POOR LAW: THE DEFICIT REDUCTION ACT'S CITIZENSHIP DOCUMENTATION REQUIREMENT FOR MEDICAID ELIGIBILITY

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On February 8, 2006, President George W. Bush signed the Deficit Reduction Act of 2005 (the "DRA").[1] Included in the DRA is a new requirement that federal Medicaid funding must be denied to individuals who claim U.S. citizenship but are unable to produce acceptable documentation. Entitled "Improved Enforcement of Documentation Requirements," the provision appears in Section 6036 of the DRA,[2] amending 42 U.S.C. § 1396b.

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[1] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6036, 120 Stat. 4, 171 (2006). Due to a clerical error, the two houses of Congress passed versions of the DRA that contain substantively different provisions regulating Medicare payments for durable medical equipment. Rep. Dennis Hastert, Speaker of the House, nonetheless certified the more restrictive Senate version, which was signed by President Bush. As of this writing, the constitutionality of this procedure—a question outside the scope of this comment—has been challenged in two suits arguing that House and Senate language was not identical at passage. No decisions have yet been rendered. *See* Jonathan Weisman, *Spending Measure Not a Law, Suit Says, Senate, House Versions Are Different*, WASHINGTON POST, Mar. 22, 2006, at A4; Press Release, Public Citizen, Deficit Reduction Act Challenged By Second Lawsuit (Mar. 30, 2006), *available at* http://www.prwebdirect.com/releases/2006/3/prweb365911.php; *see also* Letter from U.S. Representative Henry A. Waxman to U.S. Representative Nancy Pelosi (Feb. 14, 2006), http://www.democrats.reform.house.gov/Documents/20060214170704-70767.pdf (summarizing arguments as to the unconstitutionality of the certification procedure).

[2] Section 6036 of the Deficit Reduction Act of 2005 provides the following:

(a) IN GENERAL.—Section 1903 of the Social Security Act (42 U.S.C. 1396b) is amended—

. . . .

(2) by adding at the end the following new subsection:

"(x)(1) For purposes of subsection (i)(23), the requirement of this subsection is, with respect to an individual declaring to be a citizen or national of the United States, that, subject to paragraph (2), there is presented satisfactory documentary evidence of citizenship or nationality (as defined in paragraph (3)) of the individual.

"(2) The requirement of paragraph (1) shall not apply to an alien who is eligible for medical assistance under this title—

"(A) and is entitled to or enrolled for benefits under any part of title XVIII;

"(B) on the basis of receiving supplemental security income benefits under title XVI; or

"(C) on such other basis as the Secretary may specify under which satisfactory documentary evidence of citizenship or nationality had been previously presented.

This comment argues that the citizenship documentation requirement of Section 6036 is incompatible with constitutionally-mandated norms of justice and equality; that the Supreme Court has sound doctrinal footing for a decision to enforce these norms by voiding Section 6036 under a heightened rational basis standard of review; and that, as a matter of judicial policy, such review is appropriate.

I. THE NEW SECTION 6036 REQUIREMENT

"Medicaid" is a creature of 42 USC § 19, which authorizes the federal government to appropriate funds:

"(3)(A) For purposes of this subsection, the term 'satisfactory documentary evidence of citizenship or nationality' means—

"(i) any document described in subparagraph (B); or

"(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

"(B) The following are documents described in this subparagraph:

"(i) A United States passport.

"(ii) Form N-550 or N-570 (Certificate of Naturalization).

"(iii) Form N-560 or N-561 (Certificate of United States Citizenship).

"(iv) A valid State-issued driver's license or other identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act, but only if the State issuing the license or such document requires proof of United States citizenship before issuance of such license or document or obtains a social security number from the applicant and verifies before certification that such number is valid and assigned to the applicant who is a citizen.

"(v) Such other document as the Secretary may specify, by regulation, that provides proof of United States citizenship or nationality and that provides a reliable means of documentation of personal identity.

"(C) The following are documents described in this subparagraph:

"(i) A certificate of birth in the United States.

"(ii) Form FS-545 or Form DS-1350 (Certification of Birth Abroad).

"(iii) Form I-97 (United States Citizen Identification Card).

"(iv) Form FS-240 (Report of Birth Abroad of a Citizen of the United States).

"(v) Such other document (not described in subparagraph (B)(iv)) as the Secretary may specify that provides proof of United States citizenship or nationality.

"(D) The following are documents described in this subparagraph:

"(i) Any identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act.

"(ii) Any other documentation of personal identity of such other type as the Secretary finds, by regulation, provides a reliable means of identification.

"(E) A reference in this paragraph to a form includes a reference to any successor form.'

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply to determinations of initial eligibility for medical assistance made on or after July 1, 2006, and to redeterminations of eligibility made on or after such date in the case of individuals for whom the requirement of section 1903(z) of the Social Security Act, as added by such amendments, was not previously met.

(c) IMPLEMENTATION REQUIREMENT.—As soon as practicable after the date of enactment of this Act, the Secretary of Health and Human Services shall establish an outreach program that is designed to educate individuals who are likely to be affected by the requirements of subsections (i)(23) and (x) of section 1903 of the Social Security Act (as added by subsection (a)) about such requirements and how they may be satisfied.

> [f]or 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 . . . .[3]

If a state creates a Medicaid program, it must "provide—for making medical assistance available . . . to . . . all individuals" who are members of certain mandatory groups.[4] These groups include: children under age six living in a family with an income below 133% of the federal poverty line ("FPL"); children under age nineteen living in a family with an income at or below the FPL; parents with an income that would have qualified them for Aid to Families with Dependent Children ("AFDC"—previously "welfare") as of July 1996 (nationwide, this is a median income of 42% of the federal poverty line);[5] pregnant women with an income at or below 133% of the federal poverty line; certain elderly or disabled individuals who are Medicare beneficiaries; and certain impoverished elderly, blind, and disabled recipients of Supplemental Security Income ("SSI").[6]

Today, Medicaid is the largest single source of health care funding for the poorest Americans.[7] As of June 2004, approximately 41 mil-

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[3] 42 U.S.C. § 1396 (2000).

[4] 42 U.S.C. §§ 1396a(a)10–(a)(10)(A)(i) (2000).

[5] The federal "poverty line" for the continental United States is an annual income of $9,570 for one person and $16,090 for a family of three. Annual Update of the HHS Poverty Guidelines, 70 Fed. Reg. 8373, 8373–75 (Feb. 18, 2005).

[6] 42 U.S.C. § 1396a(a)(10)(A)(i) (2000). For mandatory groups, there is a certain level of mandatory coverage. States may expand this coverage in certain ways if they so choose. *See generally* DEPT. OF HEALTH AND HUMAN SERVS., CENTERS FOR MEDICARE & MEDICAID SERVS., CENTER FOR MEDICAID AND STATE OPERATIONS, MEDICAID AT-A-GLANCE 2005: A MEDICAID INFORMATION SOURCE 3 (2005), http://www.cms.hhs.gov/MedicaidGenInfo/Downloads/MedicaidAtAGlance2005.pdf; EARL DIRK HOFFMAN, JR., CLARE M. MCFARLAND & CATHERINE A. CURTIS, BRIEF SUMMARIES OF MEDICARE & MEDICAID: TITLE XVIII AND TITLE XIX OF THE SOCIAL SECURITY ACT 13–17 (2002), http://www.cms.hhs.gov/MedicareProgramRatesStats/downloads/MedicareMedicaidSummaries2002.pdf; ANNA SOMMERS, ARUNABH GHOSH & DAVID ROUSSEAU, MEDICAID ENROLLMENT AND SPENDING BY "MANDATORY" AND "OPTIONAL" ELIGIBILITY AND BENEFIT CATEGORIES (2005), http://www.kff.org/medicaid/upload/Medicaid-Enrollment-and-Spending-by-Mandatory-and-Optional-Eligibility-and-Benefit-Categories-Report.pdf. Federal Medicaid policy is implemented by the Centers for Medicare and Medicaid Services ("CMS") of the United States Department of Health and Human Services ("DHHS").

[7] *See* HOFFMAN ET AL., *supra* note 6, at 12 ("Medicaid is the largest source of funding for medical and health-related services for America's poorest people."); *see also* VERNON K. SMITH, MAKING MEDICAID BETTER: OPTIONS TO ALLOW STATES TO CONTINUE TO PARTICIPATE AND TO BRING THE PROGRAM UP TO DATE IN TODAY'S HEALTH CARE MARKETPLACE 3 (2002), http://www.nga.org/Files/pdf/MAKINGMEDICAIDBETTER.pdf ("It is difficult to overestimate the importance and impact of Medicaid, because the program is so large, it serves so many people in so many different population groups and plays a role in helping to finance virtually every state program that relates to health.").

lion individuals—14% of the U.S. population—received Medicaid benefits.[8] In the 2004 fiscal year, the federal government spent $176 billion on Medicaid[9] (nearly 8% of total federal spending)[10] and states combined spent $115 billion[11] (nearly 22% of total state spending).[12] In 2000 and 2001, Medicaid financed 56.2% of births in Louisiana, 52.6% in Alaska, and 51.7% in New Mexico.[13]

The average annual family income of adults covered by a Medicaid program was estimated at $18,614 in 2001.[14] The vast majority of beneficiaries cannot afford to pay for medical services out-of-pocket as needed, do not have access to an employer-provided health insurance plan, and cannot afford to purchase insurance independently.[15]

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[8] *See* EILEEN R. ELLIS, VERNON K. SMITH & DAVID M. ROUSSEAU, MEDICAID ENROLLMENT IN 50 STATES: JUNE 2004 DATA UPDATE 4 (2005), http://www.kff.org/medicaid/upload/7349.pdf (documenting Medicaid enrollment growth since 2000). The U.S. population in 2004 was 288,280,000. U.S. CENSUS BUREAU, POPULATION BY SEX, AGE, AND U.S. CITIZENSHIP STATUS 1 (2004), http://www.census.gov/population/socdemo/foreign/ppl-176/tab01-1.pdf.

[9] CONGRESSIONAL BUDGET OFFICE, MONTHLY BUDGET REVIEW: A CONGRESSIONAL BUDGET OFFICE ANALYSIS 2 (2005), *available at* http://www.cbo.gov/showdoc.cfm?index=6693&sequence=0 (reporting budgetary information for the fiscal year 2005).

[10] Total federal spending in 2004 was $2.293 trillion. Congressional Budget Office, *Historical Budget Data* 2 (2006), http://www.cbo.gov/budget/historical.pdf.

[11] *See* Press Release, CMS, Healthcare Spending Growth Rate Continues to Decline in 2004: Drug Spending Growth One-Half of Rate Five Years Ago (Jan. 10, 2006), http://www.cms.hhs.gov/apps/ media/press/release.asp?Counter=1750 (estimating total federal and state Medicaid costs for 2004 at $291 billion).

[12] Total state spending in 2004 was $523 billion. NATIONAL GOVERNORS ASSOCIATION & NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES 18 (2005), http://www.nasbo.org/Publications/fiscalsurvey/fsfall2005.pdf (reporting FY 2004 state fiscal data).

[13] NATIONAL GOVERNORS ASSOCIATION CENTER FOR BEST PRACTICES, MCH UPDATE: STATES PROTECT HEALTH CARE COVERAGE DURING RECENT FISCAL DOWNTURN 6 (2005), http://preview.nga.org/Files/pdf/0508MCHUPDATE.PDF (evaluating Medicaid service provision to women and children).

[14] KAISER COMMISSION ON MEDICAID AND THE UNINSURED, MEDICAID: A LOWER COST APPROACH TO SERVING A HIGH COST POPULATION 2 (2004), *available at* http://www.kff.org/medicaid/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=33829 (citing Jack Hadley & John Holahan, *Is Health Care Spending Higher under Medicaid or Private Insurance?*, 40 INQUIRY 323 (2003)).

