

# Constitutional Uncertainty and the Design of Social Insurance: Reflections on the Obamacare Case

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*Michael J. Graetz\** & *Jerry L. Mashaw\*\**<sup>1</sup>

## I. INTRODUCTION

In 2010, Barack Obama signed the Patient Protection and Affordable Care Act (the ACA), a complex statute of more than nine hundred pages that fulfilled his goal of extending health-insurance coverage to virtually all Americans—an objective that previous U.S. presidents had sought and failed to achieve for a century.<sup>2</sup> This legislation was hotly contested in the Congress, passing with the support of very few Republicans in the Senate and none in the House.

To broaden access to health insurance, the ACA relies primarily on two devices: (1) an expansion to Medicaid—a joint federal-state health-insurance program for the poor and certain other persons with disabilities or specified illnesses—to cover adults with incomes up to 133% of the poverty level, and (2) refundable tax credits for families earning up to 400% of the poverty level to subsidize purchases of private health insurance.<sup>3</sup> The Medicaid expansion includes a federal requirement that states expand their coverage to meet the new, higher income threshold or face the potential withdrawal of all federal Medicaid funds.<sup>4</sup> Private insurers are required to take all applicants, regardless of their health, and are prohibited from increasing premiums based on preexisting medical conditions.<sup>5</sup> The ACA also

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\* Wilbur H. Friedman and Columbia Alumni Professor of Tax Law at Columbia Law School and Justus S. Hotchkiss Professor Emeritus at Yale Law School.

\*\* Sterling Professor of Law at Yale Law School.

<sup>1</sup> This essay is a revised and expanded version of our article (with a similar title) in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013) [hereinafter *THE HEALTH CARE CASE*]. It is largely based on our book *MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE* (1999) [hereinafter *GRAETZ & MASHAW, TRUE SECURITY*]. See also Jerry L. Mashaw, *Legal, Imagined and Real Worlds: Reflections on National Federation of Independent Business v. Sebelius*, 38 *J. HEALTH POL. POL'Y & L.* 255 (2013).

<sup>2</sup> See generally *STUART ALTMAN & DAVID SCHAFTMAN, POWER, POLITICS AND UNIVERSAL HEALTH CARE* (2011); *GRAETZ & MASHAW, TRUE SECURITY*, *supra* note 1, at 128–31 (for a very short history); Karen S. Palmer, Address at the Physicians for a National Health Program (Spring 1999), available at <http://www.pnhp.org/facts/a-brief-history-universal-health-care-efforts-in-the-US> (describing failures since Theodore Roosevelt's presidency).

<sup>3</sup> See Patient Protection and Affordable Care Act, Pub. L. No. 111-48, 124 Stat. 119 (2010).

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

contains an “individual mandate,” which requires adults not covered by government-sponsored or employer-provided health insurance to purchase health-insurance coverage or pay a penalty.<sup>6</sup>

Seven minutes after the President had put down his pen signing the ACA into law, thirteen states filed lawsuits challenging the constitutionality of both the individual mandate and the Medicaid expansion.<sup>7</sup> Another thirteen states and several individuals and organizations, including the National Federation of Independent Businesses (NFIB), soon joined as plaintiffs.<sup>8</sup> After decisions had been rendered by several courts of appeals, the case came to the Supreme Court in an appeal from the decision of the Eleventh Circuit Court of Appeals.<sup>9</sup> The Eleventh Circuit had struck down the individual mandate as exceeding Congress’s powers under the Commerce Clause and failing to qualify as a tax authorized by Congress’s power to tax and spend for the general welfare.<sup>10</sup> That court upheld the Medicaid expansion, rejecting a claim that it was an unconstitutional attempt to coerce states into implementing and helping finance a federal program.<sup>11</sup> The court found that the individual mandate was severable from the rest of the statute, which it upheld.<sup>12</sup> The Fourth, Sixth, and District of Columbia Circuits had reached different conclusions.<sup>13</sup>

The Supreme Court’s decision in *National Federation of Independent Business v. Sebelius* (NFIB)<sup>14</sup>—which it announced on June 28, 2012, the last day of its term—was one of the most eagerly anticipated in the Court’s history. The Court had heard an extraordinary six hours of argument during a three-day period in March 2012, and it had received a record 136 amici

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<sup>6</sup> See *id.*

<sup>7</sup> Robert N. Weiner, *Much Ado: The Potential Impact of the Supreme Court Decision Upholding the Affordable Care Act*, in THE HEALTH CARE CASE, *supra* note 1 (manuscript at 69, 70); Comment, National Federation of Independent Business v. Sebelius: *The Patient Protection and Affordable Care Act*, 126 HARV. L. REV. 72, 73 (2012).

<sup>8</sup> Comment, *supra* note 7, at 73.

<sup>9</sup> See *id.* at 73–75.

<sup>10</sup> See *id.* at 75.

<sup>11</sup> See *id.* at 74–75.

<sup>12</sup> See *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1328 (11th Cir. 2011), *aff’d in part, rev’d in part sub nom*; *Nat’l Fed’n of Indep. Bus. v. Sebelius* (NFIB), 132 S. Ct. 2566 (2012). Other lower courts had also held parts of the ACA to be unconstitutional. See *Goudy-Bachman v. U.S. Dep’t of Health & Human Servs.*, 764 F. Supp. 2d 684 (M.D. Pa. 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010), *rev’d*, 656 F.3d 253 (4th Cir. 2011), *cert. denied*, 133 S. Ct. 59 (2012). Other courts dismissed cases on jurisdictional grounds. *E.g.*, *Baldwin v. Sebelius*, 654 F.3d 877 (9th Cir. 2011); *N.J. Physicians, Inc. v. Obama*, 653 F.3d 234 (3d Cir. 2011); *Bryant v. Holder*, 809 F. Supp. 2d 563 (S.D. Miss. 2011); *Calvey v. Obama*, 792 F. Supp. 2d 1262 (W.D. Okla. 2011); *Peterson v. United States*, 774 F. Supp. 2d 418 (D.N.H. 2011).

<sup>13</sup> *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391 (4th Cir. 2011), *cert. denied*, 133 S. Ct. 60 (2012), *reh’g granted and order vacated*, 133 S. Ct. 679 (2012); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2012); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012).

<sup>14</sup> 132 S. Ct. 2566.

curiae briefs on the case.<sup>15</sup> Unsurprisingly, the Court split on the key issues. Four Justices—Justices Ginsburg, Sotomayor, Breyer, and Kagan—voted to uphold the individual mandate of the ACA as a legitimate exercise of Congress’s power under the Commerce Clause and also its power to tax.<sup>16</sup> Four Justices—Justices Scalia, Thomas, Alito, and Kennedy—would have struck down the individual mandate under the Commerce Clause.<sup>17</sup> They regarded Congress’s taxing power as inapplicable on the ground that Congress failed to label the penalty for individuals who fail to purchase insurance a tax.<sup>18</sup> These four Justices also regarded the Medicaid expansion requirement, with its threat of the withdrawal of federal Medicaid funds, as unconstitutional, and they would have struck down the entire statute.<sup>19</sup>

Chief Justice Roberts concluded that the individual mandate could not be upheld under the Commerce Clause (or the Necessary and Proper Clause to effectuate a statutory scheme that is regulating such commerce) on the ground that these clauses gave Congress the power to “regulate existing commercial activity,” not the power to compel “individuals to become active in commerce.”<sup>20</sup> The Chief Justice, however, voted to uphold the individual mandate and its attendant penalty as a tax within Congress’s taxing power.<sup>21</sup>

Chief Justice Roberts—joined by Justices Breyer and Kagan, as well as Alito, Kennedy, Scalia, and Thomas, making the vote on this issue 7–2—invalidated the ACA’s provisions that provided that states that failed to expand Medicaid could lose all federal Medicaid funding. The federal government can, of course, place “conditions” on funding it provides to the states, but, as the Chief Justice stated, it cannot “conscript state [agencies] into the national bureaucratic army” through coercion.<sup>22</sup> Leaving quite uncertain the line between “conditions” and “coercion,” the Chief Justice wrote, “In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”<sup>23</sup> The Chief Justice, along with Justices Breyer and Kagan, concluded, contrary to the other four Justices voting to invalidate this provision, that this Medicaid provision could be severed from the rest of the ACA, which “need not fall.”<sup>24</sup>

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<sup>15</sup> Greg Stohr, *Record Number of Amicus Briefs Filed in Health Care Cases*, BLOOMBERG NEWS (March 15, 2012, 12:55 PM), <http://go.bloomberg.com/health-care-supreme-court/2012-03-15/record-number-of-amicus-briefs-filed-in-health-care-cases/>.

