

THE MODERNIZATION OF AMERICAN PUBLIC LAW: HEALTH CARE REFORM AND POPULAR CONSTITUTIONALISM

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The Patient Protection and Affordable Care Act (ACA) transformed U.S. public law in crucial ways extending far beyond health care. As important as were the doctrinal shifts wrought by National Federation of Independent Business v. Sebelius, the ACA's structural changes to public law likely will prove far more important should they become entrenched. The struggle over the ACA has triggered the kind of "constitutional moment" that has largely replaced Article V's formal amendment procedure since the Prohibition fiasco. The Court participates in this process, but the definitive and enduring character of these constitutional moments' outcomes springs from broad popular engagement.

Despite the Court's ruling and the outcome of the 2012 elections, the battle over whether to implement or shelve the ACA will continue unabated, both federally and in the states, until We the People render a clear decision. Whether the ACA survives or fails will determine the basic principles that guide the development of federalism, social insurance, tax policy, and privatization for decades to come.

In each of these areas, the New Deal bequeathed us a delicate accommodation between traditionalist social values and modernizing norms of economic efficiency and interest group liberalism. This balance has come under increasing stress, with individual laws rejecting tradition far more emphatically than the New Deal did. But absent broad popular engagement, no definitive new principles could be established. The ACA's entrenchment would elevate technocratic

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norms across public law, the first change of our fundamental law since the civil rights revolution. The ACA's failure would rejuvenate individualistic, moralistic, pre-New Deal norms and allow opponents to attempt a counterrevolution against technocracy.

INTRODUCTION.....	875
I. THE ROLE OF STATUTES IN POPULAR CONSTITUTIONALISM.....	880
A. <i>The Erosion of the Court-Centered Model of Constitutional Change</i>	881
B. <i>The Elements of a Constitutional Moment</i>	884
C. <i>Relating Popular Constitutionalism to Article V</i>	885
D. <i>The Enforcement of Popular Constitutionalism</i>	888
II. THE HEALTH CARE REFORM BATTLE AS A CONSTITUTIONAL MOMENT	889
A. <i>The Consensus That the ACA Represents New Constitutional Law</i>	892
B. <i>The Limited Role of Federal Constitutional Adjudication</i>	895
C. <i>The Prospects for the ACA's Political Demise</i>	897
1. <i>Federal legislation</i>	898
2. <i>State implementation</i>	900
D. <i>Complicating Factors at the Constitutional Moment</i>	902
III. THE AFFORDABLE CARE ACT'S REDEFINITION OF PUBLIC LAW.....	903
A. <i>Reassigning Roles in Federalism</i>	907
1. <i>The New Deal's fiscal federalism</i>	908
a. <i>Justificatory theories</i>	908
b. <i>Macroeconomic management</i>	909
c. <i>Models of federal-state administration</i>	912
2. <i>The ACA's federalism</i>	914
B. <i>Modernizing the Social Insurance Constitution</i>	918
1. <i>The disparate lineage of U.S. social insurance</i>	920
2. <i>The three-tier social insurance system</i>	922
3. <i>Program design</i>	925
a. <i>Eligibility determination</i>	926
b. <i>Program administration</i>	928
4. <i>The ACA's transformation of social insurance</i>	930
C. <i>Health Care Reform and Principles of Taxation</i>	932
1. <i>The New Deal's populist revenues policy</i>	934
2. <i>Reviving populism: the Tax Reform Act of 1986</i>	936
3. <i>The ACA's repudiation of populist tax purity</i>	938
D. <i>Privatization of Public Law</i>	941
1. <i>Post-New Deal tensions surrounding privatization</i>	942
2. <i>The ACA's redrawing of the public-private line</i>	945
CONCLUSION.....	949

INTRODUCTION

Implementation of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA)¹ would profoundly affect tens of millions of people's ability to get health care. It would set one of the largest segments of the economy on a dramatically new course, to a destination no one can predict with any confidence. And it would transform the politics of, and options for addressing, the federal budget deficit. These implications, however, may turn out not to be the most important issues at stake in the fierce struggle over whether to allow the ACA to take full effect.

Instead, the struggle over the ACA is one of the rare "constitutional moments" that transform public law for generations to come. The Supreme Court's decision upholding the ACA's mandate to purchase insurance but granting states the option to continue receiving Medicaid funds without implementing the ACA's Medicaid expansion² is certainly one of the most important decisions in decades in several important areas of constitutional doctrine. Yet that decision is unlikely to be the most important constitutional result of this episode.

This country has not seen a constitutional moment of this kind since the civil rights legislation of the mid-1960s. Although the attempt to create a more broadly egalitarian society in the 1970s—exemplified by the proposed Equal Rights Amendment and attacks on de facto segregation in the North—could have been another such moment, it failed to achieve the broad consensus necessary to change our fundamental law. Similarly, the Bush Administration failed to make lasting changes in our basic principles of governance in the wake of the 9/11 attacks: its agenda of executive dominance was slowed in Congress and the Court and eventually repudiated in the elections of 2006 and 2008.

If the ACA succeeds—an outcome the Supreme Court's decision and the 2012 elections have influenced but hardly decided—this episode will change fundamentally the terms of this country's social contract. This social contract, as amended by the results of this battle, will shape the future of public law in ways extending far beyond the health care sector. Far more than the vast majority of Supreme Court decisions, and exceeding even the constitutional amendments adopted over the last ninety years, the American electorate's verdict on the ACA will shape public law for decades to come in areas far removed from

1. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code). As part of the agreement that led to the ACA's passage in the House, Congress immediately amended the ACA with the Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of the U.S. Code). All discussion in this Article refers to the ACA as amended by the HCERA.

2. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

health care. The opposite result—the ACA’s implementation stalling and eventually being rolled back—would not by itself have the same effect in transforming the constitutional order: the failure of constitutional consensus is not analogous to the achievement of one. It would, however, offer the ACA’s opponents a golden opportunity to initiate a constitutional revolution of their own.

Whatever one may think of its merits, the ACA’s design was an extraordinary feat; its enactment more so. Many of the most obvious means of achieving its goals, such as a single-payer plan or government-coordinated group purchasing (the failed Clinton plan from 1994), were off the table politically. Although most pathbreaking social legislation of the past—and, indeed, all major initiatives during the previous administration—had relied on deficit spending, the conservative Democratic votes required for passage required that it include full financing. Moreover, most obvious revenue-raising measures, certainly including any increases in tax rates, were politically unacceptable. Advocates had long claimed that health care reform would produce efficiencies and savings through the reduction in bureaucratic overhead, yet dependence on votes from the major insurance companies’ home states ruled out a frontal assault on the biggest locus of inefficiency and waste. In addition, because near-universal insurance coverage was essential to the viability of the ACA’s economic model—and to the support of important provider groups such as hospitals—many of the kinds of benefit cuts commonly used to meet budgetary targets in other programs³ were also unavailable. And because Republicans gained the ability to block passage of ordinary legislation in the Senate partway through the process, the legislation had to be written without the benefit of a conventional conference committee, with any modifications to the Senate-passed version having to meet the arcane and rigorous restrictions of reconciliation.⁴

Designing legislation that could thread these multiple political, economic, fiscal, and procedural needles forced the ACA’s architects to reexamine many longstanding assumptions in public law. The severity of the constraints they experienced forced them to take on political battles that any sane politician would have preferred to avoid under other circumstances. The Democratic Party’s political imperative to pass the centerpiece of its agenda brought powerful

3. See, e.g., 7 U.S.C. § 2015(o) (2012) (denying food assistance to many unemployed, childless adults below age fifty, thereby reducing expenditures on the supplemental nutrition assistance program).

4. See 2 U.S.C. § 644(b)(1) (2012) (allowing points of order against provisions with negligible or negative fiscal impacts); David A. Super, *From the Greenhouse to the Poorhouse: Carbon-Emissions Control and the Rules of Legislative Joinder*, 158 U. PA. L. REV. 1093, 1131 (2010) (describing constraining effects of reconciliation). For an account of the politics leading to the ACA’s passage, see generally Ceci Connolly, *How We Got Here, in LANDMARK: THE INSIDE STORY OF AMERICA’S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL* (2010).

forces to bear in support of revolutionary changes in the structure of public law that the political mainstream ordinarily would have given a wide berth.

Just as importantly, the ACA's high salience has meant that these battles are being fought out before the entire U.S. electorate. Insiders may regard the 1985 Farm Bill⁵ as having reversed a half century of settled agricultural policy, but the general public was not involved and hence could hardly be said to have made any lasting commitments. When interest group coalitions realigned, politicians were free to jettison the principles agreed to a few years earlier.⁶

Not so with the ACA: opponents from left and right place its provisions under powerful microscopes and raise loud criticisms of any and all perceived flaws. With the Republican Party, a number of powerful industry groups, and some single-payer advocates seeing its passage as disastrous to their interests and its implementation even more so, no plausible concern has gone unarticulated for lack of resources. Even since it was enacted, the ACA was a central issue in the 2010 and 2012 election campaigns and surely will be again at least in 2014. In the wake of the Supreme Court's decision on Medicaid and with the refusal to establish insurance exchanges or allow Medicaid expansion a banner of conservative orthodoxy for ambitious Republican politicians, whether to participate in the ACA has become a major issue in state politics, too.

Although polling to date has found the public sharply divided on the ACA,⁷ people clearly are paying attention and will ultimately render a definitive verdict on the law. Despite strong lingering misgivings about the ACA, the electorate narrowly reelected its champion over a challenger who would have repealed it. And regardless of who wins the 2014 elections, the ACA will not be fully and securely implemented unless and until a substantial majority of the electorate embraces its departures from our prior understandings of the role of public law: only then will its opponents find the political costs of continued attacks untenable. Even well-designed initiatives of the ACA's scope almost inevitably suffer serious problems in their early implementation—and the political and procedural compromises required to enact the ACA produced a complexity likely to compound those woes.

Conversely, even if an anti-ACA Republican wins the White House in 2016 and sweeps in a broad array of Republican congressional candidates with

5. Food Security Act of 1985, Pub. L. No. 98-198, 99 Stat. 1354 (codified as amended in scattered sections of 7 U.S.C.).

6. See David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1382-83 (2004) (discussing debates over later farm bill).

7. See *As Health Care Law Proceeds, Opposition and Uncertainty Persist*, PEW RESEARCH CTR. (Sept. 16, 2013), <http://www.people-press.org/2013/09/16/as-health-care-law-proceeds-opposition-and-uncertainty-persist>.

him or her, Democrats will retain more than enough votes in the Senate to filibuster the ACA's repeal.⁸ Even if that President undermines the ACA's implementation administratively, Senate Democrats likely will not accept the ACA's permanent repeal unless they become convinced that the electorate has turned so decisively against the law that the possibility of future implementation is a powerful vote producer for Republicans.

Either way, the ultimate verdict on the ACA's reshaping of public law will be a genuinely popular one. And once achieved, it will be a powerful precedent that the winners can invoke, and that the losers must constantly seek to distinguish, in crafting other forms of public law wholly unrelated to health care.

Once the ACA's final fate is known, advocates on each side will no doubt have much to say about what principles they believe to have been proven. These self-interested interpretations will deserve little weight. Most obviously, the authors will no doubt be expanding or shrinking their assessments of the scope, or even existence, of a constitutional moment based on whether their side prevailed. In addition, none of their views will have been open to scrutiny while the debate was underway. Those wishing to assert that a constitutional change has occurred should be expected to lay their understandings of that change before the public while the public is weighing the outcome.

This Article follows in the tradition of writers seeking to lay out the expected implications of proposed constitutional changes in the midst of debates about whether to ratify those changes.⁹ This both seeks to contribute to the current debate—alerting the participants to its broader implications and seeking to provoke those on either side to embrace or renounce those implications—and to record an interpretation of the stakes while neither side knows the final outcome with sufficient certainty to adopt wholly opportunistic positions.

8. To be sure, a Republican Senate majority could eliminate the filibuster for legislation just as the current Democratic majority did for most presidential appointments. *Cf.* Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html>. A Democratic minority could, in turn, shut down the Senate indefinitely, as Republicans threatened to do over presidential appointments. *See* Editorial, *It's Still Too Unacceptably Hard to Staff the Government*, WASH. POST (Feb. 17, 2014), http://www.washingtonpost.com/opinions/its-still-too-hard-to-confirm-presidential-nominees/2014/02/17/228634f6-94fd-11e3-84e1-27626c5ef5fb_story.html. Republicans' relatively rapid return to business as usual suggests, however, that this sort of confrontation is profoundly risky for a party out of power and lacking the sympathies of a clear electoral majority.

9. *See* Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 874 (1971) (setting out the proposed interpretation of a constitutional amendment at the outset of its ratification process).

Remarkably, although the ACA was written and enacted entirely by Democrats, its transformation of public law is by no means in a manner clearly identified with the Democratic Party's program. In three of the four areas discussed below, the partisan alignment of the ACA's approaches is deeply ambiguous. And in the fourth, Democrats have effectively embraced a longtime Republican position—and Republicans have savagely attacked them for doing so.¹⁰

Part I surveys the extensive theoretical literature on popular constitutionalism. It finds recognition that, at least since the New Deal, major pathbreaking statutes have increasingly replaced formal amendments proposed under Article V as the major vehicles for constitutional debate and realignment. As arguably the most important and politically salient statute in almost half a century, the ACA provides a rare opportunity to learn more about our "Republic of Statutes."¹¹ The formation of public law depends on precedent at least as much as the formation of private law, and much of the precedent comes in the form of super-statutes, successful and failed.

Part II analyzes the ongoing struggle over whether to implement the ACA. It finds the threats to the law were never limited to constitutional invalidation or its supporters' defeat in the 2012 elections. Instead, the battle is likely to continue for several years, both federally and in the states. This Part proceeds to assess whether the resolution of the battle over the ACA can properly be seen as a constitutional moment and answers in the affirmative.

The remainder of the Article extends the analysis of the ACA's impact to the "constitution of statutes" that has guided our public law since the New Deal. It identifies four potentially constitutional results of the battle over the ACA. In each of these respects, fundamental values that have been, or are in the process of being, constitutionalized through statutes face fundamental reexamination and possibly rejection. Although the Supreme Court plays a substantial role in only one of these four areas, all have actual or potential constitutional implications, guiding legal development for generations to come.

The Article concludes with some speculations about how the constitutional law being made in the struggle over the ACA might affect other important constitutional issues of our time, including some in areas seemingly far removed from health care reform.

10. See *infra* note 74 and accompanying text.

11. See WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 3-5 (2010) (providing a roadmap to this kind of popular constitutionalism).

I. THE ROLE OF STATUTES IN POPULAR CONSTITUTIONALISM

This country has long pursued constitutional change beyond the confines of Article V. Arguments that fundamental, constitutional issues are at stake have become fixtures in the presidential campaigns of both parties.¹² Although Republicans occasionally mention amendments to outlaw abortion and same-sex marriage or to require balanced budgets, neither party's constitutional rhetoric refers primarily to the Article V process. Instead, the focus is on appointments to the Supreme Court.¹³ As a People, across the ideological spectrum, we all accept that the Supreme Court can and does change constitutional law. Decisions like *Hans v. Louisiana*¹⁴ and *Griswold v. Connecticut*,¹⁵ whatever their basis, had the same effect as Article V amendments immunizing states from suits by their citizens and creating a right of privacy. A judicial nominee questioning the authority of the rules these cases announced would fare little better than one arguing for granting titles of hereditary nobility.¹⁶

The question, then, is not whether this country's fundamental law can change without invocation of Article V. It is, instead, whether We the People should have a role in those changes beyond the attenuated process of electing Presidents who we hope will succeed in nominating the kinds of Justices we imagine will share our constitutional agendas. This Part argues that We the People can, should, and in practice do on rare occasions, change this country's fundamental law through an extraordinary process mediated by the three branches of the federal government but driven by the People through a series of ratifying or rejecting elections. This understanding of popular constitutionalism thus is both descriptive of how we actually have received and augmented our constitutional legacy and normative in its belief that this is how a democratic society ought to behave.

12. See, e.g., *Courts & the Constitution: Restoring the Rule of Law*, MITT ROMNEY FOR PRESIDENT, <http://web.archive.org/web/20120911015053/http://www.mittromney.com/issues/courts-constitution>.

13. See *id.* ("As president, Mitt will nominate judges in the mold of Chief Justice Roberts and Justices Scalia, Thomas, and Alito.").

14. 134 U.S. 1 (1890) (holding that sovereign immunity barred suits filed by citizens against their own states despite the Eleventh Amendment's language eliminating only suits by citizens of a different state).

15. 381 U.S. 479 (1965) (finding state limits on birth control unconstitutional without identifying a clear textual basis).

16. See U.S. CONST. art. I, § 9, cl. 8 (prohibiting such titles).

A. *The Erosion of the Court-Centered Model of Constitutional Change*

In recent years, scholars have increasingly questioned the traditional account of U.S. constitutionalism as beginning and ending with the written document that originated in 1789 and the Supreme Court's interpretation of that document. Bruce Ackerman finds the traditional account provides a woefully impoverished notion of popular sovereignty. He demonstrates that if Article V's amendment procedures really did represent the only legitimate vehicle for major exercises of popular sovereignty, we would have to conclude that the country has not changed significantly in more than a century—a period that encompasses dramatic economic and social transformations, which were reflected in an expansion of the size and scope of the federal government.¹⁷ Ackerman also questions the plausibility of a theory that the People have relinquished their Constitution entirely to lawyers, a group hardly held in wide popular esteem; he attributes the traditional view's persistence to lawyers' self-serving guild mentality.¹⁸

William Eskridge and John Ferejohn similarly argue that the traditional account offers a grossly oversimplified account of the means of U.S. governance. Over the last century, they note, this country has become a “republic of statutes.”¹⁹ Although all statutes are enacted through the same formal procedures under Article I, they are not by any means equal in shaping the basic terms of our society. Most statutes carry out the ordinary business of government, effective in their own terms but carrying no grander significance. Some statutes, however, such as the Social Security Act, the Administrative Procedure Act, or the Civil Rights Act of 1964, are widely regarded as deciding fundamental questions about the nature of our society. Limiting our understanding of fundamental law in this country to the written Constitution misses the vast majority of the important decisions we have made. Eskridge and Ferejohn suggest that our nation has shifted to making fundamental law through pivotal statutes because we have discovered three deep limitations on the written Constitution: it is old and extremely difficult to amend; it is largely limited to structures and procedures, omitting the substance that makes the government worth having and even many of the details necessary to implement those structures and procedures; and it speaks almost exclusively to state actors, ignoring the important impact that private parties have on our liberty and well-being.²⁰

17. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741-47 (2007).

18. 2 BRUCE ACKERMAN, *WE THE PEOPLE* 7-10 (1998).

19. ESKRIDGE & FEREJOHN, *supra* note 11, at 4-5.

20. *Id.*

Uniting these approaches is the conviction that We the People remain active in shaping the fundamental contours of our nation even as Article V has largely fallen into disuse. Ackerman summarizes the core belief:

This country's Constitution focuses with special intensity on the rare moments when transformative movements earn broad and deep support for their initiatives. Once a reform movement survives its period of trial, the Constitution tries to assure that its initiatives have an enduring place in future political life. Elected politicians will not be readily allowed to undermine the People's solemn commitments through everyday legislation. If they wish to revise preexisting principles, they must return to the People and gain the deep, broad, and decisive popular support that earlier movements won during their own periods of institutional testing.²¹

Popular constitutionalism in this sense is deeply democratic. It seeks to give the electorate the means to adjust our constitutional arrangements for changing circumstances and norms, and to do so openly, rather than leaving that power with unelected judges.²² Popular constitutionalism finds considerable irony in theories of the Constitution that criticize the exercise of power by unelected judges²³ while giving them exclusive power to modify our fundamental law through nominally interpretive decisions.²⁴

Popular constitutionalism embraces the idea that fundamental law is extraordinary and enduring, that it is not a tool for addressing relatively routine problems of public life. On the other hand, while it agrees that constitutional moments are rare, it rejects the conventional textualist account's implicit claim that significant constitutional moments have all but disappeared. We thus have two tracks of lawmaking—one for the vast majority of important but relatively low-salience decisions made without broad public engagement and another that “imposes specially rigorous tests upon political movements” and rewards those that pass with “the heightened sense of democratic legitimacy” of speaking for “We the People.”²⁵

Ackerman makes his argument on several levels. Textually, he notes that Article V, unlike its predecessor provision in the Articles of Confederation, makes no claim that its procedures are exclusive and that most early readers did

21. 2 ACKERMAN, *supra* note 18, at 4-5.

22. See ESKRIDGE & FEREJOHN, *supra* note 11, at 4, 26.

23. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 199-207 (1962) (criticizing the reach of judicial power); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4-5, 43-72 (1980) (arguing that many theories of constitutionalism are antidemocratic).

24. BICKEL, *supra* note 23, at 235-41 (finding value in the Supreme Court's role under proper limitations); ELY, *supra* note 23, at 73-75 (endorsing the Court's role in shaping constitutional law to meet new problems).

25. 2 ACKERMAN, *supra* note 18, at 5.

not regard its procedures as exclusive.²⁶ This suggests that the written Constitution is a vitally important but incomplete statement of what makes this country distinctive.²⁷ Historically, Ackerman shows that popular constitutionalism can trace its roots at least to England's Glorious Revolution of 1688, which had a deeply formative influence on our Framers.²⁸ He demonstrates that popular constitutionalism, rather than adherence to formal legal procedures, has marked the most prominent constitutional moments in our nation's history: the promulgation of the United States Constitution,²⁹ the enactment of the Reconstruction Amendments,³⁰ and the establishment of the modern regulatory state in the New Deal.³¹ Additionally, Madison argued that even if the Constitutional Convention's delegates had "violated both their powers and their obligations in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America."³²

Practically, Ackerman notes that, since the Reconstruction Amendments, this country has largely given up on making fundamental law through Article V's formal process for amending the written Constitution but has not stopped making fundamental changes to the basic principles on which the federal government operates.³³

However jarring these visions of popular constitutionalism may be to the sensibilities, nurtured in ninth-grade civics, that the U.S. Constitution is a written document amendable only through Article V, this vision of popular constitutionalism is a far cry from the periodic efforts to import one or another favored value into one of the written Constitution's open-textured provisions.³⁴ The current Court occasionally has recognized that principles clearly absent or separate from the written document nonetheless hold constitutional status.³⁵ In-

26. *Id.* at 15, 71-80.

27. *Id.* at 8-15.

28. *Id.* at 81-83; *see also* ESKRIDGE & FEREJOHN, *supra* note 11, at 2, 25 (relying on Aristotle's definition of a constitution as a nation's fundamental practices, institutions, and norms).

29. 2 ACKERMAN, *supra* note 18, at 33-65.

30. *Id.* at 99-185.

31. *Id.* at 255-344.

