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Jennifer Wiggins

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MANDATES, MARKETS, AND RISK: AUTO INSURANCE AND THE AFFORDABLE CARE ACT

JENNIFER B. WRIGGINS*

Now that the Affordable Care Act (ACA) individual health insurance mandate has been upheld by the United States Supreme Court, it is an opportune time to examine precedents for the individual mandate that were not considered in the legislative debate or litigation about the ACA's constitutionality, particularly auto insurance mandates. Although opponents' arguments were cast largely as Commerce Clause claims, the arguments have a deeper foundation as claims about liberty and coercion which go far beyond the Commerce Clause. Although auto insurance mandates are obviously different, particularly in that they are state rather than federal, auto insurance mandates can help us understand what Congress was doing, and why, when it enacted the ACA reforms and the individual mandate. Auto insurance mandates are relevant because they are a ubiquitous example of risk-spreading through a combination of private markets and public regulation, which is the same broad approach taken by the ACA individual mandate. This article shows that auto insurance mandates are an important precedent for the ACA individual mandate, and have four significant parallels with the ACA provision. First, both arose from challenging situations where there are compelling reasons for mandates. Second, both types of mandate order that people insure

* Sumner T. Bernstein Professor of Law, University of Maine School of Law. Many thanks to Dean Peter Pitegoff of the University of Maine School of Law for funding for this project, to Chris Harmon, Maine Law Class of 2014, Kevin Decker, Maine Law Class of 2014, and Kasia Park, Maine Law Class of 2013 for research assistance, to librarians Julie Welch, Maureen Quinlan, Greg Stowe, and Christine Hepler of the Garbrecht Law Library at University of Maine School of Law for marvelous work in tracking down sources, to the Faculties of the University of Maine School of Law and of Brooklyn Law School for useful discussions at faculty workshops, and to Administrative Assistants Megan Eades, Heidi Gage, and Tara Wheeler for their skilled and excellent help. Also thanks to students in my insurance law classes and to Dmitry Bam, Mary L. Bonauto, Malick Ghachem, Chris Harmon, Vaishali Mangain, Dave Owen, Sarah Schindler, Theda Skocpol, and Laura Underkuffler for helpful conversations. I greatly appreciate comments from Kenneth S. Abraham, Tom Baker, Dmitry Bam, Mary L. Bonauto, Martha Chamallas, Malick Ghachem, Dave Owen, William P. Marshall, Christopher J. Robinette, Sarah Schindler, and an anonymous peer reviewer on various versions of this article.

themselves against risks they might want to bear themselves. Both types require that risks be transferred and spread, which is an essential aspect of what insurance does. Last, both require people to buy something from a private seller. Both mandates are similar policy responses to important public policy dilemmas involving physical harm or illness and how to finance needed redress or treatment.

The article turns to the common rejoinder that auto insurance mandates are fundamentally different because driving is a choice and so regulation is acceptable, in contrast to the ACA mandate which regulates living itself, not an acceptable thing for government to do. This argument is specious for at least three reasons. First, driving is not always a choice. Second, the Supreme Court's decision shows that the ACA mandate actually does create a choice. Third, auto insurance mandates actually are far more coercive than the ACA individual mandate.

Finally, the article unearths and highlights pertinent aspects of the history of auto insurance mandates. Opponents fought mandates for six decades using arguments about freedom and American values to oppose them, much as ACA mandate opponents do today. Doubts about and challenges to the constitutionality of mandates were consistently resolved in their favor particularly in light of the public welfare aspects of insurance. "Freedom" arguments have faded over time and auto insurance mandates have proven themselves a workable, widely accepted, very American way of dealing with risk.

I. INTRODUCTION

In *National Federation of Independent Business v. Sebelius*, all of the justices of the United States Supreme Court viewed the Affordable Care Act's (ACA's) individual health insurance mandate as legislation aimed to influence individual conduct.¹ The justices disagreed on the legal implications of that conclusion. Justice Roberts' majority opinion treated the mandate as a constitutionally permissible tax on the decision to not buy health insurance but not as permissible under the commerce power.² Justice Ginsburg's opinion would have found the mandate constitutional under

¹ Nat. Fed'n. of Indep. Bus. (NFIB) v. Sibelius, 132 S. Ct. 2566 (2012).

² *Id.* at 2576-601.

either power,³ and the four dissenting justices would have rejected the mandate's constitutionality.⁴ But despite these disagreements, all of the justices seem to agree that the mandate's focus on individual regulation is central to the case. In their opinions and in their questions at oral argument, some of the justices seemed to suggest that by taking this step toward regulating individual behavior, Congress was doing something new, legally questionable and perhaps even dangerous.⁵

The ACA and the mandate are likely to be with us for some time. And there may well be other circumstances in which Congress or state legislatures might consider adopting similar individual mandates. Consequently, now is an opportune time to examine important precedents for the individual mandate that were largely overlooked in the debate about its constitutionality.⁶ Of these precedents, none is more important than auto insurance mandates, as this Article shows.

Auto insurance mandates are obviously different in some ways from the health insurance mandate. Importantly, they are creations of state law, and Commerce Clause issues therefore do not arise.⁷ Nevertheless, they are still absolutely relevant. Underlying the constitutional challenge was the idea that the ACA's requirement that someone buy health insurance, regardless of the reason for the requirement, was a frightening,

³ *Id.* at 2609-42.

⁴ *Id.* at 2642-77.

⁵ Some of the questions at oral arguments over potential types of mandates, such as being compelled to join an exercise club, Transcript of Oral Argument at 40, *NFIB v. Sibelius*, 132 S. Ct. 2566 (2012) (No. 11-393), to buy broccoli, *id.* at 13, or to buy burial insurance, *id.* at 7, are examples. Justice Alito's questions seemed to indicate deep skepticism about the basic risk-sharing characteristics of insurance and the mandate, *id.* at 7-8. Justice Scalia wrote, "[i]f Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power." See *NFIB*, 132 S. Ct. at 2646.

⁶ Indeed, since the Supreme Court's decision, the issue of auto insurance mandates as precedents has resurfaced, with Representative Michelle Bachmann claiming on CNN that auto insurance mandates are totally different from the ACA's individual mandate. *Piers Morgan Tonight*, Clips From Last Night: Michele Bachmann on Car Insurance Versus Health Insurance, CNN (July 7, 2012), <http://piersmorgan.blogs.cnn.com/2012/07/03/clips-from-last-night-michelle-bachman-on-car-insurance-versus-health-insurance-glenn-frey-on-changes-in-the-music-industry/>.

⁷ Justice Roberts stated, "[a]ny police power to regulate individuals as such, as opposed to their activities, remains vested in the States." *NFIB*, 132 S. Ct. at 2591.

unjustifiable, and unprecedented intrusion on personal liberty.⁸ Although this argument was not explicitly made, it was an essential backdrop to the litigation in general and to the Commerce Clause argument in particular.⁹ This focus of mandate opponents on ideas of liberty and coercion, with a visceral opposition to government mandates, is likely to endure despite the ACA mandate's having been upheld. The vehicle for the liberty and coercion arguments in *Sibelius* was the Commerce Clause, and in the future another constitutional provision may be pressed into service to make similar or even broader arguments.¹⁰ Our experience with auto insurance mandates should help us evaluate whether these arguments have merit.

At a more basic level, understanding the role of individual mandates in automobile insurance can help us understand what Congress

⁸ As Eleventh Circuit Court of Appeals Judge Marcus noted in his dissent in *Florida v. Dept. of Health and Human Serv's.*, "implicit in the plaintiffs' Commerce Clause challenge...is the deeply rooted fear that the federal government is infringing upon the individual's right to be let alone—a fear that is intertwined with a visceral aversion to the government's making us do something we do not want to do." *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health & Human Serv's.*, 648 F.3d 1235 (11th Cir. 2011) cert. granted, 132 S. Ct. 603 (2011) *aff'd in part, rev'd in part sub nom. NFIB*, 132 S. Ct. at 2566. See also, William P. Marshall, *National Healthcare and American Constitutional Culture*, 35 HARV. J.L. & PUB. POL'Y 1, 144-47 (2012) (noting particularly American distrust of government). Charles Fried blogged shortly after the *Sibelius* decision: "the energy behind the broccoli argument was about personal liberty, and no litigant ventured that the mandate violated the liberty clause of the Fifth Amendment." Charles Fried, *The June Surprises: Balls, Strikes, and the Fog of War*, SCOTUSBLOG (Aug. 2, 2012, 12:19 PM), <http://www.scotusblog.com/2012/08/the-june-surprises-balls-strikes-and-the-fog-of-war/>. For an explanation of the "broccoli argument," see *infra* note 23.

⁹ See *supra* note 5. See also, e.g., Fried, *supra* note 8.

¹⁰ Charles Fried wrote in his blog post shortly after the decision: "Of course, the real shadow of impropriety on everyone's mind but studiously omitted from the argument and justifications is the supposed intrusion on individual liberty implicated in Congress's scheme: the offense to liberty in requiring someone to enter the market and buy something from a nongovernmental purveyor... But the argument was not made because it would have had to be made under the Liberty Clause of the Fifth Amendment, and this would have carried over to the similar clause in the Fourteenth and therefore rendered any such a scheme enacted by a state, such as Massachusetts, similarly invalid." See Fried, *supra* note 8. Massachusetts and New Jersey passed individual health insurance mandates before the ACA was passed. See MASS. GEN. LAWS ANN. ch. 111M § 2 (West 2006) and N.J. STAT. ANN. § 26:15-2 (West 2009). The constitutionality of these mandates has not been challenged to date.

was doing, and why, when it enacted the individual mandate. Auto insurance mandates are a ubiquitous example of risk-sharing through a combination of private markets and public regulation, which is the same broad approach taken by the ACA individual mandate.¹¹ They also are an important example, like the ACA individual mandate, of using private insurance to tackle complex and wide-ranging problems involving illness and injury which have significant public dimensions. While our society uses private insurance to respond to many economic challenges, insurance and insurance principles are often ignored or not understood by the public, whether the subject is health, auto, or other insurance.¹² That common lack of understanding in turn creates fertile grounds for sweeping arguments about individual liberty—arguments that nearly overturned the ACA and that might well gain even greater traction in future debates. It is an ideal time to examine what auto insurance mandates can tell us about the ACA individual insurance mandate and about insurance mandates more generally. These questions are largely unexamined in academic literature and political discourse, perhaps because the ACA's advocates and

¹¹ See *infra* Part II.

¹² According to one study by the National Association of Insurance Commissioners (NAIC), nearly 60 percent of Americans feel confident about making insurance decisions concerning auto, home, and life insurance, but after taking a 10 question “insurance IQ test” the majority of responders to the survey received a failing score of 40 percent. *Americans Believe They’re Savvy About Insurance, But NAIC Insurance IQ Tells Different Story*, NAT’L ASS’N OF INS. COMM’RS (Mar. 10, 2009), http://www.naic.org/Releases/2009_docs/insurance_iq.htm. The NAIC also conducted a survey of 1,000 Americans concerning their awareness of car insurance which revealed that “some of the basics of auto insurance are not well understood, even though it is one of the most commonly purchased types of insurance by people of all ages and demographics.” *New NAIC Insurance IQ Study Reveals Americans Lacking in Confidence, Knowledge of Insurance Choice*, NAT’L ASS’N OF INS. COMM’RS (Apr. 6, 2010), http://www.naic.org/Releases/2010_docs/iiq_new.htm. This same survey also found that “86 percent of respondents said they do not understand all of the terms being used in the current discussion on health care reform.” *Id.* The Arizona Department of Transportation released a report in 2004 regarding trends in insurance coverage which notes that “many people do not understand the difference between liability coverage and uninsured motorist coverage.” Lisa Markkula, *Uninsured and Underinsured Motorists: Trends in Policy and Enforcement*, ARIZ. DEP’T OF TRANSP., (June 2004), http://www.azdot.gov/tpd/atrc/publications/project_reports/pdf/az548.pdf.

defenders did not emphasize them,¹³ and perhaps because insurance principles are not widely understood.¹⁴ That absence of examination leaves a significant gap in the literature which this Article endeavors to fill.

¹³ Auto insurance mandates were rarely mentioned in the litigation concerning the ACA or in the legislative discussions of it. In its opening brief, the federal government defended the health care individual mandate in part by referring to state auto insurance mandates, but did not develop the argument. It wrote that: "States have mandated insurance when (as here) an individual's lack of insurance shifts risk to others." See 1 STEVEN PLITT ET AL., *COUCH ON INSURANCE* 3d § 1:50 (rev. ed. 2009) (discussing mandatory automobile insurance laws). Congress therefore acted well within its constitutional authority by adopting a means of regulation parallel to insurance measures enacted by the states to address comparable risk-shifting." Brief for Petitioner at 36, *NFIB v. Sebelius* (U.S. Jun. 28, 2012) (No. 11-393). Auto insurance mandates were touched on superficially in the oral argument, Transcript of Oral Argument at 65, *NFIB v. Sibelius*, 132 S. Ct. 2566 (2012) (No. 11-393). Sixth Circuit Judge Sutton noted the "related and familiar mandate of the states-that most adults must purchase car insurance" in his opinion supporting the constitutionality of the individual mandate, but did not explore this point in detail. *Thomas More Law Center v. Obama*, 651 F.3d 529, 565 (6th Cir. 2011).

