

A MORAL MANDATE & THE MEANING OF CHOICE: CONCEIVING THE AFFORDABLE CARE ACT AFTER *NFIB*

BRIETTA CLARK*

I. INTRODUCTION

In July 2012, the Supreme Court issued one of its most anticipated decisions in *National Federation of Independent Business v. Sebelius* (*NFIB*)¹ — the constitutional challenge to the Patient Protection and Affordable Care Act (ACA).² One of the ACA's primary goals is to improve access to healthcare through expansions of public and private insurance.³ A focal point of the private insurance expansion in political and legal debates has been the "individual coverage requirement" or "mandate." This is a requirement that individuals either purchase a qualified insurance plan or make an annual shared responsibility payment (also referred to as a "penalty"). Proponents and opponents alike have viewed this "mandate" as critical to the fate of reform.⁴

The ACA tries to expand private insurance coverage in a number of ways: it increases consumer protections, like prohibiting insurers from denying policies based on one's preexisting condition; it replaces individualized risk rating with community rating so that people are charged the same regardless of their individual risk or conditions, making insurance

* Professor of Law, Loyola Law School, Los Angeles. J.D. University of Southern California Law School; B.A. University of Chicago. The author would like to extend a special thanks to the St. Louis University Center for Health Law Studies for the opportunity to present this paper at the 30th Anniversary Symposium, Health Reform: The Act, Decision and Election. This paper benefitted from wonderful conversations with the symposium's participants, including Thomas Greaney, Mark Hall, Timothy Jost, Paul Starr, and Sidney Watson, as well as from conversations with David DePianto and Adam Zimmerman. All errors are mine alone. The author would also like to thank the editorial staff of the *Journal of Health Law and Policy*, and especially Katherine Ledden, Editor-in-Chief.

1. 132 S. Ct. 2566 (2012) [hereinafter *NFIB*].

2. Pub.L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in various sections of 21, 25, 26, 29, and 42 U.S.C.) [hereinafter *ACA*].

3. The ACA relies on a host of provisions designed to reduce cost, improve the quality of healthcare and health outcomes, and expand access to care. See generally H.R. 3590, 111th Cong. (2010).

4. See *infra* Part II (focusing on the mandate in the dominant political and legal narrative around reform).

more affordable for those who need it the most; it strengthens regulation of insurance rates to prevent unjustified rate increases; it provides subsidies based on income; and it creates new individual and small business insurance markets in which consumers can easily compare and enroll in insurance plans that are affordable and guarantee a minimum package of essential health benefits.⁵ For this to work, policymakers believed that a mandate was necessary to prevent people from waiting until they become sick before buying insurance and to ensure that enough healthy people would be part of the insurance pool in order to help spread the risk.⁶ Without a mandate, requiring insurance companies to cover everyone at the same price, regardless of risk, would expose insurers to potentially exorbitant costs and would lead to a “death spiral” of insurers fleeing the market, undermining the ACA’s access goals.⁷

For opponents, the mandate served as a catalyst for attacks on “big government.” Forcing citizens to buy insurance from private health insurers was controversial across the ideological spectrum. But, for those seeking to narrow federal power in the name of federalism, this mandate was seen as a compelling example of the federal government’s threat to personal liberty. Considered to be a novel exercise of federal power, the mandate also generated widespread legal debate about whether it was an appropriate use of Congress’ commerce power — the legal focal point of challengers and defenders of the law. Congress and the Obama Administration asserted the commerce power as its primary legal justification for the law; according to the government, the mandate was an essential link and a necessary and proper part of an overarching regulatory scheme to solve a growing uninsurance problem that significantly impacted interstate commerce. Opponents, on the other hand, saw this as a viable opportunity to assert

5. For a comprehensive overview of the ACA, see KAISER FAMILY FOUND., SUMMARY OF NEW HEALTH REFORM LAW (2011) [hereinafter SUMMARY OF NEW HEALTH REFORM LAW], available at <http://www.kff.org/healthreform/upload/8061.pdf>; see also Brietta Clark, *Safeguarding Federalism by Saving Health Reform: Implications of NFIB*, 46 LOY. L. REV. (forthcoming 2013) (describing the private insurance reforms).

6. See I.R.C. § 5000A (2011); 42 U.S.C. § 18091 (2011); see also Ariane de Vogue, *Obama Administration Forcefully Defends Health Care Law’s Individual Mandate*, ABCNEWS (Jan. 6, 2012, 6:42 PM), <http://abcnews.go.com/blogs/politics/2012/01/obama-administration-forcefully-defends-individual-mandate/>.

7. See Steve O’Keefe, *Health Insurance Death Spiral*, HEALTH CARE COMPACT BLOG (Jun. 26, 2012), <http://healthcarecompact.org/blog/2012-06-26/health-insurance-death-spiral/>; Ezra Klein, *The Importance of the Individual Mandate*, WASHINGTON POST (Dec. 16, 2009) available at http://voices.washingtonpost.com/ezraklein/2009/12/draft_1.html. But see LARRY LEVITT & GARY CLAXTON, KAISER FAMILY FOUND., IS A DEATH SPIRAL INEVITABLE IF THERE IS NO MANDATE? (2012), available at <http://policyinsights.kff.org/2012/june/is-a-death-spiral-inevitable-if-there-is-no-mandate.aspx>.

more robust Tenth Amendment limits on a commerce power that was already too expansive.

A counter narrative developed during this time that challenged both the mandate label and the assumption that the commerce power was the right legal justification.⁸ A handful of scholars and policymakers criticized the “mandate” label as misleading, highlighting the fact that the law actually gives people a legal choice to buy insurance or pay the assessment. A few legal scholars argued that this legal choice, in fact, made the assessment look like a tax on the choice not to buy insurance, and thus could be justified under the taxing power. This counter narrative got comparatively little attention in the mainstream debates about reform until the Court issued its *NFIB* decision.⁹

Despite the overwhelming focus on whether the mandate was a constitutional exercise of Congress’ commerce power, the Court upheld the individual coverage provision as a valid exercise of Congress’ power to tax.¹⁰ Central to the Court’s decision was a struggle over the proper conception of the challenged provision: Was it a *mandate* to buy insurance enforced through a *penalty* that must be justified by the commerce power, or could it be viewed as a *tax* on the *choice* not to buy insurance that could be more easily justified by the broader power to tax and spend?

The Court did not explicitly resolve the tension in these competing conceptions. Writing for a majority of the Court, Chief Justice Roberts treated both interpretations as reasonable for purposes of the constitutional analysis despite the fact that every justice on the Court seemed to be more persuaded by the dominant view — that this was a mandate with penalty. The Court’s decision to uphold the “mandate” under the taxing power depended on a functional analysis of the coverage requirement that ultimately defied this mandate characterization, however. Roberts explained that the shared responsibility payment functioned more like a tax because people retained a genuine choice under the law; no one would really be compelled to buy insurance. As a constitutional matter, this looked like other taxes used to regulate behavior previously upheld by the Court, such as “sin taxes” on tobacco intended to encourage people to quit smoking.¹¹

The Court’s reasoning drew significant criticism, even from reform supporters, because of what some viewed as confusing and illogical

8. See *infra* Part III for a more detailed description of this counter narrative.

9. Throughout the paper, I refer to the dominant view as the “mandate with penalty” frame, or I use the terms “mandate” or “penalty” as shorthand. To refer to the counter narrative, I use the phrases “tax on choice” and “taxing choice” interchangeably, and use the terms “tax” or “choice” as shorthand.

10. See *infra* Part IV for a discussion of the Court’s decision in *NFIB*.

11. 132 S. Ct. at 2596. See also *infra* Part IV.A.

reasoning that failed to reconcile the apparent inconsistency between the mandate and choice frames.¹² More importantly, however, the Court's decision to uphold the "mandate" under the taxing power refocused our attention on practical questions about the potential for reform's success now that *NFIB* has paved the way for implementation. If sin taxes, such as those intended to discourage people from smoking, have not proven effective at influencing behavior, how effective can a similar approach be for encouraging individuals to buy insurance? *NFIB* may have saved the law from constitutional challenge, but its reasoning underscores an equally serious structural challenge in implementation — the role of individual choice.

There was remarkably little discussion about consumers' choice in the private insurance expansion before *NFIB* made clear that the ACA preserves a legal choice for people to decide whether to buy insurance because the amount of the "tax" or "penalty" is not significant or punitive enough to undermine this choice. But punitive legal and economic sanctions are not the only tools used by the federal government to influence behavior. The compulsory rhetoric in the linguistic architecture of the ACA, as well as in the government's defense of the law, may have an expressive power to influence this choice in ways that are difficult to predict or quantify. The federal government, in conjunction with many states, is using the ACA as an expressive platform to espouse evolving public values and social norms that treat healthcare as an essential human and societal good. This message also underscores a new moral obligation shared by all — government, employers, providers, insurers, and individuals — to participate in a system that ensures everyone can access this good.

Although the ACA does not effect a radical transformation of the healthcare system, its success depends on this transformative idea of shared responsibility. The ACA may not have created a true legal mandate, but this Article argues that it attempts to create a "moral mandate" for individuals to do their part by obtaining insurance.¹³ An understanding of this expressive

12. See *infra* Part IV.B.

13. The focus of this article is on the importance of consumers' participation in the individual market through the newly created exchange because this is where broad and diverse consumer participation — particularly by "healthy" consumers — is important for risk spreading that helps keep insurance premiums affordable for everyone. The challenge of ensuring consumer participation also arises in the public insurance context, though with different implications. In that case, the focus is on the health and financial risk of individuals who fail to get important preventive or regular care that can prevent more expensive crises later, as well as insuring against the financial risks borne by providers and individuals in the event of unpredictable, catastrophic events. Individuals may fail to enroll in free public insurance programs for a number of reasons, including stigma, fear of immigration-related scrutiny if the individual lives in a mixed-status household, frustration from prior bad

characteristic of the ACA helps to explain the Court's struggle to reconcile the apparent contradiction of the tax and penalty conceptions of the ACA's coverage provision. More importantly, it helps us understand and critique the federal government's attempt to leverage this expressive power to ensure the consumer participation essential to reform. *NFIB* affirms the idea that people will have a legal choice under the law. But can the federal government, through the ACA, define the meaning of this choice in a way that influences people to make the right one?

This Article proceeds as follows: Part II documents the dominant political and legal narrative which focused on the individual mandate as key to the reform's fate in the Supreme Court and in implementation. Part III discusses the counter narrative developed by scholars, such as Akhil Amar, Jack Balkin, Neil Siegel, and Robert Cooter, which challenged the mandate frame. Although most scholars treated the "taxing choice" frame as providing an additional or alternative legal justification for the mandate, Siegel and Cooter directly confronted the tension presented by these competing narratives. They acknowledged the hybrid character of the ACA coverage provision as having tax-like and penalty-like characteristics, and provided the most robust discussion of the threshold question of how to classify the provision for constitutional purposes.

Part IV considers the Court's taxing power holding in *NFIB*, in light of the competing narratives shaping the debate before the decision. This holding generated dissatisfaction because of its failure to engage the threshold question of whether the coverage requirement was really a mandate with penalty or a tax on choice. This was especially problematic given that the frame chosen proved to be outcome determinative for Chief Justice Roberts, the swing vote in the case.¹⁴ This failure highlights the tension created by the juxtaposition of a legal choice and an expressive mandate in the ACA. Cooter and Siegel's theory of how to treat such hybrid exactions helps fill in some of the analytical gaps in the Court's reasoning and provides support for the Court's taxing power holding. Ultimately, however, their theory still leaves unanswered a fundamental question about how individuals exercise

experiences with government welfare agencies, and/or challenges navigating a difficult and complex bureaucracy for determining eligibility.

14. The choice of framing did not appear to be outcome determinative for the other Justices or for most legal scholars considering the merits under both the taxing and interstate commerce powers. See Randy Barnett, *The Unprecedented Uniqueness of Chief Justice Roberts' Opinion*, THE VOLOKH CONSPIRACY (July 5, 2012, 5:14 PM), <http://www.volokh.com/2012/07/05/the-unprecedented-uniqueness-of-chiefjustice-roberts-opinion/>. Nonetheless, a number of scholars and lower courts have reinforced the notion that the characterization could be determinative by describing the taxing power as much broader and easier to satisfy than the commerce clause. See *infra* Part II.

choice, which is relevant to the constitutional question and predictions of reform success.