[15] *See* AMY DAVIDOFF, BOWEN GARRETT & ALSHADYE YEMANE, URBAN INSTITUTE, MEDICAID-ELIGIBLE ADULTS WHO ARE NOT ENROLLED: WHO ARE THEY AND DO THEY GET THE CARE THEY NEED? 2 (2001), http://www.urban.org/UploadedPDF/310378_anf_a48.pdf (concluding that Medicaid-eligible adults who do not enroll and are uninsured face substantial barriers to access to medical care); KAISER COMMISSION ON MEDICAID AND THE UNINSURED, THE MEDICAID PROGRAM AT A GLANCE 1 (2005), http://www.kff.org/medicaid/upload/The-Medicaid-Program-at-a-Glance-Fact-Sheet.pdf ("In general, private health insurance is not an option for the Medicaid population . . . . In the absence of the Medicaid program, the vast majority of its beneficiaries would join the ranks of the 45 million uninsured Americans."); SHARON K. LONG & JOHN A. GRAVES, URBAN INSTITUTE, KAISER COMMISSION ON MEDICAID AND THE UNINSURED, WHAT HAPPENS WHEN PUBLIC COVERAGE IS NO LONGER AVAILABLE? 6 (2006), http://www.kff.org/medicaid/upload/7449.pdf ("Given the lack of affordable alternatives for

For them, loss of access to Medicaid-funded health care means loss of access to health care—and to health itself.[16]

One of the federal baseline requirements for full Medicaid eligibility is that recipients be U.S. citizens, nationals, or qualified aliens.[17] The category of "qualified alien" was created in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") and includes lawful permanent residents, refugees, asylees, and certain other narrowly defined groups. To qualify for public benefits, qualified aliens must present documentation of their immigration status, which then also must be verified by the Immigration and Naturalization Service ("INS").[18] By contrast, federal law did not, before the passage of the 2005 DRA, impose similar requirements upon Medicaid applicants claiming U.S. citizenship or nationality. Such individuals were required only to submit "a declaration in writing, under penalty of perjury . . . stating whether the individual is a citizen or national of the United States."[19] States were free to impose more stringent documentation requirements, but they were discouraged from doing so by the federal agency entrusted with oversight of the Medicaid program, the Centers for Medicare and

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coverage, it is likely that, in the face of cutbacks in eligibility for public programs, the vast majority of affected current enrollees will become uninsured . . .").

[16] *See* COMMISSION ON THE CONSEQUENCES OF UNINSURANCE, INSTITUTE OF MEDICINE, CARE WITHOUT COVERAGE: TOO LITTLE, TOO LATE 1–2 (2002) (finding that the uninsured receive less preventive care, less appropriate care for chronic illnesses, and fewer hospital services when admitted); Janet Currie & Jonathan Gruber, *Health Insurance Eligibility, Utilization of Medical Care and Child Health*, 111 Q. J. ECON. 431, 454 (1996) (reporting that expansions of Medicaid eligibility for low-income children in the late 1980s and early 1990s led to a 5.1 percent reduction in childhood deaths); Jack Hadley, *Sicker and Poorer—The Consequences of Being Uninsured: A Review of the Research on the Relationship between Health Insurance, Medical Care Use, Health, Work, and Income*, 60 MED. CARE RES. & REV. 3S, 60S (2003) (surveying the substantial body of research supporting hypotheses that having health insurance improves health); Nicole Lurie et al., *Termination from Medi-Cal Benefits: A Follow-up Study One Year Later*, 314 NEW ENG. J. MED. 1266, 1268 (1996) (finding that California's decision to remove medically indigent adults from the state medical benefits program led to worsened access to care for those individuals).

[17] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C). Congress's power to discriminate in this manner has been clearly established. *See* Mathews v. Diaz, 426 U.S. 67, 84 (1976) (upholding federal discrimination on the basis of alienage in allocation of Medicaid benefits against an equal protection challenge by applying minimal rational basis review); Lewis v. Thompson, 252 F.3d 567, 583 (2d Cir. 2001) (same); City of Chicago v. Shalala, 189 F.3d 598, 598–99 (7th Cir. 1999) (same, concerning welfare benefits); Rodriguez v. United States, 169 F.3d 1342, 1342 (11th Cir. 1999) (same, concerning allocation of SSI and food stamps). *But see* Graham v. Richardson, 403 U.S. 365, 374–75 (1971) (striking down state discrimination on the basis of alienage in the allocation of welfare benefits as a violation of the Equal Protection Clause, applying heightened scrutiny).

[18] *See* CMS, Questions and Answers on Verification of Citizenship and Immigration Status, http://www.cms.hhs.gov/MedicaidEligibility/downloads/Verification4.pdf (listing the citizenship verification requirements for Medicaid applicants).

[19] 42 U.S.C. 1320b-7(d)(1)(A) (2000).

Medicaid Services ("CMS"). Instead, CMS recommended addressing fraud through strategies such as verifying the accuracy of citizenship statements against independent sources and conducting post-eligibility reviews.[20]

At the time President Bush signed the DRA, forty-six states and the District of Columbia followed CMS recommendations and accepted self-declarations as proof of citizenship for the purpose of determining Medicaid eligibility in at least some circumstances.[21] Forty-four of these jurisdictions followed a "prudent person policy," providing that officials must require documentation from applicants whose statements are deemed questionable.[22] An additional four states required supporting documentary evidence in all cases.[23]

Section 6036 completely revises this system. Under the new law, states will no longer be free to shape their own policies with respect to citizenship verification. Instead they will be required by federal law to withhold federal Medicaid dollars from individuals who apply as U.S. citizens or nationals but cannot provide "satisfactory documentary evidence of citizenship."[24] Section 6036 specifically defines "satisfactory documentary evidence" as either (1) a passport or other government-issued certification of citizenship or nationality or (2) a U.S. birth certificate or equivalent document plus additional proof of identity.[25] The Secretary of Health and Human Services is authorized to designate documents that may substitute for a passport in category

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[20] *See* DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL, SELF-DECLARATION OF U.S. CITIZENSHIP FOR MEDICAID 18–19 (2005), http://oig.hhs.gov/oei/reports/oei-02-03-00190.pdf (presenting CMS policy and recommendations concerning citizenship fraud prevention) [hereinafter HHS SELF-DECLARATION]; CTRS. FOR MEDICARE AND MEDICAID SERVS., CONTINUING THE PROGRESS: ENROLLING AND RETAINING LOW-INCOME FAMILIES AND CHILDREN IN HEALTH CARE COVERAGE 3 (2001), http://www.childrenspartnership.org/AM/Template.cfm?Section=Medcaid_and_SCHIP&CONTENTID=6495&TEMPLATE=/CM/ContentDisplay.cfm [hereinafter CMS PROG-RESS] (discouraging requirement of household Social Security information for Medicaid approval).

[21] *See* HHS SELF-DECLARATION, *supra* note 20, at 9 (surveying methods employed by states to verify citizenship for Medicaid purposes).

[22] *Id.*

[23] *Id.* Note that these states too may be required to revise their procedures to comply with Section 6036. For instance, New York requires documentation from all applicants, but in the absence of "primary documentation" will accept "secondary documentation," including: a letter indicating that a search for a birth certificate failed to locate one, an early school record, or a notarized affidavit from a blood relative familiar with circumstances of birth. STATE OF NEW YORK DEP'T OF HEALTH, CITIZENSHIP AND ALIEN STATUS REQUIREMENTS FOR THE MEDICAID PROGRAM 9–10 (2004), http://www.health.state.ny.us/health_care/medicaid/publications/docs/adm/04adm-7.pdf.

[24] 42 U.S.C. § 1396b (2000), *amended by* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6036, 120 Stat. 4, 171 (2006).

[25] *Id. See also* LEIGHTON KU & MATT BROADDUS, CENTER FOR BUDGET & POL'Y PRIORITIES NEW REQUIREMENT FOR BIRTH CERTIFICATES OR PASSPORTS COULD THREATEN MEDICAID COVERAGE FOR VULNERABLE BENEFICIARIES: A STATE-BY-STATE ANALYSIS (2006), http://www.cbpp.org/1-5-06health.pdf (reviewing DRA document requirements).

1. But in order to enter the pool of documents that are eligible to be so designated, a document must provide "proof of United States citizenship or nationality"[26] and also be "a reliable means of documentation of personal identity."[27] Similarly, the secretary may designate documents that may substitute for a birth certificate in category 2, but only if such documents "provide[] proof of United States citizenship or nationality."[28] These limiting requirements swallow up the discretion that the provisions seem at first glance to allow.[29]

II. WHAT WILL SECTION 6036 DO?

In its current version, Section 6036 "shall apply to determinations of initial eligibility for medical assistance made on or after July 1, 2006, and to re-determinations of eligibility made on or after such date in the case of individuals for whom the requirement . . . was not previously met."[30] State Medicaid agencies generally must redetermine the eligibility of the recipient every 12 months."[31] Of approximately 41 million current Medicaid recipients, 92% qualify as U.S. citizens.[32] The states thus will be required to make almost 38 million citizenship determinations between July 1, 2006 and July 1, 2007.[33] CMS' new "quality control" system, meanwhile, threatens to impose fiscal penalties upon states that fail to enforce federal requirements in a timely manner.[34]

There has been no public discussion of the legislative intent of Section 6036 aside from that provided by U.S. Representative Charlie

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[26] DRA, § 6036(a)

[27] *Id.*

[28] *Id.*

[29] John Stone, a spokesman for Rep. Norwood, has claimed that Section 6036 provides "wiggle room" so that "the secretary could establish that an elderly person who has received Social Security benefits for years is obviously a citizen." Eunice Moscoso, *Bill Adds Citizen ID Test for Medicaid*, COX NEWS SERVICE, Jan. 19, 2006, http://www.oxfordpress.com/news/content/shared/news/nation/stories/2006/01/NATIMMIG0119A_5REP.html. This is not the law. Even assuming that a person were able to produce a "document" proving receipt of Social Security benefits over a long period of time, such a document would not provide "proof of United States citizenship" because non-citizens may receive Social Security benefits. DAWN NUSCHLER & ALISON SISKIN, CONG. RESRCH. SERVS., SOCIAL SECURITY BENEFITS FOR NONCITIZENS: CURRENT POLICY AND LEGISLATION 4 (2004) ("To qualify for benefits, workers (whether citizens or noncitizens) must work in Social Security covered jobs for a specified period of time."). In fact, as noted *infra*, a colorable argument can be made that not even birth certificates satisfy the prerequisites for designation, because they are not "a reliable means of documentation of personal identity." *See infra* note 63 and accompanying text.

[30] DRA of 2005, § 6036(b)(a).

[31] Periodic Redeterminations of Medicaid Eligibility, 42 C.F.R. § 435.916(a) (2002).

[32] *See* KU & BROADDUS, *supra* note 24, at 4.

[33] *Id.* Ku and Broaddus estimate that there are approximately 55 million total Medicaid beneficiaries; this figure is significantly higher than that used by other authorities.

[34] *Id.* at 5.

Norwood (R-GA), an author of the provision and its co-sponsor in the House of Representatives.[35] Norwood's office has issued two press releases touting the provision. According to the first of these documents, Section 6036 is designed to address "the outright theft of benefits that is currently underway nationwide by illegal aliens."[36] The Congressman is quoted as follows:

> [n]obody knows for sure how much of our Medicaid dollars we're currently losing to illegal aliens, but by even the most conservative estimates, it has played a big role in causing our own citizens — low-income Americans, seniors and children, our most vulnerable health care population — to be kicked out of the system to compensate.[37]

In partial support of this contention, the press release cites research by the Federation for American Immigration Reform (FAIR) indicating that "healthcare for illegal aliens costs California $1.4 billion annually"[38] and that other states are making similar outlays.[39] "By extrapolation, Georgia Medicaid is likely bilked out of $100–300 million annually."[40] Per Norwood, Section 6036 will recover this "$300 million in health benefits stolen from low-income Georgians by illegal aliens."[41]

This argument is reiterated in a second Norwood press release, issued after Section 6036 passed the House:

> Georgia is estimated to lose around $300 million of its $7.6 billion annual Medicaid funds due to illegal aliens who fraudulently claim U.S. citizenship to claim Medicaid benefits. Georgia and many other states are being forced to cut back on health services for low-income legal citizens in order to stem the losses.
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> "It is absolutely intolerable that we have . . . allowed some of the poorest Georgians to lose access to health care due to fraud by illegal aliens," Norwood says. "After years of listening to 'advocates' whine about compassion for those who intentionally break our laws for financial gain, I'm glad to see us finally showing some compassion for our own poor and sick who abide by the law."[42]

Thus, the only legislative apology for Section 6036 proposes the following: (1) a significant number of ineligible non-citizens are impos-

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[35] Press Release, Rep. Charlie Norwood, Norwood and Deal Open Fight to Preserve Medicaid for U.S. Citizens (Oct. 27, 2005), *available at* http://www.house.gov/apps/list/press/ga09_norwood/MedicaidIllegals.html.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Press Release, Rep. Charlie Norwood, Medicaid Recipients Must Prove U.S. Citizenship Before Receiving Benefits (Feb. 1, 2006), *available at* http://www.house.gov/apps/list/press/ga09_norwood/ MedicaidIllegalsPasses.html

ing significant costs upon the federal government by receiving Medicaid benefits through fraudulent claims of U.S. citizenship; (2) Section 6036's citizenship documentation requirement will result in net federal savings by reducing fraud; and (3) these savings will enable fuller access to health care for those properly eligible. Unfortunately, none of these propositions survives serious consideration.