32. THE FEDERALIST NO. 40, at 254-55 (James Madison) (Clinton Rossiter ed., 1961).

33. *See* 2 ACKERMAN, *supra* note 18, at 4-5.

34. *See, e.g.,* Lindsey v. Normet, 405 U.S. 56, 89-90 (1972) (Douglas, J., dissenting) (finding continued tenure in rental housing a fundamental right protected by the Equal Protection Clause).

35. *See, e.g.,* District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (explaining that the First, Second, and Fourth Amendments codified preexisting rights); Alden v. Maine, 527 U.S. 706 (1999) (recognizing constitutional status of notions of state sovereignty going be-

deed, its decision that Congress may not condition continuation of states' Medicaid funding rests far more on perceived constitutional tradition than on any particular provision in the text.

B. *The Elements of a Constitutional Moment*

Scholars of popular constitutionalism have studied past constitutional moments to identify patterns that can provide the basis for rules of recognition for those unusual occasions when the nation comes together to make or amend its fundamental law.³⁶ Each of these formulations includes three elements. First, a constitutional moment must start with some form of public notice that important actors seek to change the nation's fundamental law; this prevents actions in the name of We the People by stealth or by revisionist history. Second, the proposed constitutional change must receive unusually broad public deliberation, seeking to bar elites from amending the constitution by themselves, without public engagement. And third, the process of constitution-making must last long enough to allow opportunities for opponents to seek to revisit and reverse the initial judgment, attempting to prevent hasty decisions about fundamental matters. These three elements provide both a means of weighing competing policies and a way of building legitimacy for the choices ultimately made.³⁷ Each also broadly parallels the practice when the written Constitution is amended under Article V.³⁸

To merit the name "constitutional," statutes must genuinely be extraordinary on many dimensions. They must address the most important issues of their

yond any appearing in the written Constitution, implicitly finding a popular constitutional moment in the reaction against *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

36. Guarding against subjective, self-serving claims about false constitutional moments, Ackerman derives an extensive five-step process—signaling, proposing, triggering, ratifying, and consolidating—from periods such as Reconstruction and the New Deal when our forebears changed fundamental aspects of this country's governance. See Ackerman, *supra* note 17, at 1762-85 (applying that process to the civil rights revolution of the 1960s). Eskridge and Ferejohn perceive more frequent constitutional moments occurring through enactment of major statutes; they collapse the process into three steps: (1) a new statutory policy displaces the common law or a prior statutory regime, (2) the new policy is reached through a widely publicized deliberative process, and (3) that new policy becomes entrenched over time. ESKRIDGE & FEREJOHN, *supra* note 11, at 26.

37. ESKRIDGE & FEREJOHN, *supra* note 11, at 12-18.

38. The Constitution may not be amended by ordinary legislation; it requires special signaling. The process of consideration in both chambers, and particularly ratification by the states, ensures an unusually broad discussion. And, with rare exception, ratification takes long enough to present opportunities for political winds to change, as they did on the proposed Equal Rights Amendment for women in the 1970s. See JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 29-35 (1986).

day, they must do so in a decisive manner, they must hold the public's attention during the formulation, and they must achieve broad public reverence afterwards, if not immediately then at least before they slip decisively from the headlines. Few statutes indeed meet these tests. Many are larger than life to those focusing upon them but of little interest to the public; others gain public attention but are crafted as compromises within an established tradition rather than decisive breaks with the past. Attempting to apply popular constitutionalism to statutes that, while significant, lack these attributes trivializes the process and obscures the importance of transcendent statutes like the ACA.

To date, however, the literature on popular constitutionalism has been entirely historical and theoretical: no one has studied a constitutional moment in real time. The battle over whether health care reform will be entrenched or repealed provides a rare opportunity to do so.

C. *Relating Popular Constitutionalism to Article V*

Ackerman's effort to discern and enunciate the rules this country has accepted for amending our social contract is in important respects deeply conservative. Without it, we are left without a clear limiting principle to explain why we accept the replacement of the Articles of Confederation, the Reconstruction Amendments, and the reinterpretation of the constitution to legitimate the New Deal—all of which were undertaken in significant departures from the then-applicable rules for amending our nation's basic charter. And without such a limiting principle, those wishing to corrupt this country's fundamental law could cite these precedents to justify self-interested changes. By identifying the processes by which Americans exercise popular sovereignty, Ackerman is both legitimating some additions to the written document and, even more importantly, providing a principled basis for rejecting others.³⁹ In an era of increasing polarization and radicalization in our nation's everyday politics, a set of principles for limiting what lasting change those in power at any given time may accomplish is crucial.

Article V has shown some utility for addressing discrete issues that have arisen with our Constitution, particularly those involving mechanics. It was a perfectly adequate means of shifting to popular election of senators,⁴⁰ term lim-

39. He distinguishes these constitutional moments, which fundamentally altered the U.S. governing contract, with social movements that failed to win and implement transformative political mandates. *See, e.g.,* ACKERMAN, *supra* note 18, at 389-403 (describing the lack of clear electoral mandates for, or consistent institutional recognition of, the "Reagan Revolution").

40. U.S. CONST. amend. XVII.

iting the presidency,⁴¹ curtailing excessive presidential transition periods,⁴² and reducing uncertainties when the President is unable to serve.⁴³ These isolated mechanical matters, however, are far from our constitution's most important work. Vastly more important is its role in setting the balance of power in crucial relationships, such as those among the branches of government, those between the federal and state governments, those between the races, and those between the government and the People. Article V, which by tradition has been used only to make discrete changes in the Constitution,⁴⁴ has proven ineffectual at recalibrating these balances: the Reconstruction Amendments provided a highly incomplete attempt to change the balance of power between the races and between the federal and state governments, while most other amendments since the Bill of Rights have not even tried. This shortcoming has become increasingly problematic as the nation has grown in size, wealth, and complexity, with old relationships frequently coming out of balance and new, important ones arising. For example, one of the most important relationships our constitution must balance is between the two major political parties, yet the Framers failed to anticipate them in the written Constitution. Apart from a couple of small changes to honor the electorate's partisan choices,⁴⁵ this balance has been struck entirely through other means.

The nation thus has kept Article V for addressing mechanical concerns and other issues susceptible to discrete solutions. For readjusting existing fundamental relationships and for establishing a workable balance in newly recognized ones, however, it has had to turn to broad-based popular deliberation. In addition, the expansion, scope, and complexity of federal policy has made it impossible for the public to be informed and involved even in all important aspects of it. The nation could have attempted to set basic ground rules in each important area through the cumbersome mechanism of Article V⁴⁶ or meekly

41. *Id.* amend. XXII.

42. *Id.* amend. XX.

43. *Id.* amend. XXV.

44. With the notable exception of the Fourteenth Amendment, every amendment—and certainly every amendment since the Bill of Rights—has been drafted as if bound by the kind of “single subject rule” common in state constitutions. *See, e.g., Harbor v. Deukmejian*, 742 P.2d 1290, 1298-1304 (Cal. 1987) (applying such a rule to strike down multipurpose legislation).

45. *See* U.S. CONST. amend. XII (providing for the election of the President and Vice President as a slate); *id.* amend. XXV (allowing the President to nominate a replacement, presumably of the President's party, when the vice presidency becomes vacant).

46. Alabama has taken this route, resulting in a book-length constitution and a legislature that must propose constitutional amendments before undertaking most significant policy initiatives. *See, e.g., ALA. CONST. amend. 732* (regulating bingo games in the town of White Hall); *id.* amend. 497 (prohibiting “the overgrowth of weeds and the storage and accumulation of junk, inoperable motor vehicles and other litter”).

accepted this loss of popular sovereignty, treating the federal government as a giant black box that makes policy on a vast array of issues with little popular involvement, legitimated by periodic elections fought over a handful of issues. Instead, the nation has developed fundamental principles of public policy through especially prominent and widely debated statutes.⁴⁷ The terms of these statutes serve as a dividing line between routine, although sometimes quite important, matters that the People have delegated to political elites and those fundamental decisions that may only be changed through broader popular deliberation.

Those insisting that this country's basic law is limited to the written document would seem to bear some burden to explain why that is so when the written Constitution itself makes no such claim. Textualists implicitly apply the contractual doctrine of merger to the Constitution, treating the written document as superseding any other terms that might previously have been accepted between the state and the People.⁴⁸ Yet the Ninth and Tenth Amendments explicitly negate application of that doctrine.⁴⁹ Even without them, we should not expect the written Constitution to operate as an integrated and exclusive contract. The English precedents available to the Framers involved constitution-making processes that only occasionally yielded written documents. The political philosophy on which the Framers relied derived constitutional principles from visions of natural law, not written documents. Moreover, state constitutions, both at the time of the Founding and since, have been far more detailed in both substance and procedure than the federal document. An observer familiar with these constitutional traditions, when handed our written Constitution, could be forgiven for asking, "Where's the rest of it?"

47. ESKRIDGE & FEREJOHN, *supra* note 11, at 1.

48. The concept of an integrated contract, if not the modern terminology, was certainly understood at the time the original written Constitution and Bill of Rights were drafted. *See* Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 607 (1944); John H. Wigmore, *A Brief History of the Parol Evidence Rule*, 4 COLUM. L. REV. 338, 347 (1904). Because social contract theory was highly influential on the Framers, *see* Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 230 (1983), absent indications to the contrary, one might imagine them thinking of the written document as the totality of the agreement among the People.

49. *See* U.S. CONST. amend. IX; *id.* amend. X. That contracts often did not state the full extent of the parties' agreement also was well known at the time of the Framing. *See, e.g.,* *Preston v. Merceau*, (1779) 96 Eng. Rep. 736 (K.B.) 736; 2 Black. W. 1249, 1250 ("We can neither alter . . . the two things expressed in this agreement. With respect to collateral matters it might be otherwise. He might shew who is to put the house in repair, or the like, concerning which nothing is said . . ." (citation omitted)).

D. *The Enforcement of Popular Constitutionalism*

Popular constitutionalism's enforcement, like its origins, is primarily democratic rather than court centered. The constitutional decisions made in this manner do not provide trumps in the sense that the written Constitution does;⁵⁰ they do not by themselves provide the basis for the Court to strike down legislation. The constitutional themes popular constitutionalism identifies may guide the Court in interpreting the written Constitution;⁵¹ these themes also may provide default rules for interpreting ambiguous statutes.⁵² These sorts of constitutional principles are familiar in our political discourse: people who deny principles adopted in this manner lose their legitimacy. Those attacking statutes that have taken on constitutional status "touch the third rail" or define themselves as "extremists"; when attacks on a statute cease to be regarded as extremist, that statute has lost its constitutional status and may turn out to be highly vulnerable in the world of interest group politics.

Seeing constitutional law solely in terms of authorizations of judicial review is neither originalist nor descriptively complete. Even apart from popular constitutionalism, thoughtful constitutional scholars increasingly are questioning the desirability of judicial review.⁵³ And whether or not one believes that textually driven judicial review is essential for truly constitutional government, it certainly is not sufficient. For example, if Democrats (while in control of Congress and the New York legislature) sought to establish permanent effective control of the Senate (and likely the House) by admitting one hundred blocks on the Upper West Side of Manhattan as so many separate states, the overwhelming majority of Americans of all political stripes would have the firm conviction that this action violated the country's fundamental law even though no provision of the written Constitution proscribed it and the Supreme Court would be hard pressed to find a basis for exercising judicial review. The fact that the public responded by voting en masse against the Democrats, or by failing to honor legislation enacted by this stacked Congress, would not make the

50. ESKRIDGE & FEREJOHN, *supra* note 11, at 1.

51. See JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 63-66 (2011) (discussing the role of popular movements in pushing the Court to retreat from unacceptable constitutional positions).

52. Most substantive canons of interpretation, such as the rule of lenity and the presumption against construing statutes as derogating Native American tribal sovereignty, reflect some sort of constitutional penumbra. See, e.g., *United States v. Bass*, 404 U.S. 336, 348 (1971).

53. See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 104-08 (1999) (rejecting conventional wisdom placing judicial review at the center of constitutional law).

matter any less constitutional, any less fundamental to the makeup of the country, than if the Court invoked *Marbury v. Madison*.⁵⁴

The recent controversy over whether Democrats should have accused House Republicans of proposing to eliminate Medicare⁵⁵ was at its core constitutional. Both sides recognize that Medicare has come to have constitutional status, but they differ as to how that status is to be defined. Democrats' critics believe that the constitutional commitment is only to having a federal program named Medicare that provides health care funding for the elderly and persons with disabilities; because the Republican proposal contained such a program, they felt Democrats had misused the charge of unconstitutional behavior. Democrats, by contrast, believed that Medicare's constitutional status was more than just a name and that the plan that House Republicans and Governor Romney advanced, by eliminating broad guarantees of coverage and sharply reducing the health care beneficiaries would receive, abridged that constitutional guarantee. No similar battle would have ensued had Republicans been dismantling a highway program, foreign aid, or some other government function lacking constitutional status: those supporting the threatened program would have rallied to its defense and marshaled whatever policy arguments they could, but they would not have had any hope of convincing the public that the proposed elimination crossed some sacrosanct line.

II. THE HEALTH CARE REFORM BATTLE AS A CONSTITUTIONAL MOMENT

Studying the ACA as an unfolding constitutional moment is appropriate on several levels. First, most obviously, this battle fits theories of popular constitutionalism strikingly well. Bruce Ackerman posits that We the People change our constitution only when we proceed through five distinct stages: (1) *signaling* by one of the three branches of the federal government that it wishes to engage in constitutional politics with sufficient clarity that the other branches and electorate can respond, (2) the instigator *proposing* specific changes in our constitutional order, (3) the proponents *triggering* the battle-in-chief by moving their agenda forward as legislation, major constitutional precedents, or decisive executive actions, (4) *ratifying* those initiatives by the electorate in successive elections fought substantially over the merits of the proposed constitutional regime, and (5) *consolidating* the constitutional change through broad public ac-

54. 5 U.S. (1 Cranch) 137 (1803).

55. See generally Glenn Kessler, *Biden's Claim That the GOP Will "Eliminate" Medicare*, WASH. POST (Sept. 1, 2011), http://www.washingtonpost.com/blogs/fact-checker/post/bidens-claim-that-the-gop-will-eliminate-medicare/2011/08/31/gIQAbuZlsJ_blog.html.

ceptance that marginalizes politicians who continue to object.⁵⁶ Other formulations are possible, but the clarity of the call to constitutional politics, the content of the proposed reforms, and the broad, sustained constitutional debate are all found in significant formal constitutional amendments and find parallels in the ACA's history to date.

The 2008 campaign, in which health care reform was prominent, clearly signaled the outset of a constitutional moment. Although President Obama left the initial proposing to his congressional allies, he became a vociferous advocate of the House and Senate bills even when they departed from his campaign rhetoric. After months of fruitless negotiations, the President and his allies triggered the constitutional moment by moving legislation that virtually all Republicans regarded as a break with the established constitutional order.⁵⁷ The ensuing debate has dominated political attentions of a broad swath of the electorate over an extended period of time, providing ample opportunities for ratification—or rejection. The debate has affected two more national elections and seems certain to shape at least two more. Indeed, although the Court left most of the ACA in place, allowing states to opt out of its Medicaid expansion likely will prolong the struggle over the ACA several years as governors and legislatures with deep philosophical objections to the legislation decline the generous federal matching funds available for that expansion—and likely face criticism in the next election over those choices. Finally, the ACA's constitutional change will be consolidated, analogous to state ratification at the end of the Article V process, if these governors and legislators, or their successors, succumb to and implement the Medicaid expansions and state insurance exchanges.

Understanding the battle over the ACA as a struggle for the hearts and minds of We the People allows an important elaboration upon popular constitutional theory. To date, constitutional movements have been understood as each producing and maintaining their own statutes. Eskridge and Ferejohn's book consists of a chapter for each of several constitutional movements, each of which spawned one or more statutes.⁵⁸ But no statute figures prominently in more than one of their accounts. The ACA, by contrast, is a sprawling statute with several quite distinct constitutional elements; its entrenchment or elimination thus will answer several pivotal questions at once and represent a new means of engaging in constitutional change.

Moreover, both sides view the debate over the ACA in explicitly constitutional terms. On the left, near-universal coverage is seen as a matter of principle, one for which a wide array of environmental, civil rights, economic, and other high-priority agenda items were sacrificed. Not every important issue

56. Ackerman, *supra* note 17, at 1762.

57. See Connolly, *supra* note 4.

58. See ESKRIDGE & FEREJOHN, *supra* note 11.

is a constitutional one, but proponents suggested that this country was betraying its basic principles by allowing millions of people to go without health care. Their embrace of a plan built on ideas from a right-wing advocacy group⁵⁹—and quick abandonment of their preferred statist single-payer plan⁶⁰—suggests a desire to build a broad consensus for a change in fundamental law. On the right, Tea Party activists have invoked a broad vision of constitutionalism rooted more in American tradition than in the text of the Constitution to denounce the ACA.⁶¹ Although litigators focused on particular provisions, the grassroots' complaint was that the ACA in its entirety exceeded the legitimate role of the federal government.⁶² And as confused as much of the electorate may be about the ACA's details, it certainly understood that the law was a radical departure from the traditional federal role.

Finally, and perhaps most importantly, this constitutional moment will be fought out in *both* federal and state politics. States obviously play a central role in ratifying or rejecting attempts to amend the written Constitution under Article V, but they have not always been directly involved in other constitutional moments. The New Deal consensus, for example, was hammered out almost entirely on the national level.⁶³ With respect to the ACA, however, many states have been at the forefront of litigation and have expressed their constitutional reservations by refusing to plan for the implementation of insurance exchanges and threatening to reject the Medicaid expansion.

This Part surveys the multiple challenges that the ACA still must survive if it is to reach full, stable implementation and, in so doing, fundamentally change our constitution. Conversely, its decisive defeat would represent a constitutional moment of a fundamentally different nature, resolving crucial constitutional questions for generations to come. Contrary to the conventional, Court-centered understanding of constitutional law, this Part views the litigation in the Supreme Court as important but by no means dispositive of these issues. Subpart A shows that both sides of this struggle have treated it as having constitutional proportions. Subpart B explains why the Court's decision provides only a pro-

59. See *infra* note 74 and accompanying text.

60. See Connolly, *supra* note 4.

61. One group called the ACA “every bit as ‘intolerable’ as the infamous intolerable acts of King George III that provoked the Boston Tea Party.” Jackie Bodnar, *FreedomWorks’ Constitution Defense Fund Files Supreme Court Legal Brief to Declare Obamacare Unconstitutional*, FREEDOMWORKS (Feb. 14, 2012), <http://www.freedomworks.org/press-releases/freedomworks%E2%80%99-constitution-defense-fund-files-supr>.

62. See, e.g., *Tea Party Rally to Back Virginia AG Cuccinelli’s ObamaCare Challenge*, TEA PARTY PATRIOTS (May 9, 2011, 2:39 PM), <http://www.teapartypatriots.org/news/tea-party-rally-to-back-virginia-ag-cuccinelli%E2%80%99s-obamacare-challenge> (invoking, generally, “the intentions of the Constitution’s drafters” against the ACA).

63. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 47-50 (1991).

visional judgment on the constitutional moment that the ACA has catalyzed. Subpart C explores the severe political threats the ACA still faces, most of which have been ignored to date in popular and even sophisticated accounts. Subpart D then considers and rejects arguments that the battle over the ACA is not of constitutional stature.

A. *The Consensus That the ACA Represents New Constitutional Law*

The struggle to pass the Affordable Care Act was certainly intense, dominating the headlines throughout its tortured journey in Congress. By itself, however, an intense political debate is insufficient to change this country's fundamental law, even if it does succeed in enacting a particular statute.

Applying the five-step test that Ackerman gleans from U.S. constitutional history, however, makes clear that this debate is indeed one of those rare efforts to define our country's fundamental essence. The debate began with a clear signal from then-Senator Obama that he sought to make a fundamental change in the nation's legal system.⁶⁴ He campaigned heavily on health care reform, provoking a debate that was both broad and deep: a large segment of the electorate focused on this issue, and their consideration was both sustained and intense.⁶⁵ On the other hand, although he won a large majority in the Electoral College, his advantage in the popular vote was comfortable but hardly overwhelming.⁶⁶

The next stage, proposing, involves a reform movement advancing a proposal that seeks to transcend the factional differences in society and make a change in the nation's fundamental law.⁶⁷ In contrast to many presidential candidates who promise modest rebalancing of certain aspects of public policy or simply better administration—four of the five previous Presidents were former governors—candidate Obama explicitly campaigned as the leader of a movement. Both as a candidate and in the White House, President Obama worked hard to broaden this movement. He eschewed the single-payer model many Democrats preferred⁶⁸—and greatly increased the complexity and budget prob-

64. See Connolly, *supra* note 4, at 14; see also 1 ACKERMAN, *supra* note 63, at 272-80 (describing signaling in prior constitutional moments).

65. Cf. 1 ACKERMAN, *supra* note 63, at 272-75 (describing depth and breadth of debate as crucial to achieving the signaling function).

66. Cf. *id.* at 275-78 (describing decisiveness as an important component of popular participation in constitutional moments although acknowledging that that may not be present at the early stages).

67. *Id.* at 280-85.

68. Alec MacGillis et al., *What It Means for Us All*, in LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL, *supra* note 4, at 63, 68.

lems of the legislation as a result—to adopt a basic structure that had first been proposed by right-wing advocacy groups,⁶⁹ that had been central to Republican alternatives to President Clinton’s health care reform proposal of 1993-1994, and that a prominent Republican governor had signed into state law. He negotiated broad concessions to large industry groups that had opposed the Clinton plan,⁷⁰ muting some and winning active support from others.⁷¹ Furthermore, he and his congressional allies set aside politically important commitments on abortion and even birth control to win Catholic support.⁷²

When President Obama took office, proposed the broad outlines of what became the ACA, and made it his top legislative priority, he triggered the constitutional debate to begin in earnest.⁷³ Although the ACA is a spectacularly complex piece of legislation—in its text, in what will be required to implement it, and in its economic implications—advocates on both sides see the debate primarily as one of broad principles. Opponents have little interest in corrective amendments or alternatives—the ACA’s basic structure was originally proposed by the far-right Heritage Foundation,⁷⁴ leaving little room for conservative alternatives. Conversely, advocates’ enthusiasm for the ACA seems quite divorced from the particulars of its prospective operation (which many freely criticize). Both sides clearly see this as an exercise in fundamental lawmaking.

Nonetheless, the ACA’s enactment, as momentous as it was, did not seal the constitutional moment. After all, Reconstruction added three amendments to the written Constitution and yet failed to change the practical content of the country’s fundamental law.⁷⁵ To be successful, a constitutional movement must succeed in winning ratification of its achievements in the face of determined efforts to roll them back.⁷⁶ The potential for a constitutional moment springs

69. See *infra* note 74 and accompanying text.

70. Connolly, *supra* note 4, at 16-17.

71. *Id.* at 23.