Adopting a taxing choice frame assumes certain behavioral characteristics of potential consumers in the new health exchanges. The remaining part of this Article argues that the reasoning in *NFIB*, and in Cooter and Siegel's article, turns on predictions about these new consumers' behavior that may overvalue the significance of economic sanctions in consumer decision-making, while devaluing the potential expressive effect of the law's moral mandate. Part V describes more fully this expressive effect of law. Expressive law theorists have long noted that law may influence people to comply with legal and social norms even in the absence of legal enforcement or meaningful economic sanctions. Once one understands the mandate/penalty frame as an expressive characteristic or message of the ACA, it cannot be dismissed merely as a label or political rhetoric. The ACA's expressive characteristics should be taken more seriously because of the potential for transforming norms and influencing consumer behavior. The constitutional question has been decided, and the Court may have had good reason for ignoring the law's potential expressive effect, but reform implementation is now underway, and consumer participation is critical.¹⁵ As a policy matter, it is important to consider the potential benefits and challenges of an approach that depends so heavily on expressive force, rather than legal or economic sanctions, to influence behavior.

To this end, Part VI considers the potential effect of the ACA's expressive mandate. Section A describes the harmful messaging and norms arising out of a fragmented system and a loosely regulated individual insurance market pre-ACA. Section B then considers how the federal government, through the ACA, is using its expressive power to create a new legal and social norm that obligates people to buy insurance. It is attempting to counter harmful pre-ACA norms with new messages of shared responsibility, including a robust role for government in protecting consumers and ensuring affordable care. It is educating the public about the societal costs of the uninsurance problem and the need for collective participation to solve this problem. And it is trying to instill in individuals a moral obligation to the collective to participate in this new insurance market. Section C considers more specifically how and why the ACA's expressive messages may cause people to buy insurance. Whether legal choice in the ACA ultimately undermines reform goals will depend, in part, on how effectively the federal government

15. For updates on the status of health reform implementation in the states, see *State Actions to Implement the Health Benefit Exchange*, NAT'L COUNCIL OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/health/state-actions-to-implement-the-health-benefit-exch.aspx> (last updated February 18, 2013).

uses its expressive power to define the moral content of this choice, and how many people embrace the ACA mandate as the new moral norm.

II. CENTRALITY OF THE “MANDATE” IN POLITICAL AND LEGAL NARRATIVES OF REFORM

A. *Models of Reform Pre-ACA*

Even before health reform was written, a central question and focal point of debate was whether or not to include an individual mandate to buy insurance. In the Democratic Primary Campaign for the 2008 election, it was then-Senator Obama who attacked it and used it to distinguish his approach from then-Senator Clinton’s plan.¹⁶ Obama decried the individual mandate because he was convinced that people wanted insurance and government would not have to coerce them into it. Government simply had to use its regulatory power to create a fair, level playing field for those traditionally excluded from the market by guaranteeing people access to affordable and meaningful coverage.

Not long after the election, however, President Obama became persuaded about the importance of a mandate. Obama’s healthcare reform would preserve a private market system that depended on the participation of private insurers. Without a mandate to guarantee a sizable enough pool of healthy people for the new market, insurers might suffer exorbitant costs and leave the market, causing a “death spiral” that would erode insurance options for everyone in the individual market.¹⁷ Similar health reform experiments by states that did not incorporate a mandate bore this out.¹⁸ By contrast, Massachusetts, which relied on a system of combined benefits and mandatory participation, achieved the kind of success that eluded other states.¹⁹

Although it became clear that some kind of mandatory participation would be needed, policymakers and legal scholars debated the exact structure and design of the system. Anticipating significant opposition and legal challenges to health reform, the Administration gave careful consideration to the legal implications of different approaches it could take.

16. See Andrew Cline, *How Obama Broke His Promise on Individual Mandates*, THE ATLANTIC (June 29, 2012), <http://www.theatlantic.com/politics/archive/2012/06/how-obama-broke-his-promise-on-individualmandates/259183/>.

17. See *id.*

18. See NEERA TANDEN & TOPHER SPIRO, CTR. FOR AM. PROGRESS, THE CASE FOR THE INDIVIDUAL MANDATE IN HEALTH CARE REFORM: A COMPREHENSIVE REVIEW OF THE EVIDENCE 1-2 (2012), available at http://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/individual_mandate.pdf.

19. See *id.*

In 2008, Georgetown Law School's O'Neill Institute, in conjunction with the Robert Wood Johnson Foundation, commissioned a series of papers to propose solutions to possible legal issues that posed challenges to healthcare reform, titled "Legal Solutions in Health Care."²⁰ As part of this project, Professor Mark Hall provided an overview of the possible constitutional challenges and likely outcomes to various aspects of the private insurance expansion, including the individual mandate.²¹

In his paper, Hall identified two possible mechanisms the Administration could use to achieve participation by individuals in the new markets being created: one would be through a tax on the failure to buy insurance (called a "play or pay" approach), and the other would be through a direct mandate to buy insurance that would be enforced through some kind of financial penalty.²² Hall described both of these mechanisms as legislating a kind of insurance mandate, but he distinguished the commerce clause justification of a "mandate" from the taxing power justification of a "play or pay" approach.²³ Hall noted that although the "play or pay" approach differed somewhat from the U.S. Social Security System, it was well supported by federal constitutional precedent. He also concluded that the "'play or pay' option [would be] a bit safer because it would avoid any realistic possibility of attacking compulsory insurance as a denial of due process or an unjustified taking of property."²⁴ Thus prior to enactment, the taxing "play or pay" scheme and the mandate with penalty were viewed as alternative approaches to reform triggering distinct legal analyses.

Early versions of the bill also revealed lawmakers' ambivalence about the right approach to take, with some versions referring to the mechanism used to ensure participation as a "tax" and others referring to it as a "penalty."²⁵ Eventually, they adopted language that characterized insurance

20. For access to the papers commissioned for this project, see *Legal Solutions in Health Reform*, O'NEILL INST. FOR NAT'L & GLOBAL HEALTH AT GEORGETOWN UNIVERSITY, <http://www.law.georgetown.edu/oneillinstitute/national-health-law/legal-solutions-in-health-reform/index.html> (last visited Apr. 4, 2013).

21. MARK HALL, O'NEILL INST. FOR NAT'L & GLOBAL HEALTH AT GEORGETOWN UNIVERSITY, *THE CONSTITUTIONALITY OF MANDATES TO PURCHASE HEALTH INSURANCE (2009)*, available at http://www.law.georgetown.edu/oneillinstitute/national-health-law/legal-solutions-in-health-reform/Papers/Individual_Mandates.pdf.

22. *Id.* at 3, 7 ("We also assume that such mandates are enforced through financial penalties, such as tax assessments or, at most, civil fines, but not through criminal law that would result in imprisonment (or probation), absent some other criminal act (such as tax fraud or evasion).").

23. *Id.* at 7.

24. *Id.* at 7, 15-16.

25. See *Health Care Reform*, N.Y. TIMES (Dec 18, 2012), available at http://topics.nytimes.com/top/news/health/diseasesconditionsandhealthtopics/health_insurance_and_managed_care/health_care_reform/index.html (giving an overview of the

coverage as mandatory: the key provision is titled “Requirement to maintain minimum essential coverage” and it provides that “an applicable individual shall . . . ensure that the individual . . . is covered.”²⁶ Moreover, those subject to the requirement who fail to get coverage have to pay an assessment labeled as a “shared responsibility payment,”²⁷ also referred to throughout the law as a “penalty.”²⁸ President Obama abandoned his anti-mandate campaign position to embrace the mandate as a critical element of health reform — or so it appeared.

B. Dominant Narrative of Challenges to the ACA

After the ACA’s passage, it became clear that the mandate would be the focal point for political and legal attacks on reform.²⁹ Politically, opponents of reform viewed the “mandate” as a lightning rod to stoke federalist and public fears of a federal intrusion into every aspect of our personal lives that would ultimately destroy civilization as we know it.³⁰ Such rhetoric was not only used in the popular media and at town halls, it also made it into legal briefs and court decisions making dire predictions of a parade of horrors that would result if the mandate were upheld:

[T]he federal government will have the absolute and unfettered power to create complex regulatory schemes to fix every perceived problem imaginable and to do so by ordering private citizens to engage in affirmative acts, under penalty of law, such as taking vitamins, losing weight, joining health clubs, buying a GMC truck, or purchasing an AIG insurance policy, among others. The term “Nanny State” does not even begin to describe what we will have wrought if in fact the Health Care Reform Act

legislative and political development of health reform); see also *Side-by-Side Comparison of Major Health Care Reform Proposals*, KAISER FAMILY FOUND., <http://www.kff.org/healthreform/sidebyside.cfm> (last updated Jun. 18, 2010).

26. I.R.C. § 5000A & 5000A(a) (2011) (emphasis added); see also 42 U.S.C. § 18091 (2011) (“Requirement to maintain essential coverage; findings”).

27. I.R.C. § 5000A(b) (2011).

28. *Id.* Several subsections of § 5000A refer to the shared responsibility payment as a penalty. For example, § 5000A(b)(1) imposes a penalty on applicable individuals for failure to meet the minimum coverage requirement; § 5000A (b)(2) explains the method by which a taxpayer pays the penalty; (b)(3) describes joint liability for dependents and spouses who file joint tax returns; § 5000A(c) describes the amount of the penalty; and § 5000A(e) provides certain exemptions from the penalty.

29. See KAISER FAMILY FOUND., KAISER PUBLIC OPINION: A SNAPSHOT OF PUBLIC OPINION ON THE INDIVIDUAL MANDATE 2 (2012), available at <http://www.kff.org/healthreform/upload/8296.pdf> (noting that “while the mandate is the least popular provision of the law, it is also the most widely recognized”).

30. See Clark, *supra* note 5, pt II.

falls within any imaginable governmental authority. To be sure, George Orwell's *1984* will be just the primer for our new civics.³¹

These arguments reflected a recurring theme of federal power as a threat to individual liberty. Reform opponents viewed the coverage requirement as an infringement on the right to make one's own decisions, on the right to be free from compulsory participation in a socialized medical system, and on religious liberty.³² Even supporters of reform generally objected to the idea of the mandate because it was viewed as a transfer of wealth to the private insurance companies seen as untrustworthy, the cause of many problems in the existing healthcare market, and whose troublesome antics had been used by President Obama to galvanize support for reform.³³

Notably, the federal government's political response was not to counter the "mandate" narrative, but rather to defend the mandate as essential to addressing a compelling problem in a way that still preserves some choice. The choice President Obama emphasized, though, was the ability to choose among different plans in a new and improved individual insurance market.³⁴ By contrast, having insurance was consistently and emphatically described as a requirement of the new law. In light of his prior position and the political and legal controversy the mandate generated, Obama could certainly have soft-pedaled this description. The law contains a number of exemptions, but Obama did not highlight these; rather he made clear that those who can afford to buy insurance should and must do so. Obama also could have used a phrase like "play or pay" to emphasize the choice people would have between paying the assessment and buying insurance; but this approach was apparently rejected in favor of the harsher mandate/penalty rhetoric. In speeches and town halls, Obama repeatedly embraced the mandate/penalty framework, using it to explain to the public how this new

31. See Plaintiff's Motion for a Preliminary Injunction & Brief in Support at 17-18, *Thomas More Law Ctr. v. Obama*, No. 2:10-cv-11156 (E.D. Mich. Apr. 6, 2010).

32. See, e.g., Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 632-33 (2010); Abigail R. Moncrieff, *Cost-Benefit Federalism: Reconciling Collective Action Federalism and Libertarian Federalism in the Obamacare Litigation and Beyond*, 38 AM. J.L. & MED. 288, 288-91 (2012).

