

# Democratic Constitutionalism and the Affordable Care Act

REBECCA E. ZIETLOW\*

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## I. INTRODUCTION

During the congressional debate over the 2010 Patient Protection and Affordable Care Act (ACA),<sup>1</sup> opponents of the Act mounted dramatic demonstrations against it. Tea Party activists attacked the ACA as an

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<sup>1</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. References to the ACA in this Article are intended to refer to the ACA as amended by the Reconciliation Act.

unconstitutional infringement on states' rights and individual liberty.<sup>2</sup> The Tea Party's well-publicized engagement in popular constitutionalism—constitutional interpretation outside of the courts<sup>3</sup>—has been celebrated by conservative politicians and scholars of constitutional law<sup>4</sup> and has caused other constitutional scholars to think twice about their own interest in popular constitutionalism.<sup>5</sup> Often lost in this story is the fact that the ACA itself was the product of popular constitutionalism, a victory for political advocates who argued that the right to health care was a fundamental human right that warranted protection by the federal government. During congressional debates over the ACA, members of Congress expressed both sides of the constitutional debate, and the progressive vision prevailed. That Congress enacted the ACA was not a surprise. President Barack Obama made health care reform a central issue during his campaign,<sup>6</sup> and he devoted a large amount of energy and political capital to fulfilling his promise.<sup>7</sup> Polls taken during the debate over the ACA consistently showed strong public support for the federal government to guarantee a right to health care.<sup>8</sup> Throughout the twentieth century, advocates for expanding access to health care engaged in popular constitutionalism and argued that health care was a fundamental human right.<sup>9</sup> When enacting the ACA, congressional supporters of the Act agreed, affirming that the right to

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<sup>2</sup> See Jeffrey Rosen, *Radical Constitutionalism*, N.Y. TIMES, Nov. 28, 2010, § MM (Magazine), at 34.

<sup>3</sup> By “popular constitutionalism” I intend to refer to any form of constitutional interpretation outside of the courts, including arguments made by political officials and political activists. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004).

<sup>4</sup> See, e.g., Randy Barnett, *The Tea Party, the Constitution, and the Repeal Amendment*, 105 NW. U. L. REV. COLLOQUY 281, 281–82 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/10/LRColl2011n10Barnett.pdf>; Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300, 301 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/12/LRColl2011n12Somin.pdf>.

<sup>5</sup> See, e.g., Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. 288, 291 (2011).

<sup>6</sup> See, e.g., Jill Lawrence, *Democrats Duel over Health Care*, USA TODAY, May 30, 2007, at 7A.

<sup>7</sup> Linda Feldmann, *Health Care Bill Victory: Obama's Historic Moment*, CHRISTIAN SCI. MONITOR (March 22, 2010), <http://www.csmonitor.com/USA/Politics/2010/0322/Health-care-bill-victory-Obama-s-historic-moment>.

<sup>8</sup> *CNN/Opinion Research Poll*, OP. RESEARCH CORP., 29 (Feb. 18–19, 2009) [hereinafter CNN Poll], available at <http://i2.cdn.turner.com/cnn/2009/images/08/25/top3.pdf> (showing that on February 19, 2009, 72% of respondents favored increasing government's role over health care in an attempt to lower costs and expand access); *The Debate over Health Care*, CBS NEWS/N.Y. TIMES POLL (June 12–16, 2009) [hereinafter CBS Poll], available at [http://healthcare.procon.org/sourcefiles/cbs\\_poll\\_june\\_09\\_health\\_care.pdf](http://healthcare.procon.org/sourcefiles/cbs_poll_june_09_health_care.pdf) (showing that 64% of respondents said the federal government should guarantee health care for all Americans).

<sup>9</sup> See Beatrix Hoffman, *Health Care Reform and Social Movements in the United States*, 98 AM. J. PUB. HEALTH S69, S73–75 (2008).

health care is a fundamental right in our constitutional tradition, and establishing a federal commitment to maintain that right.<sup>10</sup>

The ACA is an example of progressive constitutionalism in action through the mechanism of democratic constitutionalism. The story is a reminder that progressives need not fear popular constitutionalism. Popular constitutionalism is healthy for civic society because it involves a public dialogue about our fundamental values and how they fit into our constitutional scheme. While it is true that this dialogue can often be unpleasant and conflict-ridden, the fact remains that true constitutional change rarely occurs without conflict.<sup>11</sup> When lawmakers respond to popular constitutionalism, they can mediate the conflict and resolve the dispute through the legislative process. Through the process of democratic constitutionalism, a dialogue between the people and government officials,<sup>12</sup> lawmakers translate their constitutional vision into law. In our country, the progressive tradition, including our progressive constitutional tradition, has played out primarily on the streets, not in rulings by politically insulated courts.<sup>13</sup> Indeed, progressive constitutional change rarely, if ever, occurs without political activism.<sup>14</sup> This is particularly true with regard to the expansion of rights of belonging, those rights that promote an inclusive vision of who belongs to our national community and enforce that vision.<sup>15</sup> Finally, and perhaps most importantly, constitutional rights are most robust and lasting when they are adopted through the process of democratic constitutionalism.<sup>16</sup>

For decades leading up to the passage of the ACA, advocates argued that the federal government should play an active role in guaranteeing a fundamental right to health care.<sup>17</sup> In 2010, they succeeded in convincing lawmakers to legislate consistently with their views. During the congressional debates over the ACA, opponents of the Act echoed the Tea Party activists in their critique of the Act,<sup>18</sup> but proponents expressed a contrary constitutional vision, one that

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<sup>10</sup> See *infra* notes 235–42 and accompanying text.

<sup>11</sup> See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1329 (2006) (“Typically, it is only through sustained conflict that alternative understandings are honed into a form that officials can enforce and the public will recognize as the Constitution.”).

<sup>12</sup> See *id.* 1324–25.

<sup>13</sup> See *id.* at 1341 (“[D]irect popular engagement in constitutional deliberation infuses collective life with the kinds of meaning that help constitute a community as a community.”).

<sup>14</sup> See REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 2 (2006).

<sup>15</sup> See *id.* at 145–68 for a detailed description of rights of belonging.

<sup>16</sup> As former Attorney General Archibald Cox observed, the participation of all three branches of government in enforcing antidiscrimination norms after the 1964 Civil Rights Act was far more effective than a court ruling alone. See ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 139 (1968).

<sup>17</sup> See Hoffman, *supra* note 9, at S70–77.

<sup>18</sup> See *infra* notes 213–31 and accompanying text.

recognized health care as a fundamental right that warranted protection by the federal government.<sup>19</sup> Thus, the debate over the ACA is an excellent example of both popular and democratic constitutionalism. Of course, there are flaws in the claim that the ACA protects a fundamental right. The ACA does not guarantee universal access to health care, and its coverage excludes a significant number of vulnerable persons, most notably undocumented immigrants.<sup>20</sup> Moreover, it is important to note that Congress does not have the power to create a constitutional right, but it does have the power to recognize one. With the ACA, members of Congress recognized the existence of a fundamental economic right and expanded federal protection of that right. The ACA not only expands access to health care; more importantly, it creates a presumption in favor of affordable and accessible health care for all Americans.

The courts are now evaluating the constitutionality of the Act, and some courts have ruled against it. Not only the future of the ACA, but the future of the right to health care in the United States, is at stake in this debate. Responding to court challenges and in public debates today, supporters of health care reform seem limited to arguing that Congress had the power to enact the statute under the Commerce and Spending Clauses. The progressive vision of fundamental human rights behind the Act is eclipsed by the dry legal arguments. This is a grave mistake for several reasons. First, viewing the ACA as a form of democratic constitutionalism bolsters the argument that the ACA falls within congressional power to act.<sup>21</sup> It is reasonable for Congress to use its economic powers to establish and protect what it has identified as a fundamental economic right. Second, reviving the vision of fundamental rights, which was the basis for health care reform, is important not only to ensure that the Act is sustained in the courts, but more importantly, to cement the right to health care in our constitutional consciousness. If progressive constitutionalists cede the rhetoric of rights to the conservative opponents of the ACA, this could endanger the rights protected by that Act. Therefore, it is important to understand both the process of popular constitutionalism that led to the adoption of the ACA and the democratic constitutionalism expressed by the members of Congress who supported the Act.

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<sup>19</sup> See *infra* notes 235–42 and accompanying text.

<sup>20</sup> Mark A. Hall, *Getting to Universal Coverage with Better Safety-Net Programs for the Uninsured*, 36 J. HEALTH POL., POL'Y & L. 521, 521–22 (2011).

<sup>21</sup> The question of whether the ACA falls within the commerce or spending powers, or both, is beyond the scope of this Article. I am persuaded by the scholars and attorneys who argue that it falls within those powers. See, e.g., Wilson Huhn, *Constitutionality of the Patient Protection and Affordable Care Act Under the Commerce Clause and the Necessary and Proper Clause*, 32 J. LEGAL MED. 139, 143 (2011). But see Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 582 (2010).

## II. DEMOCRATIC CONSTITUTIONALISM AND ECONOMIC RIGHTS OF BELONGING

Throughout the history of our country, most, if not all, progressive constitutional change has occurred in response to the advocacy of social movements and political actors within and outside of our government.<sup>22</sup> Democratic constitutionalism is particularly important to developing economic rights, which the U.S. Supreme Court has ceded to the political branches.<sup>23</sup> In cases rejecting claims of constitutional economic rights, the Court has made clear that, because they are positive rights, the content of economic rights is best determined by the political branches, which are accountable to the people.<sup>24</sup> The Court has thus created fertile ground for democratic constitutionalism. Because the Court has made it clear that there are no judicially enforceable economic rights in the Constitution, only democratic constitutionalism can establish economic rights as fundamental rights within our constitutional system.

When advocating for fundamental economic rights, participants in social movements and other political actors appeal to the political branches, not the courts. Members of Congress have often responded positively, legislating to protect rights of belonging. This section considers the dynamics of constitutional advocacy within the democratic realm from a theoretical perspective. This section also briefly describes two eras in which Congress responded to popular constitutionalism to legislate to protect rights of belonging: the New Deal Era and the Second Reconstruction and War on Poverty in the 1960s. During both eras, Congress acted to protect fundamental economic rights, responding to the constitutional advocacy of the popular movements that had advocated for those rights.

### A. *Distinguishing Between Popular and Democratic Constitutionalism*

Too often, constitutional scholars conflate popular and democratic constitutionalism.<sup>25</sup> While popular constitutionalism occurs whenever people interpret the constitution outside of the courts, democratic constitutionalism depends on the political branches adopting those theories into law. The most effective progressive constitutional change begins with grassroots organizing on behalf of fundamental rights. Progressive constitutional change thus begins with constitutional advocacy in a broad sense—by the people themselves, outside of

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<sup>22</sup> See Siegel, *supra* note 11, at 1329.

<sup>23</sup> See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (finding no constitutional right to housing); *Dandridge v. Williams*, 397 U.S. 471, 484–86 (1970) (finding no constitutional right to minimum income).

<sup>24</sup> See *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955).

<sup>25</sup> See Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313, 321 (2008) (noting that popular constitutionalists do not say much about the process that the American people should use to interpret the constitution).

the courts. When political advocates frame rights in constitutional terms, they are engaged in popular constitutionalism. What begins as an amorphous claim is then translated into law via the mechanism of democratic constitutionalism. Democratic constitutionalism is thus the process through which the popular advocacy for fundamental rights succeeds as those rights are incorporated into law. The ongoing dialogue between the people and the officials expands constitutional meaning and contributes to the strength of our constitutional culture.<sup>26</sup> The doctrine is not always, or even usually, initiated by court rulings. For example, in the twentieth century, the popular conception of the scope of the Second Amendment was considerably broader than that of the courts until the Court adopted the popular view and recognized an individual right to bear arms in *District of Columbia v. Heller*.<sup>27</sup> Most importantly, constitutional doctrine is strongest and most resilient when it is fully accepted by the people.<sup>28</sup>

Considering constitutional interpretation outside of the courts broadens our understanding of both the process of constitutional interpretation and the meaning of the Constitution itself. As Reva Siegel explains, constitutional understanding emerges from interactions between citizens and officials, a process that she refers to as “the democratically responsive Constitution.”<sup>29</sup> Collective deliberation is an effective mechanism for determining constitutional meaning and contributing to the democratic authority of constitutional lawmaking.<sup>30</sup> According to Siegel, political advocates who invoke the Constitution “translate challenges to the constitutional order into the language of the constitutional order.”<sup>31</sup> Of course, in order to be effective, movements for constitutional change need to invoke a baseline understanding of the Constitution that is widely recognized and shared by the community.<sup>32</sup>

When political movements are successful in their constitutional advocacy, they influence constitutional interpretation by elected officials.<sup>33</sup> Thus, some

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<sup>26</sup> See Siegel, *supra* note 11, at 1343 (arguing that collective deliberation contributes to the democratic authority of constitutional lawmaking).

<sup>27</sup> 554 U.S. 570, 635 (2008); see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008) (arguing that “*Heller*’s originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism”); see also ZIETLOW, *supra* note 14, at 5–6 (discussing that the political process, even absent court enforcement, recognizes the robust nature of the right to bear arms).

<sup>28</sup> See MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 13–14 (2000) (arguing that during the nineteenth century, the popular conception of freedom of speech was considerably broader than the courts’ interpretations of those protections).

<sup>29</sup> Siegel, *supra* note 11, at 1339.

<sup>30</sup> *Id.* at 1342.

<sup>31</sup> *Id.* at 1350.

<sup>32</sup> *Id.* at 1356.