<sup>16</sup> *NFIB*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>17</sup> *Id.* at 2642 (joint dissent).

<sup>18</sup> *Id.* at 2651.

<sup>19</sup> *Id.* at 2671–77.

<sup>20</sup> *Id.* at 2587 (opinion of Roberts, C.J.).

<sup>21</sup> *Id.* at 2583–84. This did not, however, mean that it was subject to the Anti-Injunction Act’s restrictions on judicial consideration of tax cases.

<sup>22</sup> *Id.* at 2607 (majority opinion).

<sup>23</sup> *Id.* at 2604.

<sup>24</sup> *Id.* at 2608.

When all was said and done, the ACA was essentially saved, and its supporters, who had been holding their breaths awaiting the Court's decision, exhaled a huge sigh of relief. Given the four votes to strike down the entire Act and the fact that five Justices concluded that the ACA exceeded Congress's power under the Commerce and Necessary and Proper Clauses, relief at dodging a bullet is natural. But apprehension is as warranted as relief, given that a majority of the Supreme Court concluded that Congress had violated constitutional limits when it enacted an expansion of health-insurance coverage by relying on an "individual mandate" technique that had been proposed by the Heritage Foundation, a conservative think tank, and supported in the 1990s by a large group of Senate Republicans.<sup>25</sup> Concern seems especially apt here, when, as Gillian Metzger has emphasized, a majority of the Court would have held that Congress had transgressed fundamental constitutional boundaries without offering a clear account of what those boundaries are.<sup>26</sup>

In this essay, we will explore potential implications of the Supreme Court's ACA decision for the future of social-insurance arrangements in the United States, focusing on health insurance, Social Security and other retirement income support, and unemployment insurance. To understand our concerns, we must describe the sometimes conflicting normative commitments and institutional arrangements of our nation's social-insurance programs. Before turning to that, however, let us first offer a confession, an observation, and an echo.

## II. A CONFESSION, AN OBSERVATION, AND AN ECHO

First, the *confession*: we were surprised that a majority of the Supreme Court found that the individual mandate of the Patient Protection and Affordable Care Act exceeded Congress's Commerce Clause powers, including Congress's ability to adopt legislation that is "necessary and proper" to regulate commerce effectively. Writing separately and together, we have argued for mandating—and subsidizing—individual and family health-insurance purchases to prevent the unraveling of private health insurance through risk segmentation.<sup>27</sup> While the form of health insurance we recommended varies from that of the ACA, the individual mandate we proposed (as in the ACA) would be coupled with provisions requiring insurers to take all comers, without regard to any preexisting conditions, and to eschew medical underwriting.

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<sup>25</sup> Michael Cooper, *Conservatives Sowed Idea of Health Care Mandate, Only to Spurn It Later*, N.Y. TIMES, Feb. 15, 2012, at A15.

<sup>26</sup> Gillian Metzger, Comment, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 98 (2012).

<sup>27</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 1–46; Michael J. Graetz, *Universal Health Coverage Without an Employer Mandate*, DOMESTIC AFF., Winter 1993, at 79. For discussion of risk segmentation, see *infra* text between notes 48 and 49.

To be sure, an individual mandate—whether to purchase health or automobile insurance, vaccinate your children before sending them to school, or pay taxes—sometimes involves intrusive enforcement and evasion.<sup>28</sup> But as long as our nation continues to provide emergency medicine to all of its citizens and residents regardless of their ability to pay, prudence requires that all pay a fair share of the costs of their medical care.

The consequences of inaction here are dramatic. Virtually every American will use the health care system at some point, and people who have no health insurance and are unable to pay for their health care services will receive that care anyway. The Solicitor General's assertion that everyone is "active in the market for health care"<sup>29</sup> or "will, at some unknown point in the future, engage in a health care transaction"<sup>30</sup> is incontrovertible (even though five Justices, including the Chief Justice, found it of no moment). This is not true of broccoli, automobiles, or virtually any other product. Health care providers cannot provide their services for free: costs are involved. Those costs must and will be borne by the people who pay for health care services either directly or indirectly through insurance premiums or taxes. A reasonable estimate of the current burden on persons having health insurance of paying for the uncompensated care of the uninsured is roughly \$1000 per year.<sup>31</sup> No one denies that health insurance is interstate commerce. Nor does anyone deny that the cross-subsidies from paying customers to nonpaying customers are very substantial. Universal participation in health insurance is important, as is a broad distribution of the costs and benefits of insuring the populace.

The constitutional question is whether the thing being regulated substantially affects interstate commerce. The Supreme Court has long held that any activity that affects interstate commerce in a substantial way can be regulated by Congress under the commerce power. Hence the Court has famously held that growing wheat or marijuana for home consumption can be regulated as interstate commerce because both might leak into interstate commerce.<sup>32</sup> Moreover, the prospect of such leakage makes controlling growth for home consumption a "necessary and proper" matter for federal regulation in order to effectuate the regulation of those products when in interstate commerce. Hence, under these Supreme Court precedents, an action need neither be in commerce, only possibly substantially affecting it,

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<sup>28</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 178.

<sup>29</sup> Brief for Petitioners (Minimum Coverage Provision) at 50, *NFIB*, 132 S. Ct. 2566 (No. 11-398).

<sup>30</sup> *NFIB*, 132 S. Ct. at 2590 (opinion of Roberts, C.J.) (referring to the Government's argument).

<sup>31</sup> 42 U.S.C. § 18091 (2012) ("Requirement to maintain minimum essential coverage; findings"); *NFIB*, 132 S. Ct. at 2585 (opinion of Roberts, C.J.); *id.* at 2611 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>32</sup> *Wickard v. Filburn*, 317 U.S. 11 (1942) (growing wheat); *Gonzales v. Raich*, 545 U.S. 1 (2005) (growing marijuana).

nor be commerce at all as long as its regulation is necessary and proper to a broader scheme of interstate-commerce regulation.

Even without relying on the characterization of the failure to buy health insurance as a decision to self-insure, failing to buy health insurance clearly does affect interstate commerce. But the Chief Justice accepted the argument that the individual mandate is distinguishable from all previous instances of congressional regulation of interstate commerce on the ground that it regulates “inaction,” not “action.”<sup>33</sup>

The Chief Justice and the four dissenters refused to distinguish the requirement to buy health insurance from a mandate to buy certain vegetables or other products.<sup>34</sup> As Justice Ginsburg’s concurring opinion explains, however, broccoli is not health insurance and inaction in the broccoli market has nothing like the consequences of inaction in the health-insurance market.<sup>35</sup> That is because the health-insurance market is not like the broccoli market or the market for automobiles. We know that virtually every American will use the health care system at some point. We also know that if someone is unable to pay for their health care services and has no health insurance, they will receive health care services anyway. This is not true of broccoli or automobiles. And we know that the costs incurred by health care providers must be borne by the people who are paying for health care services or by tax revenues—and they are. No one denies that health insurance is interstate commerce. And no one can deny that the cross-subsidies of paying customers to non-paying customers are very substantial. The question, remember, is whether the thing that is being regulated substantially affects interstate commerce.<sup>36</sup> Failure to buy health insurance clearly does; that it is in some sense “inaction” rather than “action” should be a distinction without a difference for Commerce Clause analysis. Imagining a Congress mandating Americans to buy broccoli or to buy automobiles is to leave the real world far, far behind.<sup>37</sup>

When we advanced an individual mandate to purchase health insurance in the 1990s and early 2000s, no serious constitutional objection was raised against requiring all citizens and residents to purchase some specified minimum level of health insurance.<sup>38</sup> The individual-mandate idea had been pro-

<sup>33</sup> *NFIB*, 132 S. Ct. at 2587 (opinion of Roberts, C.J.).

<sup>34</sup> *Id.* at 2588–89, 2591.

<sup>35</sup> *Id.* at 2620, 2624–25 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>36</sup> Weiner, *supra* note 7 (manuscript at 75–77).

<sup>37</sup> See *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.).