First, there is no evidence to support Norwood's assertions regarding the extent and cost of Medicaid citizenship fraud by undocumented immigrants. Eliminating health benefits for undocumented immigrants would require revising current eligibility requirements themselves, not merely tinkering with procedures. This is because indigent non-citizens may qualify under current law for certain basic medical services. These include: "emergency Medicaid" (provided that, but for their citizenship status, they would be eligible for their state's Medicaid program);[43] prenatal care under SCHIP (State Children's Health Insurance Program); WIC (the Special Supplemental Program for Women, Infants and Children); and services for the prevention and treatment of communicable diseases.[44] In addition, federal law requires that hospitals with emergency rooms must screen and stabilize all individuals who present themselves, though there is no federal commitment to cover the costs of these services for those who are uninsured and unable to pay.[45] Section 6036, of course, leaves these gestures toward an American safety net untouched. Yet when Norwood cites FAIR's research on the cost of immigrant

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[43] 8 U.S.C. § 1611(b)(1)(A) (2000). The term "emergency medical condition" is defined to mean treatment for "labor and delivery" or a "medical condition . . . [with] acute symptoms" that could "plac[e] the patient's health in serious jeopardy," result in "serious impairment to bodily functions," or cause "serious dysfunction of any bodily organ or part." 42 U.S.C. § 1396b(v)(3) (2000).

[44] *See* SHAWN FREMSTAD & LAURA COX, KAISER COMM'N ON MEDICAID & THE UNINSURED, COVERING NEW AMERICANS: A REVIEW OF FEDERAL AND STATE POLICIES RELATED TO IMMIGRANTS' ELIGIBILITY AND ACCESS TO PUBLICLY FUNDED HEALTH INSURANCE 11, 23 (2004), http://www.kff.org/medicaid/upload/Covering-New-Americans-A-Review-of-Federal-and-State-Policies-Related-to-Immigrants-Eligibility-and-Access-to-Publicly-Funded-Health-Insurance-Report.pdf (discussing medical benefits available to immigrants).

[45] *See* Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd(a) (2000 & Supp. IV 2004) (requiring that the emergency department of a hospital serve individuals needing medical treatment whether they have medical benefits or not); 42 C.F.R. § 489.24(a) (2005) (mandating that hospitals with emergency rooms serve all individuals seeking medical treatment regardless of ability to pay). In 2003, Congress appropriated $1 billion through 2008 to reimburse hospitals for the cost of EMTALA care for indigent undocumented immigrants. Fact Sheet, Ctrs. for Medicare & Medicaid Servs., United States Dep't of Health & Human Servs., Emergency Health Services For Undocumented Aliens: Section 1011 Of The Medicare Modernization Act (May 9, 2005), *available at* http://www.cms.hhs.gov/apps/media/press/release.asp?Counter=1452.

healthcare "theft," he is citing estimates of the cost of emergency care for the indigent that is provided *pursuant to law.*[46]

But what of ineligible non-citizens who have misrepresented their citizenship status in order to obtain full Medicaid coverage? Certainly, current self-declaration procedures raise the specter of abuse.[47] Yet, in seeking evidence regarding *actual* abuse, the Office of the Inspector General of the Department of Health and Human Services (OIG) came up empty, identifying only a single 2002 audit report from Oregon.[48] According to the OIG's account, Oregon "found that the State provided full Medicaid benefits to 25 beneficiaries (of the sample of 812) who were noneligible noncitizens" and that citizenship fraud "could result in an annual cost of about $2 million, based on a 1 percent estimate of noneligible noncitizens receiving Medicaid benefits."[49] The OIG, however, has misread its source. The Oregon auditors actually examined only 25 cases, a random subset out of a set of 812 cases *that were chosen specifically because they seemed likely to be cases of fraud.*[50] The Oregon auditors explained: "it was determined that two of the [25] cases lacked adequate documentation to support granting full coverage to at least one of the recipients on each case."[51] Thus, the OIG's only fraud data suggests, on the basis of an examination of 25 unrepresentative cases in a system with some 41 million beneficiaries, that the incidence of fraud (in a state that accepts self-certification of citizenship by mail with no further verification procedures) will be 8% of those cases deemed likely to be fraudulent. The Oregon report does note that "if 1 percent of adults receiving full OHP coverage are ineligible noncitizens, the annual cost is $1.7 mil-

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[46] For instance, Norwood cites FAIR for the proposition that "healthcare for illegal aliens cost California $1.4 billion annually." Press Release, Rep. Charlie Norwood, *supra* note 35. This figure has its source in a FAIR report that puts the 2004 cost of unreimbursed emergency medical care for undocumented immigrants in California at between $378 million and $1.48 billion. JACK MARTIN & IRA MEHLMAN, FED'N FOR AMERICAN IMMIGRATION REFORM, THE COSTS OF ILLEGAL IMMIGRATION TO CALIFORNIANS 11 (2004), http://www.fairus.org/site/DocServer/ca_costs.pdf?docID=141. This sum is ultimately rounded out to $1.4 billion, apparently because the lower sum "does not take into account the expenditures on the children of illegal aliens who were born in this country." *Id.* at 10. These children are, of course, U.S. citizens, but the cost of their care, too, finds its way into Norwood's accounting of total immigrant "theft."

[47] *See* HHS SELF-DECLARATION, *supra* note 20, at 18 (documenting the potential for fraud inherent in the current state procedures for establishing the citizenship of Medicaid applicants).

[48] *See id.* at 13–14.

[49] *Id.*

[50] *See* OREGON SEC'Y OF STATE, AUDIT REPORT NO. 2002-03, DEPARTMENT OF HUMAN SERVICES: OREGON HEALTH PLAN ELIGIBILITY REVIEW 6 (2002), http://www.sos.state.or.us/audits/reports/full/2002/2002-03.pdf (noting that the auditors selected "a small population of 812 cases in the department's system that had a status change from ineligible alien to full coverage" but only "reviewed the documentation . . . for . . . [a] random sample of 25 cases").

[51] *Id.*

lion."[52] However, it also notes that there is no reason to believe that the 1% figure reflects actual fraud levels: "We . . . are . . . unable to estimate the cost to the department of granting full OHP coverage to ineligible non-citizens claiming to be United States citizens."[53] Interestingly, the audit does cite the definitive conclusion of Oregon's Department of Human Services that "citizenship has not been identified as an eligibility issue in the [internal] OHP quality control reviews."[54] Indeed, according to the report itself, the position of the Oregon DHS is that it "does not believe that ineligible non-citizens claiming to be United States citizens and receiving full OHP coverage is a significant problem."[55]

One may properly infer that other states share Oregon's view that citizenship fraud is a non-phenomenon: they share the burden of Medicaid costs with the federal government, and they are free to impose more burdensome documentation requirements than the federally mandated minimum, but only four have chosen to do so.[56] As an Arkansas Department of Health and Human Services spokesperson said recently, "I don't see [citizenship fraud] as much of an issue."[57] A CMS study echoes this conclusion: "States have found that they can effectively preserve program integrity without requiring additional documentation from families."[58]

The conclusion that there is a negligible level of citizenship fraud by undocumented immigrants seeking full Medicaid coverage is consistent with what we know about the strained relationship between immigrants and the U.S. health care system. Immigrants who are properly eligible for Medicaid apply for coverage in relatively low numbers in part because of concerns about disclosing family members' immigration status;[59] even immigrants who are insured receive

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[52] *Id.* at 7.

[53] *Id.*

[54] *Id.* at 6.

[55] *Id.* Aliens fraudulently acting as citizens also are absent from the recent report of the Medicaid Advisory Commission, appointed by Michael Leavitt, Secretary of the Department of Health and Human Services. The Commission formulated a menu of policy changes designed to save $11 billion over five years but nowhere addresses the phenomenon of citizenship fraud. *See generally* MEDICAID COMM'N, REPORT TO THE HONORABLE SECRETARY MICHAEL O. LEAVITT, DEPARTMENT OF HEALTH AND HUMAN SERVICE AND THE UNITED STATES CONGRESS (2005), http://www.healthlaw.org/library.cfm?fa=download&resourceID=71353&appView=folder&folderID=76608&print (outlining proposals to cut Medicaid costs).

[56] *See supra* note 23.

[57] Julie Munsell, *Alien-Identity Flaw Seen in Medicaid*, ARKANSAS DEMOCRAT-GAZETTE, Aug. 4, 2005, at 1.

[58] CMS PROGRESS, *supra* note 20, at 3.

[59] *See id.* ("Concerns about disclosing family members' Social Security Numbers (SSNs) and citizenship or immigration status can deter eligible individuals from applying for Medicaid. These concerns appear to stem from uncertainty among immigrant families and others regarding the confidentiality of information they provide to States.").

about half the medical services provided to native-born Americans who are comparably situated.[60] Furthermore, all Medicaid applicants are required to provide a Social Security number which states then are required to verify;[61] undocumented immigrants are likely to be further deterred by this prospect.

Even if we were to assume that Medicaid citizenship fraud is an urgent concern, this concern would not be assuaged by Section 6036. The drafters of this provision display remarkable faith in the birth certificate as a gold standard for proof of citizenship. Yet a 2000 report by the OIG notes that counterfeit documents are almost certain to escape detection: there are 6,422 different U.S. entities authorized to issue birth certificates and an estimated 14,000 different valid document formats currently in circulation.[62] Furthermore, there is every reason to believe that genuine documents based upon fraudulent information are regularly issued: while other arms of the government may have a "need or requirement for establishing identity, the issuing entity [for birth certificates] most likely does not."[63] The OIG's report concludes with a recommendation under the heading "Birth Certificates Alone do not Provide Conclusive or Reliable Proof of Identity": "[benefits] program administrators may not want to use birth certificates [for identity verification] at all."[64]

In light of the above, it may be surprising that there is any evidence to support the view that Section 6036 would go some way toward reducing federal expenditures. However, the non-partisan Congressional Budget Office (CBO) has concluded that the provision would result in a savings of $220 million in Medicaid costs over five years and $735 million over ten years.[65] The CBO has provided no commentary on this estimate, but analysts have concluded that these estimated savings "would not come from preventing ineligible immi-

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[60] *See generally* Sarita A. Mohanty et al., *Health Care Expenditures of Immigrants in the United States: A Nationally Representative Analysis*, 95 AM. J. PUB. HEALTH 1431 (2005) (concluding that, regardless of age, legal status or insurance coverage, immigrants, on average, receive about half of the health care services provided to native-born Americans).

[61] *See* 42 U.S.C. § 1320b-7(a) (2000) (obligating states to verify Medicaid applicants' Social Security numbers); 42 C.F.R. § 435.910 (2005) (requiring that states request Social Security numbers for each Medicaid applicant); CMS PROGRESS, *supra* note 20, at 3 ("Under Federal rules, *applicants* for Medicaid . . . must disclose their SSNs . . . . The State is required to verify the SSN with the Social Security Administration.").

[62] *See* OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH AND HUMAN SERVS., BIRTH CERTIFICATE FRAUD, at ii (2000), http://oig.hhs.gov/oei/reports/oei-07-99-00570.pdf (documenting difficulties in birth certificate fraud detection).

[63] *Id.* at 20.

[64] *Id.* at 22.

[65] *See* CONG. BUDGET OFFICE, RECONCILIATION RECOMMENDATIONS OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE 4 (2005), http://www.cbo.gov/ftpdocs/68xx/doc6829/ECrecon.pdf. The distance between this estimate and Rep. Norwood's touted $300 million in annual savings for Georgia alone bears noting.

grants from wrongly obtaining Medicaid coverage, but from reducing or delaying Medicaid enrollment for individuals who are U.S. citizens."[66]

In any event, the CBO estimate likely fills in only part of the larger fiscal picture. For instance, there is no indication that it accounts for the administrative costs that would be incurred in the process of accruing these Section 6036 "savings."[67] In addition, there are costs resulting from increased delays in eligibility determinations,[68] which would be felt directly by the Medicaid program, as well as the indirect costs generated by an increase in the number of those persons who would forego insurance entirely.[69] Taking these variables into account, Section 6036's meager savings melt away.

Rep. Norwood also claims that Section 6036 will preserve Medicaid for properly eligible citizens. There is no reason to believe this will be so. In part, this is because it requires us to assume as a given that Section 6036 would result in net savings, that federal and state policymakers would be providing higher levels of benefits if they were able to fund them, and that the savings achieved through reduction in fraud would necessarily be reinvested in the Medicaid program.

