶⁷ Finally, the Act includes limitations that categorically bar the Secretary from approving a state's waiver.⁶⁸

In the interpretation of Medicaid broadly, courts have held in a variety of formulations that the program is a cooperative federal-state operation that provides funds to participating states for medical care of needy individuals.⁶⁹ There is a delicate balance in finding where waivers are an appropriate exercise of a state's discretion, as the Secretary must balance the objectives of Medicaid with the state's desire for flexibility. This has polarized scholars with some lauding the flexibility waivers afford states and others bemoaning the states' abilities to circumvent the underlying purpose of the program.⁷⁰

II. EQUAL PROTECTION JURISPRUDENCE

Part II of this Comment will trace the Supreme Court's equal protection jurisprudence over the last one hundred years. Specifically, this Part will discuss the Court's "discrete and insular minorities" framework, how the Court identifies and addresses fundamental rights, the differing levels of scrutiny the Court applies to government

67. *Id.* at 381 ("Moreover, the administrative record reveals that the purpose of Arizona's waiver application was to save money."). *But see* *Aguayo v. Richardson*, 473 F.2d 1090, 1109 (2d Cir. 1973) (upholding work requirements within the Aid to Families with Dependent Children because the requirements comported with the intent and purpose of the welfare statute and did not reflect an illegitimate end of the state).

68. 42 U.S.C. § 1396a. For example, states cannot waive important provisions like requiring timely access to medical services to all those eligible and requiring reimbursement figures that comport with a rational rate-setting process. *See Restrictions on the Scope of Section 1115 Waivers in the Medicaid Program*, NAT'L HEALTH L. PROGRAM (July 23, 2013), <https://healthlaw.org/resource/restrictions-on-the-scope-of-section-1115-waivers-in-the-medicare-program> [<https://perma.cc/SWU7-V7DM>].

69. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 301 (1980) (noting that Medicaid was created to provide federal assistance to states that choose to reimburse medical costs for indigent persons); *W. Va. Univ. Hosps., Inc. v. Casey*, 885 F.2d 11, 20 (3d Cir. 1989) (describing Medicaid's primary purpose as helping the poor achieve access to health care), *aff'd*, 499 U.S. 83 (1991).

70. *See* Jonathan R. Bolton, *The Case of The Disappearing Statute: A Legal and Policy Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program*, 37 COLUM. J.L. & SOC. PROBS. 91, 94 (2003); Huberfeld, *supra* note 51, at 435 (arguing for the federalization of Medicaid due to the "political whims" of states infringing upon the purpose of the program); Rosenberg & Zaring, *supra* note 51, at 546 (reflecting on the enormity of the federal government's effort to transform the healthcare system and the states' responses).

actions, and how the Court's treatment of poverty within the equal protection analysis has evolved.

A. *The Supreme Court and the Fourteenth Amendment*

The Fourteenth Amendment's Equal Protection Clause prohibits states from imposing laws that treat their citizens differently for reasons that do not further a legitimate government purpose.⁷¹ The modern conception that the Fourteenth Amendment protects minority rights emerged from the famous "Footnote 4" of *United States v. Carolene Products Co.*,⁷² where the Court moved away from striking down economic and business regulations (under threat of President Roosevelt's court-packing plan) towards the protection of vulnerable populations.⁷³ Previously, the Court assiduously avoided proactive protection of minorities, preferring to insert itself in progressive economic reform.⁷⁴ Beginning with *Brown v. Board of Education*,⁷⁵ the Court ushered in the modern era of equal protection jurisprudence, where under the Fifth and Fourteenth Amendments, the Court sought to safeguard fundamental rights and protect against "invidious" discrimination.⁷⁶ Through substantive due process analysis, the Court has recognized these fundamental rights include the right to marriage,⁷⁷ the right to

71. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The Equal Protection Clause of the Fourteenth Amendment, which was incorporated to apply to the states in the mid-twentieth century, states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

72. 304 U.S. 144, 152 n.4 (1938).

73. *See id.* at 153 n.4 ("[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 742 (1985) (applying the concept of "discrete and insular minorities" to contemporary times).

74. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 917–18 (1987) (finding the *Lochner* era to be defined by "government neutrality" and broader skepticism of government intervention).

75. 347 U.S. 483 (1954).

76. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 717–18 (3d ed. 2009).

77. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (striking down a state law that prohibited same-sex marriage).

interstate travel,⁷⁸ the right to parent one's child,⁷⁹ and the right to marital privacy.⁸⁰ The Court created this mechanism by reasoning that these rights are "implicit in the concept of ordered liberty"⁸¹ or "deeply rooted in this Nation's history and tradition."⁸² When considering whether a state's action infringes upon a fundamental right, a court will apply strict scrutiny and consider whether the action is applied narrowly to fit a compelling government interest.⁸³

The Court eventually moved away from expanding fundamental rights and instead developed a "suspect class" framework that asks what level of scrutiny applies to a particular government policy.⁸⁴ Overtime, the Court settled on an analysis that is guided by whether the group in question has suffered historic discrimination, lacks political power, is defined by a trait that is immutable or difficult to change, and whose trait is relevant to a group's ability to contribute to society.⁸⁵ The Court

78. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48–49 (1867) (overruling a statute that taxed citizens upon leaving the Nevada border).

79. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (overruling a statute mandating attendance at public school); *Meyer v. Nebraska*, 262 U.S. 390, 401–03 (1923) (striking down a law restricting the teaching of foreign languages).

80. *See Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (invalidating a state law that forbade the use of contraceptives as violating the right to marital privacy); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992) (plurality) (detailing how protections provided in the Bill of Rights apply to any restraints on freedom).

81. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

82. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503, 506 (1977) (plurality) (finding that a zoning ordinance violated substantive due process by intruding upon the "sanctity of the family").

83. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (holding that a statute prohibiting interracial marriage constituted arbitrary and invidious discrimination); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (finding that a poll tax infringed upon the fundamental right to vote, stating, "[w]e have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined"); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (remarking that a sterilization law for criminals dealt with "one of the basic civil rights of man"); *see also CHEMERINSKY, supra note 76, at 719* ("Under strict scrutiny, a law is upheld if it is proven necessary to achieve a compelling government purpose.").

84. *See Harris v. McRae*, 448 U.S. 297, 322 (1980) ("The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity[.]" (footnote omitted)).

85. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442–45 (1985) (applying the suspect class factors analysis to people with intellectual disabilities); Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 742 (2014) ("If the Court answers 'yes' to some portion of these questions, then it will

recognized race, nationality, religion, and alienage as suspect classes, and under this umbrella struck down legislation that did not meet strict scrutiny.⁸⁶ Gender is quasi-suspect, which requires intermediate, though not strict scrutiny.⁸⁷ Like fundamental rights, throughout the 1970s, the Court limited the expansion of finding protected classes by forcing plaintiffs to show a discriminatory purpose behind a government policy, thereby sharply limiting the Equal Protection Clause's applicability.⁸⁸ Scholars now generally conclude that the Court's equal protection jurisprudence is closed, as the Court is simply unwilling to extend protections beyond the classes it has recognized.⁸⁹

deem that group a suspect or quasi-suspect class and will apply more searching scrutiny to laws discriminating against that group. These twin doctrines (suspect classification analysis and heightened scrutiny) are supposed to identify and protect against laws that enforce invidious discrimination.”).

86. Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. R. 1059, 1078 (2011); see also Pollvogt, *supra* note 85, at 744 (explaining that strict scrutiny requires discriminatory classifications to be narrowly tailored to a compelling government interest, placing the burden upon the government to justify a discriminatory action).

87. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (imposing a less-stringent form of scrutiny, whereby gender classifications “must serve *important* governmental objectives and must be *substantially* related to achievement of those objectives.” (emphasis added)). Note that only three years earlier, the Court suggested, in a plurality opinion, that policies implicating gender should be treated with strict scrutiny. See *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (“[C]lassifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”).

88. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (allowing courts to infer a discriminatory purpose from disparate impact but holding that disparate impact alone is insufficient to demonstrate a racial classification); see also Barnes & Chemerinsky, *supra* note 86, at 1081 (suggesting that the Court has neutered itself because “the combination of the tiers of scrutiny and the requirement for a discriminatory purpose combine to immunize from judicial review countless government actions which create great social inequalities”).

89. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756–57 (2011) (asserting that although litigants have argued that new classifications such as age, disability, and sexual orientation should receive a heightened form of scrutiny, “these attempts have an increasingly antiquated air in federal constitutional litigation At least with respect to federal equal protection jurisprudence, this canon has closed”). However, though states have generally applied the same protections based on their own equal protection clauses, there is still room for classes of individuals to achieve greater protection under state law, as the U.S. Constitution is only a floor. See Stanley H. Friedelbaum, *State Equal Protection: Its Diverse Guises and Effects*, 66 ALB. L. REV. 599, 629 (2003). For instance, Tennessee considers age a suspect class under its state constitution. See *Nat’l Gas Distribs. v. Sevier Cty. Util. Dist.*, 7 S.W.3d 41, 45 (Tenn. Ct. App. 1999).

For government action affecting non-protected classes or fundamental rights, the Court generally applies a “rational basis review,” where the government simply must show some rational justification for the government action.⁹⁰ The Court’s formulation follows that “if there is any reasonably conceivable state of facts” that demonstrates “a rational relationship between the disparity of treatment and some legitimate governmental purpose” then the action is constitutional.⁹¹ The result of the Court’s current jurisprudence is that most government policies survive an equal protection analysis.⁹²

However toothless rational basis review might appear on paper, the Court has still applied a modicum of scrutiny in several cases, utilizing what has come to be known as rational basis review “with bite.”⁹³ For example, the Court has invalidated several government policies affecting those with disabilities,⁹⁴ gay people,⁹⁵ hippies,⁹⁶ and classifications that are “wholly unrelated to the objective” of the government’s regulation.⁹⁷

In *City of Cleburne v. Cleburne Living Center, Inc.*,⁹⁸ the city of Cleburne rejected a permit application on zoning grounds for the construction of a residential home for those who were mentally disabled.⁹⁹ The

90. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (finding that any conceivable justification was sufficient to uphold the legislature’s classification, as long as the classification had a rational purpose). But see *James v. Valtierra*, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting) (suggesting that rational basis review is “no scrutiny whatsoever”).

91. *Heller v. Doe*, 509 U.S. 312, 320 (1993).

92. See CHEMERINSKY, *supra* note 76, at 720 (“The rational basis test is enormously deferential to the government and only rarely have laws been declared unconstitutional for failing to meet this level of review.”).

93. See Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 630 (2008) (stating that when the Court finds invidious discrimination it applies rational basis review “with bite” by prohibiting the government action even though it does not implicate a fundamental right or protected class).

94. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435, 465 (1985) (denying heightened scrutiny for people with intellectual disabilities but striking down a city program for its reliance on false stereotypes).

95. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (overturning a Colorado law prohibiting the passage of legislation that protected the status of homosexuals).

96. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) (striking down a statute that reflected “a bare congressional desire to harm a politically unpopular group”).

97. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (invalidating a state law that prohibited access to contraceptives for unmarried persons, concluding that there was no rational basis for the state’s differential treatment between the married and unmarried persons).

98. 473 U.S. 432 (1985).

99. *Id.* at 446.

Court reversed the city's denial, but in doing so, refused to extend quasi-suspect protection to those who are mentally impaired, as the lower courts had suggested.¹⁰⁰ However, the Court still struck down the requirement for the permit using rational basis review because it found that the permit requirement rested on "an irrational prejudice against the mentally retarded."¹⁰¹ In *Romer v. Evans*,¹⁰² the Court confronted an approved amendment to Colorado's state constitution that prohibited the legislature from passing any protections for gay people.¹⁰³ Colorado argued that this amendment was a necessary protection for other citizens' religious views and the State's interest in the conservation of resources to fight other discrimination.¹⁰⁴ The Court rejected this reasoning and overturned the amendment, stating that the proposed change was not "directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests."¹⁰⁵ Finally, in *United States Department of Agriculture v. Moreno*,¹⁰⁶ the Court considered an amendment to a government welfare program that denied benefits to families who, while they met the income requirements, consisted of people who were not directly related (households containing more than one unrelated person were barred).¹⁰⁷ Applying a rational basis test, the Court found that this limitation was improper because it barred hippies and hippie communes from participating in the food stamp program, which simply reflected a "bare congressional desire to harm a politically unpopular group," thus not reflective of a "legitimate governmental interest."¹⁰⁸

These cases suggest that there is a mechanism by which the Court can subvert its traditional equal protection analysis if it detects particularly invidious discrimination by the state.¹⁰⁹

100. *Id.*

101. *Id.* at 450.

102. 517 U.S. 620 (1996).

103. *Id.*

104. *Id.* at 635.

105. *Id.*

106. 413 U.S. 528 (1973).

107. *Id.* at 531.

108. *Id.* at 534.

109. *But see* Yoshino, *supra* note 89, at 763 ("Yet even the Court's rational basis with bite protection will ground out at a certain point . . . Pluralism anxiety has operated, and will continue to operate, as a serious obstacle to the recognition of classification-specific judicial protections . . .").

B. Poverty as a Protected Class

The Court has treated poverty as a protected class, or at the very least, has intimated that poverty implicates serious equal protection considerations.¹¹⁰ In *Harper v. Virginia Board of Elections*,¹¹¹ the Court struck down the use of poll taxes.¹¹² The majority stated, “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.”¹¹³ The Court expressed palpable unease tying voter qualifications to wealth, as it found no plausible state interest in conditioning the right to vote on money; this was unlike the ability to read and write where the Court imputed some reasonable state interest.¹¹⁴

Shortly following the Court’s proactive stance in recognizing the precariousness of economic status, the Court buttressed its ability to strike down classifications within social and economic legislation in *Levy v. Louisiana*.¹¹⁵ There, the Court invalidated a state law that prevented children born out of wedlock from recovering in a wrongful death lawsuit involving their birth mother.¹¹⁶ In writing for the majority, Justice Douglas wrote, “[i]n applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications However that might be, we have been extremely sensitive when it comes to basic civil rights.”¹¹⁷ Finally, in *McDonald v. Board of Election Commissioners*,¹¹⁸ another case that implicated election law and wealth, the Court upheld a state provision that denied absentee ballots to persons held before trial.¹¹⁹

110. See Julie A. Nice, *Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection*, 60 DRAKE L. REV. 1023, 1044 (2012) (“In these examples, the Supreme Court interpreted equal protection as requiring heightened judicial scrutiny of regulations burdening poor people.”).

