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### Social and Legal Debate About the Affordable Care Act

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# SOCIAL AND LEGAL DEBATE ABOUT THE AFFORDABLE CARE ACT

Janet L. Dolgin\* & Katherine R. Dieterich\*\*

## I. INTRODUCTION

In March 2010, the United States Congress passed and the President signed a sweeping health care reform law.<sup>1</sup> That law satisfied almost no one completely, but its passage represented a stunning development in a nation that had often considered, and always rejected, federal legislation to reform its system—or more accurately systems—for providing health care coverage and delivery. Yet, as soon as the bill became law, legal efforts to repeal it, limit it, or undermine it commenced, and public opposition was widespread and intense. This Article considers the ideological context within which Americans have opposed, and in large numbers continue to oppose, health care reform. More specifically, it examines legal and social opposition to the Affordable Care Act<sup>2</sup> and the ideological roots of that opposition.

Within minutes of the President's signing the bill, a group of state attorneys general challenged the law's constitutionality in a federal district court in Florida.<sup>3</sup> Others joined later, and Virginia filed a separate suit challenging the law's constitutionality.<sup>4</sup> These cases and the law they challenge have provided a stage on which the nation is considering many issues that encompass, but go beyond questions about the constitutionality of the Affordable Care Act. Most important, the nation, in contemplating the validity and implications of the Affordable Care Act, is considering contrasting visions of personhood and of moral community. This Article summarizes the health care reform law promulgated in 2010 and reviews legal and social responses to it in the first year

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<sup>1</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 24 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act (ACA), Pub. L. No. 111-152, 124 Stat. 1029 (2010).

<sup>2</sup> *Id.*

<sup>3</sup> Pete Williams, *State Attorneys General Sue Over Health Bill*, MSNBC.COM (Mar. 23, 2010, 7:44 PM), [http://www.msnbc.msn.com/id/36001783/ns/politics-health\\_care\\_reform/](http://www.msnbc.msn.com/id/36001783/ns/politics-health_care_reform/). Initially, the law was challenged by 12 Republican state attorneys general and one Democrat, from Louisiana. *Id.* See also Michael Kranish, *Health Mandate Tests the Reach of Government*, BOSTON.COM (Mar. 25, 2010), [http://www.boston.com/news/health/articles/2010/03/25/health\\_mandate\\_tests\\_the\\_reach\\_of\\_government/](http://www.boston.com/news/health/articles/2010/03/25/health_mandate_tests_the_reach_of_government/).

<sup>4</sup> Virginia's Attorney General, Ken Cuccinelli, sued separately, claiming that the federal law conflicted with a recently passed state law that, in Cuccinelli's words, safeguarded the state's "citizens from a government-imposed mandate to buy health insurance." E.J. Dionne Jr., Op-Ed., *The New Nullifiers: Ken Cuccinelli's Rush Back to the 1830s*, WASH. POST, Mar. 25, 2010, at A21. Virginia's law, passed shortly before passage of the federal health reform law, provides that no one in the state can be compelled to purchase health insurance. Williams, *supra* note 3.

after its passage.<sup>5</sup> Those responses—important in their own right—also offer a compelling context within which to examine the nation’s longstanding opposition to universal or near-universal health care coverage.

Part II reviews the history of the nation’s failure to reform its health care system during the twentieth century and suggests that by the first decade of the twenty-first century, discontent was endemic.<sup>6</sup> Part III summarizes essential components of the Affordable Care Act. The next two Parts (IV and V), consider, respectively, legal and socio-cultural opposition to health care reform, in general, and to the Affordable Care Act, in particular. Part IV focuses on responses to the Act in courts and in Congress. Part V then analyzes the ideological<sup>7</sup> roots of public opposition to health care reform. The ideology underlying that opposition is deeply informed by America’s peculiar class system. On the one hand, Americans have long resisted acknowledging the significance of class in their social order. On the other hand, however, they are and have long been entwined in an intensely competitive effort to assess and sustain class status. The Article links the assumptions undergirding that system of class relationships to public responses to health care reform.

## II. AMERICAN HEALTH-CARE COVERAGE: BEFORE THE AFFORDABLE CARE ACT

### A. American Health-Care Coverage and the History of Efforts to Reform It

By the end of the twentieth century, the United States was distinct among the developed countries in failing to provide health care coverage and thus health care to large numbers of people.<sup>8</sup> Thousands of people died each year because they could not afford health care and were too well off for government

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<sup>5</sup> This Article focuses on opposition to health care reform before and in the year following passage of the Affordable Care Act. Research on subsequent events (by this author and many others) will surely review and analyze concerns similar to those considered here, as they unfold in the period after March 2011.

<sup>6</sup> By the 2008 presidential election, the Democratic and the Republican candidates both presented proposals for reform. *See infra* notes 30-36 and accompanying text.

<sup>7</sup> “Ideology,” as used here, does not refer to a system of faulty political beliefs. Rather, the term, following the usage of the French Indologist Louis Dumont, refers to the underlying forms in terms of which people comprehend the meaning of personhood. Dumont wrote:

Our definition of ideology thus rests on a distinction that is not a distinction of matter but one of point of view. We do not take as ideological what is left out when everything true, rational or scientific has been preempted. We take everything that is socially thought, believed, acted upon, on the assumption that it is a living whole, the interrelatedness and interdependence of whose parts would be blocked out by the a priori introduction of our current dichotomies.

LOUIS DUMONT, FROM MANDEVILLE TO MARX: THE GENESIS AND TRIUMPH OF ECONOMIC IDEOLOGY 22 (1977).

<sup>8</sup> T. R. REID, THE HEALING OF AMERICA: A GLOBAL QUEST FOR BETTER, CHEAPER, AND FAIRER HEALTH CARE 2 (2009).

assistance.<sup>9</sup> And many more people faced bankruptcy as a result of unpaid medical bills.<sup>10</sup> Even more, Americans spent significantly more per capita each year on health care than people in any other nation.<sup>11</sup> And their return was not as impressive as that of other nations.<sup>12</sup> Most industrial nations have a higher life expectancy and lower rates of infant mortality than the United States.<sup>13</sup> These nations spend less per capita for health care than does the United States.<sup>14</sup> Yet, the American health care system has been and remains difficult to characterize because it offers first-rate care to some people and very little to others.<sup>15</sup> The great majority of developed nations provide health coverage, and thus health care, to everyone, regardless of class, age, or status.<sup>16</sup> In sharp contrast, access to health care in the United States reflects basic inequalities. American health-care professionals are well-educated; hospitals are well-equipped; and U.S. companies manufacture advanced medical technology that competes successfully with that of every other nation. Yet, as T. R. Reid reports, on a measure of “avoidable mortality” (deaths from conditions that are amenable to cures), the United States is ranked at the very bottom among developed nations.<sup>17</sup>

As Reid shows, this failure reflects the nation’s complicated network of separate systems for providing health care coverage. For many employed people under 65, the U.S. resembles Germany, France, and Japan.<sup>18</sup> Employers and employees share the costs of health care insurance. People over 65 are covered by Medicare which resembles the Canadian national health insurance system. For veterans, those in the military, and Native Americans, the system, which depends on physician-employees and government hospitals, functions similarly

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<sup>9</sup> *Id.* Reid reports that in 2001 (the year in which 3,000 people in the U.S. were murdered by terrorists), about 20,000 people died because they had no health care coverage and thus no access to health care. *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> THE COMMONWEALTH FUND, WHY NOT THE BEST? RESULTS FROM THE NATIONAL SCORECARD ON U.S. HEALTH SYSTEM PERFORMANCE, 2008 10 (2008), available at [http://www.commonwealthfund.org/usr\\_doc/Why\\_Not\\_the\\_Best\\_national\\_scorecard\\_2008.pdf?section=4039](http://www.commonwealthfund.org/usr_doc/Why_Not_the_Best_national_scorecard_2008.pdf?section=4039).

<sup>12</sup> REID, *supra* note 8, at 9-10.

<sup>13</sup> UNITED HEALTH FOUNDATION, AMERICA’S HEALTH RANKINGS: A CALL TO ACTION FOR PEOPLE & THEIR COMMUNITIES 4, 6-7 (2006), available at <http://www.allhealth.org/briefingmaterials/ahr2006staterankings-778.pdf> (reporting that according to data from the U.S. Census Bureau, the U.S. reports lower life expectancies than 43 nations and higher rates of infant mortality than 40 nations).

<sup>14</sup> THE COMMONWEALTH FUND, *supra* note 11, at 10.

<sup>15</sup> REID, *supra* note 8, at 23.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 32 (citing a 2008 report of the Commonwealth Fund, “Deaths Before Age 75 from Conditions That Are at Least Partially Modifiable with Effective Medical Care”).

<sup>18</sup> Reid’s *The Healing of America* offers an excellent portrait of the nation’s varied systems involved in the provision of health care coverage. REID, *supra* note 8, at 16-27. The summary here draws from Reid’s account.

to those in Britain and Cuba. And for over 50 million people<sup>19</sup> without health care coverage, the system resembles those in rural India and Cambodia.<sup>20</sup> Most medical care must be paid at the time of service by the patient. Patients without insurance cannot be denied emergency care at most hospitals<sup>21</sup> but they are responsible for the cost of that care.<sup>22</sup>

This potpourri of health care systems has been expensive, and it has been ineffective for millions of people. Yet, even as Americans, or at least many of them, have long appreciated the limitations of their health care system—or more accurately, their health care systems—they have consistently failed for almost a century to reform it. Americans have long opposed health care reform in the name of their most sacred beliefs. And now, opposition to the Affordable Care Act reflects a similar set of beliefs, including a commitment to “private solutions” in the name of freedom and choice. It is thus not surprising that during the twentieth century, at least seven presidents attempted and failed to reform the nation’s health care system.<sup>23</sup> In light of that history, the promulgation of the Affordable Care Act is remarkable. The next Section reviews aspects of the social and political processes that culminated in the law’s passage in 2010.

## B. Toward the Affordable Care Act

A far-reaching set of changes reshaped American medicine in the 1970s.<sup>24</sup> It turned a cottage industry into a big business.<sup>25</sup> The focus of health

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<sup>19</sup> THE COMMONWEALTH FUND, *supra* note 11; Marie Gottschalk, *Back to the Future?: Health Benefits, Organized Labor, and Universal Health Care*, 32 J. HEALTH POL. POL’Y & L. 923, 927 (2007).

<sup>20</sup> REID, *supra* note 8, at 19-21.

<sup>21</sup> Emergency Medical Treatment and Active Labor Act (EMTALA), Pub. L. No. 101-239, 103 Stat. 2106 (1989) (codified as amended at 42 U.S.C. § 1395dd (2011)). Passed by Congress to prevent patient “dumping,” EMTALA requires hospitals with emergency rooms that accept Medicare payments to screen and provide needed treatment to patients, regardless of their ability to pay.

<sup>22</sup> REID, *supra* note 8, at 10-21.

<sup>23</sup> These presidents include President Coolidge, *see* Vicki Kemper & Viveca Novak, *What’s Blocking Health Care Reform?*, COMMON CAUSE MAG., Winter 1992; President Franklin Roosevelt, COLIN GORDON, DEAD ON ARRIVAL: THE POLITICS OF HEALTH CARE IN TWENTIETH-CENTURY AMERICA 269 (2003); President Harry Truman, *id.* at 270-71; President Lyndon Johnson, Julius B. Richmond & Rashi Fein, *The Health Care Mess: How We Got Into It and What It Will Take to Get Out*, 10 DEPAUL J. HEALTH CARE L. 543, 555 (2007) (book review); President Nixon, PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE: THE RISE OF A SOVEREIGN PROFESSION AND THE MAKING OF A VAST INDUSTRY 394-96 (1982); President Carter, *id.* at 411; and President Clinton, GORDON, *supra*, at 41-44.

<sup>24</sup> *See* STARR, *supra* note 23.

<sup>25</sup> *Id.* at 379-419.

care shifted from curing the sick to saving money.<sup>26</sup> Physicians lost a great deal of control to industry.<sup>27</sup> And patients faced an increasingly expensive and chaotic system of health care coverage and of health care delivery.<sup>28</sup> By the 1990s, even the American Medical Association, a once-staunch opponent of reform, offered a proposal for reconstructing American health care.<sup>29</sup>

### 1. Acknowledging a Need for Reform

By the start of the twenty-first century, the need for reforming the nation's health care system was widely acknowledged. Among the public, even those with health insurance expressed discomfort at the swelling costs of health care.<sup>30</sup> Opinions differed broadly, however, on how reform should be accomplished. In 2008, the *New England Journal of Medicine* presented side-by-side pieces by the two candidates for the presidency.<sup>31</sup> Both candidates acknowledged a broken system and a need for change. But then agreement ended. The Republican candidate, John McCain, decried bureaucratization and federal regulation.<sup>32</sup> He argued for the preservation of choice<sup>33</sup> and against "mandates" and the creation of "new government bureaucracies."<sup>34</sup> In contrast, then-presidential candidate Barack Obama promised to establish a "national health-insurance exchange" as well as a "public-plan option,"<sup>35</sup> offering the "same coverage" available to those in Congress.<sup>36</sup>

Obama was elected in November 2008. By that time, between 45 and 50 million people in the U.S. had no health care coverage.<sup>37</sup> Furthermore, some

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<sup>26</sup> DONALD L. BARLETT & JAMES B. STEELE, *CRITICAL CONDITION: HOW HEALTH CARE IN AMERICA BECAME BIG BUSINESS—AND BAD MEDICINE* 4 (2006).

<sup>27</sup> *Id.* at 113, 129, 163, 180-81.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> Catherine Arnst, *Most Docs Favor National Health Insurance*, BLOOMBERG BUS. WK. (Mar. 31, 2008, 5:02 PM), [http://businessweek.com/technology/content/mar2008/tc20080331\\_551691.htm](http://businessweek.com/technology/content/mar2008/tc20080331_551691.htm).

<sup>30</sup> Kevin Sack, *Health Plan From Obama Spurs Debate*, N.Y. TIMES, July 23, 2008, at A1.

<sup>31</sup> *Perspective: Election 2008, Health Care Reform and the Presidential Candidates*, 359 NEW ENG. J. MED. 1537 (2008), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMp0807607>. McCain proposed providing tax credits that could be used "to continue . . . employment-based insurance or to find a plan that better meets [one's] needs." *Id.* at 1540.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1540-41. Further, McCain promised to "work with states" to provide coverage for people with preexisting medical conditions and for those with low incomes, and he promised to support legislation to reform the medical malpractice system. *Id.* at 1540.

<sup>34</sup> *Id.* at 1541.

<sup>35</sup> *Id.* at 1539. The public-plan option did not become part of the Affordable Care Act.

<sup>36</sup> *Id.* at 1538-39. Others openly argued for universal coverage. The American Nurses Association proposed creation of a one-payer system that would provide universal health care coverage. See, e.g., Kate Hartner, *Making a Choice*, ADVANCE FOR NURSES (Oct. 13, 2008), available at <http://nursing.advanceweb.com/Article/Making-a-Choice-2.aspx>.

<sup>37</sup> THE COMMONWEALTH FUND, *Access: Commonwealth Fund Study Finds Recession Left 52 Million Uninsured for Part of 2010*, BNA: HEALTH CARE DAILY REPORT (Mar. 17, 2011) (reporting 52 million people without coverage during some part of 2010) [hereinafter *Recession*].

analysts even pointed to the serious economic recession that began in 2008 as further justification for reforming the nation's health care system because of the hope that reform would control costs and provide coverage for a burgeoning group of unemployed people without health care coverage.<sup>38</sup> Finally, Obama garnered support for reform from a Democratic-controlled Congress. The nation had reached a "tipping point."<sup>39</sup> In short, the political moment was ripe for the new president to attempt what many earlier presidents had tried, and failed, to accomplish.<sup>40</sup>

## 2. The 111th Congress and the Affordable Care Act

By late 2009, both houses of the 111th Congress had passed a health care reform bill. These bills broadly reflected liberal, rather than conservative, goals.<sup>41</sup> However, the two bills differed on a number of important points.<sup>42</sup> Generally in such situations,<sup>43</sup> the two branches of Congress work in committee to "reconcile" differences between each chamber's bill.<sup>44</sup> But in January 2010, that process was precluded with the special election in Massachusetts of Republican Scott Brown to the Senate seat that had been occupied by Edward Kennedy. Brown's election deprived the Democrats of the 60 Senate votes needed to defeat a Republican filibuster and to ensure passage of the health reform bill that the House had approved.<sup>45</sup> Brown had supported the Massachusetts Health Care Reform Act<sup>46</sup> but had proclaimed clearly that he

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*Left 52 Million Uninsured*]; Gottschalk, *supra* note 19, at 927 (reporting 46 million uninsured people in U.S. in 2005).

<sup>38</sup> Victor R. Fuchs, *Reforming US Health Care: Key Considerations for the New Administration*, 301 J. AM. MED. ASS'N 963, 963 (2009), available at <http://jama.ama-assn.org/content/301/9/963.extract> (noting that the poor economic situation could have encouraged or discouraged health care reform, depending on one's focus). In 2010, a year after passage of the Affordable Care Act and before implementation of its most important provisions, a Commonwealth Fund survey found that 9 million adults had lost insurance as the result of losing a job. *Recession Left 52 Million Uninsured*, *supra* note 37.

<sup>39</sup> See MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000).

<sup>40</sup> See *supra* note 23 and accompanying text.

<sup>41</sup> In general, mainstream Republicans favored individual responsibility, fortified by tax incentives that would facilitate individuals' saving to provide for their own health care coverage. In contrast, liberals, including the new President, sought a broad social program that would expand coverage to millions of people unable to afford health care. See *supra* notes 32-36 and accompanying text.

<sup>42</sup> See *infra* notes 49-51 and accompanying text (referring to components of Senate bill not acceptable to members of House).

<sup>43</sup> Carolyn Lochhead, *Speaker Pelosi Bets House on Health Care Reform; Health Care Vote Today After Year-Plus of Debate*, SAN FRANCISCO CHRONICLE, Mar. 21, 2010, [http://articles.sfgate.com/2010-03-21/news/18841154\\_1\\_house-democrats-health-care-parents-policies](http://articles.sfgate.com/2010-03-21/news/18841154_1_house-democrats-health-care-parents-policies).