72. See Press Release, Nat’l Org. for Women, Health Care Reform Victory Comes with Tragic Setback for Women’s Rights (Mar. 21, 2010), available at <http://www.now.org/press/03-10/03-21b.html> (claiming that the bill’s “sweeping anti-abortion provision” was included to satisfy “the Catholic bishops and extremist abortion rights opponents”).

73. See 2 ACKERMAN, *supra* note 18, at 24-25 (describing the triggering function).

74. Michael Cooper, *Conservatives Sowed Idea of Health Care Mandate, Only to Spurn It Later*, N.Y. TIMES (Feb. 14, 2012), <http://www.nytimes.com/2012/02/15/health/policy/health-care-mandate-was-first-backed-by-conservatives.html>; see also Stuart M. Butler, *Assuring Affordable Health Care for All Americans*, HERITAGE FOUND. (Oct. 1, 1989), <http://www.heritage.org/research/lecture/assuring-affordable-health-care-for-all-americans>.

75. See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 30-31, 78-79 (2014) (describing the failure of the first Reconstruction when all three branches of the federal government abandoned the newly enacted constitutional amendments).

76. See 2 ACKERMAN, *supra* note 18, at 25 (discussing the ratifying function).

from the unusually vehement and multifaceted effort to prevent the ACA from taking effect. The anti-ACA campaign involves both legislative and judicial initiatives, with multiple facets to each. It involves the states, in their broad participation in litigation against the ACA, in passing statutes purporting to annul the ACA's individual and employer mandates, and potentially in obstructing implementation of the law's health insurance exchanges and Medicaid expansion.⁷⁷ It involves large, energized, well-coordinated networks of activists on both sides. Before this battle is resolved, with either result, the issues the ACA raises will have received the prolonged, intense, and inclusive deliberations required to make fundamental law. Perhaps most importantly, the principles the ACA embodies are being repeatedly referred for decisions by the People, in three elections so far and in at least one upcoming, as well as in referenda in some states.⁷⁸ At the end of the day, whatever the outcome, the results will have lasting implications for whole categories of public policy debates, many far afield from health care.

The final stage in popular constitutionalism is consolidation, where opponents effectively concede defeat and cease major, active resistance against the constitutional innovation.⁷⁹ Both sides to the health care debate implicitly concede that, if reform can pass the ratification stage, it will have little difficulty consolidating its place in the nation's constitution. Supporters are confident that the benefits it offers will prove so attractive that they will be impossible to repeal, much as Social Security, Medicare, and Medicaid won instant popular enthusiasm as benefits began to flow.⁸⁰ Supporters also believe that opponents' political traction has depended largely on misrepresentations of the ACA, which will lose credibility once it is implemented.⁸¹ Opponents do not explicitly concede this point, but their complaints about the addictive nature of public benefits suggest they, too, recognize that health care reform's consolidation

77. See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011); John Carroll, *Many States Preparing Laws Rejecting Individual Mandate*, MANAGED CARE (Mar. 2010), <http://www.managedcaremag.com/archives/1003/1003.mandate.html>; Reid Wilson, *Wyoming Governor Says No to Medicaid Expansion*, WASH. POST (Dec. 2, 2013), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/12/02/wyoming-governor-says-no-to-medicaid-expansion>.

78. See *The Patient Protection and Affordable Care Act on Statewide Ballots*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/affordable-care-act-on-the-ballot.aspx> (last updated Nov. 7, 2012).

79. See 2 ACKERMAN, *supra* note 18, at 25 (discussing the consolidation function).

80. See ESKRIDGE & FEREJOHN, *supra* note 11, at 193-98 (describing the broad popular support enjoyed by Social Security, Medicare, and Medicaid).

81. See James Hohmann, *Pelosi: People Won't Appreciate Reform Until It Passes*, POLITICO (Mar. 9, 2010), http://www.politico.com/livepulse/0310/Pelosi_People_wont_appreciate_reform_until_it_passes.html.

will come quickly after implementation.⁸² The ongoing battle over ratifying health care reform therefore will decide the outcome of this constitutional moment.

B. *The Limited Role of Federal Constitutional Adjudication*

The Supreme Court typically has played an important role in constitutional revolutions, but its role remains secondary to that of the People. At the outset of the New Deal, the Court's doctrine held that most intrusions on the right to contract were unconstitutional, often on multiple grounds.⁸³ The Court backed that up by striking down much of the First New Deal. Ultimately, however, the electorate found the Court's view of this country's constitution unpersuasive and kept reelecting President Roosevelt and pro-New Deal majorities in Congress. Eventually, one Justice bowed to the popular sentiment and the other partisans of the old constitution retired. Similarly, at the outset of the civil rights revolution, doctrine explicitly recognized Jim Crow as compatible with the Constitution.⁸⁴ *Brown v. Board of Education* reversed that holding, but *Brown* would not have survived as doctrine had the Justices appointed by a succession of Presidents not embraced it.⁸⁵ And the extent of *Brown*'s implementation in the real world—and of its extension into other facets of public life—was determined primarily off the Court. Although the Court has joined in resistance to constitutional revolutions that ultimately failed, the decisive blows were struck off the Court. The Court certainly obstructed racial justice after the Civil War, but Northern whites' abandonment of freed slaves during the second Grant Administration—culminating in the settlement of the election of 1876—is what sealed Reconstruction's fate.⁸⁶

Although the Supreme Court has upheld the ACA's most important sections, the Court's ruling is *not* the ultimate constitutional decision on the ACA. As Chief Justice Roberts noted in the conclusion of his *de facto* majority opinion in *National Federation of Independent Business v. Sebelius* (*NFIB*), the fi-

82. See Americanbridge21st, *Steve Womack on the Unemployment*, AR 08/27/13, YOUTUBE (Aug. 28, 2013), <http://www.youtube.com/watch?v=b0HgZD9RmCI>.

83. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

84. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

85. See 3 ACKERMAN, *supra* note 75, at 323 (describing the important role the Justices played in implementing desegregation).

86. See Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1966-68 (2008).

nal decision will rest with the People.⁸⁷ If they elect Presidents committed to appointing different kinds of Justices, and support those Presidents in confirmation battles, one or another aspect of the Court's decision may quickly collapse as meaningful precedent. With both parties signaling that the ACA will be a major issue in the 2016 presidential election, and with multiple Justices on each side of advanced age, the People's decision could occur more rapidly than most.

Moreover, the first ACA case before the Supreme Court illustrated how ill suited doctrinal litigation is to resolve fundamental disputes about our nation's constitution. Even had the conservative dissenters prevailed, they would have held unconstitutional only certain aspects of the ACA's mechanics: mandates to purchase private insurance and the expansion of federal-state health care programs.⁸⁸ Both of these features of the ACA reflect attempted accommodations of conservatives' preferences by keeping as many middle-class people as possible in private health insurance and limiting the legislation's gross costs.⁸⁹ Health care reform's advocates fractured badly over whether these accommodations were wise.⁹⁰ Had the Court struck them down, this middle path would no longer be viable. Expanded direct government funding of health care would go from a structurally unnecessary "public option"—whose main political virtue was placating progressive members whose votes were assured in any event⁹¹—to the only means of implementing probably the most central affirmative plank of the Democratic platform. When the People next elect a Democratic Congress and President, the path would remain clear to enact some version of a single-payer plan, perhaps by expanding Medicare to cover everyone. Funded by taxes, this would not be subject to the objections raised against the mandates. This system could operate with entirely federal funding; already the ACA relies on only very modest amounts of state funds.⁹² Unlike the ACA's complex regulatory scheme, a single-payer plan would be entirely fiscal and

87. 132 S. Ct. 2566, 2608 (2012) ("But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.").

88. *Id.* at 2643 (joint dissent).

89. *See* Connolly, *supra* note 4.

90. *See* David M. Herszenhorn & Robert Pear, *Democrats Divided over Reid Proposal for Public Option*, N.Y. TIMES (Oct. 27, 2009), <http://www.nytimes.com/2009/10/28/health/policy/28health.html> (explaining that some preferred a system with more government control).

91. *See* Connolly, *supra* note 4.

92. *See* JANUARY ANGELES, CTR. ON BUDGET & POL'Y PRIORITIES, HOW HEALTH REFORM'S MEDICAID EXPANSION WILL IMPACT STATE BUDGETS (2012), *available at* <http://www.cbpp.org/files/7-12-12health.pdf> (noting that the federal government will bear nearly all costs).

hence could be enacted readily through the reconciliation process,⁹³ immunizing it from a filibuster. In that case, a ruling against the ACA's constitutionality would actually have advanced the cause of health care reform just as early decisions against the First New Deal helped entrench the regulatory state by sweeping away less sustainable enactments.⁹⁴

On the other hand, the decision upholding the ACA does not end things. Opponents are mounting additional challenges, attacking both the ACA's overall scheme and seeking to interpret it in ways that would turn implementation into an unpopular nightmare. Should these challenges also fail, the constitutional moment will be set to conclude should the ACA be implemented without a major backlash. Chief Justice Roberts's conservative credentials are sufficient that his acquiescence in the ACA, together with a 2012 election result that is at least sufficiently inconclusive to allow the ACA's implementation, would give broad enough acceptance for the nation to accept that a constitutional change has occurred assuming no middle-class rebellion erupts.⁹⁵ This outcome, however, is by no means a given. The next Subpart explains why.

C. *The Prospects for the ACA's Political Demise*

Ultimately, although one or more branches of the federal government may be the direct *agent* of the ACA's demise, the fate of such high-profile legislation will be *decided* by We the People. And although the electorate remained sufficiently open to the ACA to reelect its primary champion, good reason exists to believe that such massive realignments of the legal and practical worlds are likely to face severe implementation problems. The prescription drug benefit added to Medicare in 2003⁹⁶ made far less dramatic changes in public programs and in the delivery of health care, yet it was plagued for years with a

93. See 2 U.S.C. § 644(b)(1)(A)-(B), (E) (2012) (prohibiting inclusion in reconciliation bills of any provisions with no fiscal effects or with fiscal effects that are merely incidental to their nonbudgetary purposes).

94. To be sure, President Roosevelt had what appeared to be larger majorities in Congress and within public opinion than Democratic advocates of health care reform do today. In fact, his coalition included wildly disparate elements that were already cleaving sharply by the time he proposed the Second New Deal. See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 44 (1996). Today's greater partisanship yields smaller potential majorities but far more party discipline.

95. See 3 ACKERMAN, *supra* note 75, at 76-78 (finding that the need to reach consensus across parties has supplanted the need to reach consensus across regions in our nation's fundamental lawmaking).

96. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 101, 117 Stat. 2066, 2071-2152 (codified as amended in scattered sections of 42 U.S.C.).

plethora of problems that confused and enraged beneficiaries⁹⁷ and provoked expert criticism.⁹⁸ But for an unusual political history giving neither party an incentive to seek its repeal,⁹⁹ it likely would not have survived. Similar implementation problems have greeted the ACA's rollout and could easily result in a failed constitutional moment.¹⁰⁰

1. *Federal legislation*

Because of the ACA's salience, congressional Republicans can, have, and most likely will continue to extend their campaign against it to a wide range of other legislation. They have denied appropriations for those aspects of the ACA's implementation, including the work of the Departments of Treasury and Labor, that do not have mandatory funding.¹⁰¹ The ACA partially funded implementation by the Department of Health and Human Services (HHS) but did not anticipate the federal government would have to establish insurance exchanges in the majority of states, as is now the case.¹⁰² House Republicans

97. See, e.g., Milt Freudenheim & Robert Pear, *New Medicare Plan Presents a Drug Benefit Conundrum*, N.Y. TIMES (Nov. 4, 2005), <http://www.nytimes.com/2005/11/04/business/04retiree.html>; Robert Pear, *Florida Elderly Feel Let Down by Medicare Drug Benefit*, N.Y. TIMES (Nov. 30, 2003), <http://www.nytimes.com/2003/11/30/us/florida-elderly-feel-let-down-by-medicare-drug-benefit.html>; Robert Pear, *In Arizona, Unease over New Medicare Drug Law*, N.Y. TIMES (Apr. 18, 2004), <http://www.nytimes.com/2004/04/18/us/in-arizona-unease-over-new-medicare-drug-law.html?pagewanted=all>.

98. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-824T, MEDICARE PART D: ENROLLING NEW DUAL-ELIGIBLE BENEFICIARIES IN PRESCRIPTION DRUG PLANS 9-10 (2007) (finding that the Department of Health and Human Services paid millions of dollars to fiscal intermediaries for drug coverage not actually provided to beneficiaries); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-710, MEDICARE PART D: PRESCRIPTION DRUG PLAN SPONSOR CALL CENTER RESPONSES WERE PROMPT, BUT NOT CONSISTENTLY ACCURATE AND COMPLETE 12-18 (2006) (finding that misinformation was provided to beneficiaries seeking help understanding complex program rules).

99. Repealing a major Bush Administration initiative would have been a major embarrassment to Republicans and would have increased the incremental cost of health care reform for Democrats.

100. See Thomas B. Edsall, Op-Ed., *The Obamacare Crisis*, N.Y. TIMES (Nov. 19, 2013), <http://www.nytimes.com/2013/11/20/opinion/edsall-the-obamacare-crisis.html>.

101. This, along with funding for the Consumer Financial Protection Bureau that Republicans also despise, was the sole issue preventing Congress from agreeing to full-year appropriations bills for 2013. See Sarah Chacko & Emily Holden, *With Little Ado, CR Sent to Obama's Desk*, CQ WKLY. (Mar. 25, 2013), <http://library.cqpress.com/cqweekly/document.php?id=weeklyreport113-000004245454> (describing the Obama Administration's failure to obtain funding for the two agencies).

102. Accordingly, the ACA did not provide funding for HHS to operate thirty-six state exchanges. See Sarah Kliff, *Does the Obama Administration Have the Money to Set Up Obamacare?*, WASH. POST WONKBLOG (Apr. 12, 2013), <http://www.washingtonpost.com/>

blocked the administration's request for \$1 billion in additional administrative funding,¹⁰³ leaving HHS with a huge hole and little way to fill it in a sequestered federal government. The states' implementation does not require new appropriations, but appropriations bills can rescind the funds the ACA provided. Republicans' successes in the fiscal showdowns in December 2010 and again in December 2012,¹⁰⁴ won while threatening to block tax cuts for the middle class (which are far more popular than the ACA) in order to extend most upper-income tax cuts (which have far less public support than repealing the ACA), have emboldened them. Their intraparty dynamics compel them to provoke further tests of nerves notwithstanding their setback around the October 2013 government shutdown.

This will allow congressional Republicans to follow the familiar two-step process for dismantling means-tested programs that ended Aid to Families with Dependent Children (AFDC) and almost destroyed the food stamp program (now the Supplemental Nutrition Assistance Program, or SNAP).¹⁰⁵ First, they seek to reduce subsidies for the least poor in the name of targeting scarce resources; then, once the program's benefits are confined to a politically unattractive core of the lowest-income people, they can attack it as an unearned gratuity that middle-income taxpayers cannot afford.¹⁰⁶ Thus, in the early 1980s, President Reagan pushed through legislation denying benefits to working families, arguing that they were the least needy and could best absorb needed cuts.¹⁰⁷ Then, beginning in the early 1990s, Republicans, led initially by Governors Tommy Thompson and John Engler and later by Speaker Newt Gingrich, attacked the programs because their recipients were not working.¹⁰⁸ The paucity of sympathetic recipients made these programs politically indefensible. Stripping away premium subsidies also will politically expose the ACA's individual

blogs/wonkblog/wp/2013/04/12/does-the-obama-administration-have-the-money-to-set-up-obamacare.

103. See Sarah Kliff, *Budget Request Denied, Sebelius Turns to Health Executives to Finance Obamacare*, WASH. POST WONKBLOG (May 20, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/10/budget-request-denied-sebelius-turns-to-health-executives-to-finance-obamacare>.

104. See David A. Super, Op-Ed., *Bring On the Fiscal Cliff*, N.Y. TIMES (Dec. 17, 2012), <http://www.nytimes.com/2012/12/18/opinion/forget-the-warnings-lets-drive-over-the-fiscal-cliff.html> (explaining the various fiscal deadlines and their consequences).

105. See Super, *supra* note 6, at 1284-85.

106. See *id.* at 1291, 1315-16.

107. See *id.* at 1292.

108. *Id.* at 1380-86. The food stamp program survived only by bringing back onto its rolls millions of low-wage working families, essentially reversing President Reagan's efforts to limit it to the poorest of the poor. *Id.*

mandate to purchase health insurance, making people with genuine hardship stories available as spokespeople for the opposition.

In sum, early indications suggest the ACA's supporters have only a very incomplete understanding of the politics of entrenching social benefits.¹⁰⁹ Its opponents have leverage to extract an enormous political cost to preserve the ACA, including the devastation of much of the rest of the Democratic agenda. If public support for the legislation remains tepid or deteriorates, parts of the fragile coalition that carried it to enactment may become unwilling to bear that cost.

2. State implementation

A veteran political observer notes that the ACA "is facing more widespread defiance than any federal initiative since the Supreme Court ordered public schools to desegregate."¹¹⁰ On the other hand, the ACA's structure offers states face-saving means to implement the law. The responsibilities it envisions for states are either attractively funded (its Medicaid expansions, which ultimately will require only ten percent state funding¹¹¹) or ideologically appealing (exchanges facilitating the purchase of private health insurance for individuals or small businesses). Most of its political lightning rods, particularly the administration of the mandates, are entrusted solely to the federal government.¹¹² Refusing to establish exchanges will not stop the ACA's implementation, and it will give federal officials an embarrassing degree of influence over state affairs.¹¹³ Insurance companies, with enormous political power in most states, seem to prefer pliant state officials to federal administrators running exchanges.¹¹⁴ Chambers of commerce are increasingly speaking out in favor of

109. Cf. ESKRIDGE & FEREJOHN, *supra* note 11, at 186-98 (describing the means by which Social Security became politically secure).

110. Ronald Brownstein, *How to End the Obamacare Debate*, NAT'L J. (Sept. 19, 2013), <http://www.nationaljournal.com/political-connections/how-to-end-the-obamacare-debate-20130919>.

111. Marco Rubio Says Medicaid Expansion Money "Will Go Away," POLITIFACT.COM (Jan. 12, 2014), <http://www.politifact.com/truth-o-meter/statements/2014/jan/13/marco-rubio/marco-rubio-says-medicaid-expansion-money-will-go->.

112. See, e.g., I.R.C. § 5000A (2012).

113. See 42 U.S.C. § 18041(c) (2011).

114. See Julie Appleby, *Governors Weigh Options on Health Insurance Exchanges*, KAISER HEALTH NEWS (Dec. 6, 2012), <http://www.kaiserhealthnews.org/stories/2012/december/07/governors-health-insurance-exchanges.aspx>.

establishing state exchanges and accepting the Medicaid expansion.¹¹⁵ Several high-profile Republican governors have recently announced plans to accept the Medicaid expansion, although typically with rhetorical provisos seeking to preserve the option to back out if the ACA's popularity wanes.¹¹⁶ Other Republican governors up for reelection in 2014 are reportedly awaiting the initial implementation experience of other states—and the passing of the deadline for primary opponents to file against them—before moving forward.¹¹⁷

States' initial decisions on Medicaid are mixed, with twenty-six jurisdictions having taken firm decisions to expand, nineteen having decided not to expand, and five still exploring expansion.¹¹⁸ Although Democratic states have been more likely to expand Medicaid than Republican ones, at least two southeastern states and such important western states as Arizona, Colorado, Nevada, and North Dakota decided to expand Medicaid with substantial Republican support; Republican governors pushed Medicaid expansions through in Michigan and Ohio.¹¹⁹ On the other hand, Maine and Wisconsin rejected the expansion, with New Hampshire and Pennsylvania still on the fence.¹²⁰ Each side therefore will have appealing models to cite if the implementation experience goes its way, facilitating recruitment of other states in each region.

Thus, states' decisions about the ACA's implementation could plausibly go either way. Each state's actual choice therefore is likely to reflect its electorate's judgment about whether the ACA is compatible with our nation's constitution. If enough states balk and chaos ensues, the ACA could fall even after its implementation in 2014. On the other hand, if implementation goes smoothly in the majority of states, pressure will mount on the holdouts, and We the People will turn a constitutional page.

115. See, e.g., Richard Mauer, *State Chamber of Commerce Bucks Parnell, Backs Medicaid Expansion*, ANCHORAGE DAILY NEWS (Oct. 24, 2013), <http://www.adn.com/2013/10/24/3139519/state-chamber-backs-medicaid-expansion.html>.

116. Abby Goodnough & Robert Pear, *Governors Fall Away in G.O.P. Opposition to More Medicaid*, N.Y. TIMES (Feb. 21, 2013), <http://www.nytimes.com/2013/02/22/us/politics/gop-governors-providing-a-lift-for-health-law.html>. But see Sandhya Somashekhar, *In Several States, Medicaid Expansion Remains in Limbo as Time Runs Short*, WASH. POST (May 2, 2013), http://www.washingtonpost.com/national/health-science/in-several-states-medicaid-expansion-remains-in-limbo-as-time-runs-short/2013/05/02/6dafcc02-b1b5-11e2-9a98-4be1688d7d84_story.html.

117. See *Politics Wasn't Only Reason Why Some GOP-Led States Didn't Set Up Own Exchanges*, NBC NEWS (Dec. 4, 2013), <http://www.nbcnews.com/politics/first-read/first-thoughts-six-things-watch-texas-tuesday-n43886>.

118. *Status of State Action on the Medicaid Expansion Decision, 2014*, KAISER FAMILY FOUND., <http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act> (last visited Apr. 1, 2014).

119. *Id.*

120. *Id.*

D. *Complicating Factors at the Constitutional Moment*

As Ackerman notes, “American elections are never single-issue affairs.”¹²¹ Each of the last three elections was, in significant part, a referendum on the sagging economy. Fairly uniform projections for tepid growth strongly suggest that the next election will be, too.¹²² Yet as Ackerman argues, the “bundling” of issues does not make this any less of a constitutional moment.¹²³ First, few past constitutional moments have involved truly pure tests of single issues. For example, Reconstruction failed as much because of the onset of the Long Depression in 1873 and the Grant Administration’s corruption as because of a substantive rejection of civil rights, but that failure nonetheless locked in Jim Crow for eight decades.¹²⁴

With conservatives tying most issues back to the ACA and liberals going all-in in their support of the legislation, it easily possesses the salience and the breadth of public debate required to make constitutional law. The process of entrenchment, too, seems likely to occur rapidly—or not at all. The ACA’s opponents clearly appreciate the enormous difficulty they will face terminating health care subsidies once people have begun to receive them in 2014.¹²⁵ This suggests that the period of vulnerability for this constitutional innovation, like that of the Social Security Act three-quarters of a century earlier, is chiefly the period before implementation. Indeed, just as the Social Security Act became entrenched shortly after it began paying benefits,¹²⁶ former opponents may come at least to support the ACA and perhaps even to favor expanding it.¹²⁷ Two successive presidential elections have been fought in large part over the

121. Ackerman, *supra* note 17, at 1774.

122. See Amrita Jayakumar, *Don’t Expect 2014 to Be Much Better for Retail Sales, Trade Group Warns*, WASH. POST (Feb. 6, 2014), http://www.washingtonpost.com/business/economy/dont-expect-2014-to-be-much-better-for-retail-sales-trade-group-warns/2014/02/06/09243656-8f6d-11e3-b46a-5a3d0d2130da_story.html.