111. 383 U.S. 663 (1966).

112. *Id.* at 670.

113. *Id.* at 668 (citation omitted).

114. See *id.* at 666 (“But the *Lassiter* case does not govern the result here, because, unlike a poll tax, the ‘ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot.’” (citation omitted)).

115. 391 U.S. 68 (1968).

116. See *id.* at 71–72 (affirming that even though the State’s policy might have had “history and tradition on its side,” the Court could still intervene if the policy reflected “invidious discrimination”).

117. *Id.* at 71.

118. 394 U.S. 802 (1969).

119. *Id.* at 810–11.

The Court was satisfied by the legislature's deliberate determination of adding different groups over a period of time that were deemed eligible for an absentee ballot.¹²⁰ Further, the Court was assuaged because this was not a distinction based on wealth and race.¹²¹ To wit, the Court went out of its way to affirm the sensitivity of such classifications based on wealth or race, writing, "a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."¹²² Where the Court identifies invidious discrimination, an antenna goes up, and the Court will favor intervention even where it might traditionally defer to the states.

With regard to criminal cases, the Court has taken an even more protective stance towards those living in poverty. Specifically, in *Griffin v. Illinois*,¹²³ the Court struck down a statute denying indigent defendants the right to appeal their convictions because the defendants could not pay for their requisite administrative record.¹²⁴ The Court pondered the inequities inherent in the criminal justice system relating to wealth, finding "our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons."¹²⁵ In a series of subsequent decisions throughout the 1960s and beyond, the Court proscribed substantial protections for indigent criminal defendants.¹²⁶ Discrimination based on wealth in the criminal

120. *Id.* at 811.

121. *Id.* at 807.

122. *Id.* (citation omitted).

123. 351 U.S. 12 (1956).

124. *Id.* at 19. The Court required the defendants to obtain the administrative record before filing their appeal. The Court rigorously staked out its claim, writing, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.*

125. *Id.* at 17.

126. *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (rejecting revocation of probation for failure to pay fine due to the defendant's destitution); *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1968) (striking down a statute that required unsuccessful criminal appellants to pay the cost of their trial transcript); *Douglas v. California*, 372 U.S. 353, 355, 357 (1963) (holding that a state's denial of appellate counsel for an indigent defendant drew an "unconstitutional line" between rich and poor defendants); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (mandating the right to counsel for indigent criminal defendants).

context raised an unavoidable red flag that implicated serious equal protection concerns.¹²⁷

The Court abruptly ended its flirtation with protecting economic status classifications outside the criminal context following the Warren Court. In a series of cases in the 1970s, the Court backed away from intervening where poverty was implicated, as the Court hinted at its tremendous unease with substituting its own judgment for that of legislatures.¹²⁸ Most notably, the Court curtailed its judicial protection for those living in poverty in *Dandridge v. Williams*.¹²⁹ The Court upheld Maryland's cap on the total amount of monthly welfare payments, Aid to Families with Dependent Children (AFDC), regardless of family size.¹³⁰ Rather than provide heightened scrutiny, the Court chose to apply rational basis review for social and economic classifications and found that the state had a legitimate interest in curtailing welfare payments and encouraging employment.¹³¹ The majority stated, "it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy."¹³² The Court was satisfied by the State's seemingly threadbare justification of the need to manage its finite amount of welfare resources.¹³³ *Dandridge* is widely seen as foreclosing judicial protection of economic status classifications; however, Justice Marshall's dissenting opinion left open the possibility of reopening the door.¹³⁴ Nevertheless, in subsequent cases, the Court has abandoned its treatment

127. *Griffin*, 351 U.S. at 23–24 (Frankfurter, J., concurring) ("To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law . . . The State is not free to produce such a squalid discrimination.").

128. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

129. 397 U.S. 471 (1970).

130. *Id.* at 486.

131. *Id.*

132. *Id.* at 485–86.

133. *Id.* at 486.

134. *Id.* at 508 (Marshall, J., dissenting) ("The Court recognizes, as it must, that this case involves 'the most basic economic needs of impoverished human beings,' and that there is therefore a 'dramatically real factual difference' between the instant case and those decisions upon which the Court relies.").

of poverty as a suspect class or at least refrained from demanding heightened scrutiny for laws that discriminated based on economic status.¹³⁵

Ultimately, while economic status is not technically a protected class, the Court's jurisprudence suggests that classifications based on poverty raise substantial equal protection concerns and require a fresh analysis. As some scholars have suggested, while the Court has repeatedly held that classifications based on poverty alone do not mandate strict scrutiny, the Court has never definitively stated that poverty is categorically not a suspect classification.¹³⁶ Potential ways the Court might reconfigure its approach towards protections for those living in poverty figure prominently in the following section.¹³⁷

III. ANALYSIS

Part III of this Comment will argue that work requirements impermissibly discriminate based on economic status. This Part will show that under the Court's traditional "discrete and insular minority" framework, poverty fits within the strictures the Court has laid out. Even if not, this Comment will show that work requirements would still fail under a "rational basis plus bite" review. Finally, this Part will argue that even if the Court refuses to apply any heightened scrutiny to programs affecting those in poverty, work requirements still violate the intent and purpose of the Medicaid program.

A. *Work Requirements Reflect Impermissible Economic Status Discrimination*

Work requirements fail under a reinvigorated equal protection analysis. Under a traditional "discrete and insular minorities" analysis, economic

135. See *Harris v. McRae*, 448 U.S. 297, 323 (1980) ("[P]overty, standing alone, is not a suspect classification."); *Maher v. Roe*, 432 U.S. 464, 471 (1977) ("[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) ("[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . ."). *But see James v. Valtierra*, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting) (castigating the majority's refusal to overturn a state initiative requiring local voter approval for low-income housing as applying "no scrutiny whatsoever").

136. See 42 U.S.C. § 1396a(a)(10)(A)–(B) (2012) (requiring participating states to cover all members of covered population groups and not only subsets of a group described within the Act); see also Nice, *supra* note 110, at 1041 ("There is a critical distinction between the accurate statement that the Court has never held poverty to be a suspect classification and the inaccurate statement that the Court has actually held that poverty is not a suspect classification.").

137. *Infra* Section III.A.

status warrants a higher standard of scrutiny because those experiencing poverty face extreme vulnerability, historical discrimination, political powerlessness, and an inability to escape their economic circumstances.¹³⁸ Under a heightened scrutiny review, or even rational basis plus teeth analysis, work requirements would fail due to the discriminatory effects of the program and the burdens placed on those living in poverty. Since those burdened by the imposition of work requirements are invidiously discriminated against for experiencing poverty, attempts to implement similar programs should be struck down.

Historical precedent provides an opening for the Court to apply heightened scrutiny to programs affecting those living in poverty.¹³⁹ The Court has suggested on numerous occasions that classifications based solely on poverty warrant heightened scrutiny.¹⁴⁰ In *Dandridge*, where the Court purportedly limited classifications based on poverty to business-like rational basis review, the Court also stated that there is a “dramatically real factual difference” between regulations affecting those living in poverty and businesses, yet it never actually grappled with this concern.¹⁴¹ A number of scholars in recent years have used widening income inequality to call for renewed protections for those living in poverty and have queried whether now is the time for the Court to reappraise the possibility of poverty reaching the level of a suspect class.¹⁴²

138. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

139. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666, 668 (1966) (striking down poll taxes and finding that “[v]oter qualifications have no relation to wealth”). Wealth in a criminal context has always garnered considerable concern from the Court. See, e.g., *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966) (finding that a distinction based on punishment had no rational connection with a transcript cost and was thus unconstitutional); *Douglas v. California*, 372 U.S. 353, 355, 357 (1963) (requiring appellate counsel for an indigent defendant in an appeal of right); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (requiring counsel for indigent criminal defendants).