<sup>44</sup> Michael B. Leahy, *Despite Massachusetts Vote, Health Care Reform Still Coming*, 20 No. 12 MASS. EMPLOYMENT L. LETTER, Mar. 2010; see also Lochhead, *supra* note 43.

<sup>45</sup> Jack Kelly, *Might a Snub Sink the Health Bill?: The Supreme Court May Not Like the Way it Gets Passed*, PITTSBURGH POST-GAZETTE, Mar. 21, 2010, at B3.

<sup>46</sup> Leahy, *supra* note 44.

disfavored both the House and the Senate health-care reform bills.<sup>47</sup> Many observers concluded that Brown's victory was health care reform's death knell.<sup>48</sup>

But Democrats devised a plan to save the reform effort. Later, the process used to ensure the law's passage stimulated claims of unfair practice.<sup>49</sup> The plan involved the Democratic-controlled House's voting on the health reform bill that the Senate had already passed.<sup>50</sup> However, components of that bill were unacceptable to many Democrats in the House. They objected, in particular, to provisions related to abortion, special interests, and taxes on so-called "Cadillac" health plans.<sup>51</sup> A second bill responded to these concerns.<sup>52</sup> The Senate passed this bill, relying on the so-called reconciliation process, thereby avoiding the need for a super-majority vote.<sup>53</sup>

President Obama signed the Affordable Care Act (the Senate bill passed in the House after Scott Brown's election) on March 23, 2010, and he signed the reconciliation bill one week later.<sup>54</sup> Opposition followed immediately:

[T]his bill is not only disliked, it is disliked intensely, and across a wide swath of the population. Majorities not only dislike it, but majorities of those majorities dislike it intensely. Twice as many independents dislike as support it intensely, and the intensity of antipathy has only grown. They dislike it intensely because it will affect them intensely,

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<sup>47</sup> Noemie Emery, *Dead Congress Walking*, 15 WEEKLY STANDARD, Mar. 22, 2010, available at <http://www.weeklystandard.com/articles/dead-congress-walking>.

<sup>48</sup> J.T. Young, *The High Costs of a Longshot*, THE AMERICAN SPECTATOR (Jan. 28, 2010, 6:07 AM), <http://spectator.org/archives/2010/01/28/the-high-costs-of-a-longshot#>. In January 2010, just after Brown's election to the Senate seat vacated by Edward Kennedy, Young wrote: "Increasingly, a single Senate race seems to have sunk health care reform." *Id.*

<sup>49</sup> Gail Russell Chaddock, *Healthcare reform 'fixes' pass, but is bipartisanship lost?*, CHRISTIAN SCIENCE MONITOR (Mar. 26, 2010), <http://www.csmonitor.com/USA/Politics/2010/0326/Healthcare-reform-fixes-pass-but-is-bipartisanship-lost>.

<sup>50</sup> Kelly, *supra* note 45; see Chaddock, *supra* note 49.

<sup>51</sup> Kelly, *supra* note 45 (noting that unions disliked the tax on "Cadillac" plans, in particular).

<sup>52</sup> Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

<sup>53</sup> Kelly, *supra* note 45. Republicans denounced reliance on reconciliation, and some members of the public responded to the congressional process with vocal discontent and angry threats. Chaddock, *supra* note 49.

In February 2011, speaking on the Senate floor, Sen. Coats (R-Ind.) decried the process through which Congress passed the Act.

The issue for [my Indiana constituents] was not whether we needed to address issues of health care, whether it was quality, cost-effectiveness, or access; the issues for them were two things: One, they resented the process where a massive bill, which many did not fully understand or grasp the implications of, was forced through these Chambers and passed hours before Christmas. The rules were bent to try to move the bill through the process, and it became a policy which was not supported on a bipartisan basis but yet a policy that affected virtually every American.

157 Cong. Rec. S434, 455 (daily ed. Feb. 2, 2011) (statement of Sen. Daniel Coats).

<sup>54</sup> Stephanie C. Ardito, *U.S. Healthcare Reform: A Follow-Up*, 18 SEARCHER (Oct. 2010), available at <http://www.infotoday.com/searcher/oct10/Ardito.shtml>.



on a personal level. . . . Polls show that most people believe this plan will make their care more expensive, and at the same time, less satisfactory than what they already have.<sup>55</sup>

In early 2011, a Washington Post-ABC poll showed that about half of the nation opposed the law. Public opposition to health care reform had remained essentially unchanged since the summer of 2009.<sup>56</sup> Opponents attempted to repeal or limit the law in Congress,<sup>57</sup> in state legislatures,<sup>58</sup> and in courts.<sup>59</sup>

The next Part of this Article briefly outlines the Affordable Care Act. It summarizes important components of the changes that the law will make to the American health care system, if it is fully implemented.

### III. THE AFFORDABLE CARE ACT: A BRIEF SUMMARY OF THE ACT AND OF EARLY RESPONSES TO IT

The Affordable Care Act expands health care coverage to many people who would not otherwise be protected. This Part briefly summarizes the Act's central provisions. It then reviews the shape of opposition to the Act.

#### A. Summary of the Act

The Act promises to extend health care coverage to millions of people.<sup>60</sup> Health care coverage will be made available to many not now insured. This will

<sup>55</sup> Emery, *supra* note 47. In the year following promulgation of the law in March 2010, opposition did not abate. In February 2011, a Kaiser Family Foundation public opinion poll found that 48 percent of people in the U.S. did not favor the law, and 43 percent did. *Kaiser Health Tracking Poll: Public Opinion on Health Care Issues*, THE HENRY J. KAISER FAMILY FOUNDATION (Feb. 2011), [www.kff.org/kaiserpolls/upload/8156-F.pdf](http://www.kff.org/kaiserpolls/upload/8156-F.pdf) [hereinafter *Public Opinion on Health Care Issues*]. The questionnaire used and the results are available at <http://www.kff.org/kaiserpolls/8156.cfm>. The Foundation's summary of the poll's results noted that "the public [was] roughly divided and partisan[] on opposite sides of the issue." *Public Opinion on Health Care Issues, supra*.

<sup>56</sup> Jon Cohen, *Public support for what's next on health care*, WASH. POST (Jan. 19, 2011, 7:48 AM), [http://voices.washingtonpost.com/behind-the-numbers/2011/01/public\\_support\\_for\\_whats\\_next.html](http://voices.washingtonpost.com/behind-the-numbers/2011/01/public_support_for_whats_next.html); Glenn Kessler, *McConnell's claims of wide backing for health-care repeal*, WASH. POST (Feb. 23, 2011, 7:40 PM), [http://voices.washingtonpost.com/fact-checker/2011/02/mconnells\\_claims\\_of\\_wide\\_back.html](http://voices.washingtonpost.com/fact-checker/2011/02/mconnells_claims_of_wide_back.html).

<sup>57</sup> See *infra* notes 177-191 and accompanying text.

<sup>58</sup> In 2010, several states passed laws that asserted an individual's right *not* to purchase health coverage insurance. See, e.g., Idaho Freedom Act, IDAHO CODE ANN. § 39-9003 (2010); UTAH CODE ANN. § 63M-1-2505.5 (West 2010) (declaring that the ACA would "infringe on the rights of citizens of this state to provide for their own health care"). Both laws are cited and discussed in *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at \*9 (N.D. Fla. Jan. 31, 2011).

<sup>59</sup> See *infra* notes 95-176 and accompanying text.

<sup>60</sup> It seems likely that the Act will be implemented, at least in significant part. However, that is not certain. Efforts now underway in courts and in Congress to repeal or limit the reach of the Act

occur, first, through the expansion of Medicaid,<sup>61</sup> and, second, through creation of the so-called “American Health Benefit Exchanges.”<sup>62</sup> These state-based exchanges will offer insurance options to people without health care coverage. In particular, people employed by small, exempt businesses can look to state-based exchanges for coverage.<sup>63</sup>

The Congressional Budget Office (CBO) has estimated that the Act’s broadening of Medicaid eligibility and its creation of state exchanges will reduce the number of uninsured by approximately 32 million people.<sup>64</sup> Still, according to CBO estimates, about 23 million nonelderly residents of the United States will be left uncovered, even after the Act is fully implemented.<sup>65</sup> These include undocumented immigrants and low-wage earners who cannot afford coverage, even through state exchanges.<sup>66</sup>

More specifically, the Act expands Medicaid eligibility to all citizens and legal immigrants with incomes up to 133 percent of the federal poverty level.<sup>67</sup> This entails a significant expansion of coverage for adults without dependent children. Indeed, in most states, whatever their income, adults without children have been unable to obtain coverage through Medicaid.<sup>68</sup> The White House Office of Health Reform estimates that 16 million people, not now covered, will

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could succeed in limiting or precluding its implementation. See *infra* Part IV.A-C (discussion of efforts to repeal or limit the ACA).

<sup>61</sup> ACA Pub. L. No. 111-148, § 2001, 124 Stat. 119 (2010) (expanding eligibility for Medicaid to those with incomes up to 133 percent of the federal poverty level).

<sup>62</sup> *Id.* at §§ 1401-02 (offering limits on cost sharing and offering tax credits to those earning between 133 and 400 percent of the federal poverty level); see also H.R. 3590—55, § 1311, 111th Cong. (2010) (enacted).

<sup>63</sup> *Multi-Share Plans Could Cover Millions Still Uninsured After PPACA Implementation*, BNA: HEALTH CARE DAILY REPORT (Mar. 3, 2011) [hereinafter *Multi-Share Plans*].

Some changes may be made in how states offer coverage. Under the Act, states may apply for waivers to innovate in the development of their exchanges. *HHS, Treasury Issue Proposed Rule Allowing States Waivers From Major PPACA Provisions*, BNA: HEALTH CARE DAILY REPORT (Mar. 11, 2011). The Act allows states to seek such waivers beginning in 2017. However, Obama proposed in March 2010 that Congress provide for waivers to be available to states as early as 2014. See *infra* notes 210-23 and accompanying text (considering coverage waivers for states).

<sup>64</sup> *Health Care*, CONGRESSIONAL BUDGET OFFICE, <http://www.cbo.gov/publications/collections/health.cfm> (last visited Feb. 14, 2011).

<sup>65</sup> *Id.*; see also *Multi-Share Plans*, *supra* note 63.

<sup>66</sup> The ACA provides an exemption from the individual mandate for low-income people for whom coverage under a state exchange would cost more than a set percent of their income. See *Multi-Share Plans*, *supra* note 63.

<sup>67</sup> The 2011 federal poverty level is \$10,890 for an individual and \$22,350 for a family of four. *The 2011 HHS Poverty Guidelines*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://aspe.hhs.gov/poverty/11poverty.shtml> (last visited Feb. 20, 2011). Thus 133 percent of the federal poverty level is about \$14,484 for an individual and about \$29,726 for a family of four. *Id.*

<sup>68</sup> LAURA KATZ OLSON, *THE POLITICS OF MEDICAID 105-06* (2010) (reporting in 2010 that in most states Medicaid mostly provides for the needs of poor children and it does not provide comprehensively or uniformly for them).

be covered as a result of the expected expansion of Medicaid eligibility.<sup>69</sup> Small businesses<sup>70</sup> and individuals without coverage through an expanded Medicaid program (or through other channels) can look to the state-based exchanges. The Act provides for funding to states as they consider how best (or whether) to implement these exchanges.<sup>71</sup> Should a state not implement an exchange by 2014, the United States Department of Health and Human Services is authorized by the Act to create and run that state's exchange.<sup>72</sup>

Exchanges must provide at least a basic set of services, including, among other things, emergency services, hospitalization, prescription drugs, maternity and newborn care, mental health treatment, pediatric services (including oral and vision services), and preventive and wellness services.<sup>73</sup> Individuals purchasing coverage through state exchanges will be eligible for cost sharing credits if their income lies between 133 percent and 400 percent of the federal poverty level.<sup>74</sup>

Further, the Act removes specific barriers to coverage. It prohibits coverage exclusions based on pre-existing conditions;<sup>75</sup> it bans lifetime coverage limits and by 2014 will ban annual limits on coverage;<sup>76</sup> and it also prohibits insurers from refusing additional coverage in the event that an insured person

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<sup>69</sup> Nancy-Ann DeParle, *The Affordable Care Act Helps America's Uninsured*, THE WHITE HOUSE BLOG (Sept. 16, 2010, 2:33 PM), <http://www.whitehouse.gov/blog/2010/09/16/affordable-care-act-helps-america-s-uninsured>. Nancy-Ann DeParle wrote as the Director of the White House Office of Health Reform.

<sup>70</sup> Small businesses will be able to purchase health insurance coverage for employees through the "Small Business Health Options Program" (SHOP Exchange). H.R. 3590—55, 111th Cong. § 1311(b) (2010). If a state has adequate resources, the law allows states to combine the Exchanges through which individuals can purchase insurance and the SHOP exchanges. *Id.*

<sup>71</sup> In February 2011, 22 state governors asked HHS to adopt six recommendations not provided for in ACA regarding the state exchanges. The governors asked HHS Secretary Kathleen Sebelius to account for their "individual circumstances and needs":

We hope the Administration will accommodate our states' individual circumstances and needs, as we believe the PPACA in its current form threatens to destroy our budgets and perpetuate and magnify the most costly aspects of our health care system. While we hope for your endorsement, if you do not agree, we will move forward with our own efforts regardless and HHS should begin making plans to run exchanges under its own auspices.

*GOP Govs Ask HHS for Changes to Healthcare Exchanges*, REPUBLICAN GOVERNORS ASSOCIATION (Feb. 7, 2011), <http://www.rga.org/homepage/gop-govs-ask-hhs-for-changes-to-healthcare-exchanges/>; see also *Republican Governors Push HHS to Adopt Their Revisions for Health Care Exchanges*, BNA: THE UNITED STATES LAW WEEK (Feb. 15, 2011).

<sup>72</sup> See ACA, Pub. L. No. 111-148, § 1302, 124 Stat. 119; see also Alan Desmarais, Ben Diederich & Stacey Muller, *Operation of a Health Exchange Within the PPACA*, MILLMAN HEALTHCARE REFORM BRIEFING PAPER (Sept. 2010), <http://publications.milliman.com/publications/healthreform/pdfs/operation-of-health-exchange.pdf>.

<sup>73</sup> ACA § 1302.

<sup>74</sup> In 2011, the federal poverty level for a family of four is \$22,350 in the contiguous 48 states and the District of Columbia. *The 2011 HHS Poverty Guidelines*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., <http://aspe.hhs.gov/poverty/11poverty.shtml> (last visited Feb. 20, 2011).

<sup>75</sup> ACA § 2704.

<sup>76</sup> *Id.* § 2711.

becomes ill.<sup>77</sup> Insurers must cover children up to age 26 under a parent's policy,<sup>78</sup> and new plans are required to offer preventive services without cost sharing. Such services include, among other things, certain immunizations, evidence-based preventive care, and screenings for children and for women.<sup>79</sup>

At the same time, the law safeguards the role of the profit-making health insurance industry.<sup>80</sup> As a result of the ACA, the private health insurance system will be subject to significant new regulation. But, even as the Act expands coverage and regulates the private industry, it protects the system of private insurance that has long provided health care coverage for most employed people and for others who bought private insurance policies on the open insurance market.

### B. Summary of Early Responses to the Act

Passage of the Affordable Care Act fueled worries within the public about sustaining class status, about the expansion of federal control over everyday life, and correlatively, about the diminution of choice and liberty.<sup>81</sup> In addition, some corporate interests, concerned in particular about the expansion of federal regulatory powers and worried about the likelihood of higher taxes to fund the Act, encouraged opposition to the Act among the public.<sup>82</sup>

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<sup>77</sup> *Id.* § 2712.

<sup>78</sup> *Id.* § 2714.

<sup>79</sup> *Id.* § 2713. The law specifies that “the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current.” *Id.* § 2713(a)(5).

<sup>80</sup> It is not yet clear how, or whether, in fact, the Act's requirement that health insurance companies spend a large part of each premium dollar on medical costs will be actualized. The Act requires large insurance companies to use 85% of premium dollars for medical costs and for smaller grouper or individual plans to spend at least 80% of premium dollars on medical costs. Michael Peltier, *Florida governor may stall Obama healthcare law*, REUTERS, (Feb. 1, 2011, 6:33 PM), <http://www.reuters.com/article/2011/02/01/us-usa-healthcare-florida-idUSTRE7109QO20110201>.

<sup>81</sup> A week after the House passed the Affordable Care Act, a Gallup poll showed that more Americans opposed health care reform than favored it. Lydia Saad, *One Week Later, Americans Divided on Healthcare*, GALLUP POLL NEWS SERVICE (Mar. 29, 2010), <http://www.gallup.com/poll/127025/one-week-later-americans-divided-healthcare.aspx>.