<sup>33</sup> See KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 208 (1999).

members of Congress supported the Civil Rights Act of 1964<sup>34</sup> (1964 Act) because they firmly believed that the Fourteenth Amendment barred private discrimination on the basis of race.<sup>35</sup> Other members of Congress supported the 1964 Act because they believed that race discrimination was immoral and that they had the power to outlaw that discrimination when it substantially affected interstate commerce.<sup>36</sup> Many of their colleagues joined them in voting for the 1964 Act, not out of strong constitutional convictions, but because polls at the time showed that their constituents, influenced by the Civil Rights Movement, strongly supported the Act and viewed it as a national priority.<sup>37</sup> Regardless of their motivation, all of the members of Congress who voted in favor of the 1964 Act established a new constitutional norm: the federal government's guarantee of protection against race discrimination in the private market.<sup>38</sup> Similarly, the debate over the ACA was a crucial constitutional debate over the nature of our federal government and its responsibilities to the people. The ACA established a federal commitment to expand access to health care for the American people.

The process of democratic constitutionalism raises an unsettling dilemma—how to distinguish between “ordinary law” and constitutional interpretation. Conflating the two raises the danger of politicizing the Constitution and undermining the Constitution's role as a constraint on politics.<sup>39</sup> To avoid this danger, members of Congress must make it clear that they are relying on the Constitution and that they intend to create constitutional law. They must speak in “the language of the constitutional order.”<sup>40</sup> At times, Congress legislates to enforce a constitutional mandate. For example, Title VI of the Civil Rights Act of 1964, which outlaws race discrimination by recipients of federal funds,<sup>41</sup> enforced the constitutional mandate established by the Court in *Brown v. Board of Education*.<sup>42</sup> Similarly, some congressional supporters of the Religious Freedom Restoration Act of 1993<sup>43</sup> intended it to overrule the Court's interpretation of the Free Exercise Clause of the First Amendment.<sup>44</sup> With both statutes, members of Congress made it clear that they were engaging in constitutional interpretation.<sup>45</sup>

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<sup>34</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

<sup>35</sup> See Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 973–75 (2005).

<sup>36</sup> *Id.* at 975–76.

<sup>37</sup> *Id.* at 971.

<sup>38</sup> *Id.* at 987.

<sup>39</sup> See Siegel, *supra* note 11, at 1348.

<sup>40</sup> *Id.* at 1350.

<sup>41</sup> 42 U.S.C. §§ 2000d–2000d7 (2006).

<sup>42</sup> 347 U.S. 483 (1954); see Zietlow, *supra* note 35, at 993.

<sup>43</sup> Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

<sup>44</sup> See ZIETLOW, *supra* note 14, at 3–4.

<sup>45</sup> Not surprisingly, the Court's response to the two statutes hinged on the extent to which Congress agreed with the Court's constitutional interpretation. Compare Heart of

Congress also engages in constitutional interpretation when it draws on a constitutional tradition to articulate fundamental principles, either structural or substantive. When Congress creates entitlements to benefits, this expands the role of the federal government and thus impacts our structure of federalism. When members of Congress make it clear that they believe a statute protects fundamental rights, this too rises to the level of constitutional interpretation, even when the Court has held that those rights are not mandated by the Constitution. Thus, when Congress enacted the ACA, it expanded both the power of the federal government and its obligation towards the American people, affecting our structure of federalism. To the extent that members of Congress framed the statute as one protecting fundamental rights, they made a constitutional statement—that the right to health care is sufficiently fundamental and important to merit the protection of the federal government.

The process of democratic constitutionalism often gives rise to conflicting constitutional interpretations.<sup>46</sup> When there is conflict, it is necessary to determine which interpretation is authoritative. There are a variety of mechanisms for determining which meaning is authoritative. Judicial supremacy, where the Court asserts its authority to determine constitutional meaning in case of a conflict, is firmly embedded in our constitutional culture,<sup>47</sup> and a full discussion of the validity of this institution is well beyond the scope of this essay. For matters that are not subject to judicial interpretation, however, other methods are necessary for determining the authoritative meaning of a constitutional provision. One possibility is to determine meaning by measuring the relative popular support for each interpretation. The problem with this approach is that there is no reliable measure of public support. In the absence of a broad popular consensus, it is not clear how popular constitutionalism alone can determine authoritative constitutional meaning. The legislative process, on the other hand, provides a formalized mechanism that is relatively transparent and accountable for determining constitutional meaning. When a legislature adopts a constitutional interpretation, it is therefore entitled to considerable deference. When Congress acts, it is entitled to even more deference because it speaks for the entire nation.

Like judicial interpretations of the Constitution, democratic constitutionalism establishes precedents. While these precedents are not formally binding through the doctrine of *stare decisis*,<sup>48</sup> groundbreaking statutes have important symbolic significance, especially when Congress legislates to

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*Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964) (upholding the constitutionality of Title II of the 1964 Act), *with City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (striking down the Religious Freedom Restoration Act as applied to the states).

<sup>46</sup> See Siegel, *supra* note 11, at 1329.

<sup>47</sup> *Boerne*, 521 U.S. at 535–36. *But see* ZIETLOW, *supra* note 14, at 145–59 (comparing courts and Congress as protectors of rights of belonging).

<sup>48</sup> Of course, the extent to which courts follow the doctrine of *stare decisis* varies. Moreover, *stare decisis* has the least force in binding the U.S. Supreme Court's interpretation of the Constitution.



protect rights of belonging. For example, after years of unsuccessful attempts to enact civil rights legislation, members of Congress surmounted an eighty-nine day filibuster to enact the Civil Rights Act of 1964, which established a federal commitment to abolishing private race discrimination.<sup>49</sup> The 1964 Act provided a new precedent for Congress to act to protect rights of belonging and ushered in a wave of legislative activity protecting those rights.<sup>50</sup> Similarly, Medicare, Medicaid, Children's Health Insurance Programs, and the Emergency Medical Treatment and Active Labor Act established a federal commitment to provide health care for those most vulnerable in our society and created precedents for Congress to rely upon when enacting the ACA.<sup>51</sup> During debates over the ACA, the Act's supporters often cited those statutes to support their view that health care is a fundamental right.

### B. *Congress and Economic Rights*

Members of Congress have often legislated to create economic rights and to identify a commitment on the part of the federal government to protect those rights. When enacting this legislation, members of Congress responded to popular unrest and political advocacy that demanded a robust federal commitment to economic rights. Congress has relied on the Court's deference when legislating to protect economic rights. However, success has proven ephemeral for programs that were not adequately embraced by the Court or the constitutional culture.

Both courts and the political branches engage in defining constitutional rights. However, in the realm of economic rights, democratic constitutionalism is the only game in town. Since repudiating its economic due process jurisprudence of the *Lochner* Era, the Court has repeatedly declined to enforce economic rights.<sup>52</sup> Instead, the Court has made it clear that economic policy falls within the realm of legislatures because it is best suited for determination by the political process.<sup>53</sup> The Court's deference leaves a large space for Congress to identify and enforce economic rights of belonging.<sup>54</sup> Judicial supremacy simply does not (and should not) play a role in limiting congressional authority over economic rights.<sup>55</sup> Instead, it is necessary to turn to

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<sup>49</sup> See ZIETLOW, *supra* note 14, at 123.

<sup>50</sup> See *id.*; Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 284–85 (2002).

<sup>51</sup> See *infra* notes 108–19 and accompanying text.

<sup>52</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 484 (1970).

<sup>53</sup> See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955).

<sup>54</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (deferring to Congress's judgment that Aid to Families with Dependent Children benefits are entitlements).

<sup>55</sup> This differentiates Congress's power to enforce equality rights by enforcing the Fourteenth and Fifteenth Amendments. In contrast to the deferential rational basis that the

the constitutional decisions of political actors to determine authoritative meaning. Thus, the area of economic rights is particularly fertile ground for democratic constitutionalism. If members of Congress enacted the ACA to establish or further an economic right, then those members of Congress are entitled to maximum deference.

Considering democratic constitutionalism in the arena of economic rights begs the question of whether Congress can create rights that the Court has failed to find in the Constitution. Since the end of the *Lochner* Era, the U.S. Supreme Court has taken a hands-off approach to legislation affecting economic rights. In *Williamson v. Lee Optical of Oklahoma Inc.*, the Court held that “it is for the legislature, not the courts, to balance the advantages and disadvantages” of economic legislation,<sup>56</sup> and concluded, “[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts.”<sup>57</sup> In *Ferguson v. Skrupa*, the Court reiterated, “[u]nder the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of [economic] legislation.”<sup>58</sup> Consistent with this approach, the Court has repeatedly held that there are no substantive economic rights in the Constitution, expressly rejecting claims of a constitutional right to a minimum income and housing. In the realm of economic benefits, the Court is particularly deferential to legislatures, reasoning that the decision of whether or not to provide benefits is a matter of economic policy best suited to legislatures. In *Goldberg v. Kelly*, for example, the Court refused to identify a constitutional right to welfare, but deferred to Congress’s power to create a legislative entitlement to welfare benefits.<sup>59</sup> Thus, the Court has allowed Congress substantial autonomy to identify economic rights.

The deference of the Court has enabled Congress to enact numerous measures to define and protect economic rights of belonging. For example, during the New Deal Era, members of Congress established an economic safety net for the American people by enacting the Social Security Act<sup>60</sup> and establishing a program of Aid to Families with Dependent Children (AFDC).<sup>61</sup> Those programs created an entitlement to economic stability for vulnerable people in our country, including children, widows, and the elderly. In a very

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Court applies to economic legislation, the Court has imposed a strict congruence and proportionality test to evaluate legislation enforcing the Fourteenth and Fifteenth Amendments. *See City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).

<sup>56</sup> 348 U.S. at 487.

<sup>57</sup> *Id.* at 488.

<sup>58</sup> 372 U.S. at 729.

<sup>59</sup> 397 U.S. at 262.

<sup>60</sup> Ginny Jordan, *Social Security Showcases History in 75th Year*, SUN-SENTINEL (Fort Lauderdale), Feb. 21, 2010, at 8.

<sup>61</sup> Ken Connor, *Welfare Reform at 10: A Singular Success*, HUMAN EVENTS (Aug. 30, 2006), <http://www.humanevents.com/article.php?id=16669>. The AFDC program was superseded by the Temporary Assistance to Needy Families program of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 116, 110 Stat. 2105 (codified in scattered sections of 8 and 42 U.S.C.).

real sense, these programs enforced the “freedom from want” that President Franklin Roosevelt had promised in his “four freedoms” speech.<sup>62</sup> Congress also created a mechanism of economic empowerment for workers with the National Labor Relations Act (NLRA), which created a federal right for workers to organize into unions, bargain collectively, and to strike.<sup>63</sup> During the “Second Reconstruction” of the 1960s, Congress enacted measures prohibiting race and sex discrimination in the marketplace.<sup>64</sup> The foremost of these measures was the Civil Rights Act of 1964, which created a federal right to freedom from race and sex discrimination in employment, and from race discrimination in education, and by privately owned places of public accommodation.<sup>65</sup> During that era, Congress also expanded entitlements through the War on Poverty,<sup>66</sup> creating Head Start and other programs for the poor,<sup>67</sup> and established Medicare, a health benefits program for the elderly.<sup>68</sup> Congress also extended health care to the poor with the Medicaid program,<sup>69</sup> and in the 1990s, added low-income children to federal health insurance coverage with the Children’s Health Insurance Program.<sup>70</sup>

Economic legislation creates precedents that functionally alter our constitutional structure. The New Deal Era and War on Poverty measures represented a federal commitment to protecting vulnerable people in our society. Because our popular culture acknowledges and approves of this federal role, the entitlements created in that legislation enjoy widespread political support. In addition to the above provisions, both the Social Security and

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<sup>62</sup> See Steven D. Jamar, *The International Human Right to Health*, 22 S.U. L. REV. 1, 2 (1994).

<sup>63</sup> Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)); see also *NLRB v. U.S. Sonics Corp.*, 312 F.2d 610, 615 (1st Cir. 1963) (finding that “the basic philosophy of the Act . . . is the encouragement of collective—as opposed to individual—bargaining”); *Bald v. RCA Alascom*, 569 P.2d 1328, 1335 (Alaska 1977) (finding that the NLRA was enacted “in response to one of the most monumental social crises of the century . . . to alleviate industrial strife and improve the lot of workers”); Michael D. Moberly, *Striking a Happy Medium: The Conversion of Unfair Labor Practice Strikes to Economic Strikes*, 22 BERKELEY J. EMP. & LAB. L. 131, 132–34 (2001).

<sup>64</sup> See ZIETLOW, *supra* note 14, at 98.

<sup>65</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-15 (2006)).

<sup>66</sup> Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1, 3 (2010); see also Dan Meyers, *A Pioneer in War on Poverty Is Still a Believer*, PHILA. INQUIRER, Jan. 22, 1995, at C01.

<sup>67</sup> Eloise Pasachoff, “Head Start Works Because We Do”: *Head Start Programs, Community Action Agencies, and the Struggle over Unionization*, 38 HARV. C.R.-C.L. L. REV. 247, 250–51 (2003).

<sup>68</sup> Social Security Amendments of 1965, Pub. L. No. 89-97, § 102(a), 79 Stat. 286, 291 (codified as amended at 42 U.S.C. § 1395 (2006)).

<sup>69</sup> *Id.* § 121(a), 79 Stat. at 343 (codified as amended at 42 U.S.C. § 1396 (2006)).

<sup>70</sup> Allison Cendali, *Implementation of the Children’s Health Insurance Program: HHS, States, and Lessons for National Health Reform*, 50 ADMIN. L. REV. 659, 659–60 (1998).