140. See, e.g., *McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802, 807 (1969) (“[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.” (citation omitted)).

141. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

142. See Maurice R. Dyson, *Rethinking Rodriguez After Citizens United: The Poor as a Suspect Class in High-Poverty Schools*, 24 *GEO. J. POVERTY L. & POL’Y* 1, 2 (2016) (“[O]n repeated occasions over the years, the Court has provided surprising dicta . . . that supports the notion that under the right factual pleadings and evidence, poverty might constitute a suspect class.”); Cary Franklin, *The New Class Blindness*, 128 *YALE L.J.* 2, 97–98 (2018) (arguing that the Court has never repudiated the idea of using the Fourteenth Amendment to prevent states from interfering with citizens’ fundamental rights and cautioning the Court against heading down this path); Goodwin Liu,

Evaluating the “dramatically real factual difference” noted in *Dandridge*¹⁴³ between the regulation of business and regulations relating to people in poverty, the “discrete and insular” minority analysis appears to satisfy the Court’s framework on its face. First, those living in poverty face extreme vulnerability as the oft-noted victims of predatory state actors.¹⁴⁴ Next, those living in poverty have faced persistent historical discrimination preceding the Nation’s founding.¹⁴⁵ Additionally, those without wealth lack real political power as access to the political system is largely confined to economic elites.¹⁴⁶ Even further, poverty ensnares those within its grasp, creating a de facto immutability of characteristic as evidenced by entrenched social immobility.¹⁴⁷ And finally, those

Rethinking Constitutional Welfare Rights, 61 STAN. L. REV. 203, 268 (2008) (arguing that the possibility of courts treating poverty with greater judicial scrutiny is dependent not on increased litigation but on an evolution in popular norms regarding wealth in our public culture); Nice, *supra* note 110, at 1031, 1033 (raising the glaring issue that poor people are denied equal protection under the Constitution and also lack the financial clout necessary to gain political protection); Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283, 1283 (2018) (arguing that Congress should proactively include poverty within anti-discrimination statutes). The most prominent scholar to initially call for greater protections for those experiencing poverty within the Fourteenth Amendment framework was Professor Frank Michelman. See Frank I. Michelman, *Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 8 (1969) (arguing that claims made under poverty protections are best understood as material deprivations rather than unequal treatment).

143. 397 U.S. at 487.

144. See, e.g., STEVEN H. WOOLF ET AL., URBAN INST., HOW ARE INCOME AND WEALTH LINKED TO HEALTH AND LONGEVITY? 1 (2015), <https://www.urban.org/sites/default/files/publication/49116/2000178-How-are-Income-and-Wealth-Linked-to-Health-and-Longevity.pdf> [<https://perma.cc/9AS2-ZYKC>] (highlighting the predation often visited upon those experiencing poverty); Matthew Shaer, *How Cities Make Money by Fining the Poor*, N.Y. TIMES MAG. (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html> [<http://perma.cc/T52S-DKCD>].

145. See, e.g., NANCY ISENBERG, WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA at xv–xvi (2016) (sketching the endurance of class within the American political framework and its applicability throughout American history); see also Alec MacGillis, *The Original Underclass*, ATLANTIC (Sept. 2016), <https://www.theatlantic.com/magazine/archive/2016/09/the-original-underclass/492731> [<https://perma.cc/JT9L-S3TH>] (discussing the imposition of class divides in colonial America).

146. See, e.g., Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERS. ON POL. 564, 576 (2014) (delineating models of political responsiveness and the overwhelming influence that elites and business interests have over the American political system, finding “[w]hen a majority of citizens disagrees with economic elites or with organized interests, they generally lose”).

147. See, e.g., PABLO A MITNIK & DAVID B. GRUSKY, PEW CHARITABLE TRS. & RUSSELL SAGE FOUND., ECONOMIC MOBILITY IN THE UNITED STATES 5 (2015),

living in poverty face persistent societal disapproval, as caricatures and stereotypes run rampant throughout American society.¹⁴⁸ Should the Court reopen its equal protection jurisprudence, poverty presents an ideal group to protect with some form of heightened scrutiny.¹⁴⁹ Under such scrutiny, work requirements would fail given the lack of a compelling, narrowly tailored, state interest and the ultimate effect of denying access to medical assistance.¹⁵⁰

Analyzing the Court's jurisprudence in a few instrumental cases provides a particularly useful insight into how it might treat poverty, work requirements, and heightened scrutiny. In *Levy v. Louisiana*,¹⁵¹ the Court invalidated a state law that prevented children born out of wedlock from recovering in a wrongful death lawsuit involving their birth mother.¹⁵² The Court found Louisiana's policy disfavoring children born out of wedlock, as justified by the State's interest in preserving the traditional

https://www.pewtrusts.org/-/media/assets/2015/07/fsm-irs-report_artfinal.pdf [<https://perma.cc/ZY3Z-X23V>] (commenting that children born in low income homes will likely end up as low income adults). Compare *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25–26 (1973) (suggesting that poverty as a class is unfeasible because its definition would be too broad under a traditional analysis), with Peterman, *supra* note 142, at 1342 (arguing that socioeconomic status, or current financial situation, is a sufficient measure because it is a simple question of defining whether a person is “currently poor”).

148. See, e.g., Sandra K. Schneider, *The Impact of Welfare Reform on Medicaid*, in *WELFARE REFORM: A RACE TO THE BOTTOM?* 197–98 (Sanford F. Schram & Samuel H. Beer eds., 1999) (connecting welfare reform and open appeals to work ethic to states' efforts to enshrine personal responsibility and access to healthcare); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 *GEO. L.J.* 1499, 1500 (1991) (arguing that there has been a long history of labeling the poor as morally distinct and weak); Anat Shenker-Osorio, *Why Americans All Believe They Are 'Middle Class'*, *ATLANTIC* (Aug. 1, 2013), <https://www.theatlantic.com/politics/archive/2013/08/why-americans-all-believe-they-are-middle-class/278240> [<https://perma.cc/5BFY-ZU9J>] (expanding upon Americans' notions of self-worth and reluctance to be associated with negative connotations of class by reasoning, for example, “[i]f homelessness is the salient exemplar [of poverty], people are unlikely to say they're ‘poor.’”).

149. See Nice, *supra* note 110, at 1050–51 (“Justice Stewart utterly failed to grapple with how this ‘dramatically real factual difference’ might matter for the level of judicial scrutiny, and instead simply declared that the majority found ‘no basis for applying a different constitutional standard’ . . . Really? No basis in the reasoning of footnote four of *Carolene Products*?” (footnotes omitted)).

150. See Pollvogt, *supra* note 85, at 744 (explaining strict scrutiny to require discriminatory classification to be narrowly tailored to a compelling government interest).

151. 391 U.S. 68 (1968).