<sup>82</sup> Americans for Prosperity, for instance, a group co-founded by oil billionaire and libertarian David Koch, has organized popular opposition to health care reform as well as to labor unions, environmental regulation, and stimulus spending. Americans for Prosperity's website describes the group as an “organization of grassroots leaders. . . . The grassroots activists of AFP advocate for public policies that champion the principles of entrepreneurship and fiscal and regulatory restraint.” *About Americans for Prosperity*, AMERICANS FOR PROSPERITY <http://www.americansforprosperity.org/about> (last visited Aug. 13, 2011). David Koch and his brother, Charles, own Koch Industries, with estimated revenues each year of a hundred billion dollars. Jane Mayer, *Covert Operations: The Billionaire Brothers Who Are Waging a War Against Obama*, NEW YORKER, Aug. 30, 2010, at 45. Mayer reported that the Koch brothers “poured more than a hundred million dollars into dozens of seemingly independent organizations.” *Id.* at 49. Mayer further reports that many of these organizations are “political and policy organizations.” The Kochs favor libertarian approaches. *Id.* at 49-50. See also *Americans for Prosperity*, SOURCE

In the end, the insurance industry was not among those opposing the Act.<sup>83</sup> Inclusion of the so-called “individual mandate” among the Act’s provisions quelled opposition from health care insurers. The mandate, which requires everyone to have health insurance or to pay a penalty,<sup>84</sup> has become a primary focus of legal opposition to the Act. More particularly, Section 1510 of the Act—providing for the “individual mandate”—requires all citizens and legal residents of the United States to have health care coverage.<sup>85</sup> Under the Act, those who do not comply will be penalized. This provision is to be phased in, beginning in 2014.<sup>86</sup>

A primary function of the individual mandate is to ensure the insurance industry a large supply of healthy customers.<sup>87</sup> In effect, the industry accepted potentially costly changes such as the prohibition on the preclusion of applicants with pre-existing conditions, the prohibition on life-time limits on essential health benefits, and the provision of coverage for certain preventive services (e.g., immunizations) without cost sharing. In return, it stands to gain a large number of young, healthy customers.<sup>88</sup>

Thus, even as it expands coverage, the law protects the system of private insurance that has long paid for the bulk of Americans’ healthcare for which the government has not paid.<sup>89</sup> The mandate was essential to industry’s acceptance of the Act. But it has become the symbol par excellence of everything opponents dislike about the Act. The mandate has been at the heart of every court case

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WATCH,

[http://www.sourcewatch.org/index.php?title=Americans\\_for\\_Prosperty#Involvement\\_in\\_protestin\\_g\\_health\\_care\\_reform](http://www.sourcewatch.org/index.php?title=Americans_for_Prosperty#Involvement_in_protestin_g_health_care_reform) (last visited Aug. 13, 2011).

<sup>83</sup> Jacob S. Hacker & Carl DeTorres, *The Health of Reform*, N.Y. TIMES, Feb. 17, 2011, at A31. Hacker and DeTorres note its despite their opposing repeal of the Act, the industry provided funding to “anti-reform candidates” and opposed provisions of the Act that control costs. *Id.*

<sup>84</sup> ACA § 1501. Certain individuals are not included in the mandate. These include those with a religious objection, people in prison, and undocumented immigrants. *Id.* § 1501(d). Others are exempt from the mandate if they cannot afford coverage. Anyone for whom the required contribution would be more than eight percent of household income is deemed to fall into this group. *Id.* § 1501(e).

<sup>85</sup> 26 U.S.C. § 5000A of the Act (“Requirement to Maintain Minimum Essential Coverage”) provides that beginning in 2014, a penalty is to be imposed on any “applicable individual” who does not “ensure that the individual [him- or herself] and any dependent of the individual who is an applicable individual” are covered for health care. The penalty is slated to begin in 2014 at \$95, to reach \$695 in 2016 and to be subject thereafter to a cost-of-living adjustment. *Id.*

<sup>86</sup> More specifically, the penalty is defined for 2016 as the greater of \$695 or 2.5 percent of household income up to a maximum of three times \$695. *Focus on Health Reform: Summary of New Health Reform Law*, THE HENRY J. KAISER FAMILY FOUNDATION, <http://www.kff.org/healthreform/upload/8061.pdf> (last modified Apr. 15, 2011).

<sup>87</sup> The individual mandate is considered immediately below and in greater detail. *See infra* Part IV.A.2.

<sup>88</sup> Insurance companies did not lobby against the ACA. Ken Collier, *In defense of universal health care*, BRIARPATCH MAGAZINE, Sept. 9, 2010, available at <http://briarpatchmagazine.com/articles/view/universal-health-care> (noting that insurance companies “grudgingly supported” Obama’s health care proposal).

<sup>89</sup> REID, *supra* note 8, at 20. In fact, many types of health care coverage plans are effective in the U.S.

challenging the Act, and for opponents of the ACA, it offers proof that the Act—and thus the government—will eviscerate choice and liberty.

At the start of the health reform debate, many liberals concurred with many conservatives (though on different grounds) in opposing an individual mandate. For President Obama, an individual mandate was a second (or third) choice. During the 2008 presidential campaign, Obama opposed a mandate. He explained that it would be unworkable and that it missed the point: “the reason people don’t have health insurance isn’t because they don’t want it, it’s because they can’t afford it.”<sup>90</sup> Conservatives consistently opposed a mandate for very different reasons. Former Senator (R-Tenn.) Bill Frist summarized much Republican opposition to an individual mandate even as he acknowledged the need to consider this approach. Frist noted his belief in “limited government and individual responsibility” and his commitment to preserving “the freedom to choose.” Yet, at the same time, he concluded that “every American deserves affordable access to healthcare,” and, in consequence, for Frist (though not for many conservatives), imposition of a mandate was necessary, albeit not ideal.<sup>91</sup>

The mandate would have been unnecessary had Congress added a government-run public option to private insurance options.<sup>92</sup> Once Congress abandoned the public option, concerns of the insurance industry trumped a general lack of support for the mandate among other groups. The individual mandate provided the protection the insurance industry demanded in light of new regulations the law placed on it. With that protection in hand, the industry refrained from lobbying against the Act.<sup>93</sup>

Legal challenges to the individual mandate have centered around the claim that Congress was without constitutional authority to promulgate the provision. In addition, and more basically, many people reacted negatively to the notion that they would lose the *choice* to remain uninsured (or at any rate would be required to pay a penalty for appropriating that choice). The mandate became emblematic of a perceived threat to choice and freedom. Thus, it is not

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<sup>90</sup> David Catron, *Obama’s Health Care Bait and Switch*, THE AMERICAN SPECTATOR (Sept. 24, 2009, 6:09 AM), <http://spectator.org/archives/2009/09/24/obamas-health-care-bait-and-sw> (quoting Barack Obama during 2008 campaign).

<sup>91</sup> Robert Schlesinger, *Frist Endorses Individual Mandate in Healthcare Reform*, U.S. NEWS & WORLD REP., Sept. 25, 2009, <http://www.usnews.com/opinion/blogs/robert-schlesinger/2009/09/25/frist-endorses-individual-mandate-in-healthcare-reform.html>.

<sup>92</sup> Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1395 (2010).

<sup>93</sup> A Christian Science Monitor reporter quoted a spokesperson for America’s Health Insurance Plans (an industry lobbying group) who explained that the law without the individual mandate would lead to “skyrocketing costs” for the industry. Linda Feldman, *Health-care reform in cross hairs: Could it survive without individual mandate?*, THE CHRISTIAN SCIENCE MONITOR, Jan. 6, 2011, <http://www.csmonitor.com/USA/Politics/2011/0106/Health-care-reform-in-cross-hairs-Could-it-survive-without-individual-mandate>.

surprising that almost immediately after the President signed the bill into law, over a dozen states filed suit, challenging the law's constitutionality.<sup>94</sup>

The next Part of this Article reviews legal opposition to health care reform, commenced in the year following the Act's passage. It reviews judicial and congressional responses, as well as responses within states, to efforts to repeal the ACA. Then, Part V reviews the roots and character of popular opposition to health care reform.

#### IV. AWAY FROM THE AFFORDABLE CARE ACT?: LEGAL CHALLENGES

Efforts to invalidate, repeal, or undermine the Affordable Care Act have moved forward in courts, in Congress, and in states. In each context, opponents have delineated a specific set of presumptive problems with the law—that, for example, Congress lacked constitutional authority to provide for the “individual mandate” or that the law should be repealed or left unfunded because, contrary to the position of the Congressional Budget Office, it would increase the nation's deficit.<sup>95</sup>

These claims and judicial and legislative responses to them reveal a great deal about the society and its underlying concerns. That is not surprising in a society that has come increasingly to view health as tantamount to “salvation.”<sup>96</sup> Americans interpret positions in the debate about health care reform—quite like they viewed positions in the much older debate about abortion—to signal broader political affiliation and social perspectives.

The public and the media have responded to court decisions about the constitutionality of the Affordable Care Act as if they were rounds in a sports event from which one “team” or the other would emerge as the “winner.” In an early 2011 cover story article about the legal rulings in cases aimed at overturning the Act, CQ Weekly declared: “Last week's federal court ruling declaring the health care law unconstitutional surprised no one and settled nothing. It merely evened the score, as one more court at the lowest level weighed in on a case bound for the highest.”<sup>97</sup> Such characterizations suggest that a far-reaching competition for ideological victory lies at the center of the health care reform effort and the counter-effort to repeal the Affordable Care Act.

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<sup>94</sup> Thirteen states joined to commence one suit. David G. Savage, *States fighting healthcare law don't have precedent on their side*, L.A. TIMES, at A1, Mar. 27, 2010. Other states joined later. At the same time, Virginia filed a separate suit challenging the health reform law, contending that the law was unconstitutional and that it conflicted with a state statute. Dionne Jr., *supra* note 4.

<sup>95</sup> See Paul Krugman, *The War on Logic*, N.Y. TIMES, Jan. 17, 2011, at A23.

<sup>96</sup> MICHEL FOUCAULT, *THE BIRTH OF THE CLINIC: AN ARCHEOLOGY OF MEDICAL PERCEPTION* 198 (A.M. Sheridan Smith trans., Vintage Books 1994) (1963).

<sup>97</sup> Seth Stern, *Sharpening Clause: Health Care Law's Legal Saga Comes to a Point*, 69 CQ WEEKLY 292, 293, Feb. 7, 2011. The weekly is described on the cover page as “Congressional Quarterly's Magazine on Government, Commerce and Politics.”

In this competition, courts' decisions have become salvos in a larger ideological battle about the nation's beliefs and values.

The first Section of this Part considers judicial responses to constitutional challenges to the Affordable Care Act in the year following its enactment. It summarizes the reasoning behind the five district court decisions about the Act's constitutionality, rendered in that year. The next three Sections review, respectively, efforts in Congress to repeal the Affordable Care Act or parts of it, responses within the states, and concessions by the Obama administration. Then Part IV contextualizes the legal responses considered in this Part through an examination of popular opposition to the law. In doing that, it reveals some of the underlying concerns within the public—concerns often disguised in court cases and legislative debate.

### A. Challenges to the Affordable Care Act in Court

Court challenges to the Act have focused around the “individual mandate” and the limits of the authority extended through the commerce clause to the federal legislature. Plaintiffs in the cases challenging the Affordable Care Act have raised a host of additional concerns,<sup>98</sup> but the district courts that have entertained challenges to the Act have concentrated primarily, though not exclusively, on the allegation that the individual mandate exceeds the power granted to Congress under the commerce clause.<sup>99</sup> The first subsection of this Section considers the consequences of this litigation for the relation between the federal government and states. The second subsection reviews the five decisions rendered by U.S. district courts in the first year after the Act became law.

#### 1. Federalism and the Affordable Care Act

Disagreement, including open antagonism, about the expansion of health care coverage through the Affordable Care Act encompasses a wide set of issues

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<sup>98</sup> Judge Moon, for instance, detailed nine allegations put forward by plaintiffs in *Liberty Univ. Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010). These include:

Plaintiffs allege that the employer and individual coverage provisions are beyond Congress' Article I powers (Count One), violate the Tenth Amendment (Count Two), violate the Establishment Clause of the First Amendment (Count Three), violate the Free Exercise Clause of the First Amendment (Count Four), violate the Religious Freedom Restoration Act (Count Five), violate the equal protection component of the Due Process Clause of the Fifth Amendment (Count Six), violate the right to free speech and free association under the First Amendment (Count Seven), violate the Article I, Section 9 prohibition against unapportioned capitation or direct taxes (Count Eight), and violate the Guarantee Clause (Count Nine).

*Id.* at 620.

<sup>99</sup> U.S. CONST. art. I, § 8, cl. 3.



at the center of the nation's understanding—and conflicting understandings—of itself. These include matters of class relationships, the meaning of choice and freedom, and the scope that the federal government should enjoy (as a political, moral, and constitutional matter) in regulating various aspects of people's private lives. Each of these issues can be, and has been, entertained through debate about the power of the federal government to regulate matters that states can regulate pursuant to the police power.

The Tenth Amendment asserts that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>100</sup> Under the so-called “police power,” states have far-reaching authority to promulgate laws deemed necessary for the welfare of the people.<sup>101</sup> In contrast, the Constitution limits Congress's power to that delineated, expressly or implicitly.<sup>102</sup>

This understanding of “state's rights” was challenged during the Civil War and Reconstruction. And still, in some part, negative visions of federalism invoke the pre-Civil War status of states, free to sanction and enforce racist rules and practices.<sup>103</sup> Post-Civil War amendments to the Constitution significantly limited the power of states vis-à-vis the federal government.<sup>104</sup> But soon after, the late nineteenth century witnessed the return of significant powers to the states, including the power to enforce segregationist laws,<sup>105</sup> and the Supreme Court invalidated a variety of federal laws, concluding that their promulgation exceeded the scope of the power given to Congress by the commerce clause.<sup>106</sup>

Then, during the New Deal, the Court broadened Congress's power significantly.<sup>107</sup> In three cases, decided between 1937 and 1942, the Court shifted the character of federalist concerns for many years.<sup>108</sup> The breadth and power of the vision that underlay these cases is suggested in the fate of

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<sup>100</sup> U.S. CONST. amend. X.

<sup>101</sup> See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 230 (2d ed. 2002).

<sup>102</sup> U.S. CONST. art. I, § 1 (declaring that the U.S. Congress has “[a]ll legislative powers herein granted”); see CHEMERINSKY, *supra* note 101, at 230.

<sup>103</sup> Gary Gerstle, *Federalism in America: Beyond the Tea Partiers*, *DISSENT MAGAZINE* (Fall 2010), <http://www.dissentmagazine.org/article/?article=3674>.

<sup>104</sup> U.S. CONST. amend. XIII, amend. XIV, amend. XV. In particular, the Thirteenth Amendment deprived states of the power to permit the ownership of human beings; the Fourteenth Amendment transferred to the federal government the power to define citizenship and to delineate and protect citizens' rights; and the Fifteenth Amendment precluded states from refusing people the right to vote “on account of race, color, or previous condition of servitude.”

<sup>105</sup> See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state laws based on notion of “separate but equal”).

<sup>106</sup> See CHEMERINSKY, *supra* note 101, at 242-50 (considering commerce-clause cases between 1870 and 1937).

<sup>107</sup> See *id.* at 250-59.

<sup>108</sup> See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (validating federal law regulating the steel industry); *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act of 1938); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the consequences of Agricultural Adjustment Act on an Ohio dairy farmer).

commerce-clause challenges to federal legislation during the next 58 years. Between 1937 and the last decade of the twentieth century, the Supreme Court did not invalidate one federal law on the ground that it exceeded Congress's authority under the commerce clause.<sup>109</sup>

By the early twenty-first century, the nation once again began to debate the power of the federal government as compared with that of states.<sup>110</sup> Those opposing the Affordable Care Act have bemoaned increasing federal power as the evisceration of choice and liberty.<sup>111</sup> The next subsection of this Article reviews the court challenges to the Act and the varied responses of the five district courts that rendered decisions on the merits in the year following passage of the Act.

## 2. Judicial Responses<sup>112</sup>

Within a year of the Act's promulgation, 28 states had joined in or filed separate suits challenging the Affordable Care Act,<sup>113</sup> and five courts had reached decisions on the merits.<sup>114</sup> Two judges upheld the statute and the individual mandate. Two others invalidated the mandate, and one of these seemed ready to invalidate the Act as a whole.<sup>115</sup> Other judges stopped challenges to the law on various procedural grounds.<sup>116</sup> Much has been made of the fact that the first two

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<sup>109</sup> See CHEMERINSKY, *supra* note 101, at 230. In 1995, the Court invalidated the Gun-Free School Zones Act of 1990 as beyond the power granted to Congress by the commerce clause. *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>110</sup> See, e.g., Gerstle, *supra* note 104; see also Gary Wood, *Our Goal is Federalism, not "States' Rights"*, TENTH AMENDMENT CENTER (2010), <http://www.tenthamendmentcenter.com/2010/03/03/our-goal-is-federalism-not-states-rights/>. The author is described as the "State Chapter Coordinator for the Utah Tenth Amendment Center." *Id.*

<sup>111</sup> In particular, many opponents of the Affordable Care Act view the "individual mandate" as an instance of untrammled federal power aimed at undermining personal choice. See *infra* notes 280-87 and accompanying text.

<sup>112</sup> In late June 2011, a divided panel for the Sixth Circuit upheld the individual mandate as a legal exercise of Congress's Commerce Clause power, *Thomas More Law Center v. Obama*, 2011 U.S. App. Lexis 13265 (6th Cir. June 29, 2011), but several weeks later, a divided panel for the Eleventh Circuit invalidated the mandate on the grounds that it exceeded Congress's Commerce Clause power. *Florida v. U.S. Dep't Health & Human Servs.*, Nos. 11-11021 & 11-11067 (11th Cir. Aug. 12, 2011).

<sup>113</sup> See Hacker & DeTorres, *supra* note 83. Hacker and DeTorres report that almost all of the states (27 of the 28) that challenged the ACA in court also asked for and accepted federal funds to construct state health exchanges. *Id.* See also N.C. Aizenman & Amy Goldstein, *Judge strikes down entire new health-care law*, WASH. POST (Feb. 1, 2011, 9:32 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/31/AR2011013103804.html>.

<sup>114</sup> *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D.Va. 2010) (upholding individual mandate and ACA generally); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (upholding individual mandate and ACA generally).

<sup>115</sup> See *infra* note 121 (describing court's refraining from enjoining the government, pending appeal to Circuit Court).

<sup>116</sup> Jennifer Haberkorn, *Mississippi judge dismisses case against health reform law*, POLITICO (Feb. 4, 2011, 9:33 AM), <http://www.politico.com/news/stories/0211/48853.html> (reporting on Judge

judges who upheld the law were appointed by Democrats,<sup>117</sup> and the first two who invalidated the law were appointed by Republicans.<sup>118</sup> That observation suggests the political concerns surrounding judicial responses to the Affordable Care Act.