President Obama mentioned car insurance mandates as precedents but neither he nor other proponents of the mandates made a detailed argument based on these mandates. In remarks to Congress, the President in 2009 described the necessity of everyone participating in a health insurance pool, and explained as follows: "Now, even if we provide these affordable options [like insurance provided through exchanges meant to foster competition] there may be those-especially the young and the healthy-who still want to take the risk and go without coverage...The problem is, such irresponsible behavior costs all the rest of us money. If there are affordable options and people still don't sign up for health insurance, it means we pay for those people's expensive emergency room visits.... Unless everybody does their part, many of the insurance reforms we seek-especially requiring insurance companies to cover preexisting conditions-just can't be achieved. *And that's why under my plan, individuals will be required to carry basic health insurance-just as most states require you to carry auto insurance.*" President Barack Obama, *Remarks by the President to a Joint Session of Congress on Health Care* (Sept. 9, 2009) http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care. See generally Erwin Chemerinsky, *Health Reform is Constitutional*, POLITICO (Oct. 22, 2009, 4:59 AM), <http://www.politico.com/news/stories/1009/28620.html> (mentioning auto insurance as a precedent). The idea of a federal individual mandate originated with the Heritage Foundation over twenty years ago. A 1989 Heritage Foundation publication, which endorsed the idea of an individual mandate, cited auto insurance as a precedent, stating that a National Health Plan should: "Mandate all households to obtain adequate insurance. Many [states] require anybody driving a

This Article, in Part I, makes the argument that auto insurance mandates are pertinent precedents and draws four important parallels between auto insurance mandates and the ACA individual mandate. Both were developed to tackle complex, challenging public policy situations involving physical harm or illness and how to pay for needed redress or treatment; they devised similar policy responses to seemingly intractable dilemmas.¹⁵ Both require people to insure themselves against risks they may want to bear themselves.¹⁶ Both require risk-spreading, which is fundamentally what insurance does.¹⁷ Finally, both require people to buy something from a private seller rather than having a government program tackle the problems at which the mandates are aimed; they both embody a public-private policy approach.¹⁸

Part II discusses the most common rejoinder to the claim that auto insurance mandates are pertinent precedents, which is that auto insurance is irrelevant because driving is a choice while living is not. This Part shows that choice and coercion are much harder to distinguish in this context than opponents contend. Driving is not always a choice,¹⁹ the Supreme Court's decision made clear that the decision whether to purchase insurance for

car to have liability insurance. But neither the federal government nor any state requires all households to protect themselves from the potentially catastrophic costs of a serious accident or illness. Under the Heritage [Foundation] plan, there would be such a requirement.” Stuart M. Butler, *Assuring Affordable Health Care for All Americans*, HERITAGE FOUNDATION LECTURE NO. 218 (Oct. 1, 1989) at 6. Mandate opponents Randy Barnett, Nathaniel Stewart, and Todd Graziano, representing a later and very different Heritage Foundation position, wrote a memorandum in 2009 preemptively deriding the idea of a parallel. Randy Barnett, Nathaniel Stewart, & Todd Graziano, *Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional*, LEGAL MEMORANDUM No. 49 (Dec. 9, 2009) (hereinafter Barnett/Heritage Memo). Although the parts of the article dealing with car insurance were inaccurate, there was no systematic response to that part of the memorandum until 2012. See Jennifer Wriggins, *Is the Health Insurance Individual Mandate “Unprecedented?”: The Case of Auto Insurance Mandates*, SSRN (Feb. 25, 2012), <http://ssrn.com/abstract=2011025>.

¹⁴ See *supra* note 12.

¹⁵ See *infra* Part I.A.

¹⁶ See *infra* Part I.B.

¹⁷ See *infra* Part I.C.

¹⁸ See *infra* Part I.D.

¹⁹ See *infra* Part II.A.

those subject to the mandate actually is a choice,²⁰ and auto insurance mandates in fact are more coercive than the ACA mandate.²¹

Finally, the Article in Part III turns to two aspects of the history of auto insurance mandates. One is the complex evolution of mandates, which took place over a six decade period.²² Now forgotten but relevant today is that opponents of mandates fought against them for decades, using arguments about freedom and American values similar to the ‘broccoli argument’ used today.²³ Yet, in the battle over how to pay for injuries connected with car accidents, governments did not take over the risk and publicly fund car accident costs, but rather left the situation to a regulated market—a market that required individual participation and that broadened coverage through mandates ordering companies to cover high risk individuals. The insurance industry developed insurance products to keep risk privatized and adjusted successfully to the mandates. Not surprisingly, ‘freedom’ arguments lack resonance today in the auto insurance context. Also forgotten but relevant is the legal history of auto insurance mandates and auto insurance regulation.²⁴ The constitutionality of auto insurance mandates was doubted and challenged all the way to the United States Supreme Court.²⁵ The Supreme Court and other courts recognized that insurance laws affecting individuals’ and companies’ freedom, such as requiring individuals to buy insurance or companies to cover high risk drivers, were permissible regulation especially in view of the public welfare aspect of insurance. With constitutional doubts laid to rest, the current public-private auto insurance regulation regime, with mandates

²⁰ See *infra* Part II.B.

²¹ See *infra* Part II.C.

²² See *infra* Part III.

²³ See *infra* Part III.A. The “broccoli argument” was a slippery-slope argument advanced to support the position that the health insurance mandate in the ACA exceeded Congress’s authority under the Commerce Clause. According to the “broccoli argument,” if Congress has the power to require individuals to purchase health insurance because it improves their health, which in turn affects interstate commerce, then Congress could also require individuals to engage in other health behavior like purchasing broccoli, which seems absurd. See *NFIB v. Sibelius*, 132 S. Ct. 2566, 2588-89 (2012). *But see id.* at 2619 (Ginsburg, J., dissenting in part) (responding to broccoli argument). See also Fried, *supra* note 8 (discussing broccoli argument).

²⁴ See *infra* Part III.B.

²⁵ See *Ex parte Poresky*, 54 S. Ct. 3, 4 (1933); *Calif. State Auto. Assoc. Inter-Insurance Bureau v. Maloney*, 341 U.S. 105, 107 (1951), discussed *infra* at Part III.B.

coupled with private competition, has thrived for decades, to the benefit of consumers. This history suggests that the ACA individual mandate may gain more acceptance as the ‘freedom’ arguments lose resonance and the benefits of the ACA become clearer.

This article shows that the ACA mandate is not the anomalous outlier that its opponents claim and that it follows an American tradition of tackling a huge problem by a public-private approach of insurance regulation and mandates. Individual insurance mandates in both the auto and health contexts are a reasonable approach to widespread problems through economic regulation, rather than a frightening infringement on personal freedom.

II. MAKING THE ARGUMENT: PARALLELS BETWEEN THE ACA AND AUTO INSURANCE INDIVIDUAL MANDATES

This section systematically draws parallels between the characteristics of auto insurance mandates and the ACA’s individual mandate. Obviously, health insurance and auto insurance are very different, and insuring people’s health raises different issues from insuring against losses associated with cars.²⁶ Public policy debates about the two issues have gone on for decades, although the battle over universal health care has had a higher profile.²⁷ Auto insurance mandates are not

²⁶ See generally ROBERT JERRY & DOUGLAS RICHMOND, UNDERSTANDING INSURANCE LAW § 64[C], at 918 (5th ed. 2012); Deborah Stone, *The Struggle for the Soul of Health Insurance*, 18 J. HEALTH POL. POL’Y & L., 287 (1993); Nicholas Bagley & Jill R. Horwitz, *Why It’s Called the Affordable Care Act*, 110 MICH. L. REV. FIRST IMPRESSIONS 1 (2011) (reforms aimed at myriad problems with U.S. health care system); Tom Baker, *Health Insurance, Risk, and Responsibility after the Patient Protection and Affordable Care Act*, 159 U. PENN. L. REV. 1577 (describing Affordable Care Act as creating a new social contract). Issues of health care costs and health insurance in the U.S. are tremendously complex. See, e.g., JOSEPH E. STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 300-30 (3d ed. 2000); Amy B. Monahan, *On Subsidies and Mandates: A Regulatory Critique of ACA*, 36 J. OF CORP. L. (2011); Brief of *Amici Curiae* Economic Scholars in Support of Petitioners Urging Reversal on the Minimum Coverage Issue, *Health and Human Services v. Florida*, 132 S. Ct. 604 (2011) (No. 11-398) (describing unique features of health care finance and insurance).

²⁷ See generally Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to the Social Order in the Inter-War Years: 1919-1941*, 4 CONN. INS. L. J. 525 (1997-1998) (describing history of spread of autos, injuries, and regulatory responses); Bagley & Horwitz, *supra* note 26, at 8 (battle over universal health coverage has lasted almost 100 years); THEDA

monolithic; there are several different types of commonly mandated auto insurance.²⁸ Yet, both mandates essentially devised the same policy response to a huge public policy problem involving how to pay for treatment or redress for physical illness or harm. The significant similarities between the mandates are outlined next.

A. BOTH TYPES OF MANDATES APPLY TO COMPLEX, CHALLENGING SITUATIONS WHERE THERE ARE STRONG POLICY REASONS FOR MANDATES

1. ACA Individual Mandate

One of the goals of the ACA was to increase health insurance coverage, and the ACA individual mandate is an important means to that goal.²⁹ At the time the ACA was passed, there was bipartisan consensus that extensive reform of the extremely complex U.S. health insurance system was urgent.³⁰ The ACA individual mandate was modeled on Massachusetts' individual mandate that passed in 2006, although the ACA is a far broader and more complex law than the Massachusetts reforms.³¹

SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 5, 180-93 (1992) (describing early and mid twentieth century political debates concerning universal health care).

²⁸ Liability insurance, uninsured motorist coverage, Med-pay coverage, and underinsured motorist coverage are the most common types of auto insurance; some states have adopted partial no-fault reforms. JERRY & RICHMOND, *supra* note 26, § 130. State mandates for each are enumerated at text accompanying notes 72-79.

²⁹ 42 U.S.C. §§ 18091(2)(C), 18091(2)(I) (2006 & Supp. IV). *See generally* KENNETH S. ABRAHAM & DANIEL SCHWARCZ, HEALTH CARE SUPPLEMENT TO ABRAHAM'S INSURANCE LAW & REGULATION 12 (5th ed. 2010).

³⁰ ABRAHAM & SCHWARCZ, *supra* note 29, at 6.

³¹ Michael Isikoff, *White House used Mitt Romney health-care law as blueprint for federal law*, MSNBC.COM (Oct. 11, 2011, 6:05 AM), http://www.msnbc.msn.com/id/44854320/ns/politics-decision_2012/t/; *Health Care: Mass Observation: Health reform in Massachusetts, the Model for Barack Obama's version, still has a long way to go before it proves itself*, ECONOMIST, June 25, 2011, at 37. ROBERT W. SIEFERT & ANDREW P. COHEN, RE-FORMING REFORM: WHAT THE PATIENT PROTECTION AND AFFORDABLE CARE ACT MEANS FOR MASSACHUSETTS 48 (U. Mass. Medical Center for Health Law and Economics & Blue Cross Blue Shield of Massachusetts Foundation 2010) (federal law modeled on Massachusetts' law); 111 Cong. Rec. H 13119 (Nov. 18, 2009) (statement of Rep. Stearns) ("In Massachusetts, for example—the public option here in

Major problems that drove the national reform were the large number of uninsured Americans, the increasing costs and spending, and the uneven quality of health care in the U.S.³² Millions of uninsured people receive health care for free, since laws, customs, and professional obligations have long mandated hospitals and providers provide care even if a patient cannot pay.³³ Their bills often are uncollectible.³⁴ These costs are passed on to the government and private insurers; private insurers raise their premiums.³⁵ As Justice Ginsberg stated: “The net result: Those with health insurance subsidize the medical care of those without it. As economists would describe what happens, the uninsured ‘free ride’ on those who pay for health insurance.”³⁶ Moreover, those without health insurance often do not get preventive medical care that could reduce their health care costs later on.³⁷ States had not and would not be able to solve the problems.³⁸ The

Congress is patterned after Massachusetts.”). *See also* 111 Cong. Rec. S 11990 (Nov. 30, 2009) (Statement of Sen. Enzi (“[a]t the beginning of this process, the majority staff of the HELP Committee decided they were going to draft a partisan bill based on the reforms that had recently been adopted in Massachusetts.”)); 111 Cong. Rec. H 12192 (daily ed. Nov. 2, 2009) (statement of Rep. Roe (“The Massachusetts plan had a noble goal, which was to try to cover as many of its citizens as possible. That’s absolutely what we should try to do in an affordable way. In Massachusetts now, they’re at around 97 percent coverage.”)). Some information, including a statement by former Governor Romney, indicates that the Massachusetts health insurance mandate was based on its car insurance mandate. David A. Fahrenthold, *Mass. Bill Requires Health Coverage, State Set to Use Auto Insurance as a Model*, WASH. POST, Apr. 5, 2006 (“Romney said the bill, modeled on the state’s policy of requiring auto insurance, is intended to end an era in which 550,000 go without insurance and their hospital and doctor visits are paid for in part with public funds. ‘We insist that everybody who drives a car has insurance,’ Romney said in an interview. ‘And cars are a lot less expensive than people.’”).

³² The Census Bureau estimates that 48.6 million Americans were uninsured in 2011. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, CENSUS BUREAU, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES 21* (2012), available at <http://www.census.gov/prod/2012/pubs/p60-243.pdf>; BOB LYKE, CONG. RESEARCH SERV., R40517, *HEALTH CARE REFORM, AN INTRODUCTION* (Apr. 14, 2009). Over forty million Americans did not have health insurance during some part of 2007. *Id.* at 1.

³³ *NFIB v. Sibelius*, 132 S. Ct. at 2611 (Ginsburg, J., concurring in the judgment in part, and dissenting in part).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 2611.

³⁷ *Id.* at 2611-12.

³⁸ *Id.* at 2612.

mandate went along with other important reforms which prohibited insurance companies from denying coverage for preexisting conditions or charging more to insure unhealthy than healthy people.³⁹ Increasing health insurance coverage made eminent sense as a reform goal.⁴⁰

The idea of a federal individual mandate had long been suggested as a way to expand coverage--it was initially proposed by the domestic policy director of the Heritage Foundation in a 1989 lecture published by the Heritage Foundation.⁴¹ The Heritage lecture recognized health insurance as different from other sorts of insurance in that it raised compelling moral issues of societal responsibility. The lecture claimed:

[H]ealth care is different. If a man is struck down by a heart attack in the street, Americans will care for him whether or not he has insurance. If we find that he has spent his money on other things rather than insurance, we may be angry but we will not deny him services—even if that means more prudent citizens end up picking up the tab. A mandate on individuals recognizes this implicit contract. Society does feel a moral obligation to insure that its citizens do not suffer from the unavailability of health care. But on the other hand, each household has the obligation, to

³⁹ These are known as the “guaranteed-issue” and “community rating” provisions. *NFIB v. Sibelius*, 132 S. Ct. 2566, 2585 (2012).

⁴⁰ There was not the political will for a single-payer system or a public option. See *infra* note 86. The Affordable Care Act obviously was a political compromise which did not fundamentally change the structure of U.S. insurance markets and did not aggressively tackle issues of quality or cost. See generally ABRAHAM & SCHWARCZ, *supra* note 29 at 12-13, 20-21. “Moral hazard” is an important insurance concept that comes into play here. Tom Baker states that the term “‘moral hazard’ typically is used to refer to the theoretical tendency for insurance to reduce incentives (1) to minimize loss or (2) to minimize the cost of a loss.” TOM BAKER, *INSURANCE LAW & POLICY* 4 (2d ed. 2008). The second type, known as “*ex post* moral hazard,” is implicated here. Abraham and Schwarcz outline the “*ex post* moral hazard concern” of health insurance, which is “the risk that individuals who become sick will over-consume health care because they do not pay the full cost of such care,” ABRAHAM & SCHWARCZ, *supra* note 29, at 9-10. The ACA has experimental programs to try to control costs but does little to change the *ex post* moral hazard connected with costs. *Id.* at 21.