33. See Avik Roy, *Once Upon a Time, Liberals Hated the Individual Mandate*, FORBES (Apr. 2, 2012), <http://www.forbes.com/sites/aroy/2012/04/02/once-upon-a-time-liberals-hated-the-individual-mandate/>; Timothy Noah, *Lefties Against Reform: A Taxonomy of Left-Liberal Opposition to the Health Care Bill*, SLATE 2 (Nov. 10, 2009), http://www.slate.com/articles/news_and_politics/prescriptions/2009/11/lefties_against_reform.html.

34. Obama stressed that this was not a "federal takeover" as asserted by opponents, but rather a more robust federal regulatory scheme that would ensure a more functional private market. Rather than creating a centralized financing scheme like Social Security, the "mandate" was actually part of broader scheme to regulate private insurance companies to create meaningful choice for individuals shopping in the individual insurance market.

system of shared responsibility was necessary to ensure affordable access for everyone.³⁵

This dominant mandate narrative shaped the focus of legal challenges as well. The primary legal justification for enacting the coverage requirement asserted by Congress in the legislation and by the Obama Administration in court briefs was its power to regulate interstate commerce.³⁶ The government made clear that this requirement was part of a broader regulatory scheme to regulate activity (the purchase and sale of insurance) because of its financial impact on the interstate market, and typically penalties used to enforce such regulatory mandates must be justified under the commerce power.

The government's characterization of the coverage requirement in its legal defense of the ACA was more nuanced. In legal briefs, the federal government argued that the coverage requirement alternatively could be upheld as an exercise of Congress's taxing power,³⁷ but this assertion did not take hold. For one thing, although the federal government was responsible for crafting the mandate frame, opponents clearly preferred it to the taxing choice alternative as a legal strategy. Opponents viewed a legal challenge to the commerce power as a promising opportunity in light of what some saw as a trend of narrowing federal power, especially by the Rehnquist Court, and predictions that such narrowing would continue under the Roberts Court.³⁸ Opponents had good reason to be optimistic about using the Tenth Amendment as a limit on the commerce power, as opposed to the much broader tax and spend power, which was seen as incredibly easy to satisfy and not subject to the same kind of Tenth Amendment constraints.³⁹ Moreover, because the mandate was characterized as

35. See, e.g., Barack Obama, Remarks on the United States Supreme Court Ruling on the Affordable Care Act (June 28, 2012), available at <http://www.presidency.ucsb.edu/ws/?pid=101087>; Barack Obama, Remarks at a Campaign Rally in Pittsburgh, Pennsylvania (July 6, 2012), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=101330>; *Future of Health Care Reform*, CBS NEWS (July 15, 2009), <http://www.cbsnews.com/video/watch/?id=5162895n>.

36. See *NFIB*, 132 S. Ct. at 2591; see also 42 U.S.C. § 18091 (2011).

37. Reply Brief for Petitioner (Minimum Coverage Provision) at 21-25, *Dep't of Health & Human Servs. v. Florida*, 132 S. Ct. 604 (2011) (No. 11-398), 2012 WL 748426.

38. See, e.g., Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 89 (2001); Adam Winkler, *Can They Kill Health Care in Court?*, THE DAILY BEAST (Mar. 22, 2010), <http://www.thedailybeast.com/articles/2010/03/23/how-to-kill-health-care-in-court.html>.

39. This concern has commonly been raised in the context of criticism that the Court has not robustly applied Tenth Amendment limits on the federal government's ability to establish conditions on its spending power, at least until the Court's Medicaid coercion holding in *NFIB*. See Clark, *supra* note 5, at pt. II.B. But this concern has also been implicit in early debates about the mandate in which challengers denied the viability of a taxing power claim, but

“essential” to the other reforms in the ACA as part of the government’s commerce argument, opponents believed that striking down the mandate could be used to kill the entire Act or at least the private insurance expansion.⁴⁰

The commerce clause question quickly became the focal point for legal scholars as well. Congress’ use of the commerce power to mandate citizens to purchase a private good was viewed as “unprecedented” and as presenting a novel and weighty constitutional question with significant implications for the scope of the federal government’s power in other areas. A split emerged among commentators and legal scholars⁴¹ on the constitutionality of the mandate under the commerce power, generating further controversy and leading to predictions that this would be the determinative legal issue.

The trend among lower courts affirmed this focus: a split emerged on the commerce clause issue,⁴² while the government’s taxing power claim was universally viewed as a much weaker one. In fact, no lower court upheld the mandate as an exercise of the taxing power.⁴³ Lower courts that addressed and rejected the taxing power justification seemed to view the commerce and taxing theories as reflecting dichotomous conceptions of the ACA’s coverage requirement: either the shared responsibility payment was a “tax” that would be considered under the taxing power or it was a “penalty” used to enforce a mandate that must be justified under the commerce

noted that even if it is used, it should be subject to the same Tenth Amendment limits enforced on the commerce clause. See *infra* note 56 and accompanying text.

40. See *NFIB*, 132 S. Ct. at 2591-93.

41. See Mark Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1827-29 (2011); see also Kevin Sack, *Florida Suit Poses a Challenge to Health Care Law*, N.Y. TIMES (May 10, 2010), <http://www.nytimes.com/2010/05/11/health/policy/11lawsuit.html?pagewanted=all>.

42. Compare *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 549 (6th Cir. 2011) (upholding the mandate under the commerce power), *abrogated by Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566, with *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1312-13 (11th Cir. 2011) (holding that the individual mandate exceeded Congress’ commerce power), *aff’d in part, rev’d in part by Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566.

43. See, e.g., *Seven-Sky v. Holder*, 661 F.3d 1, 5-10 (D.C. Cir. 2011), *abrogated by Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566 (applying a functional analysis to reject the “tax” label for purposes of the Anti-Injunction Act bar and only considering the constitutionality of the mandate under the commerce power); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 539-40, 549 (6th Cir. 2011), *abrogated by Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566 (rejecting the “tax” label for purposes of the AIA bar and noting that there is no reason to consider the taxing power justification for the mandate because it is a constitutional exercise of the commerce power). In concurring opinions, Judges Sutton and Graham specifically considered and rejected the taxing power theory as justification for the mandate. *Thomas More Law Ctr.*, 651 F.3d. at 550-54, 566.

power.⁴⁴ Only one court explicitly left open the possibility that the taxing power argument was a viable one, but it did not consider the issue.⁴⁵

One reason commonly given by courts for rejecting the taxing argument was the government's own framing of the coverage requirement as a mandate enforced by a penalty. This was true, despite the fact that every lower court considering the issue acknowledged that labels do not necessarily control the constitutional question of whether something is a tax or a penalty, and that courts should make an independent judgment to determine whether a particular exaction functions more like a tax or penalty. Lower courts seemed quite concerned about the fact that the ACA's statutory language and political framing sent a clear and consistent message that the failure to buy insurance was unlawful and would be penalized, and so the dominant framing clearly impacted lower courts' attempts to look beyond statutory labels.⁴⁶ The trend among lower courts seemed to foreclose serious consideration of the government's attempt to provide an alternative

44. See *Florida ex rel. Atty. Gen. v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1314 (11th Cir. 2011) ("Beginning with the district court in this case, all have found, without exception, that the individual mandate operates as a regulatory penalty, not a tax.").

45. The Fourth Circuit was the only court to find that the assessment could be characterized as a tax, but this was for a different legal question: whether the challenge to the coverage requirement was barred by the Anti-Injunction Act (AIA). See *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 397-401 (4th Cir. 2011), *abrogated by Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (vacating the judgment of the district court because it lacked jurisdiction to decide the constitutionality of the act based on the AIA). The AIA bars suits seeking to restrain the assessment or collection of a tax; taxpayers must first pay the assessment before they can bring a suit to challenge its lawfulness. Determining whether an assessment qualifies as a "tax" for purposes of the AIA bar is a matter of statutory interpretation, which is different from the kind of functional analysis that courts use to determine whether or not a particular assessment should be classified as a tax for constitutional purposes. The constitutional analysis is discussed in greater detail in Parts III.C. and IV of this article. For a more in-depth consideration of the difference between the AIA and the constitutional question, see Clark, *supra* note 5, at pt. III.B.

46. See, e.g. *Florida ex rel. Atty. Gen. v. U.S. Dep't of Health and Human Servs.*, 648 F.3d at 1314 ("It is not surprising to us that all of the federal courts which have otherwise reached sharply divergent conclusions on the constitutionality of the individual mandate, have spoken with clarion uniformity [on the taxing power issue]"). The Eleventh Circuit goes on to explain the relevance of the statutory label: "The plain language of the statute and well-settled principles of statutory construction overwhelmingly establish that the individual mandate is not a tax, but rather a penalty. The legislative history of the Act further supports this conclusion." *Id.* In responding to the government's claims that the court should look beyond the label to consider how the assessment operates in practice, the court explained why it came to the same conclusion: "Even ignoring Congress's deliberate choice of the term 'penalty,' the individual mandate on its face imposes a monetary sanction on an individual who 'fails to meet the requirement' to maintain 'minimum essential coverage.' As we see it, such an exaction appears in every important respect to be 'punishment for an unlawful act or omission,' which defines the very 'concept of penalty.'" *Id.* at 1319 (citations omitted).

justification based on the framing of the coverage requirement as a tax on choice.

III. THE COUNTER NARRATIVE: TAXING "CHOICE"

On the surface, the dominant narrative seemed to assume that the tax and commerce power theories presented competing and inconsistent conceptions of the coverage provision, and that the mandate/penalty frame was the correct one. A counter narrative was developing, however, that showed the coverage provision could not be so easily classified.

A. *Policy Critique and the Reality of Choice*

Many people desirous of reform were not satisfied with the compromise in the ACA in light of the Administration's purported goal of achieving universal coverage. Critics attacked President Obama for never considering the only option that would truly guarantee universal coverage — a Medicare-for-all type of system in which participation was truly compulsory and healthcare financing was centralized.⁴⁷ By contrast, the ACA preserves a market-based system in which affordability, and thus access to insurance, depends on a number of variables, including insurance company participation, rate regulation, and individuals' ability and willingness to become health insurance consumers in this new system. Those familiar with the problems of a fragmented healthcare market and the prior dysfunction of the individual insurance market were skeptical about whether the insurance reforms in the ACA would go far enough to realize its coverage goals, and lack of adequate consumer participation was a serious concern.⁴⁸

The government's own Congressional Budget Office (CBO) estimated that some people subject to the "mandate" would choose to pay the assessment instead — enough to yield approximately \$4 million in revenue. These estimates were consistent with assertions that the amount of the

47. See, e.g., J.D. Kleinke, *The Conservative Case for Obamacare*, N.Y. TIMES (Sep. 29, 2012), available at <http://www.nytimes.com/2012/09/30/opinion/sunday/why-obamacare-is-a-conservativesdream.html?pagewanted=all&r=0> (describing liberals' disappointment that Obama did not propose a single-payer plan, like Medicare-for-All, or include a public option).

48. *Id.*; see also Abigail R. Moncrieff & Eric Lee, *The Positive Case for Centralization in Health Care Regulation: The Federalism Failures of the ACA*, 20 KAN. J.L. PUB. POL'Y 266, 266 (2011); Alison Hoffman, *Oil and Water: Mixing Individual Mandates, Fragmented Markets, and Health Reform*, 36 AM. J.L. & MED. 7, 56 (2010) (describing the problems with building reform on fragmented healthcare markets). I count myself among those supportive of the ACA's goal to expand coverage, but optimistically critical or cautiously optimistic about its success, particularly because I believe that consumer participation is so essential and yet has received remarkably little attention until relatively recently.

“penalty” was too low to exert the kind of financial pressure that would coerce people into purchasing insurance and that, as a result, people would have a meaningful choice to not buy insurance. Setting such a low penalty may seem confusing in light of Obama’s rhetorical stance about the need for a mandate, but it is consistent with his original discomfort with a coercive approach to reform — recall that campaign-Obama believed such coercion was unnecessary because of his confidence that people would make the “right” choice.⁴⁹

One reason the Administration’s enforcement approach was vulnerable to criticism was because of a lack of discussion about the assumptions underlying consumer participation as an essential piece of health reform. Questions such as how people make these kinds of decisions, what tools are most effective for influencing these decisions, and why or how much influence the federal government expected the penalty to have on these decisions were never answered.⁵⁰ President Obama seemed to go back and forth between believing a mandate was unnecessary and necessary, without articulating the behavioral assumptions underlying his conclusions or the government’s use of a penalty and the amount chosen. Although this creates uncertainty about consumer participation in the new market and the accuracy of CBO predictions, the fact that some people will exercise the choice not to buy insurance under the ACA seems uncontroversial.