152. See *id.* at 71–72 (1968) (affirming that even though the State's policy might have “had history and tradition on its side,” the Court could still intervene if the policy reflected “invidious discrimination”).

family, invalid because it implicated the children's basic rights and reflected "invidious discrimination."¹⁵³ Further, in *Harper v. Virginia Board of Elections*, the Court struck down a poll tax in applying a more searching judicial inquiry and rejected the State's rationale that it could tie voting to wealth like requiring a fee for driving.¹⁵⁴ The Court rejected wealth as a precondition to voting, calling it a "capricious or irrelevant factor" compared to the importance of voting.¹⁵⁵ Here, as applied to work requirements, encouraging employment and self-sufficiency might be a rational extension of a state's welfare program and an appropriate justification under the most superficial rational basis review.¹⁵⁶ But, within the context of Medicaid, work requirements fail to meet any level of heightened scrutiny because of their invidious targeting of a class of people and the ultimate deprivation of a fundamental necessity—healthcare.¹⁵⁷

Finally, work requirements have the potential to extend their consequences far beyond their intended targets, suggesting that far from being narrowly tailored, this state action is likely overbroad and capricious.¹⁵⁸ Before the lower federal court intervened to halt the implementation of work requirements in Arkansas, a substantial number of beneficiaries (approximately 18,000) lost access to their benefits, in part due to the confusing nature of the program and the attendant bureaucratic machinery created by the State.¹⁵⁹ Critically, the vast majority of Medicaid beneficiaries already work, go to school, care

153. *Id.* at 71.

154. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966).

155. *Id.*

156. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (utilizing rational basis review to uphold any conceivable justification even if the justification was not stated on the legislative record).

157. *Contra Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970) (upholding, under a rational basis standard, Maryland's efforts to ration its welfare payments per family without consideration of total family size). Healthcare, like voting and familial status, implicates an area of traditional concern for the Court and is not simply an allotment of money based on a state budget.

158. RACHEL GARFIELD ET AL., KAISER FAMILY FOUND., IMPLICATIONS OF A MEDICAID WORK REQUIREMENT: NATIONAL ESTIMATES OF POTENTIAL COVERAGE LOSSES 1 (2018), <https://www.kff.org/medicaid/issue-brief/implications-of-a-medicaid-work-requirement-national-estimates-of-potential-coverage-losses> [<https://perma.cc/C54W-U8AB>] (finding that because most Medicaid beneficiaries already work, most "disenrollment would be among individuals who would remain eligible but lose coverage due to new administrative burdens or red tape versus those who would lose eligibility due to not meeting new work requirements").

159. Foreclosing upon access to healthcare is a material deprivation with the possibility of devastating long-term effects. *See Goldstein, Job-Scarce Town Struggles*, *supra* note 12.

for a dependent relative, or are disabled.¹⁶⁰ With potentially boundless scope, requiring hundreds of thousands of beneficiaries who already work to submit to arduous reporting requirements and the inevitable confusion that follows, reflects a callous indifference to those experiencing poverty.¹⁶¹ Even if states were to refine the mechanisms by which beneficiaries could comply with work requirements, the effect would still create a material deprivation. Denying access to a previously conferred public benefit—access to basic healthcare no less—with the potential to deprive tens of thousands, is far from narrowly tailored or reflective of a compelling state interest.¹⁶² It is effectively capricious discrimination, a state action the Court strives to stamp out, particularly given the importance of access to healthcare.

B. “Rational Basis Plus Bite” as Applied to Work Requirements

If the Court’s equal protection jurisprudence is truly closed, as suggested by some,¹⁶³ there is still an opening for the Court to grapple with the “dramatically real factual” distinction between regulations affecting businesses and classifications based on social or economic status.¹⁶⁴ The Court can still apply a “rational basis plus bite” review of state action affecting those living in poverty and subject the policies to a more searching judicial inquiry.¹⁶⁵

160. See RACHEL GARFIELD ET AL., KAISER FAMILY FOUND., UNDERSTANDING THE INTERSECTION OF MEDICAID AND WORK: WHAT DOES THE DATA SAY? 2 (2019), <http://files.kff.org/attachment/Issue-Brief-Understanding-the-Intersection-of-Medicaid-and-Work-What-Does-the-Data-Say> [<https://perma.cc/PLG3-Z66Q>] (finding that nearly eight in ten nonelderly beneficiaries live in working families, and a majority work themselves); see also Lola Fadulu, *Why States Want Certain Americans to Work for Medicaid*, ATLANTIC (Apr. 12, 2019), <https://www.theatlantic.com/health/archive/2019/04/medicaid-work-requirements-seema-verma-cms/587026> [<https://perma.cc/7TN9-XQ68>] (positing a racial undertone to various states’ efforts to impose work requirements for Medicaid).

161. See Fadulu, *supra* note 160 (discussing people losing Medicaid coverage due to an inability to access or navigate the website).

162. Under Professor Michelman’s equal protection deprivation framework, a state limiting access to healthcare and thus preventing the ability to fulfill basic needs, would fail judicial scrutiny. See Michelman, *supra* note 142, at 58.

163. See Yoshino, *supra* note 89, at 757–59 (stipulating that the canon of heightened scrutiny for new recognized classes is closed, but that the Court’s strengthening of rational basis review could open the door to stronger protections).

164. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

165. For the discussion of what constitutes rational basis plus bite see *infra* Section III.C.

Rational basis plus bite would compel the striking down of Medicaid work requirements.¹⁶⁶ The question becomes whether the Medicaid work requirements are rational/reasonable and whether they reflect “invidious discrimination” towards those living in poverty.¹⁶⁷ Like the Court’s reasoning in *City of Cleburne*, *Romer*, and *Moreno*, where the Court did not apply heightened scrutiny but still found that the respective state action invidiously targeted specific groups, under a “rational plus bite” review,¹⁶⁸ work requirements likely also fail given that this state action deliberately, or “invidiously,” targets poor people and deprives them of access to healthcare.¹⁶⁹ Even though the rational basis review is highly deferential to the state, in each of the above cases, the Court rejected each state’s reasoning because it viewed the state action as a pretext to target a class of people.¹⁷⁰ Given that the justifications for imposing work requirements on Medicaid beneficiaries are not rationally related to their purported interest, and the effect these requirements will have in disenrolling beneficiaries from Medicaid programs, work requirements fail under enhanced rational basis review.¹⁷¹ The precipitous drop in the Medicaid insurance program enrollment is a prima facie case for irrationality as the state action disproportionately impacts those living in poverty and would create an adverse effect on health outcomes across

166. See Nice, *supra* note 110, at 1053 (“If the courts nonetheless continue to assert that heightened scrutiny is not warranted, my second suggestion is for the courts to conduct an actual, factual, practical, and contextual review of the purported relation between the government’s means and its ends to determine whether this linkage is in fact rational or reasonable.”). *But see* Pollvogt, *supra* note 85, at 739 (suggesting suspect classifications are too rigid and as such the Court should embrace their rational plus bite review so that it is forced to evaluate concrete evidence as to why an act of discrimination can be justified); Yoshino, *supra* note 89, at 761 (“Yet the importance of this rational basis with bite standard should not be exaggerated. Rational basis with bite review is not equivalent to formal heightened scrutiny.”).

167. See Nice, *supra* note 110, at 1054 (pointing out where the Court has stepped in and identified invidious discrimination even without applying heightened scrutiny).