Medicare programs are now widely accepted as a commitment by the federal government to the people of the United States. Indeed, those entitlement programs are considered to be the “third rail” of politics.<sup>71</sup> In recent years, politicians have tried to reduce or privatize the Medicare and Social Security programs, but so far, their efforts have been to no avail. Strong political opposition to proposed changes reflects a widespread view that the federal government has a moral obligation to provide medical and economic security for the sick and the elderly in our society.<sup>72</sup>

When economic rights are viewed as merely economic—and not rights of belonging—by our constitutional culture, they have not fared as well. For example, the NLRA grew out of years of labor activism arguing that the right to organize and to engage in collective bargaining is a fundamental human right protected by the First and Thirteenth Amendments.<sup>73</sup> Members of Congress invoked labor’s theories in debates over the Act, arguing that the right to organize is a fundamental right.<sup>74</sup> However, Congress also invoked a more conservative narrative, that the right to organize was necessary to avert strikes that impeded interstate commerce.<sup>75</sup> Here, members of Congress were speaking to the Court, which had struck down other New Deal measures and seemed likely to do the same with the NLRA.<sup>76</sup> Eventually, arguably in part responding to labor activism, the Court upheld the NLRA based on the more conservative, commerce-based narrative.<sup>77</sup> Since then, the Court has repeatedly narrowed the rights protected by the NLRA, arguably gutting its effectiveness.<sup>78</sup> Arguably, if Congress had made it clear that it was enforcing the Thirteenth Amendment,

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<sup>71</sup> Kathryn L. Moore, *Reforming Retirement Systems: Why the French Have Succeeded When Americans Have Not*, 22 ARIZ. J. INT’L & COMP. L. 251, 286 (2005) (“This lack of political will is hardly surprising. Social security is often described as the third rail of politics: touch it and you die.”); Michael R. Wilson, *The Policymaker’s Handbook to Entitlement Reform: A New Approach to Saving Our Seniors*, 18 ELDER L.J. 159, 161 (2010).

<sup>72</sup> Polls consistently reveal strong public support for Social Security and Medicare. See, e.g., Stephanie Condon, *Poll: Most Americans Say Medicare Is Worth the Cost*, CBS NEWS (April 21, 2011, 6:30 PM), [http://www.cbsnews.com/8301-503544\\_162-20056239-503544.html](http://www.cbsnews.com/8301-503544_162-20056239-503544.html); Ryan Grim, *Poll Opposes Cutting Social Security to Trim Deficit: New Poll*, HUFFINGTON POST (Aug. 11, 2010, 10:38 AM), [http://www.huffingtonpost.com/2010/08/11/public-opposes-cutting-so\\_n\\_678374.html](http://www.huffingtonpost.com/2010/08/11/public-opposes-cutting-so_n_678374.html); Paula Span, *Social Security and Younger Americans*, N.Y. TIMES (Aug. 25, 2010, 1:52 PM), <http://newoldage.blogs.nytimes.com/2010/08/25/social-security-and-younger-americans/> (poll shows 90% of Americans between ages eighteen and twenty-nine support Social Security); Colette Thayer, *Social Security 75th Anniversary Survey Report: Public Opinion Trends*, AARP, 1 (Aug. 2010), [http://assets.aarp.org/rgcenter/econ/social\\_security\\_75th.pdf](http://assets.aarp.org/rgcenter/econ/social_security_75th.pdf).

<sup>73</sup> See ZIETLOW, *supra* note 14, at 63–66.

<sup>74</sup> *Id.* at 76–79.

<sup>75</sup> *Id.* at 80.

<sup>76</sup> *Id.* at 81.

<sup>77</sup> See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 3 (1937).

<sup>78</sup> See, e.g., James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 518–19 (2004).

and protecting the fundamental right to strike, the Court might have been more deferential to the Act, maintaining stronger legal protections for unions and their members.<sup>79</sup>

Other statutes provide a more complicated history. The Civil Rights Act of 1964 responded to years of civil rights activists arguing that freedom from race discrimination was a fundamental human right. Congress based its power on the Fourteenth Amendment, invoking the Reconstruction Era, and supporters of the Act made it clear that freedom from race discrimination is guaranteed by the Reconstruction Amendments.<sup>80</sup> Congress also relied on the commerce power. Again, Congress was speaking to the Court. In 1883, the Court held that the Fourteenth Amendment enforcement power was limited to state action.<sup>81</sup> In 1964, few members of Congress were sanguine enough to rely on the Court to overturn this precedent to uphold the 1964 Act. Sure enough, the Court upheld the Act as an exercise of the commerce power, and did not mention the Fourteenth Amendment.<sup>82</sup> While the 1964 Act endures, the state action limitation on the Fourteenth Amendment enforcement power hampers congressional efforts to enact civil rights legislation. In *United States v. Morrison*, for example, the Court struck down the civil rights provision of the Violence Against Women Act as beyond congressional power to enforce the Fourteenth Amendment because the provision addressed private behavior.<sup>83</sup> Perhaps if the Court had been forced to consider the Civil Rights Act of 1964 as an act enforcing the Fourteenth Amendment, it would have upheld the Act and done away with the state action doctrine.<sup>84</sup> Again, an opportunity was lost when human rights legislation was framed as an exercise of economic power.

These examples show that to the extent that economic powers have come to eclipse the fundamental rights protected by those statutes, those rights have been weakened. Rather than arguing to the courts, supporters of rights of belonging are most effective when they engage the popular understanding. Speaking in the language of rights is the most effective way to do so.

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<sup>79</sup> See James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 120–22 (2002).

<sup>80</sup> Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1859–61 (2010); John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 370 (1995).

<sup>81</sup> See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

<sup>82</sup> See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964).

<sup>83</sup> 529 U.S. 598, 593–99 (2000).

<sup>84</sup> See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 504–05 (2000).

### C. *The Right to Health Care*

The right to health care is well recognized in international law.<sup>85</sup> It is mentioned in the United Nations Universal Declaration of Human Rights (UDHR),<sup>86</sup> and it is guaranteed by numerous international treaties and covenants.<sup>87</sup> The United States is not bound by any covenant or treaty that guarantees the right to health care.<sup>88</sup> Nonetheless, since the days of President Theodore Roosevelt, there has been sporadic activism on behalf of a right to health care in this country.<sup>89</sup> Starting with Theodore Roosevelt, numerous American presidents have spoken out in favor of the right to health care.<sup>90</sup> Congress has responded by enacting a series of statutes creating entitlements to some health benefits and expanding access to health care.<sup>91</sup> These measures provide good precedents for lawmakers legislating to promote a right to health care.

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<sup>85</sup> See Jamar, *supra* note 62, at 17; Eleanor D. Kinney, *Recognition of the International Human Right to Health and Health Care in the United States*, 60 RUTGERS L. REV. 335, 336 (2008).

<sup>86</sup> Universal Declaration of Human Rights art. 25(l), G.A. Res. 217 (III) A, at 76, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

<sup>87</sup> The most significant such covenant is the International Covenant on Economic, Social and Cultural Rights. International Covenant on Economic, Social and Cultural Rights art. 12, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. The right to health care is also guaranteed by the Constitution of the World Health Organization pmbl., July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185 [hereinafter Constitution of the WHO], *reprinted in* 15 DEP'T ST. BULL. 211 (Aug. 4, 1946), the International Convention on the Elimination of All Forms of Racial Discrimination art. 5(e)(iv), *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD], *cited in* Kinney, *supra* note 85, at 342, the Convention on the Elimination of All Forms of Discrimination Against Women art. 12(l), *opened for signature* March 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW], *cited in* Kinney, *supra* note 85, at 342, the Convention on the Rights of the Child art. 24(l), *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC], *cited in* Kinney, *supra* note 85, at 342, and the American Declaration of the Rights and Duties of Man art. XI, O.A.S. Official Rec., OEA/Ser. L./ V./II.23, doc. 21 rev. 6 (1948) [hereinafter ADRDM], *reprinted in* ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 19 (1988). See *infra* notes 94, 96–101 and accompanying text.

<sup>88</sup> See Kinney, *supra* note 85, at 363–64.

<sup>89</sup> Theodore Roosevelt actually spoke out for the right to health care when he was no longer president, during his 1912 campaign to return to the presidency. See Hoffman, *supra* note 9, at S70.

<sup>90</sup> See Kinney, *supra* note 85, at 345–51.

<sup>91</sup> See *infra* notes 109–10, 112–14 and accompanying text.

### 1. *International Law*

In 1948, the United Nations approved the Universal Declaration of Human Rights (UDHR).<sup>92</sup> The Declaration responded to the atrocities of World War II, and represented an attempt by the western world to establish a baseline of rights which were to be universally respected, at least by the member nations of the United Nations. Article 25 of the UDHR provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care . . . and the right to security in the event of . . . sickness [and/or] disability.”<sup>93</sup> That year, the United Nations also established the World Health Organization (WHO). The WHO’s Constitution provides that “[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”<sup>94</sup> Thus, the right to health care was among those rights first recognized as universal human rights. As a WHO report points out, “[w]ithout health, other rights have little meaning.”<sup>95</sup>

Many other international agreements recognize a right to health care. The most significant such agreement is the International Covenant on Economic, Social and Cultural Rights.<sup>96</sup> Article 12 of that covenant recognizes the right to health care, which encompasses “the enjoyment of the highest attainable standard of physical and mental health.”<sup>97</sup> The right to health is also recognized in the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>98</sup> the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>99</sup> and the Convention on the Rights of the Child.<sup>100</sup> Additionally, Article XI of the American Declaration of the Rights and Duties of Man, by the Organization of American States, provides that “[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”<sup>101</sup> Like the UDHR and the WHO’s Constitution, these international agreements reflect a broad

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<sup>92</sup> UDHR, *supra* note 86.

<sup>93</sup> *Id.* art. 25(1).

<sup>94</sup> Constitution of the WHO, *supra* note 87, 62 Stat. at 2680, 14 U.N.T.S. at 186 (pmb.).

<sup>95</sup> World Health Organization, *The Right to Health—Its Implications in WHO’s Programme of Work*, 912, U.N. Doc. A/CONF.32/8 ¶ 2 (Jan. 16, 1968).

<sup>96</sup> ICESCR, *supra* note 87, 993 U.N.T.S. at 8 (art. 12).

<sup>97</sup> *Id.*

<sup>98</sup> CERD, *supra* note 87, 660 U.N.T.S. at 222 (art. 5(e)(iv)).

<sup>99</sup> CEDAW, *supra* note 87, 1249 U.N.T.S. at 19 (art. 12(1)).

<sup>100</sup> CRC, *supra* note 87, 1577 U.N.T.S. at 52 (art. 24(1)).

<sup>101</sup> ADRDM, *supra* note 87 (art. XI).

international consensus that the right to health care is a universal human right.<sup>102</sup>

Former first lady Eleanor Roosevelt, the first U.S. Ambassador to the United Nation, was a leading advocate for the UDHR, and as a member nation, the United States has agreed to its provisions.<sup>103</sup> Because it is merely a declaration, however, the UDHR does not impose specific obligations on the United States.<sup>104</sup> Indeed, the United States has so far resisted becoming a party to any agreement that guarantees economic rights.<sup>105</sup> Thus, while these international treaties and covenants clearly endorse the fundamental right to health care, that right is not enforceable in U.S. courts.

## 2. *The Right to Health Care Under U.S. Law*

The U.S. Constitution does not guarantee a right to health care.<sup>106</sup> The U.S. Supreme Court rejected such a right, and held expressly that the government has no obligation to pay the medical expenses of indigents.<sup>107</sup> Nonetheless, there has been a sporadic yet persistent movement on behalf of universal health care in our country for the past century. Elected officials have responded by voicing their support for such a right, and by enacting statutes creating the obligation that the Supreme Court held was not mandatory—that of government support of health care for the elderly, the disabled, the poor, and military veterans—and mandating life-saving treatment of people without health insurance. These measures provided precedents for the ACA, and developed the framework that necessitated the ACA's most controversial measure—the individual mandate.<sup>108</sup>

Several federal statutes establish health benefits for vulnerable or needy populations. The government has taken on the responsibility of medical care for

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<sup>102</sup> See Jamar, *supra* note 62, at 2.

<sup>103</sup> See Kinney, *supra* note 85, at 346.

<sup>104</sup> See *id.* at 339.

<sup>105</sup> See *id.* at 345.

<sup>106</sup> However, several state constitutions arguably do. See *id.* at 354–55 (noting that the constitutions of Alaska, Hawaii, Montana, South Carolina, and Wyoming require state governments to protect the health of the people). See, e.g., ALASKA CONST. art. VII, § 5 (“The legislature shall provide for the public welfare.”); HAW. CONST. art. IX, § 1 (“The state shall provide for the protection and promotion of the public health.”); MONT. CONST. art. II, § 3; S.C. CONST. art. XII, § 1; WYO. CONST. art. 7, § 20.

<sup>107</sup> See *Maier v. Roe*, 432 U.S. 464, 469 (1977).

<sup>108</sup> As Judge Sutton observed in his concurrence to the Sixth Circuit opinion upholding the ACA, “When Congress guarantees a benefit for all (by securing certain types of medical care), it may regulate that benefit (by requiring some to pay for it).” *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 563 (6th Cir. 2011) (Sutton, J., concurring) (discussing Emergency Medical Treatment and Active Labor Act, Pub. L. No. 99-272, § 9121(b), 100 Stat. 164 (1986) (codified as amended at 42 U.S.C. § 1395dd (2006))).



the elderly, the disabled, and the poor in the Medicare and Medicaid Acts.<sup>109</sup> In 1997, Congress created the Child Health Insurance Program (CHIP), which entitles children in low-income households to government-funded health insurance.<sup>110</sup> The federal government also supplies medical treatment for active members of the military and for veterans.<sup>111</sup> Finally, a federal program to support community health services provides vital services to rural and medically underserved populations.<sup>112</sup> These programs represent a federal commitment to provide health care for those who are likely to need assistance. They reflect the view that health care is important enough to justify a huge commitment of finances and other resources, implicitly recognizing the right to health care for at least part of the U.S. population.

