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MEDICAID EXPANSION AS COMPLETION OF THE GREAT SOCIETY

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I. INTRODUCTION

“But there is another tradition that we share today. It calls upon us never to be indifferent toward despair. It commands us never to turn away from helplessness. It directs us never to ignore or to spurn those who suffer untended in a land that is bursting with abundance.”¹

On the doorstep of its fiftieth anniversary, Medicaid at last could achieve the ambitious goals President Lyndon B. Johnson enunciated for the Great Society upon signing Medicare and Medicaid into law in 1965. Although the spotlight shone on Medicare at the time, Medicaid was the “sleeper program” that caught America’s neediest in its safety net—but only some of them.² Medicaid’s exclusion of childless adults and other “undeserving poor” loaned an air of “otherness” to enrollees, contributing to its stigma and seeming political fragility. Now, Medicaid touches every American life. One in five Americans benefits from Medicaid’s healthcare coverage,³ and that number soon will increase to one in four due to the Patient Protection and Affordable Care Act (“ACA”).⁴ For its first forty-nine years, Medicaid covered only about forty percent of the nation’s poor; the ACA is a fulcrum for Medicaid, tipping the old limited medical welfare program to a universal social insurance program. Medi-

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1. President Lyndon B. Johnson, Statement by the President of the United States Following Passage of the Medicare Bill by the Senate 22 (July 9, 1965), available at <https://www.cms.gov/About-CMS/Agency-Information/History/downloads/CMSPresidentsSpeeches.pdf>.

2. Rosemary Stevens & Robert Stevens, *Medicaid: Anatomy of a Dilemma*, 35 L. & CONTEMP. PROBS. 348, 348 (1971).

3. See *Medicaid & CHIP: April 2014 Monthly Applications, Eligibility Determinations, and Enrollment Report*, CENTERS FOR MEDICARE AND MEDICAID SERVICES 3 (June 4, 2014), <http://www.medicaid.gov/AffordableCareAct/Medicaid-Moving-Forward-2014/Downloads/April-2014-Enrollment-Report.pdf>.

4. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered titles of the U.S. Code).

caid's universalization reveals that the program can now be best understood as a vehicle for civil rights.

Medicaid's new universality is revealed in three measures: (1) the percentage of the population of children, pregnant women, and nonelderly adults Medicaid covers; (2) the degree to which Medicaid funds long term care for the elderly and the disabled; and (3) the ACA's philosophy that makes Medicaid a universal safety net, one that covers not just the deserving poor, but anyone who cannot afford health insurance.

We unveil how this key program metamorphoses after the ACA from one of exclusion in access and benefits to a form of social insurance that rises to the level of a civil right through its universality. We quantify this claim by explicating the enrollment and spending numbers on the various Medicaid populations. We contextualize it by considering completion of the Great Society through Medicaid's growth into social insurance. We conclude by exploring the implications for upcoming gubernatorial elections.

II. THE ACA'S FULCRUM

Medicaid was created at the same time as Medicare,⁵ but little policy power was spent creating a thoughtful safety net for the poor.⁶ Medicaid offered generous federal funding and created a federal superstructure that states had to accept to receive that funding.⁷ But many decisions about who was eligible and how their medical care would be provided echoed the Elizabethan concept of the "deserving poor,"⁸ limiting who would receive medical welfare to the aged, blind, disabled, pregnant women, and children.⁹ Medicaid was a safety net with many holes that isolated enrollees from the rest of the population, despite the intent to channel the poor into mainstream medicine.

Over time, the federal government has increased the scope of federal standards for coverage and eligibility, requiring states to provide comprehensive medical coverage to children under age twenty-one;¹⁰ to expand coverage of the aged, blind, and disabled;¹¹ to extend eligibility for pregnant women and children;¹² and to support drug coverage for people in both Medicaid and Medicare.¹³ The ACA was another such incremental step, and arguably the biggest, requiring states to enroll every-

5. Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 432 (2011).

6. ROBERT STEVENS & ROSEMARY STEVENS, *WELFARE MEDICINE IN AMERICA: A CASE STUDY OF MEDICAID* 53 (1974).

7. Huberfeld, *supra* note 5, at 445.

8. *Id.* at 439.

9. *Id.*

10. 42 U.S.C. § 1396d(a)(4)(B) (2012).

11. Social Security Act Amendments of 1972, Pub. L. No. 92-603, §§ 201, 301, 86 Stat. 1329, 1370, 1465 (codified in scattered sections of 42 U.S.C.).

12. 42 U.S.C. § 1396a(a)(10)(A)(i). (l).

13. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. 108-173, 117 Stat. 2066 (codified in scattered sections of 42 U.S.C. and 26 U.S.C.).

one under age sixty-five earning up to 133 percent of the federal poverty level (“FPL”).¹⁴ The ACA jettisoned discrimination against nonelderly childless adults by making any poor citizen eligible to enroll in Medicaid. The Supreme Court effectively rendered the ACA’s Medicaid expansion optional for states in *NFIB v. Sebelius*,¹⁵ but the idea behind the Medicaid expansion remains: Medicaid is now universal.

III. MEDICAID AS (NEAR) UNIVERSAL SOCIAL INSURANCE POST-ACA

Healthcare in the United States is expensive and costs continue to rise.¹⁶ Americans rely on health insurance to access medical care, and historically a majority of nonelderly Americans have obtained coverage through employment. The ACA continued to rely on employers to provide health insurance for the nonelderly, but, given the idiosyncrasies of the U.S. healthcare sector, many would still be uninsured.¹⁷ Thus, Congress expanded Medicaid to capture individuals who would remain uninsured even after efforts to increase employer-provided benefits. A significant number of Americans will rely on the Medicaid program to access medically necessary healthcare; early estimates put the number of newly eligible Americans at more than twelve million.¹⁸

A substantial percentage of the pre-ACA uninsured came from working families whose employers did not offer adequate coverage.¹⁹ Approximately seventy-nine percent of the uninsured have a family member in either a full time or a part time job that does not provide health insurance benefits, and seventy-five percent of the uninsured make less than 250 percent of the federal poverty level (thirty-eight percent are below one hundred percent of the federal poverty level).²⁰ Moreover, some have predicted that the ACA may effectively end the employer-provided benefits system, as employers could find paying the tax penalty more cost-effective than continuing to fund ever-increasing premiums.²¹ Thus, many working Americans may find themselves de-

14. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

15. See 132 S. Ct. 2566 (2012).

16. Annie Lowrey, *Health Care Spending’s Recent Surge Stirs Unease*, N.Y. TIMES, Apr. 18, 2014, http://www.nytimes.com/2014/04/19/business/economy/health-care-spending-recent-surge-stirs-unease.html?_r=0.

17. See Brendan S. Maher & Radha A. Pathak, *Enough About the Constitution: How States Can Regulate Health Insurance under the ACA*, 31 YALE L. & POL’Y REV. 275, 293 (2013); Jessica L. Roberts, *The Employer as (Accidental) Health-Care Policymaker* (July 1, 2014) (unpublished manuscript on file with SSRN), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2461271.

18. Samantha Artiga & Robin Rudowitz, *Medicaid Enrollment Under the Affordable Care Act: Understanding the Numbers*, KAISER FAM. FOUND. (Jan. 29, 2014), <http://kff.org/health-reform/issue-brief/medicaid-enrollment-under-the-affordable-care-act-understanding-the-numbers/>.

19. *The Uninsured: A Primer—Key Facts About Health Insurance on the Eve of Coverage Expansions*, KAISER FAM. FOUND. (Oct. 23, 2013), <http://kff.org/uninsured/report/the-uninsured-a-primer-key-facts-about-health-insurance-on-the-eve-of-coverage-expansions/>.

20. *Id.* (detailing the statistics in the “Charts & Tables” tab).

21. See, e.g., Neil Irwin, *Envisioning the End of Employer-Provided Health Plans*, N.Y. TIMES, May 1, 2014, http://www.nytimes.com/2014/05/01/upshot/employer-sponsored-health-insurance-may-be-on-the-way-out.html?_r=1&abt=0002&abg=0; Jeffrey C. McGuinness & Tevi D. Troy, *What CHROs*

pending on Medicaid, making it the new employment benefit for the working poor.

Pregnancy and childbirth provide another example of Medicaid's universality. Prenatal care pays a lifetime of wellness benefits for both mother and child, and most states have covered more pregnant women than the Medicaid Act requires. Prior to the ACA, Medicaid funded nearly fifty percent of U.S. births and provided seventy-five percent of publicly funded family planning services.²² Medicaid also covers thirty-five percent of all children.²³ Even in states that are not immediately expanding Medicaid eligibility, the ACA ensures that Medicaid will cover yet more pregnancies, births, and new lives due to the welcome mat effect.