168. *Romer v. Evans*, 517 U.S. 620, 623, 632–33 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

169. See Dyson, *supra* note 142, at 6–7 (arguing for a “poverty-plus” approach to effectively challenge not only facially discriminatory practices, but also “indirect discriminatory practices” faced by those in poverty).

170. See, e.g., *Romer*, 517 U.S. at 635 (proclaiming a “status-based” classification regarding gay people antithetical to the protections of the 14th Amendment).

171. See GARFIELD ET AL., *supra* note 160, at 1.

the state.¹⁷² The consequences of such a state policy have the potential to extend far beyond the intended targets and as such reflects “invidious discrimination.”¹⁷³ Recall the vast majority of Medicaid beneficiaries already work, go to school, care for a dependent relative, or are disabled.¹⁷⁴ Further, work requirements would upend the stated aim of the Medicaid program—to furnish access to healthcare—suggesting the targeting of those experiencing poverty.¹⁷⁵ As the Court has suggested in its jurisprudence, state interests in encouraging self-sufficiency or preserving government coffers may be outweighed by the ultimate effect of the state action. Rather than be tailored to a legitimate state goal, work requirements are effectively a status-based, targeted classification that perniciously impact all people living in poverty and thus must fail even under a rational basis review.

The implications of heightened scrutiny as applied to those living in poverty are far-reaching and would not only raise immediate questions about the applicability of work requirements for Medicaid eligibility but also for welfare benefits generally.¹⁷⁶ If the Court is willing to extend judicial protections for vulnerable populations based on economic status, the rationalization for work requirements for other programs would likely fall apart given the absence of a legitimate state interest in denying access to a minimum standard of living.¹⁷⁷ This would effectively ensure that each person has some baseline protection from want and would reorient our understanding of equality under the Constitution.¹⁷⁸

172. See *id.* at 10 (note the substantial drop in Arkansas alone); *Medicaid Briefs: Who Is Harmed By Work Requirements?*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/medicaid-briefs-who-is-harmed-by-work-requirements> [<https://perma.cc/2JCL-9Q59>] (last updated Mar. 14, 2019) (collection of research reflecting the pervasive harm work requirements will inevitably cause to different vulnerable populations).

173. GARFIELD ET AL., *supra* note 158 (warning of the far-reaching consequences of implementing work requirements).

174. See GARFIELD ET AL., *supra* note 160 and accompanying text (noting over 63% work, 74% of those non-working are in school or a caretaker, and 51% of those not working have a functional limitation).

175. *W. Va. Univ. Hosps., Inc. v. Casey*, 885 F.2d 11, 20 (3d Cir. 1989), *aff'd*, 499 U.S. 83 (1991).

176. Huberfeld, *supra* note 8, at 790–91.

177. See Michelman, *supra* note 142, at 58 (proposing that equal protection claims should be viewed under a material deprivation, or bare minimum framework, where the Court strives to ensure that every citizen has an adequate ability to secure their welfare).

178. See Ganesh Sitaraman, *Our Constitution Wasn't Built for This*, N.Y. TIMES: SUNDAY REV. (Sept. 16, 2017), <https://www.nytimes.com/2017/09/16/opinion/sunday/constitution-economy.html> [<https://perma.cc/AS3S-BS49>] (arguing that the Founders failed to account for the possibility of a severe increase in economic

C. *Work Requirements Violate the Intent and Purpose of Medicaid*

If work requirements withstand an equal protection challenge, they should still fail under the traditional section 1115 review as violative of the intent and purpose of the Medicaid program. Since its inception in 1965, Medicaid has served as a critical lifeline for low-income individuals in providing access to long-term care.¹⁷⁹ In evaluating the appropriateness of states' section 1115 waivers work requirements, the central inquiry is whether work requirements comport with the intent and purpose of Medicaid.¹⁸⁰ According to CMS, work requirements align with the Medicaid Act because work and community engagement are "anchored in historic CMS principles that emphasize work to promote health and well-being."¹⁸¹ Specifically, CMS argues that work requirements and volunteering will spur self-sufficiency and employment thereby leading to positive health outcomes in the long run.¹⁸² However, this tendentious reasoning obfuscates the intent and purpose of Medicaid, as the program's primary purpose is to provide access to healthcare.¹⁸³ Even before the drafting of the original legislation, lawmakers recognized a need to help states care for increasingly cost-heavy, care-reliant populations.¹⁸⁴ In reality, work requirements are simply a cost-saving measure for states with the ultimate effect of disenrolling recipients due to burdensome monthly requirements and few exceptions for current beneficiaries.¹⁸⁵

inequality and urging a refocusing of the Constitution to better confront the oversight of the founders' documents).

179. KAISER FAMILY FOUND., WHY DOES THE MEDICAID DEBATE MATTER? NATIONAL DATA AND VOICES OF PEOPLE WITH MEDICAID HIGHLIGHT MEDICAID'S ROLE 1 (2017), <http://files.kff.org/attachment/Fact-Sheet-Why-Does-the-Medicaid-Debate-Matter> [<https://perma.cc/9KP8-PBJ5>].

180. 42 U.S.C. § 1315(a)(1) (2012); *see also* Huberfeld, *supra* note 8 (arguing that work requirements are inconsistent with the Medicaid Act because the Act has never emphasized work).

181. *See* State Medicaid Directors Letter, *supra* note 6 (suggesting that work requirements will improve self-sufficiency by incentivizing work and therefore leading to improved health outcomes over time). This shift in 2018 represents a profound change in administrative priorities, as only a year prior CMS rejected Arizona's request to impose work requirements for Medicaid. *See* Letter from Andrew M. Slavitt, Acting Adm'r, U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., to Thomas Betlach, Dir., Az. Health Care Cost Containment Sys. (Sept. 30, 2016) (explicitly disallowing work requirements for Medicaid, finding that the requirements "do not support the objectives of the [Medicaid] program" and "could undermine access to care").

182. State Medicaid Directors Letter, *supra* note 6.

183. Zelizer, *supra* note 27.

184. *Id.*

185. *See* Katch et al., *supra* note 7.

In arguments before the district court regarding the State of Kentucky's request to impose work requirements, the HHS Secretary suggested that a work mandate satisfies the purpose of Medicaid because the requirements promote "greater independence," and "reduc[e] reliance on public assistance" by serving as a mechanism for providing rehabilitation services and encouraging self-sufficiency.¹⁸⁶ However, the district court noted this is insufficient, "[t]he text, however, quite clearly limits its objectives to helping States furnish rehabilitation and other services that might promote self-care and independence. It does not follow that limiting access to medical assistance would further the same end."¹⁸⁷ Work requirements impose immediate and unavoidable roadblocks to continued participation in the program, affecting those who are most vulnerable and effectively deny access to medical assistance.¹⁸⁸

Additionally, judicial interpretations of the purpose of the Medicaid program have repeatedly affirmed the primary objective of Medicaid as furnishing access to health care, not promoting independence.¹⁸⁹ In various contexts, courts have upheld the idea of Medicaid to be a cooperative program under which the federal government provides funding and baseline requirements to have states provide medical services

186. See *Stewart v. Azar (Stewart I)*, 313 F. Supp. 3d 237, 271 (D.D.C. 2018) ("The Secretary primarily cites Section 1396-1 in defense of that purpose, which appropriates money so that states can 'furnish . . . rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care.'"); see also *Stewart v. Azar (Stewart II)*, 366 F. Supp. 3d 125, 146 (D.D.C. 2019) (reaffirming that "self-sufficiency" is not an objective of the Medicaid program and that it is irrelevant that the State only applies the requirements to the expansion population). The district court, in its most recent decision regarding the validity of work requirements, expressed its profound frustration at the HHS Secretary's repeated failure to consider the primary objective of Medicaid—furnishing medical assistance. See *id.* at 155-56 ("Rather than follow that direction, the Secretary doubled down on his consideration of other aims of the Medicaid Act . . . the Court has some question about HHS's ability to cure the defects in the approval.").