The fundamental right to health care is also implicit in the 1986 Emergency Medical Treatment and Active Labor Act (EMTALA).<sup>113</sup> EMTALA requires hospital emergency departments to treat patients in active labor and suffering from emergency medical conditions.<sup>114</sup> Congress enacted EMTALA in response to popular outrage against hospitals that refused to treat patients in dire need.<sup>115</sup> One of the bill's co-sponsors, Senator Durenberger, explained that he supported the Act because he believed "the practice of rejecting indigent patients in life threatening situations for economic reasons alone is unconscionable."<sup>116</sup> Representative Bilirakis agreed that "no person should be denied emergency health care or hospital admittance because of a lack of money or insurance."<sup>117</sup> Again, Congress acted to protect the right to health care. Unfortunately, judicial interpretations of EMTALA have narrowed the scope of the Act and limited the extent to which it guarantees medical care.<sup>118</sup>

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<sup>109</sup> Social Security Amendments of 1965, Pub. L. No. 89-97, § 102(a), 79 Stat. 286, 291 (codified as amended at 42 U.S.C. § 1395 (2006)) (Medicare); *id.* § 121(a), 79 Stat. at 343, 343 (codified as amended at 42 U.S.C. § 1396 (2006)) (Medicaid).

<sup>110</sup> 42 U.S.C. § 1397aa (2006); *see* Cendali, *supra* note 70, at 659–60. The Child Health Insurance Program was re-authorized in 2009, and further extended in the ACA.

<sup>111</sup> Michael J. Jackonis, Lawrence Deyton & William J. Hess, 36 J.L. MED. & ETHICS 677, 677–80 (2008).

<sup>112</sup> *See* 42 U.S.C. §§ 254b to 254c-1 (2006).

<sup>113</sup> *Id.* § 1395dd.

<sup>114</sup> *See id.* § 1395dd(b).

<sup>115</sup> Marcela X. Berdion, *The Right to Health Care in the United States: Local Answers to Global Responsibilities*, 60 SMU L. REV. 1633, 1644 (2007).

<sup>116</sup> 131 CONG. REC. S13,903 (daily ed. Oct. 23, 1985) (statement of Sen. Durenberger), *quoted in* Nathanael J. Scheer, Comment, *Keeping the Promise: Financing EMTALA's Guarantee of Emergency Medical Care for Undocumented Aliens in Arizona*, 35 ARIZ. ST. L.J. 1413, 1416 (2003), *cited in* Berdion, *supra* note 115, at 1645.

<sup>117</sup> 131 CONG. REC. H9503 (daily ed. Oct. 31, 1985) (statement of Rep. Bilirakis), *quoted in* Scheer, *supra* note 116, at 1416, *cited in* Berdion, *supra* note 115, at 1645.

<sup>118</sup> *See* *Harry v. Marchant*, 291 F.3d 767, 773, 775 (11th Cir. 2002) (finding that EMTALA prohibits transfers of patients but does not guarantee medical care); *Bryant v. Adventist Health Sys./W.*, 289 F.3d 1162, 1168 (9th Cir. 2002) (same); *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 880 (4th Cir. 1992) (finding that EMTALA requires only a nondiscriminatory emergency response, not adequate care). *But see* *Thornton v. Sw. Detroit*

Nonetheless, it is true that “[b]y passing EMTALA, Congress recognized the value of at least a certain level of health care for all humans.”<sup>119</sup>

Congress took a major step backwards in the growth of responsibility for health care when it enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).<sup>120</sup> The PRWORA dismantled the Aid to Families with Dependent Children Program, an entitlement program from the 1935 Social Security Act, and replaced it with the Temporary Assistance for Needy Families Program.<sup>121</sup> The PRWORA also contains restrictions that apply to all federal benefit programs, including health benefits programs such as Medicare, Medicaid, and CHIP.<sup>122</sup> The statute authorizes states to deny benefits to “unqualified aliens,” and prohibits states from granting benefits to non-citizens who have not lived within those states for five years.<sup>123</sup> These restrictions severely limit federal and state benefits for non-citizens in the United States.<sup>124</sup>

Thus, while there was no constitutional mandate for health care, these legislative measures recognized a federal role in protecting the health of many people in our country and created precedents for congressional action to expand that role. These statutes created the framework in which Congress enacted the ACA and affected the choices available to the members of the 2010 Congress. A large number of Americans are already covered by the federal safety net established by Medicare, Medicaid, and the CHIP program, or because they are active or retired military.<sup>125</sup> Others in underserved communities can use the services of community health clinics. The rest are dependent on health insurance provided by their employers or must buy health insurance for

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Hosp., 895 F.2d 1131, 1134 (6th Cir. 1990) (finding that EMTALA requires hospitals to treat patients until they are stable); Berdion, *supra* note 115, at 1645–46.

<sup>119</sup> *Id.* at 1647. EMTALA also imposes on hospitals the burden of treating patients who delay their health care until they are in dire need for any reason, including due to their lack of insurance. See Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (2006).

<sup>120</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended primarily in scattered sections of 42 U.S.C.).

<sup>121</sup> *Id.* § 116, 110 Stat. at 2184–85 (subsection titled: “Termination of Entitlement Under AFDC Program”).

<sup>122</sup> Berdion, *supra* note 115, at 1648.

<sup>123</sup> Recent Legislation, 110 HARV. L. REV. 1191, 1192 (1997) [hereinafter Recent Legislation].

<sup>124</sup> See Berdion, *supra* note 115, at 1647–48.

<sup>125</sup> In 2010, 46,589,141 people received Medicare. Henry J. Kaiser Family Found., *Total Medicare Beneficiaries*, STATEHEALTHFACTS.ORG, <http://statehealthfacts.org/comparemaptable.jsp?yr=138&typ=1&ind=290&cat=6&sub=74#notes-1> (last visited Sept. 9, 2011). In 2011, 59,468,700 people received Medicaid. Henry J. Kaiser Family Found., *Medicaid & CHIP*, STATEHEALTHFACTS.ORG, <http://www.statehealthfacts.org/comparecat.jsp?cat=4&rgn=6&rgn=1> (last visited Oct. 26, 2011); see also Genevieve M. Kenny et al., *Who and Where Are the Children Yet to Enroll in Medicaid and the Children’s Health Insurance Program?*, HEALTH AFF., Oct. 2010, at 7.

themselves. Many people fall through the cracks and lack health insurance; for example some 50.7 million in 2009.<sup>126</sup> Many non-citizens who would otherwise be eligible for benefits are excluded from government programs by the PRWORA.<sup>127</sup> Finally, individuals have a right to life-saving emergency treatment even if they are not insured, a human right that is essentially funded by hospitals, which are required to shoulder a significant financial burden to provide life-saving treatment.

### 3. *The Movement for Health Care Reform*

The modern movement for health care reform dates back to the Progressive Era, when Theodore Roosevelt ran for president as a member of the Progressive Party. His 1912 platform declared: “We pledge ourselves to work unceasingly in State and Nation for . . . the protection of home life against the hazards of sickness . . . through the adoption of a system of social insurance adapted to American use.”<sup>128</sup> In 1915, a group of progressive reformers called the American Association for Labor Legislation proposed a system of compulsory health insurance to protect workers against wage loss and the medical cost of sickness.<sup>129</sup> However, doctors opposed the measure, and the labor movement was divided over it, and even though suffragists also rallied for health care reform in 1919, the measure was never adopted.<sup>130</sup>

In the 1920s, the reformers’ emphasis shifted to controlling the cost of medical care. A group called the Committee on the Costs of Medical Care proposed group health care and voluntary insurance, but the American Medical Association (AMA) opposed even these modest measures, calling them “socialized medicine.”<sup>131</sup> During the New Deal Era, the Roosevelt Administration attempted to add medical care to the safety net established by Congress. In his 1941 Annual Message to the Congress, Roosevelt included “freedom from want” and “freedom from fear” as two of the freedoms to which Americans are entitled.<sup>132</sup> Roosevelt later elaborated on this when he introduced his “Second Bill of Rights,” which included the right to protection from economic fears associated with aging, health and subsistence, and the “right to

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<sup>126</sup> CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009, at 22 (2010).

<sup>127</sup> Recent Legislation, *supra* note 123, at 1192.

<sup>128</sup> 155 CONG. REC. S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Baucus); *see also* Hoffman, *supra* note 9, at S70.

<sup>129</sup> *See id.*

<sup>130</sup> *See id.*

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

<sup>132</sup> President Franklin D. Roosevelt, The Annual Message to the Congress (Jan. 6, 1941), in 1940 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: WAR—AND AID TO DEMOCRACIES 663, 672 (Samuel I. Rosenman ed., 1941).

adequate medical care and the opportunity to achieve and enjoy good health.”<sup>133</sup> Nonetheless, Roosevelt failed to expand access to health care.<sup>134</sup> Although organized labor strongly supported national health insurance, Roosevelt feared the opposition of the AMA.<sup>135</sup> Instead, the United States was one of the few Western democracies that did not adopt universal health care after World War II.<sup>136</sup>

During the 1940s and 1950s, organized labor led the call for national health insurance. President Harry Truman submitted plans for national health insurance to Congress.<sup>137</sup> Union leaders helped to draft the Wagner-Murray-Dingell Bill, the major health insurance legislation of the Truman Era.<sup>138</sup> However, this effort was again attacked as “socialized medicine” and failed during the Cold War Era.<sup>139</sup> By the 1960s, workers shifted their focus to obtaining health benefits through the bargaining process, but they also supported Medicare as an effort to offset the expense of bargained-for health care.<sup>140</sup> The AFL-CIO created the National Council of Senior Citizens, made up of retired union members, to campaign for Medicare. According to historian Beatrix Hoffman, “14,000 seniors marched down the boardwalk at the 1964 Democratic Convention in Atlantic City.”<sup>141</sup> One year later, Congress created the Medicare program, which provides government-funded medical insurance for the elderly and the disabled.<sup>142</sup>

The 1970s saw a renewed movement for universal health care coverage. The National Council of Senior Citizens joined the labor-led Committee for National Health Insurance (CNHI) and worked for passage of a plan to establish national health insurance sponsored by Senator Edward Kennedy.<sup>143</sup> The movement for health care also had allies in the feminist movement. In the early 1970s, the CNHI held the first conference on women and universal health care, pointing out that the majority of uninsured and underinsured people in the United States are women.<sup>144</sup> Both Presidents Nixon and Carter supported a

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<sup>133</sup> See 90 CONG. REC. 57 (1944) (Roosevelt’s 1944 State of the Union address); see also Kinney, *supra* note 85, at 346.

<sup>134</sup> Hoffman, *supra* note 9, at S71.

<sup>135</sup> *Id.*

<sup>136</sup> Kinney, *supra* note 85, at 345.

<sup>137</sup> See *id.* at 348.

<sup>138</sup> Hoffman, *supra* note 9, at S71. Rep. John Dingell remained in Congress and strongly supported the ACA. *Affordable Health Care for America*, REPRESENTATIVE JOHN DINGELL, <http://dingell.house.gov/issues/affordable-health-care-for-america.shtml> (last visited Sept. 9, 2011).

<sup>139</sup> Hoffman, *supra* note 9, at S71–72.

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

<sup>141</sup> *Id.* at S72.

<sup>142</sup> Social Security Amendments of 1965, Pub. L. No. 89-97, § 102(a), 79 Stat. 291 (codified as amended at 42 U.S.C. § 1395 (2006)) (Medicare); *id.* § 121(a), 79 Stat. at 343 (codified as amended at 42 U.S.C. § 1396 (2006)) (Medicaid).

<sup>143</sup> Hoffman, *supra* note 9, at S72.

<sup>144</sup> *Id.* at S75.

national health insurance plan.<sup>145</sup> President Carter established a commission for the Study of Ethical Problems in Medical and Biomedical and Behavioral Research, in part to determine whether there is a moral or ethical right to health care.<sup>146</sup> Senator Kennedy's bill never passed, and the moment was lost. Ronald Reagan, an opponent of government programs in general, was elected president in 1980. Under his leadership, the presidential commission issued its report, declining to decide whether health care was a moral or ethical right.<sup>147</sup>

In 1992, newly elected President Bill Clinton proposed a health care reform plan that relied on the private insurance market.<sup>148</sup> Though President Clinton's plan was supported by the AFL-CIO, it was opposed by the Gray Panthers, the Consumers' Union, and mental and public health advocates, who backed an alternative single-payer bill.<sup>149</sup> President Clinton's plan failed, and the political debate turned from substantive to procedural rights, including patients' rights in a managed care system.<sup>150</sup> By the late 1990s, the debate had turned back to considering whether there was a right to universal access to health care. In 1993, the American Association for the Advancement of Science, the world's largest federation of scientific and engineering societies, released a report arguing that "there is a right to a basic and adequate standard of health care consistent with society's level of resources."<sup>151</sup> Several organizations formed a consortium to promote the right to health care.<sup>152</sup> The Universal Health Care Action Network was formed and focused on grass roots organizing for health care reform.<sup>153</sup>

At the state level, activists for health care reform began to achieve results. In June 2000, health care reform advocates in Massachusetts launched an effort to bring universal health care coverage to the state.<sup>154</sup> In 2004, Massachusetts state lawmakers overwhelmingly approved a constitutional amendment that was designed to give all state residents the right to low-cost health care coverage.<sup>155</sup> Activists throughout the country called for their state governments to do the

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<sup>145</sup> Kinney, *supra* note 85, at 348.

<sup>146</sup> *Id.* at 350.

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

<sup>148</sup> See Hoffman, *supra* note 9, at S72.

<sup>149</sup> See *id.*; see also Dan Wascoe, Jr., *Unique Alliance Speaks Against Health Care Bill—Activists Support for Single-Payer System*, STAR TRIBUNE (Minneapolis), Aug. 19, 2009, at 1B.