Courts responding to the Affordable Care Act do not necessarily aim to further specific political ends. However, there are few precedents that offer determinative guidance. Thus judges in these cases find direction—often perhaps not self-consciously—from their underlying beliefs and values. This is particularly likely to happen in cases such as those challenging the ACA because of the uncertainty of the legal ground on which the parties' claims rest. Law professor Brian Tamanaha suggests insightfully that one consequence of "legal uncertainty" is that judges look inward for guidance. Tamanaha explains:

The region of legal uncertainty is where judges render decisions with the least legal guidance, and where judges' particular mix of legal and social views has the most leeway and impact . . . . This is why the political views of Supreme Court justices, who hear the highest proportion of legally uncertain cases, manifest a much stronger relationship with their legal decisions (although significantly short of a complete alignment) in comparison to lower court judges.<sup>119</sup>

Tamanaha's insight will likely be important if (or when) the Supreme Court entertains the constitutionality of the individual mandate since the question at the heart of the debate about the mandate—whether the commerce clause precludes Congress's penalizing economic *inactivity*—has not been previously considered by the Court.<sup>120</sup>

The next two subsections of the Article review five district court decisions about the Act's constitutionality decided between October 2010 and February 2011. Those discussed in subsection A(2)(a) validated the mandate. Those considered in subsection A(2)(b) did not. One or more of them will likely be entertained by the Supreme Court.

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Keith Starrett's conclusion that 10 individuals who challenged the health reform law in Mississippi lacked standing).

<sup>117</sup> In October 2010, U.S. District Judge George Caram Steeh upheld the ACA against challenge. Steeh was appointed by President Clinton in 1998; U.S. District Judge Norman Moon also upheld the law (in November 2010). Judge Moon was also appointed by Clinton in 1998. U.S. District Judge Henry Hudson and U.S. District Judge Vinson, both of whom invalidated the law, were appointed, respectively, by President George W. Bush in 2002 and by President Reagan in 1983. *The Court Rulings So Far*, ATLANTA J.-CONSTITUTION, Feb. 1, 2011, at A7.

<sup>118</sup> *Commonwealth ex el. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (invalidating individual mandate); *Florida v. United States Dep't of Health and Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2011).

<sup>119</sup> BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 190 (2009).

<sup>120</sup> See Seth Stern, *Scoping Out the High Court on the Individual Mandate*, 69 CQ QUARTERLY 295, Feb. 7, 2011.

**a. *Thomas More Law Center v. Obama*,<sup>121</sup> *Liberty Univ. v. Geithner*,<sup>122</sup> and *Mead v. Holder*<sup>123</sup>: Decisions Validating the Affordable Care Act in the Year After Its Passage**

In October 2010 (about seven months after President Obama signed the Affordable Care Act), Judge George Caram Steeh, for the Eastern District of Michigan, rendered the first substantive judicial response in a case challenging the Act's constitutionality. A Michigan public interest law firm and a group of individuals residing in the state joined as plaintiffs in *Thomas More Law Center v. Obama*.<sup>124</sup> The individual plaintiffs contended that they did not have, and did not choose to purchase, health insurance and, further, that they objected to paying a penalty "tax" because such money would become part of the nation's general revenues and could thus be used to fund abortions.<sup>125</sup>

The plaintiffs in this case, as in the other cases, argued that requiring people without health care coverage to purchase insurance exceeded the power granted to Congress by the commerce clause.<sup>126</sup> They grounded that assertion on the claim that the relevant provision in the ACA penalized inaction (failure to buy health insurance). This, they contended, was not within the reach of the commerce clause. An Amicus Brief to the Sixth Circuit, submitted on behalf of the plaintiffs by the Cato Institute and Randy Barnett, a law professor at Georgetown University, explained this contention clearly:

If allowed to stand, the individual mandate would collapse the traditional distinction between acts and omissions by characterizing a failure to act as a "decision" not to act—thereby transforming inactivity into activity by linguistic alchemy. It would also then collapse the distinction between economic and noneconomic activity by characterizing an activity as "economic" not based on the type of activity it is but on whether it has any economic effect.<sup>127</sup>

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<sup>121</sup> *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010). The U.S. Court of Appeals for the Sixth Circuit agreed to an expedited review of the District Court decision. *Thomas More Law Ctr. v. Obama*, No. 10-2388, 2011 WL 2556039 (6th Cir. Feb. 8, 2011); see Mary Anne Pazanowki, *Health Care—Insurance: Sixth Circuit Grants Expedited Review of Ruling on Individual Mandate Challenge*, BNA: THE UNITED STATES LAW WEEK (Feb. 15, 2011).

<sup>122</sup> *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010).

<sup>123</sup> *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011). On March 11, 2011, the lead plaintiff, Margaret Mead, withdrew. The case is now called *Seven-Sky v. Holder*, No. 11-5047, 2011 WL 1113489 (D.C. Cir. Mar. 17, 2011), as reported by Brad Joondeph, *Mead v. Holder now Seven-Sky v. Holder*, ACA LITIGATION BLOG (Mar. 11, 2011), <http://acalitigationblog.blogspot.com/2011/03/mead-v-holder-now-seven-sky-v-holder.html>.

<sup>124</sup> 720 F. Supp. 2d 882 (E.D. Mich. 2010).

<sup>125</sup> *Id.*

<sup>126</sup> *More*, 720 F. Supp. 2d at 893.

<sup>127</sup> Brief Amici Curiae of the Cato Institute and Prof. Randy E. Barnett in Support of Appellants, *Thomas More Law Center v. Obama*, No. 10-2388, 2011 WL 2556039 (6th Cir. Feb. 8, 2011) (No. 10-2388), 2011 WL 6573011.

District Court Judge George Steeh rejected the plaintiffs' claim, concluding that the unique character of the "health care market" made it almost impossible to decide never to participate in that market. Judge Steeh explained:

No one can guarantee his or her health, or ensure that he or she will never participate in the health care market. Indeed, the opposite is nearly always true. The question is how participants in the health care market pay for medical expenses—through insurance, or through an attempt to pay out of pocket with a backstop of uncompensated care funded by third parties. This phenomenon of cost shifting is what makes the health care market unique. Far from "inactivity," by choosing to forgo insurance plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now through the purchase of insurance, collectively shifting billions of dollars . . . onto other market participants.<sup>128</sup>

In the second district court decision rejecting a challenge to the Act's constitutionality, *Liberty University v. Geithner*,<sup>129</sup> Judge Norman Moon, writing for the federal district court in Lynchburg, Virginia, upheld the ACA and various specific provisions in the face of a challenge brought by Liberty University and others.<sup>130</sup> The University, founded by Jerry Falwell, and the other plaintiffs brought suit on the day that the Affordable Care Act was signed by President Obama.<sup>131</sup> The *Liberty* plaintiffs argued,<sup>132</sup> among other things, that as a "Christian organization,"<sup>133</sup> the University objected to the possibility that penalties it might have to pay under the ACA could be used "to fund or support abortions in violation of [Liberty's] sincerely held religious beliefs."<sup>134</sup> The legal weight of the University's abortion argument was insubstantial, but the allegation is significant in setting a frame for the broader debate about health care reform. Further, the plaintiffs in *Liberty* challenged the constitutionality of the requirements that large employers provide health care coverage and that individuals obtain health care coverage or pay a penalty.<sup>135</sup>

Judge Moon easily rejected the University's concern about abortion.

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<sup>128</sup> *More*, 720 F. Supp. 2d at 894.

<sup>129</sup> *Liberty University v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010).

<sup>130</sup> *Id.* In addition to Timothy Geithner, Sec. of the Treasury, defendants included Kathleen Sebelius, Sec. of U.S. Dep't of Health & Human Servs., Hilda Solis, Sec. of U.S. Dep't of Labor, and Eric Holder, Attorney Gen. of the U.S., all in their official capacities).

<sup>131</sup> *Id.*

<sup>132</sup> See *supra* note 98 (delineating plaintiffs' allegations).

<sup>133</sup> *Liberty*, 753 F. Supp. 2d at 619.

<sup>134</sup> Complaint for Declaratory Preliminary and Permanent Injunctive Relief at 16, *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010) (No.6:10-cv-00015-nkm), available at <http://aca-litigation.wikispaces.com/file/view/LU+Complaint.pdf>. Under the ACA, no insurance plans are required to cover abortion. *Liberty*, 753 F. Supp. 2d at 619.

<sup>135</sup> *Liberty*, F. Supp. 2d at 620.

Plaintiffs have not raised a plausible claim that the Act burdens religious practice. They fail to allege how any payments required under the Act . . . would be used to fund abortion. Indeed, the Act contains strict safeguards at multiple levels to prevent federal funds from being used to pay for abortion services beyond those in cases of rape or incest, or where the life of the woman would be endangered.<sup>136</sup>

Judge Moon responded to the plaintiffs' allegation that Congress is without authority to require large employers to provide health care coverage for employees by noting a long history of Supreme Court support for congressional regulation of employment conditions.<sup>137</sup>

Further, plaintiffs in *Liberty* alleged, as had the plaintiffs in *Thomas More Law Center*,<sup>138</sup> that the individual mandate exceeded congressional authority under the commerce clause. First, they argued, the mandate's requiring people to purchase health care coverage and the penalty exacted on those who refrained from doing so did not adequately involve *commercial* activity. Second, they claimed that the mandate penalized inactivity (*not* buying coverage) rather than activity, and thereby fell outside the scope of the commerce clause.<sup>139</sup>

Judge Moon rejected both claims. The decision to purchase or not purchase health care coverage, he concluded, was an economic decision—a decision that “in the aggregate substantially affects the interstate health care market.”<sup>140</sup> As had the court in *Thomas More*, Judge Moon determined that a decision to forego health care insurance is “an economic decision” about how and when to pay for health care and is thus activity—not “inactivity.”<sup>141</sup>

Judge Gladys Kessler, writing for a U.S. district court in the District of Columbia in *Mead v. Holder*,<sup>142</sup> followed Judges Steeh and Moon<sup>143</sup> in rejecting plaintiffs' challenge to the constitutionality of the Affordable Care Act and, more particularly, to the individual mandate.<sup>144</sup> The plaintiffs in *Mead*, individual federal taxpayers, contended that they could afford to purchase health care coverage but choose not to do so.<sup>145</sup> Thus they claimed that the Act's imposition

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<sup>136</sup> *Id.* at 642-43.

<sup>137</sup> *Id.* at 630-36. Moreover, he concluded, the character of health care coverage offered to employees has “substantial effects cumulatively on interstate commerce.” *Id.* at 636.

<sup>138</sup> See *supra* notes 121, 126-128 and accompanying text (considering decision in *Thomas More*).

<sup>139</sup> *Liberty*, 753 F. Supp. 2d at 631-33.

<sup>140</sup> *Id.* at 633.

<sup>141</sup> *Id.* (citing *Thomas More Law Ctr.*, 720 F. Supp. 2d 882, 894 (E.D. Mich. 2010)).

<sup>142</sup> *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011).

<sup>143</sup> See *supra* notes 128, 140-41 and accompanying text; John S. Adams, *U.S. health care law not immune to nullification*, USA TODAY (Feb. 28, 2011, 12:55 AM), [http://www.usatoday.com/news/nation/2011-02-28-nullify28\\_ST\\_N.htm](http://www.usatoday.com/news/nation/2011-02-28-nullify28_ST_N.htm).

<sup>144</sup> *Mead*, 766 F. Supp. 2d at 34. Two of the plaintiffs in *Mead* further contended that the individual mandate violated the Religious Freedom Restoration Act. *Id.* at 42. The court concluded that “the conflict alleged between [the individual mandate] and Plaintiffs' Christian faith does not rise to the level of a substantial burden.” *Id.* at 42.

<sup>145</sup> *Id.* at 20.

of a penalty on those who continue to forego health care insurance would harm them.<sup>146</sup> Judge Kessler, validating the Act, noted first that Congress has clear authority to regulate interstate insurance markets<sup>147</sup> and that a decision to purchase or not purchase health care insurance is “economic.”<sup>148</sup> She rejected as essentially “semantic” the plaintiffs’ claim that the Act regulated “inactivity” rather than “activity” and further concluded, as had Judges Steeh and Moon, that it is virtually impossible for an individual to “remain outside of the health care market altogether.”<sup>149</sup>

***b. Virginia ex rel. Cuccinelli v. Sebelius*<sup>150</sup> and *Florida v. United States Department of Health and Human Services*<sup>151</sup>: Decisions Invalidating the Affordable Care Act or Significant Provisions of the Act**

In the first year after passage of the Affordable Care Act, two federal district courts concluded that the individual mandate exceeded congressional authority. In the first of these cases, a Virginia district court judge concluded in December 2010 that Congress lacked constitutional warrant to impose the mandate.<sup>152</sup> In the second, decided in early 2011, a district court judge in Florida similarly concluded that the individual mandate exceeded congressional authority, and beyond this, the Florida court concluded that the centrality of the mandate to the Act as a whole necessitated the court’s invalidating the Act.<sup>153</sup> This section summarizes each of these decisions. However, it focuses on *Florida v. United States Department of Health and Human Services*<sup>154</sup> because the consequences of this decision were potentially more sweeping<sup>155</sup> and because the decision reveals more about the ideology<sup>156</sup> undergirding efforts to invalidate the Act.

In *Virginia ex rel. Cuccinelli v. Sebelius*, Judge Henry Hudson, writing for the U.S. District Court in the Eastern District of Virginia, concluded that the individual mandate provision in the ACA exceeded congressional authority but that that provision, Section 1501, could be severed from the Act, leaving all parts

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 30.

<sup>148</sup> *Id.* The court further concluded that in the aggregate, individual decisions to forego insurance have a substantial effect on the market for health insurance throughout the nation. *Id.*

<sup>149</sup> *Id.* at 36.

<sup>150</sup> *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010).

<sup>151</sup> *Florida v. United States Dep’t Health and Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

<sup>152</sup> *Cuccinelli*, 728 F. Supp. 2d at 782.

<sup>153</sup> *Florida*, 2011 WL 285683, at \*40.

<sup>154</sup> *Id.*

<sup>155</sup> See *infra* note 176 and accompanying text (noting court’s agreeing not to enjoin the Act if the federal government expeditiously appealed the district court decision to the Eleventh Circuit).

<sup>156</sup> See *supra* note 7 (defining “ideology” as used in this Article).

of the Act except those making “specific reference” to Section 1501 in place.<sup>157</sup> The court grounded its decision on the conclusion that the individual mandate penalized inactivity, not activity, and therefore fell outside the authority granted to Congress to regulate activities affecting interstate commerce.<sup>158</sup> The court further rejected the government’s contention that Congress had the authority under its taxing power to penalize those who failed to obtain health care coverage.<sup>159</sup> That argument, the court explained, rested on the erroneous presumption that the mandate involved imposition of a tax, not a penalty, on those who did not obtain coverage.<sup>160</sup>

Six weeks later, in *Florida v. United States HHS*, Judge Roger Vinson invalidated the individual mandate<sup>161</sup> and concluded that the “inextricable[.]” connection between the mandate and other provisions of the ACA necessitated his invalidating all of the law’s provisions.<sup>162</sup> Judge Vinson expressly grounded his analysis of the individual mandate in a view of the Constitution constructed in the years surrounding the nation’s creation.<sup>163</sup> Further, he concluded that the Constitution’s necessary and proper clause<sup>164</sup> could not save the individual mandate because the mandate was not “being used to implement or facilitate enforcement of the Act’s insurance industry reforms,” but “to avoid the adverse consequences of the Act itself.”<sup>165</sup>

Judge Vinson did not mask his own perspective. He buttressed conclusions about the necessary and proper clause, for instance, by noting that the defendants’ vision of the “necessary and proper” clause was “[s]urely . . . not what the Founders anticipated.”<sup>166</sup> The opinion referred at least a dozen times to the Federalist Papers and to the “framers[.]” understandings of congressional authority. Judge Vinson declared again and again that invalidating the individual mandate was necessary to safeguard the vision of the Constitution that inspired those who constructed and who first interpreted the document. At the start of the opinion, Judge Vinson explained that the case before him was “not really about our health care system at all.” Rather, he declared, “[i]t is principally about our

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<sup>157</sup> *Cuccinelli*, 728 F. Supp. 2d at 790.

<sup>158</sup> *Id.* at 788.

<sup>159</sup> *Id.* at 782-83.

<sup>160</sup> *Id.* at 787-88.

<sup>161</sup> The opinion further rejected plaintiffs’ argument that the expansion of Medicaid entailed in health care reform violated the Spending Clause, U.S. CONST. art. I, § 8, cl. 1. That argument fell with Judge Vinson’s conclusion that a state’s participation in Medicaid is voluntary. *Florida v. United States Dep’t Health and Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at \*3 (N.D. Fla. Jan. 31, 2011).

<sup>162</sup> *Florida*, 2011 WL 285683, at \*36. Judge Vinson awarded declaratory relief for the plaintiffs but refrained from enjoining the Act’s implementation. *Id.* at \*39-40.

<sup>163</sup> In Footnote 2 of his opinion, Judge Vinson described The Federalist and noted that the opinion would cite to and rely on it “several times.” *Florida*, 2011 WL 285683, at \*1.

<sup>164</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>165</sup> *Florida*, 2011 WL 285683, at \*31.

<sup>166</sup> *Id.*



federalist system.”<sup>167</sup> Accordingly, Judge Vinson suggested that his opinion in the case must be categorized among that set of historic acts and documents that stood (and continue to stand) for liberty, freedom, and choice.

It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If it has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting—as was done in the Act—that compelling the actual transaction is *itself* “commercial and economic in nature, and substantially affects interstate commerce,” it is not hyperbolizing to suggest that Congress could do almost anything it wanted.<sup>168</sup>

More striking still, Judge Vinson expressly invoked the Boston Tea Party of 1773. He thus seemed to be nodding almost expressly to the early twenty-first century “tea party movement”<sup>169</sup>:

It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place. If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain for it would be “difficult to perceive any limitation on federal power,” and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended.<sup>170</sup>

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<sup>167</sup> *Id.* at \*1.

<sup>168</sup> *Id.* at \*22.