B. *Competing Legal Theories: Tax on Choice or Mandate with Penalty?*

In addition to raising questions about the potential effectiveness of health reform, the choice narrative was more consistent with the taxing power justification that was not viewed as viable by courts and which did not receive its due attention by the legal academy. Some scholars did recognize this, asserting early on that the taxing power was the better justification for the ACA because it was a more accurate interpretation of the ACA’s legal design.⁵¹ Jack Balkin provided one of the earliest defenses of the law on

49. See Ezra Klein, *Unpopular Mandate: Why do politicians reverse their positions?*, THE NEW YORKER (Jun. 25, 2012), available at http://www.newyorker.com/reporting/2012/06/25/120625fa_fact_klein.

50. Joshua Guetzkow, *Beyond Deservingness: Congressional Discourse on Poverty, 1964-1996*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 173, 176 (2010) (“In crafting legislative solutions, policymakers employ not only diagnostic frames but also their notions about how to bring about a desired behavior in the target population. To gain a better understanding of policy development and choice, we therefore also need to understand the ways that policymakers frame targets of policy and how this interacts with their [diagnostic framing of the problem].”).

51. This section focuses on arguments developed by Akhil Amar, Jack Balkin, and Robert Cooter with Neil Siegel. But other scholars argued that the taxing power provided an alternative justification for the coverage requirement as well. See, e.g., Brian D. Galle,

taxing power grounds in a 2009 on-line debate about the constitutionality of the mandate with attorneys David Rivkin and Lee Casey who opposed reform.⁵² The debate was held after different versions of the ACA had passed in the House and Senate, and before the language was finalized in the reconciled version. Balkin began by asserting the taxing justification, noting that the assessment was part of a broader framework that used exactions and tax subsidies and credits to encourage the purchase of insurance, as well as to raise revenue.⁵³ Although Balkin began with the taxing justification, the debate's focus eventually turned to the commerce clause because this is where his opponents focused their arguments.⁵⁴

Rivkin and Casey initially did not address the taxing power justification on its own merits; they relied heavily on the "mandate" label used in the Senate version (as opposed to what they said "purports to be a tax mechanism" in the House version), and they believed a mandate could only be justified under the commerce power.⁵⁵ In response to Balkin's taxing argument, however, they argued that even if the taxing power was a viable alternative justification, it would nonetheless be subject to the same constitutional limits as the commerce clause.⁵⁶ In this way, Rivkin and Casey essentially collapsed the taxing and commerce clause analyses, despite contrary precedent that made clear that the taxing power is much broader than the commerce power and not subject to the same kind of Tenth Amendment limits. Rivkin and Casey also seemed to place greater significance on the label than Balkin: Rivkin and Casey found the elimination of the "tax" label from prior bills significant in deciding to treat

Conditional Taxation and the Constitutionality of Health Reform, 120 YALE L.J. ONLINE 27, 28 (2010).

52. See *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. 93, 94 (2009) [hereinafter *A Healthy Debate*] (debate between David B. Rivkin, Jr. and Lee A. Casey challenging the mandate, and Jack M. Balkin defending it).

53. *Id.* at 102.

54. *Id.* at 105 ("The arguments for Congress's power to pass health insurance reform under the General Welfare Clause are conclusive. However, because Rivkin and Casey devote most of their discussion to the commerce power, I will discuss these issues as well.").

55. *Id.* at 94-101, 109.

56. *Id.* at 100-01 (criticizing the view of the taxing power as a broader justification of the "mandate" than the commerce power as an "inability to comprehend that the Constitution inherently limits the reach of the Taxing and Spending Clause, just as it does the Commerce Clause, and that exertions of congressional power that exceed the proper scope of these clauses are void"). According to Rivkin and Casey, it does not matter if the "tax" used to enforce the mandate would otherwise be a constitutional exercise of the taxing power; the fact that the mandate exceeds the commerce clause means both are void. *Id.* at 100-01. They did not seem to seriously consider the taxing justification on its own merits until their rebuttal of Balkin, but then argued that as a tax, it would violate the Constitution's prohibition on direct taxes. *Id.* at 110.

the challenged provision as a mandate that had to be justified under the commerce power, while Balkin asserted that the coverage requirement could be justified under both the commerce power and taxing power.⁵⁷

Balkin affirmed this position in a 2010 article even after it was clear that the ACA's statutory language and political rhetoric adopted a "mandate/penalty" framework.⁵⁸ Although the primary goal of the article was apparently to weigh in on what was already shaping up to be the dominant narrative — whether the mandate could be justified under the commerce power — Balkin could not ignore what seemed a more compelling justification, noting briefly that the challenged provision is likely "fully constitutional" under Congress's taxing power because it is a tax that "clearly promotes the general welfare under existing precedents."⁵⁹ He went on to explain why he thought the taxing characterization was more appropriate:

The [ACA] features an "individual mandate" that is designed to coax uninsured persons into purchasing health insurance. The term . . . is misleading for two reasons. First, the law does not actually require all individuals to purchase insurance Second, it is not actually a mandate. It is a tax, which people do not have to pay if they have purchased health insurance The tax gives uninsured people a choice.⁶⁰

Akhil Amar also provided a particularly robust analysis in favor of the taxing power, by looking beyond the statutory label and focusing on the way the exaction would function in practice.⁶¹ Like Balkin, Amar emphasized that the ACA gives people a legally equivalent choice between two options — purchasing insurance and making the shared responsibility payment — which undermines the idea that the government is using the law to force people to buy insurance.⁶² Amar acknowledged the ACA's "regulatory" goal to encourage the purchase of insurance, but explained that precedent makes clear that taxes can serve a regulatory purpose as long as raising revenue is also a goal.⁶³

The problem with Balkin and Amar's approaches, however, is that they did not engage the obvious tension in the framing of the commerce and

57. *A Healthy Debate*, *supra* note 52, at 102-08.

58. See Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 45 (2010).

59. *Id.* at 45.

60. *Id.* at 44-45 (emphasis added).

61. Akhil Amar, *The Lawfulness of Health-Care Reform*, YALE L.J. ONLINE 5-7, available at <http://ssrn.com/abstract=1856506>. In fact, Amar has accused opponents of reform as the ones playing word games by attributing greater meaning to use of labels than warranted. Amar says this argument defies constitutional text, constitutional history, Supreme Court precedent, and longstanding canons of interpretation. *Id.* at 8-12.

62. *Id.* at 5-12.

63. *Id.* at 13.

taxing power arguments. They seemed to treat the taxing and commerce theories as equally plausible for constitutional purposes without expressly addressing the idea that the compulsory nature of the action (buying) that must be justified under the commerce clause would seem to foreclose a tax-based theory that presumes that people are not coerced into action because they have a genuine choice. This tension is implicitly suggested at different points in their discussions. For example, Amar called the payment alternative to the coverage requirement a “tax-penalty” a few times.⁶⁴ He also said that even if it does not qualify as a tax under a strict definition it should be understood as a “tax-equivalent.”⁶⁵ Similarly, Balkin used the terms interchangeably in ways that suggest the provision defies easy classification:

It is likely that the individual *mandate* is fully constitutional under Congress’ power under the General Welfare Clause and the power “[t]o lay and collect Taxes” Nevertheless, the *tax* is also constitutional as an exercise of Congress’s commerce power.⁶⁶

C. *The Hybrid Nature of the ACA’s Coverage Requirement: Reconciling Tax and Penalty Theories?*

One of the only articles that addressed this apparent tension in a robust way was written by Robert Cooter and Neil Siegel.⁶⁷ Like Amar and Balkin, Cooter and Siegel believed that the coverage requirement could be found constitutional under either the commerce or taxing power theory.⁶⁸ But in *Not the Power to Destroy*, Cooter and Siegel considered the tension presented by these alternative theories, and the implications for constitutional analysis. They explained that the ACA is a kind of hybrid exaction that defies easy classification, and that while such hybrids are not exceptional they do present a greater challenge to judges to justify the threshold classification that determines its constitutional treatment.⁶⁹

Based on a review of the Court’s dense and somewhat inconsistent precedent governing the tax-penalty distinction, Cooter and Siegel developed a theory to explain the constitutionally relevant differences between taxes and penalties which could be used to guide courts in

64. See, e.g., *id.* at 13 (“Apart from their Simon Says word game, Obamacare critics have also argued that the insurance mandate cannot be upheld as a tax because the mandate operate as an independent regulation from the tax-penalty.”).

65. *Id.* at 16-21.

66. Balkin, *supra* note 58, at 45 (emphasis added).

67. See Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

68. Robert D. Cooter & Neil S. Siegel, *Taxes, Regulations, and Health Care: Part II of Collective Action Federalism* 14-15 (Sep. 20, 2010) (unpublished manuscript) (on file with the University of Chicago Law School).

69. Cooter & Siegel, *supra* note 67, at 1226-29, 1239-47.

classifying hybrid exactions like the ACA's. First, they emphasized that the labeling is not and should not be determinative. Courts look beyond labels to determine the proper classification and thus which constitutional test to apply.⁷⁰ In looking beyond the label, courts consider how a particular exaction or assessment functions — that is, what effect it will have on an individual's conduct.⁷¹ Penalties typically must be justified under a stronger constitutional standard (like the commerce power), in part, because penalties are coercive and prevent conduct; taxes, on the other hand, may dampen conduct, but government takes as a given that such conduct will continue so that taxing the behavior will generate some revenue. Thus penalties and taxes have distinct effects that matter for constitutional purposes.

Next, Cooter and Siegel identified three salient characteristics relevant to courts' classification of an exaction as either a tax or a penalty: whether the amount or magnitude of the exaction is significant enough to undermine choice or coerce someone into a decision; whether there is a *mens rea* requirement (reflecting intentionality); and whether there is an escalative or recidivist element to the exaction.⁷² They used these characteristics to develop an "effects test" to determine when exactions should be treated as a tax or penalty for constitutional purposes based on whether an exaction is likely to prevent conduct (like a penalty) or merely dampen conduct (like a tax). The easy cases — that is cases in which something can be easily classified as a tax or penalty — are where all three of these characteristics align: If none of the three are present, then it looks like a tax that merely dampens conduct and is likely satisfied under the very broad tax and spend power. If all three characteristics are present, then the exaction is likely to prevent conduct, and thus should be treated like a penalty, which means it will have to be justified under some other regulatory power, like the commerce power.⁷³

Finally, Cooter and Siegel apply this test to the ACA coverage requirement, acknowledging the challenge it presents as a "hybrid exaction" with both tax and penalty characteristics. They note that the statutory language in the ACA, which suggests that participation is mandatory and that the failure to buy insurance is unlawful and will be penalized, creates "*expressive characteristics*" that make the law look like a mandate enforced by a penalty.⁷⁴ But in applying the above three-pronged effects test, they

70. *Id.* at 1200-10.

71. *Id.*

72. *Id.* at 1210-22.

73. *Id.* at 1222-35.

74. Cooter & Siegel, *supra* note 67, at 1239-41 (emphasis added) (acknowledging that Congress' choice of label was "not arbitrary, thoughtless, or expressively interchangeable [but

ultimately concluded that the “material effects” of the law will likely make it function more like a tax: the magnitude of the exaction is too small to have a coercive effect on people (based on CBO estimates); there is no scienter requirement of the kind that suggests bad intent; and the amount of the “penalty” does not increase with repeated failures to buy insurance.⁷⁵ In short, according to Cooter and Siegel, because one would not expect the ACA to have the kind of punitive or coercive effect that one expects from criminal or serious civil penalties, it should be treated like a tax for constitutional purposes. Without much discussion, Cooter and Siegel assume that the tax-like “material” effects will trump any penalty-like “expressive” effects;⁷⁶ that is, at most the law will have a dampening effect by encouraging some people to buy insurance, but it will not *compel* anyone to buy insurance.⁷⁷

Against an overwhelming policy and legal narrative that focused on the mandate and commerce power, Amar, Balkin, and Cooter and Siegel’s attempts to refocus our attention on the taxing choice argument were ultimately vindicated by the Supreme Court’s decision. It is not clear why this “taxing choice” argument or the tension between the taxing choice and mandate with penalty narratives did not get more attention prior to *NFIB*. One reason could be that, as noted above, proponents and opponents were effective at focusing everyone’s attention on the mandate in their messaging. A government mandate creates a clear, and thus more powerful, image of the challenged action, making it easier to stoke the fears that animated mainstream discussion and fed into more sensational claims of an unprecedented example of federal intrusion into personal decisionmaking.