123. See Ackerman, *supra* note 17, 1775-77.

124. See RICHARD H. ABBOTT, *THE REPUBLICAN PARTY AND THE SOUTH, 1855-1877*, at 230 (1986); see also Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 141-42 (2014).

125. Cf. ESKRIDGE & FEREJOHN, *supra* note 11, at 186 (noting the conversions of Republican former opponents of Social Security when they began receiving benefits).

126. See *id.* at 186-87 (describing how Social Security survived that period in its own history by expanding benefits).

127. Cf. *id.* at 192 (describing how a bipartisan commission originally proposed by one of Social Security’s opponents came to not only support Social Security but propose expansions).

merits of health care reforms, giving We the People direct means with which to ratify or overturn the decision of the elites.¹²⁸

III. THE AFFORDABLE CARE ACT'S REDEFINITION OF PUBLIC LAW

The Affordable Care Act's success would transform the New Deal constitution. This Part develops a model of the New Deal constitution as far more conservative than is generally understood. It then shows, in each of four major areas of public law, how the ACA overturns the settlement reached in the New Deal.

As revolutionary as the New Deal was in many respects, in others it was strikingly traditionalist. It infused European ideas about economic management into U.S. policymaking to a degree previously unimaginable.¹²⁹ It saw the federal government take on a host of new responsibilities, some previously held by state and local governments and some not seen as public functions at all.¹³⁰ It dramatically increased the size of the federal workforce.¹³¹ It established that providing economic security to the People was a central function of government and established large-scale social insurance programs.¹³² And it contributed to a substantial broadening of the role of federal taxation in the economic life of the country.¹³³

Yet despite all of these changes, the New Deal incorporated large segments of the old order. It minimized the dislocation of states and obscured much of what did occur.¹³⁴ Much of its economic management sought to preserve and strengthen the pillars of conservative small-town America, such as small farmers and Main Street businesses. Reacting against its predecessors' embrace of laissez-faire economics, it often saw competition as destructive rather than efficient. And although federally administered social insurance programs did not overtly discriminate by race, the New Deal did not challenge racist distribution of federal funds in those programs operated by states.

128. *Cf. id.* at 198 (describing the national elections most important to Social Security's survival).

129. See Patricia E. Dilley, *The Evolution of Entitlement: Retirement Income and the Problem of Integration*, 30 LOY. L.A. L. REV. 1063, 1127 (1997).

130. *Cf. David A. Super, Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2575-76 (2005).

131. See Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the McConnell Decision*, 22 YALE L. & POL'Y REV. 235, 237 n.2 (2004).

132. Super, *supra* note 130, at 2575-76.

133. *Id.*

134. *Id.* at 2576.

Overall, President Roosevelt sought to build the broadest possible coalition for his program and to entrench the essential elements of that program to the point that the ordinary ebb and flow of politics could not dislodge them.¹³⁵ This goal required him to go beyond the ordinary requirements of majoritarian politics. Although he clearly had the votes in Congress—and, after 1937, on the Supreme Court—to brush aside any opposition, he systematically avoided disrupting entrenched social, political, and economic expectations any more than necessary.¹³⁶

Contrary to the image of efficiency-seeking, expertise-driven government many have come to associate with the New Deal, then, its constitution of public law retained the prior regime's presumption in favor of the traditional institutions of society. Instead, it merely recognized a relatively narrow set of overriding national interests that justified modest departures from that presumption—and granted the political branches of the federal government the power to intervene on behalf of those interests without substantive judicial approval. It certainly did not embrace the “extreme instrumental, manipulative rationality” of bureaucratic government seeking to maximize economic efficiency.¹³⁷ Many New Dealers may well have agreed with Max Weber that traditional communities were impediments to economic productivity,¹³⁸ but their leaders were not prepared to have the federal government push those communities and their institutions aside.

In the succeeding decades, this balance between new and old continued to dominate the design of public law. Far from being a sweeping modernizing force, the Administrative Procedure Act ducked many crucial issues—including the entire public benefits system¹³⁹—and deferred to existing statutory arrangements on most others.¹⁴⁰ The first major post-New Deal expansion of social welfare provisions was to help families achieve the traditional goal of home ownership.¹⁴¹ The Taft-Hartley and Landrum-Griffin Acts helped stem the growth of union power and confine them to the relatively sedate business of

135. ESKRIDGE & FEREJOHN, *supra* note 11, at 172-73.

136. *Id.*

137. Piotr Sztompka, *The Trauma of Social Change: A Case of Postcommunist Societies*, in CULTURAL TRAUMA AND COLLECTIVE IDENTITY 155, 156 (Jeffrey C. Alexander et al. eds., 2004).

138. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 22-23, 137 (Talcott Parsons trans., Unwin Hyman 1930) (1905).

139. See 5 U.S.C. § 553(a)-(b) (2012) (excluding government grants and benefits, as well as many other public functions, from the APA's rulemaking procedures).

140. See, e.g., *id.* §§ 553(c), 554(a) (deferring to authorizing statutes as to whether formal procedures govern rulemaking and adjudication).

141. See Housing Act of 1949, ch. 338, 63 Stat. 413 (codified as amended at 42 U.S.C. §§ 1441-1469 (2011)).

contract negotiation rather than more aggressive organizing and political activism. Agricultural programs initiated in emergency conditions during the Great Depression became institutionalized as expressions of fealty to the disappearing small-farm lifestyle. Expanded aid to the poor took the form of distribution of surplus agricultural commodities, emulating the kind of aid families might receive from their small-town neighbors. Throughout, economic management was accepted as a means, but economic efficiency was far from the dominant objective.

By the 1960s, the New Deal constitution's pairing of modern economic means with populist and conservative social ends came under stress. As the *Lochner* era's specter receded into the past and pervasive resistance to civil rights persisted, a liberal Supreme Court became more willing to intervene to rationalize social welfare programs.¹⁴² At the same time, conservatives succeeded in persuading the Court to adopt economic efficiency—the “consumer welfare” standard—as the primary measure of antitrust violations.¹⁴³ Richard Nixon, a conservative but not particularly a traditionalist, sought to rationalize social welfare programs, federalizing the administration of many and replacing the inefficient direct provision of in-kind aid with vouchers for food and housing.¹⁴⁴ He also oversaw the creation of more modern regulatory agencies, such as the Environmental Protection Agency and the Occupational Safety and Health Administration, founded on coherent theories of market failure rather than vague fears of unregulated competition. Eventually, bipartisan coalitions dispatched old-style market cartelizing agencies, such as the Civil Aeronautics Board and the Interstate Commerce Commission, and updated others.¹⁴⁵ More generally, as the postwar economic boom lifted more people into the urban middle class, federal management of the economy became more broadly accepted.

This advance of economic efficiency and increasing marginalization of traditional values faced sharp criticism, and not just from die-hard nostalgics:

The public interest state . . . represents in one sense the triumph of society over private property. This triumph is the end point of a great and necessary movement for reform. But somehow the result is different from what the reformers wanted. Somehow the idealistic concept of the public interest has summoned up a doctrine monstrous and oppressive. . . .

142. See, e.g., *King v. Smith*, 392 U.S. 309, 311-13 (1968) (finding the “man in the house” rule, often used selectively to disqualify African Americans from Aid to Families with Dependent Children, was unauthorized by statute).

143. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 427 (The Free Press 1993) (1978).

144. See David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 585 (2008).

145. See STEPHEN BREYER, *REGULATION AND ITS REFORM* 237-38, 323-40 (1982).

....

... The great error of the public interest state is that it assumes an identity between the public interest and the interest of the majority.¹⁴⁶

Yet by then the process had reached the point of no return:

There can be no retreat from the public interest state. It is the inevitable outgrowth of an interdependent world. An effort to return to an earlier economic order would merely transfer power to giant private governments which would rule not in the public interest, but in their own interest.¹⁴⁷

By itself, however, elites' enthusiasm for economic efficiency and bureaucratic governance could not overturn the New Deal constitution's insistence that traditional values be preserved even at considerable cost. On low-salience legislation, elites could agree to disregard the New Deal constitution. Yet although the old order could no longer claim sweeping fealty, traditionalist arguments nonetheless continued to carry the day, or even to persist unchallenged, in many areas. Major statutes had to include small business exceptions.¹⁴⁸ The New Deal constitution continued to provide a political trump to those dissatisfied with public law initiatives that treated traditional values too cavalierly. This uncertainty ill served both traditionalist and modernist forces: it was economically inefficient and socially disorienting.

The ACA has forced a resolution of this tension. It aggressively brushes away traditionalist ideas entrenched since the New Deal in four sweeping areas of public law. Between them, these areas encompass the federal government's relations with its two most important domestic competitors (the states and private business) as well as its principal means of acquiring and spending moneys (taxing and providing social insurance). If the ACA survives, the cumulative effect of these moves will be to break the back of the New Deal constitution of public law and enshrine economic efficiency as the dominant principle of U.S. public law. If it fails, the New Deal constitution will have a new lease on life.

This Part explores four of the most important ways in which the ACA's entrenchment would transform the New Deal constitution. Each Subpart will begin with an analysis of the New Deal's treatment of the area, which combines a limited opening to technocratic governance with the maintenance of strong traditionalist or populist norms. It then shows how the ACA moves decisively in the technocratic direction and surveys the implications of that transformation should the ACA survive.

146. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771, 774 (1964).

147. *Id.* at 778.

148. *See, e.g.*, Age Discrimination in Employment Act of 1967 § 11(b), 29 U.S.C. § 630(b) (2012); Worker Adjustment and Retraining Notification Act § 2(a)(1), 29 U.S.C. § 2101(a)(1); Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b) (2011); Americans with Disabilities Act of 1990 § 101(5)(A), 42 U.S.C. § 12111(5)(A).

A. Reassigning Roles in Federalism

The New Deal's best-understood contribution to our national constitution is probably the shift of power from the private sector to the federal government. Less appreciated but no less important, the New Deal also transformed the relationship between the federal government and the states. Implicit in the expansion of the federal government's power to regulate the private sector was a corresponding curtailment of state power to the extent that states might have wished to impose different policies or leave the sector unregulated.

But the New Deal did far more than increase the federal government's entanglement in regulatory federalism. It also created, almost from scratch, a new field of fiscal federalism. The complex financial interactions between federal and state governments both allowed the federal government to make new kinds of policies and gave it a powerful new tool to expand its regulatory influence. Thus, for example, although even after 1937 the Supreme Court might have hesitated to interpret the Commerce Clause to allow federal regulation of domestic relations, Congress has been able to set standards for child support orders¹⁴⁹ and terminations of parental rights¹⁵⁰ that states accept as a condition of receiving several billion dollars of federal aid.

Yet as radical as these concepts were, New Dealers sought to avoid affronting traditional state sensibilities. They both minimized the expansion of federal power and concealed the extent to which they were displacing states.¹⁵¹ In the intervening decades, fiscal federalism has grown considerably. It has been constrained, however, by the conceptual and structural limits imposed at its founding.

This Subpart explores the most sweeping challenge to those limits since the founding of modern fiscal federalism. Subpart A.1 reviews the major terms of the New Deal's constitution of fiscal federalism, under which three main rationales have justified federal-state cooperative funding programs: a perceived but ill-defined duty of the federal government to compensate state and local governments for direct consequences of its policies; the federal government's desire to exercise policymaking leadership; and the federal government's superior revenue-raising capacity. The superior capacity model, although easy to defend economically, has struggled to gain acceptance because of its perceived disrespect to the sovereign states. The other two models tend to be unstable. Without broad acceptance of the legitimacy and durability of any one model, many programs have hedged, relying on admixtures of two, often producing awkward and inefficient results.

149. 42 U.S.C. § 654.

150. *Id.* § 627.

151. *See* Super, *supra* note 130, at 2576.

Subpart A.2 shows how both the ACA and the Supreme Court's decision upholding the law take us in a very different direction. The ACA's ultimate success would redefine the three models and impose a rationalist view of fiscal federalism; its demise would invite the right to seek to initiate a new constitutional moment to dismantle the superior capacity and leadership models.

1. *The New Deal's fiscal federalism*

The New Deal's shift in fiscal federalism was particularly dramatic with respect to social provision. Prior to the Great Depression, the federal government provided aid to only a few small segments of the low-income population, such as some veterans and Native Americans.¹⁵² When the Depression created need that swamped the capacities first of local governments¹⁵³ and then of states,¹⁵⁴ the federal government's role expanded significantly.¹⁵⁵ This required a normative justification for the new federal role: integration of fiscal federalism with the federal government's other important tasks—notably macroeconomic regulation—and agreement on an administrative structure.

a. *Justificatory theories*

The actual motivation for the New Deal's expansion of the federal government's fiscal role was its superior capacity.¹⁵⁶ Too open an acknowledgment of this, however, could be seen either as an insult to the sovereign states or as opening the door to the evisceration of states' fiscal roles.¹⁵⁷ This reluctance to admit that the federal government's crucial contribution is its *superior fiscal capacity* required development of other models.¹⁵⁸ One model saw the federal role in terms of its policy *leadership*: it provided funding to states in exchange for their following various federal policies in the administration of their programs.¹⁵⁹ Funding for Medicaid and No Child Left Behind found support from the leadership model. Another model saw federal aid to the states as *com-*

152. See ESKRIDGE & FEREJOHN, *supra* note 11, at 172; WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 64-65, 207 (5th ed. 1994).

153. MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 214-15 (1986).

154. TRATTNER, *supra* note 152, at 287.

155. *Id.* at 282.

156. See KATZ, *supra* note 153, at 215.

157. See Super, *supra* note 130, at 2552-54.

158. See, e.g., *id.* (describing the compensatory, leadership, and superior capacity models).

159. *Id.* at 2577-79.

pensatory for burdens the federal government had placed on states, directly or indirectly.¹⁶⁰ The block grants that continue to fund some state activities after cancellation of a federal program and aid to jurisdictions attacked on 9/11 exemplify this compensatory model.¹⁶¹

b. *Macroeconomic management*

Unlike states, the federal government is not obliged to balance its budget each year. As a result, the federal government long has taken responsibility for macroeconomic management. Indeed, states' balanced budget rules compel them to engage in procyclical fiscal policy: spending cuts and tax increases during recessions as well as tax cuts and spending increases during expansions.¹⁶² This pattern results in states offsetting federal fiscal policy and complicating macroeconomic management. During the current slump, rapid declines in state and local spending have offset a large part of the increase in consumer purchases and business investment since the economy hit bottom, contributing to prolonged stagnation.¹⁶³

Beginning in the 1960s, federal policy has sought to moderate but far from eliminate the pressure on states to adopt procyclical fiscal policies. The partial deductibility of state and local taxes provides an implicit partial federal match to state tax increases, increasing their effective yield.¹⁶⁴ Although states' costs for Medicaid and other need-based programs continue to rise as the economy weakens, the federal government pays the majority of the increment.¹⁶⁵ Because states' revenues are simultaneously declining, they commonly cut eligibility and benefits in these programs but likely by less than they would if they had to bear the full increase in costs due to the downturn.¹⁶⁶ To the extent states increase revenues or shift spending from other functions into means-tested programs, the net amount of money coming into the state increases. And with much of that money going to people in severe need, it is likely to result in immediate, stimulative increases in demand. The matching system provides states slightly greater protection against regional recessions: to the extent that a

160. *Id.* at 2571-74.

161. *See, e.g., id.* at 2584-85; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-72, OVERVIEW OF FEDERAL ASSISTANCE TO THE NEW YORK CITY AREA (2003).

162. *See Super, supra* note 130, at 2607-12.

163. *See* Paul Krugman, Op-Ed., *States of Depression*, N.Y. TIMES (Mar. 5, 2012), <http://www.nytimes.com/2012/03/05/opinion/krugman-states-of-depression.html>.

164. *See* I.R.C. § 164 (2012).

165. *See Super, supra* note 130, at 2609-10.

166. *See id.* at 2612-13.

state's median income relative to the rest of the country were to decline, its federal matching payments would increase.

Because the specifics of macroeconomic management rarely achieve salience at the federal level, and even less so in the states, little focused effort has been made to reduce or eliminate states' inadvertent hindrance of federal macroeconomic policy. Some changes have helped: in the early 1970s, the federal government assumed almost complete fiscal responsibility for means-tested aid to the elderly and disabled¹⁶⁷ (a function whose cost does not vary much with the economic cycle) and for food aid for all low-income people¹⁶⁸ (which is highly cyclical). From the 1970s through the 1990s, Congress reliably provided supplemental unemployment insurance (UI) benefits paid entirely with federal funds to supplement those the states provided while modifying UI financing to give states incentives to save during booms and borrow during protracted downturns.¹⁶⁹

On the other hand, other changes increased pressure on states to act procyclically. Converting cash assistance and child care subsidies into block grants to states meant that federal aid no longer increased with rising need during economic downturns.¹⁷⁰ Although the legislation creating the Temporary Assistance for Needy Families (TANF) block grant included contingency and loan funds to provide additional assistance to states during downturns,¹⁷¹ states' incentives to avoid accessing these funds proved overwhelming. Congress's inclination to provide federal UI benefits has been dropping sharply: it ended the program early after the recession of 1990-1991, made only a token effort after the recession of 2001, and is winding up federal UI benefits after the 2007-2009 recession while both unemployment and long-term unemployment are at historically high levels and consumer spending remains deeply depressed.¹⁷² The 1996 welfare law also denied food stamps to childless adults below age fifty,¹⁷³ one of the groups first affected by economic downturns.

167. See 42 U.S.C. § 1382g(a)(3)-(4) (2011).

168. See 7 U.S.C. §§ 2011-2036 (2012).

169. See CHAD STONE & HANNAH SHAW, CTR. ON BUDGET & POLICY PRIORITIES, EMERGENCY UNEMPLOYMENT INSURANCE BENEFITS REMAIN CRITICAL FOR THE ECONOMY (2010), available at <http://www.cbpp.org/cms/?fa=view&id=3320>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-4400, UNEMPLOYMENT INSURANCE TRUST FUNDS: LONG-STANDING STATE FINANCING POLICIES HAVE INCREASED RISK OF INSOLVENCY 6-7 (2010).

170. See, e.g., 42 U.S.C. §§ 601-619 (providing for Temporary Assistance for Needy Families block grants).

171. See *id.*; see also LIZ SCHOTT & LADONNA PAVETTI, REDESIGNING THE TANF CONTINGENCY FUND TO MAKE IT MORE EFFECTIVE 1 (2011).

172. See, e.g., ISAAC SHAPIRO & JESSICA GOLDBERG, CTR. ON BUDGET & POLICY PRIORITIES, 1.1 MILLION "EXHAUSTEES" LEFT OUT OF EXTENSION OF TEMPORARY FEDERAL

The 2009 economic stimulus legislation represented the most focused attempt to reduce state and local governments' drag on federal macroeconomic policy.¹⁷⁴ It offered states supplements to their TANF block grants on the condition that they spend the funds on direct aid to families or public service job creation.¹⁷⁵ It increased the federal match on Medicaid spending and administrative costs in federal-state programs while prohibiting states from reducing Medicaid eligibility or benefits.¹⁷⁶ It exempted childless adults from the 1996 welfare law's three-month time limit.¹⁷⁷ And it backed a decade of increasing federal engagement with elementary and secondary education with a new matching program to help states retain teachers.¹⁷⁸ Unfortunately, the perceived political imperative to treat the economic crisis as a short-term aberration required almost all of these measures to have short expiration dates.¹⁷⁹

More subtly, and with little apparent reflection on the consequences for macroeconomic management, Congress has changed the structure of matching payments to shift costs of economic downturns to states. The 1997 legislation that created the State Children's Health Insurance Program (CHIP) to supplement Medicaid provided more generous matching payments to states raising their eligibility limits above historical Medicaid levels.¹⁸⁰ The concept was rational enough on its own terms: near-poor families, most between 100% and 200% of the poverty line, are less politically compelling than those deep in poverty, and states were unlikely to be willing to spend as much to extend

UNEMPLOYMENT BENEFITS (2002), available at <http://www.cbpp.org/archiveSite/5-22-03ui.pdf> (describing premature expiration of benefits after 2001 recession).

173. 7 U.S.C. § 2015(o)(2)-(3).

174. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of the U.S. Code).

175. *Id.*, sec. 2101, § 403, 123 Stat. at 446-49.

176. See Judy Feder & John Holahan, *Medicaid: Extending the Enhanced Federal Match Makes Sense (Guest Opinion)*, KAISER HEALTH NEWS (June 30, 2011), <http://www.kaiserhealthnews.org/Columns/2011/June/063011federholahan.aspx>.

177. See DOROTHY ROSENBAUM, CTR. ON BUDGET & POLICY PRIORITIES, SNAP IS EFFECTIVE AND EFFICIENT 6 & n.9 (2013), available at <http://www.cbpp.org/files/7-23-10fa.pdf>.

178. See Sam Dillon, *Schools Aided by Stimulus Money Still Facing Cuts*, N.Y. TIMES (Sept. 7, 2009), <http://www.nytimes.com/2009/09/08/education/08school.html?pagewanted=all>.

179. See, e.g., Brad Plumer, *Food Stamps Will Get Cut by \$5 Billion This Week—and More Cuts Could Follow*, WASH. POST WONKBLOG (Oct. 28, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/28/food-stamps-will-get-cut-by-5-billion-this-week-and-more-cuts-could-follow>.

180. 42 U.S.C. § 1397ee(a)(1) (2011).

health insurance to their children.¹⁸¹ Once states implemented health insurance expansions under CHIP, however, the effect was to increase states' costs more sharply during economic downturns.¹⁸² Not only did states have to bear their share of the costs of increased numbers of people qualifying for some form of coverage, but they also saw their federal matching rate decline as children previously eligible in the CHIP income eligibility range fell into the lower income range served by Medicaid.¹⁸³ Moreover, the Medicaid benefit package was required to be more comprehensive than that under CHIP,¹⁸⁴ further increasing states' net costs as families' incomes fell.

c. *Models of federal-state administration*

If one viewed federal and state governments as independent, self-serving entities operating at arm's length, the administrative structure of federal-state programs would seem quite remarkable. The federal government gives roughly one-sixth of its budget to states to spend.¹⁸⁵ Yet the states carrying the federal government's checkbook are not in any formal sense the federal government's fiduciaries. Indeed, as Jessica Bulman-Pozen and Heather Gerken have pointed out, states often exploit their leverage in federal-state programs to challenge federal policies.¹⁸⁶

The federal government has sought to constrain states' enormous power over its own fisc through three devices. First, it limits its exposure with a fixed ceiling on the amount that states may receive and disburse. General revenue sharing operated on this basis in the 1970s.¹⁸⁷ Second, it imposes command-and-control regulations on states to direct the funds to its desired purposes.