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[66] Meredith L. King, *Unnecessary Documentation*, CTR. FOR AM. PROGRESS, Dec. 21, 2005, http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=1312693; *cf.* Victoria Wachino et al., *Medicaid Provisions of House Reconciliation Bill Both Harmful and Unnecessary: Senate Bill Achieves Larger Savings Without Reducing Access to Care*, CTR. FOR BUDGET AND POL'Y PRIORITIES, Dec. 9, 2005, http://www.cbpp.org/12-9-05health.pdf (finding that the Senate's budget reconciliation bill achieves larger net savings in health care expenditures than the House bill does, but avoids policies that harm low-income beneficiaries).

[67] Twenty-five state Medicaid directors already have indicated that a citizenship documentation requirement would require them to hire additional staff to perform eligibility reviews. *See* HHS SELF-DECLARATION, *supra* note 20, at 11 (2005).

[68] Twenty-seven state medical directors have indicated that the requirement would delay eligibility determinations. *Id.* This delay would translate into an increase in medical costs for those persons who ultimately were approved, due to the loss of marginal benefit from low-cost preventative care or early intervention in progressive ailments. *See generally* AM. COLL. OF PHYSICIANS, INTERNAL MED., NO HEALTH INSURANCE? IT'S ENOUGH TO MAKE YOU SICK (2000), http://www.acponline.org/uninsured/lack-paper.pdf (noting that early detection and treatment can prevent 90% of blindness due to diabetic eye disease, and that more than 50% of diabetes-related lower extremity amputations and related surgery costs could be avoided through preventive care); Michael C. Lu et al., *Elimination of Public Funding of Prenatal Care for Undocumented Immigrants in California: A Cost/Benefit Analysis*, 182 AM. J. OBSTET. & GYNECOL. 233 (2000) (finding that every dollar spent on prenatal care saved $3 in care soon after birth and $4 in longer-term medical costs).

[69] For a discussion of the likely impact of Section 6036 on the total number of uninsured, see *infra* note 93 and accompanying text. Regarding the cost to the federal government of an increase in the number of uninsured, see, for example, KAISER COMM'N ON MEDICAID AND THE UNINSURED, THE COST OF CARE FOR THE UNINSURED: WHAT DO WE SPEND, WHO PAYS, AND WHAT WOULD FULL COVERAGE ADD TO MEDICAL SPENDING? 3 (2004), http://www.kff.org/uninsured/7084.cfm (estimating that the total federal, state, and local spending to pay for the care of the uninsured in 2004 was $34.6 billion, with over two-thirds of the money coming from the federal government in the form of disproportionate share hospital (DSH) payments).

But even if we were to grant all of the above, Norwood's framing of Section 6036 would remain incredible because all available data support the conclusion that, far from ensuring that Medicaid will be available for the poorest citizen beneficiaries, Section 6036's actual effect will be to prevent many of the neediest from gaining access to care.

There is unambiguous evidence regarding the relationship between application procedures and total Medicaid enrollment.[70] As of 2002, approximately 5.3 million adults were eligible for Medicaid but were uninsured; three-quarters of them had incomes below the poverty line, and half had incomes below 50% of the poverty line.[71] As of 1995, approximately 17% of the children who were eligible for Medicaid were uninsured.[72] Why? CMS has concluded that "a leading reason why eligible families fail to successfully enroll in Medicaid is that the families do not supply state-required documentation."[73] In a 1999 survey of low-income parents whose children were uninsured, 9% cited "administrative hassles" as the "main reason."[74] Comparable results were obtained in a 2000 survey of parents with eligible children who were not enrolled in Medicaid: 72% of respondents explained that they had not enrolled because of "the difficulty in getting all required documentation," 66% cited the "overall hassle of the enrollment process," and 62% expressed concerns that "the process was complicated and confusing."[75]

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[70] *See* CMS PROGRESS, *supra* note 20, at 1 ("If the [Medicaid] application process is simple and easy to complete, a family is more likely to complete it. By the same token, if the process is complicated, because other programs are involved, a family may be deterred and not complete the process."); KAISER COMM'N ON MEDICAID AND THE UNINSURED, IN A TIME OF GROWING NEED: STATE CHOICES INFLUENCE HEALTH COVERAGE ACCESS FOR CHILDREN AND FAMILIES 3 (2005), http://www.kff.org/medicaid/7393.cfm (describing the expansion of Medicaid rolls through late 1990s "streamlined enrollment systems"); Karl Kronebusch & Brian Elbel, *Enrolling Children in Public Insurance: SCHIP, Medicaid, and State Implementation*, 29 J. HEALTH POL. POL'Y & L. 451 (2004) (concluding that states that remove asset tests and implement presumptive eligibility and self-declaration of income have higher SCHIP enrollment levels, while waiting periods and premiums reduce enrollment).

[71] *See* AMY DAVIDOFF ET AL., KAISER COMMISSION ON MEDICAID AND THE UNINSURED, HEALTH COVERAGE FOR LOW-INCOME ADULTS: ELIGIBILITY AND ENROLLMENT IN MEDICAID AND STATE PROGRAMS, 2002, at 2 (2005), http://www.kff.org/uninsured/upload/Health-Coverage-for-Low-Income-Adults-Eligibility-and-Enrollment-in-Medicaid-and-State-Programs-2002-Policy-Brief.pdf (surveying the non-elderly Medicaid-eligible population).

[72] *See* Amy Davidoff et al., *Medicaid-Eligible Children Who Don't Enroll: Health Status, Access to Care, and Implications for Medicaid Enrollment*, 37 INQUIRY 203, 203, 210 (2000) (assessing the number of uninsured children to establish the effectiveness of state programming).

[73] CMS PROGRESS, *supra* note 20, at 2.

[74] GENEVIEVE KENNEY & JENNIFER HALEY, URBAN INSTITUTE, WHY AREN'T MORE UNINSURED CHILDREN ENROLLED IN MEDICAID OR SCHIP? 4 (2001), http://www.urban.org/UploadedPDF/310217_ANF_B35.pdf.

[75] MICHAEL PERRY ET AL., KAISER COMMISSION ON MEDICAID AND THE UNINSURED, MEDICAID AND CHILDREN OVERCOMING BARRIERS TO ENROLLMENT FINDINGS FROM A NATIONAL SURVEY 9

To address these concerns, many have recommended that application procedures be streamlined, "simplifying forms and documentation requirements, substituting mail-in and telephone applications for face-to-face interviews, reducing or eliminating monthly eligibility redeterminations, and creating presumptive eligibility procedures that allow medical providers to conditionally enroll those who appear to be eligible."[76] One recent study concludes that even with respect to determining income eligibility, self-declaration, "with appropriate safeguards, provides states with the opportunity to simplify enrollment procedures and increase enrollment of eligible individuals without jeopardizing program integrity."[77]

Instead, the trend is in the opposite direction.[78] Washington state is typical. In March 2003, it had a children's Medicaid enrollment of 350,000; in April of that year, it began requiring income eligibility documentation; in July, it began requiring eligibility determinations to take place every six months instead of every twelve. By May 2004, 40,000 fewer children were enrolled.[79] While it is conceivable that 11% of the March 2003 child beneficiaries were ineligible due to excessive income and were properly screened out, at least one study has concluded that it is more likely that the bulk of this decline is unrelated to eligibility.[80]

In light of the above, it is impossible to avoid the conclusion that the primary effect of Section 6036's new documentation requirement

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(2000), http://www.kff.org/medicaid/upload/Medicaid-and-Children-Overcoming-Barriers-to-Enroll-ment-Report.pdf.

[76] Kronebusch & Elbel, *supra* note 70, at 453 (describing changes proposed by "advocates and policy makers"). *See also* CMS PROGRESS, *supra* note 20, at ii (outlining state best practices "to streamline application and eligibility determination processes consistent with the principles of both simplicity of administration and program integrity" with the goal "to ensure that low-income families and children have access to health benefits"); CINDY MANN ET AL., KAISER COMM'N ON MEDICAID AND THE UNINSURED, REACHING UNINSURED CHILDREN THROUGH MEDICAID: IF YOU BUILD IT RIGHT, THEY WILL COME 8 (2002) (recommending that states "[l]imit the number of documents families are required to supply and rely instead on computerized data matches, audits, or other methods of assuring program integrity"); PERRY ET AL., *supra* note 75, at 15 (recommending that states "focus on greater convenience and smoother processes" in order to boost enrollment).

[77] DANIELLE HOLAHAN & ELISE HULBERT, UNITED HOSPITAL FUND OF NEW YORK, LESSONS FROM STATES WITH SELF-DECLARATION OF INCOME POLICIES, at v (2004), http://www.uhfnyc.org/ usr_doc/lessons.pdf.

[78] DONNA COHEN ROSS & LAURA COX, KAISER COMM'N ON MEDICAID AND THE UNINSURED, BENEATH THE SURFACE: BARRIERS THREATEN TO SLOW PROGRESS ON EXPANDING HEALTH COVERAGE OF CHILDREN AND FAMILIES: A 50 STATE UPDATE ON ELIGIBILITY, ENROLLMENT, RENEWAL AND COST-SHARING PRACTICES IN MEDICAID AND SCHIP, 3 fig.2 (2004), http://www.kff.org/medicaid/upload/Beneath-the-Surface-Barriers-Threaten-to-Slow-Progress-on-Expanding-Health-Coverage-of-Children-and-Families-pdf.pdf (noting that procedural barriers to Medicaid access began to be reintroduced in 2001).

[79] *Id.* at 7 fig.3.

[80] *Id.* at 8.

will be to thin the Medicaid rolls by weeding out eligible citizen beneficiaries—precisely the group for whom Rep. Norwood professes "compassion." Even more disturbing is the fact that Section 6036's effects will be borne disproportionately by the most vulnerable within this group of eligible citizens.

In large part, this is because many Americans do not have ready access to their birth certificates, and those of lower socioeconomic status are substantially more likely to fall into this category. According to a national telephone survey conducted in January 2006, 5.7% of all U.S.-born adults do not possess a birth certificate or a passport. This number rises to 7% for senior citizens, 8.1% for those with an annual income below $25,000, 8.9% for African-American adults, 9.1% for adults living in rural areas, and 9.2% for adults without a high school diploma.[81] A total of 10.3% of U.S.-born adults who have incomes below $25,000 and have children reported they did not have a birth certificate or passport for at least one of their children.[82] These figures suggest that between 3.2 and 4.6 million currently eligible Medicaid beneficiaries are not currently in a position to comply with Section 6036.[83]

Many of these individuals, especially among those born in the first half of the 20th century, do not have a birth certificate in their possession because none exists.[84] Historically, the gaps in the birth registration system in the United States have been dramatic and, once again, directly correlated with socio-economic status. An estimated 7.5% of U.S. births in 1940 were not formally recorded; among non-whites, the figure is 18%, among non-whites living in rural areas, 24.2%, and among rural non-white births outside of a hospital, 24.9% went unregistered.[85] By 1950, the system of birth registration had

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[81] LEIGHTON KU ET AL., CENTER FOR BUDGET AND POLICY PRIORITIES, SURVEY INDICATES BUDGET RECONCILIATION BILL JEOPARDIZES MEDICAID COVERAGE FOR 3 TO 5 MILLION U.S. CITIZENS (2006), http://www.cbpp.org/1-26-06health.htm#_ftnref14.

[82] *Id.*

[83] *Id.*

[84] *See* Ira Rosenwaike & Leslie F. Stone, *Verification of the Ages of Supercentenarians in the United States: Results of a Matching Study*, 40 DEMOGRAPHY 727–39 (2003), *available at* http://muse.jhu.edu/journals/demography/v040/40.4rosenwaike.pdf (describing the lack of birth certificates among extremely elderly persons); *see also* Mark E. Hill et al., *Age-Linked Institutions and Age Reporting Among Older African Americans* 2 (Pop. Aging Rsrch. Ctr., Univ. of Penn., Working Paper No. WPS 95-05, 1995), *available at* http://www.pop.upenn.edu/rc/parc/aging_center/1995/PARCwps95-05.pdf ("[B]irth registration in the United States was seriously deficient well into the 20th century. As late as 1959, a birth certificate could be located for less than one-third of a sample of persons aged 45 and over"); Ira Rosenwaike & Mark E. Hill, *The Accuracy of Age Reporting Among Elderly African-Americans: Evidence of a Birth Registration Effect* 2 (Pop. Aging Rsrch. Ctr., Univ. of Penn., Working Paper No. WPS 95-04, 1995), *available at* http://www.pop.upenn.edu/rc/parc/aging_center/ 1995/PARCwps95-04.pdf (same).