<sup>38</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 171–81 (proposing a catastrophic policy based on income with an individual mandate); Graetz, *supra* note 27, at 79 (proposing an individual mandate); Charles Fried, *The June Surprises: Balls, Strikes, and the Fog of War*, in THE HEALTH CARE CASE, *supra* note 1 (manuscript at 51, 55) (stating that “until only a couple of years ago,” the mandate was “debated only in policy, not constitutional terms”); Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison, *Introduction*, in THE HEALTH CARE CASE, *supra* note 1 (manuscript at 1, 2) (“[T]he arguments that eventually won a majority of the Court . . . were barely on the radar screen when the legislation was drafted.”).

posed by the Heritage Foundation, supported by dozens of Senate Republicans, and only at the very last minute removed from the final 1992 health-insurance proposals of President George H.W. Bush.<sup>39</sup> Massachusetts enacted such a regime in 2006, and its then-governor, Mitt Romney, subsequently urged it as a model for national legislation.<sup>40</sup> Like virtually everyone else who had thought about it, we believed that the constitutionality of such a mandate had been settled in the legal contests over the New Deal.<sup>41</sup> Indeed, as we discuss further below, one of the objectives of our social insurance analysis and proposals was to liberate state-based unemployment insurance from the archaic structure imposed upon it by long-gone constitutional constraints on the federal government.<sup>42</sup>

Second, a brief *observation*: the Court's Commerce Clause analysis is not our only cause for puzzlement regarding the ACA opinions. Take three prominent examples: (1) Chief Justice Roberts's unnecessary dicta telling us that he would strike down the statute on Commerce Clause grounds in an opinion upholding the law under Congress's taxing powers;<sup>43</sup> (2) the willingness of the four dissenting Justices to abandon the Court's previous jurisprudence and traditions on severability and urge striking down the entire statute, not just the mandate (the only provision that they found constitutionally objectionable), nor just the mandate and its related health-insurance requirements of guaranteed coverage and community rating (as the Government had urged);<sup>44</sup> and (3) the 7–2 vote, holding for the first time that a federal-state cooperative program was so coercive as to be constitutionally infirm and doing so long before any federal administrator had exercised her statutory discretion to cut off any state funds. More on the last point below.

Third, an *echo*, with an elaboration. We would emphasize, as has Charles Fried, that the gravamen of the constitutional complaint against the individual mandate is its supposed intrusion on personal freedom.<sup>45</sup> But, as Fried points out, no litigant ventured that the mandate violated the Liberty Clause of the Fifth Amendment (which, having the identical scope as the Liberty Clause of the Fourteenth, would have made a scheme like that of Massachusetts unconstitutional).<sup>46</sup> When all was said and done, no one at-

<sup>39</sup> Fried, *supra* note 38 (manuscript at 55). Note that one of the authors of this article, Michael J. Graetz, was present for and witnessed the last minute removal of the individual mandate from the George H.W. Bush proposals in 1992.

<sup>40</sup> See Mitt Romney, *Mr. President, What's the Rush?*, USA TODAY, July 30, 2009, at 7A.

<sup>41</sup> See, e.g., Fried, *supra* note 38 (manuscript at 51–53); Metzger, *supra* note 26, at 83–84.

<sup>42</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 69–91, 188–209; *infra* Part IV.C.

<sup>43</sup> For further discussion, see Metzger, *supra* note 26, at 84–85; Weiner, *supra* note 7 (manuscript at 73–74).

<sup>44</sup> See Abbe R. Gluck & Michael J. Graetz, Op-Ed., *The Severability Doctrine*, N.Y. TIMES, March 22, 2012, at A29.

<sup>45</sup> See Fried, *supra* note 38 (manuscript at 52–53).

<sup>46</sup> *Id.*; see also Jamal Green, *The Missing Due Process Argument*, in THE HEALTH CARE CASE, *supra* note 1 (manuscript at 91) (discussing the absence of due process arguments in the ACA case).

tacked a state government's requirement that individuals must purchase health insurance or advanced any constitutional limitation on the states doing so. All we have now is a holding that if the federal government wishes to do the same, it must exercise its powers to tax and spend, not its power to regulate. The ACA case, then, is best understood as a legal attack on the *means*, but not the goals, of the health care legislation, even though, as we shall show, by inhibiting potentially politically achievable means for expanding social insurance, the Court may also have undermined the goals of expanding and modernizing our nation's social-insurance protections.

This emphasis on means rather than ends and on state over federal powers potentially poses significant risks for social insurance. It may imply harmful constraints on the ability of Congress to restructure these programs to better meet the needs of the American people in our twenty-first century economy. Not coincidentally, the new constitutional framework announced in the ACA decision favors those who want to dismantle rather than strengthen our nation's social-insurance protections. We shall explain why this is so with regard to not only health insurance but also unemployment insurance and Social Security. Doing so, however, first requires a little background on U.S. social-insurance protections.

### III. THE INSTITUTIONAL AND NORMATIVE COMPLEXITY OF U.S. SOCIAL INSURANCE

What do we mean by "social insurance"? The critical risk that social insurance addresses is the risk of inadequate labor income. For some, loss of access to labor income may be complete and permanent, such as when death or permanent disability strikes. Others may lose labor income only episodically and temporarily through unemployment or less severe illnesses or injuries. This risk also occurs as part of the normal progress of the life cycle: both youth and old age put one out of the labor market, so social insurance helps to protect against poverty or inadequate income during these years.

"Private insurance" is composed of contracts to pool common risks so that statistically predictable economic losses will be experienced as small subtractions from all insured persons' wealth rather than as calamities for an unfortunate few. "Social insurance" also pools risks, but social insurance depends on government action, directed at a particular class of risks. It is designed to pursue societal purposes that could not or would not be achieved through individual contracting in private insurance markets. Social insurance is not merely a variation on private insurance. It is a different product—a social rather than an individual (or group) contract.

The ability of private markets alone to provide reliable and affordable insurance to protect against these risks to labor income is limited. First, some risks are so difficult to predict that private insurance actuaries cannot make reliable estimates about exposure. Risks also sometimes "co-vary" so that many of the people in the insurance pool will realize the risks all at



once. If such risks cannot be diversified, a private insurance market may not develop at all. This is why unemployment insurance, for example, is always provided publicly. Second, there is a tendency for private insurance markets to suffer from “adverse selection,” which occurs when individuals have better information about their risks than the insurance companies. This leads to an overrepresentation of those with high risks in the insurance pool, and, if insurance companies set their premiums based on average risks, they will not survive. On the other hand, if they assume that all buyers are high-risk, they will set premiums so high that they will price people with low and moderate risks out of the market, thereby greatly limiting insurance coverage. Third, many insurance markets are subject to “moral hazard,” the possibility that insured people will change their behavior in a way that increases their chances of collecting on their insurance. So, the combination of uncertainty, covariance of risks, adverse selection, and moral hazard undermines private insurance markets.<sup>47</sup> This results in the absence of some forms of private insurance altogether and often produces high prices and limited coverage when such insurance is offered. Private insurance companies have created strategies to deal with these problems, but they often don’t succeed.<sup>48</sup>

One common technique is to segment the market. Consider, for example, three groups of people. The first group, L, has low risks, say of high health expenditures; the second, M, has moderate risks; and the third, H, is very risky. (Perhaps folks in H are heavy smokers or have preexisting medical conditions.) Unless the government requires it, a private insurance company will not insure L, M, and H at the same rate. If a company offers to do that, a competing company will soon offer the L and M folks lower rates. So, private insurance markets tend to segment the market into groups with homogeneous risks. Indeed, private insurers often compete with one another through their ability to segment markets and charge rates that differ based on risks. Life insurance and medical underwriting designed to individualize risk assessments are prominent examples.

Sometimes such market segmentation is a good thing. There is no reason for careful and sober drivers to subsidize inattentive and drunk ones. But there is a range of circumstances in which mandatory insurance, with subsidies to those at high risk (through some combination of tax revenues and the premiums of those with lower risks), is sound policy. This is the realm of social insurance. Throughout the world, in various forms, social insurance exists and covers—to a greater or lesser extent—the risk of being out of the labor force for some period of time. Common reasons for such absences include illness, disability, unemployment, and retirement. Universal government-sponsored, -provided, or -financed health insurance is ubiquitous.

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<sup>47</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 16–17.

<sup>48</sup> See *id.* at 16–18. See generally CAROL A. HELMER, REACTIVE RISK AND RATIONAL ACTION: MANAGING MORAL HAZARD IN INSURANCE CONTRACTS (1985).