⁴¹ Butler, *supra* note 13.

the extent that it is able, to avoid placing demands on society by protecting itself.⁴²

President Obama also observed that “[U]nless everybody does their part, many of the insurance reforms we seek—especially requiring insurance companies to cover preexisting conditions—just can’t be achieved,” thus describing it as a way for people to be required to pay their fair share.⁴³

There are compelling, insurance-related reasons, often lost in the debate, for having the mandate be one of the ways to increase coverage. The key insurance-related reason for it is to combat “adverse selection,” which is the tendency for people who are disproportionately likely to experience an insured-against event to buy insurance for that event.⁴⁴ This leads to a heightened number of claims and increased costs.⁴⁵ Adverse selection is a phenomenon in insurance generally and had been common in the individual health insurance market prior to the ACA’s passage.⁴⁶ This led companies to have broad exclusions in policies for pre-existing conditions which greatly limited coverage supplied by policies.⁴⁷ In the health insurance context, the general adverse selection concern is that people who were healthy would not buy insurance until they thought they were getting sick, and insurance companies extending insurance would not know the buyers’ exact health status; then cost projections would be

⁴² Butler, *supra* note 13, at 6. Butler stated immediately before the passage quoted above that the Heritage proposed federal individual mandate “assumes that there is an implicit contract between households and society, based on the notion that health insurance is not like other forms of insurance protection. If a young man wrecks his Porsche and has not had the foresight to obtain insurance, we may commiserate but society feels no obligation to repair his car. But health care is different.” *Id.*

⁴³ President Barack Obama, Remarks to a Joint Session of Congress on Health Care (Sept. 10, 2009), *supra* note 13.

⁴⁴ BAKER, *supra* note 40, at 6 (noting that adverse selection in this context generally refers to “the (theoretical) tendency for high-risk people to be more interested in insurance than low-risk people.” Mark Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PENN. L. REV 1825, 1841 (2011) (mandate essential to combat adverse selection). ABRAHAM & SCHWARCZ, *supra* note 29, at 12 (purpose of mandate is to combat adverse selection).

⁴⁵ BAKER, *supra* note 40, at 6.

⁴⁶ See ABRAHAM & SCHWARCZ, *supra* note 29, at 11 (In the individual market, prior to the ACA, because of adverse selection concerns, almost all policies had preexisting condition exclusions.).

⁴⁷ *Id.* at 5, 11.

inaccurate, payouts would be excessive, and costs would skyrocket.⁴⁸ The ACA itself explains:

[I]f there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize the adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage for pre-existing conditions can be sold.⁴⁹

In other words, the mandate's goal, which was part of the larger reforms, is to broaden the risk pool so that insurance markets can work better for the benefit of consumers.⁵⁰

This broadening of the risk pool was well explained by Justice Ginsburg:

In the fullness of time...today's young and healthy will become society's old and infirm. Viewed over a lifespan the costs and benefits even out: The young who pay more than their fair share currently will pay less than their fair share when they become senior citizens...And even if, as undoubtedly will be the case, some individuals, over their lifespans, will pay more for health insurance than they receive in health services, they have little to complain about, for that is how insurance works. Every insured person of the covered class will ultimately need that protection.⁵¹

⁴⁸ Hall, *supra* note 44, at 1841.

⁴⁹ 42 U.S.C.A. § 18091(a)(2)(I) (West 2010). ABRAHAM & SCHWARCZ, *supra* note 29, at 20.

⁵⁰ 42 U.S.C.A. § 18091(a)(2)(I) (West 2010). *See generally* Bagley & Horwitz, *supra* note 26.

⁵¹ NFIB v. Sibelius, 132 S. Ct. 2566, 2620 (2012). The Commerce Clause section of Justice Ginsburg's opinion in which this language is found is of course a dissent, but it is relevant here both because the mandate was upheld and because her analysis focuses on the health insurance aspects of the Affordable Care Act

The ACA mandate arose from an urgent situation where reform was needed for many reasons; these reasons included a huge number of uninsured people and the costs imposed on the insured by the uninsured.⁵² Having a mandate that gives an incentive for people to purchase health insurance, in order to extend coverage and reduce adverse selection, was a positive policy reform.

2. Auto Insurance Mandates

Auto insurance mandates, which developed over decades, have a variety of goals.⁵³ The goals include protecting drivers from tort judgments for damages caused by their negligence, making a pool of money available to compensate for injuries caused by negligently driven automobiles, compensating drivers for injuries caused by uninsured and underinsured drivers, and making sure medical expenses from car accidents are paid for.⁵⁴ The development and spread of cars in the United States in the first half of the twentieth century created many challenges.⁵⁵ Cars, in addition to being wonderful instruments of transportation, were mobile instruments of destruction which easily could kill or maim.⁵⁶ Injuries and death caused by cars were legion, and the best way to encourage safety, provide financial security for drivers, passengers, and pedestrians, and compensate for injuries caused by cars was not obvious.⁵⁷ After decades of legislative experimentation and industry opposition, the current web of mandates developed to deal with cars—an expensive and injury-causing necessity.⁵⁸

which is pertinent to this article. *Id.* at 2617-18. In contrast, the majority sees insurance as simply another product. *Id.* at 2586-87, 2590-91.

⁵² See *supra* text accompanying notes 29-40.

⁵³ See discussion *infra* Part III (discussing the history of auto insurance mandates).

⁵⁴ See generally KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* 85-104 (2008) [hereinafter *LIABILITY*]; Simon, *supra* note 27.

⁵⁵ See generally *LIABILITY*, *supra* note 54.

⁵⁶ See generally Simon, *supra* note 27. In fact some thought there should be strict liability for auto injuries under a dangerous instrumentality theory. *Id.* at 562. S. Lochlann Jain, “*Dangerous Instrumentality*”: *The Bystander as Subject in Automobility*, 19 *CULTURAL ANTHROPOLOGY* 61, 61-94 (2004). Most people lacked health and disability insurance and injuries were common, so that injuries were likely to be calamitous. *LIABILITY*, *supra* note 54, at 72-73.

⁵⁷ Simon, *supra* note 27.

⁵⁸ *LIABILITY*, *supra* note 54, at 78-103.

Mandates have proven to be a workable policy approach to the complex issues presented by the injuries caused by cars.⁵⁹

Driving can lead to injuries that have costs of various types, including injuries that a careless driver causes and injuries that a faultless driver suffers. These injuries are hard to predict in advance and their costs may be astronomical. Other than a very few rich people, no one can be certain that she has the money available to cover those unexpected events. Mandatory auto insurance turns many accidents that would be financial disasters into mere inconveniences.⁶⁰

Without mandates, adverse selection, described above, can occur.⁶¹ People who know they are most at risk for a particular harm will tend to buy insurance, while those who are at lower risk will tend not to buy it. What then can happen is that insurance companies' costs are higher than expected, which results in rate increases or company failure.⁶²

In the auto insurance context, adverse selection is rarely discussed because of auto insurance individual mandates which by definition minimize adverse selection.⁶³ But if there were no individual mandates, adverse selection could easily arise -- dangerous but wealthy drivers who fear tort judgments might seek liability insurance to protect their assets in case they injure someone through their carelessness. At the same time, people who are confident in their own carefulness might choose not to buy liability insurance. That might make the liability insurance pool more full of risky drivers than insurance companies anticipated, resulting in higher-

⁵⁹ *Id.* at 102. This is not to say that mandates are perfect. See *infra* note 65.

⁶⁰ LIABILITY, *supra* note 54, at 102.

⁶¹ See *supra* text accompanying notes 44-46.

⁶² See *supra* p. 34.

⁶³ Leah Wortham, *The Economics of Insurance Classification: The Sound of One Invisible Hand Clapping*, 47 OHIO ST. L.J. 835, 888 (1986) (noting that since car insurance is mandatory, adverse selection concerns are lessened); See Robert Hockett, *Making Sense of the Health-Care Reform Debate*, 53 CHALLENGE 28, 44 (Jan-Feb 2010) (“[A] principal means of avoiding the adverse selection problem is by requiring participation by all, in order that no particular inference need be drawn from somebody’s seeking to participate. But only the state has authority to require that people participate in insurance pools—as states routinely do, for example, with driver’s insurance, social security, and Medicare...[I]n requiring participation in such insurance pools, government is doing more than addressing the adverse-selection obstacle to well-functioning insurance arrangements. It is also preventing a form of free-riding—for example, that of uninsured motorists upon the coverage of insured motorists.”).

than-predicted costs.⁶⁴ This could further result in skyrocketing rates and insurance company failure. Further, if many drivers do not buy insurance, rates go up for those who do, and the victims of many accidents go uncompensated, which spreads the costs throughout society. But even very careful drivers must buy auto liability insurance. After all, they might be careless and cause an accident that they could not pay for – even though that is unlikely. Their liability insurance keeps them from financial ruin and helps compensate the injured person. If the careful driver's insurance does not cover the accident costs, and the driver cannot afford those costs out-of-pocket, the costs fall only on the victim or are passed on to society. Combating adverse selection through individual auto insurance mandates which allow competition and comparison shopping has proven to be workable, successful policy.⁶⁵

⁶⁴ Since there are mandates this is necessarily hypothetical, but it logically follows from the concept of adverse selection. Wortham, *supra* note 63 (noting that since car insurance is mandatory, adverse selection concerns are lessened).

⁶⁵ Of course, auto insurance mandates are not a perfect solution to the problems they tackle; nor is there a perfect solution. They may have inflationary effects on health costs. LIABILITY, *supra* note 54, at 103. They may lead to more accidents than there would be without insurance because of the “moral hazard” effect of having liability coverage. Alma Cohen & Rajeev Dehejia, *The Effect of Auto Insurance and Accident Liability Laws on Traffic Fatalities*, 47 J.L. & ECON. 357, 357 (2004) (arguing that auto insurance mandates have led to increases in fatalities due to moral hazard effect of insurance). For discussion of “moral hazard” concept, see *supra* note 40. Auto insurance mandates (and the way they are priced) may encourage more driving than is environmentally beneficial. See generally Jennifer B. Wriggins, *Automobile Injuries as Injuries with Remedies: Driving, Insurance, Torts, and Changing the ‘Choice Architecture’ of Auto Insurance Pricing*, 44 LOY. L.A. L. REV. 69, 73-80 (2010). There are persistent equity issues in the way insurance companies classify risk. See, e.g., King v. Meese, 743 P.2d 889 (Cal. 1987) (classification by insurance companies of safe drivers who live in South Central Los Angeles as high risk drivers, and requiring them therefore to pay more is constitutional). See generally KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* (1986) [hereinafter *DISTRIBUTING RISK*]; Regina Austin, *The Insurance Classification Controversy*, 131 U. PA. L. REV. 517 (1983); Wortham, *supra* note 63.

B. BOTH TYPES OF MANDATE REQUIRE PEOPLE TO INSURE THEMSELVES AGAINST RISKS THEY MAY WANT TO BEAR THEMSELVES

1. ACA individual mandate

A person may want to set aside the money that she may need to pay medical and hospital bills if she becomes ill or has an accident, rather than purchase insurance in advance. This is known as self-insuring.⁶⁶ For example, Kaj Ahlberg, one of the individual plaintiffs in *Florida v. U.S. Department of Health and Human Services*, which was also decided as part of *NFIB v. Sibelius*, filed a declaration stating he has no health insurance and has “no desire or intention to buy health insurance in the future, as I am now and reasonably expect to remain, financially capable of paying for my and my family’s health care services out of my own resources as needed.”⁶⁷ Plaintiff Ahlberg also stated that he thought health insurance was not a “sensible or acceptable” use of his financial resources.⁶⁸ This idea that a person should be able to self-insure for medical costs deeply resonates with the freedom and coercion arguments that underlay the plaintiffs’ Commerce Clause arguments.⁶⁹ But if a person is one of those affected by the ACA individual mandate, her choice to self-insure will have a cost—she will have to either buy health insurance or make the

⁶⁶ Robert Jerry and Douglas Richmond explain as follows: “Sometimes people cope with risk through self-insurance. For example, a restaurant owner, cognizant of the possibility that a person may contract food poisoning, is likely to take substantial preventive measures to limit the risk of such an occurrence. After taking such steps, a remote risk nonetheless exists that a customer might be poisoned. The owner may calculate that such an event will rarely occur and may conclude that if it does occur the damages associated with such an event could easily be paid from the owner’s assets. Alternatively, the owner may choose to set aside a portion of each year’s profits into a reserve fund designated to pay the loss should it occur. In either case, the owner chooses to bear the risk. This is the essence of self-insurance.” JERRY & RICHMOND, *supra* note 26, § 10.

⁶⁷ Declaration of Kaj Ahlberg in Support of Plaintiffs’ Motion for Summary Judgment, ¶ 4, *Florida v. U.S. Dept. of Health and Human Services*, Case No.: 3:10-cv-91-RV/EMT, U.S.D.C., N.D. Fla. Pensacola, Order Granting Summary Judgment, 15. Similarly, Mary Brown’s declaration stated that she “is subject to the individual mandate and objects to being required to comply as she does not believe the cost of health insurance is a wise or acceptable use of her resources.” *Id.* at 14 (quoting Mary Brown’s declaration).

⁶⁸ Ahlberg declaration, *supra* note 67, at ¶ 7.

⁶⁹ See *supra* notes 8-10 and accompanying text.

Shared Responsibility Payment.⁷⁰ For those to whom the ACA mandate applies, the government is telling people they are not allowed to “freely” bear risks that they might want to, and might be perfectly capable of, bearing themselves.

2. Auto insurance individual mandates

A driver may want to set aside the money that she will have to pay if she injures someone through negligence rather than purchase insurance to cover that risk. She may currently be able to, and expect to remain able to pay for harm she might cause through her carelessness, so she may want to self-insure against that risk. But the requirements in 49 states that she buy liability insurance before registering a car and driving, on pain of civil or criminal penalties,⁷¹ covering what she would have to pay if she injured someone through negligence, deny her that “free” choice of setting aside the funds in advance.⁷²

⁷⁰ See *infra* text accompanying notes 122-27 (discussing the Shared Responsibility Payment); see *infra* Part II (discussing choice and coercion as ways to distinguish between auto insurance mandates and the ACA mandate).

⁷¹ INSURANCE INFORMATION INSTITUTE, *Compulsory Auto/Uninsured Motorists* (Feb. 2013), <http://www.iii.org/media/hottopics/insurance/compulsory> (49 states and the District of Columbia in 2012 had mandatory liability auto insurance). State laws require drivers to purchase liability coverage in specified minimum amounts. JERRY & RICHMOND, *supra* note 26, § 132. New Hampshire does not require every driver to purchase liability insurance but does require all drivers to show they are financially responsible and requires drivers who have been convicted of driving under the influence to purchase liability insurance. N.H. REV. STAT. ANN. § 264 (LexisNexis 2011). According to one treatise published in 1974, around the time many insurance mandates were passed, liability insurance is aimed at alleviating two major problems: “1. Protecting the tortfeasor of an automobile accident from financial disaster resulting from a judgment rendered against him in a court of law. 2. Providing compensation for the victim of an accident for injuries received from the accident.” M.G. WOODRUFF III, JOHN R. FONSECA & ALPHONSE M. SQUILLANTE, *AUTOMOBILE INSURANCE AND NO-FAULT LAW* § 3:1 (1974). See CALVIN H. BRAINARD, *AUTOMOBILE INSURANCE* 16 (Richard D. Irwin, Inc. ed., 1961) (liability coverage has dual purpose of protecting the finances of the insured and the victim).