The taxing choice theory, on the other hand, is based on a more nuanced consideration of the effect of the law, which, in turn, is based on uncertain and complex behavioral predictions about how many people would in fact choose to buy insurance and why. Although policy and legal critiques consistently cite CBO estimates of people who would pay the assessment to challenge the mandate rhetoric, this has not been very successful as a descriptive tool. The reality of whether one will even be

rather] appears to reflect a congressional judgment that failing to insure is wrong. . . . [Thus] [t]he minimum coverage provisions expresses a penalty”).

75. *Id.* at 1241-47.

76. See *id.* at 1247; see *infra* Parts III.B., IV.A. for a more in-depth discussion of Cooter and Siegel’s assumptions underlying this conclusion.

77. As explored further in Part IV, *infra*, Cooter and Siegel’s article acknowledges the fact that the expressive characteristics of the law that make it look like a penalty may have some effect of their own, however the authors seem to easily dismiss its significance, concluding that the material effects (suggesting a tax) trump any possible coercive or punitive effects of these expressive characteristics. Cooter & Siegel, *supra* note 67, at 1247.

subject to the mandate, whether one will be eligible for a subsidy and how much, and what insurance will cost is based on technical, detailed, and complex rules and calculations which cannot be performed yet because they depend on other variables (such as insurance premiums and future income) that may be unknown. Prior to the *NFIB* decision, as the law's fate hung in the balance, many were simply waiting to see if the law would survive before investing the time to understand the details of implementation.

Finally, the taxing argument may also have not received as much attention because far fewer legal scholars seemed willing to navigate the confusing precedent on the tax-penalty distinction or the additional, and relatively obscure, constitutional question raised by the taxing power — whether the ACA would violate the prohibition on direct taxes.⁷⁸ The result was that the taxing choice narrative did not receive the kind of airing it deserved as a constitutional or policy matter.

IV. *NFIB*

Because of the dominant narrative described in Part II, many people were caught by surprise when the Roberts Court in *NFIB* upheld the mandate as an exercise of the taxing power, but not the commerce power.⁷⁹ The taxing choice narrative was vindicated, but the Court's reasoning sparked criticism from both sides of the debate. Although the decision brought closure with respect to the constitutional challenge, its reasoning underscored the tension between the taxing choice and mandate narratives, as well as the practical uncertainty created in the ACA with respect to the role of consumer choice in the newly regulated private markets.

78. At various debates or panel discussions I observed or helped moderate, there were a number of constitutional law scholars who said they did not feel as comfortable addressing the taxing power questions so the commerce clause became the focus by default. Even the majority in *NFIB* was criticized by the dissent for not giving this question adequate attention: “[W]e must observe that rewriting § 5000A as a tax . . . would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population [T]he meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. The Government’s opening brief did not even address the question And once respondents raised the issue, the Government devoted a mere 21 lines of its reply brief to the issue. At oral argument, the most prolonged statement about the issue was just over 50 words.” *NFIB*, 132 S. Ct. at 2655.

79. See Barnett, *supra* note 14; Michael J. Graetz & Jerry L. Masha, *Constitutional Uncertainty and the Design of Social Insurance: Reflections on the ACA Case 1* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 12-316, 2012), available at <http://ssrn.com/abstract=2146814>.

A. *The Holding*

With respect to the constitutionality of the individual coverage requirement, the Court granted certiorari on the question of whether it could be justified by Congress' commerce or taxing power.⁸⁰ Consistent with the dominant focus pre-*NFIB*, most of the Court's focus was on the commerce clause issue. Writing for himself, Chief Justice Roberts considered this argument first, holding that the coverage requirement exceeded the commerce clause.⁸¹ Central to his analysis was the conception of the mandate as compelling the purchase of insurance. He held that while the regulation of the insurance market is undeniably authorized under the commerce power, this power cannot be used to compel one to enter the market or to create commerce where none existed before.⁸² Justices Scalia, Kennedy, Thomas, and Alito in a joint dissent,⁸³ and Thomas in a separate dissent,⁸⁴ agreed with Roberts' conclusion, echoing his concerns about an expansive commerce power used to compel individuals to purchase private goods. Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented from this part of the opinion; they believed it was constitutional under the commerce power relying heavily on the government's characterization of the mandate as an essential part of the broader regulatory scheme to fix the insurance market and solve the uninsurance problem.⁸⁵ All of the Justices, through four separate opinions, seemed to embrace the framing of the challenged provision as a mandate, enforced by a penalty; they simply differed as to whether or not it could be justified under the commerce power.

Roberts then turned to the federal government's alternative justification under the taxing power.⁸⁶ In a move which seemed to catch even his colleagues by surprise,⁸⁷ Roberts, joined by Ginsburg, Breyer, Sotomayor, and Kagan, upheld the "mandate" on this basis.⁸⁸ There were three notable aspects of this part of Roberts' opinion. First, Roberts, writing for himself again, began by admitting that the government's taxing power argument presented a serious conceptual challenge to the Court:

80. See *NFIB*, 132 S. Ct. at 2577.

81. *Id.* at 2585-87 (opinion of Roberts, C.J.).

82. *Id.* at 2585-93 (focusing on the activity-inactivity distinction).

83. *Id.* at 2642 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

84. *Id.* at 2677 (Thomas, J., dissenting).

85. *NFIB*, 132 S. Ct. at 2619-23.

86. *Id.* at 2595. The Constitution provides that Congress may "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

87. See Paul Campos, *Roberts Wrote Both Obamacare Opinions*, SALON.COM (July 3, 2012), http://www.salon.com/2012/07/03/roberts_wrote_both_obamacare_opinions/.

88. *NFIB*, 132 S. Ct. at 2593-94.

The Government's tax power argument asks us to view that statute differently than we did in considering its commerce power theory. In making its Commerce Clause argument, the Government defended the mandate as a regulation requiring individuals to purchase health insurance. The Government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product.⁸⁹

Roberts's unease with this alternative conception was palpable, as he immediately conceded that the mandate/penalty conception was "the most straightforward reading of the statute."⁹⁰

Although Roberts acknowledged the tension between these conceptions, he did not try to explain which conception was the right or better one as a constitutional matter. Roberts simply noted that statutes can have different meanings and relied on a canon of interpretation that courts have a duty to read a statute in the light that avoids it being found unconstitutional. As long as the government's alternative reading of the statute is a reasonable one, the Court said, it has a "plain duty . . . to adopt [this reading if it] will save the Act."⁹¹ This meant that in order to answer the constitutional question before it, the Supreme Court had to assess the reasonableness of the government's legal assertion that the shared responsibility payment could be considered a tax, as opposed to a penalty.⁹²

In considering whether the "tax" interpretation was reasonable, Roberts, this time writing for the majority, refused to defer to Congress' label.⁹³ The Court said that it must look beyond the label, and it applied a test similar to the tests used by Amar, Balkin, and Cooter and Siegel, to determine whether the payment effectively functioned more like a tax or a penalty.⁹⁴ Under this

89. *Id.* at 2593.

90. *Id.* (noting the use of the word "shall" in I.R.C. §5000A(a) (2011)).

91. *Id.* at 2593-94 ("The question is not whether that is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one.").

92. This tax-penalty question was complicated by another claim asserted by the federal government early in the litigation: that the legal challenge to the mandate was premature under the Anti-Injunction Act (AIA). The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." I.R.C. §7421(a) (2011). This means that individuals must pay their taxes before they can bring a suit to challenge them, so the earliest that a taxpayer who failed to get insurance would have to pay the "shared responsibility payment" is 2015. *NFIB*, 132 S. Ct. at 2582. The Court unanimously held that the assessment was not a tax for purposes of the AIA bar, even though a majority found that it could be justified as a constitutional tax. For a more in-depth comparison of these two claims, see Clark, *supra* note 5, pt. III.B.

93. *NFIB*, 132 S. Ct. at 2594 (majority opinion).

94. *Id.*

functional test, the Court held that the payment looked like a tax in many respects:

It is paid into the Treasury by “taxpayer[s]” when they file their tax returns; it does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code; and for taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. Moreover, the requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which must assess and collect it “in the same manner as taxes.” Finally, this process yields the “essential feature of any tax” by producing at least some revenue for the Government.” Indeed, the payment is expected to raise about \$4 billion per year by 2017.⁹⁵

Moreover, the Court found that the assessment does not have the usual indices of a penalty for unlawful conduct. In distinguishing the ACA payment from the kind of penalty typically subject to the stricter commerce clause test, the Court looked at three things: the amount due, the absence of a scienter requirement, and the means of enforcement. First, the Court found that because for most Americans the amount due will be far less than the price of insurance, this gives consumers a real choice between making the payment to the government or buying insurance; the payment does not look like a “prohibitory financial punishment” that is designed to force compliance with the mandate.⁹⁶ Second, the means of enforcement is solely through collection by the IRS, and the ACA even prohibits the IRS from using its harshest collection tools, such as liens, levies, and criminal prosecution. Finally, the fact that there is no scienter requirement, coupled with the government’s assurance that people who pay the tax are viewed as complying with the law, suggests that the government is not really penalizing uninsurance as wrongful behavior;⁹⁷ rather it is using the shared responsibility payment simply to encourage people to purchase insurance. Roberts said that the tax on the failure to buy insurance is similar to other regulatory measures upheld as taxes, such as taxes on cigarettes and sawed-off shotguns.⁹⁸ In acknowledging this regulatory goal, Roberts says that this regulatory character does not undermine the government’s taxing power argument.⁹⁹

95. *Id.*

96. *Id.* at 2595-96.

97. *Id.*

98. *NFIB*, 132 S. Ct. at 2596.

99. *Id.* (“Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed That §5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.”).

Once Roberts determined that the taxing choice interpretation was reasonable, it was easy to find the provision constitutional under the very broad taxing power which simply requires that the tax raises revenue related to the general welfare. The Court considered and rejected arguments that it violated other Constitutional provisions, such as the Article I prohibition on direct taxes.¹⁰⁰

B. *The Dissent*

Justices Scalia, Kennedy, Thomas, and Alito wrote a joint dissent that was critical of this holding and particularly scathing about the Court's willingness to take the taxing power argument seriously. In fact, in framing the overall case, they identify two questions that make the case difficult: the first having to do with the constitutionality of the mandate under the commerce power, and the second with whether the Medicaid expansion is structured coercively in violation of the tax and spend power.¹⁰¹ They ignored the taxing power justification altogether — at least in this initial framing — suggesting that they did not even view it as a credible claim. Indeed, after analyzing, and rejecting, the commerce power justification of the mandate, the dissenting justices would have stopped there.¹⁰²

The dissenting Justices then criticized the threshold assumption underlying the government's and majority's suggestions that the payment can be legitimately conceived as a penalty and tax at the same time, for purposes of applying two different constitutional standards:

The Government contends, however, as expressed in the caption to Part II of its brief, that "THE MINIMUM COVERAGE PROVISION IS INDEPENDENTLY AUTHORIZED BY CONGRESS'S TAXING POWER." The phrase "independently authorized" suggests the existence of a creature never hitherto seen in the United States Reports: A penalty for constitutional purposes that is *also* a tax for constitutional purposes. In all our cases the two are mutually exclusive. The provision challenged under the Constitution is either a penalty or else a tax. Of course in many cases what was a regulatory mandate enforced by a penalty *could have been* imposed as a tax upon permissible action; or what was imposed as a tax upon permissible action *could have been* a regulatory mandate enforced by a penalty. But we

100. *Id.* at 2598-2600 (holding that the payment did not violate the prohibition on direct taxes in art. I, § 9, cl. 4 of the U. S. Constitution and was not subject to the same "activity requirement" as the commerce power).