Social insurance in the United States is a twentieth-century creation, largely a product of the Great Depression.<sup>49</sup> Before that, economic security was mostly a family responsibility. Children worked beside their parents on the farm or in the family's business after school. Family members who became too old to work were cared for by the next generation; the pastoral image was Grandpa at the fireside waiting to greet his hardworking children and grandchildren as they returned from the fields. (Grandmas never retired from housework and other chores.) Family members who became disabled were cared for within the family. Private philanthropy sometimes provided additional assistance.

Throughout the nineteenth century, American governments took responsibility only for their military and civilian employees, who were sometimes protected by federal or state pensions, health insurance, and disability insurance.<sup>50</sup> (Merchant seamen were a special case, having had a compulsory federal health-insurance scheme since the 1790s.<sup>51</sup>) A number of states provided cash assistance for widows and orphans. A few large employers introduced some pension benefits. Anyone else without an income was supported by relatives or was relegated to the "poorhouse."<sup>52</sup>

President Roosevelt's 1935 Committee on Economic Security proposed a comprehensive scheme of social insurance to provide protections against what were then perceived to be life's major threats to family income: loss of parental income support, old age, death of the family breadwinner, disability, illness, and unemployment.<sup>53</sup> But that scheme was never completed. Over the years, Americans—benefited and burdened by the New Deal legacy—have continued to add to, subtract from, modify, and reaffirm a vision that has been all but lost behind the details and political struggles surrounding particular programs.

The basic purpose of social insurance is income security. To realize that purpose, social insurance must cover common risks to income security across the life cycle of individuals. Risks to labor income obviously change over the course of a person's life. Children are not expected to work. Indeed, in early childhood they cannot work, and later they are often limited in the kinds and amount of work they can do. During the working years, the greatest threats to adequate income occur through illness or accident, job loss because of economic dislocation or family responsibilities, and persistent low wages. Retiring from the workforce when one is older, though predictable, resembles leaving the workforce due to disability or unemployment. Retirees are often thought of as having inadequate savings to finance

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<sup>49</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 24–25.

<sup>50</sup> See *id.*

<sup>51</sup> An Act for the Relief of Sick and Disabled Seamen, ch. 77, 1 Stat. 605 (1798) (requiring seamen to pay for a government-administered insurance scheme before setting sail).

<sup>52</sup> GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 24.

<sup>53</sup> See COMM. ON ECON. SEC., REPORT TO THE PRESIDENT (1935), available at <http://www.ssa.gov/history/reports/ces.html>.

old age, but such shortcomings can be due to either myopia about how much savings will be required or low wages over a lifetime—often coupled with family responsibilities—that preclude the ability to save adequately. If it is to fulfill its social purposes effectively, social insurance must be universal in coverage even though it may be provided in different ways through diverse programs. To provide an adequate level of protection, social insurance must recognize and facilitate two different forms of redistribution—redistribution of resources across the lifetime of individuals and redistribution from families that have not incurred the insured risks to those that have.<sup>54</sup> Our nation's current social-insurance arrangements perform better for the elderly than for children or workers.

In the United States, we provide social insurance through a complex mixture of mandatory and voluntary mechanisms, financed through both public and private budgets, and with a dizzying array of functions allocated between the states and the federal government. This institutional complexity is a function not only of historical and political contingencies, including pre–New Deal constitutional doctrine, but also of conflicting normative commitments.<sup>55</sup> Health insurance alone, for example, reflects commitments to the moral worth of every person's life, to individual and collective responsibilities, to a competitive market for health insurance, to consumer choice, to professional integrity, to individual and physician autonomy, and to budgetary constraints.<sup>56</sup>

Let us briefly review the techniques for providing social insurance now prevalent in the United States. We start with public provision: the government can run a social-insurance program and require participation by all workers. This is the current U.S. approach to risks of old age, death (survivorship), disability, and hospital expenses in old age—the familiar Old-Age, Survivors, and Disability Insurance (OASDHI) programs embodied in the Social Security and Medicare Acts. But even these familiar social-insurance programs employ more heterogeneous mechanisms than are generally acknowledged.

Medicare Part A (hospital care) and Part B (physician services) are important examples. Part A is a mandatory program financed through a wage tax on employers and employees. Part B is a voluntary program financed through relatively small premiums coupled with subsidies from general federal revenues—subsidies that are sufficiently large to provide coverage that is virtually universal.<sup>57</sup> Despite the differences in their financial and regula-

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<sup>54</sup> See GRAETZ & MASHAW, *TRUE SECURITY*, *supra* note 1, at 8–10, 25–28.

<sup>55</sup> For a general discussion of these commitments, which include market failure, solidarity, mutual obligation, self-regard, paternalism, and social harmony and productivity, see *id.* at 17–23.

<sup>56</sup> For further discussion of these conflicting normative commitments, see Michael J. Graetz & Jerry L. Mashaw, *Ethics, Institutional Complexity and Health Care Reform*, 10 J. CONTEMP. HEALTH L. & POL'Y 93 (1994).

<sup>57</sup> 42 U.S.C. §§ 1395j–1395w5 (2012). Over time, the Part B subsidies became more and more generous—growing from fifty percent of premiums to seventy-five percent. And shifts

tory arrangements, both programs were designed to ameliorate the threat to family income security that medical costs pose for retirees. Normal insurance market segmentation in the private health-insurance markets would produce high costs and spotty coverage for a group like the elderly that, on average, combines high risks with low incomes.

Alternatively, insurance coverage can be mandated by law. Some current American social-insurance programs use mandates, either to require employer-based coverage or to compel individual participation in a state-run scheme. Workers' compensation offers a ready example of the employer-mandate mode.<sup>58</sup> But mandates can be used as well to require individual purchases of private-insurance protection. Automobile liability insurance is a standard U.S. example. Individual mandates have also been considered and implemented in the pension and health-insurance regimes of other nations.<sup>59</sup> Conservative critics have long urged reforming Social Security pensions by substituting or including mandatory individual accounts that function somewhat like Individual Retirement Accounts (IRAs).<sup>60</sup>

The IRA exemplifies yet another common technique for socializing insurance markets: public subsidies provided through the tax law. Medicare's coverage of physician services (Part B) may be our most conspicuous and successful example of social insurance financed largely by subsidies out of general revenues. But direct subsidies are not the only alternative; much U.S. social-insurance protection is subsidized through targeted tax breaks.<sup>61</sup> Tax subsidies for voluntary employment-based regimes have tended to work rather badly, but they are a way for government to "sponsor" and subsidize social insurance without making the size of "government" appear bigger.<sup>62</sup> The tax subsidies for employment-based health insurance and retirement income are now the federal government's largest "tax expenditures," eclipsing the deductibility of home-mortgage interest.<sup>63</sup>

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in medical treatment modalities over time have made out-of-hospital care both medically more important and financially more burdensome. The current scheme may be outmoded, even after the 2003 addition of a complex drug benefit (Part D)—or poorly designed from the beginning—but the point of this example remains. Public provision of insurance coverage need not be of one type, either in its regulatory or its financial arrangements.

<sup>58</sup> ISHITA SENGUPTA, VIRGINIA RENO & JOHN F. BURTON, JR., *WORKERS' COMPENSATION: BENEFITS, COVERAGE, AND COSTS*, 2005, at 1, 8 (2007), available at [http://www.nasi.org/sites/default/files/research/NASI\\_Workers\\_Comp\\_2005\\_Full\\_Report.pdf](http://www.nasi.org/sites/default/files/research/NASI_Workers_Comp_2005_Full_Report.pdf).

<sup>59</sup> R. Kent Weaver, *The Politics of Pensions: Lessons From Abroad*, in *FRAMING THE SOCIAL SECURITY DEBATE: VALUES, POLITICS, AND ECONOMICS* 183, 184–85, 211–12 (R. Douglas Arnold, Michael J. Graetz & Alicia H. Munnell eds., 1998) (describing mandatory-contribution systems abroad).

<sup>60</sup> See, e.g., *The Future of Social Security for This Generation and the Next: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 105th Cong. 5 (1997) (statement of Stephen Moore, CATO Institute); Steve Forbes, *How to Replace Social Security*, WALL ST. J., Dec. 18, 1996, at A20.