<sup>169</sup> The Tea Party movement reflects a decentralized conglomeration of conservative interests. Despite popular perceptions of tea partiers, many supporters of the movement are not terribly far from the Republican mainstream. Jonathan Martin & Ben Smith, *The tea party's exaggerated importance*, POLITICO (Apr. 22, 2010, 5:05 AM), <http://dyn.politico.com/printstory.cfm?uuid=234CBD3C-18FE-70B2-A8B9BF16A67DEB16>. Martin and Smith wrote:

[V]arious sides have their own reasons for finding something new and arresting in the spasms of outrage personified by the tea partiers. The right sees the protests as evidence of a popular revolt against President Barack Obama . . . . The left sees them as evidence of incipient fascism and an opposition to Obama rooted in racism—proof of the beyond-the-pale illegitimacy of large swaths of the conservative moment.

Many tea partiers can be described as “largely white, middle-class, middle-aged voters who are aggrieved.” *Id.* The homepage of the Tea Party Patriot website quotes Sarah Palin: “This summit [referring to an event scheduled for late February 2011] offers a terrific opportunity for true American patriots to hear from experts on issues like lowering taxes, balancing the budget, and repealing Obamacare.” TEA PARTY PATRIOTS, <http://www.teapartypatriots.org/> (last visited June 8, 2011). House Republicans soon attempted to actualize Palin’s hope that Congress would repeal the Affordable Care Act. See *infra* notes 184-85 and accompanying text.

<sup>170</sup> *Florida*, 2011 WL 285683, at \*22.

The court's analogy here is striking. At the broadest level Judge Vinson's opinion suggests that overturning the health reform law—or at least the individual mandate, presumptively at its center—was tantamount to the colonists' efforts to overthrow the yoke of British control. In a narrower vein, Judge Vinson's invocation of the Boston Tea Party, symbolic of the colonists' commitment to liberty and freedom, provides a peculiar analogy for what is, at base, a decision about the reach of the *federal* legislature—not about the ultimate right of the people to choose health insurance coverage or not. In fact, there is no constitutional prohibition on state legislatures' requiring the state's residents to purchase health care insurance. Indeed, Massachusetts' health care reform act, passed in 2006,<sup>171</sup> requires state residents to purchase health care coverage.<sup>172</sup>

As a practical matter, as well, Judge Vinson's decision held potentially far-reaching consequences for the government, anxious to continue implementing the ACA. The court opined that without the individual mandate, the Act's other provisions could not be sustained<sup>173</sup>:

In sum, notwithstanding the fact that many of the provisions in the Act can stand independently without the individual mandate (as a technical and practical matter), it is reasonably “evident,” . . . that the individual mandate was an essential and indispensable part of the health reform efforts, and that Congress did not believe other parts of the Act could (or it would want them to) survive independently. I must conclude that the individual mandate and the remaining provisions are all inextricably bound together in purpose and must stand or fall as a single unit.<sup>174</sup>

The court, however, refrained from issuing an injunction, noting its presumption that the administration ““will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction.””<sup>175</sup> The Obama administration moved for clarification, and in March

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<sup>171</sup> An Act, Providing Access to Affordable, Quality, Accountable Health Care, 2006 Mass. Adv. Legis. Serv. 58 (LexisNexis).

<sup>172</sup> More specifically, the Massachusetts law required all residents not eligible for Medicaid to purchase health care coverage unless unable to afford such coverage. The law further provides that any person not so insured and not deemed eligible for a hardship waiver is subject to a penalty, with specific amounts of that penalty set by the state's Department of Revenue. Mass. Gen. Laws ch. 111M, § 2(b) (2006), reprinted in 2006 Mass. Acts ch. 58, § 13; see also Mary Ann Chirba-Martin & Andres Torres, *Universal Health Care in Massachusetts: Setting the Standard for National Reform*, 35 FORDHAM URB. L.J. 409, 414-15 (2008).

<sup>173</sup> Had Congress included a “severability” clause in the health reform legislation, Vinson would not have been able to invalidate all of the law's provisions when he found the individual mandate unconstitutional. Jonathan Turley, *How the Health Care Bill Became a ‘Ford Pinto’ Law*, USA TODAY, Feb. 7, 2011, at 9A. A severability clause would have protected all parts of the bill not found unconstitutional upon judicial invalidation of another clause or clauses.

<sup>174</sup> *Florida*, 2011 WL 285683, at \*39.

<sup>175</sup> *Id.* at \*39 (quoting Comm. on Judiciary of U.S., House of Representatives v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008)).

2011, Judge Vinson stayed his January order pending appeal to the Eleventh Circuit.<sup>176</sup>

### B. Challenges to the Affordable Care Act in Congress

In addition to challenges to the Affordable Care Act in court, opponents of the Act moved to repeal it in Congress. In the wake of national elections in November 2010, the Democrats lost the majority they had enjoyed in the House of Representatives,<sup>177</sup> while the election narrowed the Democratic majority in the Senate.<sup>178</sup> Even more, many of the new Republican members of the House had campaigned on a promise to repeal the Affordable Care Act. Among the 85 freshman in the House, many identified themselves with at least some aspects of a conservative tea-party agenda.<sup>179</sup>

The Republican majority in the House opened the term with a public reading of the Constitution. The event included representatives from both parties; it was the first reading ever of the full document on the floor of the House.<sup>180</sup> This public reading of the nation's presumptive urtext, seemed aimed at proclaiming the new majority's self-definition as prototypically and traditionally American.

On the same day, conservative Representative Ted Poe from Texas<sup>181</sup> decried the Affordable Care Act on the House floor and called for its repeal. His language suggested the ideological context within which many members of Congress and of the public perceived the Act.

[T]his new Congress must be committed to listening to the will of the people and following the Constitution. Immediately we must right a wrong that has been forcibly placed like chains on the American people.

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<sup>176</sup> *Florida v. United States Dep't Health and Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 723117 (N.D. Fla. March 3, 2011). Judge Vinson's order gave the defendant, Department of Health and Human Services, seven days to file a notice of appeal of his January decision and to ask for expedited review in the Circuit Court. *Id.* at \*11. Five days later, on March 8, 2011, the administration appealed Judge Vinson's original decision to the U.S. Circuit Court of Appeals for the Eleventh Circuit. Jennifer Haberkorn, *White House appeals Florida lawsuit*, POLITICO (Mar. 8, 2011, 6:20 PM), <http://www.politico.com/news/stories/0311/50897.html>.

<sup>177</sup> Jennifer Steinhauer & Robert Pear, *G.O.P. Newcomers Set Out to Undo Obama Victories*, N.Y. TIMES, Jan. 2, 2011, at A1. The House Republican majority in the 112th Congress was 242-193. *Symbolic Actions First, Big Votes Later*, SAN JOSE MERCURY NEWS, Jan. 4, 2011.

<sup>178</sup> The Senate in the 112th Congress opened with 53 Democrats and 47 Republicans (counting Senators who caucus with them). Renee Loth, Op-Ed., *We All "Own" the Constitution*, BOSTON GLOBE, Jan. 8, 2011, at 11.

<sup>179</sup> *Symbolic Actions First, Big Votes Later*, *supra* note 177. See also *supra* note 169 (describing tea parties).

<sup>180</sup> AP, *Despite Glitches, Constitution is Read on House Floor*, BOSTON GLOBE, Jan. 7, 2011, at 7.

<sup>181</sup> *Biography*, CONGRESSMAN TED POE, 2ND DIST. TEXAS, <http://poe.house.gov/About/>. (last visited June 10, 2011).

The unhealthy national health care bill bruises the doctrine of the Constitution. The people don't want the government stealing their individual liberty to make health decisions. Congress must repeal this totalitarian act.

In a few moments, Congress this day, on this new day, will read the Constitution on the House floor, the sacred rule of law for this Nation. Nowhere in this document of wisdom does the Federal Government have the omnipotent authority to force any American to buy any product or face criminal penalties, whether it is a car, health insurance, or a box of donuts.

The nationalized health care bill is an unconstitutional oppression of the American citizen. We will repeal this injustice. On this new day, we stewards of the Constitution must right this wrong, this illegal law that has been coerced upon the people without their consent. And that's just the way it is.<sup>182</sup>

The statement claims another beginning, in the name of the nation's most sacred truths, initiated by the nation's stewards. Poe characterized the Affordable Care Act as a new form of enslavement that would undermine freedom and choice. Moreover, the Affordable Care Act, in Poe's description, was promulgated through a totalitarian, not a democratic, process.<sup>183</sup>

Several days later, the Republic majority in the House (joined by three Democrats) voted unanimously to repeal the Affordable Care Act.<sup>184</sup> Rhetoric surrounding the vote stressed its far-reaching moral implications. Indeed, the bill was named "Repealing the Job-Killing Health Care Law Act."<sup>185</sup> The House intended the vote as a statement of purpose since repeal was virtually certain to fail in the Senate.<sup>186</sup>

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<sup>182</sup> 157 CONG. REC. H50 (daily ed. Jan. 6, 2011) (statement of Rep. Poe). Mr. Poe's apparent assertion (which might have been intended as metaphor) that the Act imposes "criminal penalties" is incorrect.

<sup>183</sup> See *id.*

<sup>184</sup> David M. Herszenhorn & Robert Pear, *House Votes for Repeal of Health Law in Symbolic Act*, N.Y. TIMES, Jan. 19, 2011, <http://www.nytimes.com/2011/01/20/health/policy/20cong.html>. The House voted 245 to 189 to repeal the law.

<sup>185</sup> H.R. 2 (106th Cong. 2011). Representative Poe, speaking on the floor of the House in early January, described the Affordable Care Act as enchaining the nation. Arthur D. Postal, *Ready to Repeal*, NAT'L UNDERWRITER LIFE AND HEALTH/FIN. SERVICES, Jan. 2, 2011.

<sup>186</sup> Two weeks after the House voted to repeal the Affordable Care Act, Senate Minority Leader Mitch McConnell (R-Ky.) introduced a measure to repeal the Act in its entirety. Felicia Sonmez, *Senate Defeats Republican-led Health-care Repeal Effort*, WASH. POST, Feb. 2, 2011, available at <http://voices.washingtonpost.com/44/2011/02/senate-debates-health-care-rep.html>. The change was presented as an amendment to an unrelated bill about aviation. David M. Herszenhorn, *Senate Rejects Repeal of Health Care Law*, N.Y. TIMES, Feb. 3, 2011, at A20. The measure, as expected, was defeated. All 47 Republican Senators voted to repeal, and all 50 Democrats, joined by one independent, voted against repeal. *Id.* Two Senators did not participate in the vote. Passage of the repeal required 60 votes. At the same time, the Senate considered and passed a proposed change in the health care law (not considered by the House at the time). This change, which would repeal a tax-reporting provision that was perceived as burdening small businesses, passed easily (by a vote

Republicans in Congress also drafted bills to limit federal spending and thus make unavailable the funds needed to implement reform,<sup>187</sup> and they promised to continue the effort to repeal at least certain, central provisions of the law (such as the “individual mandate”).<sup>188</sup> Interestingly, in February 2011, over a fifth of Americans believed that the Affordable Care Act had, in fact, been repealed.<sup>189</sup>

Tom Harkin (D-Iowa), chairman of the Health, Education, Labor and Pension Committee, attributed the sentiment undergirding Republican efforts to repeal or limit the ACA to a set of values supportive of industry interests.<sup>190</sup> More starkly, Paul Krugman suggested that many of the explanations proffered by those opposed to the law—that, for instance, it would increase the deficit or preclude the creation of new jobs—served as pretext for something more basic and more discomfiting: “[t]hey’re against reform because it would cover the uninsured—and that’s something they just don’t want to do.”<sup>191</sup> Part IV of this Article considers these as well as a variety of additional concerns that may underlie opposition to health care reform among the American public.

### C. Challenges to the Affordable Care Act in the States

In addition to the suits initiated by state attorneys general aimed at challenging the constitutionality of the Affordable Care Act in federal courts, a number of states attempted to limit the Act’s effectiveness. Some state legislatures voted to trim Medicaid programs, thereby challenging implementation of the Act at the state level. Others declared that they would not implement state exchanges by the 2014 deadline. And still others sought to nullify the ACA in state legislatures. Each of these responses will be considered, in turn.

The Affordable Care Act expands the population eligible for Medicaid to include those with incomes up to 133% of the federal poverty level.<sup>192</sup> In 2009,

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of 81-17). *Id.* Senate Republicans countered claims that the vote was “futile” from the start, characterizing it as the beginning of the road to success after the elections of 2012. *Id.*

<sup>187</sup> Herszenhorn & Pear, *supra* note 184.

<sup>188</sup> *Id.*

<sup>189</sup> Drew Altman, *Pulling it Together: Forget Math and Science, Teach Civics (Or Why we Need to Bring Back “School House Rock”)*, KAISER FAMILY FOUNDATION (Feb. 24, 2011), <http://www.kff.org/pullingittogether/Forget-Math-and-Science-Teach-Civics.cfm>. Altman reports on a Kaiser Family Foundation survey that found 22% of those polled saying the Act had been repealed; 26% refusing to answer or saying they did not know if the Act had been repealed; and 52% responding that the Act was still the law. *Id.*

<sup>190</sup> Herszenhorn & Pear, *supra* note 184.

<sup>191</sup> Krugman, *supra* note 95.

<sup>192</sup> ACA, Pub. L. No. 111-148, § 2001(a)(1), 124 Stat. 119 (as amended by § 10201). This new eligibility group includes those who are under 65 and not pregnant or entitled to Medicare. Letter from Cindy Mann, Dir., Ctr. for Medicaid & State Operations, Ctrs. for Medicare & Medicaid Servs., to State Health Official & State Medicaid Director (Apr. 9, 2010), available at <https://www.cms.gov/smdl/downloads/smdl10005.pdf>. See also Karyn Schwartz & Anthony Damico, *Expanding Medicaid under Health Reform: A Look at Adults at or below 133% of*

almost 50 million people participated in the Medicaid program. The ACA provides that about 16 million people not now eligible for Medicaid will become eligible by 2014.<sup>193</sup> The law further prohibits states from precluding future Medicaid participation for those now covered by the program.<sup>194</sup>

Yet, as states confronted serious budget shortfalls in early 2011, governors sought to limit Medicaid programs.<sup>195</sup> In February 2011, the Governor of Wisconsin proposed significant cuts to the state's Medicaid program as part of a response to the state's budget deficit.<sup>196</sup> A memorandum from the state's Legislative Fiscal Bureau supported the Governor's proposal. The memorandum explained that, in the event of a budget deficit,<sup>197</sup> the state could reduce income levels for Medicaid eligibility for non-disabled, non-pregnant adults and remain in compliance with the ACA.<sup>198</sup> The Wisconsin proposal for effecting Medicaid cuts despite ACA provisions seeming to preclude reductions in Medicaid eligibility levels could provide a model for other states.<sup>199</sup>

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*Poverty, Focus on Health Reform*, KAISER FAMILY FOUNDATION (Apr. 2010), available at <http://www.kff.org/healthreform/upload/8052-02.pdf>.

<sup>193</sup> The ACA provisions that generally require states to continue their current coverage of adults until January 2014 are referred to as the "maintenance of effort" (MOE) provisions. Letter from Cindy Mann, Dir., Ctr. for Medicaid, CHIP and Survey & Certification, Ctrs. for Medicare & Medicaid Servs., to State Medicaid Director (Feb. 25, 2011), available at <http://www.ancor.org/sites/default/files/SMD%20MOE%2002-25-11.pdf>.

<sup>194</sup> *Id.*

<sup>195</sup> Kevin Sack, *For Governors of Both Parties, Medicaid Looks Ripe to Slash*, N.Y. TIMES, Jan. 29, 2011, at A1.

<sup>196</sup> Christopher Weaver, *Wisconsin Union Battle Masks Medicaid Tensions*, KAISER HEALTH NEWS (Feb. 25, 2011), <http://www.kaiserhealthnews.org/Stories/2011/February/25/Dennis-Smith-Wisconsin-Medicaid-Cuts.aspx>.

<sup>197</sup> During the same period, Wisconsin's Governor Scott Walker was engaged in a showdown with union members and Democrats in the state legislature. Walker and Republican legislators favored a bill challenging unions' ability to engage in collective bargaining. Kate Zernike & Susan Saulny, *Standoffs, Protests, and a Prank Call*, N.Y. TIMES, Feb. 24, 2011. Supporters of the bill argued that it was a necessary response to the state's budget shortfall. *Id.* Similar bills were being considered by legislators in Indiana and Ohio. *Id.* The antagonism toward unions shown by those anxious to undercut unions reflects sentiments quite like those reflected in much antagonism to health care reform. Economist Richard Freeman saw the antagonism to unions as a serious sign of hopelessness. Sabrina Tavernise, *In Columbus, Conflicted Emotions on Unions*, N.Y. TIMES, Feb. 24, 2011, at A19. At one time, he explained to a N.Y. Times reporter, people would go to their own employers, seeking benefits similar to those afforded to others. *Id.* Now, Freeman explained, people see no hope of achieving that goal, and they simply do not "want to be the lowest one on the totem pole." *Id.* Thus, they begrudge others the benefits they enjoy. *Id.*

<sup>198</sup> Memorandum from Bob Lang, Dir., Legislative Fiscal Bureau, to Members, Wisconsin Legislature (Feb. 14, 2011), available at [http://legis.wisconsin.gov/lfb/2011-13Bills/2011\\_02\\_14\\_budget%20Adjustment%20Legislation.pdf](http://legis.wisconsin.gov/lfb/2011-13Bills/2011_02_14_budget%20Adjustment%20Legislation.pdf).