187. *Stewart I*, 313 F. Supp. 3d at 271.

188. See *Katch et al., supra* note 7; ROBIN RUDOWITZ ET AL., KAISER FAMILY FOUND., FEBRUARY STATE DATA FOR MEDICAID WORK REQUIREMENTS IN ARKANSAS (2019), <http://files.kff.org/attachment/State-Data-for-Medicaid-Work-Requirements-in-Arkansas> [<https://perma.cc/HZ9P-AGCQ>] (noting that over 18,000 people lost coverage due to the work and reporting requirements).

189. See, e.g., *W. Va. Univ. Hosps., Inc. v. Casey*, 885 F.2d 11, 20 (3d Cir. 1989) ("[T]he primary purpose of [M]edicaid is to achieve the praiseworthy social objective of granting health care coverage to those who cannot afford it."), *aff'd*, 499 U.S. 83 (1991).

to eligible individuals.¹⁹⁰ Congress never contemplated encouraging self-sufficiency through mandated employment or volunteering by conditioning federal funding to Medicaid work requirements.¹⁹¹ Similar to the Ninth Circuit in *Newton-Nations v. Betlach*, where the court found that Arizona's mandatory increased co-pays did not have a research or demonstration value (when viewed in the context of the Medicaid program) and were simply a cost-saving mechanism,¹⁹² work requirements reflect a cost-saving motivation that fails to provide a compelling demonstration or research value to the state.¹⁹³

A plain reading of the statute also reflects Medicaid's primary purpose to furnish medical assistance. The statute creating the program reads:

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or . . . disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this [subchapter].¹⁹⁴

Nothing within the legislative history, text of the statute, or judicial interpretations of the Medicaid program reflects a desire or opening for work requirements.¹⁹⁵ Dignity and access to basic healthcare were the primary motivations of the legislation.¹⁹⁶ Further, there is a lack of definitive evidence that work requirements are effective at increasing

190. *See id.* (describing the goal of reimbursing hospitals for caring for Medicaid-eligible patients); *see also* *Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985) (noting Congress designed Medicaid to “subsidize[]” states in “funding . . . medical services for the needy”); *Ohio Dep’t of Medicaid v. Price*, 864 F.3d 469, 472 (6th Cir. 2017); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457–58 (5th Cir. 2017).

191. *See* *Cohen & Ball*, *supra* note 27, at 3–4 (discussing the goals of Medicaid through the legislative process); *supra* note 32 and accompanying text (Congressional Record and reports).

192. *Newton-Nations v. Betlach*, 660 F.3d 370, 381 (9th Cir. 2011).

193. *See id.* (“The administrative record contains no finding from the Secretary that Arizona’s demonstration project will actually demonstrate something different than the last 35-years’ worth of health policy research.”).

194. Social Security Act of 1965, Pub. L. No. 89-97, § 121(a), 79 Stat. 343 (codified as amended at 42 U.S.C. § 1396-1 (2012)).

195. *Cohen & Ball*, *supra* note 27; *see also supra* note 32 and accompanying text.

196. *See supra* notes 28–31 and accompanying text.

rates of employment over the long term, jeopardizing the central justification of states like Kentucky in proposing these requirements.¹⁹⁷

An illustrative point of comparison of congressional intent regarding work requirements and benefits exists between Welfare Reform of the 1990s and Medicaid.¹⁹⁸ In paradigm-shifting legislation reforming access to welfare benefits in 1996, Congress dramatically altered access to government welfare by writing “personal responsibility” into the title of the reform act.¹⁹⁹ The subsequent changes to welfare created stringent work requirements (or participation in job training programs) that explicitly tied the receipt of benefits to work.²⁰⁰ Congress cloaked the reforms in moral justifications of preserving the sanctity of the family by imposing harsh requirements.²⁰¹ Welfare reform largely reflected a cultural shift, beginning in the 1980s with the ascendance of the Reagan administration, that vilified those purportedly taking advantage of government benefits and who were ostensibly defrauding the system en masse.²⁰² In contrast to welfare reform,

197. See Alvin Chang & Tara Golshan, *The Republicans Push for Welfare “Work Requirements,”* *Cartoonsplained*, VOX (July 26, 2018), <https://www.vox.com/2018/7/26/17465068/work-requirements-medicaid-snap-republican-cartoon> [<https://perma.cc/R2H2-SWFD>] (commenting that work requirements encouraged people to work in the short term, but the effect of the work requirement diminished a few years later).

198. See Laura D. Hermer, *What to Expect When You’re Expecting . . . TANF-Style Medicaid Waivers*, 27 *ANNALS HEALTH L.* 37, 55–60 (2018) (evaluating the potential acceptance of Medicaid work requirements, in the same vein as SNAP and TANF justifications, and explaining the potential for negative consequences given that the majority of Medicaid recipients already work).

199. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

200. Two programs, Supplemental Nutrition Assistance Program (SNAP), commonly known as Food Stamps or EBT, and Temporary Assistance for Needy Families (TANF), imposed strict eligibility requirements largely centered around work. Supplemental Nutrition Assistance Program, Pub. L. No. 97-98, § 1333, 95 Stat. 1291 (1981) (codified at 7 U.S.C. § 2029 (2012)); Temporary Assistance for Needy Families, Pub. L. No. 104-193, § 103(a)(1), 110 Stat. 2129 (1996) (codified at 42 U.S.C. § 607).

201. See *supra* note 200; see also Claudia Schlosberg & Joel D. Ferber, *Access to Medicaid Since the Personal Responsibility and Work Opportunity Reconciliation Act*, 31 *CLEARINGHOUSE REV.* 528, 528–29 (1998) (detailing how welfare reform laid the foundation for restrictions in access to Medicaid).

202. The impetus for welfare reform was catalyzed by harsh rhetoric surrounding recipients of government benefits, culminating most notably with the term, “Welfare Queen.” See Rachel Black & Aleta Sprague, *The Rise and Reign of the Welfare Queen*, *NEW AM.* (Sept. 22, 2016), <https://www.newamerica.org/weekly/edition-135/rise-and-reign-welfare-queen> (highlighting how continued welfare reform of the last decade has clung to the tenet of equating poverty and criminality); see also PETER B. EDELMAN,

Congress has only expanded eligible populations for Medicaid.²⁰³ With the passage of the ACA, Medicaid expansion was understood to be part of a systemic shift towards a national healthcare model, as the program is one mechanism for needy individuals to receive access to care.²⁰⁴ Therefore, the implementation of work requirements directly contradicts the intent of Congress by thwarting an expressed goal of the legislature.