<sup>150</sup> Kinney, *supra* note 85, at 351.

<sup>151</sup> Charles Marwick, *Report: Health Care Reform Must Affirm 'Right,'* 270 JAMA 1284, 1284 (1993).

<sup>152</sup> Consortium for Health & Human Rights, *Commentary, Health and Human Rights: A Call to Action on the 50th Anniversary of the Universal Declaration of Human Rights*, 280 JAMA 462, 464 (1998), cited in Kinney, *supra* note 85, at 351.

<sup>153</sup> See Hoffman, *supra* note 9, at S76.

<sup>154</sup> Lisa Eckelbecker, *Health Care Petition Drive Is Launched*, WORCESTER TELEGRAM & GAZETTE, June 7, 2000, at E1.

<sup>155</sup> Shaun Sutner, *Health Coverage Gets Nod*, WORCESTER TELEGRAM & GAZETTE, July 15, 2004, at A1.

same.<sup>156</sup> Meanwhile, there was a growing consensus that our health care system needed to be changed in order to address escalating costs and a corresponding increase in the number of Americans who lacked health insurance.<sup>157</sup> Grassroots activism for health care reform increased, centering on the claim that health care is a universal right. During the debates over the ACA, activists demonstrated in support of the Act, arguing that health care is a human right.<sup>158</sup>

### III. 2010 PATIENT PROTECTION AND AFFORDABLE CARE ACT

The ACA expands health care coverage to millions of Americans and contains provisions to lower the cost of that care.<sup>159</sup> In addition, the Act prohibits discrimination based on race, sex, national origin, disability, or age by health programs administered by the federal government or receiving federal financial assistance.<sup>160</sup> By extending Medicaid to cover more low-income people, the Act expands coverage to women and racial minorities, who are more likely to be poor.<sup>161</sup> The ACA thus takes an important step in ensuring equality of access to health care. Most intriguing, however, is the extent to which the ACA recognizes a fundamental right to health care.

The ACA does not nationalize health care, and there are significant gaps in the Act's coverage. Nonetheless, there is good reason to believe that the ACA recognizes a fundamental right to health care in the United States. The ACA responds to years of activists demanding that health care is a fundamental right. During congressional debates over the ACA, members of Congress repeatedly invoked the tradition of activism in support of a right to health care dating back

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<sup>156</sup> See Barbara Feder Ostrov, *S.J. Rally Supports Health Care Reform*, SAN JOSE MERCURY NEWS, Mar. 13, 2005, at 2B (describing a rally for universal health care at a union hall attended by "labor leaders, health care activists and advocates for the poor"); Ross Sneyd, *Health Care Reform Does Too Little, Say Activists*, TIMES-ARGUS (Barre-Montpelier, VT), Feb. 15, 2006, at A1 (describing a rally of Concerned Vermonters for Universal Health Care); Mike Sprague, *Local Woman Crusading for Health Care Reform*, WHITTIER DAILY NEWS, Aug. 19, 2007 (profiling a 63-year-old woman who was participating as a district captain in AARP's universal health care campaign).

<sup>157</sup> See Robin Toner & Sheryl Gay Stolberg, *Decade After Health Care Crisis, Soaring Costs Bring New Strains*, N.Y. TIMES, Aug. 11, 2002, at A1.

<sup>158</sup> See Grace Schneider, *Campaign Volunteers Continue to Help Obama*, COURIER-J. (Louisville), Feb. 3, 2009, at A1; *Teamsters Launch Campaign to Support Health Care Reform*, INT'L BROTHERHOOD OF TEAMSTERS (July 27, 2009), <http://www.teamster.org/content/teamsters-launch-campaign-support-health-care-reform>; see also Chris Frates & Martin Kady II, *Health Care Reformers Look to Spur Change*, POLITICO (Nov. 12, 2008, 4:37 AM), <http://www.politico.com/news/stories/1108/15529.html> (describing the campaign for health care reform).

<sup>159</sup> See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of 26 and 42 U.S.C.).

<sup>160</sup> *Id.* § 1557, 124 Stat. at 260 (to be codified at 42 U.S.C. § 18116).

<sup>161</sup> See DENAVAS-WALT, *supra* note 126, at 11, 62–67.

to Theodore Roosevelt.<sup>162</sup> Members of Congress relied on their economic powers, including the commerce, taxing and spending clauses, pointing out the economic impact of the lack of access to affordable health care.<sup>163</sup> Many supporters of the Act also affirmed that health care is a right, not a privilege, and that the ACA would protect that right.<sup>164</sup> Members of the American public were most concerned about their own health care, but they were also concerned about its availability to others. During the debate over the ACA, polls consistently showed that over 60% of the American public favored a federal guarantee of health care for all Americans.<sup>165</sup>

The argument that the ACA protects a fundamental right to health care has its weaknesses. While statutes such as Medicaid, Medicare, CHIP, and EMTALA clearly do create a right to health care for some Americans, the ACA stops short of creating an entitlement to health care for all Americans.<sup>166</sup> Instead, Congress adopted a hybrid system based on the private market. Moreover, the Act excludes undocumented immigrants from its coverage.<sup>167</sup> As a result of these choices, millions of people residing within the United States' borders will still lack access to health care.<sup>168</sup> This is in part due to the fact that the movement for health care reform was less well-organized and salient than either the labor movement or the civil rights movement. During the decade leading up to the passage of the ACA, a consensus had developed that our health care system was broken, but there was a relative lack of consensus over how to fix it.<sup>169</sup> While the ACA does not create a right to health care for all, the statute does expand access to that right for millions of Americans. Most importantly, the ACA establishes a federal commitment to promote the fundamental right to health care that was acknowledged by numerous supporters of the Act. During congressional debates over the Act, members of

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<sup>162</sup> See, e.g., 156 CONG. REC. H1012 (daily ed. Mar. 2, 2010) (statement of Rep. Kagen); *id.* at H1377 (daily ed. Mar. 12, 2010) (statement of Rep. Hoyer); *id.* at H1390 (statement of Rep. Garamendi); *id.* at H1453 (daily ed. Mar. 16, 2010) (statement of Rep. Cohen).

<sup>163</sup> Patient Protection and Affordable Care Act, §§ 1501(a)(1)–(a)(2), 10106(a), 124 Stat. at 242–43, 907–08 (to be codified at 42 U.S.C. § 18091) (congressional findings).

<sup>164</sup> See *infra* notes 235–42 and accompanying text.

<sup>165</sup> CNN Poll, *supra* note 8, at 29 (showing that 72% favor increasing government's role over health care in attempt to lower costs and expand access); CBS Poll, *supra* note 8 (showing that 64% said that the federal government should guarantee health care for all Americans).

<sup>166</sup> Thanks to David Orentlicher for emphasizing this point to me.

<sup>167</sup> Patient Protection and Affordable Care Act, § 1411(b)(2), 124 Stat. at 224 (to be codified at 42 U.S.C. § 18081).

<sup>168</sup> CONG. BUDGET OFFICE, SELECTED CBO PUBLICATIONS RELATED TO HEALTH CARE LEGISLATION, 2009–2010, at 11 (2010) (estimating that twenty-three million non-elderly people would be left uninsured under the Patient Protection and Affordable Care Act).

<sup>169</sup> See GfK Roper Pub. Affairs & Media, *The AP-National Constitutional Center Poll*, ASSOCIATED PRESS, 8 (Sept. 15, 2009), <http://surveys.ap.org/data/GfK/AP-GfK%20Poll%20Constitution%20Topline%20with%20trends%20final%20091109.pdf> (showing that 47% of respondents agreed the government should guarantee access to health insurance, while 50% said it should be up to the individual).

Congress repeatedly affirmed the existence of a right to health care.<sup>170</sup> By contrast, government lawyers litigating the constitutionality of the ACA have confined themselves to arguments over the extent of Congress's commerce and spending powers.<sup>171</sup> Revitalizing the rights-based arguments in favor of the ACA is important to understanding both the statute itself, and the process of democratic constitutionalism that led to the Act's adoption.

### A. *The ACA*

The ACA represented Congress's attempt to reform the health care system without making any drastic changes to our health care delivery system. Thus, while bills to establish a single-payer health care system were introduced in both the House and Senate, President Obama and leading members of Congress made it clear from early on that a single-payer system would not be considered as an option.<sup>172</sup> Instead, the ACA expands government assistance but relies primarily on employer-provided private health insurance to meet the health care needs of Americans. A crucial provision of the ACA prohibits health insurance companies from denying coverage or charging exorbitant prices to persons with pre-existing medical conditions.<sup>173</sup> The resulting burden on insurance companies is offset by the requirement that all persons purchase health insurance, the so-called individual mandate. This public-private solution is intended to expand access to health care and decrease its cost.

One of the most important provisions of the ACA expands Medicaid coverage to all Americans below 133% of the poverty level.<sup>174</sup> Because 15% of American households currently fall below that level, this measure alone will

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<sup>170</sup> See, e.g., 156 CONG. REC. H1012 (daily ed. Mar. 2, 2010) (statement of Rep. Kagen); *id.* at H1377 (daily ed. Mar. 12, 2010) (statement of Rep. Hoyer); *id.* at H1390 (statement of Rep. Garamendi); *id.* at H1453 (daily ed. Mar. 16, 2010) (statement of Rep. Cohen).

<sup>171</sup> See, e.g., Memorandum in Support of the Defendants' Motion to Dismiss, *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011); Memorandum in Support of Defendants' Motion to Dismiss, *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010); Defendants' Response to Plaintiffs' Motion for Preliminary Injunction and Brief in Support, *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

<sup>172</sup> See John Brennen, *Outrage over Health Reform: Protesters Say Obama Plan Falls Short*, RECORD (Hackensack, NJ), June 21, 2009, at L3; see also Bob Braun, *In Health Care Reform, Even the Supporters Are Divided*, STAR-LEDGER (Newark, NJ), May 18, 2009, at 1; Michael Vitez, *In Philadelphia, Key Congressman Touts Single-Payer Insurance*, PHILA. INQUIRER, Mar. 8, 2009, at B14.

<sup>173</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1201(4), 124 Stat. 119, 155-56 (2010) (to be codified at 42 U.S.C. §§ 300gg, 300gg-1, 300gg-4).

<sup>174</sup> *Id.* § 2001(a)(1)(c), 124 Stat. at 271. Previously, only individuals with incomes below 100% of the poverty level were eligible for Medicaid. See *Analysis of the Health Care Reform Law: PPACA and the Reconciliation Act*, NAT'L HEALTH LAW PROGRAM, 2 (2010), [http://www.healthlaw.org/images/stories/PPACA\\_Part\\_II.pdf](http://www.healthlaw.org/images/stories/PPACA_Part_II.pdf) (Part II).



provide health care to millions of people.<sup>175</sup> The ACA also expands Medicare coverage by increasing coverage for prescription drugs, by ending the “donut hole” in prescription coverage.<sup>176</sup> The Act mandates that all insurance programs, including Medicaid and Medicare, provide “essential health benefits,” including coverage of preventive care,<sup>177</sup> and scales back the privatization of Medicare by restricting the Medicare Advantage program.<sup>178</sup> These provisions significantly expand the scope of the entitlement to government-funded insurance for the elderly and the poor.

A second category of measures under the ACA regulates medical insurance companies. Most importantly, the ACA prohibits insurance companies from denying coverage or increasing rates for people who have pre-existing conditions,<sup>179</sup> cancelling insurance absent fraud or misrepresentation of material fact,<sup>180</sup> or charging higher premiums based on a person’s medical history.<sup>181</sup> The ACA also prohibits insurance companies from imposing lifetime caps on coverage of “essential health benefits,”<sup>182</sup> and requires insurance companies to provide coverage for young adults on their parents’ insurance policies through age twenty-six.<sup>183</sup> The ACA prohibits all health care providers from discriminating on the basis of race, color or national origin, sex, disability, or age.<sup>184</sup> The ACA also regulates employers, requiring those who employ over fifty employees to provide health insurance for their employees.<sup>185</sup> The Act provides tax credits for businesses that employ under twenty-five employees,

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<sup>175</sup> CONG. BUDGET OFFICE, *supra* note 168, at 11 (estimating that sixteen million Americans would be eligible for Medicaid under the Patient Protection and Affordable Care Act).

<sup>176</sup> Patient Protection and Affordable Care Act, §§ 3301(b), 3315, 124 Stat. at 461–62, 479, *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1101(a)–(b), 124 Stat. 1029, 1036–39 (to be codified as amended at 42 U.S.C. § 1395w) (Elimination of the “doughnut hole” in Medicare Part D will occur over time from 2011–2020.).

<sup>177</sup> Patient Protection and Affordable Care Act, § 1302(a)–(b), 124 Stat. at 163–64 (to be codified at 42 U.S.C. § 18022).

<sup>178</sup> *See id.* §§ 3204, 3209, 124 Stat. at 456–460, *amended by* Health Care and Education Reconciliation Act of 2010, §§ 1102–03, 124 Stat. at 1040–47 (to be codified at 42 U.S.C. § 1395w).

<sup>179</sup> Patient Protection and Affordable Care Act, § 1201(4), 124 Stat. at 156 (to be codified at 42 U.S.C. §§ 300gg–1, 300gg–4).

<sup>180</sup> *Id.* § 2712, 124 Stat. at 130–31 (to be codified at 42 U.S.C. § 300gg–12).

<sup>181</sup> *Id.* § 2701, 124 Stat. at 155 (to be codified at 42 U.S.C. § 300gg).

<sup>182</sup> *Id.* §§ 1001(5), 1302(a–b), 10101(a), 124 Stat. at 130–31, 883 (to be codified at 42 U.S.C. § 300gg–11).

<sup>183</sup> *Id.* § 1001(5), 124 Stat. at 132 (to be codified at 42 U.S.C. § 300gg–14).