[85] *See* Sam Shapiro, *Recent Testing of Birth Registration Completeness in the United States*, 8 POPULATION STUD. 3, 15–16 tbls.2 & 4 (1954) (examining birth registration in 1950).

greatly expanded but was still far from universal and especially likely to bypass certain groups: 2.1% of births nationwide were undocumented, but the number is 6.5% for non-white births, 11.3% for rural non-whites in general, and 12.5% for rural non-whites who did not give birth in a hospital.[86] The same pattern emerges when one looks at the educational attainment of mothers. In 1940, a birth certificate was lacking for 2.6% of children born to a mother who had attended at least one year of college, but 20.7% of the children of mothers who had 4 years or fewer of school were unregistered. By 1950, only 0.4% of the children of the most educated mothers were undocumented, while 9.2% of the children born to the least educated mothers remained unrecognized.[87]

Every state provides that individuals for whom no birth certificate exists may apply for a delayed certificate of birth registration. It is clear, however, that a significant number of applicants will be unable to comply with the necessary procedures. For instance, in Texas, the procedure is as follows: first, an applicant pays a fee of $22.00 to the Department of Vital Statistics and completes a form requesting a search for the non-existent certificate. This process can take up to three weeks.[88] Once the record is not found, the Department will provide instructions for completing and filing a "Delayed Certificate of Birth Form" which must be signed before a notary public and submitted along with three documents that prove date and place of birth, one of which verifies parents' names, all of which are five years old or older, and at least one of which was created within 10 years of birth. The cost for filing a Delayed Certificate of Birth is $25.00. Certified copies are $22.00 each. Supporting documentation must be verified by department staff, which will confirm information with outside entities. Because of this requirement, the processing time is generally eight to ten weeks. If the supporting documentation is not sufficient, processing could take several more weeks. If the documentation requirement cannot be met, the Department may refer the applicant to county probate court, where there will be further

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[86] *Id.*

[87] *Id.* at tbl.4. *See also* S.H. Preston et al., *African-American Mortality at Older Ages: Results of a Matching Study*, 33 DEMOGRAPHY 193, 193–209 (1996) (illustrating the difficulty in determining life expectancy among elderly blacks due to a lack of birth certificates); Douglas V. Almond et al., Civil Rights, the War on Poverty, and Black-White Convergence in Infant Mortality in Mississippi, 50 fig.7B (Nov. 2003), *available at* http://www.nber.org/~almond/mississippi.pdf (charting trends in hospital births in Mississippi and Georgia); Rosenwaike & Hill, *Accuracy of Age Reporting*, *supra* note 84, at 733–34 (noting the difficulty of accurately tracking trends in African-American life expectancy due to lack of reliable birth records).

[88] Texas Department of State Health Services, Delayed Certificate of Birth Registration, http://www.dshs.state.tx.us/vs/delayed/default.shtm (last visited Aug. 18, 2006); Texas Department of State Health Services, Certified Copy of a Birth Certificate, http://www.dshs.state.tx.us/vs/reqproc/certified_copy.shtm (last visited Aug. 18, 2006).

documentation requirements, fees, and delays.[89] With millions of low-income, elderly, homeless, or physically and mentally disabled Americans simultaneously attempting to comply with the requirements of Section 6036, delays will be compounded.[90]

Echoing the above concerns, several state Medicaid directors have publicly voiced their conclusion that Section 6036, far from preserving Medicaid for U.S. citizens, will indeed make it more inaccessible. Ohio Medicaid Director Barbara Edwards has noted that Ohio's elimination of a birth certificate requirement led to improvement in coverage and re-enrollment for eligible children.[91] Connecticut Medicaid Director David Parrella has expressed concern over the "tremendous administrative burden" posed by Section 6036, which will "slow things down" and drive eligible applicants away.[92] According to Wisconsin Medicaid Director Mark Moody, the new requirement "will have a significant impact on enrollment."[93]

Rep. Norwood's inability to provide a coherent explanation of the function of Section 6036 is not of overriding significance; in the final analysis, he was but one vote in its favor. Perhaps there are alternative means of making sense of the requirement? Perhaps, for instance, Section 6036 is best understood as an unpleasant but necessary form of "informal rationing" designed to limit public spending.[94] Of course, budget and policy considerations will always impose limits upon welfare spending; rationing is always necessary. But informal rationing within the social welfare context is particularly perverse in its operation, precisely because it:

> may have the greatest deterrent effects on some of the neediest families. For example, the burden of complying with many procedural requirements is likely to depend on the claimant's literacy, math ability, organ-

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[89] *Id. See also* Texas Department of State Health Services, Delayed Certificate of Birth Registration For Children 15 Years of Age or Older, http://www.dshs.state.tx.us/vs/delayed/15older.shtm (last visited Aug. 18, 2006).

[90] Garland Land, executive director of the National Association for Public Health Statistics and Information Systems, has observed, "We expect the legislation will increase the volume of birth certificate requests by as much as 25 percent to 50 percent. Many vital records jurisdictions may find it very difficult to manage this large of an increase of requests in such a short time period." KU, SURVEY, *supra* note 81, at 7.

[91] Lorraine Schofield, *House Provision on Medicaid Citizenship Test Prompts State Unease*, INSIDE CMS, Nov. 17, 2005, *available at* http://www.aphsa.org/News/Doc/Article%20in%20Inside%20CMS%20_11-17-2005_%20on%20Medicaid%20Citizenship.pdf.

[92] *Id.*

[93] Schofield, *supra* note 91.

[94] *See generally* David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 817, 854 (2004) ("Perhaps the most fundamental concern about choice-based rationing systems is whether the outcomes they produce really do represent claimants' and potential claimants' choices at all and, to the extent they do, whether those choices have the qualities that make them legitimate bases for allocating public resources.").

> izational and social skills, and childcare and transportation resources. Yet the claimants likely to be the weakest in those areas—and hence most burdened—also are likely to have the poorest job prospects and hence be the neediest.[95]

The problem with the informal rationing of social benefits is, therefore, that it drives the neediest from programs that are intended to alleviate need. While citizenship documentation surely would not represent an insurmountable burden for the vast majority of people, those for whom it would present such a burden are precisely those whom Medicaid is designed to reach. The homeless, the mentally ill, and the elderly are especially likely to be confounded by the new requirement, but they will be joined by African-Americans whose mothers were denied access to Jim Crow maternity wards and impoverished single parents who work full-time, deal with emergencies as they arise, and have neither a dollar nor a minute to spare.

Yet Section 6036 cannot be explained fully even in this manner, because, as noted above, it cannot be expected to succeed at the one thing informal rationing has to recommend it: cutting costs.[96] This fact suggests that we must search more deeply for a proper understanding of the effects of Section 6036. Indeed, the rule will have additional, more abstract ramifications.

Many scholars have pointed out that social welfare law is an expression of social values.[97] We recognize certain categories of need, but we are ambivalent about these categories to varying degrees; we express this ambivalence by modulating the degree of stigma we attach to the members of each category.[98] Procedure is the language we use to communicate this stigma. Thus, as Amy Mulzer has written:

> The more "worthy" the claimant, the less hesitant society is to aid her, and the fewer the procedural limitations placed upon her participation in the [social benefits] program. While claimants for cash assistance or food stamps are subject to harsh or invasive verification procedures, claimants who have validated their claim for aid through participation in the labor force, and who have a socially acceptable reason for their current inability to work—old age, for example, or disability—participate in programs operated on a "social insurance" model, such as the Social Se-

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[95] *Id.*

[96] *See supra* notes 65–69 and accompanying text.

[97] *See generally* JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA (1991); GERTRUDE HIMMELFARB, THE DEMORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES (1995); LAWRENCE MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP (1986); FRANCES F. PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (2d ed. 1993).

[98] Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 374–76 (1996) (noting that attachment of stigma to public assistance deters many from seeking the aid).

curity retirement and disability programs. These non-means tested programs are federalized, "rule-bound, relatively evenhanded in [their] administration, and [are operated] with little reported hassle."[99]

Mulzer's next sentence clarifies what is at stake in Section 6036: "Likewise, claimants for in-kind programs such as Medicaid are somewhat less likely to be subjected to invasive verification procedures than claimants for cash assistance."[100]

Viewed from this angle, we see that perhaps Section 6036's most significant effect will be to ratchet up the stigma attendant upon Medicaid, as the law communicates the message that those in need of health care are not to approach their government benefactors with a sense of entitlement. Section 6036 decrees that fraudulent intent on the part of applicants is to be presumed, in the absence of acceptable documentary proof to the contrary. And the specific nature of the fraud of which Medicaid applicants are presumed guilty is especially telling: they are not Americans. Consequently, not only is the nation free of obligation to the members of the least fortunate strata. Their very need raises the suspicion that they are not members of the nation at all.

Norwood claims to be barring the gates of America against alien invasion. But Section 6036, when judged by its effects, is not an anti-alien statute. When it slams the gates of the welfare state, it is all of the poor who are left outside.

III. A MINIMAL RATIONAL BASIS REVIEW OF SECTION 6036

You may well be convinced by the above that Section 6036's principal effect will be to delay or bar access to health care by those who are properly eligible; that those who are impacted will suffer a significant harm; that those who will suffer will be, disproportionately, those individuals who are most in need of assistance; that others, who wish to misrepresent their citizen status, will succeed in doing so; that while Section 6036 will likely result in some savings through reductions in the Medicaid rolls, this savings may be immediately offset by increased administrative costs and it will certainly be offset over the long term by costs resulting from delays in treatment and an increase in the number of uninsured; and that Section 6036 is, at root, a stigmatizing measure. Yet you may also believe that all of the above should be disregarded by a court asked to rule on Section 6036's constitutionality.

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[99] Amy Mulzer, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 683–84 (2005) (citations omitted).

[100] *Id.* at 684.

The Constitution places constraints on government action: its "justice" mandate can be found in the "Due Process" Clause of the Fifth Amendment, which bars profoundly unfair acts;[101] its "equality" mandate can be found in the "Equal Protection" Clause of the Fourteenth Amendment, which protects against discriminatory classification.[102] These requirements are equally binding upon all branches of government, but *Marbury v. Madison* stands for the consensus principle that the Supreme Court has the power to substitute its judgment for that of members of other branches, voiding acts that it deems to violate constitutional requirements; hence, "judicial review."[103] In *Lochner v. New York*, the Court notoriously exercised the power of judicial review to void a New York law regulating labor conditions in the baking industry, finding that it was an unjust burden on the freedom of contract protected by the Due Process Clause.[104] Backlash against *Lochner*, however, ultimately led the New Deal court to cede the entire field of economic regulation and social welfare to Congress.[105] Typical of the modern approach is *Flemming v. Nestor*,[106] where the court rejected a due process challenge to the termination of Social Security benefits to the resident wife of a formerly resident alien who has been deported as a Communist. Here, the Court announced that "when we deal with a withholding of a noncontractual benefit under a social welfare program . . . we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."[107] The Court sounded the same note in *Dandridge*

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[101] U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) ("Due Process is that which comports with the deepest notions of what is fair and right and just."); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (stating that due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

[102] U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."). Though the Fourteenth Amendment is drafted as a limit on the power of the states, it has been held to bind the federal government as well. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (justifying a decision to prohibit Washington, D.C. public school segregation based on reasoning that the denial of Fourteenth Amendment liberty interests constitutes a violation of Fifth Amendment due process rights).

[103] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[104] Lochner v. New York, 198 U.S. 45 (1905)

[105] *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1385 (2001) (citing the conventional understanding of *Lochner* as "symbolic of an era during which courts inappropriately substituted their views as to proper social policy for those of representative assemblies").

[106] 363 U.S. 603 (1960).

[107] *Id.* at 611.

v. Williams,[108] where it rejected the argument that Maryland's cap on the total monthly welfare support available to a single family violated the Equal Protection Clause. The Court rejected the reasoning as being of a time:

> when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought. . . ." "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific" . . . . [T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.[109]

Thus, as the Court states in *Hodel v. Indiana*, "[s]ocial and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld . . . when the legislative means are rationally related to a legitimate governmental purpose."[110]

As the rule articulated in *Hodel* duly notes, the Court has not entirely abandoned judicial review. For instance, the Court will engage in a more searching inquiry when the state has burdened the exercise of a "fundamental right." The canon of rights—aside from those specifically protected in the text of the Constitution—now includes the right to raise one's children,[111] use contraception,[112] receive an abortion,[113] live with one's family,[114] marry,[115] and refuse medical treatment.[116] Similarly, in the equal protection context, invidious classifi-

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[108] 397 U.S. 471 (1970).

[109] *Id.* at 484–86 (citations omitted).

[110] 452 U.S. 314, 331 (1981).

[111] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1928) (affirming that state infringements on parental rights will be subject to strict scrutiny); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (holding that the right of parents to determine how their children will be educated is fundamental and that state action that burdens this right is subject to strict scrutiny).