Work requirements, as currently structured, present implacable barriers to retaining eligibility within the Medicaid program.²⁰⁵ As noted twice by the District Court in *Stewart v. Azar*, the approval of Kentucky's (and later Arkansas's) section 1115 waiver was "arbitrary and capricious" for failing to account for the upwards of 95,000 Kentucky residents who were liable to be disenrolled from the Medicaid program due to the imposition of work requirements.²⁰⁶ Courts retain the ability to strike down section 1115

NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 92 (2017) (understanding welfare reform as a broader effort to criminalize poverty and its effects); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 162 (1996) (demonstrating public support declines for welfare reform when opposition to government programs exploits stereotypes about its primary beneficiaries); Nicole Huberfeld & Jessica L. Roberts, *Health Care and the Myth of Self-Reliance*, 57 B.C. L. REV. 1 (2016) (underscoring the stereotypes of dependency underlying requirements for government benefits); Ross, *supra* note 148, at 1500 (arguing that there has been a long history of labeling the poor as morally distinct and weak).

203. See RUDOWITZ ET AL., *supra* note 39, at 3 (tracing Medicaid eligibility expansions to children, pregnant women, and people with disabilities as well as the Children's Health Insurance Program (CHIP) which helped cover children from low-income families and enroll them in both CHIP and Medicaid).

204. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 583 (2012) ("The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.").

205. See Timothy Stoltzfus Jost, *Health Care in the United States and the Affordable Care Act*, 43 HUM. RTS. 6, 8 (2018) (noting that most Medicaid adults are working, disabled, in school, or taking care of family and that "[a] recent study found that 46 percent of all beneficiaries, and one-quarter of beneficiaries who worked 1,000 hours a year, would fail to meet the 80-hour requirement at least one month a year"); see also Katch et al., *supra* note 7; RUDOWITZ ET AL., *supra* note 188, at 1 (finding that since Arkansas' work requirements have been implemented 18,000 residents have been disenrolled from Medicaid in 2018).

206. *Stewart II*, 366 F. Supp. 3d 125, 140 (D.D.C. 2019); *Stewart I*, 313 F. Supp. 3d 237, 265 (D.D.C. 2018) ("At bottom, the record shows that 95,000 people would lose Medicaid coverage, and yet the Secretary paid no attention to that deprivation. Nor did he address how Kentucky HEALTH would otherwise help 'furnish . . . medical

waivers should they run afoul of the objectives of the program and harm those the programs were designed to protect.²⁰⁷ The primary objective of Medicaid is to furnish access to medical assistance; as such, work requirements directly contravene the stated objective of the healthcare program by preventing those most in need of medical assistance of keeping it.²⁰⁸ Not only are the states' various efforts to impose barriers to Medicaid arbitrary and capricious for failing to consider the disenrollment effect on recipients as discussed by the District Court for the District of Columbia, but they are also fundamentally flawed for not furthering an objective of Medicaid. Thus, given that work requirements violate the intent and purpose of Medicaid, the requirements should be found presumptively invalid.

CONCLUSION

At the signing ceremony for the Social Security Amendments of 1965 President Johnson stated,

Few can see past the speeches and the political battles to the doctor over there that is tending the infirm, and to the hospital that is receiving those in anguish, or feel in their heart painful wrath at the injustice which denies the miracle of healing to the old and to the poor.²⁰⁹

Regrettably, states across the country are attempting to curtail access to “the miracle of healing” with the potential implementation of work requirements. These work requirements subvert congressional intent and offend the guarantees implicit within the Constitution. By imposing work requirements on Medicaid beneficiaries through section 1115 waivers, states impermissibly discriminate based on economic status and violate the intent and purpose of the Medicaid program. These requirements reflect

assistance.’ . . . By doing so, he ‘failed to consider adequately’ a salient purpose of Medicaid and, thus, an important aspect of the problem.”).

207. *Nazareth Hosp. v. Sec’y U.S. Dep’t of Health & Human Servs.*, 747 F.3d 172, 181 (3d Cir. 2014) (“In fact, a Section 1115 waiver project can be vacated if a court finds that the Secretary could not have rationally found the program likely to advance the objectives of Medicaid.” (citing *Newton-Nations v. Betlach*, 660 F.3d 370, 381 (9th Cir. 2011)); *see also* *Beno v. Shalala*, 30 F.3d 1057, 1070 (9th Cir. 1994). It is equally important to distinguish between Welfare and Medicaid here when contemplating the intent and purpose of each respective program. Courts have upheld section 1115 waivers in the welfare context because the legislature deliberately considered tying work to benefits, thus the tethering was within the intent and purpose of the statute. *See Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973).

208. *See RUDOWITZ ET AL.*, *supra* note 39, at 2–3 (emphasizing the devastating effects work requirements would have on Medicaid beneficiaries due to their inability to meet the program’s new mandate).

209. President Johnson, *supra* note 1.

impermissible economic status discrimination because policies affecting impoverished communities deserve heightened scrutiny, or at least a rational basis plus bite analysis, and do not further a legitimate government objective, making them unconstitutional. Even if work requirements survive a constitutional assault, promoting better health outcomes and encouraging self-sufficiency at the risk of disenrolling innumerable, otherwise qualified people contravenes the intent and purpose of Medicaid, which is to furnish medical care for indigent populations.

Work requirements reflect impermissible economic status discrimination. Programs affecting those living in poverty deserve heightened scrutiny under a traditional “discrete and insular minorities” analysis, as these populations face extreme vulnerability, historical discrimination, political powerlessness, and largely an inability to escape their economic circumstances. Under heightened scrutiny, work requirements fail because they unduly target those living in poverty and are not narrowly tailored and do not promote a compelling government interest. Moreover, even if equal protection jurisprudence is closed, state action relating to those in poverty would still fail under a rational plus bite analysis. Work requirements target poor people and do not rationally further a state interest, effectively mirroring the invidious and capricious discrimination, which the Court has vigilantly struck down in the past, even without applying heightened scrutiny.

Notwithstanding judicial interpretations of whether incentivizing work comports with the objectives of the Medicaid program, the clear purpose of the cooperative federalism structure of the Medicaid program is to “furnish medical assistance,” not to promote self-sufficiency or positive health outcomes. Cost-saving justifications alone under section 1115 waivers are invalid and, should be categorically denied. Further, unlike welfare reform, Congress never contemplated tying work requirements to the receipt of Medicaid. Therefore, efforts to use section 1115 waivers to impose such requirements are invalid for their failure to rationally further an objective of the Medicaid program.

If the Preamble is our constitutional lodestar, under which we are to truly create a “more perfect union” that “promote[s] the general welfare,”²¹⁰ then the Constitution ought to enshrine a fundamental

210. U.S. CONST. pmb. For a discussion of the Preamble’s effect across the globe, see Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT’L. J. CONST. L. 714, 719–20 (2010) (analyzing the meaning of the Preamble as understood by the Founders, one of whom, James Monroe, saw the Preamble as the “Key of the Constitution”); Milton Handler, Brian Leiter & Carole E. Handler, *A Reconsideration of*

principle of equality and guarantee freedom from material deprivation. This equality should permeate our constitutional jurisprudence and provide protections to those who are trapped by the obstinance of economic circumstance. Poverty should not be an impenetrable trap. Access to healthcare and welfare benefits ought not to be restricted through the imposition of work requirements. We need not all be required to “work 9 to 5.”

the Relevance and Materiality of the Preamble in Constitutional Interpretation, 12 CARDOZO L. REV. 117, 125–27 (1990) (arguing that while preambles do not create rights, they should be used to interpret specific provisions within the Constitution). *But see* *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) (“Although [the] Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States . . .”).