<sup>184</sup> *Id.* § 2706, 124 Stat. at 160 (to be codified at 42 U.S.C. § 300gg–5).

<sup>185</sup> Patient Protection and Affordable Care Act, §§ 1513(a), 10106(e)–(f), 10108(i)(1)(A), 124 Stat. at 253, 910, 914, *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1003(a)–(d), 124 Stat. 1029, 1033 (to be codified as amended at 26 U.S.C. § 4980H).

and that provide health insurance to those employees.<sup>186</sup> These measures regulate the private market to expand access to private health insurance.

Finally, the ACA regulates individuals by requiring them to obtain medical insurance.<sup>187</sup> The Act requires states to create insurance exchanges designed to be affordable markets for those who are unable to obtain insurance through government programs or employment,<sup>188</sup> and provides federal tax credits for individuals purchasing insurance who earn less than 400% of the federal poverty level.<sup>189</sup> With a few exceptions, individuals who remain uninsured will be required to pay a penalty when they pay their federal income taxes.<sup>190</sup> This “individual mandate” is necessary because insurance companies are now required to provide health insurance for all comers.<sup>191</sup> Without the mandate, Congress feared that the Act would create an incentive for people to avoid buying insurance until they became sick. Since most people who hesitate to buy insurance are young and healthy, their lack of participation would greatly increase the cost of the risk pool, and thus the cost of health care.<sup>192</sup>

The ACA furthers the right to health care by expanding access to health care and imposing cost control measures to make health care more affordable. The ACA requires insurance companies to provide preventive health care, thus guaranteeing that individuals can get treated before their conditions become acute. Moreover, the Act’s antidiscrimination provisions emphasize the value of the right to health care because it cannot be denied arbitrarily or with discriminatory intent.<sup>193</sup> The anti-discrimination provisions of the ACA are analogous to the Civil Rights Act of 1866,<sup>194</sup> which prohibited the denial of property rights on the basis of race. Just as the Civil Rights Act of 1866 reflected the importance of property rights, which many members of the Reconstruction Congress believed to be natural rights, so does the ACA’s

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<sup>186</sup> Patient Protection and Affordable Care Act, §§ 1421(a), 10105(e), 124 Stat. at 237–38, 906 (to be codified at 26 U.S.C. § 45R).

<sup>187</sup> *Id.* § 1501(b), 124 Stat. at 244–49 (to be codified at 26 U.S.C. § 5000A).

<sup>188</sup> *Id.* §§ 1311, 10104(e)–(h), 10203(a), 124 Stat. at 173, 900–01, 927 (to be codified at 42 U.S.C. § 18031).

<sup>189</sup> *Id.* § 1401(a), 124 Stat. at 213, 215, amended by Health Care and Educational Reconciliation Act of 2010, § 1004(a)(1)(A), (a)(2)(A), 124 Stat. at 1034 (to be codified at 26 U.S.C. § 36B).

<sup>190</sup> The graduating penalty begins in 2014 at \$95.00 or 1% of a person’s taxable income (whichever is greater), and increases to \$695.00 or 2.5% of a person’s income (whichever is greater) by 2016. See Patient Protection and Affordable Care Act, §§ 1501(b), 10106(b)(1), 124 Stat. at 244–45, 249, 909, amended by Health Care and Education Reconciliation Act of 2010, § 1002(a)(1)–(a)(2), 124 Stat. at 1032 (to be codified at 26 U.S.C. § 5000A(b)(1), (c)(2), (g)).

<sup>191</sup> See Patient Protection and Affordable Care Act, §§ 1501(a)(1)–(a)(2), 10106(a), 124 Stat. at 242–43, 907–08 (to be codified at 42 U.S.C. § 18091) (congressional findings).

<sup>192</sup> See *id.* §§ 1501(a)(2)(G), 10106(a), 124 Stat. at 243, 907–08 (to be codified at 42 U.S.C. § 18091) (congressional findings).

<sup>193</sup> *Id.* § 1557, 124 Stat. at 260 (to be codified at 42 U.S.C. § 18116).

<sup>194</sup> Ch. 31, 14 Stat. 27.

protection against race, sex, and other forms of discrimination by health care providers illustrate the importance of the right at issue—the fundamental right to health care.

## B. Congressional Debates over the ACA

During the debates over the ACA, members of Congress engaged in heated arguments over the policy behind the Act and the means of implanting that policy. Some of the most heated exchanges, however, concerned the constitutionality of the Act. Opponents charged that the Act was beyond the power of Congress and violated both states' and individual rights. Proponents of the Act countered that the Act was a necessary means to protect a fundamental right. They asserted both the authority and the obligation to expand access to health care for the American people. The views of the proponents prevailed in this political process.

### 1. Policy Arguments

Members of Congress on both sides of the debates over the ACA agreed that our health care system is broken. Fence-sitting Republican Senator Olympia Snowe observed that “virtually everyone I have encountered agrees the system is broken.”<sup>195</sup> Republican Senator Barrasso agreed: “We know there are things that need to be corrected. There are improvements that need to be made.”<sup>196</sup> Supporters of the Act repeatedly decried the high cost of health care.<sup>197</sup> Opponents agreed. Said Republican Senator Coburn, a staunch opponent of the Act, “What is the real problem in health care today? What is it that keeps people from getting care? The No. 1 [sic] problem that keeps people from getting care is cost. It costs too much.”<sup>198</sup> However, supporters and opponents vehemently disagreed about whether the Act would improve the situation.

Proponents of the Act claimed that it would reduce costs by cutting administrative tape, outlaw discrimination by insurance companies, and reduce costs by working to change the focus of the health care system from treating sickness to promoting wellness.<sup>199</sup> They maintained that government involvement was necessary to ensure access to affordable health care. Said ACA supporter Senator Mary Landrieu, “People in my State and around the Nation . . . know that government must stand sometimes to protect them from

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<sup>195</sup> 155 CONG. REC. S11,890 (daily ed. Nov. 20, 2009) (statement of Sen. Snowe).

<sup>196</sup> *Id.* at S11,899 (statement of Sen. Barrasso).

<sup>197</sup> *See, e.g., id.* at S13,292 (daily ed. Dec. 16, 2009) (statement of Sen. Sanders); *id.* at S13,481 (daily ed. Dec. 19, 2009) (statement of Sen. Stabenow); *id.* at S13,648 (daily ed. Dec. 21, 2009) (statement of Sen. Durbin).

<sup>198</sup> *Id.* at S11,896 (daily ed. Nov. 20, 2009) (statement of Sen. Coburn); *see also* 156 CONG. REC. H1005 (daily ed. Mar. 2, 2010) (statement of Rep. Roe).

<sup>199</sup> 155 CONG. REC. S11,989 (daily ed. Nov. 30, 2009) (statement of Sen. Baucus).

abusive practices in the private marketplace, abusive practices of insurance companies, to try to level the playing field and set the rules.”<sup>200</sup> In the House, Representative Steny Hoyer argued that the bill would provide greater access to health care and pointed to polls showing that a majority of Americans supported comprehensive reform.<sup>201</sup> Representative Al Green of Texas declared, “And to these who would contend that we should stop at this point, that we should simply let it go, my response is: we cannot let health care go, because it won’t let us go. The system is not sustainable. . . . This is the right thing to do.”<sup>202</sup>

Opponents of the Act insisted that it was a mistake to involve the government further in health care delivery.<sup>203</sup> They claimed that the Act would increase, not decrease, the cost of health care.<sup>204</sup> Opponents also voiced process-based concerns. For example, Senator Inhofe accused the majority of making deals behind closed doors and ramming and jamming the Act.<sup>205</sup> Representative Sam Johnson of Texas warned, “If the Democrats insist on ramming this bill through against the will of the American people, then they’d better be prepared to suffer the consequences in November.”<sup>206</sup> Proponents denied this charge and accused their opponents of engaging in “a relentless misinformation campaign, aimed solely at using fear to sway public opinion against this bill.”<sup>207</sup>

Not all members of Congress agreed that the Act went too far. Some critics of the Act argued that it did not go far enough. For example, on behalf of himself and two other senators, Senator Bernie Sanders proposed, and then withdrew, an amendment that would have established a single-payer system of health care.<sup>208</sup> Sanders argued that a single-payer system was “the only mechanism we have to provide comprehensive high-quality health care to all of our people in a cost-effective way.”<sup>209</sup> Sanders argued that removing the for-profit insurance companies from the health care system was necessary for effective reform.<sup>210</sup> He predicted that Congress would approve a single-payer

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<sup>200</sup> *Id.* at S13,732 (daily ed. Dec. 22, 2009) (statement of Sen. Landrieu).

<sup>201</sup> 156 CONG. REC. H1150 (daily ed. Mar. 4, 2010) (statement of Rep. Hoyer).

<sup>202</sup> *Id.* at H1154–55 (statement of Rep. Green).

<sup>203</sup> *See, e.g.*, 155 CONG. REC. S11,898 (daily ed. Nov. 20, 2009) (statement of Sen. Coburn) (“A question I asked my staff—and we did the research—what was health care inflation before 1970? Do you realize that most of the time it was less than the regular increase in inflation? What was the difference? What happened? What happened is the government got involved in health care.”).

<sup>204</sup> *See, e.g., id.* at S11,900–02 (statement of Sen. Enzi); *id.* at S11,996 (daily ed. Nov. 30, 2009) (statement of Sen. Grassley).

<sup>205</sup> *Id.* at S11,892 (daily ed. Nov. 20, 2009) (statement of Sen. Inhofe).

<sup>206</sup> 156 CONG. REC. H1107 (daily ed. Mar. 4, 2010) (statement of Rep. Johnson).

<sup>207</sup> 155 CONG. REC. S13,733 (daily ed. Dec. 22, 2009) (statement of Sen. Landrieu); *see also id.* at S11,992 (daily ed. Nov. 30, 2009) (statement of Sen. Dodd).

<sup>208</sup> *See id.* at S13,290 (daily ed. Dec. 16, 2009). The co-sponsors to Senator Sanders’ amendment were Senators Sherrod Brown and Roland Burris. *Id.*

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

<sup>210</sup> *Id.* at S13,291.

system in the future and opined, “On that day, when it comes—and it will come—the U.S. Congress will finally proclaim that health care is a right of all people and not just a privilege. And that day will come, as surely as I stand here today.”<sup>211</sup> In the House, Representative John Conyers agreed, “If this bill passes, we should celebrate it. Tomorrow we will begin the work to make it better—to truly secure health care as a human right.”<sup>212</sup>

## 2. Constitutional Arguments

The arguments of the Tea Party activists were often repeated during congressional debates over the ACA.<sup>213</sup> Opponents of the Act claimed that it represented an unprecedented expansion of government at the expense of individual liberty. As Senator Lisa Murkowski explained her view, “This health care bill is a massive overreach by the Federal Government that will result in our government having more involvement in your family’s health care decisions and greater government intervention . . . .”<sup>214</sup> Senator Roberts called the Act a “stunning assault[] on liberty” filled with “Orwellian policies.”<sup>215</sup> Senator Inhofe agreed: “[W]e don’t want the government telling us what we can and cannot do. A government-run universal health care system or a socialized system is not the answer.”<sup>216</sup> Senator Ensign declared, “What happened to life, liberty, and the pursuit of happiness? I guess Americans can only have them if they comply with this new bill and buy a bronze, silver, gold, or platinum health insurance program.”<sup>217</sup> Said Senator Kyl, “If the Reid bill has a motto, it is ‘in government we trust.’ With the turn of every page, it is no exaggeration to say the Reid bill creates a Washington takeover of health care . . . [it] amount[s] to a stunning assault on liberty.”<sup>218</sup>

In the House, opponents of the Act also argued that the Act threatened individual liberty. Representative Broun of Georgia declared, “And I ask, Madam Speaker, for the American people to stand up and say ‘no’ to socialism and say ‘yes’ to freedom and liberty. I hope the American people will contact their Congressman and their Senators and say ‘no’ to ObamaCare . . . .”<sup>219</sup> Said Representative Mike Pence of Indiana, “The American people don’t want a government takeover of health care. Despite the President’s latest polished pitch, ObamaCare 2.0 is still a government takeover of one-sixth of the

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<sup>211</sup> *Id.* at S13,290.

<sup>212</sup> 156 CONG. REC. H1899 (daily ed. Mar. 21, 2010) (statement of Rep. Conyers).

<sup>213</sup> *See, e.g., id.* at H1007 (daily ed. Mar. 2, 2010) (statement of Rep. Gingrey) (referring to Tea Party protests during town hall meetings).

<sup>214</sup> 155 CONG. REC. S11,893 (daily ed. Nov. 20, 2009) (statement of Sen. Murkowski).

<sup>215</sup> *Id.* at S11,888 (statement of Sen. Roberts).

<sup>216</sup> *Id.* at S11,893 (statement of Sen. Inhofe).

<sup>217</sup> *Id.* at S13,721 (daily ed. Dec. 22, 2009) (statement of Sen. Ensign).

<sup>218</sup> *Id.* at S13,730 (statement of Sen. Jon Kyl).

<sup>219</sup> 156 CONG. REC. H1112 (daily ed. Mar. 4, 2010) (statement of Rep. Broun).