<sup>199</sup> *Id.* The Governor's proposal gives the state health department authority to cut the Medicaid program without a vote by the state's legislators. *Id.*

In January, 2011, 33 Republican governors and governors-elect expressed concerns about the impact on state budgets of "maintenance of effort" (MOE) provisions of the ACA and requested their removal in a letter to President Obama and Congressional leaders. *GOP Governors Ask Feds to Ease Healthcare Mandates*, REPUBLICAN GOVERNORS ASSOCIATION (Jan. 7, 2011), <http://www.rga.org/homepage/gop-governors-ask-feds-to-ease-healthcare-mandates/>. The actions proposed by Governor Walker apparently were designed to take advantage of an exception to the

In addition, a number of state governors have refused to participate in the creation of state exchanges under the ACA. Should a state not set up a state exchange or arrange to participate in a multi-state exchange by 2014, the ACA gives the federal government authority to offer an exchange program to residents of that state.<sup>200</sup> In the meantime, some governors,<sup>201</sup> opposed to the ACA and concerned about budget deficits, have returned funds to the federal government that had been distributed to assist states in implementing health care reform.<sup>202</sup> Michael Cannon, Director of Health Policy Studies at the Cato Institute, applauded governors who have refused to implement state exchanges: “It is the height of fiscal irresponsibility to be making new spending commitments” for “a massive new entitlement program” in a time of enormous federal and state deficits.<sup>203</sup>

By February 2011, about a dozen state legislatures were considering the possibility of nullifying the Act. Nullification, a doctrine entertained early in the nation’s history, would give states authority to invalidate (within the state’s boundaries) a federal law the state deemed unconstitutional.<sup>204</sup> The constitutionality of the nullification doctrine was the subject of debate between James Madison and John Calhoun in the early nineteenth century. In a letter of Aug. 28, 1830, Madison described nullification as a doctrine that would “speedily put an end to the Union itself.”<sup>205</sup> Two years earlier, John Calhoun supported the constitutionality of and need for state authority to nullify federal law. Calhoun exclaimed that without this authority, states would be reduced to “mere corporations.”<sup>206</sup>

In early 2011, Idaho’s House of Representatives passed a nullification bill by a wide majority (49 to 20), becoming the first state legislative body to attempt to undermine the ACA—or any federal law—through state action declaring the law unconstitutional and therefore nullified within the state’s

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MOE requirements. This exception allows a state certifying a budget deficit to “roll [Medicaid] back” for previously covered adults, not pregnant or disabled, with incomes above 133% of the poverty level. Judith Solomon, *Repealing Health Reform’s Maintenance of Effort Provision Could Cause Millions of Children, Parents, Seniors, and People with Disabilities to Lose Coverage*, CENTER ON BUDGET AND POLICY PRIORITIES (Feb. 24, 2011), <http://www.cbpp.org/files/2-10-11health.pdf>. See also Mann, *supra* note 193. Thus, even without the repeal of the MOE provisions, this exception would allow “certifying” states to reduce their Medicaid programs if coverage has been more expansive than under the ACA’s 2014 mandated levels for certain individuals. There were also Recovery Act Medicaid MOE provisions in place until June 20, 2011, to which the ACA’s budget deficit exception did not apply. See Mann, *supra* note 192.

<sup>200</sup> Arthur D. Postal, *PPACA: GOP Governors Blast Exchange Procedures*, NAT’L UNDERWRITER LIFE AND HEALTH/FIN. SERVS., Feb. 8, 2011, at 2.

<sup>201</sup> These include governors from Florida, Wisconsin, and New Hampshire. Michael F. Cannon, *All Governors Should Just Say No to ObamaCare*, KAISER HEALTH NEWS, Feb. 22, 2011, available at <http://www.kaiserhealthnews.org/columns/2011/february/022211cannon.aspx?referrer=search>.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> ANTHONY J. BELLIA, JR., *FEDERALISM* 95 (2011).

<sup>205</sup> *Id.* at 100-01.

<sup>206</sup> *Id.* at 97, 100. Calhoun’s Exposition was written in response to a federal tariff act, passed in 1828. *Id.* at 96.

boundaries.<sup>207</sup> Pundits differ on estimates of the likelihood that a successful state nullification of the ACA would be upheld in federal court.<sup>208</sup> However, the nullification effort suggests the intensity of concern in many places about the power—or perhaps, more accurately, the policies—of the federal government. One Idaho representative who voted to nullify the Act explained his vote as a message to the federal government. “I can’t plow a ditch in my own field,” he declared, “without federal government permission.”<sup>209</sup>

#### D. Administration Responses

By February 2011, the Affordable Care Act—the milestone of the Obama administration’s first two years in office—had become a target of widespread attack.<sup>210</sup> It occurred in courts, in Congress, in state legislatures, and in public forums. In short, for many Obama opponents, the Act provided the central symbol of everything they disliked about the administration.<sup>211</sup>

By early 2011, the administration began to make concessions to the Act’s opponents. First, President Obama agreed to support repeal of a tax provision in the Act that members of both parties found objectionable.<sup>212</sup> This concession seemed to signal the administration’s readiness to work with the new Republican-controlled House. Then, in mid-February, the administration granted waivers to four states, exempting them from complying with the level of benefits that the Act requires.<sup>213</sup> The waivers allowed the continuation of “limited-benefit plans” effective in the states in question (Florida, New Jersey, Tennessee, and Ohio) even though benefits offered by these plans fell far below the \$750,000 for essential benefits required under the Affordable Care Act.<sup>214</sup> Even more remarkably, by the end of the month, Obama, speaking to the National Governors Association, announced his readiness to support a legislative amendment to the Act that would allow states to choose as early as 2014 (the year in which the mandate becomes effective)<sup>215</sup> not to implement controversial provisions of the

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<sup>207</sup> John S. Adams, *U.S. Health Care Law Not Immune to Nullification*, USA TODAY, Feb. 28, 2011, at 3A. The state’s Senate has a strong Republican majority and a Republican Governor, who has apparently suggested that he will sign the bill if the Senate passes it. *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> See *infra* notes 276-302 and accompanying text.

<sup>211</sup> See *infra* notes 276-302 and accompanying text.

<sup>212</sup> Sheryl Gay Stolberg & Kevin Sack, *Altering Stand on Health Law, Obama Offers Waiver Option*, N.Y. TIMES, Mar. 1, 2011, at A1.

<sup>213</sup> Robert Pear, *Four States Get Waivers to Carry Out Health Law*, N.Y. TIMES, Feb. 17, 2011, at A22. Pear reports that House Republicans were asking “if the new law is so good, why have so many waivers been granted?” *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> The Act requires states to implement the mandate in 2014 but allows them to develop alternative systems complying with the coverage requirements set forth in the Act, beginning 2017. Obama’s waiver proposal would allow states never to implement the mandate. Julie Rovner, *Obama to Governors: Opt Out of Health Law If You Can Do Better*, NPR: ALL THINGS CONSIDERED (Feb. 28,



Act, including the individual mandate.<sup>216</sup> Many lawmakers immediately found fault with the proposed amendment.<sup>217</sup> Republicans preferred repealing the Act to amending it.<sup>218</sup> And Democrats feared that transforming the mandate into a suggestion would undermine the Act's essential aims.<sup>219</sup>

Obama's apparent willingness to sacrifice the mandate<sup>220</sup>—a provision that government lawyers have continually defined in litigation as essential to the Act's implementation<sup>221</sup>—reveals how seriously the administration viewed opposition to the health care reform law. In fact, however, this concession was less far-reaching than it seemed on its face.<sup>222</sup> Although the waiver-concession would offer flexibility to states in designing programs and, in particular, would allow states to avoid mandates, it would require any alternative program to provide comprehensive coverage at no extra cost to the federal government.<sup>223</sup>

## V. SOCIO-CULTURAL OPPOSITION TO THE AFFORDABLE CARE ACT

Almost half of the American population has long opposed creation of a system that would provide universal or near-universal health care coverage. A similar percent—about half—of the population opposed the Affordable Care Act a year after its promulgation.<sup>224</sup> Public responses to the law reflect a broad set of

2011, 5:22 PM), <http://www.npr.org/blogs/health/2011/03/01/134143305/governors-skeptical-on-presidents-offer-of-flexibility>. Obama's waiver proposal would allow states never to implement the mandate. *Id.*

<sup>216</sup> Stolberg & Sack, *supra* note 212. Stolberg and Sack report that the proposal is not likely to succeed because Republicans in the House would prefer to repeal, than to amend, the ACA. *Id.*

<sup>217</sup> Sen. Orrin Hatch (R-Utah) called Obama's apparent flexibility "bull." Kate Nocera, *Senator Orrin Hatch calls President Barack Obama's flexibility talk 'bull,' POLITICO* (Mar. 1, 2011, 12:51 PM), <http://www.politico.com/news/stories/0311/50423.html>; Carrie Teegardin, *Obama's Offer Gets Chilly State Reception*, ATLANTA J.-CONST, Mar. 2, 2011, at B1.

<sup>218</sup> Teegardin, *supra* note 217.

<sup>219</sup> Stolberg & Sack, *supra* note 212.

<sup>220</sup> The proposal to allow states to avoid implementing the mandate was proposed in November 2010 by Senator Ron Wyden (D-Or.) and Senator Scott Brown (R-Mass.). *Id.*

<sup>221</sup> See *supra* notes 215-16 and accompanying text.

<sup>222</sup> Specifically, in announcing its willingness to allow states additional flexibility in implementing the ACA, the administration offered support for legislation that had previously been introduced by two Senators—Ron Wyden (D-Or.) and Scott Brown (R-Mass.). John E. McDonough, *Wyden-Brown and the Health Law: A Match Made in Heaven or Limbo?*, KAISER HEALTH NEWS (Mar. 8, 2011), <http://www.kaiserhealthnews.org/Columns/2011/March/030911mcdonough.aspx>. Wyden and Brown had proposed allowing states to craft their own systems of health care coverage as early as 2014, rather than requiring them to wait until 2017, as the ACA provided. *Id.*

<sup>223</sup> The waiver provision requires states to offer "coverage that is at least as comprehensive" as that detailed under the Act; to provide "cost-sharing protections"; to offer coverage to "at least a comparable number of residents" as that provided without a waiver; and not to "increase the federal deficit." *Id.*

<sup>224</sup> *Kaiser Health Tracking Poll, Public Opinions on Health Care Issues*, KAISER FAMILY FOUNDATION (Feb. 2011), <http://www.kff.org/kaiserpolls/upload/8156-F.pdf> (noting that in February 2011 48% of the public opposed the ACA and 43% approved of it and noting that polls

attitudes about government, society, and personhood. The Act has become a lightning rod for political disagreements and a barometer of reactions to the federal government. This is unusual: attitudes about health care seem not to have generally determined American politics.<sup>225</sup> Even more, the Act provides a slate on which the public has entertained its understanding of personhood, community, and class.

The first Section of this Part portrays popular opposition to health care reform before Congress passed the Affordable Care Act. In large part, before passage of the Act, opponents of reform concentrated on the virtues of choice and hard work; they described the expansion of government-funded health care to people who had not “earned” it as a deep inequity. The tone and rhetoric of this opposition began to shift in the first year of the Obama administration. After the Affordable Care Act became law, public opposition to the Act followed a model constructed by professionals (lawyers, scholars, politicians, and judges) opposed to the Act. Section B of this Part describes and analyzes this shift. It suggests opponents of health care reform continued to focus on the perceived evisceration of “freedom” and “choice.” However, the rhetoric of opposition expanded. A new focus—the federal government as a usurper of American values—competed with the old focus—on the injustice of providing “free” health care to a larger segment of the population.

#### A. Popular Opposition to Health Care Reform Just Before Passage of the Act<sup>226</sup>

The depth of opposition to governmental action providing universal or near-universal health care in the U.S.<sup>227</sup> reflects the nation’s commitment to an ideology that prizes freedom and choice for the autonomous individual. Americans are not averse to sacrificing other apparently central values, such as equality, in order to safeguard liberty.<sup>228</sup> In November, 2009, Rep. Dick Arney (R-Tex.) compared European communality with American individualism: “Europe is governed by a concern for the well-being of the collective. That’s what they care about. What makes us different is we begin with the liberty of the individual. We got it right, and they got it wrong.”<sup>229</sup> The American preference, as Arney portrayed it, for individualism over community, is variously depicted

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had revealed similar percentages of those unfavorable about the Act or favorable about it since its passage).

<sup>225</sup> Altman, *supra* note 189.

<sup>226</sup> Many of the issues discussed in this section are considered in Janet L. Dolgin, *Class Competition and American Health Care: Debating the State Children’s Health Insurance Program*, 70 LA. L. REV. 683 (2010).

<sup>227</sup> See *Kaiser Health Tracking Poll*, *supra* note 224 and accompanying text.

<sup>228</sup> See PAUL FARMER, *PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR* 163 (2005).

<sup>229</sup> Michael Sokolove, *The Outsider’s Insider*, N.Y. TIMES, Nov. 8, 2009, at MM24.

as dislike for “socialism” and big government.<sup>230</sup> The next subsection concentrates on a complicated variant of that commitment—one grounded in the nation’s peculiar class system. This variant has long presumed that many, if not most, poor people, bear responsibility for their poverty.

### 1. Assumptions Underlying Public Opposition to Health Care Reform

Public opposition to health care reform before passage of the ACA focused—even if implicitly more often than expressly—on concerns grounded in class competition. The opacity of class in the United States has long shaped the character of class competition.<sup>231</sup> Americans, as a group, continue to believe that social mobility will eventually follow hard work for almost anyone who tries hard enough.<sup>232</sup> This belief is long-standing and deeply internalized. Benjamin Franklin voiced it in the late 1700s. “Laziness,” Franklin explained, “travels so slowly, that Poverty soon overtakes him.”<sup>233</sup> In fact, a proverbial rise from poverty to riches, grounded in individual effort, is more myth than fact.<sup>234</sup> Sustaining that myth has depended in part on the absence of explicit measures of class in the U.S.<sup>235</sup>

Americans rely on various marks of status to assess themselves in relation to others. None is determinative. Among the powerful indicia of class status sit signs of health status. Americans judge class status by assessing—though often not self-consciously—other peoples’ dental health, weight, posture, and general appearance of fitness and well-being.<sup>236</sup> Thus, Americans compete for class status by assessing each other’s physicality and thus each other’s health status. This process is rarely transparent. Yet, its consequences are powerful and often insidious. Indeed, opponents of universal or near-universal health care have argued that those with chronically poor health and those whose children are in poor health receive what they deserve—either because they have chosen

<sup>230</sup> *Id.* A Tea Party leader and health reform opponent in San Diego told Michael Sokolov that people were being brought together to further “fiscal responsibility” and to preclude “a more socialized culture.” *Id.*

<sup>231</sup> See Janet L. Dolgin & Katherine R. Dieterich, *Weighing Status: Obesity, Class, and Health Reform*, 89 OR. L. REV. 1113 (2011).

<sup>232</sup> Erika Blacksher, *Healthcare Disparities: The Salience of Social Class*, 17 CAMBRIDGE Q. HEALTHCARE ETHICS 143, 144 (2008).

<sup>233</sup> SIMON P. NEWMAN, *EMBODIED HISTORY: THE LIVES OF THE POOR IN EARLY PHILADELPHIA* 143 (2003).

<sup>234</sup> Janny Scott & David Leonhardt, *Class in America: Shadowy Lines That Still Divide*, N.Y. TIMES, May 15, 2005, Sec. 1, at 11.

<sup>235</sup> *Public Views on SCHIP Reauthorization: Survey Highlights*, NPR/KAISER FAMILY FOUNDATION, HARVARD SCHOOL OF PUB. HEALTH (2007), <http://www.kff.org/kaiserpolls/upload/7704.pdf>.

<sup>236</sup> Harold D. Sgan-Cohen & Jonathan Mann, *Health, Oral Health and Poverty*, 138 J. AM. DENTAL ASS’N 1437 (2007) (noting importance of socio-economic “disparities in oral health”); SANDER L. GILMAN, *FAT: A CULTURAL HISTORY OF OBESITY* 8, 14, 46-48 (2008) (considering cultural construction of obesity); Phillip Alcabes, *What Ails Public Health?*, 54 CHRON. HIGHER EDUC., no. 11, Nov. 9, 2007, at B6 (noting moral assessments of food choices).

“laziness”<sup>237</sup> over hard work and thus failed to obtain health care coverage from an employer or the resources to purchase it privately or because their life style seems not to facilitate good health.<sup>238</sup>

Signs of poor health associated with poverty may even provide a pretext for mocking poverty or for expressing disgust at poor people. A well-known television talk-show host reportedly besmirched food stamps and ridiculed their use by poor people. The “obese” poor use them, he suggested, to purchase “Twinkies, Milk Duds, [and] potato chips.”<sup>239</sup> This sort of mockery facilitates a sense of disgust at those who are poor and, more particularly, at those who are poor and fat.<sup>240</sup>

Insofar as Americans compete for class status through reference to health status, they see the expansion of health care coverage to those at the lower edges of the socio-economic hierarchy as a leveler of class. That perception can seem threatening to people who believe that class status reflects moral worth and who fear being displaced in the class system by those below them.<sup>241</sup> Those particularly anxious about falling on the nation’s socio-economic hierarchy seek targets for their anxiety. Two such targets have been dominant in discourse

<sup>237</sup> See NEWMAN, *supra* note 233.

<sup>238</sup> Americans frequently use similar metaphors, for instance, to describe fat people and poor people. See Katherine Mayer, Note, *An Unjust War: The Case Against the Government’s War on Obesity*, 92 GEO. L.J. 999, 1014, 1018 (2004) (considering obesity); see also NEWMAN, *supra* note 233 (considering poverty and noting Benjamin Franklin linking “industriousness” with good fortune).

<sup>239</sup> Alfred Lubrano, *In Hard Times, American Blame the Poor*. PHILA. INQUIRER, Feb. 15, 2010, at A1, reprinted in *Bauer not only American blaming the poor*, THE STATE, Feb. 23, 2010, available at <http://www.thestate.com/2010/02/23/1170297/bauer-not-only-american-blaming.html> (reporting that talk-show host Rush Limbaugh asserted that poor people buy junk food and then “watch the NFL on one of two color TVs . . . and that’s poverty in the U.S.” *Id.* The list of items that Limbaugh apparently said poor people buy with food stamps included beer; however, as Lubrano noted, food stamps cannot be used to purchase alcoholic drinks).