<sup>61</sup> See STAFF OF S. COMM. ON THE BUDGET, 112TH CONG., *TAX EXPENDITURES* 823–1004 (Comm. Print 2012) (listing and describing tax benefits for social insurance).

<sup>62</sup> See GRAETZ & MASHAW, *TRUE SECURITY*, *supra* note 1, at 61–64, 299–303.

<sup>63</sup> See STAFF OF J. COMM. ON TAXATION, 112TH CONG., *ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2011–2015*, at 36, 42 (Comm. Print 2012).

Not all subsidies to social insurance are from general revenues. Cross-subsidies within insurance pools are a common response to undesirable private insurance market segmentation.<sup>64</sup> Higher earners can subsidize lower earners through premium or payment arrangements in virtually any social-insurance scheme, just as high earners subsidize low earners in the current Social Security pension system. Low-risk elders subsidize those with high risks in the Medicare system by paying the same premiums and taxes. Moreover, cross-subsidies are not limited to public insurance programs and taxation. Regulation also plays a role. Mandated “community rating” (which requires similar premiums for diverse populations), as is common in many states and required under the ACA, for example, can force cross-subsidies within private insurance pools that would otherwise generate differential premiums based on differences in risks.

Much social-insurance protection for health coverage during Americans’ working years and for their retirement income is provided through employer-sponsored, tax-favored health-insurance and retirement funds. This voluntary coverage is far from universal, turning on the worker’s connection to a particular employer.<sup>65</sup> The spotty coverage, however, only signals that this kind of social insurance is inadequate; it does not negate its social-insurance nature.

Finally, means-tested, noncontributory programs for dependent children and the aged were a part of the original Social Security Act. Indeed, old-age assistance based on need is Title I of the Social Security Act of 1935, and it enjoyed broad public support when the statute was enacted.<sup>66</sup> Almost a decade before the Social Security Act was amended to include contributory, earnings-related disability insurance, means-tested support for both the blind and the totally and permanently disabled had already been added to the Act.<sup>67</sup> The Earned Income Tax Credit (EITC) has become an increasingly important wage subsidy for low-income families with children.<sup>68</sup> Indeed, what we may now think of as the conventional conception of social insurance through taxing and spending—mandatory, contributory, earnings-related, universal or near universal programs, such as Social Security’s OASDI—accounted for only slightly more than half of all social-insurance transfers in the United States by the end of the twentieth century.<sup>69</sup> The rest

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<sup>64</sup> See discussion of risk segmentation *supra* text between notes 48 and 49.

<sup>65</sup> See EMP. BENEFIT RESEARCH INST., THE U.S. RETIREMENT INCOME SYSTEM 5 fig.5 (2005), available at <http://ebri.org/pdf/publications/facts/0405fact.pdf> (indicating that, as of 1999, only about half of private-sector employees participated in retirement plans); *Which Workers Are Most Likely to Have Employment Based Coverage?*, EMP. BENEFIT RES. INST., <http://www.ebri.org/publications/benfaq/index.cfm?fa=hlthfaq13> (last visited May 12, 2013) (indicating that only fifty percent of service workers have employment-based health coverage).

<sup>66</sup> See ANDREW ACHENBAUM, SOCIAL SECURITY: VISIONS AND REVISIONS 30 (1986).

<sup>67</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 62.

<sup>68</sup> See STAFF OF J. COMM. ON TAXATION, 112TH CONG., *supra* note 63, at 947–53 (noting that the EITC reduced number of people in poverty by 4.9 million in 2009).

<sup>69</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 62–63.

have been provided through a combination of mandates and subsidies, with the subsidies often, but not always, delivered through the tax law.<sup>70</sup>

In summary, social insurance is a distinctive set of programs designed to moderate the risks of current income loss or inadequacy by providing secure cash or near-cash entitlements on the occurrence of specified risks. Although the general risk to be insured is simply the lack of labor income, the ways that risks materialize are diverse and change over the lifetimes of individuals and families. Risks also are often different for each individual and family, and they differ over time as social and economic conditions change.

#### IV. THE PROBLEM OF INSTITUTIONAL DESIGN

This diversity of risks requires multiple techniques for providing social insurance. It is impossible to know yet just how the Court's ACA decision may inhibit the federal government's flexibility in employing these techniques; too much ambiguity remains. But it is not too soon to explore the potential implications for the future of U.S. social insurance of the constitutional limitations embraced by a majority of the Court. We consider three contexts: (1) health insurance, (2) retirement income security, and (3) unemployment insurance.

##### A. *Health Insurance*

In the health arena, our institutional arrangements have long been inadequate.<sup>71</sup> We have, year after year, left forty to fifty million persons uninsured and many millions more with inadequate or insecure coverage. Yet the United States has spent nearly twice the share of its economic output on health as other industrial nations—but with little or nothing in measurably improved health outcomes to show for it.<sup>72</sup>

There was nearly a century of unsuccessful efforts to reform our nation's system of providing health insurance prior to the ACA. Proposals for major change by virtually every President, Democrat or Republican, since FDR were all defeated.<sup>73</sup> Only Lyndon Johnson enjoyed a major success, creating Medicare and Medicaid in 1965,<sup>74</sup> to which George W. Bush managed to add both prescription drug coverage and "Medicare Advantage" on

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<sup>70</sup> *See id.*

<sup>71</sup> Our own social-insurance conception of health insurance is as "catastrophic" loss, defining catastrophic as income-based. *See* GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 171–81.

<sup>72</sup> *Id.* at 127.

<sup>73</sup> *See generally* sources cited *supra* note 2.

<sup>74</sup> *See Medicare Program—General Information*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <http://www.cms.gov/Medicare/Medicare-General-Information/MedicareGenInfo/index.html?redirect=/medicaregeninfo/> (last modified Mar. 24, 2012, 10:35 AM).

a quite different model.<sup>75</sup> As we have said, Part A, hospital care, is mandatory and financed by payroll taxes. Part B, physician services, is voluntary and subsidized from general revenues. Both Parts A and B are administered by the federal government as insurer, although much of the actual claims processing is contracted out to private insurance companies.<sup>76</sup> Part D, prescription drug coverage, is voluntary and subsidized from general revenues but provided by highly regulated private insurers, as is Part C, “Medicare Advantage,” which allows Medicare beneficiaries to opt into a private insurance plan whose premiums are paid by Medicare.

Medicaid is a joint federal-state program for poor persons and certain others who meet specified eligibility criteria.<sup>77</sup> Medicaid coverage is often broader than Medicare, especially for long-term care.<sup>78</sup> Since Medicaid income- and assets-eligibility tests vary among states, there is great interstate variation in who qualifies and for what benefits.<sup>79</sup> Because of its income and resources criteria for coverage, Medicaid coverage frequently creates “income cliffs” for low-income workers. A few more dollars can mean complete loss of coverage, which means that a good job opportunity, if it does not include adequate health insurance, may be too risky to take. Moreover, both eligibility and coverage vary from state to state under general federal criteria.

Workers with health-insurance coverage rely predominantly on voluntary, tax-subsidized employer plans.<sup>80</sup> But these subsidies are distributionally regressive, and small businesses are less likely to provide employment-based coverage.<sup>81</sup>

Importantly, critical examination of the pre-ACA system of American health insurance reveals the limits of private insurance, federal tax subsidies, state financing, and voluntariness when attempting to fulfill the normal social-insurance goals of universality and progressivity. And, of course, complexity reigned long before enactment of the ACA. Moreover, the U.S. health-insurance system has managed to combine large and accelerating medical expenditures with stagnant or decreasing insurance coverage.<sup>82</sup> Despite the major gaps in voluntary, subsidized social insurance, Medicare Part B demonstrates that if *everyone’s* subsidies are large enough and financed by progressive taxation, one can approach universality with some progressivity. Because Medicaid provides coverage for low-income families, the groups

<sup>75</sup> See *Health Plans—General Information*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <http://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/index.html?redirect=/healthplansgeninfo/> (last modified Apr. 25, 2013, 2:20 PM).

<sup>76</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 131.

<sup>77</sup> See *Eligibility*, MEDICAID.GOV, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Eligibility.html> (last visited May 12, 2013).

<sup>78</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 134–35.

<sup>79</sup> See Sara Rosenbaum, *Medicaid’s Next Fifty Years: Aligning an Old Program With the New Normal*, in THE HEALTH CARE CASE, *supra* note 1 (manuscript at 337, 342).