[112] *See* Griswold v. Connecticut, 381 U.S. 479, 481–86 (1965) (using strict scrutiny to analyze a Connecticut statute forbidding the use of contraceptives because the statute impinges on the right of marital privacy that is within the penumbra of specific guarantees of the Bill of Rights).

[113] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874–75 (1992) (holding that state action that burdens the right to obtain an abortion is subject to heightened scrutiny); Roe v. Wade, 410 U.S. 113, 154–56 (1973) (declaring that the right to obtain an abortion is fundamental and that state action that burdens this right is subject to strict scrutiny).

[114] *See* Moore v. City of Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (deciding that the right of members of a family to live together is fundamental and that state action that burdens this right is subject to strict scrutiny).

[115] *See* Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (announcing that the right to marry is a central part of the liberty protected by the Due Process Clause and that state action that burdens this right is subject to strict scrutiny).

[116] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (pronouncing the right to refuse medical treatment to be fundamental and subjecting state action that burdens this right to strict scrutiny). Some legal scholars cite *Lawrence v. Texas*, 539 U.S. 558 (2003), for the proposition that the Court also has recognized a fundamental right to sexual intimacy. This is understandable, given that the doctrinal basis for the Court's decision in *Lawrence* is submerged

cations raise judicial dander. Specifically, courts carefully will examine state action that classifies by race[117] or national origin[118]—and, to an "intermediate" degree, sex[119] and illegitimacy.[120]

But health is not a fundamental right,[121] nor are the poor generally considered a protected class.[122] Consequently, any attempt to

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in an argument that seems to belie it. Nonetheless, the Court declines to designate the right at issue as fundamental and it accordingly applies heightened rational basis scrutiny. *See* Paul M. Secunda, Lawrence*'s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117, 131 (2005) ("[T]he best reading of *Lawrence* is that although the liberty interest concerning personal autonomy is a 'substantial' or 'important' one, it is not a fundamental one.").

[117] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict scrutiny to a state statute classifying individuals by race); McLaughlin v. Florida, 379 U.S. 184, 191–92 (1964) (explaining how the Fourteenth Amendment's purpose of eliminating racial discrimination calls for the use of strict scrutiny of state actions which rely on race-based classifications).

[118] *See* Hernandez v. Texas, 347 U.S. 475, 479 (1954) (analyzing a state statute that classifies individuals by national origin using the standard of strict scrutiny); Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to classifications based on national origin); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (utilizing the strict scrutiny standard of review to analyze nationality-based classifications). Also, state classification by alienage receives strict scrutiny. *See* Plyler v. Doe, 457 U.S. 202, 218–23 (1982) (applying strict scrutiny to a state statute that classified by alienage); Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (holding that state classifications based on alien status are subject to strict scrutiny).

[119] *See* United States v. Virginia, 518 U.S. 515, 531 (1996) (applying intermediate scrutiny to a state statute classifying individuals by sex); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982) (holding that a state statute creating gender-based classifications is subject to intermediate scrutiny); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (applying intermediate scrutiny to a gender-based classification).

[120] *See* Trimble v. Gordon, 430 U.S. 762 (1977) (applying heightened scrutiny to a state statute classifying individuals by illegitimacy); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (holding that classifications based on illegitimacy are subject to heightened scrutiny).

[121] *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) ("[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."); Maher v. Roe, 432 U.S. 464, 469 (1977) (holding that the States need not require that health care meet minimum standards as part of its provision for public welfare).

[122] *See* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988) (holding that a North Dakota statute permitting some school districts to charge a user fee for bus transportation survives an equal protection challenge based on a minimal rational basis standard of review, and noting that "[w]e have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny"); Harris v. McRae, 448 U.S. 297, 323 (1980) (upholding restrictions on federal funding for abortion against an equal protection challenge by applying a heightened rational basis standard of review and holding that "poverty, standing alone, is not a suspect classification"); Maher v. Roe, 432 U.S. 464, 471 (1977) (upholding Connecticut restrictions on abortion funding against an equal protection challenge by applying a heightened rational basis review and holding that "financial need alone [does not identify] a suspect class"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (applying a heightened rational basis standard of review to uphold the Texas school financing system against an equal protection challenge); United States v. Kras, 409 U.S. 434, 446 (1973) (upholding the federal bankruptcy law's fee scheme against an equal protection challenge by applying a heightened rational basis standard of review); Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (per curiam) (holding that the poor are not a suspect class

persuade a court to strike down Section 6036 as inconsistent with constitutional values must run the gauntlet of rational-basis review.[123]

To understand precisely what this would entail, we may refer to two cases often cited for the proposition that "the rational-basis test [is] used to review economic regulation under the Due Process and Equal Protection Clauses":[124] *Williamson v. Lee Optical, Inc.*[125] and *FCC v. Beach Communications, Inc.*[126]

In *Lee Optical*, the Court considered a variety of due process and equal protection challenges to an Oklahoma statute that had the effect of barring opticians from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist. Holding that no special circumstances dictated strict scrutiny, the Court applied a rational basis standard of review and upheld the statute.[127] The significance of the decision, however, is in the nature of "rational basis" analysis the Court prescribes. According to the Court, neither the

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and that an Oregon fee scheme for civil appeals withstands an equal protection challenge based on a heightened rational basis standard of review); James v. Valtierra, 402 U.S. 137, 141 (1971) (upholding a provision in the California Constitution requiring local referenda to approve state-subsidized low-rent housing projects despite an equal protection challenge based on a minimal rational basis standard of review); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (upholding a Maryland welfare law against an equal protection challenge, holding that "reasonable basis" is the correct standard of review to apply in "the area of economics and social welfare"). *But see* Shapiro v. Thompson, 394 U.S. 618, 658–59 (1969) (implying, in dicta, that classification by wealth is invidious); Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966) (applying strict scrutiny to hold that poll taxes are unconstitutional on equal protection grounds and observing that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored"); Griffin v. Illinois, 351 U.S. 12, 17 (1956) (applying strict scrutiny to strike down an Illinois fee requirement for appeals of felony convictions on both due process and equal protection grounds). For historical accounts of the development of the Court's welfare rights jurisprudence, see generally ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997); MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 (1993); R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994).

[123] *See, e.g.*, Mathews v. De Castro, 429 U.S. 181, 185 (1976) ("In enacting legislation [providing for governmental payments of monetary benefits], a government does not deny equal protection 'merely because the classifications made by its laws are imperfect.' If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" (citation omitted)); Weinberger v. Salfi, 422 U.S. 750, 770 (1975) (holding that a statutory classification in the area of social welfare, such as social security legislation, is consistent with the Equal Protection Clause if it is rationally based and free from invidious discrimination); Vill. of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (asserting that economic and social legislation enacted by a legislature that has drawn lines in the exercise of its discretion will be upheld if it is reasonable, not arbitrary, and bears a rational relationship to a permissible state objective); Dandridge v. Williams, 397 U.S. 471, 487 (1970) ("[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.").

[124] *E.g.*, Kelo v. City of New London, 125 S. Ct. 2655, 2669 (2005) (Kennedy, J., concurring).

[125] 348 U.S. 483 (1955).

[126] 508 U.S. 307 (1993).

[127] 348 U.S. at 486–90.

state's actual aim nor the actual relationship between the statute and the state's aim may be considered. Rather, "[i]t is enough that there is an evil . . . and that it might be thought that the particular legislative measure was a rational way to correct it."[128] The Court concludes that "it might be thought" that the Oklahoma statute was a rational response to the desire to ensure that citizens had regular eye examinations;[129] the statute is, accordingly, upheld. The *Lee Optical* rational basis review thus takes place entirely on a hypothetical plane.

The *Lee Optical* approach to rational basis review is forcefully echoed in *FCC v. Beach Communications.* Here, the Court denied the merits of an equal protection challenge to a federal statute that distinguished among cable television facilities for regulatory purposes. In the process, the Court articulated a clear rule: "Where there are 'plausible reasons' for Congress's action, 'our inquiry is at an end.'"[130] The Court added: "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."[131]

Under the *Lee Optical-Beach* "social and economic regulation" standard, then, Section 6036 would survive judicial review. A court might grant that Section 6036 was unwise, unfair, illogical, and improvident—but the court still would be forced to conclude that a legislature conceivably could rationally speculate (if totally insulated from empirical data) that the phenomenon of noneligible noncitizens fraudulently claiming full Medicaid benefits was imposing significant costs and that this phenomenon could be addressed effectively by requiring that all Medicaid beneficiaries produce citizenship documentation.

Section 6036 would survive this pseudo-review,[132] but this would be the wrong result.

IV. THE CORRECT STANDARD OF REVIEW FOR SECTION 6036: HEIGHTENED RATIONAL BASIS REVIEW

Lee Optical-Beach minimal scrutiny is not the only doctrinally legitimate form of rational basis review. As the Court stated in *U.S. Railroad Retirement Board v. Fritz,* after surveying equal protection rational basis decisions, even "[t]he most arrogant legal scholar would

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[128] *Id.* at 488.

[129] *Id.*

[130] *Beach Commc'ns,* 508 U.S. at 313–14 (citation omitted).

[131] *Id.* at 315.

[132] Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 359 (1999) ("Any statute could survive a review that freely hypothesizes purpose and does not insist that there be any connection in fact between a classification and such a hypothesized purpose.").

not claim that all of these cases applied a uniform or consistent test."[133] Most students of the Supreme Court have followed Gerald Gunther in modestly distinguishing between conventional rational basis review cases from those that apply "heightened rational basis" or "rational basis with bite."[134]

The Court has never explicitly acknowledged the existence of heightened rational basis review,[135] so it would be surprising if a coherent approach emerged from the case law.[136] Nonetheless, elements regularly recur: (1) government action has specially burdened a group; (2) the action is a poor fit with potentially legitimate government interests; (3) the burden is significant; (4) the burdened group is a disfavored minority; and (5) the government's action was motivated by hostility toward the group.

In the due process context, we have to date only one heightened rational basis analysis, in the case of *Lawrence v. Texas*.[137] Examining a Texas statute that criminalized sexual relations between members of the same sex, the decision discusses the importance of the liberty interest at stake in expansive terms but declines to designate this interest as fundamental, a move that would dictate heightened scrutiny, as Justice Scalia's dissent points out.[138] Nonetheless, the Court's discus-

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[133] 449 U.S. 166, 176 n.10 (1980). One scholar has identified seven variants of rational basis review. *See* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 236 (2002).

[134] *See* Gerald Gunther, *Foreword: In Search Of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1, 25–37 (1972) (surveying 1971 Supreme Court decisions sustaining or remanding equal protection claims without invoking the strict scrutiny formula and concluding that "old equal protection formulations have been given an interventionist twist in a significant number of cases"); *see also*, Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 2 (1992) (distinguishing between cases that apply highly deferential rational basis review and cases that "used rationality review to monitor closely the purposes a legislature sought to advance"); Gayle Lynn Pettinga, Note, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 800 (1987) ("[T]he Court is now willing to employ a searching scrutiny under the guise of traditional rational basis review; that is, to employ rational basis with bite.").

[135] *But see* Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring), discussed *infra* notes 137–46 and accompanying text.

[136] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-33, at 1614 (2d ed. 1988) (observing that the Court "has never provided a coherent explanation" of the circumstances that trigger a heightened form of rationality review); Farrell, *supra* note 132, at 357–58 (examining every successful rational basis claim under the Equal Protection Clause decided in the Supreme Court between 1971 and 1996 and concluding that "the Court's selection of cases to which it will give a heightened, less deferential rationality review follows no obvious pattern. The Court never explains why it has selected a particular case for heightened rationality. The Court's analysis differs from case to case. None of these cases has had a significant precedential impact on subsequent cases. For the most part, once the case has been decided, the Court ignores it.").

[137] 539 U.S. 558 (2003).

[138] *Id.* at 599.

sion of the statute is free of speculation regarding hypothetically legitimate purposes; on the contrary, it accepts as self-evident that the actual purpose of the legislation is to stigmatize homosexual sexual conduct: "The issue is whether the majority may use the power of the State to enforce [condemnation of homosexual conduct as immoral] on the whole society."[139] Having defined for itself the purpose of the Texas statute, the Court concludes that it is illegitimate. "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[140] Justice O'Connor's concurring opinion provides a revealing gloss on the majority's analysis. Arguing that the case should have been decided on equal protection grounds, O'Connor states with clarity: "When a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."[141] It appears that similar considerations dictated similarly "searching" analysis under the due process analysis.