181. Indeed, states already had the ability to raise their effective income eligibility limits as high as they wished at existing matching rates by disregarding arbitrary amounts of income. See 42 U.S.C. § 1396a(r)(2). Their failure to do so indicated that they had gone as far as they were willing at current matching rates.

182. See Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 472 & n. 205 (2011).

183. See Linda C. Fentiman, *The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. U. L. REV. 537, 595-96 (2006).

184. See KAISER COMM'N ON MEDICAID & THE UNINSURED, A DECADE OF SCHIP EXPERIENCE AND ISSUES FOR REAUTHORIZATION 3-4 (2007), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7574-2.pdf>.

185. CONG. BUDGET OFFICE, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: OUTLAYS IN 2011 FOR FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS 3 (2013).

186. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258-59 (2009).

187. See State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (repealed 1981).

States' administration of the Disability Determination Services that make initial decisions on eligibility for disability payments under Social Security and Supplemental Security Income take this approach.¹⁸⁸ And third, it requires the states to share in some fraction of the costs, giving states an independent financial interest in the cost effectiveness of the program.¹⁸⁹

Most federal-state programs include at least two of these devices. The AFDC program that provided cash welfare to the poorest of the poor from 1935 to 1996 had detailed federal rules and required state matching payments;¹⁹⁰ the TANF block grant that replaced it, and most other block grants, have detailed rules and funding caps.¹⁹¹ SNAP operates with detailed federal rules,¹⁹² compels states to share in the cost of issuances deviating significantly from those rules,¹⁹³ and requires states to share administrative costs.¹⁹⁴ The stringency of one of these controls often is inversely proportional to the stringency of another.

The combination selected often depends on the effects sought. Fixed caps provide the most reliable restraints on the *total* federal funds that states expend but offer nothing as to the *effectiveness* of those expenditures. Matching requirements can guard against careless misexpenditure of funds but not against deliberate efforts to spend federal funds in ways the federal government has not selected. Detailed, well-drafted federal rules can be effective in controlling both the amount and the purpose of federal spending, but they expose their authors to political criticism over their terms—and they are impossible where federal policymakers cannot agree on the program's contours.

The effectiveness of these controls varies from program to program. Too high a state matching requirement for a program that is not a priority for many politicians can fail to motivate state activity: AFDC's Job Opportunity and Basic Skills (JOBS) program¹⁹⁵ and the Food Stamp Employment and Training Program¹⁹⁶ often returned money to the treasury unspent.¹⁹⁷ On the other hand,

188. See 42 U.S.C. § 421 (2011).

189. Medicaid, for instance, historically required states to supply about forty-three percent of the total program funding. Super, *supra* note 130, at 2586-87.

190. 42 U.S.C. §§ 602, 612 (1994) (repealed 1996).

191. 42 U.S.C. §§ 605-609 (2011). TANF also has a maintenance-of-effort funding requirement (MOE) for states, but, because it does not require that MOE funds be spent on the same activities as federal funds, it cannot be seen as a check on the integrity of state administration. *Id.* § 609(a)(7).

192. 7 C.F.R. pts. 271-285, 295 (2013).

193. 7 U.S.C. § 2025(c) (2012).

194. *Id.* § 2025(a), (h).

195. 42 U.S.C. §§ 681-687 (1994) (repealed 1996).

196. 7 U.S.C. §§ 2015(d)(4), 2025(h) (2012).

a low state-matching requirement may cause states to seek loopholes to expand the program beyond the scope conceived at the federal level. Many states expand Medicaid's income eligibility limits far beyond those Congress set, exploiting a routine authorization to select accounting methodologies,¹⁹⁸ thus fundamentally transforming the program.¹⁹⁹

Recent years have seen movement away from reliance on detailed federal rules. Although sometimes couched in terms of high principles, this chiefly reflects the breakdown of substantive policy consensus at the federal level and the need to engage states in any political coalition that has a chance of enacting a significant social program. Where federal policymakers can agree on policies, they have not hesitated to dictate to the states.²⁰⁰ Although the Congressional Budget Office's cost estimates for matching programs have proven quite accurate on the whole,²⁰¹ Republicans nonetheless have been more willing to acquiesce to programs with fixed caps.²⁰²

2. *The ACA's federalism*

The ACA's most dramatic impact is in its rejection of the New Deal's approach to justifying cooperative fiscal federalism.²⁰³ Indeed, it could be viewed as taking a first step toward curtailing such arrangements generally. It displaces the increasingly uneasy balance—struck in the Social Security Act and maintained since—that divides fiscal responsibility for the social safety net between

197. STAFF OF H. COMM. ON WAYS & MEANS, 104TH CONG., 1996 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 413-19 (Comm. Print 1996); CHRISTOPHER BOTSKO ET AL., STATE USE OF FUNDS TO INCREASE WORK SLOTS FOR FOOD STAMP RECIPIENTS: REPORT TO CONGRESS 23-31 (2001).

198. 42 U.S.C. § 1396a(r)(2) (2011).

199. See John Holahan & Mary Beth Pohl, *Leaders and Laggards in State Coverage Expansions*, in *FEDERALISM & HEALTH POLICY* 179, 181 (John Holahan et al. eds., 2003).

200. For example, with both parties seeking to be seen as requiring cash assistance recipients to work, the otherwise thinly drawn TANF regulations are spectacularly prescriptive about which kinds of work activities count. 45 C.F.R. §§ 261.30-.36 (2013).

201. See *The Accuracy of CBO's Budget Projections*, CONG. BUDGET OFFICE (Mar. 25, 2013), <http://www.cbo.gov/publication/44017>.

202. See *Chapter 2: Origins and Effects of Federal Block Grant Programs*, NAT'L COUNCIL ON DISABILITY, <http://www.ncd.gov/publications/2013/05222013/05222013Ch2> (last visited Apr. 1, 2014) (documenting instances of Republicans' preference for capped programs).

203. It also significantly expands federal regulation of health plans previously subject to state insurance offices. See, e.g., 42 U.S.C. § 18012 (limiting states' standard-setting authority over such plans). This is important public policy but does not meaningfully extend the New Deal's regulatory constitution.

the federal and state governments. The ACA essentially requires states to maintain the fiscal effort they were putting into the prior system—responsibilities that may well dissipate over time—while the federal government covers almost all of the costs of its expansion.²⁰⁴

The ACA openly and unapologetically relies upon the superior capacity model. Just as the New Deal initiated fiscal federalism in the wake of states' inability to respond to mass unemployment, the ACA comes after two decades of state efforts at health care reform that failed, wave after wave, when one or another recession destroyed the states' fiscal capacity to provide the necessary subsidies.²⁰⁵ This time, however, Congress made little effort to obscure the federal role: premium subsidies come directly from the federal government rather than being funneled through states.²⁰⁶ To be sure, the ACA imposes considerable detailed policy guidance on those accepting its funds.²⁰⁷ Nonetheless, the predominance of resources, rather than policy leadership, in its motive is evident from the sweeping waivers it allows states.²⁰⁸

Chief Justice Roberts's de facto majority opinion in *NFIB* confirms the realignment among the post-New Deal models of fiscal federalism. Most obviously, it sharply weakens the leadership model, preventing the federal government from leveraging states' dependence on existing federal funding to gain their acquiescence to federal policy leadership into new directions. Because this decision came in the face of exceptionally generous federal financing provisions for the Medicaid expansion, this decision may have broad implications. At a minimum, it converts the form of leadership the federal government may exercise in cooperative federalism programs to a more persuasion-driven form. About half the states did not expand Medicaid prior to the ACA's implementation in 2014.²⁰⁹ Comparisons between the experiences of the implementing and nonimplementing states may provide a natural experiment that gives renewed meaning to the idea of "laboratories of democracy."

NFIB also, however, strengthens the other two models of fiscal federalism. The compensatory model has assumed that the federal government has a moral obligation to protect states from the fiscal burdens it imposes on them. *NFIB* for the first time makes that obligation legally binding. Although neither Chief Justice Roberts nor the conservative dissenters provide a detailed roadmap for

204. See MacGillis et al., *supra* note 64, at 108, 164-65.

205. Carol S. Weissert, *Promise and Perils of State-Based Road to Universal Health Insurance in the U.S.*, 7 J. HEALTH CARE L. & POL'Y 42, 47, 50-51 (2004).

206. See MacGillis et al., *supra* note 64, at 79-80.

207. Cf. *id.* at 163-68.

208. See, e.g., 42 U.S.C. § 18051(d) (allowing states to receive ninety-five percent of the federal funds otherwise coming to them for alternative health care systems).

209. *Status of State Action on the Medicaid Expansion Decision, 2014*, *supra* note 118.

assessing future fiscal impositions, the mere awareness that some such impositions may be constitutionally proscribed will surely strengthen the moral authority of states demanding compensation in a host of other areas.

NFIB also acknowledges and accepts Congress's open reliance on the superior capacity model. Historically, the habit has been to treat both federal and state governments' fiscal capacities as similar, presumably because doing anything less would imply that the states are not fully sovereign. Chief Justice Roberts loudly broke this conspiracy of silence. He acknowledged that, whatever their formal powers, states' practical fiscal capacity is far inferior to that of the federal government.²¹⁰ This opened the door for frank discussions in mainstream legal and political circles about division of fiscal responsibility. Presumably this could include a more structured, deliberate means of counter-cyclical revenue sharing with states to avert teacher and public safety officer layoffs during recessions—as well as the deflationary effects of state and local austerity. A Medicaid matching rate that varied with unemployment (rather than merely a state's prosperity *relative* to other states), permanent provisions for extended federal UI benefits and augmented food assistance when unemployment exceeds some threshold, and automatic supplements to states' TANF block grants—all measures implemented ad hoc in the 2009 stimulus legislation but now expired with unemployment still high—would similarly merit serious debate now that the New Deal's polite but dishonest homage to states' fiscal capacity is behind us.

Conversely, if the ACA fails, it will do so in large part because it was perceived as being “too big.” Unlike most recent costly federal initiatives, the ACA did not add to the deficit.²¹¹ Although the news media has often left that point unsaid, and polling indicates many voters are confused on that point,²¹² the fact that it fully offset its spending suggests that its demise would signify that no consensus exists that securing access to health care is an appropriate project for the federal government. To be sure, the ACA's fiscal provisions give states broader roles in shaping eligibility rules than some preferred,²¹³ and

210. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604-05 (2012) (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.).

211. See Ezra Klein, *11 Facts About the Affordable Care Act*, WASH. POST WONKBLOG (June 24, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/06/24/11-facts-about-the-affordable-care-act>.

212. See, e.g., *Kaiser Health Tracking Poll, Feb, 2012*, ROPER CENTER, http://www.ropercenter.uconn.edu/cfide/psearch_test/webroot/multquestion_view.cfm?QSTN_ID2=1806927&qid=+1806927&pid=4&ccid=4&x=75&y=12 (last visited Apr. 1, 2014) (finding that fifty-four percent of respondents believed the ACA increased the deficit).

213. See, e.g., 42 U.S.C. §§ 18051-18052 (allowing states to design alternatives to insurance exchanges and premium subsidies); Alex Wayne, *Piling Trouble on a Torn Net*, CQ

governors have complained about the costs it does require states to bear. Nonetheless, the ACA's public meaning is as an expansion of federal fiscal responsibility for human services. Some of the ACA's critics claimed to favor its goals but challenged the federal government's legitimacy in pursuing them.²¹⁴ Similarly, although the ACA delegated far more regulatory power to the states than many would have preferred,²¹⁵ the broad public understanding of the ACA is as a vast expansion of federal regulatory power. And as criticism of its regulatory provisions has gone to their scope rather than to their (generally popular) substance, the ACA's fall would be a constitutional statement about the role and scope of federal economic regulation.

In other aspects of fiscal federalism, the ACA's entrenchment of the superior capacity model gives federal policymakers a useful tool with which to counteract states' procyclical offsetting of federal fiscal policy. In the near term, however, the ACA exacerbates that problem. The ACA's cost-sharing structure has a similar effect to CHIP's but with a much more dramatic impact on states. Relatively prosperous low-income people will receive federal health insurance tax credits at no cost to the states. An intermediate group will be covered by the ACA's Medicaid expansion (in states implementing that expansion); their costs will be free to states initially and will eventually stabilize at just ten percent of the total spent on them.²¹⁶ The lowest-income people will remain on states' Medicaid programs subject to the existing matching rates, which even in the poorest states require considerably more than a ten percent state share.²¹⁷ Thus, when the economy slackens and families' incomes decline, they will shift down from a category with full federal fiscal responsibility to those that impose more and more burdens on states—precisely at times when the states are least able to bear those burdens. Conversely, a booming economy will shrink the legacy Medicaid population and bring further fiscal relief to states whose budgets are already moving into the black.

WKLY. (Sept. 21, 2009), <http://library.cqpress.com/cqweekly/weeklyreport111-000003206255> (proposing to abolish state eligibility rules).

214. See, e.g., Peter Beilenson & Ken Ulman, *Let the States Lead: National Health Care Reform Is Gridlocked—in Part Because We Don't Know What Works*, BALT. SUN (Jan. 31, 2010), http://articles.baltimoresun.com/2010-01-31/news/bal-op.health31_1_national-health-care-reform-health-status-hospital-and-emergency-room.

215. See Editorial, *The Next Step on Health Reform*, N.Y. TIMES (Dec. 26, 2009), <http://www.nytimes.com/2009/12/27/opinion/27sun1.html?pagewanted=all> (describing the House's efforts to establish insurance exchanges at the federal level, which the Senate ultimately rejected).

216. See *supra* note 111 and accompanying text.

217. See KAISER COMM'N ON MEDICAID & THE UNINSURED, MEDICAID FINANCING: AN OVERVIEW OF THE FEDERAL MEDICAID MATCHING RATE (FMAP) 1 (2012), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8352.pdf>.

Finally, the ACA turns the prevailing division of administrative responsibilities on its head by fragmenting administration of its low-income subsidies. Because of ideologically based resistance and procrastination prior to the Supreme Court's decision, at least half of the states initially decided not to operate the insurance exchanges administering the health insurance subsidies for their residents.²¹⁸ Some of these states will cooperate closely with their federal exchanges; some will refuse to do so, increasing the likelihood of people falling through the cracks. In many of the other states, ideological opposition to the ACA made the major insurance companies indispensable members of the coalition to agree to operate a state exchange; those companies' price typically was putting the exchange in the hands of a private or semiprivate entity that they dominate.²¹⁹ Thus, responsibility for determining eligibility for subsidies will be divided between existing state Medicaid offices, isolated federal exchanges, cooperative federal exchanges, public state exchanges, and private exchanges.

This arrangement likely will be unstable; if the ACA survives, the federal exchanges may become a permanent part of the administrative landscape. If so, it would mean that for the first time federal officials will be dispensing large amounts of state funds (rather than the other way around). Developing accountability mechanisms for this arrangement could call some basic assumptions about the federal-state relationship into question. Alternatively, it could provide the impetus for fully federalizing the financing of Medicaid and for giving these entities responsibility for dispensing other benefits that are entirely federally funded, such as SNAP. For now, however, the ACA is more destabilizing the traditional, state-deferential order than pointing to a clear, technocratic substitute.

B. *Modernizing the Social Insurance Constitution*

In addition to reshaping fiscal federalism, the New Deal also elevated a small, obscure federal activity—social insurance—and set it on course to become the government's largest function. Although the particulars of social insurance are continually in flux, the federal government's performance of this role has clearly achieved constitutional status. President Roosevelt deliberately set out to entrench a system of federal social insurance as something that would

218. See *Establishing Health Insurance Marketplaces: An Overview of State Efforts*, KAISER FAMILY FOUND. (May 2, 2013), <http://kff.org/health-reform/issue-brief/establishing-health-insurance-exchanges-an-overview-of> (reporting that twenty-six states are declining to run insurance exchanges).

219. See, e.g., *State Action to Establish Health Insurance Marketplaces: Idaho*, COMMONWEALTH FUND (July 2013), <http://www.commonwealthfund.org/Maps-and-Data/State-Exchange-Map.aspx#Idaho> (describing a nongovernmental exchange with a board dominated by health care providers and insurance companies).

be widely accepted as a fundamental right.²²⁰ The Framers may not have envisioned it—just as many believed that a standing army was incompatible with a free country²²¹—but today, terminating Social Security, Medicare, and other core social insurance programs is no more plausible than the dissolution of the army and navy.

This Subpart analyzes the ACA's challenge to the New Deal's accommodation between radically different ideas about social provision. Subpart B.1 traces the contrasting European economic and indigenous social ideas that came together to create the uniquely American system of social insurance.

Subpart B.2 describes the three-tier system the New Deal produced and how that structure largely survived in the decades since. This system rests on a hard dichotomy between contributory social insurance programs and marginalized means-tested programs as well as an overt willingness to ignore many extreme needs altogether. The former have been understood as addressing a primarily economic problem; accordingly, they have been designed and administered to seek maximum aggregate efficiency. The latter are seen as addressing social problems and have preserved the traditionalist moralizing, individualistic approach to those problems. Contributory social insurance programs, notably Social Security, have included significant redistribution but have tended to obscure it.

Subpart B.3 then identifies the substantive and procedural differences between the tiers in this system.

Finally, Subpart B.4 shows how, to achieve their goal of near-universal coverage, the ACA's architects obliterated the lines between types of programs, with formal subsidies extending far up the income scale as well as a range of informal ones. Its administration and eligibility rules are built around aggregate efficiency and reject much of the individualistic focus, both liberal and conservative, built into other means-tested programs. If the ACA survives, the traditional, individualistic, means-tested program that the New Deal so carefully preserved is likely to disappear fairly rapidly; if the ACA perishes, the New Deal constitution's line between mass economic and individualistic social programs will be reinforced, and society's willingness to ignore dire need among many of its weakest members will be reiterated.

220. ESKRIDGE & FEREJOHN, *supra* note 11, at 173, 181. This effort succeeded initially when the Social Security Act passed Congress with overwhelming majorities, *id.* at 182, and became entrenched as the program coopted most of its opponents in the Republican Party and the conservative wing of the Democratic Party, *id.* at 188-96.

221. THE FEDERALIST NO. 8, at 67-68 (Alexander Hamilton), *supra* note 32; *id.* NO. 24, at 157-58 (Alexander Hamilton).

1. *The disparate lineage of U.S. social insurance*

Our constitution of social insurance sprang from two very different parents. It was in part an adaptation of European social insurance, pioneered by Otto von Bismarck and developed by the British and others.²²² But it was also an attempt to update and sustain a much older, indigenous system of community-based aid. The philosophies and assumptions underlying these two antecedent systems were quite different.

The European-based social insurance system saw both hardship and its remedy in aggregate economic terms. Income shortfalls could be predicted with reasonable confidence in the elderly, the infirm, those that had lost the primary worker on whom they depended, and those unemployed due to friction in the labor market or downturns in the economic cycle. Government could remedy these shortfalls by shifting resources from the high to the low points in economic cycles and by diverting funds from people in more prosperous phases of their lives and those who had had the good fortune to avoid serious injury and illness. Understood in these terms, relatively little individual-level information was required, and hence the administrative bureaucracy could be kept quite lean to hold down transaction costs. Bismarck realized that, by addressing these problems efficiently, government could gain broad allegiance from lower- and middle-income people without diverting itself significantly from its primary goals.²²³

The community-based aid system, by contrast, saw problems and solutions in individualistic social terms. The system's historical origins, and even more its mindset, were rooted in neighbors helping neighbors within small towns.²²⁴ Under this vision, conscientious but clear-thinking neighbors and parishioners would assess the circumstances of an individual or family in need and dispense the proper mixture of aid and moral guidance to address the problem. Viewed from the perspective of the individual in need, the results could be quite harsh: a widow might be pressured into marrying a man she disliked, perhaps one known to be abusive, and when bad harvests or other broad economic forces depressed income throughout a region, little aid would be forthcoming. Yet the individualistic nature of the enterprise—both the provision of aid and the making of moral judgments—was thought to improve the character of all involved and thereby strengthen the fabric of the community.²²⁵

222. See TRATTNER, *supra* note 152, at 230 n.7.

223. See JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY: 1900-1985*, at 31 (1986).

224. See generally TRATTNER, *supra* note 152, at 32-46.

225. See KATZ, *supra* note 153, at 58-66.

Even in small rural communities, direct neighbor-to-neighbor aid often proved unworkable. The advent of industrialization, urbanization, and the intense concentrations of poverty that they brought rendered the neighbor-based aid obviously insufficient even to pretend to meet the scope of the need.²²⁶ Nonetheless, that system remained policymakers' professed ideal, and governments setting up poor-relief programs went to great lengths to incorporate what they regarded as the essential features of the idealized model.²²⁷ One icon of early public aid programs was the poorhouse. It rested on the assumption that someone would not need public aid without some pathology and hence, by seeking aid, was implicitly admitting an inability to live independently. Conversely, having paupers "inside" made them more susceptible to moral upgrading, whether their problems were drinking, disregarding the community's sexual mores, or presumed idleness.²²⁸ Although most members of the community might not actively participate in judging and imposing moral correction on those in the poorhouse, awareness of its stigma provided a strong deterrent against becoming impoverished and hence against alienating community power figures: family patriarchs, employers, landlords, and the like.²²⁹

Poorhouses, however, proved both expensive and administratively challenging to operate. During major economic downturns, their capacity was grossly inadequate. Maintaining them was a largely thankless task, and often after an initial frenzy of moralizing reformism, communities' poorhouses fell into disrepair.²³⁰ As a result, "outdoor relief"—supporting a family in its own home—became the predominate form of aid in practice, if not in communities' self-image, almost everywhere.²³¹ Yet the formal preference was still indoor relief, and the ultimate ideal remained informal neighbor-to-neighbor aid. Localities thus did all that they could to interject the maximum amount of moral judgment and correction into their programs.²³² Assistance was provided a week, or at most a month, at a time by a local official or judge, with the petitioner subject to any form of scrutiny the dispensing authority sought to impose.²³³ Communities imposed work programs, not to obtain services of value—the occasional services of largely unskilled people who happened to need

226. *See id.* at 146-50.

227. *See id.* at 36-57.

228. *Id.* at 23-24.

229. *See* FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 33-38, 165-75 (1971).

230. *See* KATZ, *supra* note 153, at 85.

231. *See id.* at 54-55.

232. *See id.* at 58-60.