A substantial portion of the elderly and the disabled also need Medicaid.²⁴ In fact, anyone who requires long term care, but lacks comprehensive long term care insurance²⁵ or significant savings, will find herself dependent on Medicaid. Studies indicate that over seventy percent of the elderly population will require long term care.²⁶ This is also true for non-elderly individuals who have serious disabilities.²⁷ While Medicare covers many of the healthcare costs for the over-sixty-five population and the permanently disabled, that coverage is far from comprehensive. Close to ten million Americans need long term care services, and Medicare fails to cover these necessary expenses.²⁸ Medicaid is currently the largest payer for long term care in the United States,²⁹ funding forty percent of

Think About Employee Healthcare: a 2014 Snapshot, AM. HEALTH POL'Y INST. (2014), available at <http://www.americanhealthpolicy.org/Content/documents/resources/What%20CHROs%20Think%20About%20Health%20Care.pdf>.

22. Anne Markus et al., *Medicaid Covered Births, 2008 Through 2010 in the Context of Implementation of Health Reform*, 23 WOMEN'S HEALTH ISSUES J. e273, e275 (2013), available at [http://www.whijournal.com/article/S1049-3867\(13\)00055-8/pdf](http://www.whijournal.com/article/S1049-3867(13)00055-8/pdf); *Medicaid Drives Upward Trend in Public Funding for Family Planning Services*, 15 GUTTMACHER POLICY REVIEW 1 (2012), available at <http://www.guttmacher.org/pubs/gpr/15/1/gpr150121.html>; Phil Galewitz, *Nearly Half of U.S. Births are Covered by Medicaid, Study Finds*, KAISER HEALTH NEWS (Sept. 3, 2013), <http://capsules.kaiserhealthnews.org/index.php/2013/09/nearly-half-of-births-in-the-u-s-are-covered-by-medicaid-study-finds/>.

23. Markus et al., *supra* note 22, at e273.

24. About fourteen percent of Medicaid beneficiaries are also enrolled in Medicare. *Medicaid Moving Forward*, KAISER FAM. FOUND. (June 17, 2014), <http://kff.org/medicaid/fact-sheet/the-medicaid-program-at-a-glance-update/>.

25. About seven to nine million citizens had long-term care insurance as of 2012. Kathleen Ujvari, *Long Term Care Insurance: 2012 Update*, AARP PUB. POL'Y INST. (June 2012), available at http://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2012/ltc-insurance-2012-update-AARP-ppi-ltc.pdf.

26. Donald Redfoot & Wendy Fox-Grage, *Medicaid: A Program of Last Resort for People Who Need Long-Term Services and Supports*, AARP PUB. POL'Y INST. (May 2013), available at http://www.aarp.org/content/dam/aarp/research/public_policy_institute/health/2013/medicaid-last-resort-insight-AARP-ppi-health.pdf.

27. Medicaid covers 9.3 million nonelderly people with disabilities. The Kaiser Commission on Medicaid and the Uninsured, KAISER COMM. ON MEDICAID AND THE UNINSURED, MEDICAID: A PRIMER: KEY INFORMATION ON THE NATION'S HEALTH COVERAGE PROGRAM FOR LOW-INCOME PEOPLE 1, 4 (Mar. 1, 2013), available at <http://kaiserfamilyfoundation.files.wordpress.com/2010/06/7334-05.pdf>.

28. *Id.*

29. Redfoot & Fox-Grage, *supra* note 26.

all costs.³⁰ Furthermore, Medicaid foots the bill for over sixty percent of long term nursing home residents.³¹ In short, if you live long enough, you will be enrolled in Medicaid.

In sum, many Americans—through no fault of their own—will require governmental assistance to pay for healthcare at some point in their lives. Because so many rely on Medicaid and at so many junctures from birth to death, Medicaid is no longer a limited program that touches only the “others” labeled as the “deserving poor.” Medicaid is a universal health insurance program that buttresses those who need healthcare but cannot afford it. Medicaid is morphing into universal social insurance.

IV. UNIVERSALITY—THE GREAT SOCIETY FIFTY YEARS LATER

Medicaid has always been an entitlement for those who met its eligibility parameters because anyone who is eligible under the Medicaid Act must be enrolled in the program.³² In other words, once a state agrees to accept federal funding for Medicaid, that state must enroll everyone who qualifies. The state cannot delay applicants’ admittance into Medicaid, deny their application, or otherwise cap enrollment.³³

But, if Medicaid was already a statutory entitlement, then how does its new universality render Medicaid a civil right? For the purposes of this Essay, we define “civil right” as an enforceable right that is necessary for full and equal citizenship.³⁴ Access to necessary medical care is essential to full and equal citizenship, a premise clearly recognized and supported by the ACA. Given Medicaid’s new universal access philosophy, the program itself and its expansion are best understood as a civil rights issue.