<sup>80</sup> See *Which Workers*, *supra* note 65.

<sup>81</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 141; *Which Workers*, *supra* note 65.

<sup>82</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 127–42.

that have generally been made worst off in our health-insurance system are not the poor, but rather those struggling to become or remain middle class.

The ACA endeavors to increase coverage and restrain medical inflation while maintaining the vast majority of existing institutional arrangements. New and stronger federal regulatory mechanisms were an essential element of cost control in the ACA, and the individual mandate was considered necessary to move toward universal coverage while keeping a marketplace of private insurers.

On the Supreme Court's current view, a so-called "single-payer system," like Medicare for all, would not have raised the constitutional objections lodged against the ACA, even though it would have been a far more aggressive federal intervention in the private marketplace. The conventional wisdom, however, is that no constitutional roadblocks are needed to stymie a single-payer model: insurance-industry political muscle and conservative ideological resistance will do the job nicely. If a single-payer system is politically off the table, a program as comically complex as the ACA begins to look like the only federal path to universal coverage—and maybe cost control.

The Court has never recognized any constitutional difficulty with shifting more health-insurance responsibilities of the federal government to the states or to private actors (including employers) acting voluntarily. Devolving the purchase and financing of health insurance and medical care to the states and private parties is at the core of conservative proposals for health-insurance reform, such as Paul Ryan's premium support plan for individuals to replace Medicare and block grants to the states to replace Medicaid.<sup>83</sup> However, all U.S. experience suggests that shifting more of these responsibilities to the states and private parties will serve to increase the gaps and differences in coverage and reduce or eliminate the redistribution of risks.

At stake in the ACA litigation, then, was an effort to erect a constitutional barrier to what had been only a political challenge. By limiting Congress's means of providing social insurance, through denial of Commerce Clause validity for the individual mandate, the ACA's opponents intended to threaten its core goals, especially that of universal coverage. Moving forward, if Medicare for all is barred politically—and insisting that states expand their Medicaid coverage is unconstitutional "coercion"—any improvements to the ACA's coverage will have to use the taxing and spending power to support greater access to private health insurance. If, however, for political reasons, necessary increases in the tax for failure to purchase insurance cannot be enacted, one wonders whether legislation meant to strengthen the ACA can be crafted that is both effective and meets the fragmented Supreme Court's tests. At some point—perhaps we have already reached it—Americans will have many health-insurance choices and little

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<sup>83</sup> See H. BUDGET COMM., *THE PATH TO PROSPERITY: A BLUEPRINT FOR AMERICAN RENEWAL* 37–56 (2012), available at <http://paulryan.house.gov/uploadedfiles/pathtoprosperity2013.pdf> (setting forth the Fiscal Year 2013 Budget Resolution).



prospect of understanding their entitlements, their options, their costs, and the adequacy of their coverage. Other key pillars of our nation's social-insurance system, such as Social Security and unemployment insurance, face similar challenges in this new constitutional environment.

### B. *Insuring Adequate Retirement Income*

Social Security has long been America's most successful social-insurance program. Ninety-five percent of working Americans are now covered by the retirement, disability, and survivors' benefits of Social Security, a mandatory federal program characterized by a progressive benefit structure financed by payroll taxes. No one doubts the program's success in diminishing poverty among our nation's elderly.<sup>84</sup> But as ongoing demographic changes reduce the ratio of workers to retirees from 3:1 to 2:1, Social Security's financial challenges have recently come to the fore in our national debates. This, in turn, has created an opportunity for some of Social Security's political opponents—2012 vice presidential candidate Paul Ryan and President George W. Bush are notable recent examples—to urge substituting private savings accounts, which is essentially self-protection through thrift, for at least some substantial portion of Social Security's retirement benefits.<sup>85</sup>

Why retirement—a routine and largely predictable event—is not an appropriate occasion for self-protection through savings does not readily lend itself to a short, simple answer. But its essence lies in the uncertainty about future economic conditions, the risk of inflation, and the risk of longevity (in other words, the risk of outliving one's savings).<sup>86</sup> Every Organisation for Economic Co-operation and Development (OECD) nation and many others have instituted some form of social insurance to promote retirement security.<sup>87</sup> In the United States, we have relied on what has long been labeled a “three-legged stool,” composed of (1) the inflation-adjusted, universally available defined benefit of Social Security; (2) voluntary, tax-advantaged, employer-based private pensions (which now largely take the form of defined-contribution plans); and (3) private savings.<sup>88</sup> The fundamental debate of recent decades has been whether and how to change this mix.

Interestingly, while liberals and conservatives have split over the importance of retaining (and perhaps even strengthening) Social Security's provision of retirement income, Democrats and Republicans have agreed on the

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<sup>84</sup> See GRAETZ & MASHAW, *TRUE SECURITY*, *supra* note 1, at 101–02.

<sup>85</sup> See Sahil Kapur, *Ryan: I Still Support Social Security Privatization*, TPMDC (Oct. 11, 2012, 10:35 PM), <http://tpmdc.talkingpointsmemo.com/2012/10/paul-ryan-defends-social-security-privatization.php>; President George W. Bush, State of the Union Address (Feb. 2, 2005).

<sup>86</sup> For more detail, see GRAETZ & MASHAW, *TRUE SECURITY*, *supra* note 1, at 92–111.

<sup>87</sup> See R. Kent Weaver, *supra* note 59, at 185.

<sup>88</sup> Michael J. Graetz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PA. L. REV. 851, 856–58 (1987).

importance of strengthening private savings for retirement.<sup>89</sup> Moving toward universal savings accounts has served as a rallying cry for both the left and the right.<sup>90</sup> The critical distinction has been that Republicans have often proposed such accounts in lieu of at least some portion of current Social Security while Democrats have pushed for mandatory private accounts on top of existing Social Security protections.<sup>91</sup>

In our prior work, we have urged some specific reforms to put Social Security on a sounder financial footing, and in addition, we have proposed additional mandatory personal investment accounts.<sup>92</sup> The purposes of the latter proposal are to increase prefunding of retirement income, allow wider participation in the benefits of capital appreciation, and enhance personal responsibility for retirement.<sup>93</sup> (We also have urged using mandatory personal savings accounts “to reduce the moral hazard of other social insurance protections, such as unemployment insurance”;<sup>94</sup> more about that later.<sup>95</sup>) These “[m]andatory personal accounts would provide for all workers a second tier of retirement savings that could fill gaps in current employer-based pension coverage—coverage that now strongly favors higher-paid, better-educated, and older workers, as well as workers employed by large firms.”<sup>96</sup>

While some other proponents of individual accounts have urged voluntary rather than mandatory accounts, our nation’s experience with IRAs demonstrates that universality can be accomplished only by mandating that each individual have an account.<sup>97</sup> Making voluntary, tax-subsidized IRAs available to bolster savings for retirement—like employer-sponsored retirement plans—has principally benefited higher-income, better-educated workers.<sup>98</sup> Low-wage workers, of course, would have difficulty funding private retirement accounts if payroll deductions, in addition to current Social Security and Medicare taxes, were required. Thus, subsidies for such workers, funded from general tax revenues, would be necessary. As with health insurance, however, even subsidized, voluntary (rather than mandatory) accounts would produce important gaps in both coverage and adequacy for low- and middle-class workers and their families.<sup>99</sup>

<sup>89</sup> See, e.g., NAT’L. ACAD. OF SOC. INS., UNCHARTED WATERS: PAYING BENEFITS FROM INDIVIDUAL ACCOUNTS IN FEDERAL RETIREMENT POLICY 5–7 (Virginia P. Reno et al. eds., 2005), available at [http://www.nasi.org/sites/default/files/research/Uncharted\\_Waters\\_Report.pdf](http://www.nasi.org/sites/default/files/research/Uncharted_Waters_Report.pdf).

<sup>90</sup> See *id.*

<sup>91</sup> See *id.* at i, 5–7 (providing examples of proposals for individual accounts).

<sup>92</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 254–63.

<sup>93</sup> See *id.* at 263–67.

<sup>94</sup> *Id.* at 263.

<sup>95</sup> See *infra* text accompanying note 121.

<sup>96</sup> GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 264.

<sup>97</sup> For a description of tax-favored IRAs and their coverage, see STAFF OF S. COMM. ON THE BUDGET, 112TH CONG., *supra* note 61, at 973–77.