<sup>240</sup> *Id.* Lubrano quotes the head of a conservative “family institute” in Pennsylvania to have explained that taxpayers who believe their taxes are used to assist poor people may “end up with a sense of disgust with people receiving the help.” *Id.*

<sup>241</sup> A satirical piece in *The Onion*, published in March 2007, makes a similar point. Jocelyn Chao, *I Don’t Want Health Care If Just Anyone Can Have It*, THE ONION, issue 43-10, Mar. 7, 2007, <http://www.theonion.com/articles/i-dont-want-health-care-if-just-anyone-can-have-it,11294/>.

“Providing health care for all would completely undermine the whole idea of health care,” Chao writes satirically. *Id.* She portrays a middle-class employee with health care coverage to proclaim:

When hospital administrators see me flash my Blue Cross card, it means something. It tells the world, “Hey, look at me: I pay increasingly high monthly premiums, submit to annual exams, and claim . . . health-related expenditures . . . on my taxes, and you can’t.” But when this bill passes, they’ll be handing out insurance cards willy-nilly, and nobody will be able to tell the difference between someone who’s had health coverage for 20 years and someone whose boss was compelled by law to provide it to all full-time employees. *Id.*

And then she has her protagonist comment: “After all, how do I know I’ve made it in this world if I’m not able to enjoy something others can’t?” *Id.*

opposing health care reform. Those living in poverty or at the economic margins—viewed as likely to benefit from government-funded health care—have provided one of the primary targets.<sup>242</sup> The government—ready to fund the extension of health care coverage—has provided the other.<sup>243</sup>

Much of the rhetoric in opposition to health care reform before passage of the ACA focused on the first target. More particularly, that rhetoric recalled the presumptive failure of the poor to make the “right” choices—choices that would alleviate poverty—and on the threat that expanded health care coverage would pose to “freedom.” One poster on a conservative blog about health care reform expressed this sentiment clearly:

I remember the Carry ad last time around, with His Pompousness intoning “Healthcare should be a RIGHT!” I’m not sure which scared me more, the idea that a presidential candidate would say this, or how few people were outraged by this.

Look, there’s no way you can ever consider making a good or service a “right”. Once you start believing that some people have a “right” to something that someone else needs to pay for, the whole notion of freedom begins to collapse. We had a little war about a hundred years ago to disabuse certain people of the notion that they had a “right” to the fruit of someone else’s labor, and slavery is just as immoral today as it was back then.<sup>244</sup>

## 2. Opposition to Health Care Reform During the 2008 Presidential Campaign

The tone of opposition to health care reform changed subtly during the presidential campaign of 2008. The costs of health care were skyrocketing.<sup>245</sup> In addition, employers offered insurance to employees less often.<sup>246</sup> The number of uninsured in the United States had reached 52 million by 2010.<sup>247</sup> Not only

<sup>242</sup> Lubrano, *supra* note 239 (quoting Temple University sociologist Matt Wray).

<sup>243</sup> See *infra* notes 265-74 and accompanying text.

<sup>244</sup> Next 93, *Then we need to take our lumps on it*, Comment responding to Soren Dayton, *How the media helps Obama: The health care version*, REDSTATE BLOG (April 3, 2008), [http://archive.redstate.com/blogs/soren\\_dayton/2008/apr/03/how\\_the\\_media\\_helps\\_obama\\_the\\_health\\_care\\_version#comment-721533](http://archive.redstate.com/blogs/soren_dayton/2008/apr/03/how_the_media_helps_obama_the_health_care_version#comment-721533) (A few typographical errors in the post have been corrected to facilitate ease of reading.).

<sup>245</sup> It was hardly a secret that increases in the cost of health care between 1975 and 2005 were precipitous. James C. Capretta, *Health Care 2008: A Political Primer*, NEW ATLANTIS, Spring 2008, at 17-31 (reporting that according to the Congressional Budget Office, during the 30 years between 1975 and 2005, the cost of health care increased each year more than 2% more than the nation’s gross domestic product).

<sup>246</sup> Warren Greenberg, *Employer-Based Health Insurance at the End of the Line?*, 20 HEALTH LAWYER, No. 4, April 2008, at 38 (reporting that fewer companies offered health insurance in 2006 (61%) than in 2000 (69%)).

<sup>247</sup> *Commonwealth Fund Study Finds Recession Left 52 Million Uninsured for Part of 2010*, BNA: HEALTH CARE DAILY REPORT (Mar. 17, 2011) (reporting that Commonwealth Fund’s 2010 survey

were scores of millions of people without health care coverage,<sup>248</sup> but those with health care insurance increasingly<sup>249</sup> worried about losing it.

In the context of these troubling developments, health care reform emerged as a central issue in the 2008 presidential election.<sup>250</sup> Debate between the candidates no longer separated those seeking reform from those pleased with the status quo.<sup>251</sup> Almost no one argued—at least not expressly—in favor of preserving the status quo. The nation's extant system of health care seemed to have reached a breaking point. Both candidates for the presidency in 2008 urged reforms in the nation's systems of health care coverage and delivery.<sup>252</sup> In sum, Obama stressed the importance of expanding access to care;<sup>253</sup> McCain stressed the importance of "choice."<sup>254</sup>

A national debate during 2007 and 2008 about the reauthorization and expansion of the State Children's Health Insurance Program (SCHIP)<sup>255</sup> foreshadowed differences between the Obama and McCain proposals for reforming the nation's system. SCHIP provides health care coverage for children in families with incomes just above the level of eligibility for Medicaid. It was created in 1997, with funding for ten years. In 2007, two separate bills to reauthorize and expand the program were vetoed by President Bush, and

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found that approximately 52 million people in the U.S. had no health coverage at some point in the year).

<sup>248</sup> Capretta, *supra* note 245 (estimating 47 million people in U.S. were without coverage in 2006).

<sup>249</sup> *Id.*

<sup>250</sup> As campaigning for the 2008 presidential election began, it was clear that the nation was facing its so-called "health care problem." Deborah Solomon, *Health-Insurance Gap Surges as Political Issue*, WALL ST. J., Jan. 19, 2007, at A1 (referring to the "long-festering issue of providing health coverage" to the many uninsured in the U.S.).

<sup>251</sup> *Perspective: Election 2008, supra* note 31, at 1538-41.

<sup>252</sup> See *supra* note 250 and accompanying text. Barack Obama, then the Democratic candidate for president, promised to reduce the costs of health care (by as much as \$2,500 for the typical family). Sack, *supra* note 30. He also promised that "all Americans" would gain "access to the benefits of modern medicine." *Perspective: Election 2008, supra* note 31, at 1538. During the campaign, Obama favored an employer mandate (but not an individual mandate), and he advocated the development of health insurance exchanges to offer coverage options to uninsured individuals and small businesses. Jonathan Oberlander, *The Partisan Divide—the McCain and Obama Plans for U.S. Health Care Reform*, 359 NEW ENG. J. MED. 781, 782-83 (2008) (noting that Obama declared that he could support an individual mandate if it proved impossible to develop a plan providing universal coverage, and thus suggesting clearly that Obama did not originally favor an individual mandate). Republican candidate John McCain rejected "a hugely expensive, bureaucratic, government-controlled system," but he did not deny the need for change. *Perspective: Election 2008, supra* note 31, at 1537. McCain favored encouraging competition by deregulating the insurance market—a change he believed would reduce costs. *Feature: Two Prescriptions for America's Ills: McCain and Obama Offer Conflicting Health Plans. Here's How You'd Fare*, CONSUMER REPORTS, Nov. 2008, at 18. McCain also argued in favor of letting families make their own decisions about health care costs. Samuel S. Flint & Stephen H. Gorin, Editorial, *Health Care Reform in the 2008 Primaries*, 33 HEALTH & SOC. WORK 83, 84 (2008).

<sup>253</sup> *Perspective: Election 2008, supra* note 31.

<sup>254</sup> *Id.*

<sup>255</sup> See Balanced Budget Act of 1997, H.R. 1015, 105th Cong. (1997).

Congress was unable to override those vetoes.<sup>256</sup> President Bush's vetoes satisfied a wide set of voices within Congress and among the public that opposed reauthorizing SCHIP.<sup>257</sup> Many public responses to the proposed reauthorization and expansion of SCHIP reflected deep-seeded class competition.

Negative sentiments about reauthorizing SCHIP provided a preview of opposition to health care reform after 2008.<sup>258</sup> Those opposing the proposed expansion of SCHIP expressed class competition, focusing on the seeming injustice of rewarding those just above the federal poverty level. They also voiced assumptions undergirding a broader ideology that prizes choice and autonomy. Opponents' fears about SCHIP's expansion fell into several interrelated categories.<sup>259</sup> These include distress about increased governmental spending *for this purpose*,<sup>260</sup> fear that expanding SCHIP would facilitate "socialized medicine" and would thus undermine individual autonomy, and a correlative fear that expanding SCHIP would result in loss of liberty and choice. In addition, opponents of SCHIP's expansion noted what they viewed as the injustice to the middle-class of providing free care for lower-middle-class families.

Indicative of the nature of class competition in the U.S., many opponents of SCHIP's expansion differentiated the provision of health care for very poor people (e.g., those eligible for Medicaid) from governmental health coverage for somewhat less poor people (e.g., those who would have been eligible under an expanded SCHIP program).<sup>261</sup> At least in part, this distinction reflects the unself-conscious conclusion that those eligible for Medicaid do not generally present a competitive threat to the status of the middle-class, but those eligible for coverage under an expanded SCHIP program (perhaps, earning as much as 400% of the federal poverty level) would constitute a class threat.<sup>262</sup>

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<sup>256</sup> See Children's Health Insurance Program Reauthorization Act of 2007, H.R. 976, 110th Cong. (2007); Children's Health Insurance Program Reauthorization Act of 2007, H.R. 3963, 110th Cong. (2007). The program was eventually reauthorized in 2009 during the Obama presidency. See Children's Health Insurance Program Reauthorization Act of 2009, H.R. 2, 111th Cong. (2009).

<sup>257</sup> Opposition to the reauthorization and expansion of SCHIP in 2007 and 2008 is considered in Dolgin, *supra* note 226.

<sup>258</sup> Republican candidates in the 2008 presidential campaign supported the Bush administration in opposing the reauthorization and expansion of SCHIP while Democratic candidates favored expanding the program. Flint & Gorin, *supra* note 252.

<sup>259</sup> The delineation of concerns expressed by those opposing SCHIP's expansion in 2007 and 2008 summarizes a more detailed discussion and analysis in Janet L. Dolgin's article. See Dolgin, *supra* note 226, at 726-41.

<sup>260</sup> President Bush justified his veto of the bills that would have expanded and reauthorized SCHIP by referring to the cost of covering children in families earning 400% of the federal poverty level. H. R. Doc. No. 110-62 (2007). Yet, Bush had been quite willing to spend comparable sums for other ends—including even some health coverage matters. See Dolgin, *supra* note 226, at 730 (noting Bush's support for other expensive bills such as Medicare Part D).

<sup>261</sup> See Dolgin, *supra* note 226, at 736-37.

<sup>262</sup> Relevant evidence is presented and reviewed in Janet L. Dolgin's article. See Dolgin, *supra* note 226, at 726-41.

Opponents of the Obama administration's health care reform proposals voiced similar concerns. However, the near-universality of coverage promised by that reform made it harder to complain expressly about offering unfair assistance to people in the lower middle-class. Thus, in part, opponents of "ObamaCare"<sup>263</sup> focused less on the presumptive injustice of providing health care to people who had not "earned" it and more on the dangers to everyone of federal control over health care. After passage of the Affordable Care Act the public also appropriated models, constructed by lawyers and scholars, that focused on the Act as an unacceptable instance of government excess. In addition, with the development of a recessionary economy in 2008, opponents of health care reform voiced concern about budget deficits facing all levels of governments.<sup>264</sup>

### 3. The Summer of 2009

In the summer of 2009, about six months into the Obama presidency, opponents of health care reform—many associated with the newly emerging "tea party" movement—organized throughout the nation to confront Democratic lawmakers, home from Washington for the summer.<sup>265</sup> Some of the protests seemed truly to have had a grassroots origin; some seemed to have been facilitated by a set of well-funded conservative groups.<sup>266</sup>

Often, the tone of the "town hall" meetings—many set up by members of Congress as informational sessions for local voters about health care reform—was angry.<sup>267</sup> In Cincinnati, police were called to quell rising tempers at one

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<sup>263</sup> Steinhauer & Pear, *supra* note 177. The term was originally understood derisively. Increasingly, however, Democrats accept the appellation and hope to transform it into a positive reference. *Id.*

<sup>264</sup> In early 2011, Republicans in the House worked to refund provisions of the ACA. Joanne Kenen, *Health Policy Brief: Congress and the Affordable Care Act*, HEALTH AFFAIRS, (Feb. 25, 2011), [http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief\\_id=41](http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=41) (noting that debate about the ACA's future had "already become part of the debate over federal spending for the current fiscal year 2011).

<sup>265</sup> Mary Kate Cary, Op-Ed., *Healthcare Reform a Tough Sell in Town Halls Where Recession's Hit Hardest*, U.S. NEWS.COM, Aug. 12, 2009. Some of the protesters were local. Others were bused in from elsewhere. *Id.*

<sup>266</sup> Robert Stacy McCain, *Grandma Is an Angry Mob*, THE AMERICAN SPECTATOR, (Aug. 18, 2009, 6:08 AM), <http://spectator.org/archives/2009/08/18/grandma-is-an-angry-mob/print>. Americans for Prosperity, created by David Koch of the wealthy Koch oil family, has created a number of smaller groups that lobby against health care reform. These include Patients First and Patients United. Margaret Talev, *Who's behind the fight against health-care change: Close Up*, SEATTLE TIMES, Aug. 17, 2009, at A3; see also *supra* note 82 and accompanying text.

A disproportionate number of these confrontations during the summer of 2009 happened in states hit hardest by the recession and suffering from particularly high rates of unemployment. Cary, *supra* note 265. Cary lists among these states Missouri, Indiana, North Carolina, and Ohio. *Id.*

<sup>267</sup> Howard Wilkinson, *More Heat, Less Light*, CINCINNATI ENQUIRER, Aug. 20, 2009.



informational session with a member of Congress.<sup>268</sup> Another town hall event held in Phoenix in August featured signs reading “Pull the Plug on ObamaCare” and “Marx Was Not a Founding Father.”<sup>269</sup> In late August, a Fox News journalist taped tea party activists in Arizona exclaiming that “they” (presumably government) “are stepping on our civil liberties,” that America should shift direction and head back to the “founding fathers” with “Christianity” as its “base,” and that they themselves were being asked to “work[] for someone else,” presumably a reference to taxing them to provide health care coverage for others.<sup>270</sup>

The so-called tea partiers participated in many of these confrontational meetings during the late summer of 2009. They comprised a decentralized conglomeration of conservative interests.<sup>271</sup> Many were “white, middle-class, middle-aged” and “aggrieved.”<sup>272</sup> The program they referred to as “ObamaCare” provided a forum within which to voice a wide set of worries about their own socio-economic status, about fears of slipping in the nation’s class hierarchy,<sup>273</sup> and about an increasingly powerful federal government.<sup>274</sup>

<sup>268</sup> Howard Wilkinson (Edit), *More Heat, Less Light*, CINCINNATI ENQUIRER, Aug. 21, 2009. The Representative was Steve Driehaus (D-Ohio). *Id.*

<sup>269</sup> McCain, *supra* note 266.

<sup>270</sup> FOX ON THE RECORD WITH GRETA VAN SUSTERAN (Fox News Network television broadcast Aug. 31, 2010).

<sup>271</sup> Yet, despite popular perceptions, many supporters of the movement have expressed interests harmonious with those of the Republican mainstream. Jonathan Martin & Ben Smith, *The Tea Party’s Exaggerated Importance*, POLITICO (Apr. 22, 2010, 5:05 AM), <http://dyn.politico.com/printstory.cfm?uuid=234CBD3C-18FE-70B2-A8B9BF16A67DEB16>.

Martin and Smith, suggesting that many tea partiers are akin to mainstream Republicans, write:

[V]arious sides have their own reasons for finding something new and arresting in the spasms of outrage personified by the tea partiers. The right sees the protests as evidence of a popular revolt against President Barack Obama . . . . The left sees them as evidence of incipient fascism and an opposition to Obama rooted in racism—proof of the beyond-the-pale illegitimacy of large swaths of the conservative moment.

*Id.*

<sup>272</sup> *Id.* The homepage of the Tea Party Patriot website quotes Sarah Palin in early 2011: “This summit [referring to an event scheduled for late February 2011] offers a terrific opportunity for true American patriots to hear from experts on issues like lowering taxes, balancing the budget, and repealing Obamacare.” Suzi Parker, *Rebellious Arizona—the Perfect Venue for Next Week’s Tea Party Summit*, POLITICS DAILY (Feb. 14, 2011), <http://www.politicsdaily.com/2011/02/14/rebellious-arizona-the-perfect-venue-for-next-weeks-tea-part/print/>.

<sup>273</sup> Lisa Disch described the movement as a defense of “property interests,” especially for white people. See Lisa Disch, *Tea Party Movement: The American “Precariat”?*, UC BERKELEY 2 (Oct. 22, 2010), <http://ccsrwm.berkeley.edu/sites/default/files/shared/docs/Disch%20paper.pdf>. Disch explains that tea partiers are not “racist” so much as anxious to safeguard their share “in what George Lipsitz has called ‘racialized social democracy.’” *Id.* at 3 (quoting George Lipsitz, *The Possessive Investment in Whiteness: Racialized Social Democracy and the ‘White’ Problem in American Studies*, 47 AM. Q. 369 (1995)).

<sup>274</sup> See Disch, *supra* 273, at 1 (noting that tea partiers saw health care reform as “a budget-breaking extension of the welfare state; a government ‘take-over’ of health care”).

## B. Popular Opposition to Health Care Reform in the Year After Passage of the Affordable Care Act

By the next spring, the Affordable Care Act was law. Politicians and lawyers had begun actively to craft new models for portraying the law's shortcomings and presumptive dangers. Old models that announced the injustice of providing health care for the "unworthy" poor were not abandoned,<sup>275</sup> but they were increasingly supplemented, and then outnumbered, by new models, announcing the dangers "big government" posed to individualism, autonomy, and choice.