To that end, whether to expand Medicaid is a social justice matter, not just an economic or political issue. Congress intended the ACA to significantly reduce the number of uninsured Americans to open the gateway to healthcare.³⁵ Positioning Medicaid as a catch-all for lower in-

30. KAISER COMM. ON MEDICAID AND THE UNINSURED, *supra* note 27, at 4.

31. *Id.*

32. 42 U.S.C. § 1396a(a)(10) (2012).

33. *See id.*

34. Robin West looks to Thomas Paine for the definition of civil rights: “they are (1) natural rights (2) that arise by virtue of one’s membership in society, and (3) that cannot be enforced or protected on their own.” Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 906 (2014). She explains that “[t]hey are, in modern parlance, natural and positive rights of societal membership; they are rights to law, rather than rights to be free of law.” *Id.* (emphasis in original). Stephen Calabresi and Julia Rickert explain “[p]olitical rights were bestowed on select citizens with especially good judgment; civil rights, on the other hand, were the natural rights to which every person, or at least every citizen including even children, was entitled.” Stephen G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 71 (2011). The *Stanford Encyclopedia of Philosophy* defines civil rights as “the basic legal rights a person must possess in order to have [equal citizenship].” *Civil Rights*, STAN. ENCYC. PHIL. (Aug. 1, 2012), <http://plato.stanford.edu/entries/civil-rights/>.

35. *Key Facts About the Uninsured Population*, KAISER FAM. FOUND. (Sept. 26, 2013), <http://kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/>.

come individuals in need of health insurance was the primary mechanism for achieving this goal.³⁶ Hence, when the Supreme Court made Medicaid expansion optional for states, it eroded the ACA's primary purpose. To dismiss Medicaid expansion as a political issue subject to the whims of federalism ignores the social justice implications of the decision not to expand the program and disregards those individuals who will be unable to access healthcare as a result.

While most states are moving toward expansion,³⁷ certain states are refusing to expand Medicaid due to legislative or gubernatorial opposition to the ACA.³⁸ This resistance is occurring primarily in the deep South, where the numbers of uninsured and per capita poverty are concentrated.³⁹ Large swaths of the uninsured are concretely and negatively affected by nonexpansion. Medicaid's new universality should protect these socially vulnerable populations, such as minimum wage workers, people of color, and people with disabilities, who are less likely to have health insurance and are less able to pay for care out-of-pocket. The disproportionate representation of these populations in holdout states has important implications for the upcoming gubernatorial elections.

Gubernatorial challengers have been gathering evidence that Medicaid expansion is economically sensible and politically feasible.⁴⁰ Meanwhile, very active negotiations are occurring between states and HHS over "demonstration projects" for Medicaid expansion.⁴¹ While HHS has displayed significant flexibility in allowing the states to experiment with individualized paths to eligibility expansion, Medicaid's universality provides a backstop to those negotiations and to state flexibility. This philosophical backstop was evident in HHS's recent approval of Pennsylvania's demonstration waiver. Among other things, Governor Tom Corbett requested approval of a work-search requirement for anyone applying for Medicaid working less than twenty hours per week.⁴²

36. *Id.*

37. See Nicole Huberfeld, *Dynamic Expansion* (Nov. 22, 2013) (unpublished manuscript on file with SSRN), available at <http://ssrn.com/abstract=2358641>.

38. *Where the States Stand on Medicaid Expansion*, THE ADVISORY BOARD COMPANY (Sept. 4, 2014, 3:01 PM), <http://www.advisory.com/daily-briefing/resources/primers/medicaidmap>.

39. See *The Impact of the Coverage Gap in States not Expanding Medicaid by Race and Ethnicity*, KAISER FAM. FOUND. (Dec. 17, 2013), <http://kaiserfamilyfoundation.files.wordpress.com/2013/12/8527-the-impact-of-the-coverage-gap-in-states-not-expanding-medicaid.pdf>.

40. See Perry Bacon, Jr., *How Democrats Could Gain Power This Fall*, NBC NEWS (Sept. 6, 2014), <http://www.nbcnews.com/politics/elections/how-democrats-could-gain-power-fall-n197371>; see also Stand Dorn et al., *What is the Result of States Not Expanding Medicaid?*, URBAN INSTITUTE (Aug. 2014), <http://www.urban.org/UploadedPDF/413192-What-is-the-Result-of-States-Not-Expanding-Medicaid.pdf>.