233. *See* Kerry R. Bensinger, *From Public Charity to Social Justice: The Role of the Court in California's General Relief Program*, 21 LOY. L.A. L. REV. 497, 505-08 (1988).

aid at a given time typically cost more to organize and supervise than they were worth—but as a morality test.

So whereas the European social insurance system rested on the assumption that certain kinds of deprivation were statistically inevitable in the aggregate, the community-based aid system that prevailed in this country before the New Deal regarded individual moral collapse as a constant threat requiring constant vigilance and energetic countermeasures. The social insurance system was continually adapting as new data permitted improved actuarial projections; the community-based aid system grudgingly adjusted to fiscal and administrative imperatives, but regarded itself as contending with eternal truths about the moral corruptibility of human nature.

With the fiscal collapse first of local governments and then of states, the Great Depression exposed fundamental flaws in the community-based system and prevented it from continuing to operate as it historically had.²³⁴ On the other hand, the nation was far from ready to embrace fully the European concept of social insurance. The result was an elaborate series of compromises involving the financing, coverage, eligibility, and administration of social insurance programs in this country.

2. *The three-tier social insurance system*

Although President Roosevelt intended social insurance to broaden equality,²³⁵ he did not seek to move all populations forward at the same speed. As a result, public transfer programs in this country since the New Deal have operated on what amounts to a three-tiered response to social need.²³⁶ The top tier consists of universal programs available to everyone, or to everyone within a broad class of the population, without regard to income. The second tier consists of means-tested programs. The third tier is a rejection of public responsi-

234. See KATZ, *supra* note 153, at 226.

235. See ESKRIDGE & FEREJOHN, *supra* note 11, at 182.

236. A third option, present in some of the European systems that provided models for the New Deal, was voluntary insurance programs. ESKRIDGE & FEREJOHN, *supra* note 11, at 178. These never entered the core of the U.S. social insurance constitution, *id.*, although subsidized insurance has been important in strategies to help particular populations, such as farmers and those living in disaster-prone areas. Pensions subsidized through tax expenditures, most prominently individual retirement accounts (IRAs) and 401(k) plans, have consumed considerable resources and sometimes have been championed as alternatives to the safety net constitution. For example, the tax exemption for employer-sponsored health insurance long prevented strong coalitions from forming in favor of health care reform; opponents recently have sought to deflect proposals like the ACA with tax-preferred medical savings accounts. See, e.g., Steve Huntley, Op-Ed., *No Winners in Obama's Health-Care Overhaul*, CHI. SUN-TIMES, Feb. 23, 2010, at 18.

bility altogether, representing the continued vitality of traditional, moralistic ideas in the pre-New Deal constitution.²³⁷

Top-tier programs were the centerpiece of the social insurance constitution as President Roosevelt envisioned it.²³⁸ These relatively few programs consume the vast majority of social insurance spending.²³⁹ Early in their history, first-tier programs abandoned their initial pretense of complete reliance on beneficiaries' contributions for funding—instead depending on large tax expenditures and direct transfers of general revenues—but much of the public still believes they are self-sufficient. The illusion that these programs did not reallocate resources helped spawn other social programs that, although not technically social insurance, provided comprehensively for the needs of a substantial segment of the middle class.²⁴⁰ These programs concealed their redistributive nature by including real (but inadequate) dedicated funding streams, by having the redistribution come as exercises of supposedly expert discretion (for example, where to provide a subsidy and on what terms), and by concealing them within the tax code.

Political debate about social welfare since the New Deal has been about which groups, and which needs of this or that group, will be consigned to each treatment.²⁴¹ The resolutions sometimes are quite complex. We may respond to the same need under each of the three tiers for different populations: many of the elderly and some people with disabilities have access to social insurance (Medicare) for their health needs, with recourse to a means-tested program for additional coverage if needed; the poorest families with children may have access to a highly parsimonious means-tested program (Medicaid) for health care; and childless adults below age sixty-five who lack severe, long-lasting disabili-

237. Critics of the Social Security Act feared “a system of regimentation and bureaucratic domination.” ESKRIDGE & FEREJOHN, *supra* note 11, at 181-82 (internal quotation mark omitted); see CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980*, at 229-30 (1984) (advocating elimination of all public welfare programs operating above the local level); MARVIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION* 24-31 (1992) (praising efforts to bring “countryside” values of personal connection and mutual responsibility to the alienating city).

238. ESKRIDGE & FEREJOHN, *supra* note 10, at 182-83.

239. See CONG. BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2013 TO 2023*, at 16 tbl.1-3 (2013) (showing that spending on Social Security, Medicare, and UI was seventy percent of mandatory spending in 2012).

240. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 229-30 (1985) (describing the programs that facilitated the white middle class's move to the suburbs after World War II).

241. See KATZ, *supra* note 153, at 268-69. For example, some have argued that expanding universal programs, as much of Europe has done, will leave aid to the poor less politically vulnerable. MARTIN CARNOY & DEREK SHEARER, *ECONOMIC DEMOCRACY: THE CHALLENGE OF THE 1980s* 339-50 (1980).

ties were largely on their own before the ACA.²⁴² Also, a given population may have different needs addressed in different tiers: the elderly have a top-tier program for health care, a second-tier, means-tested program (SNAP) for food, and generally no direct help (apart from their cash income) for housing.

Gender has played an important role in the assignment of tiers. Groups disproportionately composed of men, typically those who have worked outside of the home, have been more likely to receive first-tier programs.²⁴³ Disproportionately female groups, such as those raising children, have more often received second-tier programs.²⁴⁴ Indeed, as groups' gender compositions have changed, programs have taken on characteristics of the other tier. As women's increasing participation in the formal workforce and programmatic reforms made UI, a first-tier contributory social insurance program, more available to women,²⁴⁵ Congress and states began imposing increasingly intrusive behavioral controls and eligibility disqualifications. By contrast, as second-tier, means-tested Medicaid became the primary public funding source for nursing home and other long-term care—a service both genders require—Congress exempted that aspect of Medicaid from many of the program's more intrusive behavioral rules. Indeed, Congress even exempted the long-term care portion of Medicaid from much of the means test that families with children must meet.²⁴⁶

Race also has played a significant role in assigning tiers. Federal administrators during the New Deal and in the succeeding decades gave state and local governments free rein to discriminate against African Americans and other people of color while aiding identically situated whites.²⁴⁷ When the civil rights revolution prohibited overt discrimination, the Supreme Court read the Social Security Act to prohibit many of the facially neutral means of achieving the same ends through exercises of discretion.²⁴⁸ When large numbers of Afri-

242. See *Where Are States Today? Medicaid and CHIP Eligibility Levels for Children and Non-Disabled Adults as of January 1, 2014*, KAISER FAMILY FOUND. (Jan. 13, 2014), <http://kff.org/medicaid/fact-sheet/where-are-states-today-medicaid-and-chip>.

243. Cf. Beverly Leopold McDonald & Rita Diehl, *Women and Welfare*, 14 CLEARINGHOUSE REV. 1036, 1038 (1981) (explaining that women obtain through social insurance programs what most men obtain through employment).

244. See *id.* (describing programs available to women, and in particular, mothers).

245. See, e.g., Maurice Emsellem et al., *Income Supports Can Dramatically Increase Resources Available for Lower-Income Working Families*, 34 CLEARINGHOUSE REV. 509, 520-25 (2001); Michelle Mitchell, Note, *Gender and Unemployment Insurance: Why Women Receive Unemployment Benefits at Lower Rates than Men and Will Unemployment Insurance Reform Close the Gender Gap?*, 20 TEX. J. WOMEN & L. 55, 64-68 (2010).

246. See, e.g., 42 U.S.C. § 1396a(a)(10)(A)(ii)(V) (2011).

247. See DOROTHY K. NEWMAN ET AL., *PROTEST, POLITICS, AND PROSPERITY: BLACK AMERICANS AND WHITE INSTITUTIONS, 1940-75*, at 76-77 (1978).

248. See, e.g., *Lewis v. Martin*, 397 U.S. 552, 554, 559-60 (1970) (striking down state practices that financially disqualify children whose mothers cohabit with men); *King v.*

can American families moved north to escape Jim Crow, the number and share of people of color receiving AFDC surged.²⁴⁹ This, in turn, led to growing white middle-class hostility to welfare in particular and means-tested programs generally—and added welfare receipt to the list of grievances traditionalist whites lodged against African Americans.²⁵⁰

The distinctions among the tiers have remained robust over time. To be sure, some top-tier programs provide benefits under redistributive formulas. Some agencies, including the Social Security Administration (SSA), the Centers for Medicare and Medicaid Services, and the Department of Veterans Affairs, administer programs on both the first and the second tiers. But only a handful of programs have both universal and means-tested components: school meals, the new Medicare prescription drug benefit, and arguably the long-term care component of Medicaid.²⁵¹

Finally, lest anyone believe that gaps in the safety net were the result of oversights or the sluggishness of step-at-a-time elaboration of the safety net, the 1996 welfare law²⁵² reinvigorated the third-tier response, rejecting public responsibility for large new segments of the chronic and acute poor. As a result, as poverty has skyrocketed in the current economic slump, the number of poor families receiving cash assistance has remained largely unchanged—with millions of poor families receiving no cash aid at all.²⁵³

3. Program design

This strict separation into tiers has had far broader consequences than the programs' bare architectures. Both their means of determining eligibility for benefits and their administrative apparatuses differ sharply from one another.

Smith, 392 U.S. 309, 333-34 (1968) (denying states' authority to add new conditions of moral eligibility).

249. PATTERSON, *supra* note 223, at 166-73; cf. PIVEN & CLOWARD, *supra* note 229, at 189-92.

250. See LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* 28-33 (1992).

251. Although eligibility for long-term care assistance is nominally subject to the Medicaid means test, Congress in the 1980s modified that test for middle-income nursing home patients to allow them to qualify. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 303, 102 Stat. 683, 754-64 (codified as amended at 42 U.S.C. § 1396r-5).

252. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S. Code).

253. See DANILO TRISI & LADONNA PAVETTI, CTR. ON BUDGET & POLICY PRIORITIES, TANF WEAKENING AS A SAFETY NET FOR POOR FAMILIES 1 (2012), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=3700>.

a. *Eligibility determination*

Consistent with their economic theory of the problems they are addressing, first-tier social insurance programs base eligibility on financial formulas. Criticisms of these formulas primarily go to their highly aggregative nature and their failure to take more of claimants' circumstances into account.²⁵⁴

Second-tier programs, by contrast, typically have much more intrusive eligibility criteria and application procedures, with tolerance of these methods being the price beneficiaries must pay to receive aid.²⁵⁵ This can be a deliberate method for controlling caseloads.²⁵⁶ Indeed, many of the most important second-tier programs have explicit caps on the number of participants, commonly set at a tiny fraction of those eligible.²⁵⁷ Rationing this artificially constrained supply of benefits leads to inefficiencies, but it also provides further opportunities to assess claimants' moral character.²⁵⁸

Efforts to shift second-tier programs from a social to an economic vision of poverty have been slow and halting. The establishment of coherent financial eligibility requirements, which most states had done by the 1950s, was a nod toward the economic approach of social insurance. On the other hand, the longstanding view that poverty was a social pathology from which low-income people need to be cured resulted in requirements of intense scrutiny prior to dispensing any aid. Although the Supreme Court declared in 1941 that "the theory of the Elizabethan poor laws no longer fits the facts" and "[p]overty and immorality are not synonymous,"²⁵⁹ more than a quarter century passed before the Court would intervene in the operation of means-tested programs. Its recognition of public benefits as a new form of property proved only modestly effective at providing security to vulnerable recipients.²⁶⁰

254. See, e.g., *Weinberger v. Salfi*, 422 U.S. 749, 767-68 (1975) (rejecting challenge to irrebuttable presumption that marriages occurring shortly before death were shams not entitling the surviving spouse to Social Security on the decedent's account).

255. One former senior HHS official sadly described its two large health care programs to the author as "Med-I-Care and Med-I-Don't-Care." David A. Super, Op-Ed., *An Error Message for the Poor*, N.Y. TIMES (Jan. 3, 2014), <http://www.nytimes.com/2014/01/04/opinion/an-error-message-for-the-poor.html>.

256. See David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CALIF. L. REV. 1051, 1103-04 (2005).

257. See, e.g., *Alexander v. Polk*, 750 F.2d 250 (3d Cir. 1984) (scrutinizing procedures for allocating scarce slots in the Special Supplemental Nutrition Program for Women, Infants, and Children).

258. See David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 672-77 (2004).

259. *Edwards v. California*, 314 U.S. 160, 174, 177 (1941).

260. See David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1773 (2013).

By the early 1970s, the supervisory apparatus of means-tested programs faced criticism from all sides. Claimants' advocates resented its disregard of claimants' privacy and suspected it continued to obscure racial discrimination and other illegitimate judgments.²⁶¹ Conservatives believed that social workers invariably sympathized with claimants and hence were unreliable stewards of scarce public funds.²⁶² And states resented the cost of hiring enough professionals to supervise their much-increased caseloads.²⁶³ President Nixon perceived an opportunity to shrink the gap between first-tier, social insurance programs and second-tier, means-tested programs, proposing sweeping economic-oriented reforms to the latter. His proposals for food assistance, housing subsidies, and assistance to the low-income elderly and persons with disabilities prevailed, but traditionalist opposition to reducing the individual supervision of low-income people—along with a lack of political realism on the Left, which insisted on an unambiguous shift to the economic model—doomed his Family Assistance Plan to reform AFDC.²⁶⁴

Absent any substantive change, the criticism of social work in means-tested programs led to the replacement of professionals with minimally trained "income maintenance" workers.²⁶⁵ These employees, many with only high school educations, were expected to implement detailed, supposedly nondiscretionary policy rather than to exercise subjective judgments about claimants. As programs evolved to reflect a political climate more inclined to moralize against low-income people,²⁶⁶ these undertrained workers were making increasingly complex, subjective judgments.²⁶⁷

The design of financial eligibility criteria in second-tier programs also reflects the programs' ambivalence about the nature of need. A great many factors affect the extent of an impoverished individual's or family's need for aid. Certainly the number of people involved and the amount of available income are two important factors. But many others, including resources and possible aid from relatives and other public programs, have been considered in some

261. See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1137 (2000).

262. See *id.* at 1138.

263. See *id.*

264. See PETER EDELMAN, *SEARCHING FOR AMERICA'S HEART: RFK AND THE RENEWAL OF HOPE* 108-12 (2001).

265. Diller, *supra* note 261, at 1161 & n.203.

266. See David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2060-61 (2004).

267. David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 838-39 (2004).

programs²⁶⁸—even if ability to access those hypothetical sources of aid is highly dubious. Programs’ reliance on these social factors of eligibility has varied considerably over time.

The most significant shift toward a more economic approach in second-tier programs was the establishment of the Earned Income Tax Credit (EITC) in 1975²⁶⁹ and its subsequent expansions in later years.²⁷⁰ The EITC emulated first-tier programs in sharply restricting the facts relevant to eligibility determinations—chiefly just annual income, the source of that income, and responsibility for supporting minor children—and relied on the IRS’s existing administrative structure rather than building one of its own. Lodged within the tax code, it achieved some of the obscurity that long had politically benefited aid to more affluent people.²⁷¹

b. *Program administration*

The dichotomy between the aggregative, efficiency-minded social insurance system and the individualized social supervision of welfare programs extends to program administration. The myth of self-sufficiency of first-tier programs, along with the appeal of the populations they serve, has resulted in considerable political strength, low stigma for beneficiaries, and generally respectful, deferential program administration. The top level of the social insurance system rapidly evolved into the impersonal bureaucratic structure of a financial institution. For decades, the Social Security Administration (SSA) has had relatively few local offices, which are staffed by “claims representatives” and “service representatives” who respond to specific requests for assistance without having any ongoing responsibilities for particular claimants.²⁷² Decades ago, the SSA established toll-free numbers and strongly encouraged claimants to interact with it remotely; the Reagan Administration even shrank

268. See, e.g., *Medora v. Colautti*, 602 F.2d 1149 (3d Cir. 1979) (analyzing the requirement that applicants for general assistance first exhaust other possible public benefit programs).

269. Act of Mar. 29, 1975, Pub. L. No. 94-12, § 204, 89 Stat. 26, 30-32 (codified as amended at I.R.C. § 32 (2012)).

270. See, e.g., Tax Reform Act of 1986, Pub. L. No. 99-514, § 111, 100 Stat. 2085, 2107-08 (amending I.R.C. § 32).

271. See CONG. BUDGET OFFICE, *supra* note 239, at 16 tbl.1-3 (projecting EITC spending to exceed any other income-security program once recession-induced bulges in SNAP and UI benefits subside).

272. See *Jobs with Social Security*, SOCIAL SECURITY, <http://www.ssa.gov/ny/jobs-general.htm> (last visited Apr. 1, 2014).

its front-line staff by one-third.²⁷³ The SSA contracts out much of its disability determination work to state agencies to reduce costs. Medicare went a step further and privatized much of its claims management, eschewing local offices altogether.²⁷⁴

By contrast, means-tested programs' localized history, and their emphases on interacting with individuals, caused them to have numerous local offices, to assign specific eligibility workers to each family, and to require frequent interviews as a condition of receiving benefits.²⁷⁵ These programs' administrative regulations speak explicitly in social terms, describing "cooperation,"²⁷⁶ "encourage[ment],"²⁷⁷ the proper method for "talking with" employers and landlords,²⁷⁸ home visits,²⁷⁹ and assessing fault when the interaction goes awry.²⁸⁰

Since the 1980s, some means-tested programs have modernized their administration in limited ways. Medicaid, a means-tested program serving large numbers of middle-class people, dispensed with the interview requirement in many states.²⁸¹ It also relied on database matching in lieu of requiring claimants to prove their eligibility with documentation.²⁸² More recently, as the persistent fiscal crisis has shrunk state workforces at the same time as record numbers of people are seeking Medicaid and SNAP, states have closed offices, reduced interview requirements, and expanded their reliance on database matching and remote service. Texas and Indiana both privatized their administration of means-tested programs, resulting in large numbers of eligible households having benefits denied or terminated due to administrative errors.²⁸³ The paradigm of means-tested programs, however, has remained the

273. David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 444 n.206 (2008).

274. See PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 374-75 (1982).

275. See, e.g., 7 U.S.C. § 2020(e)(2) (1994) (amended 1996) (requiring in-person interviews each time a household's application to receive food stamps is approved or renewed); 7 C.F.R. § 273.2(e)(1) (2013) (requiring interviews prior to approval to receive SNAP benefits and at least annually thereafter).

276. 7 C.F.R. § 273.2(d).

277. *Id.* § 273.2(c)(2)(i).

278. *Id.* § 273.2(f)(4)(ii).

279. *Id.* § 273.2(f)(4)(iii).

280. *Id.* § 273.2(h)(1).

281. See DONNA COHEN ROSS & LAURA COX, KAISER COMM'N ON MEDICAID & THE UNINSURED, *MAKING IT SIMPLE: MEDICAID FOR CHILDREN AND CHIP INCOME ELIGIBILITY GUIDELINES AND ENROLLMENT PROCEDURES*, at ii (2000), available at <http://kaiserfamilyfoundation.files.wordpress.com/2000/09/2166.pdf>.

282. See *id.* at 15.

283. See Matea Gold et al., *Indiana's Bumpy Road to Privatization*, L.A. TIMES (June 24, 2011), <http://articles.latimes.com/2011/jun/24/nation/la-na-indiana-privatize-20110624>;

local office, with eligibility workers exercising some degree of supervision over particular recipients.²⁸⁴

4. *The ACA's transformation of social insurance*

The ACA has provided an obvious vehicle for subverting this order.²⁸⁵ To be sure, it would leave the poorest families in Medicaid.²⁸⁶ Nonetheless, most of those newly insured would participate through the same exchanges that provide middle- and upper-income people non-means-tested assistance purchasing insurance. Decisions allowing erosion in the standards for health plans for low-income people purchasing coverage through the exchanges would also affect more politically powerful middle- and upper-income people buying similar plans. And higher-income people in universal programs would experience some significant means testing.²⁸⁷ Although imperfect, this partial merger of the first two tiers of public response to need would be transformative. If the ACA survives, this suggests that the New Deal's inefficient segregation between universal and means-tested programs will no longer be part of the constitution of our safety net.

Perhaps even more transformative is the ACA's general rejection of the third tier—denial of public involvement—as a legitimate response to clear need. Apart from undocumented immigrants, the ACA recognizes all people's need for health care—and on surprisingly equal terms. Proponents also argue that lack of insurance is an economic problem for the nation as a whole, requiring costly administrative overhead to separate out costs and leading to inefficient cost shifting.²⁸⁸ This universality and the harm being uninsured causes

Judith Havemann, *Welfare Reform Incorporated: Social Policy Going Private*, WASH. POST (Mar. 7, 1997), <http://www.washingtonpost.com/wp-srv/politics/special/welfare/stories/wf030797.htm>.

284. See David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1423-28 (2011) (analyzing the psychological roots of our collective attachment to administrative discretion).

285. See ESKRIDGE & FEREJOHN, *supra* note 11, at 197 (describing how national health insurance came close to being included in the original Social Security Act or its early amendments).

286. MacGillis et al., *supra* note 68, at 108.

287. *Id.* at 119-20. A modest degree of means testing entered Medicare with the prescription drug benefit enacted in the prior decade, but the ACA entrenches this policy by bringing it to a core social insurance program.

288. See Neil S. Siegel, *Free Riding on Benevolence: Collective Action and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. 29, 62-63 (2012).

people of all ages are central to its supporters' arguments.²⁸⁹ Indeed, defying custom, the ACA gives the federal government primary fiscal responsibility for the least politically attractive group—childless adults—and leave states sharing more substantially in the costs of relatively attractive children, seniors, and people with disabilities.²⁹⁰ The ACA's survival would refocus future social welfare debates on which *needs* the safety net will address rather than which *people* it will recognize.

On the other hand, the ACA's demise would be an enormous triumph for the third-tier response—or nonresponse—to human needs. If our nation is willing to abandon legislation providing as important a service as health care to tens of millions of people,²⁹¹ a denial of social responsibility will remain a politically credible response to human needs. Exceptions, indeed large exceptions, will remain: programs will not dissolve all at once. But hopes will evaporate for expanding the first tier to relieve individual hardship and to reduce the second tier's role. And those seeking to preserve or expand second-tier programs will need to expend considerable political capital arguing that those programs should exist at all.

The ACA also makes fundamental changes in how this country determines need in means-tested programs. In particular, it makes a dramatic movement away from determinations of need on a month-by-month basis and toward annualized calculations. It represents the triumph of the annualized, efficiency-oriented accountancy model of the EITC over the monthly, individualized, social work model of welfare programs. This shift has costs for low-income people. The EITC and related tax provisions have based eligibility on annual need; although the funds they provide have certainly been useful to low-income beneficiaries, they are ill designed to meet the day-to-day needs of low-income people. Indeed, we may already have too large a proportion of our means-tested benefits provided through programs based on annual need.²⁹² Annualizing need imposes particular difficulties on the large fraction of low-income families

289. Eugene Robinson, Op-Ed., *Behind the Rage, a Cold Reality*, WASH. POST (Aug. 11, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/10/AR2009081002455.html>.