⁷² Liability insurance “pays proceeds to a third party to whom an insured becomes liable.” BAKER, *supra* note 40, at 23. Liability insurance pays, on behalf of a negligent driver, money that the negligent driver owes to his victim up to a set limit purchased in advance. JERRY & RICHMOND, *supra* note 26, at 924. Enforcement is through the torts system. *Id.*

Similarly, this same driver may want to set aside the money for a different risk, namely the risk that she or a passenger will suffer injuries from a negligent driver who does not have insurance or who is a hit-and-run driver. This driver who wants to self-insure may think that the risk of being injured by a hit-and-run or uninsured driver is low, that she has sufficient resources to cover her and her passengers' injuries in that kind of a situation, and that purchasing insurance to cover that risk is a waste of money.⁷³ However, laws in twenty-two jurisdictions require that this driver buy insurance for the risk to herself and her passengers from being struck by an uninsured or hit-and-run driver; this is known as uninsured motorist coverage.⁷⁴

Laws in a few states will tell this same motorist that even if she does not want to buy insurance coverage for her own or her passengers' medical bills, she must buy it (up to a certain limit).⁷⁵ And laws in eight states tell this driver that she also must buy insurance to cover the risk that she (or her passengers) will be injured by a driver who does not have

⁷³ Perhaps she has excellent health insurance and disability insurance, and she would rather self-insure against these risks than purchase insurance for them.

⁷⁴ Insurance protecting drivers from risks created by other drivers who may lack insurance is known as uninsured motorist coverage. ALAN I. WIDISS & JEFFREY E. THOMAS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE 8 (3d ed. 2005). Twenty-one states and the District of Columbia require drivers to purchase it. See INSURANCE INFORMATION INSTITUTE, *Compulsory Auto/Uninsured Motorists* (Feb. 2013), <http://www.iii.org/media/hottopics/insurance/compulsory>; Memo from Christopher Harmon to Jennifer Wriggins August 24, 2012 (twenty-one states and the District of Columbia require uninsured motorists coverage; Insurance Information Institute Memo does not list Connecticut) (on file with the author); WIDISS & THOMAS, *supra*, at 8; 6 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 61.02[3][a][ii] (Christopher J. Robinette ed. 2012). For more detail on uninsured motorist coverage and its historical development see *infra* note 159.

⁷⁵ This is known as Med-Pay coverage. LIABILITY, *supra* note 54, at 79-80. It is required for all drivers in Colorado, Maine, and Pennsylvania. COLO. REV. STAT. § 10-4-635 (2012) (passed in 2004), ME. REV. STAT. tit. 29 § 1605-A (2012) (Maine, passed in 1997), 75 PA. CONS. STAT. ANN. § 1711 (West 2006) (passed in 1984). New Hampshire requires that auto liability policies contain Med-Pay coverage, although New Hampshire is the only state that does not require all drivers to purchase liability coverage. N.H. REV. STAT. ANN. § 264:16 (LexisNexis 2011) (passed in 1971). See LIABILITY, *supra* note 54, at 79-80 (noting Med-Pay coverage began in mid-twentieth century and allowed coverage of medical expenses before health insurance became widespread).

sufficient insurance to cover her or her passengers' injuries.⁷⁶ Finally, laws in sixteen states require her to buy "no-fault" coverage that covers part of accident expenses regardless of driver carelessness.⁷⁷ Again, even if this driver is currently, and expects to remain able to cover the potential costs, she is not allowed to do that without risking civil or criminal penalties in the states where this coverage is required.

States have long legislated that individuals may not decide to self-insure against many risks of auto use, including risks to themselves, their passengers, or their own assets. While some of these are risks to others, some are risks to the driver herself. Mandatory car insurance, in all its various forms,⁷⁸ is an example of the government telling drivers that they are not allowed to bear risks that they might want to, and might be perfectly capable of, bearing themselves.⁷⁹

C. BOTH TYPES OF MANDATES REQUIRE THAT RISKS BE TRANSFERRED AND SPREAD, WHICH IS FUNDAMENTALLY WHAT INSURANCE DOES

The various mandates require transfer and spreading of risk, which are essential yet often forgotten aspects of insurance.⁸⁰

⁷⁶ This is known as "underinsured motorist coverage." WIDISS & THOMAS, *supra* note 74, § 31.4. Eight states mandate that drivers buy this coverage, so that if they are harmed by a careless driver who does not have sufficient liability insurance to cover their injuries, they will have sufficient coverage under their own 'underinsured motorist' coverage. NEW APPLEMAN ON INSURANCE, *supra* note 74, at VOL. 6 § 61.02[3][a][ii].

⁷⁷ See INSURANCE INFORMATION INSTITUTE, *supra* note 74. This no-fault coverage often is known as Personal Injury Protection (PIP) and can cover medical expenses, lost wages, and rehabilitation expenses depending on the state. JERRY & RICHMOND, *supra* note 26, § 132.

⁷⁸ The forms mentioned above are liability insurance, uninsured motorist coverage, Med-Pay coverage, underinsured motorist coverage, and no-fault elements. See *supra* notes 71-77 and accompanying text.

⁷⁹ For discussion of choice and coercion in the two contexts, see *infra* Part II.

⁸⁰ According to insurance scholar Tom Baker, "[A] risk transfer is...a transaction or institutional arrangement that transfers, or shifts, risk from one person or entity to another...[R]isk spreading occurs whenever an entity takes on risk and parcels it out to a group of people. Insurance is the paradigmatic risk-spreading institution. Many people pay relatively small amounts of money so that there is a large pot of money to cover the costs of the unfortunate few who suffer a loss." BAKER, *supra* note 40, at 2. Insurance scholar Kenneth Abraham describes the same process with somewhat different terminology: "[I]nsurance is a method

1. ACA individual mandate

Congress chose to approach health care reform with a private insurance framework rather than public funding; this meant that risk-sharing between individuals was an essential aspect of the plan. If I am one of those affected by the mandate, the premiums that someone else pays may end up benefitting me if I become a victim of a disease or injury.⁸¹ Those premiums will help pay the hospitals and doctors that provide medical care for me, and they may total much, much more than the cost of my premiums. Correlatively, health insurance premiums that I pay may wind up benefitting not me but someone else who is a victim of a disease or injury. This pooling and transferring of risk is the essence of insurance.⁸²

2. Auto insurance individual mandates

States have chosen to respond to the myriad injury problems caused by autos through a private insurance framework rather than public funding. Having liability insurance means that other people's premiums may end up benefitting me if I cause an accident through carelessness, because the premiums other people have paid for their liability insurance may be used to help pay the judgment or settlement that compensates for the injury I caused through carelessness.⁸³ Also, other people's premiums may help me if I am a victim of an accident caused by someone else's carelessness, since those premiums will help pay for the compensation I receive from the injurer's liability policy. Alternatively, my premiums may

of managing risk by distributing it among large numbers of individuals or enterprises." ABRAHAM, *supra* note 65. See *NFIB v. Sibelius*, 132 S. Ct. 2566, 2620 (2012) (Ginsberg, J., dissenting) (noting "that is how insurance works.").

⁸¹ As Tom Baker explains, "[m]any, perhaps most, people in the United States never realize that, if they are lucky, most of their premiums for most forms of insurance will go to pay other people's claims. Indeed, one of the most common images of insurance is quite similar to that of a savings account....[People] often expect that over the course of a lifetime the deposits made by each person should roughly equal the withdrawals on that person's insurance account....[W]hen it comes to health, disability, property, and term life insurance, if your withdrawals equal your deposits, you have had, at least in some respects, a very unfortunate life. If you are fortunate, your insurance dollars go to pay other people's claims." BAKER, *supra* note 40, at 14.

⁸² *Id.* at 2, 14.

⁸³ *Id.* at 14 (describing how one's insurance premium dollars may go to pay others' claims, or vice versa).

end up benefitting not me but someone who negligently causes an accident or a victim who suffers an injury from someone else's carelessness. This sharing and shifting of risk is what insurance does.

D. BOTH TYPES OF MANDATE REQUIRE PEOPLE TO BUY SOMETHING FROM A PRIVATE SELLER

Both mandates require people to buy something from a private seller since they are based on the very American idea that competition among insurance companies, combined with laws requiring coverage, will benefit consumers more than having a government program alone deal with the situation.⁸⁴

1. ACA individual mandate

Congress could have chosen to fund health care costs in a different way, for example through universal public insurance funded through its power to tax. It could have expanded existing government health care funding such as the Medicare and Medicaid programs that currently provide health care to millions who fit specific eligibility criteria

⁸⁴ Workers compensation legislation takes a somewhat similar, private-public approach to insurance for workers' injuries. In every state but Texas, employers of a certain size must participate. 1 LARSON'S WORKERS' COMPENSATION LAW § 2.06, at 2-12 (MATTHEW BENDER & CO. 2009), VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 651 (4th ed. 2009) (noting that participation in Texas is optional but encouraged). In most states, employers obtain insurance through the private market. LIABILITY, *supra* note 54, at 60. Fourteen states have a "public option" of state-run insurance that competes with private insurers, while six states have government-run funds that monopolize the field of coverage. *Id.* at 60-61. The large majority of states allow employers to self-insure for groups. Christine Fuge, *The Workers Compensation Self-Insurance Decision*, INT'L RISK MGM'T INS. (Aug. 2001), available at <http://www.irmi.com/expert/articles/2001/fuge08.aspx>. This approach to workers compensation is what Professor Abraham calls a "mixed public-private insurance approach," and contrasts with systems in other countries where workplace injury costs are compensated through their social welfare systems. LIABILITY, *supra* note 38, at 61. See generally SKOCPOL, *supra* note 27, at 285-302 (describing history of workers compensation reforms and particularly the failure of more comprehensive policies), JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004) (outlining history of workers compensation legislation). For further discussion of workers compensation law history, see *infra* note 180.

to cover everyone.⁸⁵ But that would have been dramatically different from the ACA, which largely leaves the system of governmental provision of health insurance in place and adopts a mostly privatized system for health care not covered by governmental programs.⁸⁶ One of the goals of the ACA and the mandate was to increase competition and choice for the benefit of consumers.⁸⁷ It will use a system of state exchanges which will allow variations between states as to basic requirements for policies and will allow consumers to comparison shop for policies that are most beneficial for them and their families.⁸⁸ Since the mandate does not go into effect until 2014, at the present one cannot point to existing increased competition for customers.

2. Auto insurance individual mandates

It would be possible to have the losses caused by car accidents be paid for in a totally different way, perhaps through a no-fault insurance plan or government programs funded by tax revenue.⁸⁹ But legislatures have decided that mandates setting a floor for coverage and mandates that

⁸⁵ ABRAHAM & SCHWARCZ, *supra* note 29, at 5.

⁸⁶ *Id.* The mandate was far from a single-payer system and did not even include a public option. Shalagh Murray & Lori Montgomery, *Senate Democrats Largely Support Health Care Deal that Drops Public Option*, WASH. POST, Dec. 10, 2009, at A1; *see also Dems Make Deal to Drop Public Option*, CBS NEWS (Dec. 9, 2009, 12:35 PM), http://www.cbsnews.com/2100-250_162-5943452.html.

⁸⁷ *See Putting Americans in Control of Their Health Care*, WHITEHOUSE, Title I. *Quality, Affordable Health Care for all Americans*, WHITEHOUSE.GOV, whitehouse.gov/health-care-meeting/proposal/titlei (last visited Feb. 17, 2013) (“Americans without insurance coverage will be able to choose the insurance coverage that works best for them in a new open competitive insurance market—the same insurance market that every member of Congress will be required to use for their insurance...”).

⁸⁸ *See supra* note 87; Louise Radnofsky, *Puzzling Over What to Call State Insurance Exchanges*, WALL ST. J., Aug. 7, 2012, at A7; ABRAHAM & SCHWARCZ, *supra* note 29, at 15.

⁸⁹ In fact, a no-fault plan modeled on workers compensation insurance (known as the Columbia Plan) was proposed in 1932 by prominent experts but it never became law in any state. Simon, *supra* note 27, at 585-87; LIABILITY, *supra* note 54, at 4-7. Other efforts to replace the liability system for auto accidents with a no-fault system did not lead to comprehensive reform. *Id.* at 92-100. For a recent analysis of the failure of no-fault to spread more widely, *see* Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise,"* 61 DEPAUL L. REV. 303 (2012).

companies cover high-risk drivers, together with competition among companies and the common law theory of negligence liability are the best way to approach the funding of the costs of accidents.⁹⁰ Auto insurance mandates have led to fierce competition and continued innovation.⁹¹ They exemplify how government mandates coupled with private competition have resulted in a successful system which extends coverage and shares risk very broadly, bringing many benefits to consumers.⁹²

E. CONCLUSION

There are significant similarities between the mandates. First, they both are ways to tackle public policy dilemmas that have no easy solution, and there are strong policy reasons for mandates in each context. Second, they direct people to insure themselves against risks they may want to handle through setting money aside rather than through buying insurance. Third, they require that risks be pooled and transferred, which is a fundamental function of insurance. Fourth, they both are based on the very American idea that, rather than a government takeover of a problem, competition among private companies, together with laws requiring coverage and regulating insurance, will benefit the public more. In the auto context, mandates have developed into system which is so workable and widely accepted that most people do not think about it much.⁹³ The parallels between the two types of requirements are striking, and show that

⁹⁰ Each state has a high risk plan which requires insurance companies to offer coverage to drivers considered too risky to insure. See *infra* notes 112-16 and accompanying text. Liability for car accidents has long been based on the common law theory of negligence. Simon, *supra* note 27, at 561; JERRY & RICHMOND, *supra* note 26, at §§ 131-32. However, cases almost always settle and treatment of claims is generally routinized and without deep inquiry into fault. See generally Nora Freeman Engstrom, *Sunlight & Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011) (describing how routinization distances damage determinations from fault determinations).

⁹¹ See e.g., *Deregulating Auto Insurance: Hearing Before H. Comm. on Financial Services, Subcommittee on Oversight and Investigation* (Aug. 1, 2001) (statement of Robert E. Litan, Vice President, Economic Studies Program at Brookings Institution), available at http://www.brookings.edu/testimony/2001/0801business_litan.aspx (testimony stating that insurance for automobiles is a competitive market, and with the advent of the internet it will be more so); JERRY & RICHMOND, *supra* note 26, at 918-19 (describing pay-as-you-drive developments). See *infra* note 169.

⁹² See *infra* pp. 37-39.