American economy, and the American people know it.”<sup>220</sup> His Hoosier colleague, Representative Dan Burton, agreed, arguing that the Act would “lead to socialized medicine.”<sup>221</sup>

The focal point of the constitutional opposition in Congress, as in the courts, was the provision of the Act requiring individuals to purchase insurance, also known as the “individual mandate.” Senator Inhofe proclaimed,

Under this bill, the government will tell people what type of coverage they can and cannot have, mandate that every American have health care or pay a tax, mandate employers to provide a certain level of benefits or pay a fine, introduce a government-run plan designed to destroy the private market . . . .<sup>222</sup>

Senator Grassley agreed, “The Federal Government is a government of limited powers under the 10th [A]mendment. To my knowledge—and I think I know a lot about U.S. history—never in 225 years has the Federal Government said you had to buy anything.”<sup>223</sup> Senator Kay Bailey Hutchinson observed, “People are saying to me: How can the Federal Government tell me I have to buy insurance? I think they have a point.”<sup>224</sup> Senator Ensign agreed:

Where do we draw the line? Will we even draw one at all? The Constitution draws that line. It is called the enumerated powers. I don’t think Congress has ever required Americans to buy a product or service, such as health insurance, under penalty of law. I doubt Congress has the power to do that in the first place.<sup>225</sup>

Ensign argued that the Act did not fall within Congress’s power to regulate interstate commerce because “[t]he mandate to purchase health insurance does not purport to regulate or prohibit activity of any kind, whether economic or noneconomic. Instead, the individual mandate provision regulates no action.”<sup>226</sup>

In the House, opponents also cited the Tenth Amendment as a basis for opposing the individual mandate. Said Representative Wamp,

[The founding fathers] carved out the 10th Amendment and gave States some sovereignty. There are liberal publications today writing that article VI allows the Federal Government to override the States. But that is on matters of

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<sup>220</sup> *Id.* at H1151 (statement of Rep. Pence).

<sup>221</sup> *Id.* at H1155 (statement of Rep. Burton).

<sup>222</sup> 155 CONG. REC. S11,893 (daily ed. Nov. 20, 2009) (statement of Sen. Inhofe).

<sup>223</sup> *Id.* at S11,996 (daily ed. Nov. 30, 2009) (statement of Sen. Grassley).

<sup>224</sup> *Id.* at S13,718 (daily ed. Dec. 22, 2009) (statement of Sen. Hutchinson).

<sup>225</sup> *Id.* at S13,721 (statement of Sen. Ensign).

<sup>226</sup> *Id.* at S13,722.

equality and justice, not a decision of policy by the Federal legislature to mandate costs and taxes and debt on its people.<sup>227</sup>

His colleague, Representative Burgess, agreed. “The whole question of making everyone buy health insurance, the question of an individual mandate that is contained within the Senate policy, is something that this country has not done before.”<sup>228</sup> Burgess argued that the mandate regulated “nonactivity” and therefore could not be justified by the Commerce Clause.<sup>229</sup> Thundered Representative Barrett,

Mr. Speaker, let me say this. If this bill does pass, South Carolina won't stand for it. And I will tell you today that I will do everything within my power to defend the States' rights that are set forth by the 10th Amendment of the Constitution of the United States.<sup>230</sup>

Representative Gohmert cited both the Ninth and Tenth Amendments, and like his colleague, Representative Barrett, threatened to file a lawsuit immediately to challenge the Act.<sup>231</sup>

Citing legal experts, proponents of the Act responded that the individual mandate was a constitutional exercise of Congress's power.<sup>232</sup> Representative Louise Slaughter argued that the individual mandate fell within Congress's authority to regulate activity that substantially affects interstate commerce.<sup>233</sup> Argued Representative George Miller of California, “This provision is grounded in Congress's taxing power but is also necessary and proper—indeed, a critical linchpin—to the overall effort to reform the health care market and bring associated costs under control throughout interstate commerce.”<sup>234</sup>

By far the dominant narrative of the proponents of the ACA was that the ACA was a measure that would increase the individual rights of the American people. Many proponents of the ACA maintained that the Act protected a fundamental right to health care. Senator Tom Harkin, chair of the Senate Health Employment and Labor Policy Committee, insisted, “But we must make this beginning in order to fulfill that dream and really make health care a right, not a privilege. . . . We say yes to progress, yes to people, yes to health care as an inalienable right of every American citizen.”<sup>235</sup> Senator Dick Durbin agreed,

<sup>227</sup> 156 CONG. REC. H1566 (daily ed. Mar. 17, 2010) (statement of Rep. Wamp).

<sup>228</sup> *Id.* at H1591 (statement of Rep. Burgess).

<sup>229</sup> *Id.* at H1716 (daily ed. Mar. 19, 2010) (statement of Rep. Burgess); *see also id.* at H1740–41 (statement of Rep. King).

<sup>230</sup> *Id.* at H1719 (statement of Rep. Barrett).

<sup>231</sup> *Id.* at H1739–40 (statement of Rep. Gohmert); *see also id.* at H1742 (statement of Rep. Foxx) (citing the Tenth Amendment to oppose the Act).

<sup>232</sup> *See e.g.*, 155 CONG. REC. S13,720–21 (daily ed. Dec. 22, 2009) (statement of Sen. Baucus) (citing analysis by Mark Hall, Professor, Wake Forest University School of Law).

<sup>233</sup> 156 CONG. REC. H1826 (daily ed. Mar. 21, 2010) (statement of Rep. Slaughter).

<sup>234</sup> *Id.* at H1882 (statement of Rep. Miller).

<sup>235</sup> 155 CONG. REC. S13,642–43 (daily ed. Dec. 21, 2009) (statement of Sen. Harkin).

What this debate is about is whether health insurance is a right or a privilege. If it is a privilege only for the wealthy in America, then we have lost our way as a nation. We have to understand that protection of our well-being and health through health insurance is something every American is entitled to.<sup>236</sup>

Senator Dodd noted:

[T]here are those, I guess, who believe it is a privilege to have access to health care as an American citizen. Those of us on this side of the aisle believe it is a right, and as a right, you ought not to be denied that right based on economic circumstances, your gender, or your ethnicity in this Nation. You ought to have access to health care as a fundamental right in our Nation.<sup>237</sup>

Senate Majority Leader Harry Reid agreed that the Act “acknowledges, finally, that health care is a fundamental right, which my friend Senator Harkin spoke about so clearly—a human right—and not just a privilege for the most fortunate.”<sup>238</sup>

In the House, supporters of the Act also argued that it was a civil rights measure, protecting a fundamental right to health care. Representative Ellison of Minnesota invoked “the progressive vision for America,” and claimed that the ACA was consistent with that vision “where we have civil rights and human rights for women, people of color, working people, people who live in rural areas; where the country literally works for everyone and not just a few; where we really believe that all men are created equal and created with certain inalienable rights.”<sup>239</sup> Representative Ryan of Ohio agreed, “This is a basic human rights issue,”<sup>240</sup> and Representative Patrick Kennedy added, “Health care is not only a civil right, it’s a moral issue.”<sup>241</sup> Representative Barbara Lee of California declared, “This is a major first step in setting a strong foundation where finally health care becomes a basic human right for all rather than a privilege for the few, which it has been in the past.”<sup>242</sup>

Supporters of the Act also emphasized the Act’s contribution to women’s health care. As Representative Barbara Lee explained, “While health care reform is essential for everyone, women are in particularly dire need for major changes to our health care system.”<sup>243</sup> Representative Gwen Moore agreed, pointing out that “health care reform will provide women the care they need [and] . . . ban the insurance practice of rejecting women with a preexisting condition.”<sup>244</sup> Representative Mazie Hirono added that women would benefit

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<sup>236</sup> *Id.* at S13,649 (statement of Sen. Durbin).

<sup>237</sup> *Id.* at S13,643 (statement of Sen. Dodd).

<sup>238</sup> *Id.* at S13,645 (statement of Sen. Reid).

<sup>239</sup> 156 CONG. REC. H1165 (daily ed. Mar. 4, 2010) (statement of Rep. Ellison).

<sup>240</sup> *Id.* at H1439 (daily ed. Mar. 15, 2010) (statement of Rep. Ryan).

<sup>241</sup> *Id.* at H1826 (daily ed. Mar. 21, 2010) (statement of Rep. Kennedy).

<sup>242</sup> *Id.* at H1632 (daily ed. Mar. 18, 2010) (statement of Rep. Lee).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at H1637 (statement of Rep. Moore).



from the prohibition on denial of insurance due to pre-existing conditions, noting that insurance companies had cited domestic violence and pregnancy as disqualifying pre-existing conditions.<sup>245</sup> In the House, members celebrated National Women's History Month and noted the historical nature of the Act. For example, Representative Capps noted:

[W]omen have been at the forefront of our Nation's most important struggles; the abolition movement, support for people with disabilities, efforts to enact child labor laws, civil rights, and environmental causes, to name a few. And now we are again at the forefront of one of the most historic efforts of our time, the fight for affordable health care coverage.<sup>246</sup>

She also claimed that Speaker Nancy Pelosi's leadership was largely responsible for the success of the Act.<sup>247</sup>

Many proponents invoked the historical antecedents of the ACA and portrayed themselves as participants in a long-time struggle to expand access to health care. Senator Dick Durbin proclaimed, "When the history of the Senate is written, I think this vote will be included because it is a historic vote."<sup>248</sup> As Senator Max Baucus pointed out,

In the Presidential campaign of 1912, Theodore Roosevelt's platform said: "We pledge ourselves to work unceasingly in State and Nation for . . . the protection of home life against the hazards of sickness . . . through the adoption of a system of social insurance adapted to American use." Today, nearly a century later, we are closer than ever to enacting meaningful health care reform.<sup>249</sup>

Senator Christopher Dodd also invoked President Roosevelt, who "picked up [the] challenge" to create a national health care system, and argued that the Act would ensure the "freedom from fear" that Roosevelt promised sixty-nine years prior because "[n]o American can be free from fear when getting sick could mean going broke."<sup>250</sup> Senator Mary Landrieu noted that President Harry Truman had twice "called on Congress to pass reform legislation to expand

<sup>245</sup> See 155 CONG. REC. H12,368–69 (daily ed. Nov. 5, 2009) (statement of Rep. Hirono).

<sup>246</sup> 156 CONG. REC. H1598 (daily ed. Mar. 18, 2010) (statement of Rep. Capps).

<sup>247</sup> *Id.*

<sup>248</sup> 155 CONG. REC. S13,648 (daily ed. Dec. 21, 2009) (statement of Sen. Durbin).

<sup>249</sup> *Id.* at S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Baucus). Senator Casey agreed,

I am grateful we are finally at this point where the Senate at long last will be debating our health care bill. It has been a long time in coming. Some of us have waited years, some have waited for decades to be at this point in our history.

*Id.* at S12,001 (statement of Sen. Casey).

<sup>250</sup> *Id.* at S13,643 (daily ed. Dec. 21, 2009) (statement of Sen. Dodd).

quality health care coverage to more Americans.”<sup>251</sup> Dodd also likened the heated ACA debate to that over Medicare, which he characterized as “the ironclad commitment to take care of our seniors” that “took the poorest sector of our population, the elderly, and lifted them out of poverty.”<sup>252</sup>

Supporters in the House agreed. Representative Inslee declared,

“We the people of the United States, in order to form a more perfect union”—that is what got America started. And when we form a more perfect union, it is always a continuous and controversial process. Social Security, Medicare, civil rights, at those times it was always controversial. . . . Today, we will have choice. Today, we will have health care. Today, we are forming a more perfect union in the tradition of this great country.”<sup>253</sup>

Several referred to the Civil Rights movement of the 1960s as a precedent for the Act. Noted Representative Patrick Kennedy, “The parallels between the struggle for civil rights and the fight to make quality, affordable health care accessible to all Americans are significant. It was Dr. Martin Luther King, Jr., who said, [‘]Of all forms of inequality, injustice in health care is the most shocking and inhumane.[’]”<sup>254</sup> Representative John Dingell agreed,

Today is a day that is going to rank with the day we passed the civil rights bill in 1964. Today we are doing something that ranks with what we did on Social Security or Medicare. This is the day on which we can all be proud if we vote for that legislation.<sup>255</sup>

Representative Andrews summed up this theme: “For Social Security, we gave decency for seniors. In Medicare, we gave compassion for seniors. In the Civil Rights Act, we gave equality for all Americans. Tonight, we will give justice and decency. That’s the kind of country that we will be.”<sup>256</sup>

Many senators invoked their deceased colleague, Senator Edward Kennedy, who had been a leader in the fight for health care reform for decades before his death in the summer of 2009. As Senator Tom Harkin observed,

Our former chairman, Senator Ted Kennedy, fought all his life for national health insurance, and years ago, back in the 1960s, said health care ought to be a right, not a privilege. . . . It was his great dream of an American where

<sup>251</sup> *Id.* at S13,732 (daily ed. Dec. 22, 2009) (statement of Sen. Landrieu).

<sup>252</sup> *Id.* at S11,993 (daily ed. Nov. 30, 2009) (statement of Sen. Dodd).

<sup>253</sup> 156 CONG. REC. H1820 (daily ed. Mar. 21, 2010) (statement of Rep. Inslee).

<sup>254</sup> *Id.* at H1826 (statement of Rep. Kennedy).

<sup>255</sup> *Id.* at H1857–58 (statement of Rep. Dingell).

<sup>256</sup> *Id.* at H1895 (statement of Rep. Andrews); *see also id.* at H1,920 (statement of Rep. Jim Moran) (“As with Social Security and Medicare and Civil Rights legislation, it is now time for another step in our historic progress toward greatness. That’s why we chose public service and why we, as Democrats, will pass this bill today.”); *id.* at H1899 (statement of Rep. Conyers) (“If this bill passes, we should celebrate it. Tomorrow we will begin the work to make it better—to truly secure health care as a human right.”).

quality, affordable health care is that right. He thought of it as a moral imperative . . . .<sup>257</sup>

In the House, Senator Edward Kennedy's son, Patrick, made an emotional appeal to his colleagues on behalf of his father. Repeating his father's speech during the debate over the Civil Rights Act of 1964, which itself referred to the late President John F. Kennedy, Representative Kennedy claimed, "No memorial, oration or eulogy could more eloquently honor his memory than the earliest possible passage of this bill for which he fought so long. His heart and his soul are in this bill."<sup>258</sup>

### 3. *Lessons from the Congressional Debates*

In the end, of course, the proponents of the ACA prevailed, and the Act became law. The vote in favor of the Act followed prior precedents enacted by Congress, including statutes creating economic rights in general, and the right to health care in particular. The ACA itself creates an important precedent, a federal commitment to promote the right to health care for most, if not all, Americans. The debate was a spirited one, and the constitutional arguments on both sides were vigorously debated. The arguments of the Tea Party activists outside of the Capitol building were often voiced by their political allies within Congress. However, the arguments of the proponents of the Act were heard more loudly. The Tea Party position of individual liberty and limited government lost the congressional debates over the ACA. Instead, an alternative vision of rights, based on a positive commitment of government to protect the right to health care, prevailed.