290. See Super, *supra* note 158, at 2565-66 (describing the opposite division of responsibility between federal and state governments in existing safety net programs).

291. See Jacob Sullum, *Idea of "Right" to Health Care Is Wrong*, CHI. SUN-TIMES, Dec. 24, 2009, at 14.

292. See Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 579-84 (1995) (describing mismatch between families' need and annual measures of income).

whose income fluctuates over the course of a year.²⁹³ Particularly after the administration twice agreed to amendments to the ACA in 2011 to sharply increase the severity of the clawback of monthly subsidies exceeding what a family qualifies to receive on an annualized basis, families losing employment mid-year may be unable to afford health coverage: although they lack the current funds to pay premiums, their income earlier in the year will disqualify them from receiving sufficient subsidies.²⁹⁴

Finally, the ACA's administrative structure makes a sharp break from the New Deal tradition of means-tested programs. Its subsidies for low-income people's health insurance premiums and cost-sharing expenses, the largest new means-tested program established in decades, are to be administered by insurance exchanges whose only public presence is likely to be a website. Subsidy decisions will largely be automated; to the extent human interaction is required, it will come from anonymous functionaries having no direct contact with claimants. A subsequent year-end reconciliation of subsidies and income will be handled through the tax system, again automated or handled by anonymous IRS agents far removed from claimants. Not only does the subsidy system lack rules for supervising individual claimants, but its administrative structure makes doing so impossible.²⁹⁵

C. *Health Care Reform and Principles of Taxation*

Quite apart from its practical importance in funding government, this country long has seen its taxation system as defining our national identity.²⁹⁶ The

293. See Lily L. Batchelder, *Taxing the Poor: Income Averaging Reconsidered*, 40 HARV. J. ON LEGIS. 395, 396 (2003) (finding that poor people pay more taxes than their average incomes would dictate because of the tax code's treatment of their fluctuating income).

294. See JUDITH SOLOMON & ROBERT GREENSTEIN, CTR. ON BUDGET & POLICY PRIORITIES, PROVISION IN HOUSE REPUBLICAN PAYROLL TAX BILL WOULD CAUSE 170,000 PEOPLE TO FORGO HEALTH COVERAGE AND COULD JEOPARDIZE HEALTH REFORM (2011), available at <http://www.cbpp.org/files/12-12-11health2.pdf>.

295. See Sheryl Gay Stolberg & Susanne Craig, *Only 106,000 Pick Health Insurance Plans in First Month*, N.Y. TIMES (Nov. 13, 2013), <http://www.nytimes.com/2013/11/14/us/health-law-enrollment-figures-far-lower-than-initial-estimates.html> (describing the system's highly automated, deindividualized structure).

296. See, e.g., JEFFERY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM 6 (1987) (quoting William Jennings Bryan as calling taxation "a badge of freedom"); STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 20-22 (1999) (finding that effective taxation is a precondition to the effectiveness of any individual rights).

Supreme Court's rejection of income taxation under the original Constitution²⁹⁷ is among the small handful of decisions *We the People* reversed under Article V.²⁹⁸ Taxation therefore is a natural subject for popular constitutionalism. Moreover, enduring, difficult-to-change rules governing the tax system's structure can reduce the inefficiencies resulting from rent-seeking political behavior.²⁹⁹ The appropriate level of taxation long has been, and will remain, a hotly contested political issue, but those debates do not purport to yield conclusions of fundamental law. By contrast, the legitimate scope of the taxing power has been a persistent constitutional concern.

Although other New Deal initiatives receive far more attention, its tax policy was among its most transformative. With today's Internal Revenue Code and the plethora of administrative interpretations seen as icons of technocratic governance and interest group liberalism, it is easy to attribute that model to the New Deal. In fact, however, the New Deal's tax policy was strikingly populist and hostile to technocratic policymaking. The Social Security Act of 1935 expanded the reach of income taxation from the elite to the great majority of workers and sought legitimacy through simplicity and formal equality.

This Subpart explores how the ACA undercuts the simplifying values in taxation that the New Deal honored—even as it was raising revenues to support a greatly expanded federal government. This traditionalist view made a powerful effort to reassert itself through the bipartisan Tax Reform Act of 1986's effort to purge the Internal Revenue Code of covert economic regulatory provisions and the proceeds of interest group liberalism. Although many rent-seeking interest groups have resisted these principles over the past quarter century, the New Deal's approach to the legitimate structure of the tax code has persisted and seems likely to continue to do so absent clear repudiation by *We the People*. The ACA's eventual victory would likely snuff out the traditionalist vision of a "clean" tax code; its demise would discourage the Code's future use for non-revenue-related purposes. Here again, the ACA's survival will favor the large, the efficient, and the technocratic;³⁰⁰ its failure will preserve the power of the local, the relational, and the moralistic.

297. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 637 (1895), *superseded by constitutional amendment*, U.S. CONST. amend. XVI.

298. U.S. CONST. amend. XVI.

299. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 77 (1962).

300. Cf. ESKRIDGE & FEREJOHN, *supra* note 11, at 191 (describing President Roosevelt's enthusiasm for efficiency and other technocratic values).

1. *The New Deal's populist revenues policy*

The tax system enacted in the wake of the Sixteenth Amendment focused overwhelmingly on elites: various corporate income taxes and a personal income tax that reached only the richest individuals.³⁰¹ The Revenue Act of 1932 extracted large sums out of a severely ailing economy, but it did not change the underlying structure. Further revenues were required, however, to expand the federal government's activities and in particular to provide a robust system of social insurance. Wealth was sufficiently concentrated to allow a further deepening of the existing revenue structure, at least in the near term.

The Social Security Act of 1935, however, established the principle of broad, individual participation in a system of taxing income. In so doing, it fundamentally changed the theory of justice underlying the tax system. The payroll tax was promoted and understood as a rite of membership in society, something that (almost) all working people paid to secure a benefit that (almost) all working people could enjoy. President Roosevelt sought to ease acceptance of this large increase in federal revenues by making it look more like a purchase than a tax.³⁰²

Unlike the income tax systems of the time, it prized simplicity and transparency over all else: no deductions, no complex accounting rules, and no preferences of any kind for wages up to the covered limit. In the aggregate, the payroll tax was regressive: it did not apply to higher amounts of wages or to any unearned income, which is disproportionately received by the affluent.³⁰³ Accordingly, sophisticated elite opinion favored a progressive income tax, then and now.³⁰⁴ By contrast, the payroll tax's claim of justice applied on the individual level and appealed to those suspicious of economic analyses: each person could be assured that she was being taxed on the same basis as other work-

301. W. Elliot Brownlee, *Wilson and Financing the Modern State: The Revenue Act of 1916*, 129 PROC. AM. PHIL. SOC'Y 173, 175 (1985).

302. See ESKRIDGE & FEREJOHN, *supra* note 11, at 176-77.

303. Affluent recipients of capital income have proven adept at evading even taxes designed to reach them. Henry J. Aaron, *Richer Means Harder to Tax*, in TAX POLICY IN THE TWENTY-FIRST CENTURY 232, 240-43 (Herbert Stein ed., 1988).

304. Joel Slemrod, *Professional Opinions About Tax Policy: 1994 and 1934*, in TAX POLICY IN THE REAL WORLD 435, 435, 448 (Joel Slemrod ed., 1999).

ers.³⁰⁵ Moreover, the earmarking of payroll taxes for Social Security (and later Medicare) provided at least the appearance of restraint.³⁰⁶

The broadening and deepening of the tax system, combined with the New Deal's expansion of the federal government's role in economic management, triggered a debate over the legitimate purposes of tax law. For decades, many had argued that taxation should focus on measuring net income accurately and taxing it accordingly.³⁰⁷ This view would accept policies designed to promote equality and simplify administration, but not those serving nontax purposes.³⁰⁸ Others would go further, arguing that either progressive rates or deductions, exemptions, and credits—essentially, those provisions that distinguish our income tax system from the New Deal's payroll tax—invite political maneuvering that distorts the tax system.³⁰⁹ Since the 1960s, rules reducing tax liability in aid of nontax policies have been described as “tax expenditures,”³¹⁰ although criticism of them,³¹¹ and unsuccessful attempts to purge them,³¹² go back much farther. As a group, they can be attacked by New Deal populists as giveaways to wealthy elites and by libertarians as a form of state planning.³¹³ Both may criticize the insulation against political scrutiny programs enjoy as tax expenditures.³¹⁴

Administrative decisions that superficially resemble tax policy choices but actually serve the same purposes as spending programs result from the “choice of the tax system as the vehicle for providing financial assistance.”³¹⁵ Critics typically assume that tax expenditures are less efficient—more expensive—than spending programs achieving comparable results.³¹⁶ This inefficiency re-

305. Some suggest that the complexity created by tax expenditures increases noncompliance by the affluent, raising equity concerns. When behavioral effects are considered, however, the overall effect is less clear. Louis Kaplow, *How Tax Complexity and Enforcement Affect the Equity and Efficiency of the Income Tax*, in *TAX POLICY IN THE REAL WORLD*, *supra* note 304, at 381, 393.

306. James M. Buchanan, *The Economics of Earmarked Taxes*, 71 J. POL. ECON. 457, 465-67 (1963).

307. See STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* 91 (1985).

308. See *id.* at 97-98.

309. Randall G. Holcombe, *Tax Policy from a Public Choice Perspective*, in *TAX POLICY IN THE REAL WORLD*, *supra* note 304, at 397, 401.

310. SURREY & MCDANIEL, *supra* note 307, at 31.

311. E.g., HENRY C. SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* 108-09 (1938).

312. See BIRNBAUM & MURRAY, *supra* note 296, at 13.

313. *Id.* at 47.

314. SURREY & MCDANIEL, *supra* note 307, at 106-07.

315. *Id.* at 69-70.

316. See *id.* at 70, 82.

sults from tax expenditures subsidizing activities that would have occurred without incentives and from providing subsidies greater than the value of the underlying activity.³¹⁷ Critics also see typical tax expenditures as the culprits in high-income taxpayers' ability to avoid substantial tax liability.³¹⁸

2. *Reviving populism: the Tax Reform Act of 1986*

A principle preventing politicians from granting special favors through the tax code would put the aggregate and long-term good over immediate political exigencies, a classic role for constitutionalism. The Tax Reform Act of 1986 represented a major effort to invoke popular constitutionalism to reinvigorate the New Deal presumption against tax expenditures.³¹⁹ Its core principle was that the tax code should emphasize equality of taxation and should only sparingly be used as a substitute for public spending on behalf of favored causes.³²⁰ Prior attempts to restrict the tax code to rules serving tax purposes had failed quickly,³²¹ perhaps because they sought to serve other, divisive goals rather than focusing on establishing tax relevance as a constitutional principle.³²² This constitutional moment began with repeated signaling from both President Reagan and senior congressional Democrats.³²³ The Reagan Administration followed up with a detailed proposal, setting the initial terms of the debate.³²⁴ This did not initially lead to the kind of broad public engagement necessary for constitutional change,³²⁵ but sweeping, principled arguments about fairness—as well as political arm twisting—soon carried along many previously hesitant legislators.³²⁶ This, in turn, gradually brought along the electorate³²⁷ to the

317. *Id.* at 82-83.

318. *See id.* at 71. Stanley Surrey and Paul McDaniel do note that a small minority of tax expenditures—less than thirteen percent—are progressive. *Id.* at 71-72.

319. Another bipartisan agreement earlier in President Reagan's Administration buttressed the New Deal constitution's preference for earmarking by solving an impending shortage in Social Security funding entirely within the trust fund structure. MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 239-40 (updated ed. 2008).

320. *See* 1 U.S. TREASURY DEP'T, *TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH*, at ii (1984), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/tres84v1All.pdf>.

321. BIRNBAUM & MURRAY, *supra* note 296, at 15-16, 99.

322. *Id.* at 29, 51, 174.

323. *Id.* at 39-41, 73, 94-100.

324. *Id.* at 53-64, 75.

325. *Id.* at 108-10.

326. *Id.* at 174-75.

327. *Id.* at 235, 239.

point that the reform's opponents began seeking additional time to reverse the result.³²⁸

To be sure, the Tax Reform Act left intact many massive tax expenditures having dubious relationships with revenue-raising purposes narrowly construed. Vigorous debates ensued over which provisions should be understood as departures from the core purposes of tax.³²⁹ Indeed, it even initiated some new provisions seeking to advance broader social goals, such as the EITC.³³⁰ The powerful interest groups whose lobbying contributed to the complexity of the code were hardly vanquished.³³¹ Nonetheless, the Act's enactment changed the terms of legitimacy in tax policy discourse. The fact that some, even including its authors, did not immediately conform themselves to the renewed New Deal's constitutional understanding does not mean that that regime had not been reinvested in an important way.

The norm of tax purity, however, has been under considerable pressure since the Tax Reform Act's enactment.³³² The pervasiveness of the tax code has proven tempting to social engineers in each party who seek to carry out new initiatives without bearing the fiscal costs and political risks of establishing new bureaucracies. In addition, presidential candidates building their campaigns around the expansion of this principle through a "flat tax" have fared poorly. In hindsight, the Tax Reform Act's ineffectiveness in entrenching norms of tax purity may have resulted from its failure to establish a strong political precedent of providing alternative, direct subsidies—a politically viable alternative to tax expenditures.³³³

Still, evidence of the ongoing force of this principle in political discourse is amply available. Most recently, the leadership of the President's bipartisan deficit reduction commission felt that this concept had sufficient sway to allow it

328. *Id.* at 277, 281.

329. See, e.g., Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1181-82 (1993) (referencing some of these controversies).

330. See BIRNBAUM & MURRAY, *supra* note 296, at 55 (describing political imperatives to reduce tax burdens on the lowest-income households). But see Alstott, *supra* note 292, at 564-66 (questioning the tax code's efficacy as a vehicle for poverty relief).

331. See Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891, 893 (1987).

332. See, e.g., Daniel S. Goldberg, *Tax Subsidies: One-Time vs. Periodic: An Economic Analysis of the Tax Policy Alternatives*, 49 TAX L. REV. 305, 305-07 (1994) (finding evidence that the Tax Reform Act's simplification was rapidly being reversed); Eduardo Porter, *A Nation of Too Many Tax Breaks*, N.Y. TIMES (Mar. 13, 2012), <http://www.nytimes.com/2012/03/14/business/a-nation-with-too-many-tax-breaks-economic-scene.html> (noting that tax expenditures climbed from 6% of gross domestic product in 1988 to 7.8% in 2003, reversing two-thirds of the Tax Reform Act's simplifications).

333. See SURREY & MCDANIEL, *supra* note 307, at 89.

to depart from its mission to propose rewriting the tax code along the lines of the 1986 Act.³³⁴ Complaints that its proposed rate reductions would lose revenue and hence were inconsistent with its charge failed to gain traction on the commission or in the public debate.

3. *The ACA's repudiation of populist tax purity*

The ACA builds a large and complex health care subsidy system into the tax code, affecting a substantial segment of the American public. It also builds a considerable amount of its regulation of health insurance transactions in the private sector into the code. Crucially, it enforces its individual mandate to purchase insurance through a tax penalty.³³⁵ It makes no attempt to earmark revenues for the new social insurance program it establishes. The ACA also represents a dramatic shift from deductions to refundable credits as a means of delivering tax subsidies.³³⁶ Although many if not most deductions exist to favor some politically or economically appealing activity, they at least have the appearance of being part of the process of accurately measuring income. Credits, by contrast, are indisputably tax preferences and hence overt uses of the code for economic regulation.

The ACA's premium subsidies likely escape some of the classic defects of tax expenditures: relatively few of their recipients would have purchased comparable coverage without the subsidies, and they will not be vehicles for higher-income taxpayers to avoid paying their fair share. On the other hand, implementing these subsidies and coordinating them with other parts of the health care subsidy system surely do "consume a significant part of the time and energy of those involved in tax policy decisions."³³⁷ These subsidies are likely to increase audit costs and to increase the number of taxpayers with net liability that they may have difficulty paying.³³⁸ They also likely will divert a

334. NAT'L COMM'N ON FISCAL RESPONSIBILITY & REFORM, THE MOMENT OF TRUTH 15, 28-34 (2010), available at http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf. Although endorsed by co-chairs Alan Simpson and Erskine Bowles, the proposal received insufficient support to become a recommendation of the commission itself. The proposal also did not specify how the tax code could be rewritten in this manner. *Id.*

335. I.R.C. § 5000A(c) (2012).

336. See Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 24 (2006) (criticizing regressivity of deductions as a means of tax expenditure).

337. SURREY & MCDANIEL, *supra* note 307, at 71.

338. See *id.* at 94-97 (finding the IRS lacking in the capacity to perform these tasks in addition to raising revenues).

significant share of their benefits to intermediaries—tax return preparation services—rather than the activity they seek to subsidize.³³⁹

The ACA also takes to heart Chief Justice Marshall's dictum that "the power to tax involves the power to destroy"³⁴⁰ and seeks to tax into oblivion high-cost, employer-sponsored plans that threaten indirectly to damage the market³⁴¹ and tanning studios that threaten directly to damage consumers' skins.³⁴²

Arguably none of these provisions is qualitatively different from others that have gone before them.³⁴³ The ACA's unusual political salience, however, makes them impossible to dismiss as the result of the political system's modest imperfections in implementing the national constitution. This is all the more so since the Court sustained the individual mandate on these grounds alone. Critics have attacked the ACA's reliance on the tax code, and four Justices derided extending taxation to include such penalties. Republican presidential nominee Mitt Romney conceded that it is a tax but asserts that it is an illegitimate one.³⁴⁴ Finally, the ACA's financing includes over \$700 billion in reductions in Medicare spending, which Republican critics have attacked as violating the principle of earmarking payroll taxes.³⁴⁵

The ACA's survival would imply rejection of those attacks and the New Deal tax constitution that they represent. Judging the fairness of the tax code would depend on distributional tables produced by experts rather than popular-

339. *See id.* at 83-84 (criticizing tax expenditures on this basis). The incidence of the ACA's subsidies likely is complex, with a great deal likely going to large health care companies, relatively affluent doctors, and insurance companies. A direct subsidy program such as Medicaid also benefits providers but may divert few resources because it does not benefit insurers and it can control reimbursement rates more tightly.

340. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

341. I.R.C. § 4980I (2012).

342. *Id.* § 5000B.

343. *See* Richard Rubin, *Doling Out Health Subsidies Could Further Tax IRS*, CQ WKLY. (Oct. 19, 2009), <http://library.cqpress.com/cqweekly/weeklyreport111-000003225319>.

344. *See Romney: Individual Mandate "Is a Tax,"* CBS NEWS (July 4, 2012), <http://www.cbsnews.com/news/romney-individual-mandate-is-a-tax>.

345. COURTNEY COLLINS & ANDREW J. RETTENMAIER, NAT'L CTR. FOR POLICY ANALYSIS, *HOW HEALTH REFORM AFFECTS CURRENT AND FUTURE RETIREES* (2011), *available at* <http://www.ncpa.org/pdfs/st333.pdf>. This principle is exceedingly difficult to administer in practice, particularly because the earmarking is largely a political fiction. No serious observer believes that the exhaustion of dedicated funds would constitute a politically viable excuse for Congress to allow Social Security or Medicare hospitalization benefits to cease. Therefore, the Medicare cuts in the ACA effectively reduced the amount of general funds going into Medicare, arguably reinforcing the principle of earmarking.

ly observable features of the code.³⁴⁶ It would accept that interest group politics would produce specific tax preferences that disadvantage ordinary people without delegitimizing the tax system as a whole if its overall effect is progressive. This view need not regard the Tax Reform Act of 1986 as an outlier or a wrong turn. Instead, it would recognize that collective action problems make removal of even failed or outdated tax preferences difficult under ordinary political conditions. The Tax Reform Act, then, would be understood as a periodic purge that needed to affect many preferences at once to pay for sufficient rate reductions and make the legislation politically viable.³⁴⁷ It would predict occasional similar efforts in the future without expecting them to have lasting, much less constitutional, import. It would dispense with the fiction of earmarked taxes and exhaustible public trust funds, recognizing that programs' budgets depend on their ability to compete in the federal budget as a whole.

The ACA's demise, on the other hand, would still leave a tax code at sharp variance with the 1986 Act. The ACA's defeat seems unlikely to be attributable primarily to its intertwinement with the tax code. Should the ACA fail, therefore, it would postpone the resolution of the attempted constitutional moment on the legitimacy of using the tax code for regulatory purposes not recognized as having a close tie to revenue raising.³⁴⁸

If the ACA's failure occurs in part through Republicans' use of their leverage in budget negotiations, through a Republican's election as President in 2016, or through a Republican takeover of Congress, the constitutional moment on the legitimate uses of the tax code may come relatively soon. Both House Republicans and the Romney-Ryan campaign proposed overhauls of the tax system that claim to emulate the Tax Reform Act of 1986: reducing rates and eliminating tax advantages that serve purposes other than raising revenue.³⁴⁹

346. See R. Glenn Hubbard, *On the Use of "Distributional Tables" in the Tax Policy Process*, in *TAX POLICY IN THE REAL WORLD*, *supra* note 304, at 293, 296-98 (discussing the difficulty of producing such tables).

347. See Stanley L. Winer & Walter Hettich, *What Is Missed if We Leave Out Collective Choice in the Analysis of Taxation*, in *TAX POLICY IN THE REAL WORLD*, *supra* note 304, at 411, 415-16 (finding that many tax expenditures represent political equilibria that ordinarily make them hard to liquidate).

348. This delay may be a relatively short one as Republicans have again made the reduction in tax rates a major part of their agenda, which they assert should be offset with reductions in tax preferences. See Matt Bai, *Obama v. Boehner: Who Killed the Debt Deal?*, N.Y. TIMES MAG. (Mar. 28, 2012) <http://www.nytimes.com/2012/04/01/magazine/obama-vs-boehner-who-killed-the-debt-deal.html>.

349. Lori Montgomery, *Rep. Dave Camp Patiently Pursues Tax Reform*, WASH. POST (July 28, 2012) http://articles.washingtonpost.com/2012-07-28/business/35487579_1_tax-code-tax-system-popular-deductions; see also David Brody, *Paul Ryan Exclusive: Explains Why Romney Campaign Won't Reveal Tax Loopholes*, BRODY FILE (Sept. 16, 2012, 11:34 PM), <http://blogs.cbn.com/thebrodyfile/archive/2012/09/16/paul-ryan-exclusive-explains->

This basic approach has attracted bipartisan engagement in the Senate as well. Proponents' refusal to identify any of the tax preferences they would eliminate raises questions about whether they are prepared to follow President Reagan's model—and highlights the difficulty of such a move. Nonetheless, the essentially identical proposals by the House Republicans and Governor Romney have clearly performed the signaling function of a new constitutional moment. Democrats' choice to question Republicans' sincerity about making up the lost revenue rather than defending the broader use of the tax code—with some influential Senate Democrats joining discussions about how to produce a new tax reform bill on the 1986 model—suggests that the ACA's demise could revive the constitutional endeavor begun in 1985.