101. *Id.* at 2642-43 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

102. *Id.* at 2650.

know of no case, and the Government cites none, in which the imposition was, for constitutional purposes, both. The two are mutually exclusive.¹⁰³

The joint dissenters insisted that precedent “establish[es] a clear line between a tax and a penalty” where a tax is “an enforced contribution to provide for the support of government” and a penalty is “an exaction imposed by statute as punishment for an unlawful act.”¹⁰⁴ They then argued that the threshold question of whether the provision is a tax or penalty should turn on the Government’s framing, and it was clear that the Act adopted a framing of “wrongdoing” through its use of terms like “shall,” “requirement,” and “penalty.”¹⁰⁵ They also noted the President’s repeated insistence to the public that the shared responsibility payment was a penalty, and not a tax. The joint dissenters ultimately concluded that “there is simply no way, ‘without doing violence to the fair meaning of the words used,’ to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty.”¹⁰⁶

Although they clearly lost this legal argument, as the taxing power was used to uphold reform, their view of the correct framing of the provision seemed to prevail as the mandate/penalty narrative was the one that seemed to resonate with the entire Court. Despite upholding the “mandate” under the taxing power, the reasoning throughout the opinion reinforced the notion that these were conflicting and incompatible narratives. This left many unsatisfied with and confused by the majority opinion.¹⁰⁷ Even those who agreed with the conclusion lamented what seemed to be a lackluster explanation for its holding.¹⁰⁸ Indeed, Roberts’ reluctant and apologetic

103. *NFIB*, 132 S. Ct. at 2650-51 (emphasis in original) (citations omitted). The dissent admits that it can be “both [a tax and penalty] for statutory purposes since Congress can define ‘tax’ and ‘penalty’ in its enactments any way it wishes.” *Id.* at 2651 n.5.

104. *Id.* at 2651 (citing *U.S. v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)). The dissent notes that “[i]n a few cases, this Court has held that a ‘tax’ imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held – never – that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that any exaction imposed for violation of the law is an exercise of Congress’ taxing power—even when the statute calls it a tax, much less when (as here) the statute repeatedly calls it a penalty.” *Id.*

105. *Id.* at 2651-52.

106. *Id.* at 2651. The dissent relied on a different canon of statutory instruction to challenge the majority’s willingness to view this as a tax: “[T]hat a statute that penalizes an act makes it unlawful” *Id.* at 2652 (citing *Powhatan Steamboat Co. v. Appomattox R. Co.*, 24 How. 247, 252 (1861)). The dissent also complained that “to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it.” *NFIB*, 132 S. Ct. at 2655.

107. See Clark, *supra* note 5, at pt. V.A.2 (describing criticism of the Court’s decision).

108. See, e.g., Ronald Dworkin, *A Bigger Victory Than We Knew*, N.Y. REV. BOOKS, Aug. 16, 2012 at 6, 12, available at <http://www.nybooks.com/articles/archives/2012/aug/16/bigger-victory-we-knew/>.

tone, as well as Ginsburg's neglect of the issue in her partial concurrence, suggests that not even a majority of the Court was fully persuaded by this justification.¹⁰⁹

The joint dissenters highlighted the majority's failure to address the conceptual disconnect between the commerce power and the taxing power justifications,¹¹⁰ but the dissenting opinion was not very helpful for resolving this tension either. For the dissent, this mandate-penalty frame negated all other "functional" arguments used by the majority to conclude that the taxing argument was a reasonable interpretation for constitutional purposes, but the joint dissenters never explained why this was so. They merely criticized the countervailing taxing theory as a "self-serving litigating position[] entitled to no weight" in the face of a contradictory framing created by the statutory language.¹¹¹ But in light of a long history of the Court prioritizing substance over form, the joint dissenters shirked their obligation to explain why the mandate frame should trump the choice architecture of the ACA. Neither the majority nor the dissent offered a coherent theory for classifying hybrid exactions like the ACA's coverage requirement in a way that is consistent with the underlying concerns that lead us to treat penalties and taxes differently for constitutional purposes.

C. *Struggling to Reconcile Legal Choice with an Expressive Mandate*

Cooter and Siegel's theory begins to fill in this gap, helping to illuminate the reason the Court struggles with these competing conceptions, and

109. *Id.*; see also *NFIB*, 132 S. Ct. at 2593.

110. *NFIB*, 132 S. Ct. at 2609-29 (Ginsburg, J., concurring) (discussing the mandate's constitutionality under the commerce clause only).

111. *Id.* at 2650-55. The dissenting Justices focused on what they considered potential harms of the majority's decision. First, they said that rewriting the statute to interpret the provision as a tax lets the government avoid the political accountability for creating a tax. It is not clear how this could be in this case since rules governing the origination of taxes in the legislature do not seem to have been violated. Moreover, the idea that a mandate/penalty frame would avoid the backlash that a taxing scheme or that the "play or pay" rhetoric would have generated is not borne out by the controversy surrounding the mandate. See *supra* Part I. The dissent also criticized the majority's holding for letting the government elide the negative constitutional implications that result from the most obvious constitutional question arising out of the government's own choice to frame this as a mandate/penalty. *NFIB*, 132 S. Ct at 2655. But this simply begs the question about whether the provision was really a tax or penalty for constitutional purposes. Finally, the dissent was disturbed by the majority's decision on the taxing power question in light of the Court's unanimous holding that this was not a tax for AIA purposes. It held that the AIA was inapplicable to the challenge because in the statutory context, Congress' choice to label the payment a "penalty" controls. The Court rejected the "functional test" that was used for the constitutional analysis, leaving open the possibility that the assessment could be viewed as a penalty for one purposes (the AIA statutory bar) and a tax for another (the constitutional analysis). *Id.* at 2583 (citations omitted).

offering a more robust justification for the majority's conclusion. The Court's functionality analysis is very similar to Cooter and Siegel's effects test. Both focus primarily on the economic incentives for determining the likely "effect" of the law on consumer behavior.¹¹² Moreover, the "straightforward reading" of the mandate referred to by the *NFIB* Court echoes what Cooter and Siegel describe as the law's "expressive" characteristic. Although Cooter and Siegel do a better job of engaging the hybrid nature of the ACA and the tension between legal choice and an expressive mandate, they do not provide much discussion about the potential effects of these expressive characteristics or about how to account for these effects in classifying an exaction for constitutional law purposes.

Cooter and Siegel do touch on this briefly. Specifically, they address the concern that these expressive characteristics will create penalty-like effects that could make people feel compelled to buy insurance. These concerns were raised by a judge on the D.C. Circuit Court of Appeals in *Seven-Sky v. Holder*, one of the many cases challenging the constitutionality of the coverage requirement prior to *NFIB*.¹¹³ In *Seven-Sky*,¹¹⁴ the court addressed two issues relating to the characterization of the coverage requirement. The one receiving the most attention was whether the provision was constitutional under the commerce power; the court affirmed the district court's holding that it was a constitutional exercise of Congress' commerce power.¹¹⁵

The court also decided that it needed to address a threshold jurisdictional question raised in an amicus brief about whether the challenge was barred by the Anti-Injunction Act (AIA). This question had important implications for whether the provision could be properly framed as a tax. The D.C. Circuit, like all other courts deciding this issue except one, held that the AIA did not apply because Congress deliberately chose to label the shared responsibility payment a penalty, and not a tax, and Congress did

112. Cooter and Siegel actually developed and circulated this theory in draft prior to the Court's decision, however, the article was not formally completed and published until after decision. There is some speculation about whether the Court was informed by their work, as well as by other scholars like Amar and Balkin. See, e.g., Neil Siegel and Robert Cooter, *Online ACA Symposium – A Theory of the Tax Power That Justifies – and May Have Informed the Chief Justice's Analysis*, SCOTUSBLOG (Jul. 9, 2012), <http://www.scotusblog.com/2012/07/online-aca-symposium-a-theory-of-the-tax-power-that-justifies-and-may-have-informed-the-chief-justices-analysis-2/>.

113. Cooter & Siegel, *supra* note 67, at 1246-47.

114. *Seven-Sky v. Holder*, 661 F. 3d 1 (D.C. Cir. 2011).

115. *Id.* at 14-20. The coverage requirement was also challenged using the Religious Freedom Restoration Act, but this claim received almost no discussion. In a footnote, the court briefly noted that it affirmed the district court's dismissal of the appellants' claim because they failed to allege facts showing a substantial burden on their religious exercise. *Id.* at 5n.4.

not include any language in the ACA expressing a contrary intent. Although the test for determining whether something is classified as a “tax” for purposes of the AIA is a matter of statutory interpretation, and thus is legally distinct from the constitutional question, Judge Kavanaugh’s dissent on this jurisdictional issue and his explanation for why it was premature to decide the merits of the case, are relevant to understanding the choice/mandate tension in the constitutional context.

Kavanaugh made clear that the government’s label would not be determinative of the constitutional question; yet he did not dismiss the relevance or significance of such labeling.¹¹⁶ Kavanaugh also made several interesting analytical moves in his opinion that destabilized the notion that the coverage requirement could be easily classified as a tax or penalty, even under a functional analysis. The first interesting move he made was to use a hybrid label throughout his dissent, which he sets out right at the beginning:

One provision of the [ACA] requires most Americans to maintain health insurance or else pay a *tax penalty* when they file their annual tax returns. That provision — commonly referred to as the individual mandate — is codified in the Tax Code and takes effect in 2014. The *tax penalty* for those without health insurance is capped at the average price of a health insurance plan. The *tax penalty* is the only sanction for failing to have health insurance. And the IRS — and only the IRS — may assess, collect, and enforce the *tax penalty*.¹¹⁷

The second interesting move was his criticism of the majority’s “heavy rhetorical reliance on the fact that Congress labeled the individual mandate provision as a ‘penalty’ and not a ‘tax.’”¹¹⁸ In explaining why courts should not rely so heavily on rhetorical labels, Kavanaugh describes Congress’ possible motivation for choosing a penalty label that suggests the label may indeed have an important behavioral effect that goes beyond mere rhetoric. Specifically, he notes that Congress may choose the label “penalty” instead of “tax” because the “penalty” label suggests violation of a legal rule, which government believes will have a more powerful effect in altering behavior that Congress wants to encourage or discourage.¹¹⁹

In fact, Kavanaugh cites to government reports which reveal how the federal government has used this strategy in other contexts. For example, he cites to a 1999 report by the Department of the Treasury which says that

116. In my opinion, Cooter and Siegel read too much into Kavanaugh’s footnote by using it to characterize Kavanaugh’s position as “deem[ing] it constitutionally irrelevant that the ACA labeled the exaction for noninsurance a ‘penalty’ instead of a ‘tax.’” Cooter & Siegel, *supra* note 67, at 1244 (emphasis added).

117. *Seven-Sky*, 661 F. 3d at 21 (emphasis added).

118. *Id.* at 29.

119. *Id.* at 29-30.

"[p]enalties clearly signal that noncompliance is not acceptable behavior In establishing social norms and expectations, subjecting the noncompliant behavior to any penalty may be as important as the exact level of the penalty" ¹²⁰ He cites to another report as early as 1989 in which an Executive Task Force for the commissioner's Penalty Study asserted that "[p]enalties as a consequence of violating a standard of behavior remind taxpayers of their duty" and that "[p]enalties are a tool for change."¹²¹ If such assumptions are true, then labeling would seem to be relevant to any constitutional test that turns on an exaction's predicted effects (like Cooter and Siegel's) or an inquiry into how it actually functions (like the Court's in *NFIB*). And this is where Kavanaugh ultimately ends up when, toward the end of his dissent, he speculates — but does not draw any conclusions — about how a court would answer the threshold constitutional question of whether the ACA coverage requirement should be analyzed as a tax or penalty.