### 1. Conservative Opponents of the Affordable Care Act

In the year after passage of the Act, opponents of health care reform reshaped their rhetoric but not their underlying concerns. They continued to focus on a perceived lack of fairness in providing "free" health care coverage to people with incomes below—and even more, to those with incomes slightly above—the federal poverty line. That sense of injustice was buttressed by the perception that those in the intermediate strata,<sup>276</sup> increasingly fearful of losing their place in the nation's class hierarchy, would not be similarly rewarded. Assumptions underlying these fears harmonized with a longstanding expectation within the United States that one's position in the nation's class hierarchy follows from a set of personal choices. Thus, Americans, especially those in the middle- and upper-classes, have long believed that hard work and a good education result in socio-economic success<sup>277</sup> and that their success is thus "deserved."<sup>278</sup> Soon after President Obama signed the Affordable Care Act, Marcia Alesan Dawkins noted its presumed consequences in the eyes of many people anxious about slipping in socio-economic status: "By making health care available to more people, those who believe it's a privilege they've earned are now placed on the

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<sup>275</sup> In early 2011, South Carolina's Lieutenant Governor Andre Bauer reportedly explained that governmental assistance for people in poverty was akin to feeding stray animals that "breed." Lubrano, *supra* note 239. The same article reports a state legislator from Colorado describing poor people living in "single-family homes [as] dysfunctional." *Id.*

<sup>276</sup> John B. Judis, *Phantom Menace: The Psychology Behind America's Immigration Hysteria*, NEW REPUBLIC, Feb. 13, 2008, at 21 (defining "intermediate strata" as socio-economic group at the lower, but not the lowest, end of the nation's hierarchy; it feels pressured "from above" and "from below").

<sup>277</sup> Scott & Leonhardt, *supra* note 234. The economic downturn that began in 2008 has begun openly to challenge such assumptions, and may continue to do so, at least for a time.

<sup>278</sup> *Id.*; see also Paul Krugman, *The Great Wealth Transfer*, ROLLING STONE, Dec. 14, 2006, at 44. In fact, reality belied this belief long before the current economic recession. *Id.*

same hierarchical rung as others who they believe don't deserve or haven't earned it."<sup>279</sup>

By 2010, however, the rhetoric voiced by opponents of health care reform began also to reflect the discourse of professional opponents. Posters responding to media stories about legal challenges to the Act appropriated models crafted by lawyers, politicians, and judges. Increasingly, opposition from among the public described the Act as a violation of American tradition and of the Constitution. One post, typical of many others in the week after the Act became law, began by noting that the author was "not a constitutional lawyer," and then explained:

[I]t is the first time you are going to be required by the federal government to buy something from a private company for the act of existing. Now, as Mr. Barnett says, if this is deemed constitutional, couldn't the federal government mandate that you buy anything from a private company. . . . [W]hy can't the feds force me to buy a computer or face a fine, a car or face a fine etc.<sup>280</sup>

Another post expressed amazement "at the number of people here who just don't understand the constitution."<sup>281</sup> This poster then explained that allowing Congress to "tax" those who do not have health coverage would end badly for the nation:

Make no mistake, the next phrase of this, within 10 years, will be to keep costs down by limiting caloric intake of all Americans AND enforcing regimented exercise programs of all able bodie[d] citizens. The US now owns you. And you sold yourselves to them . . . . That's not slavery, that's indentured servitude, and you fell for it.<sup>282</sup>

This post thus cloaks a message about freedom and choice inside a frame stressing the ACA as an abuse of federal power.<sup>283</sup>

<sup>279</sup> Marcia Alesan Dawkins, *Who's Afraid of Health Care Reform?*, TRUTHDIG, Mar. 29, 2010, [www.truthdig.com/report/item/whos\\_afraid\\_of\\_health\\_care\\_reform\\_20100329/](http://www.truthdig.com/report/item/whos_afraid_of_health_care_reform_20100329/).

<sup>280</sup> *BusinesstoMed*, Comment to *State attorneys general sue over health bill*, MSNBC, (Mar. 23, 2010, 12:18 PM), [http://politics.newsvine.com/\\_news/2010/03/23/4057775-state-attorneys-general-sue-over-health-bill#comments](http://politics.newsvine.com/_news/2010/03/23/4057775-state-attorneys-general-sue-over-health-bill#comments). The reference to "Barnett" was to Professor Randy Barnett of Georgetown University Law Center, quoted in Williams' piece. Pete Williams, *State attorneys general sue over health bill*, HEALTH CARE REFORM ON MSNBC.COM (Mar. 23, 2010, 7:44 PM), <http://www.msnbc.msn.com/id/36001783/#.Tk2rIM2KaBQ>.

<sup>281</sup> Rhinehold, Comment to *State attorneys general sue over health bill*, MSNBC, (Mar. 24, 2010, 1:08 AM), [http://politics.newsvine.com/\\_news/2010/03/23/4057775-state-attorneys-general-sue-over-health-bill#comments](http://politics.newsvine.com/_news/2010/03/23/4057775-state-attorneys-general-sue-over-health-bill#comments).

<sup>282</sup> *Id.*

<sup>283</sup> That theme runs through many responses in opposition to the Affordable Care Act. Renee Ellmers, a nurse, who won a seat in the House of Representatives as a Tea Party candidate in 2010, explained, in an interview with Jessica Marcy, that "the American people want this health care situation addressed . . . in the free market . . . where they can make their decisions for their own

Speaking on the Senate floor in February 2011, in hearings addressing a proposal to repeal the Act,<sup>284</sup> Jim DeMint, a conservative Republican from South Carolina,<sup>285</sup> voiced a similar message:

This law [the Affordable Care Act] is actively creating a government controlled system that relies on high taxes, less choices, and bureaucrats making health care decisions for Americans. . . . Last year the Joint Economic Committee found that ObamaCare created 159 new Federal programs and bureaucracies to make decisions that should be made between patients and their doctors. . . .

Worst of all, in the rush to pass this legislation, none of its proponents cared if it was unconstitutional. They were not going to let the Constitution get in the way of their health care takeover. . . .

An unconstitutional law that touches the most important personal decisions Americans ever make must not stand. We must repeal the bill in its entirety. Because at the very heart of it, which makes all of the other parts work, that very heart, that individual mandate, violates the highest law of our land.<sup>286</sup>

On the same day, newly elected Senator Ron Paul (R-Ky.), also speaking on the Senate floor, described opposition to the Affordable Care Act as encompassing far more than a transformation of the nation's system of health care coverage:

The commerce clause . . . for the last 70 years has gotten larger and larger. I used to joke that you can drive a truck through it now, it is so big. . . .

The commerce clause—the expansive definition and understanding of it—has been supplying no restraint to this body. But I think this court case and I think this bill is about so much more than health care. It is about whether we live and operate with constitutional restraint of government.<sup>287</sup>

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families and not have the president and the government make it for them.” Jessica Marcy, *A New Nurse in the House: The KHN Interview with Rep. Renee Ellmers*, KAISER HEALTH NEWS, Feb. 28, 2011, <http://www.kaiserhealthnews.org/Stories/2011/February/28/Rep-ellmers.aspx>.

<sup>284</sup> The Senate considered a bill, introduced by Sen. McConnell (R-Ky.) (amendment No. 13) to repeal health care reform as well as a proposal, introduced by Sen. Stabenow (D-Mich.) (amendment No. 9) to repeal one provision in the bill (the 1099 reporting requirement). 157 Cong. Rec. S. 434, 471 (daily ed. Feb. 2, 2011). In March 2011, Senate Majority leader Harry Reid (D-Nev.) announced that the Senate might vote on a repeal of the expansion of 1099 as soon as late March or early April. *Taxation, Senate Postpones Vote to Repeal Form 1099 Until After March Recess*, BNA HEALTH CARE POLICY REPORT, 19 HCPR 427, Mar. 18, 2011.

<sup>285</sup> Jim DeMint, *About Jim*, SENATE.GOV, <http://demint.senate.gov/public/index.cfm?p=AboutJim> (last visited Mar. 16, 2011).

<sup>286</sup> 157 Cong. Rec. S. 434, 444 (daily ed. Feb. 2, 2011).

<sup>287</sup> *Id.* at 454.

Most opposition to the Act was grounded in comparatively mainstream aspects of American ideology and was peaceful. Some, however, was neither mainstream nor peaceful. The next subsection describes more extremist, even sometimes violent, opposition. That opposition suggests the intensity of anger that affected at least some of those who opposed the Affordable Care Act and the values they understood the Act to signal.

## 2. Extremist Opposition

A more hateful, desperate response to the Affordable Care Act emerged openly in the days immediately before, and in the months after, the Act's passage.<sup>288</sup> In large part, these manifestations of opposition were grounded on an elaboration and magnification of claims detailed above. Angry opposition emerged in a public arena a few hours before Congress passed the Affordable Care Act.<sup>289</sup> Activists opposing passage of the reform bill surrounded one of the Capitol buildings. As Barney Frank, an openly gay member of the House, and John Lewis, a 70-year old one-time civil-rights activist, walked into the capital, protesters screamed "faggot" and "nigger."<sup>290</sup> Others screamed "liar" and "crook" at Representative Henry Waxman (D-Cal.), a supporter of the reform bill. Democratic Whip Jim Clyburn (D-S.C.) watched a protester spit on a black member of the House.<sup>291</sup> Clyburn, himself black, exclaimed that he heard things that day that he had not heard since 1960 when he was "'marching to try to get off the back of the bus.'"<sup>292</sup>

Almost a year later, a gunman, apparently aiming primarily at Representative Gabrielle Giffords (D-Ariz.), killed six people, wounded 13, and seriously injured Giffords with a bullet to her head.<sup>293</sup> Giffords, a moderate Democrat who won reelection to Congress in 2010 in a conservative Arizona district, had voted for the Affordable Care Act. The alleged assailant seems to have been mentally ill. Even so, the shooting spurred existing concerns about the heated political environment.<sup>294</sup> Giffords had been targeted metaphorically the

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<sup>288</sup> Dawkins, *supra* note 279. Dawkins reports opponents of the Act referring to Rep. John Lewis (D-Ga.) as a "nigger," to Rep. Barney Frank (D-Mass.) as a "faggot," and sending a fax that labeled a "drawing of a noose and gallows . . . labled 'Bart (SS) Stupak.'" *Id.*

<sup>289</sup> Associated Press, *Health bill opponents heckle top Dems: Lawmakers harassed; protesters had used racial epithets Saturday*, MSNBC.COM, (Mar. 22, 2010, 6:54 AM), [http://www.msnbc.msn.com/id/35965961/ns/politics-capitol\\_hill/#](http://www.msnbc.msn.com/id/35965961/ns/politics-capitol_hill/#).

<sup>290</sup> Brian Beutler, *Tea Partiers Call Lewis 'N\*\*\*\*r', Frank 'F\*\*\*\*t', at Capitol Hill Protest*, TPM (Mar. 20, 2010, 5:41 PM), <http://tpmdc.talkingpointsmemo.com/2010/03/tea-partiers-call-lewis-nr-frank-ft-at-capitol-hill-protest.php?ref=mp>.

<sup>291</sup> Associated Press, *supra* note 289.

<sup>292</sup> Beutler, *supra* note 290.

<sup>293</sup> Michael Petrou & Luiza Ch. Savage, *How Arizona happened: Behind the assassination attempt that shocked America*, MACLEAN'S.CA (Jan. 18, 2011, 11:57 AM), <http://www2.macleans.ca/2011/01/18/tragedy-in-tucson/#more-166442>.

<sup>294</sup> Dennis Henigan, *Brady Campaign: Giffords Shooting "Inevitable,"* OPPOSING VIEWS (Jan. 9, 2011), <http://www.opposingviews.com/i/brady-campaign-gabrielle-giffords-shooting-inevitable>.

previous spring on a map, reportedly posted online by Sarah Palin. The map marked with gun-sight crosshairs a group of Democrats, including Giffords, who represented conservative districts and had voted for the Act.<sup>295</sup> In addition, Palin apparently commented on Twitter, in a message addressed to “commonsense conservatives and lovers of America:” “Don’t retreat, instead—RELOAD!”<sup>296</sup> And Giffords’ opponent in the 2010 campaign for the House seat was reported to have held a “Target for Victory” event at a shooting range.<sup>297</sup>

The shooting was not the first episode of violence aimed at Giffords, and she was not the only representative threatened with violence. Soon after Congress passed the Affordable Care Act, vandals attacked Giffords’ district office in Arizona.<sup>298</sup> Other House Democrats reported similar angry acts directed against them. An Alabama blogger, and one-time leader of the Alabama Constitutional Militia, suggested that readers throw bricks into the offices of Democratic headquarters throughout the nation, as a message in opposition to the party’s support for health care reform.<sup>299</sup> In the week in which the House passed the Affordable Care Act, at least ten Democrats in the House reported death threats, harassment, or vandalism.<sup>300</sup>

Angry opponents of health care reform resembled more moderate opponents, in stressing the threat that health care reform presented to efforts to safeguard liberty and freedom. One vandal in Rochester, N.Y., attached a note to a brick thrown into the Democratic Committee’s headquarters. It read: “Extremism in defense of liberty is no vice.”<sup>301</sup> And the blogger from Arizona

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As early as August, 2009, there was concern for Giffords’ safety. At that time, when opponents of health reform were conducting widespread public protests, a concealed gun was dropped by a protester at one of her events. Corey Dade, *Shooting Fallout: Political Rhetoric Takes the Heat*, NPR (Jan. 9, 2011), <http://www.npr.org/2011/01/10/132784957/shooting-fallout-political-rhetoric-takes-the-heat?sc=ema#>. Within days of the Loughner shootings, a CBS News poll indicated 57% of Americans did not think the political climate itself was a factor, although 32% thought it was; 45% thought the shooter’s political views were “probably” a factor and the same percentage said such a shooting is likely to recur. Brian Montopoli, *Poll: 45% Say Politics Motivated Jared Loughner*, CBS NEWS, (Jan. 11, 2011, 6:30 PM), [http://www.cbsnews.com/8301-503544\\_162-20028218-503544.html](http://www.cbsnews.com/8301-503544_162-20028218-503544.html).

<sup>295</sup> Petrou & Savage, *supra* note 293. Palin’s camp denied that the crosshairs were meant as gun sights. Dade, *supra* note 294.

<sup>296</sup> Petrou & Savage, *supra* note 293.

<sup>297</sup> *Id.*

<sup>298</sup> Suzy Khimm, *Jared Lee Loughner: Meet Rep. Giffords’ Alleged Shooter*, MOTHER JONES (Jan. 8, 2011, 2:51 PM), <http://motherjones.com/mojo/2011/01/jared-lee-loughner-gabrielle-giffords>.

<sup>299</sup> Philip Rucker, *Lawmakers concerned as health-care overhaul foes resort to violence*, WASH. POST, Mar. 25, 2010, at A01, available at [http://www.washingtonpost.com/wp-dyn/content/article/2010/03/24/AR2010032402122\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/03/24/AR2010032402122_pf.html).

<sup>300</sup> *Id.* Threats or actual vandalism were reported by many Democrats. Vandals attacked the district office of Louise M. Slaughter (D-N.Y.) and threatened her by voice mail with a sniper attack. Someone severed a gas line at the home of the brother of Tom Perriello (D-Va.). This occurred after a self-proclaimed “tea party” member posted the address (apparently believed to be that of the representative, not his brother) online and suggested that opponents of health care reform “drop by” to communicate their opposition. Bart Stupak (D-Mich.) received a voice mail that said: “You’re dead. We know where you live. We’ll get you.” *Id.*

<sup>301</sup> The language was used by Barry Goldwater in his 1964 speech accepting the Republican party’s nomination of the presidency. (It may not have been original with Goldwater either.) Goldwater

who encouraged readers to respond with violence to those who supported health care reform referred to those who followed his call as the “modern ‘Sons of Liberty.’”<sup>302</sup>

## VI. CONCLUSION

This Article has reviewed social, political, and legal opposition to the Affordable Care Act in the period just before it became law and in the year that followed its promulgation. The Act has become a stage on which Americans can proclaim their understandings of personhood, community, and national identity. And it has provided a Rorschach test, revealing people’s deepest understandings of their relation to themselves and others. Public and professional opposition to the Affordable Care Act has intensified in the year since it became law. The extent and intensity of opposition to the Act is unusual though not unprecedented for a major piece of social legislation, a year after its promulgation.

Yet, upon contemplation, neither continuing opposition to the Act nor its political fallout should occasion great surprise. The Act is perceived as threatening values that many Americans hold dear and that they express often and openly—values such as freedom, choice, and individualism. Even more important, the Act challenges the nation’s opaque class system—the system that undergirds Americans’ commitment to their most heartfelt values. Americans are intensely concerned about class status and, at the same time, downplay the central role of class in their lives and interactions.

Health care reform has provided a “central symbol” for a society that remains uncertain about the basic assumptions on which its fondest beliefs rest. Health care reform implicates relations of power between people and the government; it carries significant weight in a society in which health has become “tantamount to salvation;”<sup>303</sup> it implicates the possibility (or not) of an economic recovery, and perhaps most important, it implicates society’s widespread reliance on evidence of health status as evidence of class status. In short, the sort of major transformation in health care coverage and delivery likely to follow the implementation of the Affordable Care Act challenges people’s assumptions about everyday life itself. And thus, contemplation of that transformation and the socio-economic uncertainty that will likely accompany it provides a fit context for the nation to re-conceptualize its past and to contemplate its future.

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said: “Extremism in the defense of liberty is no vice! And let me remind you also that moderation in the pursuit of justice is no virtue!” The quote was inspired—whether Goldwater knew it or not—by Cicero. Associated Press, *Threats Against Lawmakers After Health Vote*, N.Y. TIMES (Mar. 24, 2010, 7:14 PM), <http://www.nytimes.com/2010/03/24/us/politics/AP-US-Health-Care-Threats.html>.

<sup>302</sup> Rucker, *supra* note 299.

<sup>303</sup> FOUCAULT, *supra* note 96.