⁹³ LIABILITY, *supra* note 54, at 102.

the ACA individual mandate is neither the anomaly nor the unprecedented intrusion on individual freedom which its opponents claim.⁹⁴ This in turn leads which leads to discussion of the claim that auto insurance mandates are completely distinguishable because driving is a choice.

III. CHOICE, FREEDOM, AND COERCION

The most common response to the example of car insurance mandates as precedents is that auto insurance mandates are totally different because driving is a choice.⁹⁵ This “choice rejoinder” of mandate critics asserts that one can choose to drive or not to drive and government can regulate because driving is a choice.⁹⁶ By contrast, there is no choice in the ACA mandate context; one must buy the insurance simply because one is alive.⁹⁷ Critics claim that the ACA mandate is deeply coercive, in contrast to auto insurance mandates⁹⁸ This Part will show that the line between choice and coercion does not track the two kinds of mandates in that way. First, driving often is not a choice but a necessity, as cases and statutes

⁹⁴ See, e.g., Barnett/Heritage Memo, *supra* note 13.

⁹⁵ See, e.g., Michael Tanner, *Individual Mandates for Health Insurance: Slippery Slope to National Health Care*, CATO INSTITUTE (Policy Analysis No. 568), Apr. 5, 2006, at 10 n.13 (“If one does not like the regulations, including an insurance mandate, one can choose not to drive. A health insurance mandate would not generally give people such a choice.”); Barnett/Heritage Memo, *supra* note 13, at 6; *America’s Newsroom*, Interview by Bill Henner with George Pataki, former N.Y. Governor (FOX Television Broadcast Sept. 6, 2010) (Former Governor George Pataki of New York was asked in a September 2010 interview, ‘what’s the difference between being required to carry auto insurance and the requirement to carry health insurance?’ He responded: The difference is, if you want to drive a car on a public street in this country, you are asking the government for the right to do something. You don’t have a right to go on a public highway. And when you do go on a public road, you can pose [] risk to someone else out there. So clearly the government has the right to say that you should know how to drive and you should have insurance if you do. But the health-care bill says, if you don’t want to do anything, if you just want to sit home and not participate, we’re going to fine you, because we’re going to make you participate in this program.’ Interviewer: ‘So, it is mandatory participation, it’s not voluntary as is the case when you choose to drive a car?’ Mr. Pataki: ‘When you choose to drive.’).

⁹⁶ See *supra* note 95.

⁹⁷ See *supra* note 95.

⁹⁸ See, e.g., Barnett/Heritage Memo *supra* note 13, at 6; Tanner, *supra* note 95; *America’s Newsroom*, *supra* note 95.

have long recognized.⁹⁹ Second, for those to whom the ACA mandate might apply, there is a choice between buying insurance and making a Shared Responsibility Payment, which is not different in kind from other government incentives and taxes.¹⁰⁰ Third, auto insurance mandates actually are more coercive than the ACA mandate.¹⁰¹ In short, the ACA mandate involves less coercion and more choice than its opponents claim, and car mandates involve more coercion and less choice than is commonly recognized. Therefore, the ACA mandate cannot be dismissed as coercive while accepting car insurance mandates as not coercive.

A. DRIVING IS NOT A PURE “CHOICE”

Characterizing driving as a pure choice has no footing in the reality of most Americans’ lives. Former Massachusetts Governor Mitt Romney articulated this in a 2011 interview: “[T]he government of course has a lot of mandates, and I know folks don’t like that—mandates kids go to school, mandates they have to have auto insurance if they have an automobile. And my conservative friends say, well, we don’t have to have automobiles; well what state do you live in? Of course you have to have automobiles in this nation.”¹⁰² Romney’s point is simply that automobiles and driving are necessities in the U.S. Driving is very often not a pure choice but rather is essential for making a living and just for living; it is a constrained decision shaped not only by individuals and households but by government policy at all levels.¹⁰³

Cases and statutes have long recognized that driving is not an ‘extra’ or a choice, but that it is necessary for people to be able to earn a living. For example, in the context of drivers’ licenses, the United States Supreme Court wrote that once the state issues licenses, “their continued

⁹⁹ See *infra* Part II.A.

¹⁰⁰ See *infra* Part II.B.

¹⁰¹ See *infra* Part II.C.

¹⁰² *The O’Reilly Factor*, Interview by Bill O’Reilly with Former Governor Mitt Romney, Presidential Candidate (FOX Television Broadcast, Sept. 13, 2011).

¹⁰³ It is true that in some parts of the United States such as Manhattan in New York City, driving is not essential. But those parts are the exception and tend to be expensive. See Genevieve Guiliano & Susan Hanson, *Managing the Auto*, in *THE GEOGRAPHY OF URBAN TRANSPORTATION* 385 (Susan Hanson & Genevieve Guiliano, eds., 3d ed. 2004) (“The U.S. has the highest rate of private vehicle ownership, the highest level of daily miles traveled and the lowest rates of trip-making by modes other than the auto [in the world.]”).

possession may become essential in the pursuit of a livelihood.”¹⁰⁴ Therefore, procedural due process must be given before a license may be suspended.¹⁰⁵ If the ability to drive had not been an element of “life, liberty, or property,” in this case property, no process would have been due.¹⁰⁶ The Supreme Court also has recognized that many are dependent on driving in order to make a living.¹⁰⁷

The Supreme Court of Michigan considered driving to be a necessity when determining the constitutionality of comprehensive auto insurance reform in the 1978 case of *Shavers v. Kelley*.¹⁰⁸ Upholding the reforms in general but specifying that auto insurance had to be provided at equitable and fair rates, the court explained as follows:

In Michigan the independent mobility provided by an automobile is a crucial, practical necessity; it is undeniable that whether or not a person can obtain a driver's license or register and operate his motor vehicle profoundly affects important aspects of his day-to-day life.¹⁰⁹

The court noted that under the law, without insurance, a person could not register her vehicle, and “the interest in registering and operating a vehicle is as significant as the interest in the use of a driver's license.”¹¹⁰ Therefore, the state's auto insurance laws had to guarantee that rates were not arbitrary or unfair in order to be constitutional.¹¹¹

Every state's laws treat driving as more of a necessity than a choice since every state has a requirement that auto insurers cover high risk

¹⁰⁴ *Bell v. Burson*, 402 U.S. 535, 539 (1971).

¹⁰⁵ According to Laurence Tribe, the court's decisions in this area have largely abandoned “whatever had remained of the rights-privileges distinction.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 666 (2d ed. 1988). See *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Bell*, 402 U.S. at 539.

¹⁰⁶ U.S. CONST. amend. XIV, § 1.

¹⁰⁷ See *Calif. State Auto. Assoc. Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 107 (1951), discussed *infra* at Part III.B.

¹⁰⁸ *Shavers v. Kelley*, 402 Mich. 554, 598 (1978), *cert denied*, 442 U.S. 934 (1979).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 599.

¹¹¹ *Id.* at 600. The court's decision gave the legislature and the state commissioner eighteen months to ensure that rates were equitable and fair. The Supreme Court denied cert, and there is no further history. See *supra* note 108.

individuals so that those individuals can drive.¹¹² This is a mandate on insurance companies. Rather than simply allowing insurance companies to deny coverage to risky drivers so that they cannot drive, all states have developed a plan so that high risk drivers can get behind the wheel, backed by insurance.¹¹³ As noted in one treatise: “[t]he need for such a plan is instantly recognizable. The only alternatives are either to impose a disproportionate number of bad risks upon a few insurers . . . or to *disallow these [bad] risks the opportunity to drive. Neither alternative is acceptable to the parties involved.*”¹¹⁴ If driving was seen as merely optional, this universal market regulation would never have developed.¹¹⁵ As insurance law professor Kenneth Abraham explains,

[t]he current emphasis on various kinds of residual markets in the automobile insurance field reveals a great deal about the centrality of the automobile in our culture. The use of an automobile at a tolerable cost has become almost a fundamental right; the maintenance of residual markets that assure all drivers minimum insurance coverage follows from and reflects this development.¹¹⁶

Although it would be reasonable to exclude high-risk drivers from coverage and thus from driving, no state agrees because of the importance of driving and car access.

On any given day, over two-thirds of Americans aged fifteen and

¹¹² “[A]ll states have some kind of high-risk or “residual market plan” through which automobile insurance is sold to people unable to obtain insurance in the voluntary market. The most common mechanism in the states is the “assigned risk plan” under which insurers doing business in a state are required to insure some portion of otherwise uninsurable risks.” JERRY & RICHMOND, *supra* note 26, § 22[e]. This is also known as the involuntary market. Press Release, Ins. Info. Inst. (Jan. 25, 2011), www.iii.org/issue_updates/residual-markets.htm. These requirements and their history are discussed more fully at *infra* Part III.A; litigation about the constitutionality of one state’s high risk plan is discussed more fully at *infra* Part III.B.

¹¹³ See *infra* Part III.

¹¹⁴ WOODRUFF, FONSECA, & SQUILLANTE, *supra* note 71, § 3:35, at 99 (emphasis added).

¹¹⁵ See ABRAHAM, DISTRIBUTING RISK, *supra* note 65, at 216, 219. See *infra* Part III.

¹¹⁶ ABRAHAM, DISTRIBUTING RISK, *supra* note 65, at 219.

older are behind the wheel of a car for at least an hour.¹¹⁷ Roughly 80% of adult Americans have a drivers' license.¹¹⁸ The "free choice" to drive is affected by state and federal transportation policy as well as local zoning laws, all of which have a significant impact on the form and character of cities, suburbs, and rural areas.¹¹⁹ Being able to drive a working car is essential for suburban and rural transportation in the U.S.¹²⁰ The respective locations of work, schools, shopping, medical care and housing often leave individuals with no real choice as to whether or not to drive.¹²¹

¹¹⁷ *Spotlight on Statistics: Automobiles*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/spotlight/2011/auto> (Oct. 2011).

¹¹⁸ Press release, National Safety Council, Licensed Drivers and Number in Accidents by Age: 2009 (Sept. 30, 2009) (on file with the author) (211 million Americans have drivers licenses).

¹¹⁹ See Michael Lewyn, *How Government Regulation Forces Americans Into Their Cars: A Case Study*, 19 WIDENER L. J. 839, 839-40 (2007) (showing how zoning and other regulations disadvantage pedestrians); John Pucher, *Public Transportation*, in THE GEOGRAPHY OF URBAN TRANSPORTATION 202, 217 (Susan Hanson & Genevieve Giuliano, eds., 3d. ed. 2004); ANDRES DUANY, ELIZABETH PLATER-ZYBECK, & JEFF SPECK, SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM xiii (2000). The Federal policies include the federal guarantee of home mortgages, the home mortgage interest deduction, and federal road building and utility subsidies. Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797, 1842-49 (2007). State policies include zoning for building type, separate use zoning, and lack of regional planning. *Id.* at 1846-50.

¹²⁰ DUANY, ET AL., *supra* note 119, at 25 (cars are essential for life in suburbs); Lisa R. Pruitt, *Missing the Mark: Welfare Reform and Rural Poverty*, 10 J. GENDER, RACE, & JUST. 439, 454-58 (2007) (detailing transportation issues for rural women).

¹²¹ See DUANY ET AL., *supra* note 119. The exact causal mechanisms of sprawl are disputed. See, e.g., ROBERT BRUEGMAN, *SPRAWL: A COMPACT HISTORY* (2005), JONATHAN LEVINE, *ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE* (2006). Regardless of the exact causal mechanism, major structural factors sharply constrain individuals' choice. See, e.g., Katharine B. Silbaugh, *Wal-Mart's Other Woman Problem: Sprawl and Work-Family Balance*, 39 CONN. L. REV. 1713 (2007). Moreover, when gas prices rise, polls find many Americans suffer hardship, revealing the speciousness of the notion that driving is an optional activity. See Gary Langer & Gregory Holyk, *Gas Prices Slam Mobility and Obama's Popularity*, ABC NEWS (Apr. 25, 2011), <http://abcnews.go.com/Politics/gas-prices-slam-drivers-obamas-poll-numbers/story?id=13453640> ("with gas prices up 26% to an average of \$3.88 a gallon, seven in ten Americans in this ABC News/Washington Post poll report financial hardship as a result, six in 10 say they have cut back on driving.");

B. THE ACA INDIVIDUAL MANDATE CREATES A CHOICE

The ACA mandate gives those who are subject to it a choice between obtaining health insurance and paying the ‘Shared Responsibility Payment,’ which is by statute always less than the cost of the insurance.¹²² Justice Roberts concluded that the Shared Responsibility Payment was for constitutional purposes a valid tax, and asserted that “imposition of a tax...leaves an individual with a lawful choice to do or not do a certain act.”¹²³ The lack of additional consequences was significant in determining that the mandate could validly be seen as a tax. He noted that “[n]either the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The government . . . confirm[s] that if someone chooses to pay [the Shared Responsibility Payment] rather than obtain health insurance, they have fully complied with the law.”¹²⁴ The Shared Responsibility Payment, as Justice Roberts explained, is like many other types of government policy aimed to influence behavior.¹²⁵ It makes the decision to self-insure for medical expenses more costly than it would be otherwise.¹²⁶ He explained in a

Michael D. Shear, *High Gas Prices Give G.O.P. Issue to Attack Obama*, N.Y. TIMES (Feb. 18, 2012). Proposals to increase the gas tax, which has not been raised since 1993, consistently have met with defeat because of political opposition. Brian D. Taylor, *The Geography of Urban Transportation Finance*, in THE GEOGRAPHY OF URBAN TRANSPORTATION 294, 307-10. Gas prices in Europe are roughly four times higher than in the U.S., and the large majority of the differential is due to higher gas prices. John Pucher, *Public Transportation*, in THE GEOGRAPHY OF URBAN TRANSPORTATION 207, 217. These responses show that driving is seen as a necessity, as indeed it is. Further, they demonstrate how vacuous it is to assert that the decision whether or not to drive is a pure choice.

¹²²*NFIB v. Sebelius*, 132 S. Ct. 2566, 2595-96 (2012). The shared responsibility payment per individual will be either \$695 indexed for inflation in later years, 26 U.S.C. § 5000A(c)(3)(A) (2010), or 2.5% of household income. *Id.* at § 5000A(c)(2)(B)(iii). For more information see DAVID NEWMAN, CONGRESSIONAL RESEARCH SERVICE, INDIVIDUAL MANDATE AND RELATED INFORMATION REQUIREMENTS UNDER PPACA 8-11 (2011), <http://healthreformgps.org/wp-content/uploads/CRSreportonPPACAUG2011.pdf>. For instance, a single individual with no dependents with an income of \$40,000 will pay about \$750 in 2016, whereas the same individual with \$100,000 in annual income will pay about \$2,500. *Id.*

¹²³ *NFIB*, 132 S. Ct. at 2600.

¹²⁴ *Id.* at 2597.