<sup>98</sup> *Id.* at 977 (stating that forty percent of IRA benefits go to taxpayers with incomes above \$200,000).

<sup>99</sup> For evidence that mandated retirement savings are more effective than voluntary, tax-preferred savings, see Raj Chetty et al., Active vs. Passive Decisions and Crowd-Out in Retirement

Along with individual-account proponents on both the political left and right, we also saw no constitutional objections to mandating such accounts before the ACA litigation. But, given what a majority of the Court has said about mandating health-insurance purchases, it is now difficult to see how such accounts could pass constitutional scrutiny under the Commerce Clause. It is significantly more difficult to demonstrate a link between mandatory individual retirement accounts and interstate commerce than between interstate commerce and the purchase of health insurance. In the wake of the Court's health-insurance decision, it seems clear that a majority of the current Court would hold that a federal mandate for personal savings accounts could be accomplished only indirectly through the Taxing and Spending Clause, and not by a straightforward requirement that everyone save a specified amount.<sup>100</sup> The obvious technique, then—ignoring political barriers—would be to impose a tax that is completely forgiven by putting an equivalent amount into a savings account for specified purposes. However, Chief Justice Roberts's opinion, which emphasizes the small size of the ACA penalty (the tax) relative to the cost of purchasing the ACA's mandated health-insurance coverage, raises the possibility that a larger penalty-to-benefit ratio (even if located in the tax code) might be viewed as a substitute for regulation and thus run afoul of the Court's new Commerce Clause limitations.<sup>101</sup>

If, as appears to be the case, a direct mandate of savings for specified purposes is now viewed by the Court as beyond the federal government's regulatory powers, but not as overstepping its taxing and spending powers, it might again seem that only the means, not the ends, of such a policy have been limited by the Court's ACA decision. But the practical and political limitations implied by the Court's decision may, nevertheless, loom large.<sup>102</sup>

It was the allergic reaction of Representatives and Senators to the "T" word that caused the ACA "tax" to be presented as a "penalty." Indeed, since June 6, 1978, when—by a nearly two-to-one margin—the people of California added a measure known as "Proposition 13" to that state's constitution, increasing taxes has become extremely difficult politically.<sup>103</sup> Proposition 13 limited state property taxes and also made it very difficult for the

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ment Savings Accounts: Evidence From Denmark (Dec. 2012) (unpublished manuscript), available at [obs.rc.fas.harvard.edu/chetty/crowdout.pdf](http://obs.rc.fas.harvard.edu/chetty/crowdout.pdf).

<sup>100</sup> This majority would consist of the five Justices who determined that the individual mandate of the ACA was not authorized by the Commerce Clause: Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito.

<sup>101</sup> See *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2600 (2012) (opinion of Roberts, C.J.) ("[W]e need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it.")

<sup>102</sup> Even mandated savings demonstrates the emptiness of the action vs. inaction distinction. Savings for retirement (or a period of unemployment) is a deferral of consumption. Requiring savings can be viewed as equivalent to limiting current consumption. This is certainly a constitutionally appropriate use of the taxing power given the long history of both broad consumption taxes and narrow taxes on the consumption of specific items (such as alcohol, tobacco, and tires).

<sup>103</sup> See ROBERT KUTTNER, *REVOLT OF THE HAVES* 17–20 (1980).

state legislature to raise other taxes.<sup>104</sup> In rejecting calls to be “responsible” by virtually all of their elected representatives, California voters spurred the anti-tax movement, which has since served as the lynchpin of Republican Party politics.<sup>105</sup> Opposition to tax increases has long been the glue that has held the Republican coalition together. Grover Norquist, an outspoken leader of the Republican anti-tax movement, describes taxes as “the central vote-drawing issue.”<sup>106</sup> “You win this issue,” he says, “you win—over time—all issues.”<sup>107</sup>

Even Democrats have been afraid to support new or increased taxes, except on the rich. On April 16, 2008, debating Hillary Clinton in Philadelphia at a crucial moment in their campaign for the Democratic presidential nomination, Barack Obama pledged not to raise taxes on Americans earning less than \$250,000 a year.<sup>108</sup> One of the debate’s moderators, ABC’s George Stephanopoulos, asked if this statement was “an absolute, read-my-lips-pledge.”<sup>109</sup> Through the use of those words, Stephanopoulos was channeling George H.W. Bush’s famous promise to never increase taxes. When Bush accepted the 1988 Republican nomination for President, he suggested, making his biggest political mistake, that the Democratic Congress would push him to sign a tax increase, and his response was: “Read my lips, no new taxes.” Two years after that, facing a pressing need to take control of spiraling budget deficits and a Democratic Congress insisting that both tax increases and spending restraint be part of any budget deal, Bush negotiated and signed the 1990 Budget Reconciliation Act, which curtailed government spending and raised taxes.<sup>110</sup> When it came time for the 1992 presidential election, and in the midst of a weak economy, the voters no longer trusted him and denied him reelection.<sup>111</sup> Many times during the 2008 campaign and while in office, Barack Obama repeated his pledge not to increase taxes for any family with less than a \$250,000 annual income.<sup>112</sup> This, of course, takes off the table any generally applicable tax to promote or create personal savings accounts.

Thus, if individual accounts can be implemented only through taxation, they may be politically impossible. The potential implications of the Court’s decision for modernizing unemployment insurance may be even greater.

<sup>104</sup> For more on the enactment of Proposition 13, see generally *id.*

<sup>105</sup> See MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* 9 (2006); KUTTNER, *supra* note 103, at 19–20.

<sup>106</sup> GRAETZ & SHAPIRO, *supra* note 105, at 9.

<sup>107</sup> *Id.*

<sup>108</sup> MICHAEL J. GRAETZ, *THE END OF ENERGY: THE UNMAKING OF AMERICA’S ENVIRONMENT, SECURITY, AND INDEPENDENCE* 184 (2011).

<sup>109</sup> *Id.*

<sup>110</sup> Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, 1388-573 (codified as amended in scattered sections of 2 U.S.C. and 15 U.S.C. § 1022).

<sup>111</sup> GRAETZ, *supra* note 108, at 184.

<sup>112</sup> *Id.* at 185.

### C. Unemployment Insurance

Unemployment insurance (UI), a centerpiece of the original 1935 Social Security Act, was an essential response to the Great Depression. Ever since, UI has provided crucial support for American workers in recessionary periods. But the recent Great Recession has surely demonstrated what policy analysts have long understood: our system of UI needs to be modernized. Today, unemployment insurance undoubtedly should be a national program. In our nation's economy, with its single currency, macroeconomic shocks affect the entire country. But there are very substantial regional variations in an economic downturn's timing and intensity. These variations argue for including the whole nation in the insurance pool; otherwise regional demands will be greatest when regional capacity is weakest.

But, unemployment insurance, as it was constructed in the 1930s and as it remains today, is a set of diverse state programs for which the federal government offers a peculiar incentive. The unemployment insurance program was structured as a national tax on employers who fund their employees' unemployment benefits, modeled—for reasons of both politics and constitutional law—after a federal-state estate tax arrangement that had been upheld by the pre–New Deal Supreme Court.<sup>113</sup> The federal tax is waived for any employer whose state imposes a similar unemployment tax and establishes an unemployment-insurance benefits program that conforms to the broad contours of the federal statute.<sup>114</sup> That every state would act on this incentive was guaranteed by the unnecessarily high rate set for the federal tax.<sup>115</sup> States can virtually always make their employers, or at least some substantial number of them, better off by having a state system of their own.

As governor of New York, Franklin Roosevelt understood the difficulties with this design. He attempted to obtain agreement among his fellow governors to adopt parallel unemployment insurance systems in every state. As he told them then, unless we all act together, none of us can act at all.<sup>116</sup>

Roosevelt's reasoning was impeccable. Interstate competition makes it problematic for states to act alone to maintain robust programs of unemployment insurance. Such competition continuously tempts individual states to improve their 'business climate' by reducing unemployment insurance taxes for existing and prospective employers. These "races to the bottom" will

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<sup>113</sup> For a description of the development of the UI structure, including the crucial role of Justice Louis Brandeis, see John Fabian Witt, *The Secret History of the Chief Justice's Obama-care Decision*, in *THE HEALTH CARE CASE*, *supra* note 1 (manuscript at 215, 216–18). The UI structure was upheld by a 5–4 vote in *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

<sup>114</sup> See Federal Unemployment Tax Act, 26 U.S.C. §§ 3301–11 (Supp. V 2011).