Kavanaugh seems genuinely uncertain about the effect that such labeling might have on this constitutional question. This is difficult because of contradictory assertions — both of which Kavanaugh seems to take seriously. Those supporting the taxing choice theory point to the low penalty amount and CBO estimates of the people who will choose to pay the assessment, though Kavanaugh questions the assumptions upon which this "choice" theory is based:

Such an argument assumes that citizens care only about economic incentives and not also about complying with The Law. Plaintiffs vigorously contest that assertion. According to plaintiffs, the United States does not necessarily consist of 310 million people who have over-absorbed their Posner and equate (i) a traditional regulatory tax that incentivizes or disincentivizes certain behavior and (ii) a legal mandate or prohibition accompanied by a tax penalty of the same amount. After all, plaintiffs say, common sense tells us that many citizens want to be law-abiding (and known as law-abiding), and that their desire to be law-abiding affects their behavior.¹²²

Kavanaugh never tells us how to resolve this dilemma because he feels it is premature. He suggests a potentially easy fix that might make the question disappear: if the "penalty" label is changed to a "tax" one then the government is sending a singular message that should make classification

120. *Id.* at 30 n.11 (citing to Office of Tax Policy, Dep't of the Treasury, Report to the Congress on Penalty and Interest Provisions of the Internal Revenue Code 36 (1999)) (emphasis added).

121. *Id.* (citing to the Exec. Task Force for the Commissioner's Penalty Study, Report on Civil Tax Penalties at III-1 & X-1 (1989)).

122. *Seven-Sky*, 631 F.3d at 49.

easy. If not, the juxtaposition of legal choice and an expressive mandate complicates the constitutional question because the proper constitutional framework depends in part on behavioral predictions and assumptions that have either been ignored, not well supported or explained, or appear to be inconsistent.

It is this discussion to which Cooter and Siegel refer as they consider whether the economic or “material” effects of the ACA trump its “expressive” characteristics. Unfortunately, Cooter and Siegel’s discussion of the potential expressive function of law is not very helpful in this regard. Cooter and Siegel dismiss these expressive law concerns and their relevance to constitutional analysis too quickly.¹²³ They make the same mistake that Kavanaugh identified in the government’s argument: they conclude that the material effects (consistent with a tax) trump the expressive effects (consistent with a penalty) based on an assumption that “most people care more about their private costs than social costs” and that “most people respond by comparing the exaction to their private benefit for the conduct.”¹²⁴ According to the authors, private costs, defined primarily in economic terms, are considered paramount in predicting consumer behavior under the ACA, which seems to assume that people are hyper-rationalized, profit-maximizing actors.¹²⁵

V. UNDERSTANDING THE EXPRESSIVE VALUE OF LAW

NFIB, Cooter and Siegel’s article, and Judge Kavanaugh’s decision, all call attention to the expressive function of the ACA, and its role in complicating our understanding of the ACA for constitutional purposes and for predicting reform success. Still missing though is a useful explanation for exactly how and why this expressive function could matter. What assumptions about the expressive effects of the ACA have led to such different and heated conclusions about whether a taxing choice or mandate with penalty conception is the right one? Can a closer look at the assumptions that underlie the classification of a hybrid like the ACA

123. See Cooter & Siegel, *supra* note 67, at 1230-36, 1246-47 (“In sum, the ACA’s exaction for noninsurance is mixed because it has a penalty’s expression and a tax’s materiality [but] [b]ecause the predicted effect of the ACA’s exaction for noninsurance is to dampen uninsured behavior, not to prevent it, it is a tax equivalent for purposes of Congress’ tax power.”). Cooter and Siegel note later, however, that although the effects may not be able to be predicted with certainty, it is not a court’s job to make this prediction. It is enough that the Court finds that Congress could have rationally concluded that an exaction would dampen conduct instead of prevent it. *Id.* at 1233.

124. *Id.* at 1231-32 n.165.

125. *Id.* (“Whether a tax or penalty should be used to regulate behavior depends on whether the amount is enough to cause people to internalize the social cost created by certain conduct.”).

coverage provision provide a more satisfying and coherent defense of Roberts' approach? What might these assumptions mean for the success of reform? If the ACA's expressive effects are so easily trumped by its material effects, then will enough people buy insurance and participate in the market to ensure affordable coverage? The remainder of the Article will explore these questions, beginning with an overview of law's expressive function and theories about how this can influence behavior.

A. *Expressive Law Theory as a Critique of Law and Economics*

Expressive law theorists understand the expressive characteristics, dimensions, or functions of law to mean the "cultural consequences of choice — [] the values that a particular policy choice, in the specific context in which it is taken, will be generally understood to endorse."¹²⁶ This is important because their central claim is that law has an expressive influence on behavior independent of any effect created by its sanctions; that is, law affects behavior expressively by what it says rather than by what it does.¹²⁷ Expressive law theories are, in part, a critique on the traditional law and economics approach, which focused exclusively, or primarily, on individuals as rational actors driven to maximize economic benefit.

Although not fully developed, we see hints of this traditional approach in Cooter and Siegel's focus on the "material" effects of the assessment based on the amount, and their dismissal of the significance of possible expressive effects of the law to influence behavior. Underlying their assertion that "people care more about their private costs than social costs"¹²⁸ are implicit assumptions that private costs and benefits are understood primarily in economic terms, and that private and social costs are easily distinguished. *NFIB* implicitly adopts this approach by focusing only on the sanctions and character of enforcement to determine whether the financial costs of uninsurance were significant enough to essentially leave one no choice but to buy insurance.

The problem, expressive law theorists say, is that this traditional approach fails to account for the way that social norms, and the stigma or esteem that results from rejecting or complying with such norms, can influence people's behavior independently of other sanctions or enforcement threats. For instance, Lawrence Lessig has criticized the legal profession for ignoring the way governments "act to construct the social

126. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 66 (1995).

127. See *id.* at 66-71; see generally Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031-32 (1996).

128. Cooter & Siegal, *supra* note 67, at 1232 n.165.

structures, or social norms, or . . . the social meanings that surround us," despite the fact that this idea is well understood in social theory.¹²⁹ Cass Sunstein and Richard Pildes have mounted similar criticisms, noting that "[s]ometimes people do not behave as economists predict — deviating in ways that do not appear to maximize their 'expected utility' often because of social norms Costs and benefits include the consequences of acting inconsistently or consistently with social norms."¹³⁰ Sunstein offers an example of rational decision-making that accounts for the role of social norms:

[C]hoice is, roughly speaking, a function of the intrinsic utility of choice, the reputational utility of choice, and the effects of choice on a person's self-conception. If someone cleans up after his dog, or fails to do so, his decision may reflect not only the act's intrinsic value, but also anticipate reputational effects as well as effects on the agent's self-esteem. We can thus extend the game theoretic insight that a person's behavior often depends on expectations about behavior by other people. Behavior and choice are a product not only of other people's behavior, but also of the perceived judgments of other people, and those judgments have a great deal to do with — indeed they constitute — social norms. People act in accordance with their perceptions of what other people think. Sometimes they act strategically in order to avoid other people's opprobrium. It follows that individual rationality and self-interest are a function of social norms and are not sensibly opposed to them.¹³¹

Though government can use its expressive power in conjunction with robust enforcement and punitive sanctions to coerce people into complying with the law, the more interesting case to expressive law theorists, and the more relevant one for purposes of considering the ACA mandate, is how government can use its expressive power to influence behavior in the absence of meaningful enforcement or sanctions. This power has received the most attention in the areas of antidiscrimination and criminal law, but government's ability to harness this power in the regulatory arena should not be underestimated. Sunstein has shown that the expressive goal of much regulation is to "reconstruct existing norms and to change the social meaning of action through a legal expression or statement about

129. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 947, 956 (1995).

130. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909-10 (1996); see also Pildes & Sunstein, *supra* note 126, at 66 (noting that the weakness with cost-benefit approaches is that "they necessarily focus on the quantitative or material effects of policies [and] cannot take into account [] the expressive dimensions of legal and political choices").

131. Sunstein, *On the Expressive Function of Law*, *supra* note 127, at 2022, 2031-32.

appropriate behavior.”¹³² It is generally accepted as legitimate and standard for government to use its expressive power to counter existing norms that may be harmful or an impediment to well-being, especially where the harm is a collective one that demands some kind of intervention or coordination by a third party — like the government.¹³³ This is particularly visible in the areas of public health and safety.¹³⁴ But scholars have also demonstrated how government and powerful industry players in the financial arena have successfully leveraged the expressive power of law and social norms to influence people’s financial decisions, especially as it concerns debt.¹³⁵

Evidence of the government’s expressive power in both of these regulatory arenas — health and safety, on the one hand, and financial regulation, on the other, may have significant implications for the government’s ability to implement health reform successfully. Affordable coverage is critical for healthcare access, but affordable coverage is only possible if enough people become consumers in the individual market. And as already noted in the first three sections, the ACA’s regulatory structure does not actually create a true legal mandate for consumers to buy insurance, nor is the economic penalty viewed by most people as high enough to influence people as a purely economic matter. But if the government has already successfully leveraged its expressive power in the health, safety, and financial arenas, it might be able to do the same in order to solve a serious collective action problem with important health and financial dimensions. Before exploring this specific claim, it is necessary to flesh out exactly *how* and *why* law may have an expressive influence in some cases.

B. *How Does Law Expressively Influence Behavior?*

Scholars’ claims about the influence of expressive law in any given case are subject to debate, in part because of uncertainty about exactly how law expressively influences the behavior of any one individual. A full exploration of the merits and weaknesses of the types of studies used to support expressive law theories is beyond the scope of the article, but even expressive law theorists acknowledge that it is difficult to establish clear

132. *Id.* at 2031; see also Lessig, *supra* note 129, at 956 (“If social meanings exist, they are also used. They not only constitute, or guide, or constrain; they are also tools - means to a chosen end whether an individually or collectively chosen end. They are a resource - a semiotic resource - that society provides to all if it provides to any. They are a way ‘for hitting each other and coercing one another to conform to something [one has] in mind’; or for inspiring another or inducing another to do, or believe, or want, in a certain way.”).

133. Sunstein, *Social Norms and Social Roles*, *supra* note 130, at 967.

134. See *id.* at 910.

135. See *infra* note 140 and accompanying text.

causal relationships between a law's expressive value and one's behavior. This could explain why courts were reluctant to do a meaningful inquiry into the potential punitive expressive effects of the ACA for constitutional purposes. As imperfect as a law and economics approach may be, it has some predictive power and is more consistent with the taxing choice theory adopted by the Court in *NFIB*. That said, scholars have offered explanations for the different ways that government can expressively influence people's behavior, which are useful for understanding how the ACA may impact people's choice to buy insurance.

Law may impact decision-making in the absence of the threat of legal or significant economic sanction in different ways. For example, the expressive message of a law may reflect existing social norms, such that violation of these norms invites stigma or shame. Law can also be used deliberately to try to change or redefine the social meaning of behavior by altering the social "cost" of that behavior, in ways that impact people's choices. These kinds of effects presume three things. First, as noted above, they presume that the perceived judgments of other people matter and that people will act in accordance with what others think.¹³⁶ Second, they depend on the behavior being easily visible, so that one who violates the norm is vulnerable to stigma or reputational harm.¹³⁷ Finally, there is a presumption that the law reflects social norms: people motivated by a desire to seek approval or avoid disapproval consider the social consequences of acting inconsistently or consistently with norms established by the law.¹³⁸

One common illustration of this phenomenon occurs in the context of laws requiring people to clean up after their dogs. Sunstein explains how such law might expressively influence people to comply despite the absence of meaningful enforcement:

Consider, for example, laws that forbid littering and laws that require people to clean up after their dogs. In many localities such laws are rarely enforced through the criminal law, but they have an important effect in signaling appropriate behavior and in inculcating the expectation of social opprobrium and, hence, shame in those who deviate from the announced norm. With or without enforcement activity, such laws can help reconstruct norms and the social meaning of action. Someone who fails to clean up after his dog may then be showing disrespect or even contempt for others. Many, most, or all people may see things this way, and the result can be large changes in behavior. Eventually there can be norm cascades, as

136. Sunstein, *supra* note 127, at 2032; see also McAdams, *An Attitudinal Theory of Expressive Law*, *supra* note 127, at 340.