D. *Privatization of Public Law*

Several early New Deal initiatives aggressively blurred the public-private line. Private businesspeople were invested with sweeping regulatory power through industry councils to regulate production and marketing. When, however, the Court struck down some of these laws,³⁵⁰ President Roosevelt acquiesced.³⁵¹ Conventional legal thinking at that point recognized a sharp division between public and private functions. Consistent with its practice of avoiding unnecessary challenges to traditional understandings of public law, the New Deal found other ways to accomplish its goals.

A few isolated examples of direct industry participation in federal regulation remain—most prominently, banks' role in selecting policymakers at the Federal Reserve—but this has ceased to be a major point of contention.³⁵² This broad abandonment of direct private control over federal regulation has changed the form of the privatization debate but by no means eliminated it.

why-romney-campaign-wont-reveal-tax.aspx (invoking the 1986 Act as a guide); *Mitt Romney: Rich Taxpayers Will Pay Their Share*, CNN MONEY (Aug. 15, 2012, 5:00 AM ET), <http://finance.fortune.cnn.com/2012/08/15/mitt-romney-interview>.

350. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); see *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down requirement that entire industry conform to terms of union contracts negotiated by mines with two-thirds of industry production).

351. 2 ACKERMAN, *supra* note 18, at 297 (describing President Roosevelt's dismissal of the importance of the Court's delegation doctrine in a subsequent press conference); ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 223-24 (1966) (reporting President Roosevelt's instruction to abandon legislation that would test *Carter Coal*).

352. See *Cospito v. Heckler*, 742 F.2d 72, 90 (3d Cir. 1984) (Becker, J., dissenting) (arguing against reliance on industry accreditation in the distribution of federal funds).

This Subpart explores how the ACA's entrenchment would transform the public-private line in U.S. law. Subpart D.1 describes the principles separating the public from the private that the New Deal left us and subsequent attempts to move those lines. Subpart D.2 then examines how the ACA's entrenchment would enshrine a new, pragmatic understanding of the relationship between government and large private entities. As with the reconceptualization of the tax system discussed above, the ACA here represents less of an innovation than a consolidation—in a very public manner—of trends that had already arisen in elite politics. Unlike each of the other three examples discussed above, however, the ACA decisively turns traditional political alignments on their heads. Democrats, who often raise traditionalist objections to privatization, enacted legislation that opens new frontiers in the area, while Republicans' primary constitutional challenge to the ACA revolved around a criticism of its eschewal of the public tax-and-transfer methodology. The ACA's survival would thoroughly undercut many of the leading critiques of privatization; its demise would likely embolden traditionalist opponents of privatization and undermine economic arguments' effectiveness as bases for separating the public and private spheres.

1. *Post-New Deal tensions surrounding privatization*

Since the New Deal, the maintenance of a clear distinction between public and private affairs has faced four main challenges.³⁵³ Each has its own political, legal, and operational context; not every actor who supports one type of development that blurs the public-private line also supports the others. However, proponents of all of these developments tend to agree that weakening the public-private divide would further the New Deal's pragmatic willingness to discard traditional distinctions to better serve the public good.³⁵⁴

First, business interests can manipulate public policy to advance their interests without playing any formal role in its promulgation. One of the earliest recognitions of this was President Eisenhower's warning about the power of the "unwarranted influence . . . [of] the military industrial complex."³⁵⁵ Over time, scholars drew increasing attention to industries' "capture" of congressional committees and nominally public agencies through constant communications,

353. Other frontiers may open in coming years but are insufficiently developed today to figure directly in a constitutional moment. *See generally* Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1060-88 (2013) (exploring various early privatization initiatives).

354. *See, e.g.*, JOHN D. DONAHUE & RICHARD J. ZECKHAUSER, COLLABORATIVE GOVERNANCE: PRIVATE ROLES FOR PUBLIC GOALS IN TURBULENT TIMES 3-11 (2011).

355. JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 331 (1967).

domination of regulators' access to information, and hiring of former public servants at lucrative salaries.³⁵⁶

Second, as the government's role expanded to include more provision of benefits and services, privatizers sought to narrow the definition of an inherently governmental function and expand delegations to private entities.³⁵⁷ Several of the most important public benefit programs, including Medicare, Medicaid, SNAP, and Section 8, rely overwhelmingly on private providers of particular services. SNAP and Section 8 replaced programs (commodity distribution³⁵⁸ and public housing,³⁵⁹ respectively) that depended on direct governmental provision of services; Medicaid has largely superseded, and become the primary funding source for, publicly provided primary care.³⁶⁰ Over time, private entities won functions with more and more discretionary authority, including sweeping authority to make subjective eligibility and benefit-level decisions in cash assistance and child care programs for low-income families and de facto decisionmaking authority in SNAP and Medicaid in some states.³⁶¹ And when the Bush Administration persuaded Congress to add a new prescription drug benefit to Medicare in 2003,³⁶² the program gave private benefits coordinators sweeping control over the design and administration.³⁶³

Third, government agencies have formed increasingly complex, and often obscure, partnerships with businesses in which both partners are advancing both public and private ends.³⁶⁴ The failed proposals to privatize Social Security would have followed this model: the government would have used its taxing power to secure moneys from wage earners but then turned most of the proceeds over to private investment firms in the name of those wage earners, sub-

356. See, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 85-93 (1969) (describing the process by which industry groups come to dominate the agencies established to regulate them).

357. See Super, *supra* note 273, at 403-05 (distinguishing among the functions that could be privatized in public benefit program delivery).

358. See TRATTNER, *supra* note 152, at 326 (describing how the Agriculture Act of 1949 was replaced by the Food Stamp Act of 1964, which was the precursor to the modern SNAP program).

359. See KATZ, *supra* note 319, at 129-33.

360. Michael S. Sparer, *Safety Net Providers and the New Medicaid: Choices and Challenges*, in *MEDICAID AND DEVOLUTION: A VIEW FROM THE STATES* 154, 156-66 (Frank J. Thompson & John J. DiIulio Jr. eds., 1998).

361. See, e.g., Super, *supra* note 273, at 395-96.

362. See *supra* note 96 and accompanying text.

363. See, e.g., 42 U.S.C. § 1395w-111 (2011).

364. See, e.g., John D. Donahue, *The Race: Can Collaboration Outrun Rivalry Between American Business and Government?*, 70 PUB. ADMIN. REV. (SPECIAL ISSUE) S151, S151-52 (2010).

ject to some government regulation.³⁶⁵ Far more successful have been the federal government's efforts to enlist private industry in wide-ranging domestic surveillance efforts with a combination of special favors and implied threats to withhold regulatory indulgences.³⁶⁶

Finally, private entities can, willingly or otherwise, provide a vehicle for government to convert regulatory power into redistributive power. When establishment or expansion of a public tax-and-transfer system is politically or operationally infeasible, regulators can require private entities to redistribute resources.³⁶⁷ The private actors directly subject to these regimes are typically able to pass much of the burden on to other consumers,³⁶⁸ creating the rough equivalent of a tax on those consumers to fund transfers to the beneficiaries of the regulation. In practice, to secure the regulated entities' acquiescence, regulators often accompany these regimes with additional opportunities to extract rents from their customers, leaving those entities better off than they would have been without the regulation. In exchange for their administration of the redistribution of wealth—and for lowering the public salience of that redistribution—these private intermediaries are handsomely rewarded.

Although some critics respond to these challenges in the same technocratic terms that advocates use to justify privatization³⁶⁹—or simply reject those advocates' definition of the public good³⁷⁰—many also seek to defend a traditional conception of what is governmental for its own sake.³⁷¹ Thus, for example, President Eisenhower warned that the “potential for the disastrous rise of misplaced power exists and will persist” and that “we should take nothing for

365. See HENRY J. AARON & ROBERT D. REISCHAUER, *COUNTDOWN TO REFORM: THE GREAT SOCIAL SECURITY DEBATE* 77 (rev. ed. 2001).

366. Jon Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 904, 913, 926-27 (2008).

367. See generally Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239 (2005) (discussing redistribution through regulatory taxes).

368. See, e.g., David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 451-60 (2011) (tracing the economic incidence of redistribution via private law rules).

369. See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1260 (2003); Super, *supra* note 273, at 413-41 (analyzing the economics of privatizing public assistance programs).

370. See Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 719-24 (2010) (arguing that privatization systematically expands executive power at the expense of the other branches).

371. PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 1-7, 78-80 (2007); Avihay Dorfman & Alon Harel, *The Case Against Privatization*, 41 PHIL. & PUB. AFF. 67, 68 (2013).

granted.”³⁷² Charles Reich finds echoes of feudalism when “sovereign power is shared with large private interests.”³⁷³ More recently, Michael Sandel expresses alarm that market mechanisms have become so dominant in our society and government that they threaten our humanity.³⁷⁴

Privatization agendas have sometimes sought to expand the private role as an end in itself³⁷⁵ and have sometimes been advanced as a way station on the road to total elimination of a governmental activity.³⁷⁶ Rarely before, however, have dramatic *expansions* of the scope of governmental intervention in society been accomplished through an equally dramatic *reduction* in the functions performed directly by the government. If the ACA becomes entrenched, the latter innovation will have constitutional implications just as surely as the former.

2. *The ACA's redrawing of the public-private line*

Amidst all of the disinformation in public discourse about health care reform, the ACA's privatizing impact has gained fairly broad understanding.³⁷⁷ The ACA shifted the public-private balance toward the private sector in all four of the dimensions described above.

First, the ACA's best-understood intervention on behalf of a private industry is its mandate that individuals and businesses purchase health insurance. To be sure, the tax system has frequently rewarded purchases of assets in the private sector—most obviously homes³⁷⁸—and the Court has recognized the so-called individual mandate to purchase health insurance as merely a tax advantage for those that do so.³⁷⁹ Rarely, however, have tax provisions promoting purchases been designed with the intention that almost all taxpayers make those purchases. Federal and state regulators have mandated discrete, well-defined purchases, such as car insurance and seat belts, but not on this scale. Health care reform could have been the health insurance industry's Waterloo; instead, the ACA is its triumph.

372. GALBRAITH, *supra* note 355, at 331 (internal quotation mark omitted).

373. Reich, *supra* note 146, at 770.

374. MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* 8-14 (2012).

375. See CHARLES NOBLE, *WELFARE AS WE KNEW IT: A POLITICAL HISTORY OF THE AMERICAN WELFARE STATE* 140-41 (1997).

376. See Super, *supra* note 273, at 393-400, 462-64 (finding that public-benefit privatization efforts in the 1990s were motivated by a desire to eliminate governmental activity).

377. See MacGillis et al., *supra* note 68, at 73 (noting the persistence of the debate over whether government should provide health care directly or through private parties and stating that the ACA does both).

378. See I.R.C. § 163(h) (2012).

379. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2595-96 (2012).

Second, the ACA provides the vast majority of its coverage expansion through private providers. This choice is quite remarkable. The government already has several health care financing systems with far lower administrative costs than private insurance companies. Rather than providing services and imposing fees directly, however, the ACA requires individuals to purchase health insurance from private companies. It will send subsidies for low- and moderate-income consumers directly to those companies.³⁸⁰

Indeed, not only does the ACA assign most of its *new* beneficiaries to the private sector, it also seeks to facilitate the shifting of a large segment of the low-income population already covered by public programs into private health insurance. The law provides for sweeping waivers of Medicare and Medicaid rules to make the elderly and people with disabilities who are eligible for both programs attractive for private insurance companies to cover.³⁸¹ The extent to which previously public responsibilities are shifted to the private sector appears to be expanding administratively as states leverage their ability to decline the ACA's Medicaid expansion to press HHS for waivers, which channel Medicaid funds through private insurance companies.³⁸²

On the other hand, the ACA also specifically prohibits any departure from prior statutory requirements that most Medicaid eligibility determinations be made by public civil servants.³⁸³ This appears to reflect lobbying by public employees' unions.³⁸⁴ In the ACA's larger scheme, it represents more a specific determination that eligibility determinations are a core public function than a broader limitation on the privatization principle.³⁸⁵

Third, control over the contents of those health insurance policies will be the result of a complex interaction between specific federal regulations, broader federal standards for actuarial values, and decisions by private actors. Benefi-

380. MacGillis et al., *supra* note 68, at 81.

381. 42 U.S.C. § 1396n(h) (2011).

382. See, e.g., Paul Krugman, Op-Ed., *Mooching Off Medicaid*, N.Y. TIMES (Mar. 4, 2013), <http://www.nytimes.com/2013/03/04/opinion/krugman-mooching-off-medicare.html> (criticizing proposal as a wasteful giveaway to health insurer interests); Letter from Cindy Mann, Dir., Ctr. for Medicaid & CHIP Servs., to Justin Senior, Deputy Sec'y of Medicaid, Fla. Agency for Health Care Admin. (Feb. 20, 2013) (on file with author) (indicating willingness to approve such a waiver).

383. 42 U.S.C. § 18083(d)(2)(B); see *id.* § 1396a(a)(4)(A) (requiring merit systems employees to determine eligibility for Medicaid except where certain health care providers are empowered to make temporary determinations).

384. See *Health Care Reform*, AFSCME (2009), <http://www.afscme.org/members/conventions/resolutions-and-amendments/ieb-resolutions/health-care-reform> (threatening to oppose the Senate bill that became the foundation of the ACA).

385. Cf. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1487-92 (2003) (analyzing constitutional implications of eligibility determinations).

ciaries dissatisfied with their coverage will have great difficulty determining the degree to which public and private decisions contributed to their problems.

Finally, the ACA's emphasis on community rating, sharply restricting insurance companies' ability to charge persons likely to need extensive care anything approaching the full cost of that care, is a massive redistribution of wealth from the healthy to the sick. Here again, expanding Medicare would have accomplished this through the tax-and-transfer system,³⁸⁶ but the President and Congress repeatedly rejected proposals to do so. This helped the President achieve the goal he announced early in the ACA's consideration of keeping the legislation's ten-year cost under \$1 billion. The ACA thus followed one of the main rationales for regulatory redistributions—but on a far larger, and more politically salient, scale.

Overall, then, the ACA represents a dramatic departure from past understandings of the public-private line. It responds to persistent complaints about abuses by private health insurance companies by entrenching those companies and expanding their business. This suggests that, particularly in the wake of *Citizens United v. FEC*,³⁸⁷ the public and private sectors are sufficiently intertwined that the former may have to purchase the latter's compliance with new public policies. The federal government will be paying a multibillion-dollar premium to have the ACA administered by private entities. Previously, most arguments for privatization have claimed that it would bring fiscal savings. The ACA implies a strong preference for private-sector administration that may be overcome only for compelling reasons. This presumption led to the privatization of small functions as well as large ones, leaving a public-private line that weaves back and forth between quite similar functions, resulting in a public-private combine that the electorate will have great difficulty disentangling.³⁸⁸ This opacity has allowed the ACA to engage in far greater redistribution than media reports of its cost estimate would suggest. And because the government is so tightly entangled with the health insurance industry, the ACA's success will depend heavily on the industry's success. That, in turn, will give the industry leverage to force even more blurring of the public-private line.³⁸⁹

386. See, e.g., Lisa Dubay et al., *Advancing Toward Universal Coverage: Are States Able to Take the Lead?*, 7 J. HEALTH CARE L. & POL'Y 1, 8 (2004) (discussing single-payer strategies).

387. 558 U.S. 310 (2010).

388. See *Super*, *supra* note 273, at 461 (discussing deficits in democratic accountability in such situations).

389. But cf. Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1197 (2008) (finding privatization's effect on industry lobbying effort ambiguous).

Privatization on this scale certainly has important constitutional implications. The ACA's entrenchment, however, will not rewrite our fundamental understanding of the public-private line as immediately as it will our understandings of federalism, social insurance, and the uses of the tax code. This is because the public debate at the time of the ACA's passage was remarkably confused on the question of privatization.³⁹⁰ Neither side has sought to frame the debate in terms of a broad expansion of private influence in government. Liberals have presumably refrained from doing so because they do not want the ACA to be a precedent for privatization, which they generally oppose. Conservatives, in turn, have sought to obscure the extent of the ACA's reliance on the private sector with persistent rhetoric about a "government takeover."³⁹¹ This presumably reflects a concern that a broader appreciation of the ACA's privatizing character would make the law look more moderate and undermine momentum to destroy it. Most strikingly, the Court's four dissenting Justices made clear that a less privatized approach—raising taxes and spending the money on health care—would have been constitutionally permissible.³⁹² Thus, paradoxically, the ACA's failure would set back the cause of privatization, to which most of its enemies ordinarily pay homage.

The struggle over the ACA nonetheless sets the stage for a future constitutional decision about privatization. In Ackerman's terms, the ACA has served as a "triggering" event for a broad constitutional discussion of the public-private line. That debate seems likely to proceed because both sides in traditional privatization debates badly compromised their prior positions in the struggle over the ACA. The outcome of that debate may well depend on which side concludes first that the ACA's fate is set. If the ACA's pro-privatization opponents concede that it will become entrenched before its anti-privatization supporters believe they can let down their guard, those opponents will be able to cite the ACA in support of other aggressive privatization initiatives that can serve the "proposing" function. If, on the other hand, the ACA's supporters believe it is doomed before its actual collapse, they may begin to blame its privatizing features for whatever implementation problems have alienated the electorate. Conversely, if they become confident in its survival, they may renew in earnest their advocacy for a public option to coordinate coverage or for expanding Medicare, abandoning many of the ACA's privatizing features.

390. See 3 ACKERMAN, *supra* note 75, at 106-11, 287 (arguing that tactical choices made in assembling a majority for a particular decision should not be accorded constitutional weight).

391. A. Barton Hinkle, *Big-Government Ratchet Turns Another Click*, REASON (Aug. 22, 2012), <http://reason.com/archives/2012/08/22/big-government-ratchet-turns-another-cli>.

392. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2647 (2012) (joint dissent).

Although the debate about privatization has advanced less far than those in other aspects of public law, it could ultimately be even more sweeping. Much of the opposition to the ACA has attacked the notion of government assisting people to obtain health coverage through any means. This raises the question of whether the ACA's opponents' future agenda will be privatizing government functions or eliminating them altogether.³⁹³ Critics of privatization long have suggested that the latter was their true goal. Whatever course the erstwhile privatizers decide to pursue, future debates are likely to focus on the defining principles of this country's governance rather than technocratic questions of how most efficiently to operate this or that program. As such, these questions will be far more susceptible to popular constitutionalism.

CONCLUSION

Although we tend to think of legislation as a lower form of enactment, we should remember that this is not always the case. Quia Emptores ended an era, transforming feudalism.³⁹⁴ The Stamp Act brought down an empire.³⁹⁵ The Civil Rights Act of 1964 ensured the fall of a racist regime entrenched for almost a century.

In much the same way, the ACA's survival would sweep away a crucial part of the New Deal's delicate accommodation of both traditionalist and modernizing values. Under the constitution the ACA would bequeath us, formal distinctions in governance roles—between federal and state, between public and private, between taxing, spending, and regulating, and between social insurance and social welfare—would lose their presumptive clout. Each would survive only to the extent that it could be justified in terms of efficiency and rationality.

The practical consequences would not occur immediately; indeed, some remnants of the prior regime would likely linger indefinitely. Many decades separated the Reconstruction Amendments from *Brown v. Board of Education* and its progeny. But if the ACA becomes entrenched, the initiative will pass irreversibly to the forces of modernization, economic efficiency, and technoc-

393. Privatization also often represents efforts by one executive to bind successors, and the legislature, to particular policy choices. Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 845-55 (2011).

394. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 208-09 (2d ed. 1979).

395. EDWARD S. MORGAN & HELEN M. MORGAN, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION 353-70 (1962).

racy in most major areas of national policy. The “public interest state” of which Charles Reich warned will finally have arrived.

The good news is that this will pave the way for constructive solutions to many persistent problems. The FDA will be able to regulate drug compounding³⁹⁶ despite pharmacists’ claims that it will destroy their way of life. We will be able to rely on the federal government’s superior fiscal capacity, rather than just its policy leadership, to make sure schools have enough teachers to leave no child behind. Thoughtfully designed programs like SNAP will be able to replace moralizing and neglect in helping low-income people afford basic necessities.³⁹⁷ We will be able to judge our tax system by its actual progressivity rather than with inapt metaphors to purchases. And we will be able to divide responsibilities between the public and private sectors based on what each one does best.

These opportunities to advance reasoned governance, however, come with a cost. As Reich cautioned,

it is not any particular kind of power, but all kinds of power, that are to be feared. . . . Liberty is more than the right to do what the majority wants, or to do what is “reasonable.” Liberty is the right to defy the majority, and to do what is unreasonable.³⁹⁸

Accordingly, We the People may decide, especially if the ACA’s implementation proves rocky, to reject this transformation of the New Deal constitution. That, by itself, will not remake the constitution, most obviously because the ACA’s opponents offer no single affirmative vision: some want to roll back the New Deal and radically shrink government, some accept the New Deal but resist going further, and some accept aspects of post-New Deal elaboration of national government.³⁹⁹ The ACA’s demise could, however, provide an opening for one or more of the social movements allied against it try to rally the country to constitutional transformation along their own lines.

If the ACA does survive and entrench the post-New Deal constitution, its supporters would be well served by considerable modesty. A great many people who stood to benefit handsomely from the ACA nonetheless joined the opposition, in part due to misinformation but also due to very real concerns about its

396. Denise Grady et al., *Scant Oversight of Drug Maker in Fatal Meningitis Outbreak*, N.Y. TIMES (Oct. 6, 2012), <http://www.nytimes.com/2012/10/07/us/scant-drug-maker-oversight-in-meningitis-outbreak.html>.

397. See David A. Super, *Protecting Civil Rights in the Shadows*, 123 YALE L.J. (forthcoming 2014) (discussing political difficulties of low-income people during periods of low salience).

398. Reich, *supra* note 146, at 774.

399. See, e.g., Matthew Continetti, *Hands Off My Medicare*, WKLY. STANDARD (Aug. 17, 2009, 2:39 PM), http://www.weeklystandard.com/weblogs/TWSFP/2009/08/hands_off_my_medicare_1.asp (defending the ACA’s critics who approve of Medicare).

constitutional consequences. The traditional values that the New Deal constitution carefully preserved were not reliable guardians of individual liberty against bureaucratic abuse. But if the ACA coalition sweeps them away, it should redouble its search for effective responses to capture and corruption, to elites' dominance of the governance agenda and the new language of power, and to the fatalism that is the mortal enemy of true democracy.