¹²⁵ *Id.* at 2596.

¹²⁶ *Id.* at 2597.

footnote:

Of course, individuals do not have a lawful choice not to pay a tax due, and may sometimes face prosecution for failing to do so (although not for declining to make the shared responsibility payment, see 26 U.S.C. §5000A(g)(2)). But that does not show that the tax restricts the lawful *choice* whether to undertake or forgo the activity on which the tax is predicated. Those subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.¹²⁷

The ACA individual mandate will impose financial costs on some, as do many government activities, but that is a different matter from taking away individual choice.

C. AUTO INSURANCE MANDATES ARE FAR MORE COERCIVE THAN THE ACA INDIVIDUAL MANDATE.

States' auto insurance mandates actually are more coercive than the ACA individual mandate in at least two ways. First is in the reach of the mandates. Auto insurance mandates (and they typically require the purchase of several types of insurance) apply to everyone who is a licensed driver and car owner, requiring drivers to buy insurance they may not want to buy, at the risk of fines or jail sentences.¹²⁸ It is probably impossible to accurately estimate the number of people who buy auto liability and other auto insurance solely because of mandates, but it seems safe to say that this figure is probably in the tens of millions.¹²⁹ These mandates certainly affect the finances of those subject to them, and they may override decisions about risk and budgets of people who must comply with them (i.e. all

¹²⁷ *Id.* at 2600 n.11 (emphasis added). See *supra* Part II.

¹²⁸ See *supra* notes 34-40 and accompanying text.

¹²⁹ With an estimated 211 million licensed drivers, and over 125 million automobiles registered in 2011, this admittedly vague estimate seems fair. See *supra* note 118 for an estimate of driver's license holders. See *State Motor-Vehicle Registrations - 2011*, FED. HIGHWAY ADMIN. (2012), <http://www.fhwa.dot.gov/policyinformation/statistics/2011/pdf/mv1.pdf> (Estimating total number of automobiles (excluding trucks, buses) registered in 2011: 125,656,528, and estimating number of all motor vehicle registrations in 2011 to be 244,778,179).

drivers). The ACA, by contrast, may require roughly six million Americans to purchase insurance or make the Shared Responsibility Payment, a far smaller number.¹³⁰ Further, the ACA contains a hardship exemption, as well as other exemptions from the usual Shared Responsibility Payment for not obtaining insurance in the ACA.¹³¹ The large majority of Americans do and will get their health care through employer-provided insurance, Medicare, Medicaid, or the Veterans' Administration.¹³²

Second, state auto insurance mandates are enforced with a wide range of penalties, including stiff fines and criminal punishment for those who drive without insurance in some states.¹³³ Penalties differ from state to state but ten states punish first time offenders with jail time, while twenty states impose a fine.¹³⁴ Upon a second infraction, penalties can increase

¹³⁰ See *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act*, CONG. BUDGET OFFICE (Apr. 30, 2010), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/individual_mandate_penalties-04-30.pdf (the majority of the uninsured population will not be subject to the penalty; estimating about 4 million people will be subject to the penalty); Linda J. Blumberg, Matthew Buettgens, & Judy Feder, *The Individual Mandate in Perspective*, URBAN INST. 1-2 (Mar. 2012), <http://www.urban.org/UploadedPDF/412533-the-individual-mandate.pdf>.

¹³¹ Professor Mark Hall explains,

“[t]echnically, the mandate applies to all legal residents who are not in prison and who do not claim a religious exemption, but several categories of people are exempt from paying the penalty for noncompliance. PPACA § 1501(b), 26 U.S.C.A. § 5000A(d)-(e) (West Supp. 1A 2010). Exemptions include people whose income is below the tax-filing threshold and people who cannot afford coverage, which is defined as the lowest-priced individual insurance plan costing them more than 8% of their household income. *Id.*, 26 U.S.C.A. § 5000A(e)(1)-(2). Exemptions also extend to members of Indian tribes, to individuals with gaps in coverage of three months or fewer, and to those suffering general hardship as defined by the Department of Health and Human Services. *Id.*, 26 U.S.C.A. § 5000A(e)(3)-(5).”

Hall, *supra* note 44, at 1830 n.20.

¹³² Blumberg, Buettgens, & Feder, *supra* note 130. 60% of Americans obtain health insurance through their own or a family member's employer. ABRAHAM & SCHWARCZ, *supra* note 29, at 4.

¹³³ See *infra* notes 134-35.

¹³⁴ Jail time for first time offenders: Alabama: ALA. CODE. § 32-7A-12 (2012) (imposing not more than 3 months in jail); Kentucky: KY. REV. STAT. ANN. §

dramatically.¹³⁵ The ACA, by contrast, as noted above, is enforceable only by the limited Shared Responsibility Payment, generally “far less” than the

187.990 (West 2012) (imposing 90 days in jail); Massachusetts: MASS. GEN. LAWS ANN. ch. 90, § 34J (West 2009) (imposing up to one year in jail); Minnesota: MINN. STAT. ANN. § 169.791 (2003) (imposing 90 days in jail); New York: N.Y. VEH. & TRAF. LAW. § 319 (McKinney 2003) (imposing a fine of \$150-1,500, a civil penalty fine of \$750 and/or 15 days in jail); Oklahoma: OKLA. STAT. tit. 47, § 7-606 (2011) (imposing up to 30 days in jail); South Carolina: S.C. CODE ANN. § 56-9-80 (2011) (imposing up to 30 days in jail); South Dakota: S.D. CODIFIED LAWS § 32-35-113 (2012) (imposing a \$500 fine or up to 30 days in jail); West Virginia: W. VA. CODE ANN. § 17D-2A-9 (2012) (imposing a \$200-5,000 fine and/or up to 15 days in jail); Wyoming: WYO. STAT. ANN. § 31-4-103 (West 2010) (imposing a \$250-700 fine and/or up to six months in jail). Fines for first time offenders: *See* Alabama: ALA. CODE § 32-7A-16 (2000) (Class C Misdemeanor resulting in a fine of not more than \$500); Arizona: ARIZ. REV. STAT. ANN. § 28-4135 (2009) (issuing a \$500 fine); Colorado: COLO. REV. STAT. ANN. § 42-4-1409 (West 2010) (issuing a fine of \$500); Delaware: DEL. CODE ANN. tit. 21 § 2118(s)(1) (West 1995) (issuing a fine from \$1,500-2,000); District of Columbia: D.C. CODE § 31-2413(b)(1)(A) (2011) (issuing a civil fine of \$500); Hawaii: HAW. REV. STAT. § 431:10C-117 (2006) (issuing a \$500 fine); Illinois: 625 ILL. COMP. STAT. ANN. § 5/3-707 (West 2010) (issuing a \$500-1000 fine); Iowa: IOWA CODE ANN. § 321A.32 (West 1997) (issuing a \$250-1,500 fine); Kentucky: KY. REV. STAT. ANN. § 187.990 (West 2012) (issuing a \$500 fine, 30 days imprisonment, or both); Massachusetts: MASS. GEN. LAWS ANN. ch. 90, § 34J (West 2009) (issuing a \$500-5,000 fine and/or up to 1 year in prison); Minnesota: MINN. STAT. ANN. § 169.791 (West 2011) (issuing a \$200-1,000 fine); Mississippi: MISS. CODE ANN. § 63-15-4 (West 2010) (issuing a \$500 fee); Nebraska: NEB. REV. STAT. ANN. § 60-3,168 (West 2005) (issuing a fine of \$100-500); Nevada: NEV. REV. STAT. ANN. § 485.187 (West 2001) (issuing a fine of \$600-1,000); New Jersey: N.J. STAT. ANN. § 39:6B-2 (West 2011) (issuing a \$300-1,000 fine); New York: N.Y. VEH. & TRAF. § 319 (McKinney 2003) (issuing a \$150-1,500 fine); South Dakota: S.D. CODIFIED LAWS § 32-35-113 (2003) (issuing a \$500 fine or thirty days imprisonment); Vermont: VT. STAT. ANN. tit. 23, § 800 (West 2000) (issuing a civil penalty of \$250-500); West Virginia: W. VA. CODE § 17d-2a-7 (West 2011) (issuing a \$200-5,000 fine and/or up to 15 days imprisonment); Wisconsin: WIS. STAT. ANN. § 344.65 (West 2009) (Issuing a \$500 fine); Wyoming: WYO. STAT. ANN. § 31-4-103 (West 2006) (issuing a \$250-750 fine and/or 15 days imprisonment).

¹³⁵ For example, Arizona requires two-time offenders to pay \$750 and forgo their driving privileges for six months; a third violation increases the fine up to \$1,000. *See* ARIZ. REV. STAT. ANN. § 28-4135 (2012). Arkansas imposes second time offenders \$250-500 and fines subsequent offenders \$500-1,000 and/or imposes a sentence of one year in jail. ARK. CODE ANN. § 27-22-103 (West 2011). Colorado and Utah penalize second-time offenders with a \$1,000 fine. COLO. REV.

cost of insurance for those who can afford to buy but refuse to purchase insurance.¹³⁶ There are no other penalties.¹³⁷ The ACA individual mandate is significantly less coercive than auto insurance mandates.

D. CONCLUSION

A common response to the example of car insurance mandates as a relevant precedent, that driving is a choice so that auto insurance mandates are irrelevant, falls apart under scrutiny. Driving is not a pure choice, the ACA mandate creates a choice, and auto insurance mandates actually are far more coercive than the ACA mandate. Dismantling the “choice rejoinder” reinforces the point that auto insurance mandates are relevant precedents for the ACA. The next section describes how today’s system of auto insurance mandates labored under strikingly similar political and legal challenges for decades before becoming the well-settled arrangement that it is today.

IV. THE FORGOTTEN HISTORY OF AUTO INSURANCE MANDATES

This section traces the forgotten history of development of auto insurance mandates, highlighting two aspects that are relevant to the ACA

STAT. ANN. § 42-4-1409 (West 2010); UTAH CODE ANN. § 41-12a-302 (West 2007). Idaho imposes a \$1,000 fine and/or up to 6 months in jail. IDAHO CODE ANN. § 49-1232(2) (West 2012). The District of Columbia increases its initial civil penalty of \$500 by 50% for each additional offense, D.C. CODE § 31-2413(b)(1)(A) (2011), while Hawaii fines two-time offenders three times as much (\$1,500) for their second offense. HAW. REV. STAT. § 431:10C-117 (West 2006). In Kansas, second-time offenders must pay \$800-2,500, KAN. STAT. ANN. § 40-3104(g)(2) (West 2010). Minnesotans, who for the second time violate their compulsory auto insurance mandates, must pay up \$3,000. MINN. STAT. ANN. § 169.791 (West 2011). New Jersey also imposes a stark punishment for repeat time offenders; they must pay up to a \$500 fine, spend up to 14 days in jail, and complete thirty days of community service. N.J. STAT. ANN. § 39:6B-2 (West 2011). Moreover, Wyoming imposes an even greater fine (\$500-1,500) and sentences these violators up to six months in jail. WYO. STAT. ANN. § 31-4-103 (2006).

¹³⁶ NFIB v. Sebelius, 132 S. Ct. 2566, 2597 (2012).

¹³⁷ As Justice Roberts stated, “[n]either the [ACA] nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS.” *Id.*

mandate.¹³⁸ First is the complex legislative evolution of mandates which showcases both the public-private nature of how U.S. society handles the risks of automobiles and the contingent nature of arguments about freedom in the context of insurance mandates. Second is the constitutional history of auto insurance mandates; in this history, the public welfare dimensions of insurance easily have trumped claims that mandates unconstitutionally interfere with freedom.

A. THE COMPLEX LEGISLATIVE EVOLUTION OF MANDATES

The spread of automobiles was an essential backdrop to the development of auto insurance mandates. The rapid growth in the number of vehicles on U.S. roads—the number of cars increased by ten times between 1915 and 1930—led to huge changes in the U.S.¹³⁹ The very welcome explosion in mobility went along with tremendous increases in injuries in the first half of the twentieth century.¹⁴⁰ Injuries were far more common on a per-mile basis than they are now, and health and disability insurance was far less common, so that injuries were likely to cause disastrous financial consequences in addition to whatever physical and emotional injuries they caused.¹⁴¹ Legislative intervention was needed, and various approaches were tried to deal with the problems caused by autos.¹⁴² In 1927, Massachusetts became the first state to adopt a compulsory liability insurance plan.¹⁴³ Its major purpose was to ensure that defendants

¹³⁸ Space limitations preclude a comprehensive history of the development of auto insurance mandates. *See generally* LIABILITY, *supra* note 54, at 70-82; Jerry & Richmond, *supra* note 26, § 131; Engstrom, *supra* note 89; Simon, *supra* note 27.

¹³⁹ LIABILITY, *supra* note 54, at 70.

¹⁴⁰ Simon, *supra* note 27, at 540.

¹⁴¹ LIABILITY, *supra* note 54, at 72-73.

¹⁴² Most states began by passing "financial responsibility" laws, which required drivers involved in an accident caused by their negligence to show that they had sufficient means to pay future claims. Connecticut passed the first such law, in 1925, and 18 states passed similar laws by 1932. LIABILITY, *supra* note 54, at 72. Many drivers satisfied these requirements by buying liability insurance. *Id.* at 72. But these laws did not do anything to make sure that victims of a driver's first negligently-caused accident would be compensated. *Id.* at 73.

¹⁴³ *See* LIABILITY, *supra* note 54, at 73; WOODRUFF, FONSECA & SQUILLANTE, *supra* note 71, § 3:21, at 90. The plan required drivers to show their ability to cover damage caused by an accident in advance, unlike other states' financial responsibility laws. LIABILITY, *supra* note 54, at 72-73. The plan allowed drivers to make a cash deposit in advance as an alternative, *In re* Opinion of the Justices, 147

were solvent.¹⁴⁴ The road to our nationwide web of auto insurance mandates, which now includes high-risk plans in all states, liability insurance in virtually all states, uninsured motorist coverage in twenty-two states, and some combination of Med-Pay coverage, underinsured motorist coverage, and no-fault elements in many states, was not smooth, quick, or inevitable.

The auto insurance industry opposed insurance mandates for more than six decades after the first-in-the-nation 1927 Massachusetts law took effect.¹⁴⁵ A major concern was that, although liability insurance mandates obviously increase the demand for insurance, the mandates would force companies to cover high risk drivers and reduce profitability.¹⁴⁶ In Massachusetts, the initial experience after compulsory liability insurance passed was lowered profits, which stalled the momentum of those favoring compulsory insurance and strengthened industry opposition.¹⁴⁷ Industry representatives used arguments based on freedom and American values to oppose mandates.¹⁴⁸

The opposition to mandates was articulated in terms of freedom and free enterprise.¹⁴⁹ For example, C.D. McVay, an insurance company president, wrote in 1954 that mandates raised “the entire question of the validity of private enterprise.”¹⁵⁰ He doubted the need for such mandates when the number of deaths from auto accidents over a nine-year period was less than the number of deaths from household accidents in Ohio over the same period, and questioned the legislative priority accorded to auto

N.E. 681 (Mass. 1925), but is generally referred to as “compulsory liability insurance legislation.” *LIABILITY*, *supra* note 54, at 73.