Lawrence can be understood as an extension of *Romer v. Evans*,[142] which features a similar analysis under the rubric of equal protection. Here, the court applies heightened rational basis review to hold invalid a provision of Colorado's constitution that prohibited all levels of state and local government from taking actions to protect gays and lesbians. The Court's opinion is devoid of hypothetical explanations; it even dismisses the state's attempt to explain its own motives.[143] Because the provision was "at once too narrow and too broad,"[144] the Court concluded that it was "inexplicable by anything but animus toward the class it affects."[145] Regarding animus, the decision is unambiguous: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[146]

The *Romer* court attributes its views on animus to *U.S. Dept. of Agriculture v. Moreno*,[147] a case that is especially relevant to an analysis of Section 6036. Here, the Court examined a section of the Food Stamp Act that categorically excluded from eligibility all households containing any individuals who bore no familial relation to other resi-

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[139] *Id.* at 571.
[140] *Id.* at 577–78 (citations omitted).
[141] *Id.* at 580.
[142] 517 U.S. 620 (1996).
[143] *Id.* at 626 (describing the State's reading of the amendment as "implausible").
[144] *Id.* at 621.
[145] *Id.* at 632.
[146] *Id.* at 634 (citations omitted).
[147] 413 U.S. 528 (1973).

dents. The government argued that the statute was rationally related to the goal of minimizing fraud: households with unrelated members were more likely than others to contain individuals who misrepresented their income or voluntarily remained poor, and such households were also relatively unstable, making abuses particularly difficult to detect.[148] But the Court noted the availability of alternative and effective mechanisms for protection against fraud, concluding that "[t]he existence of these provisions necessarily casts considerable doubt upon the proposition that the [statute] could rationally have been intended to prevent those very same abuses."[149] More importantly, the Court objected that the statute was so overinclusive and underinclusive as to rule out any rational relation to fraud-prevention: those who were intent on deception could simply set up separate households, while those who were so poor that they could not afford to alter their living arrangements would be cut off.[150] By critically examining the relationship between the statute and the government's purported objectives, the Court smoked out Congress's real, illegitimate aim: "The legislative history . . . indicates that that amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[151] This the Court found to be unacceptable, coining the phrase that echoed forcefully in *Romer*: "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[152]

City of Cleburne v. Cleburne Living Center[153] fits the same mold. Here, the Court voided a Texas city's attempt to impose a licensing requirement upon group homes for the mentally retarded. The decision went to great lengths to explain its refusal to grant heightened scrutiny to the mentally retarded as a "quasi-suspect" class.[154] Nonetheless, the rational basis review ultimately performed by the Court was decidedly heightened. Hypothetical justifications for the law were nowhere suggested. Instead, the court critically examined the city's claims regarding its actual purposes, rejecting them as pretextual because the means chosen were radically underinclusive: for instance, if the city aimed to control the number of people occupying single dwellings, why did it not require licenses from hospitals or fra-

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[148] *Id.* at 535.

[149] *Id.* at 536–37.

[150] *Id.* at 537–38.

[151] *Id.* at 534.

[152] *Id.* ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

[153] 473 U.S. 432 (1985).

[154] *Id.* at 442–46.

ternities?[155] Having eliminated the city's explanations as beyond belief, the court concluded that, once again, "irrational prejudice" was at the root of legislation.[156] The Court struck down the law as an equal protection violation, because irrational prejudice is not a legitimate state aim.[157]

In other cases, such as *James v. Strange*,[158] the Court has been even more aggressive. At issue here was a part of a Kansas scheme that provided that the state had the right to recover the costs of public defense from indigent defendants and that, when indigents defaulted upon their assessments, the defendants were not permitted to avail themselves of certain restrictions on state recoupment procedures, such as a cap on weekly garnishment of wages, that were available to other judgment debtors. The Supreme Court voided the statute as an equal protection violation that did not survive heightened rational basis review. The Court observed that the scheme placed a great burden upon the members of the class, whose hopes for "self-sufficiency and self-respect" the statute "blighted."[159] The fact that alternative means of achieving the state's goals were available was taken into consideration as well.[160] Ultimately, the Court weighed the burdens to members of the class against the statute's benefits to the state and concluded that the disproportion revealed "elements of punitiveness and discrimination" sufficient to render the statute invalid.[161] This conclusion is especially striking because it appears that the Court accepted that the statute did indeed have a rational relation to the legitimate state aim of cost recovery.[162]

All the above decisions have a similar structure: through critical analysis, the Court peels away the government's defenses, revealing a core of impermissible animus toward a disfavored minority.[163] The revelation of the animus seals the law's fate. Why should this be so?

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[155] *Id.* at 450.
[156] *Id.*
[157] *Id.* at 446.
[158] 407 U.S. 128 (1972).
[159] *Id.* at 141–42.
[160] *Id.* at 141.
[161] *Id.* at 142.
[162] *Id.* at 138.
[163] As noted above, the decisions surveyed also share another significant feature: they abstain from announcing their own doctrinal status. Kermit Roosevelt III sees this as strategic "subterfuge" motivated by "the desire not to authorize lower courts to apply the rule the Court refuses to announce." Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1691 (2005). On this view, there is no heightened rational basis review doctrine as such; there are only individual and aberrant cases where the Court has decided to ignore its own decision rules and instead get the "right" result.

Lower courts have indeed been reluctant to recognize the existence of heightened rational basis review. *See, e.g.*, Powers v. Harris, 379 F.3d 1208, 1224 (10th Cir. 2004) (refusing to employ heightened rational basis review to examine economic legislation because, *inter alia*, the Court

The Court has taken great pains to clarify that its minimal rational basis decisions are grounded in a constitutionally-mandated faith in democratic decision-making processes. As Justice Blackmun wrote for the Court in *Nordlinger v. Hahn*: "Time and again . . . this Court has made clear in the rational-basis context that the 'Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'"[164] The *Beach* Court finds this presumption to be wise policy: "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."[165]

Yet, consistent with its underlying theory, the canonical formulation of rational basis review forthrightly acknowledges that total judicial deference is not always appropriate. The Blackmun quotation from *Nordlinger*, *sans* ellipses, reads: "the 'Constitution presumes that, *absent some reason to infer antipathy*, even improvident decisions will eventually be rectified by the democratic process."[166] The implicit idea is that deference should be at its lowest ebb when there is reason to believe that democratic processes are not functioning as they should, so that legislators are promoting the interests of an in-group at the expense of an out-group. The most influential articulation of this theme can be found in the famous fourth footnote to *Carolene Products*. Here, the Court ponders whether it might be said that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."[167] Indeed, "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

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has never explicitly acknowledged the existence of the doctrine, nor has it "provid[ed] [a] principled foundation for determining when more searching inquiry is to be invoked").

[164] 505 U.S. 1, 17 (1992) (citation omitted). Rather, more acidly, Stephen Loffredo has observed that "[w]henever one finds paeans to democracy in *United States Reports*, there is a fair chance that the Court has just dispatched a poor person's claim of constitutional right." Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1290 (1993); *see also id.* at 1290 n.50 (calculating that "[n]early 40% of all postwar cases that invoke the term 'presumption of constitutionality' to uphold legislation involve the Court's denial of a poor person's claim.").

[165] FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

[166] 505 U.S. 17 (emphasis added).

[167] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

searching judicial inquiry."[168] While the *Carolene* language is often cited as the origin of a "discrete and insular minority" test for extensions of equal protection heightened scrutiny classifications, the "discrete and insular" language is suggested as merely one potential means of addressing the Court's real concern: that hostility toward an unpopular minority can render that minority effectively unable to protect its interests through the democratic process.

In Section 6036, we have legislation placing a special burden upon indigents in need of public assistance. Is there "reason to infer" congressional "antipathy" to this class that would interfere with its ability to defend itself through the political process? There is.

The Constitution avers in its opening phrase that it speaks for "the people of the United States."[169] But the Founders had no interest in providing a legal definition of the single "people" they were inventing. For instance, while members of the House of Representatives were to be "chosen . . . by the people of the several states,"[170] these states had discretion to define their "people" for themselves: "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."[171] Similarly, presidential electors were appointed by state legislatures, in whatever manner they chose.[172] The only limit on state discretion in matters of suffrage in the original Constitution can be implied from Article IV, Section 4: "The United States shall guarantee to every state in this union a republican form of government."[173] Yet no definition of "republican" is provided.[174]

By drafting the Constitution in this manner, the Founders protected and perpetuated the disenfranchisement of the poor. As Alexander Keyssar found in his significant study, The Right to Vote: The Contested History of Democracy in the United States:

> The lynchpin of . . . suffrage regulations was the restriction of voting to adult men who owned property. On the eve of the American Revolution, in seven colonies men had to own land of specified acreage or monetary value in order to participate in elections; elsewhere, the ownership of

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[168] *Id.* *See also* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 715 (1985) (explaining that "the *Carolene* theory is to seize the high ground of democratic theory").

[169] U.S. CONST. pmbl.

[170] U.S. CONST. art. I, § 2.

[171] *Id.*

[172] U.S. CONST. art. II, § 1

[173] U.S. CONST. art. IV, § 4.

[174] *See* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (holding that questions arising under this section are political, not judicial, in character and that "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character").

personal property of a designated value (or in South Carolina, the payment of taxes) could substitute for real estate.[175]

Though local evidence is spotty, Keyssar estimates that roughly 40% of adult white males were disenfranchised under the constitutional scheme, together with nearly all women, African-Americans, and Native-Americans.[176] That the Founders desired this result can be seen from the records of the Constitutional Convention, where the brief debate on the question of suffrage was framed by Gouverneur Morris's concern that voting rights were being spread too broadly.[177]

Between 1790 and 1850, most states eliminated explicit limits of the franchise to property holders and taxpayers.[178] With the ratification of the Fourteenth Amendment in 1868, the Constitution recognized for the first time such a thing as a "right to vote"[179] that should not be denied due to economic status, though this right is protected in a peculiarly tortured manner. Section 2 punishes state deviations from an ideal model of adult male suffrage, whether in state or federal elections, by deducting the number of excluded adult males from the state's total adult male population as used to calculate the size of its delegation in the House of Representatives.[180] This provision has the perverse effect of further punishing those who are excluded from the franchise: not only will they have no vote, but their

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[175] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 5 (2000).

[176] *Id.* at 7. Five New England states permitted blacks to vote on the same terms as whites, and otherwise qualified New Jersey women had voting rights. *Id.* at 6, 20. *See also* Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1348 (discussing the history of state constitutions limiting suffrage to white men).

[177] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 201–11 (Max Farrand ed., 1966); *see also* Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 376 (1989) (noting the simultaneous rise of pauper exclusion clauses and abolition of property qualifications and finding that the Founding generation believed that "all men were entitled to govern themselves, but that only property ownership allowed them actually to do so").

The founding consensus in favor of excluding the impoverished from the American demos can be seen in unvarnished form in the Northwest Ordinance, enacted in 1787 by the Continental Congress under the Articles of Confederation and affirmed with slight modifications in 1789 by the first U.S. Congress under the Constitution. The document is lauded to this day as one of the greatest achievements of American nation-building. *See, e.g.*, Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 933 (1995) (arguing that the Northwest Ordinance should be considered on par with the Declaration of Independence and the Federalist Papers as a document that "authoritatively expresses a guiding set of principles" of the U.S. Constitution). Congress declared in the Northwest Ordinance that "a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years residence in the district, shall be necessary to qualify a man as an elector of a representative." The Northwest Ordinance, ch. 8, 1 Stat. 50, 51 (1789).

[178] KEYSSAR, *supra* note 175, at 29.

[179] U.S. CONST. amend. XIV, § 2.

[180] *Id.*

state's representatives cannot even claim to represent them "virtually." They are instead totally written out of the constitutional order.

Of course, the end of explicitly class-based franchise restrictions did not mark the full integration of the American poor into the *demos*. To start with, a substantial portion of the poor were denied political rights on the basis of race and gender. For the remaining sub-group of white male poor, the dominant trend between 1855 and World War I was the rolling back of newly acquired rights. For instance, Massachusetts imposed an unprecedented literacy test upon voters in 1855, in an effort to keep Irish workers away from the polls.[181] Georgia revoked the franchise from impoverished white males in 1860, for similar reasons.[182]

The formal political disenfranchisement of the American indigent persisted well into the 20th century. When Congress debated the Twenty-Fifth Amendment in 1956, it considered adding a clause that would permit states to retain their pauper exclusion provisions.[183] In 1957, the Oklahoma Supreme Court granted elderly pensioners an exemption from that state's pauper exclusion rule, which remained on the books.[184] In 1972, Massachusetts finally deleted the pauper exclusion clause from its constitution, but in the statewide referendum on the question, roughly 20% of the electorate voted to keep the exclusion in place. A similar referendum in Rhode Island was defeated.[185] Thus, "despite its pioneering role in promoting democratic values, the United States was one of the last countries in the developed world to attain universal suffrage."[186]

There is ample evidence that our political system has not overcome this legacy of deliberate disenfranchisement. A meta-analysis of recent research concluded that "[s]tudents of civic involvement in America are unanimous in characterizing political input through political participation as being extremely unequal."[187] Thus, "only 29 percent of individuals in families with incomes under $15,000 are affiliated with a political organization, compared with 73 percent

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[181] KEYSSAR, *supra* note 175, at 86.