<sup>115</sup> See generally *Unemployment Insurance Tax Topic*, EMP. & TRAINING ADMIN., <http://workforcesecurity.doleta.gov/unemploy/uitaxtopic.asp> (last updated Dec. 10, 2012). For a comparison of state unemployment laws, see *Comparison of State Unemployment Laws*, EMP. & TRAINING ADMIN., <http://www.unemploymentinsurance.doleta.gov/unemploy/comparison2012.asp> (last updated Sept. 11, 2012).

<sup>116</sup> GRAETZ & MASHAW, *TRUE SECURITY*, *supra* note 1, at 75 (citing DANIEL NELSON, *UNEMPLOYMENT INSURANCE: THE AMERICAN EXPERIENCE 1915–1935* (1969)).

undermine both the economic security and macroeconomic stabilization purposes of unemployment insurance, as well as its effectiveness. As a result, states now have very different unemployment insurance programs.<sup>117</sup> But the general trend over time has been for the states to reduce both coverage and benefits and to fail to respond to changes in labor markets that put more and more low-wage, part-time, and part-year workers outside the system.

The Great Recession and its halting recovery have exposed major flaws in the current unemployment-insurance structure. Benefits paid to unemployed workers are frequently inadequate to keep their families afloat and to facilitate their search for a new job, and many workers find themselves without any coverage at all.<sup>118</sup> And, while state administration of UI may be appropriate, there is little or no case to be made for state financing of a national unemployment program. The current financing structure is a creature of archaic constitutional constraints.

We find nothing in the Court's ACA opinion that would bar federalization of UI financing and eligibility rules. Again, the Court's opinion calls into question only the techniques for doing so. Federal repeal and replacement of existing arrangements is not barred constitutionally, but the political obstacles to such a sweeping change are large.

More incremental and therefore potentially more politically palatable changes, such as eliminating the federal credit for state UI taxes unless specified conditions are met, may, however, now be constitutionally questionable. If a majority of Justices found that such changes crossed the vague barrier against "coercion" of the states—as the Court did with the ACA's changes to Medicaid—then the changes would be barred. The power of the UI program's tax incentive may make it irresistible and, therefore, on at least one reading of the ACA opinion, unconstitutional. Given the ambiguities of the Court's opinions, it is impossible to know for sure.<sup>119</sup>

In addition to its unique structural defects, unemployment insurance confronts especially large problems of moral hazard. People are more likely to stop working when the costs of doing so are cushioned by the replacement of much of their wages. In addition, private insurance companies suffer in economic downturns, just as claims for unemployment insurance rise. As

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<sup>117</sup> *Id.* at 75; see generally *Comparison of State Unemployment Laws*, *supra* note 115.

<sup>118</sup> See STEPHEN A. WOODBURY & MARGARET C. SIMMS, AN AGENDA FOR FUTURE RESEARCH: STRENGTHENING UNEMPLOYMENT INSURANCE FOR THE 21ST CENTURY (Nat'l. Acad. of Soc. Ins., Unemployment Insurance Brief No. 1, 2011), available at [http://www.nasi.org/sites/default/files/research/UI%20Brief%20No%201\[1\].pdf](http://www.nasi.org/sites/default/files/research/UI%20Brief%20No%201[1].pdf); WAYNE VROMAN, UNEMPLOYMENT INSURANCE: PROBLEMS AND PROSPECTS (Nat'l. Acad. of Soc. Ins., Unemployment Insurance Brief No. 2, 2011), available at <http://www.nasi.org/sites/default/files/research/UI%20Brief%20No%202.pdf>.

<sup>119</sup> As Gillian Metzger has emphasized, the Court was willing "to hold that Congress had transgressed fundamental constitutional boundaries without offering a clear account of what those boundaries are. Coercion is notoriously difficult to identify, in large part because no agreement exists on the proper baseline against which to assess if a state funding condition goes too far." Metzger, *supra* note 26, at 98–99.

we have seen recently, insurers can go bankrupt in a deep recession.<sup>120</sup> Hence, even if private insurance could solve the moral-hazard problem, private unemployment insurance would be inadequate. Unsurprisingly, private UI is virtually unknown.

To limit the potential for moral hazard, we have suggested combining expanded unemployment-insurance coverage with a system of individual accounts for each worker.<sup>121</sup> In such a system, each employee would be required to contribute, say, three percent of wages to her account in order to help fund both periods of unemployment and retirement. If a worker experiences a period of compensated unemployment, her account would be reduced by, say, twenty percent of the costs of the unemployment compensation paid. A worker whose account is insufficient to fund the required copayment would face a surcharge on her wages when re-employed, which would be paid until such time as the individual's account had an adequate balance. Upon retirement or death, amounts left in the worker's account would be paid in retirement benefits or as a death benefit to the worker's heirs.

The Supreme Court's ACA decision, however, introduces new constitutional uncertainties into this kind of much-needed modernization of our nation's system of unemployment insurance. Changes such as we have suggested here may remain possible, but must now apparently be grounded in Congress's taxing power—the power Congress is most reluctant to use. It is difficult to know why barring Congress's ability to mandate individual savings accounts is a sensible or appropriate reading of the Constitution. It turns entirely on the majority's unconvincing reliance on the distinction between action and inaction in the ACA case.

## V. CONCLUSION

Health insurance is just one component of a modern system of social insurance—protection of some degree of income security for all Americans in the face of risks common in a dynamic market economy. None of the risks to loss of wage income that we have discussed here—illness, retirement, or unemployment—ever has been or ever will be adequately protected through private insurance alone.<sup>122</sup> Transferring responsibilities from the federal government to state governments, or from governmental risk-spreading arrangements to individuals or families, inevitably weakens these protections. When states are responsible for financing basic social-insurance protections, families' economic security depends on which side of a river

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<sup>120</sup> The recent AIG bailout is the most notorious example. See *The Causes and Effects of the AIG Bailout: Hearing Before the Comm. on Oversight and Gov't Reform*, 110th Cong. (2008).

<sup>121</sup> See GRAETZ & MASHAW, TRUE SECURITY, *supra* note 1, at 263–66.

<sup>122</sup> Both short- and long-term disability constitute additional examples of the kind of risks at stake here, but we do not discuss those issues here.

they call home. State-based financing also introduces the potential for destructive interstate races to the bottom, inevitably creating important gaps and inadequacies of coverage.

A common feature of the ACA and our proposals for improving retirement security and unemployment insurance is their incremental nature: they largely build on existing institutional arrangements rather than starting anew. The ACA and our retirement security proposals, in particular, fall in the middle between the more radical public-provision and privatization proposals advanced in Washington in recent years. It would be ironic indeed if one consequence of the Supreme Court's ACA decision is to rule out of bounds those kinds of incremental changes that are most consonant with the checks and balances at the heart of the democratic structure of our nation's Constitution.

The originalist constitutional vision, embodied in the constitutional challenge to the ACA and found in both Chief Justice Roberts's and the dissenting Justices' opinions, ignores the necessity in today's economy of placing both the power and the responsibility for social insurance with the federal government. It is a mystery to us why, when it comes to social-insurance protections, key politicians seem to believe that state governments always function better than the national government—or, even if not, that our Constitution commits us to a national government of quite limited power and functions in this arena.

To be sure, a majority of the Supreme Court, in refusing to strike down the individual mandate of the ACA, rejected that view. But in doing so, the Court introduced important new limitations and uncertainties into the constitutionally permissible techniques by which the national government can fulfill its social-insurance goals. Unfortunately, the technique permitted by the Court—taxing—is the most politically difficult for Congress to employ.

Make no mistake: the constitutional challenge to the ACA and the complementary political efforts to devolve social-insurance responsibilities to the states and to individuals pose a challenge to the very idea of social insurance. If our individual freedom includes the liberty to opt out of participation in universal risk pooling and to evade the intertemporal and interfamily redistribution that resides at the core of our social-insurance protections, the very idea of providing social insurance is threatened.

Social insurance allows us to thrive in an economic system where only some members of society enjoy financial success because both effort and luck play a crucial role. Social insurance is at its base a deeply conservative idea. By protecting family incomes from common risks in a market economy, it simultaneously provides a critical political protection for that same market economy. Why a conservative Court or conservative politicians should want to make the American social-insurance system less effective or more difficult to reform is a mystery.