41. See Tom Baker, Abbe R. Gluck, Nicole Huberfeld, & Theodor Ruger, *The New Health Care Federalism: An Empirical and Theoretical Assessment of Federalism Dynamics in Health Care and Beyond* (U. of Penn. Law Sch. Pub. Law Research Paper No. 14-34, 2014), available at http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2511003.

42. Jesse Cross-Call & Judith Soloman, *Approved Demonstrations Offer Lessons for States Seeking to Expand Medicaid Through Waivers*, CENTER ON BUDGET & POL'Y PRIORITIES (Aug. 20, 2014), <http://www.cbpp.org/cms/?fa=view&id=4190>.

HHS denied this request despite posturing from the Governor that the work requirement was the heart of the waiver request.⁴³

Here is where the destigmatizing effect of Medicaid's new universalist lens really matters. Pennsylvania's work search proposal harkened back to Medicaid's welfare days, when welfare medicine was part of a package that vilified recipients. Enrollees were treated as "other" due to the limited eligibility standards for the program, and the state could force enrollees to engage in behaviors unrelated to obtaining medical care—like searching for work. Given the increasing rate at which health insurance has been decoupled from employment benefits, the dependency concern is outdated and irrelevant, as many Medicaid enrollees are working poor. HHS must enforce Medicaid's new universality, or the philosophy of the expansion will be lost.

Gubernatorial candidates may not recognize that they are battling over the modernized Great Society, but they are certainly fighting over Medicaid expansion. Thirty-six states will hold gubernatorial elections in November, and Medicaid is an issue in every state that has not expanded already, and even in some states that have expanded by waiver.⁴⁴ Challengers are offering more generous visions for expansion than incumbents. Again, consider Pennsylvania, where challenger Tom Wolf has stated that Pennsylvania will expand its Medicaid program pursuant to the ACA, and not through a waiver that contains special requirements for new enrollees such as copayments and wellness compliance programs.⁴⁵ He has pledged to maximize Medicaid availability.⁴⁶ Similar promises are occurring nationwide, adding to the momentum of Medicaid's new universality.

In states where expansion does not occur this year, the penultimate poor will fall into a coverage gap that is the unique creation of the ACA and the holding in NFIB that rendered the expansion optional. People earning more than one hundred percent of the FPL will be able to obtain private insurance through health insurance exchanges with the benefit of federal tax credits,⁴⁷ but people earning less than one hundred percent of the FPL will be ineligible for tax credits and unable to obtain coverage.⁴⁸ Though they will not be penalized under the ACA, they are denied the civil right that is newly universal Medicaid. HHS is eager to enroll as

43. Letter from Marilyn Tavenner, Adm'r, Ctrs. for Medicare and Medicaid Servs., to Beverly Mackereth, Sec'y, Pa. Dep't of Pub. Welfare (Aug. 28, 2014), available at http://www.dpw.state.pa.us/cs/groups/webcontent/documents/document/c_098846.pdf.

44. National Governors Association, *2014 Gubernatorial Election Information* (Aug. 11, 2014), <http://www.nga.org/cms/2014Elections>; David K. Jones, *Medicaid Expansion at Stake in Key Gubernatorial Races*, AL-JAZEERA AM. (Oct. 13, 2014, 6:00 AM), <http://america.aljazeera.com/opinions/2014/10/election-medicaidexpansionobamacarefloridawisconsin.html>.

45. Peter Jackson, *5 Differences Between Pennsylvania Gov. Tom Corbett, Opponent Tom Wolf*, TIMES HERALD (Sept. 2, 2014, 10:21 AM), <http://www.timesherald.com/government-and-politics/20140902/5-differences-between-pennsylvania-gov-tom-corbett-opponent-tom-wolf>.

46. *Id.*

47. Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Businesses v. Sebelius*, 93 B.U. L. REV. 1, 85–86 (2013).

48. *Id.*

many newly eligible in Medicaid as possible, but it should not do so at the expense of enforcing the program's new universality.

V. CONCLUSION

Medicaid is finally open to all who qualify financially, modernizing the program philosophically and rejecting the old trope that medical welfare is only for the deserving poor. But, philosophy will not become reality until all states have expanded their programs. While much of the debate surrounding Medicaid expansion has sounded in the registers of politics and economics, the program is better understood in terms of civil rights. Meaningful access to affordable healthcare is an essential element of citizenship, and the newly universalized Medicaid helps to ensure that all Americans can obtain medical treatment at all stages of life. As candidates battle over whether and how to expand Medicaid, they must appreciate that this is not just a highly charged political issue or a state budgetary concern, but also a matter of social justice.

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