¹⁴⁴ *JERRY & RICHMOND*, *supra* note 26, § 131, at 920.

¹⁴⁵ *LIABILITY*, *supra* note 54, at 73. As Calvin Brainard wrote in his 1961 book, “[p]erhaps no other legislation has been so often proposed over so many years and so strenuously opposed as that of compulsory auto insurance.” *BRAINARD*, *supra* note 71, at 428.

¹⁴⁶ *LIABILITY*, *supra* note 54, at 74.

¹⁴⁷ *Id.*

¹⁴⁸ *See infra* notes 149-153, 163, 165, and accompanying text.

¹⁴⁹ *See, e.g.*, C.D. McVay, *The Case Against Compulsory Automobile Insurance*, 15 *OHIO ST. L. J.* 150, 154 (1954). Calvin Brainard reports in a 1961 book that a member of the Casualty Actuarial Society told a meeting of the National Association of Casualty and Surety Executives: “The threat of compulsory automobile insurance is not dead. The present danger in the situation is that we may become weary of the battle and so let ourselves be beguiled into believing that compulsory automobile insurance is not the evil which in our hearts we know it to be.” *BRAINARD*, *supra* note 71, at 435.

¹⁵⁰ McVay, *supra* note 149, at 154.

accident injuries: “[i]f we are going to set out a program of compensation for loss from accident there is no logic or justification based on the social, economic theory in not including any and all forms of accidental injury and death.”¹⁵¹ Coming as it did in 1954, and tying mandates to “social, economic theory” and the elimination of private enterprise, he may have been referring to the threat of socialism, although he does not say so explicitly.¹⁵² Regardless of whether he was referring to socialism, he is saying that mandates directly threaten freedom and capitalism since they may lead to creating an overly controlling and protective society where all risks are insured.¹⁵³

After Massachusetts’ pioneering 1927 law and the intervening Depression, it was not until the 1950s that a second state, New York, passed a mandatory liability insurance law.¹⁵⁴ During the 1930s, a proposal for a mandatory auto insurance plan modeled on workers compensation with a no-fault theory of compensation was developed by an expert commission.¹⁵⁵ It was opposed by insurance companies and did not pass in any state.¹⁵⁶ Reform efforts in the 1970s to change from a negligence system to a no-fault system stalled after initial successes and have not fundamentally changed the system.¹⁵⁷

¹⁵¹ *Id.*

¹⁵² Tellingly, Calvin Brainard wrote in 1954, “[C]ritics of universal financial responsibility through statutory compulsion fear that it will ‘lead to among other things: administrative problems, more accidents, fraudulent claims, higher claims costs, less insurance protection for the public, politics in rate making, the end of the private insurance industry, and socialism.’” BRAINARD, *supra* note 71, at 435. See also *supra* note 27.

¹⁵³ Calvin Brainard quotes the Secretary of the Treasury, Mr. Robert B. Anderson, as stating in 1959 that the strength of the American way of life is grounded in “reliance on the integrity, wisdom and initiative of the individual-not the directives of an all-wise government” in a speech to the annual convention of the National Association of Life Underwriters. BRAINARD, *supra* note 71, at 206. Brainard goes on to state “compulsory insurance programs are at odds to a greater or less extent with this statement of principle wherever individuals have it within their means to obtain minimum protection voluntarily.” *Id.* at 206.

¹⁵⁴ WIDISS & THOMAS, *supra* note 74, §1.10, at 9.

¹⁵⁵ LIABILITY, *supra* note 54, at 74. This was known as “The Columbia Plan”, and was favored by many of those considered to be “the best minds” in the field. *Id.* See generally Simon, *supra* note 27.

¹⁵⁶ Economic problems such as the Depression eclipsed the importance of the issue. LIABILITY, *supra* note 54, at 75-76.

¹⁵⁷ See generally LIABILITY, *supra* note 54, at 75-76; Engstrom, *supra* note 89.

In 1956, New York became the second state to pass a mandatory liability insurance law; other states gradually followed New York's example and by 1980, auto liability insurance was mandatory in most states, despite continuing insurance company opposition.¹⁵⁸

While opposing mandates, the insurance industry developed auto insurance products such as uninsured motorist coverage to fill social needs, cover risk privately, and stave off governmental control.¹⁵⁹ Such products initially were optional but many states gradually mandated them.¹⁶⁰ As states developed legislation requiring drivers to have insurance, the problem arose that many drivers were considered by insurance companies to be too risky to insure. High-risk plans were gradually passed in every state so that companies were mandated to cover a share of drivers they thought were too risky to insure.¹⁶¹ These plans were at times proposed by the insurance industry as a way to avoid government takeover of the risk, and at times were opposed by insurance companies as a violation of their

¹⁵⁸ See LIABILITY, *supra* note 54, at 82.

¹⁵⁹ The invention of uninsured motorist coverage by insurance companies exemplifies this dynamic. Uninsured motorist coverage requires drivers to buy coverage to protect themselves against the risk that they will be injured by an uninsured or hit-and-run motorist. WIDISS & THOMAS, *supra* note 74, §1.2, at 2. The problem of uncompensated auto injuries continued to be urgent and acute after World War II, when auto use and auto accidents rapidly increased. *Id.* Legislative pressure, especially in New York, increased for liability insurance mandates. Insurance company opposition to liability insurance mandates and other changes in insurance regulation remained firm. *Id.* §§ 1.8, 1.14, at 7, 14. Faced with a stalemate, the New York Superintendent of Insurance asked insurance companies for a solution that did not involve mandates, and the insurance industry in response invented the idea of uninsured motorist coverage. *Id.*, § 1.8, at 8. The coverage would protect the driver by putting the driver in the same position she would have been in, had the motorist who caused her injury actually carried the required insurance. *Id.* The coverage also would protect others who were "insureds" on the policy, such as passengers. *Id.* Initially uninsured motorist coverage was optional but gradually became mandatory in 21 states and the District of Columbia. See, e.g., *Nat'l Fed'n of Indep. Businesses v. Sibelius*, 132 S. Ct. 2566, 2612 (2012). In the states where its purchase is not mandatory, companies nonetheless are required to offer it even though they might prefer not to. WIDISS & THOMAS, *supra* note 74, §§1.1, 1.11, 1.14, at 2, 10, 15 (noting that uninsured motorist coverage is now the subject of mandates in 49 states; mandates require either an uninsured motorist coverage in every policy or that such a policy be offered to all insurance buyers).

¹⁶⁰ WIDISS & THOMAS, *supra* note 74, § 1.9, at 8; ROBINETTE, *supra* note 74.

¹⁶¹ See *supra* note 112 (explaining how every state has a high risk plan).

freedom of contract.¹⁶² Cars were so central that even risky drivers must have the opportunity to buy insurance to drive, legislatures concluded.¹⁶³

Insurance companies continued to oppose insurance mandates even until the late 1980s.¹⁶⁴ Congress held hearings on auto insurance in 1988, and at those hearings, a representative of the American Insurance Association testified that the automobile insurance industry opposed mandates “because we believe them fundamentally anathema to American values.”¹⁶⁵ The insurance association representative did not specify the values to which he referred, but it seems likely that freedom of choice and free enterprise would be among the values to which he was alluding. The industry spokesman also blamed mandatory insurance for problems in the insurance industry at that time and argued for repealing or reducing the mandates.¹⁶⁶

By 2011, auto insurance for drivers’ liability was mandatory in all but one jurisdiction, and states had a variety of other auto insurance mandates.¹⁶⁷ Private insurance companies have adjusted to the auto insurance mandates, and there is now a thriving and very competitive market for auto insurance in the United States.¹⁶⁸ This market continues to innovate, as evidenced by the concept and technology of pay-as-you-

¹⁶² See *Cal. State Auto. Ass’n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 108 (1941). This constitutional challenge to California’s high risk plan reached the Supreme Court. See *infra* Part III.B.

¹⁶³ In the development of assigned risk plans, we also see the universal recognition that the auto insurance market, left to its own devices, will produce an unacceptably high number of people considered uninsurable. See *Cal. State Auto. Ass’n Inter-Ins. Bureau*, 341 U.S. at 106-07.

¹⁶⁴ See, e.g., *Hearing Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the Comm. on Energy and Commerce H. of Rep.*, 100th Cong. 325 (1988) (statement of David Snyder, Am. Ins. Ass’n).

¹⁶⁵ *Id.* at 325.

¹⁶⁶ Snyder, representing the American Insurance Association, claimed “Auto insurance problems result from legal requirements to buy automobile insurance, unrealistically high mandatory coverages, skyrocketing losses resulting from lawsuits, health care costs, crime and fraud, auto repair costs, preventable deaths and injuries on our highways, and counter-productive regulatory intervention into the private sector.” *Id.* at 323. He argued for the repeal or reduction of mandatory insurance and financial responsibility requirements. *Id.* at 324.

¹⁶⁷ See *supra* Part I.C. *Compulsory Auto/Uninsured Motorists*, INS. INFO. INST. (Feb. 2013), http://www.iii.org/issues_updates/compulsory-auto-uninsured-motorists.html.

¹⁶⁸ See *supra* note 91.

drive.¹⁶⁹ Insurance companies have long urged more federal governmental efforts to promote safety,¹⁷⁰ and also have independent safety promotion programs.¹⁷¹ Price competition for customers is fierce, particularly with the advent of internet commerce.¹⁷² Driving has become an essential part of U.S. life, the U.S. economy, and how millions of Americans get to work, school, medical care, and shopping. Although often overlooked, auto insurance mandates are an important part of this picture.¹⁷³ Now the Insurance Information Institute, an influential national industry group, states that “[t]he public generally supports compulsory insurance and wants these laws enforced.”¹⁷⁴ Auto insurance laws exemplify how government mandates coupled with private competition have resulted in a successful system which extends coverage and shares risk very broadly, bringing many benefits to consumers.¹⁷⁵

The twentieth-century freedom and free enterprise arguments against auto insurance mandates are no longer made by the insurance

¹⁶⁹ Progressive Insurance Company, for example, has a program known as Snapshot, which promises to save good drivers up to 30% with use of a device that is plugged into drivers’ cars and transmits information such as how and when one drives which is used to revise drivers’ rates on a monthly basis. *See How Snapshot Works*, PROGRESSIVE.COM, www.progressive.com/auto/snapshot-how-it-works.aspx (last visited Feb. 27, 2013). *See generally* Wriggins, *supra* note 65 (detailing pay-as-you-drive auto insurance innovations and arguing such insurance would reduce driving). Insurance companies have developed partnerships with private environmental groups such as the Hartford’s partnership with the Sierra Club, through which Hartford offers lower rates on hybrid vehicles. Matthew Sturdevant, *The Hartford Announces New Affiliation With Sierra Club*, COURANT.COM (June 2, 2011, 2:13 PM) http://blogs.courant.com/connecticut_insurance/2011/06/the-hartford-announces-new-aff.html.

¹⁷⁰ *See, e.g., Hearing Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the Comm. on Energy and Commerce H. of Rep.*, *supra* note 164, at 324.

¹⁷¹ Allstate Insurance Company and the affiliated Allstate Foundation have made research on teens and risk, and teen driver safety, a priority. *See, e.g., Chronic, A Report on the State of Teen Driving 2005* (Allstate Found., Northbrook, IL), 2005, available at <http://www.allstate.com/content/refresh-attachments/citizenship/chronic.pdf>.

¹⁷² *See supra* note 91.

¹⁷³ *See* LIABILITY, *supra* note 54, at 101-103; DISTRIBUTING RISK, *supra* note 65, at 219.

¹⁷⁴ INS. INFO. INST., *supra* note 167.

¹⁷⁵ *See supra* notes 167-173 and accompanying text.

industry and seem to have very little traction for most people today. As insurance expert Kenneth Abraham observes:

For most people, paying sizable sums for auto insurance has simply become part of the background cost of living. The whole insurance and liability system for dealing with auto accidents has become so embedded in our lives that it is almost transparent.¹⁷⁶

While most people probably do not think about auto insurance mandates much, and do not seem to understand the specifics of mandates well,¹⁷⁷ there is a broad recognition on the part of both insurance companies and people that auto insurance mandates are one of the ways we deal as a society with the risks of driving.¹⁷⁸

B. QUESTIONS OF CONSTITUTIONALITY

The legality of the various kinds of auto insurance mandates is now well-established. However, when they passed their constitutionality was doubted and at times challenged. Decisions generally upheld them.¹⁷⁹ The court decisions that, almost without exception, upheld them over the last 87 years showcase the public welfare function of insurance.

Prior to passing its pioneering 1927 auto insurance mandate, the Massachusetts legislature asked for an Advisory Opinion from the Supreme Judicial Court of that state on twenty-nine questions concerning its constitutionality.¹⁸⁰ The Supreme Judicial Court pronounced the law constitutional.¹⁸¹ The Court found that the dangers posed by cars presented ample reason for requiring drivers to prove that they could cover tort judgments, since “legal liability without financial responsibility is a barren right to one who sustains injury by the wrongful act of another.”¹⁸² The

¹⁷⁶ LIABILITY, *supra* note 54, at 102.

¹⁷⁷ *See supra* note 12.

¹⁷⁸ *See* INS. INFO. INST., *supra* note 167.

¹⁷⁹ *See infra* note 206.

¹⁸⁰ *In re Op. of the Justices*, 147 N.E. 681 (Mass. 1925). The legislature asked ten questions, several of which had many subsections, leading to a total of 29. The questions ranged from whether the law’s requirements for operators were constitutional to whether the regulation of policies (such as not allowing termination during the term of the policy) were constitutional. *Id.* at 684-686.

¹⁸¹ *See id.* at 693.

¹⁸² *Id.* at 694.

court stressed the “peculiar nature” of insurance, which subjects it to broad government regulation since it “affects large numbers of people and is intimately connected with the public welfare.”¹⁸³ The court noted that compulsory workers compensation insurance had been upheld against due process challenges, and opined that workers compensation mandates were “a greater stretch of legislative power than is contemplated by the proposed bill.”¹⁸⁴ The court upheld rules against cancellations and limitations on underwriting in the legislation, noting that the law’s interference with companies’ “freedom of contract” and its interference with drivers’ “freedom of action” were both justified.¹⁸⁵ Judicial review of insurance company decisions was necessary because the refusal to issue a policy “may drive one out of business or seriously hamper his convenience.”¹⁸⁶ As a result of that 1925 opinion, the law’s constitutionality has rarely been challenged; the thorough Massachusetts opinion set the stage for acceptance of other states’ mandates.¹⁸⁷

In 1933, the U.S. Supreme Court faced the question of whether the compulsory auto liability insurance law in Massachusetts violated an individual’s fourteenth amendment rights.¹⁸⁸ Mr. Joseph Poresky, pro se, claimed that “he cannot comply with the statute” although he did not say why, and asserted that the statute violated his Fourteenth Amendment rights.¹⁸⁹ He sought a writ of mandamus forcing the federal court in Massachusetts to hear his application for an injunction, but the Supreme Court simply denied the petition, citing the 1925 Massachusetts Advisory

¹⁸³ *Id.* at 698.