[182] *Id.*

[183] *Id.* at 271.

[184] *Id.*

[185] *Id.* at 272.

[186] *Id.* at xxiii–xxiv. *But see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (noting that the impoverished plaintiffs do not constitute a cognizable class in part because they have not been subjected to "a history of purposeful unequal treatment"). The Court's refusal to acknowledge the history of discrimination against the poor in the United States is itself strong evidence in support of the postulate that members of the group cannot rely upon the majority for rational decision-making.

[187] Kay Lehman Schlozman et al., *Inequalities of Political Voice, in* INEQUALITY AND AMERICAN DEMOCRACY 19 (Lawrence R. Jacobs & Theda Skocpol eds., 2005).

among those in families earning over $75,000."[188] A similar pattern is reflected in voting statistics. Looking at data from the 2000 elections, the Census Bureau concluded that:

> Citizens with higher incomes were more likely to vote. The voting rate among people living in families with annual incomes of $50,000 or more was 72 percent, compared with 38 percent for people living in families with incomes of under $10,000. Together, about one-half of those who voted in the November 2000 election lived in families with incomes of $50,000 or more.[189]

Such data leads the historian Keyssar to observe that 21st century "nonvoters come disproportionately from the same social groups that in earlier decades were the targets of restrictions on the franchise."[190]

If indigent Americans truly were shut out of the American political process one would expect to find substantive outcomes that were hostile to their interests. This is the case. In fact, it is what most distinguishes U.S. social demographics from those of other developed democracies. The American poor are legion[191] and their numbers are growing;[192] the extent of economic inequality is breathtaking[193] and accelerating (See Tables 1, 2, 3). These facts have been shaped by political choices (See Table 4).[194] As one group of political scientists concluded, upon surveying the most current data: "economic ine-

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[188] LAWRENCE R. JACOBS & THEDA SKOCPOL, *Studying Inequality and American Democracy: Findings and Challenges, in* INEQUALITY AND AMERICAN DEMOCRACY, *supra* note 187, at 216.

[189] U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000, at 5 (2002), http://www.census.gov/prod/2002pubs/p20-542.pdf.

[190] KEYSSAR, *supra* note 175, at 320. In this context, the continuing impact of felon disenfranchisement should not be overlooked. An estimated 4.7 million disproportionately poor and African-American felons and ex-felons are currently prohibited from voting. *See* Jacob S. Hacker et al., *Inequality and Public Policy in* INEQUALITY AND AMERICAN DEMOCRACY, *supra* note 187, at 203 n.17; Christopher Uggen & Jeff Manza, *Democratic Contraction: The Political Consequences of Felon Disenfranchisement Laws in the United States*, 67 AM. SOC. REV. 777, 778 (2001) ("The United States stands alone in the democratic world in imposing restrictions on the voting rights of a very large group of non-incarcerated felons.").

[191] The U.S. Census estimates the total number of Americans living below the poverty line at 37 million, or 12.7% of the total U.S. population. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 9 (2005), http://www.census.gov/prod/2005pubs/p60-229.pdf.

[192] *Id.* (showing that poverty has risen in each of the last four years).

[193] Tony Judt, *Europe vs. America*, THE NEW YORK REVIEW OF BOOKS, Feb. 10, 2005, at 4 ("In the US today the richest 1 percent holds 38 percent of the wealth . . . .").

[194] *See* Robert M. Solow, *Welfare: The Cheapest Country*, NEW YORK REVIEW OF BOOKS, Mar. 23, 2000, at 20–23, *available at* http://www.nybooks.com/articles/177 ("[M]arket outcomes are not less egalitarian here than in Europe generally. . . . [But] the US eliminates much less poverty than any other [major developed country]. The 'post-tax-and-transfer' deep poverty rate in the US is more than twice as high as the average of the other fourteen countries."); *see also* GARTH L. MANGUM ET AL., THE PERSISTENCE OF POVERTY IN THE UNITED STATES 110 (2003) ("The fact that so many developed countries with lower per capita gross domestic products (GDPs) have lower relative poverty rates than the United States indicates that the persistence [of poverty in the United States] is, at least in part, a matter of policy choice.")

quality in the United States is greater than in other nations in part because U.S. public policy is less focused on trying to ensure equality."[195]

The system of tiered review dictates that under certain circumstances judges must suspend their faculty for rational thought. But it also provides for the exercise of rational thought when deciding when to suspend it. The data presented above provide good reason to infer that antipathy against the poor impedes their ability to use the political process effectively. This well-founded inference is, in turn, good reason for the courts to deploy a standard of heightened rational basis review when confronted with legislation such as Section 6036.[196]

When subjected to a properly heightened rational basis review, Section 6036 does not fare well. With this provision, the government has limited Medicaid eligibility to the class of U.S. citizens who are not only indigent, but can prove their citizenship by producing a birth certificate. The most straightforward basis upon which to defend the statute is that it will reduce federal spending. But, as noted above, Section 6036 will actually increase federal spending; it bears no rational relationship to this legitimate goal.

In the alternative, the government might assert that Section 6036 bears a rational relation to the legitimate state aim of fraud reduction. But due to the peculiar nature of the U.S. system of birth registration, the class the government has created is an exceedingly poor fit with this aim. Like the *Cleburne* zoning rule, Section 6036 is underinclusive: it will not deter those who are intent upon fraud, who can easily obtain a fraudulent birth certificate. And like the exclusion of certain households from Food Stamp eligibility at issue in *Moreno*, Section 6036 is overinclusive: the amount of effort it takes to obtain a valid birth certificate will deter many genuinely eligible citizens from completing the Medicaid application process. Meanwhile—even more so than the Kansas recoupment scheme at issue in *James v. Strange*—the overinclusiveness of the rule will result in the most grave kind of harm to those who are impacted: some whose lives would have been saved by receiving proper medical treatment will instead perish. Finally, there is no evidence of the existence of any meaningful level of fraud and there are ample alternative mechanisms for addressing the concern (as in both *Moreno* and *Strange*). In sum, the disproportion between the burden upon members of the class and the benefits that will accrue the government leaves the Court with no

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[195] Hacker, *supra* note 190, at 157.

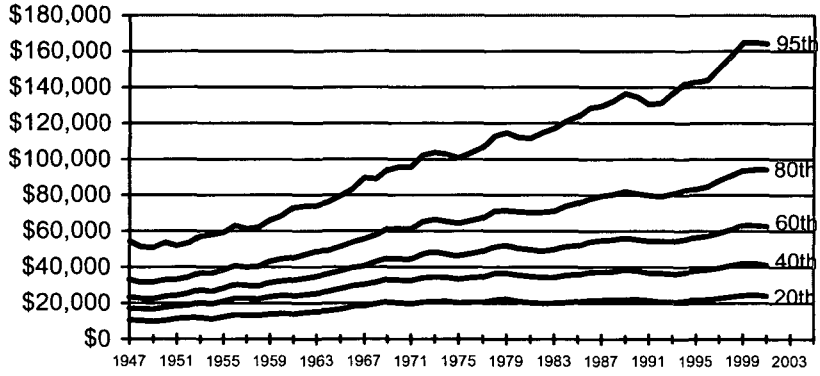
[196] Of course, the presence of animus toward a politically vulnerable minority is also a classic rationale for the application of strict scrutiny. With respect to classifications by wealth, however, this possibility has been foreclosed. *See supra* note 122.

choice but to conclude that Section 6036 rests ultimately upon animus toward those whose poverty renders them dependant upon public assistance to meet basic medical needs—a disfavored minority like the homosexuals targeted by the Texas anti-sodomy statute voided by *Lawrence* and the Colorado anti-anti-discrimination amendment declared unconstitutional in *Romer*.

The anti-poor animus of Section 6036 is of a piece with a continuing legacy of disenfranchisement that has rendered democratic processes incapable of addressing the deepening crisis of social inequality in the United States. Until very recently, the American poor were denied the most basic prerogatives of citizenship; today, Section 6036 attempts once again to banish them from the *demos*. This aim is illegitimate, rendering Section 6036's documentation requirement impermissible. Thankfully, our courts have a role to play in bringing U.S. social policy into conformity with constitutional values.

TABLE 1

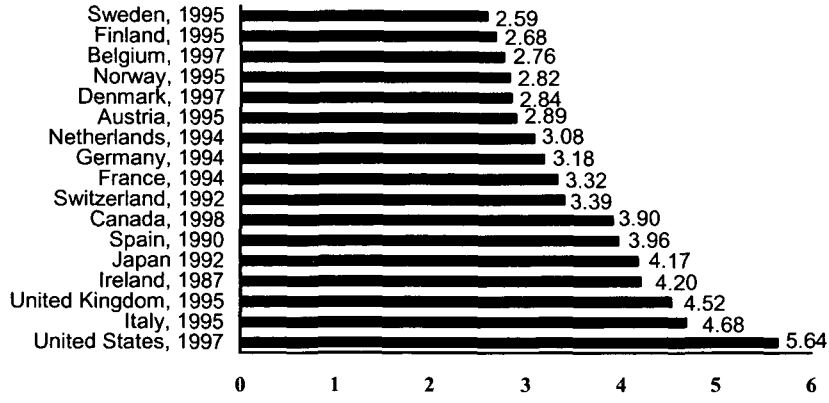
Family Income by Percentile, 1947-2001 (in 2001 dollars)



SOURCE: U.S. Census Bureau, Historical Income Tables, Table F-1.

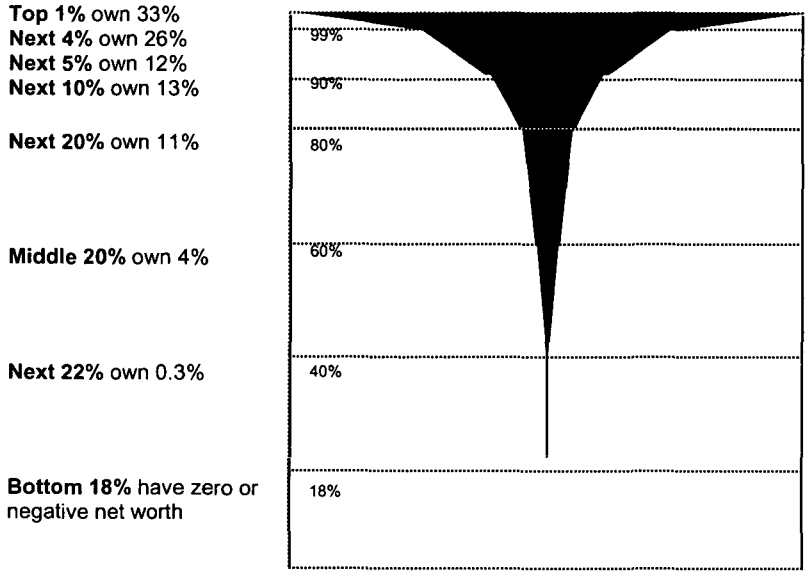
TABLE 2

Household Income in OECD Countries: Ratio of 90th percentile to 10th percentile



SOURCE: Economic Policy Institute, *The State of Working America,* 2002–03 (2003), Table 7.10

TABLE 3
Distribution of Wealth in the U.S., 2001



SOURCE: Edward N. Wolff, *Changes in Household Wealth in the 1980s and 1990s in the U.S.*, (Levy Economics Institute, Working Paper No. 407, 2004) *available at* http://ideas.repec.org/p/lev/wrkpap/407.html.

TABLE 4
Relative Poverty Rates (percent), 1991

	Post-tax/transfer Relative Poverty	*Pre-tax/transfer Relative Poverty*
Australia	6.4	21.3
Belgium	2.2	23.9
Canada	5.6	21.6
Denmark	3.5	23.9
Finland	2.3	9.8
France	4.8	27.5
Germany	2.4	14.1
Ireland	4.7	25.8
Italy	5.0	21.8
Netherlands	4.3	20.5
Norway	1.7	9.3
Sweden	3.8	20.6
Switzerland	4.3	12.8
United Kingdom	5.3	25.7
United States	11.7	21.0

SOURCE: L. Kenworthy, *Do Social-Welfare Policies Reduce Poverty? A Cross-National Assessment*, (Luxembourg Income Study, Working Paper No. 188, 1998).