It is also important to note what the debates did not establish. They did not establish the motives of the members of Congress who voted for (or against) the Act. Not only is it virtually impossible to determine the motive of an individual, motive is irrelevant for determining the validity of legislation.<sup>259</sup> At most, the debates provide evidence that the members of Congress who voted for the Act were reasonable, that the Act was rationally related to a legitimate goal, which is all that the government needs to show to prove the constitutionality of congressional actions.<sup>260</sup> What matters is not what the members of Congress thought or believed, but what they actually said during the debates. Those debates created a congressional record of a constitutional and policy argument over the statute, just as a trial transcript and briefs create a record of arguments made before the Court. Of course, the binding decision is the vote of each member of Congress. When the ACA prevailed, the vote on the Act was a

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<sup>257</sup> 155 CONG. REC. S13,642 (daily ed. Dec. 21, 2009) (statement of Sen. Harkin).

<sup>258</sup> 156 CONG. REC. H1826 (daily ed. Mar. 21, 2010) (statement of Rep. Kennedy).

<sup>259</sup> See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964).

<sup>260</sup> See *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010); see also *Gonzalez v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring).

finding of constitutionality on the part of a majority of Congress. Reading the congressional debates is helpful to understanding what that decision means.

### C. *Constitutional Litigation over the ACA*

Soon after the ACA became law, a number of state and individual plaintiffs filed constitutional challenges to the Act. Many of those cases were dismissed for lack of ripeness or standing.<sup>261</sup> In the remaining cases, courts have issued conflicting rulings. Without exception, the focus of the litigation is on whether Congress had the power to enact the ACA under the commerce, spending and taxing powers. No litigant has raised the issue of whether the Act protects any rights, including a right to health care,<sup>262</sup> though Judge Jeffrey Sutton noted the right in passing in his important concurrence to the Sixth Circuit opinion upholding the Act.<sup>263</sup> The United States Supreme Court recently agreed to hear the constitutional challenge to the ACA.<sup>264</sup> Unless the government changes its tactics, however, it is unlikely that the Court will consider whether the ACA can be justified as a statute protecting a right to health care. This is an unfortunate oversight.

The courts of appeals are currently split on whether the ACA is constitutional. The Sixth Circuit upheld the Act as falling within Congress's commerce and spending powers.<sup>265</sup> The court rejected the argument that the individual mandate violated any external limit on congressional power.<sup>266</sup> In his

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<sup>261</sup> See *Kinder v. Geithner*, No. 1:10 CV 101 RWS, 2011 WL 1576721, at \*4–10 (E.D. Mo. Apr. 26, 2011) (standing and ripeness); *Purpura v. Sebelius*, No. 10-04814, 2011 WL 1547768, at \*9 (D.N.J. Apr. 21, 2011) (standing); *Peterson v. United States*, 774 F. Supp. 2d 418, 425 (D.N.H. 2011) (standing); *N.J. Physicians, Inc. v. Obama*, 757 F. Supp. 2d 502, 510–11 (D.N.J. 2010) (standing); *Shreeve v. Obama*, No. 1:10-CV-71, 2010 WL 4628177, at \*4 (E.D. Tenn. Nov. 4, 2010) (standing); *Baldwin v. Sebelius*, No. 10CV1033, 2010 WL 3418436, at \*3 (S.D. Cal. Aug. 27, 2010) (standing). One court denied a motion to dismiss for lack of standing, but has not issued a ruling on the merits of the case. See *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684, 692 (D.N.J. 2010).

<sup>262</sup> *But see* Brief Amicus Curiae of the National Women's Law Center et al. in Support of Defendant-Appellant at 24–31, *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (Nos. 11-1057, 11-1058) [hereinafter NWLC Brief] (portraying the Act as a civil rights measure). Some challengers have argued that the ACA violates their individual right to religious freedom, but their arguments were rejected. See, e.g., *Mead v. Holder*, 766 F. Supp. 2d 16, 41–43 (D.D.C. 2011); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 641–43 (W.D. Va. 2010).

<sup>263</sup> See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 549–54 (6th Cir. 2011) (Sutton, J., concurring).

<sup>264</sup> See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, No. 11-393, 2011 WL 5515162, (U.S. Nov. 14, 2011); *Dep't of Health & Human Servs. v. Florida*, No. 11-398, 2011 WL 5515164 (U.S. Nov. 14, 2011); *Florida v. Dep't of Health & Human Servs.*, No. 11-400, 2011 WL 5515165 (U.S. Nov. 14, 2011).

<sup>265</sup> *Thomas More Law Ctr.*, 651 F.3d at 541–47, *aff'g* 720 F. Supp. 2d 882, 893–94 (E.D. Mich. 2010)).

<sup>266</sup> *Id.*

concurrence, Judge Sutton noted the EMTALA requirement that hospitals provide emergency service, as well as a “culture of compassion” that “leads hospitals and doctors to treat many others in the same way.”<sup>267</sup> Judge Sutton observed, “When Congress guarantees a benefit for all (by securing certain types of medical care), it may regulate that benefit (by requiring some to pay for it).”<sup>268</sup> Thus, Judge Sutton noted the statutory right to health care as part of his rationale for upholding the Act. Some of the lower courts have agreed with the Sixth Circuit. In the District of Columbia, Judge Gladys Kessler held that the ACA fell within Congress’s power under the Commerce and Necessary and Proper Clauses.<sup>269</sup> In the Western District of Virginia, Judge Norman K. Moon held that the ACA fell within Congress’s commerce power.<sup>270</sup>

On the other hand, the Eleventh Circuit has ruled that the ACA exceeds the constitutional limits on congressional power.<sup>271</sup> In particular, the court held that the provision of the Act which requires individuals to purchase health insurance exceeds Congress’s power to regulate interstate commerce.<sup>272</sup> The court noted that the individual mandate was an unprecedented measure because Congress was ordering individuals to purchase a product on the private market.<sup>273</sup> The court held that the regulated matter lacked the necessary nexus to interstate commerce, which would justify Congress’s use of the commerce power.<sup>274</sup> The court concluded that the “breathtaking” scope of the individual mandate “affords no limiting principles in which to confine Congress’s enumerated power.”<sup>275</sup> Moreover, according to the court, the mandate violates principles of federalism because it regulates areas of traditional state concern, including both health care and insurance.<sup>276</sup> This intrusion on state autonomy, said the court, “strengthens the inference of a constitutional violation.”<sup>277</sup> Finally, the court rejected the government’s argument that the individual mandate was essential to

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<sup>267</sup> *Id.* at 562. (Sutton, J., concurring).

<sup>268</sup> *Id.*

<sup>269</sup> *Mead v. Holder*, 766 F. Supp. 2d 34, 35, 41 (D.D.C. 2011). The court also held that the Act did not violate the Religious Freedom Restoration Act. *Id.* at 41–43.

<sup>270</sup> *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611, 635 (W.D. Va. 2010). The court also held that the Act did not violate the Establishment, Free Exercise, or Free Speech Clauses of the First Amendment, nor did it violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 641, 643, 645–47.

<sup>271</sup> See *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1328 (11th Cir. 2011). The court’s decision upheld District Judge Vinson’s ruling that the ACA’s individual mandate was unconstitutional, *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1283–84, 1306 (N.D. Fla. 2011), but rejected his ruling that the mandate was not severable from the statute. See *Florida ex rel. Att’y Gen.*, 648 F.3d at 1328.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 1241.

<sup>274</sup> *Id.* at 1293.

<sup>275</sup> *Id.* at 1295.

<sup>276</sup> *Id.* at 1307.

<sup>277</sup> *Florida ex rel. Att’y Gen.*, 648 F.3d at 1307.

a larger regulatory scheme.<sup>278</sup> Thus, the mandate was unconstitutional.<sup>279</sup> However, the court held that the individual mandate provision was severable, leaving aside the issue of whether the remainder of the ACA is constitutional.<sup>280</sup> Of course, the constitutionality of the ACA will be ultimately resolved by the United States Supreme Court.

There is one exception to the lack of a right to health care argument in the courts. In an amicus brief in the Fourth Circuit appeal of *Virginia ex rel. Cuccinelli v. Sebelius*, the National Women's Law Center (NWLC) argued that the ACA is a civil rights law because it addresses the discrimination that women experience in the health care market.<sup>281</sup> The NWLC brief argues that the ACA is directed at reducing discrimination against women not only because women are more likely than men to be uninsured or underinsured, but also because the nondiscrimination measure in the Act addresses the discrimination that women often suffer in the health insurance market.<sup>282</sup> The NWLC brief makes the intriguing claim that the ACA is analogous to the Civil Rights Act of 1964, which was unanimously upheld by the Supreme Court, because the 1964 Act also regulated nonparticipation in the market—the refusal of businesses to serve African-Americans.<sup>283</sup> While the NWLC brief does not claim that the ACA protects a fundamental right to health care, it does frame the ACA as a civil rights measure, taking the debate beyond the dry legalese of the Commerce Clause and revitalizing the rights-based claims of the popular and democratic constitutionalism that led to the passage of the Act.

Notwithstanding the NWLC brief, none of the courts that have considered the constitutionality of the ACA have considered the question of whether the Act protects a fundamental right of belonging. This is not surprising. None of the government briefs in support of the Act have even made the argument. Instead, government lawyers have confined themselves to the argument that the

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<sup>278</sup> *Id.* at 1310–11.

<sup>279</sup> *Id.* at 1328. In the Eastern District of Virginia, Judge Henry Hudson also held that the Mandate was unconstitutional. *See Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010). However, the Fourth Circuit Court of Appeals overturned that decision on the ground that plaintiffs lacked standing. *See Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011).

<sup>280</sup> *Florida ex rel. Att'y Gen.*, 648 F.3d at 1328.

<sup>281</sup> NWLC Brief, *supra* note 262, at 24.

<sup>282</sup> *Id.* at 5, 15, 28.

<sup>283</sup> *Id.* at 21 (“Just as a hotel’s decision not to rent rooms to African-Americans is not a decision that avoids participation in the market for lodging, but rather is a decision about how to engage in that market, the choice not to purchase health insurance is not a decision that avoids participation in the health care market, but is simply a decision about when and how to pay for the costs of health care.”). In his concurrence to the Sixth Circuit Court opinion upholding the constitutionality of the Act, Judge Sutton rejected this analogy. *See Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 551–52 (6th Cir. 2011) (Sutton, J., concurring).

Act falls within Congress's enumerated powers.<sup>284</sup> This is unfortunate. There are significant strategic advantages to the argument that the ACA protects a fundamental right to health care. While the Court usually defers to Congress in the economic realm, courts tend to value human rights over economic rights. Most importantly, when courts and people embrace rights-based arguments, those rights tend to be more robust and enduring.<sup>285</sup> Even the staunchest critics of the ACA already shy away from its protection against denial of coverage for pre-existing conditions, the most popular provision of the ACA.<sup>286</sup> Once a right is widely considered to be fundamental within the popular understanding, it is hard for any government official, be it legislator or judge, to deny the existence of that right.

#### IV. CONCLUSION

If health care is widely considered to be a fundamental right that is protected by the federal government, that protection will stabilize and become more robust. If anything, there is likely to be more popular pressure for the federal government to expand access and affordability of health care. Perhaps this is why the House Republican budget in 2011 would do away with Medicare and Medicaid altogether, replacing those popular health benefits programs with ineffective block grants.<sup>287</sup> The Republican budget, championed by House Budget Chair Paul Ryan, challenges the premise of the ACA that health care is a fundamental right. Ryan's proposal may require health care reform advocates to go to the mat and take a stand on behalf of a fundamental right to health care.

The fate of the ACA in federal courts is far from clear. However, even if the Supreme Court overturns the ACA, it is likely that the people will pressure Congress to adopt other measures to protect the fundamental right to health care. Obviously, this will only happen if there continues to be a consensus that health care is a fundamental human right. The ultimate future of the ACA in

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<sup>284</sup> See, e.g., Memorandum in Support of Defendants' Motion for Summary Judgment at 12–50, *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91-RV/EMT), 2011 WL 285683; Memorandum in Support of the Defendants' Motion to Dismiss at 16–34, *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011) (No. 1:10-CV-00950); Defendants' Reply in Support of Motion to Dismiss at 14–30, *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684 (D.N.J. 2010) (No. 1:10-cv-00763-CCC); Memorandum in Support of Defendants' Motion to Dismiss at 22–40, *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010) (No. 6:10-cv-00015-nkm).

<sup>285</sup> For example, while courts have limited the scope of Title VII, the Civil Rights Act of 1964 as a whole remains intact. Courts retain deference to disparate impact discrimination notwithstanding *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).

<sup>286</sup> This provision necessitates the individual mandate so that insurance companies will not be required to insure only the sick and the elderly. Cf. NWLC Brief, *supra* note 262, at 23–24.

<sup>287</sup> HOUSE COMM. ON THE BUDGET, THE PATH TO PROSPERITY: RESTORING AMERICA'S PROMISE 39, 44 (2011).

particular and the right to health care in general depends not on the courts, but on the boots on the ground and the effectiveness of political advocacy.