¹⁸⁴ *Id.* at 696. Workers compensation legislation began to be passed in the United States in the early twentieth century. Laws were broadly modeled on Britain’s and Germany’s laws which were passed in the late nineteenth century. 1 LARSON, *supra* note 84 at §2.06 at 2-10. See generally SKOCPOL, *supra* note 27, at 285-302; WITT, *supra* note 84. Constitutional challenges were filed to workers compensation statutes but they were ultimately upheld by the Supreme Court in *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). See *supra* note 84.

¹⁸⁵ See *In re Op. of the Justices*, 147 N.E. at 701.

¹⁸⁶ *Id.*

¹⁸⁷ WOODRUFF, FONSECA & SQUILLANTE, *supra* note 71, §3:29, at 95.

¹⁸⁸ *Ex Parte Poresky*, 290 U.S. 30, *reh’g. denied*, 366 U.S. 922 (1933). Although the decision does not specifically mention due process, it has been referred to as pertaining to due process rights. WOODRUFF, FONSECA & SQUILLANTE, *supra* note 71, §3:29, at 95.

¹⁸⁹ *Ex Parte Poresky*, 290 U.S. 30, *reh’g. denied*, 366 U.S. 922 (1933).

Opinion of the Justices and other cases supporting government's authority to enact laws in the interest of the public safety and welfare.¹⁹⁰

The most high-profile constitutional challenge was to California's high-risk plan; *California State Auto Association Inter-Insurance Bureau v. Maloney* was decided in 1951 by the United States Supreme Court.¹⁹¹ The context was that as states gradually passed requirements that drivers have insurance or show that they could pay for harm they caused by some other means, many drivers were considered "high risk" by insurance companies who refused to insure them.¹⁹² States then began passing laws requiring insurance companies to cover a share of high-risk drivers starting in 1938; these plans often are known as assigned risk plans.¹⁹³ A California insurance organization¹⁹⁴ challenged the constitutionality of that state's assigned risk plan, passed in 1947, claiming that the law interfered with its due process rights by requiring it to contract with people it did not want to contract with, thereby making it less profitable.¹⁹⁵ The challenge resulted in

¹⁹⁰ *Id.*

¹⁹¹ See *Cal. State Auto Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 107 (1951).

¹⁹² See *supra* notes 113-117 and accompanying text.

¹⁹³ JERRY & RICHMOND, *supra* note 26 at §22[e]. Every state has such a plan. See *supra* note 112. New Hampshire enacted the first assigned risk plan in 1938. Snyder, *supra* note 54, at 324. New Hampshire had passed a law in 1937 requiring motorists to deposit security or purchase insurance in a sufficient amount to pay for a lawsuit stemming from a car accident. This type of law is known as a 'financial security law'. See LIABILITY *supra* note 54, at 72. These types of laws were precursors to the current mandatory liability laws; most drivers complied with these laws by purchasing auto liability insurance. *Id.* at 72-73. Many people were unable to deposit the necessary security because they did not have the funds, and were unable to obtain insurance because they were considered too risky for insurers. *Id.* Hence the structure was created where insurers were assigned policyholders they simply were required to cover. *Id.*

¹⁹⁴ The opinion describes the organization, California State Automobile Association Inter-Insurance Bureau, as follows:

Appellant is an unincorporated association which the California District Court of Appeal analogizes to a mutual insurance corporation. The details of its organization and operation are not important here. It is supervised by the Insurance Commissioner of California, like other insurance companies doing a liability insurance business. It was formed to write automobile insurance to a select group of members at a lower cost than the then prevailing rate.

341 U.S. at 106.

¹⁹⁵ *Id.* at 107.

a unanimous 1951 United States Supreme Court opinion that explained the history of assigned risk plans and upheld the California plan.¹⁹⁶ The mandate was on insurers rather than drivers so it is distinguishable. But the case is significant here for several reasons. First, the mandate on companies relates directly to individual mandates since it arose from and was necessitated by these mandates. The case also highlights the deferential treatment given to insurance laws in light of the strong links between insurance, the public welfare, and government regulation, shows how driving has long been a necessity; and illustrates the public-private nature of legislative solutions to thorny public policy problems.

Justice Douglas, writing for the court, first described the California law which required that all drivers show proof of financial responsibility before they could get a driver's license.¹⁹⁷ Justice Douglas stated that the law made it impossible for many people to drive since they were classified as poor risks, rightly or wrongly, by insurance companies and did not have the funds to show proof of financial responsibility with cash as the law allowed.¹⁹⁸ Douglas noted that "many hardship cases developed among people who were dependent upon the use of the highways for a living."¹⁹⁹ One proposed solution was that the state itself would insure these risks.²⁰⁰ Instead, insurance companies responded with legislation, which the legislature passed, authorizing the Insurance Commissioner to establish a plan for each company to insure some of the drivers who could not obtain insurance in the regular market.²⁰¹ The resulting plan assigned higher risk drivers to companies in proportion to their market share.²⁰²

¹⁹⁶ *Id.* at 105.

¹⁹⁷ *Id.* at 106. Justice Black believed it was frivolous to suggest there was a constitutional question. *Id.* at 111 ("Mr. Justice Black would dismiss the appeal on the ground that the constitutional questions are frivolous."). At the time of the Maloney case, California did not have mandatory liability insurance for drivers; Massachusetts was still the only state with mandatory liability insurance. See *supra* text accompanying note 158.

¹⁹⁸ *Maloney*, 341 U.S. at 107. The lower court noted concerns that insurance companies' risk classification was inaccurate towards racial minorities, as well as the elderly and young drivers, and caused "much hardship and many inequities." *Cal. State Auto Ass'n Inter-Ins. Bureau v. Downey*, 216 P.2d 882 (Cal. App. 1st Dist.) (1950), *aff'd*, *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 107 (1951).

¹⁹⁹ *Maloney*, 341 U.S. at 107.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

The Supreme Court, noting that the state could have taken over the whole field, and that insurance was “a business to which the government has long had a special relation,” upheld the plan as permissible regulation of a challenging problem.²⁰³ Notable was the court’s recognition of the centrality of automobiles, even in 1951, to many people’s livelihoods, and the hardship of not being able to drive.²⁰⁴ Also striking was the fact that “the economic burden on the public purse” caused by uncompensated injuries was a reason offered for the mandate.²⁰⁵ Finally, it is noteworthy that high risk plans were developed by private industry in response to the threat of government takeover of insuring for that risk.²⁰⁶

State auto insurance mandates of all types have been upheld for decades against constitutional attacks; the “public welfare” nature of insurance, the “special relation” between government and insurance, and the “peculiar nature” of insurance all were factors supporting courts’ acceptance.²⁰⁷ Legal challenges based on freedom, like the policy

²⁰³ *Maloney*, 341 U.S. at 109. Justice Douglas wrote that “[c]learing the highways of irresponsible drivers, devising ways and means for making sure that compensation is awarded the innocent victims, and yet managing a scheme which leaves the highways open for the deserving are problems that have taxed the ingenuity of lawmakers and administrators.” *Id.* at 110.

²⁰⁴ *See Maloney*, 341 U.S. at 107, 110.

²⁰⁵ Brief for Appellee at 37 n. 23, *Cal. State Auto Ass’n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105 (1951) (No. 310).

²⁰⁶ *Maloney*, 341 U.S. at 107. The same is true for uninsured motorist coverage, which was also developed to avoid government takeover of the risk. *See supra* note 157.

²⁰⁷ *Maloney*, 341 U.S. at 110, *In re Op. of the Justices*, 147 N.E. at 698. Cases and advisory opinions deeming auto insurance mandates constitutional include the following: *Drake v. Gordon*, 848 F.2d 701 (6th Cir. 1988); *Bushnell v. Sapp*, 571 P.2d 1100 (Colo. 1977); *Gentile v. Altermatt*, 363 A.2d 1 (Conn. 1975); *Del Rio v. Crake*, 955 P.2d 90 (Haw. 1998); *Washington v. Fireman’s Fund Ins., Co.*, 708 P.2d 129 (Haw. 1985); *Burriss v. N. Assurance Co. of Am.*, 691 P.2d 10 (Kan. 1984); *Manzanares v. Bell*, 522 P.2d 1291 (Kan. 1974); *Fann v. McGuffey*, 534 S.W.2d 770 (Ky. 1975); *Pinnick v. Cleary*, 271 N.E.2d 592 (Mass. 1971); *In re Opinion of Justices*, 147 N.E. 681 (Mass. 1925); *In re Requests of the Governor and the Senate on the Constitutionality of Act No. 294 of the Public Acts of 1972*, 208 N.W.2d 469 (Mich. 1973); *Justices*, 129 A. 117 (N.H. 1925); *Rybeck v. Rybeck*, 358 A.2d 828 (N.J. Super. Ct. App. Div. 1976); *Montgomery v. Daniels*, 340 N.E.2d 444 (N.Y. App. Div. 1971); *Singer v. Sheppard*, 346 A.2d 897 (Pa. 1975); For a comprehensive although dated list of challenges to auto insurance mandates by state *see* IRVIN E. SHERMER, *AUTOMOBILE LIABILITY INSURANCE* § 11 (Clark Boardman Callaghan, Vol I 1981). *See also* Josephine Y. King,

arguments based on freedom that were made to oppose the laws' passage, have been abandoned. Opponents now use the political process to lobby for changes they seek.²⁰⁸ The system of auto insurance mandates and private competition has been with us for decades; with constitutional doubts laid to rest and legislative support for the mandates, industry and individuals have adjusted to the very American public-private model of dealing with the consequences of automobile accidents.²⁰⁹

V. CONCLUSION

Now that the Supreme Court has upheld the ACA's individual mandate under the Federal government's taxing power, it is a critical time to look at precedents for the individual mandate, which was not done at the time of the ACA's passage or the Supreme Court case. A systematic examination of auto insurance mandates shows that the ACA individual mandate is not the uniquely coercive anomaly that its opponents claim.

Auto insurance mandates are similar in four important, yet unexamined ways, to the ACA individual mandate. First, both types of mandate are responses to difficult situations that defy simple solutions; there are strong public policy reasons for both types of mandates.

Second, both order people to buy insurance to protect themselves from risks they might want to bear themselves. Third, both require that risks be pooled and spread, which is fundamentally what insurance is and does. Fourth, both mandate that some people buy something from a private

Constitutionality of No Fault Jurisprudence, 1982 UTAH L. REV. 797 (1982); BERNARD P. BELL, 5-46 NEW APPLEMAN LAW OF LIABILITY INSURANCE § 46.03 (Matthew Bender, Rev. Ed. 2011). *But see* Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1973)(holding that the threshold classifications of the compulsory insurance law were arbitrary); Grace v. Howlett, 283 N.E.2d 474 (Ill. 1972) (Illinois' no-fault law unconstitutionally discriminated against commercial vehicles by limiting their special damages remedies and that the compulsory arbitration provision denied citizens their right to a jury trial); Shavers v. Kelley, - 267 N.W. 2d 72 (Mich. 1978), *cert. denied*, 442 U.S. 934 (1979)(Michigan no-fault law's procedures for rate-setting do not guarantee due process; eighteen months granted for the state to develop a remedy).

²⁰⁸ People and organizations can and do lobby their representatives to change auto insurance laws if they object to them, as happened in 2011 in Wisconsin. Jason Stein, *Walker Signs Bill Rolling Back Auto Insurance Minimums*, MILWAUKEE WISCONSIN JOURNAL-SENTINEL ONLINE, (Apr. 12, 2011), available at www.jsonline.com/news/statepolitics/119695019.html.

²⁰⁹ LIABILITY, *supra* note 54, at 102-04.

seller; they both use a model of a regulated market combined with private competition to deal with the problems at which they are aimed rather than have a government program handle the problems. Most broadly, they embody essentially the same policy response to a massive public policy problem involving illness or injury and how to pay for needed treatment or redress.

The most common response to the parallel is that auto insurance mandates are distinguishable and actually irrelevant because they are regulating something that is a choice—whereas the ACA mandate coercively intrudes on individuals' freedom. This “choice rejoinder” resonates with the sentiments underlying the majority's Commerce Clause discussion, but this Article has shown that it falls apart under scrutiny for three reasons. First, driving is not always a choice, and both caselaw and insurance laws recognize this. The fact that every state has laws requiring insurance companies to insure high-risk drivers shows that driving is seen as a necessity rather than a choice, for example. Second, the Supreme Court's decision makes clear that the ACA individual mandate presents a choice between buying insurance and paying higher taxes, so it is not coercive in the way opponents claim. Third, car insurance mandates are far more coercive than the ACA mandate in their reach and enforcement mechanisms.

The history of auto insurance mandates, both legislative and constitutional, yields several observations that bear on the ACA. One, arguments about freedom and American values are recycled from generation to generation by reform opponents but do not necessarily have staying power. The current “forced purchase of broccoli”²¹⁰ arguments made by mandate opponents and accepted by the majority opinion in the Commerce Clause section may fade over time as the ACA goes into effect. Second, the combination of auto insurance market regulation, including high risk plans that mandate expansion of coverage, with private auto insurance mandates, has been so workable that it is rarely the focus of public attention. The ACA's individual mandate and other reforms similarly recognize that market intervention is necessary to expand coverage more widely, and envision a system significantly similar to our auto insurance system where insurance companies compete in a regulated market. Third, while constitutional doubts initially were raised about mandates, these doubts have been definitively resolved in part because of what the Massachusetts Supreme Judicial Court called the “peculiar

²¹⁰ See *NFIB v. Sibelius*, 132 S. Ct. 2566, 2591.

nature” of insurance and its significance for the “public welfare”²¹¹ and what the United States Supreme Court called the “special relation” between government and the insurance business.²¹² Health insurance has a public welfare function that is far more important than car insurance, so if decisions upholding car insurance showcase the public welfare function of insurance, how much more should the public welfare function of insurance be emphasized in the context of health insurance.

This article has demystified the ACA individual mandate by showing its significant similarities to the commonplace, widely accepted auto insurance mandates found all over the United States. Now that the ACA individual mandate has been shown to be grounded in the U.S. public policy tradition of auto insurance mandates, perhaps the focus can shift to making it work as well as possible.

²¹¹ See *In re Op. of the Justices*, 147 N.E. at 701.

²¹² *Maloney*, 341 U.S. at 105.