137. Lessig, *supra* note 129, at 1015.

138. See McAdams, *An Attitudinal Theory of Expressive Law*, *supra* note 127, at 340. This reflects an assumption that democratically-produced legislative outcomes are positively correlated with popular attitudes and signal of these attitudes. *Id.*

reputational incentives shift behavior in new directions. It should be unsurprising to find that, in many places, people clean up after their dogs even though this is not especially pleasant and even though the laws are rarely enforced.¹³⁹

A more powerful and relevant example of this expressive power occurs in the case of underwater mortgages and the concern about people walking away from their mortgages. In his paper titled *Underwater and Not Walking Away: Shame Fear and the Social Management of the Housing Crisis*, Brent White explores the reasons why the vast majority of underwater homeowners continue to make their mortgage payments, even when it is clearly not in their best financial interest to do so.¹⁴⁰ White argues that, in some cases, homeowners “ignore market and legal norms under which strategic default might not only be a viable option, but also the wisest financial decision [because] they have been encouraged to behave in accordance with social and moral norms that require individuals to keep their promises and honor financial obligations.”¹⁴¹ White traces how the government, financial industry, and other “social control agents” cultivated these norms causing homeowners to associate foreclosure with fear, shame, and guilt, and how homeowners’ desire to avoid shame is what drives many people to continue paying their mortgage, even when they know it is against their financial interest.¹⁴² White’s example shows how government can successfully leverage its expressive power to shape or create social meaning and norms that can overcome compelling countervailing factors and interests to influence behavior. This is likely due, in part, to the fact that the foreclosure process itself provides multiple opportunities for government and private actors to bombard underwater homeowners with shaming messages, as well as the fact that even after the foreclosure, the effect of a foreclosure on one’s credit report ensures that the decision to walk away, and thus the

139. Sunstein, *On the Expressive Function of Law*, *supra* note 127, at 2032-33.

140. Brent T. White, *Underwater and Not Walking Away: Shame Fear and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 971-72 (2010) (noting that many of these homeowners are “hundreds of thousands of dollars underwater and have no reasonable prospect of recouping their losses”, and noting that this “includes [] homeowners who live in ‘nonrecourse states’ [] where lenders cannot pursue defaulting homeowners for a deficiency judgment.”). White acknowledges behavioral economists’ arguments that some of these homeowners may suffer from cognitive biases that make it difficult to understand whether they would in fact be better off if they walked away. He claims that this fails to explain the cases where homeowners are aware that it would be in their best financial interest to walk away, but nonetheless make an apparently irrational financial decision to keep paying. *Id.* at 972.

141. *Id.*

142. *Id.*

stigma associated with it, would continue to be visible to others in the future.¹⁴³

An external threat of shame or promise of esteem (the “reputational utility of choice”) may not necessarily be the motivating factor or cost in any particular individual’s decision. Certainly threat of reputational harm may play a more important role where law is being used to actively change an existing norm that is strongly preferred by individuals. But in the absence of such a strong contrary preference, some individuals may be motivated to change their behavior by a strong internal sense of fairness to follow the norms established or reflected by the law.¹⁴⁴ In these cases, the visibility of the behavior or opportunity for shaming becomes less relevant for compliance, as long as the law’s message is communicated clearly and consistently.

In some cases, law may create or change norms “by signaling the underlying attitudes of a community or society.”¹⁴⁵ In this way, the law can make visible a social meaning that may have been “hidden” previously, which facilitates the realization of a behavioral norm that is more consistent with people’s preferences by making it easier for people to engage in the desirable behavior, or to stop the undesirable behavior. This might happen in a couple of ways. It could be that the law, by affirming existing attitudes of a “silent majority” in a visible and expressively forceful way, empowers this majority to become more vocal and exert social pressure on those who violate legal norms. Take public smoking bans as an example. Even without the threat of legal compliance, nonsmokers (and even occasional smokers who find they like the idea of a ban in certain settings) may feel entitled to “enforce” the law through social sanctions — confrontation and shaming of those who violate the law. This confrontation and shaming creates a social cost to the act of smoking in violation of the ban, which may be significant enough to alter the smoker’s behavior. The greater the pressure, and the more widespread the use of social sanctions become, the more people’s beliefs shift to embrace a smoke-free environment as the new behavioral norm.

Alternatively, the law may help change social norms by ambiguating the meaning attached to particular behavior. Take laws requiring motorcycle helmets for example. If people are given a choice to wear helmets or not, then the community of riders may assign their own social meaning to the choice, which can impact people’s decisions. Riding without a helmet may signal a valuing of freedom, the willingness to take risks, or even a belief

143. *Id.* at 996-1007.

144. See McAdams, *An Attitudinal Theory of Expressive Law*, *supra* note 127, at 344-45 nn. 12-17.

145. *Id.* at 340.

about what it means to get an “authentic” riding experience.¹⁴⁶ This can be used deliberately to, or can inadvertently, create a stigma that attaches to those who choose to wear a helmet. The extent to which one’s reputational utility is harmed by wearing a helmet, many people will likely choose to ride without to avoid the stigma, even if they would prefer to wear one or would otherwise be indifferent. But when law requires helmets, it ambiguates the meaning of choosing to wear one: Is it that someone is not daring and free enough, or is it just that they want to avoid getting an expensive ticket? In this way, law can undermine prior stigmatizing messages that were impediments to people choosing to act in ways they may prefer and that is certainly more desirable from the government’s perspective.

Relatedly, law can serve an educative function that helps illuminate a norm that was previously invisible or suppressed due to a lack of information.¹⁴⁷ The expressive messaging of law can be used to update people’s existing beliefs about the costs and benefits of a particular action (such as the health risks of smoking or the danger of not wearing a seat belt) that leads people to change their behavior (stop smoking or buckle up) in ways that are more consistent with their own desire for health and safety.¹⁴⁸ Thus in promoting or defending such laws, the government gives people new information about a risk or problem, which leads them to act in ways that are more consistent with their preexisting value of health and safety, and which, in turn, leads to the kind of behavior the government wants to promote.

Finally, the moral meaning and stigma attached to a violation is likely a function of the degree and type of harm one is understood to be causing. If second-hand smoke is simply unpleasant, a violator may be stigmatized as rude. But once people understand that smoke also increases one’s risk of serious health problems, violators may be viewed much more harshly, as

146. See, e.g., Lessig, *supra* note 129, at 964 & n.54 (mentioning the struggle around the social meaning of helmets and attempts to increase their use in the United States). Lessig provides a much richer discussion of two other examples of helmets and social meaning. His first example looks at how the changing political meaning of helmets in Russia was shaped by government in ways that first discouraged and then encouraged their use. *Id.* at 963-65. His second example focuses on the use of helmets in hockey and is more directly analogous to my discussion of how rules or law can be used to change the meaning of wearing motorcycle helmets in the U.S. to encourage use. *Id.* at 967-68.

147. *Id.*; see also McAdams, *An Attitudinal Theory of Expressive Law*, *supra* note 127, at 340 (noting that individuals are sensitive to new information); Sunstein, *Social Norms and Social Roles*, *supra* note 130, at 913-14 (“There is a thin line between education and provision of information on the one hand and attempted norm-change on the other. [I]n the process of norm management, government has a number of tools.”).

148. Sunstein, *Social Norms and Social Roles*, *supra* note 130, at 948-49; Alex Geisenger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 53-55 (2002).

showing contempt for others and thus deserving of contempt in return. This knowledge may then influence the frequency and intensity with which nonsmokers are willing to confront violators, which in turn, raises the reputational harm and thus the social cost of violating such bans.¹⁴⁹ In this way, increased knowledge about the risks of smoking may also create greater awareness and sensitivity in smokers because of their own internal sense of fairness and value of health, which causes them to change their behavior — to embrace rules that limit smoking and even to try to quit.

Expressive law theory provides a very rich picture of the many ways in which law can influence people's choices in the absence of legal or serious economic sanction. Unfortunately, this richness also limits its predictive power because any one, or more likely some combination, of these theories may be operating in any given instance to influence an individual's behavior based on his or her own internal norms, how visible social norms are, and one's sensitivity and exposure to external shaming based on these social norms.

C. *The Strength of Government Messaging and Expressive Power*

Taking a closer look at the different ways in which law may influence behavior in the above examples should make clear that merely passing a law or making a pronouncement does not magically and instantly transform social meaning. Expressive law scholars recognize that the influence may be direct or indirect, and may occur over time by gradually shifting the equilibrium to a point where the desired behavior increases and a greater portion of the public has internalized this as the new norm.¹⁵⁰ Whether the public internalizes certain norms and how quickly norms shift depend on a number of factors, such as the visibility of the message, the credibility of the source of the information, and the consistency and clarity of the message; these factors, in turn, determine law's expressive power.

Generally, government has a huge advantage in shaping social meaning, in part because the uniqueness and emphatic means of government speech helps to guarantee a minimal level of credibility and sincerity that demands the public's attention. Law also guarantees a powerful forum for publicizing the new norm. The ACA is a perfect example of this as it has received overwhelming attention in the mainstream media. President Obama's use of the bully pulpit to tout and explain healthcare reform repeatedly, as well as the Administration's use of its websites to highlight the benefits of reform and to generate anticipation for enrollment

149. See, e.g., Robert D. Cooter, *Keynote: Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 10-11 (2000) (explaining this phenomenon in the context of owners picking up after their dogs).

150. See, e.g., Sunstein, *Social Norms and Social Roles*, *supra* note 130, at 928-30.

in 2014, are examples of the powerful tools available to government speakers.¹⁵¹ Moreover, the government's presumption of credibility in messaging and in predictions about behavior are illustrated by scholars and judges' reliance on CBO statistics estimating the amount of revenue the ACA penalty will generate based on predictions of the number of consumers who will forego buying insurance despite being subject to the mandate.

Clarity of message will be a big challenge, however, because of the law's complexity. This complexity has made it easy for opponents to feed voters wrong information, such as the creation of death panels, which fuels public fear and opposition. Where government is trying to solve a multi-faceted collective action problem, such as the healthcare access/cost problem that requires facilitating coordination between many different public and private actors, it may require a massive technical, detailed, and complex regulatory scheme that can seem impenetrable to consumers, making it difficult to construct a clear, consistent and powerful expressive message.¹⁵²

Trust is also a critical factor in determining whether consumers embrace the ACA's moral messaging. In an environment where issues are highly politicized and public mistrust of the public or private actors delivering the message is salient, the expressive characteristics of law may not have as much moral or practical force for everyone. Such polarization has certainly characterized the health reform debate, but this polarization was largely fueled by legal challenges to the law that have been settled, and the heated rhetoric is starting to die down.

One complicating factor is that while the federal government is the creator of the ACA and has been its key promoter so far, states will have to play a key role, and trust is generally greater the closer the public is to the lawmakers delivering the message. In states that are embracing reform and acting in partnership with the federal government, this can strengthen the credibility and force of the federal government's message. In states that are resisting health reform, or only proceeding in a grudging way, the message will likely get diluted or overwhelmed by contradictory messages from officials who are vocal opponents of reform and closer to the people that the federal government needs to reach.

151. See, e.g., *The Healthcare Law & You*, HEALTHCARE.GOV, <http://www.healthcare.gov/law/> (last visited Feb. 19, 2013); see also *Affordable Care Act*, U.S. DEP'T OF LABOR, <http://www.dol.gov/ebsa/healthreform/> (last visited Feb. 19, 2013).

152. See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1683-87 (2000) (describing the important signaling and coordinating functions of legal and social norms); Sunstein, *On the Expressive Function of Law*, *supra* note 127 (describing the role of norms in solving collective action problems).

Another variable is the role of consumer groups and public interest organizations. Groups advocating for greater healthcare access are playing a key role in providing consumers information about reform generally and specifically about enrollment through the exchanges. These consumer organizations are already trusted by certain constituencies, and to the extent the government is able to elicit help from these trusted private partners, this can give its message greater force and credibility. On the other hand, organizations mobilized against reform continue to use legal and social action to undermine reform efforts with their constituencies as well.

Although there are many variables that impact the government's ability to craft and publicize its message effectively, the federal government has successfully leveraged its expressive power before, and a close look at its reform rhetoric suggests its intent to do this again to try to ensure adequate participation in the new private insurance expansion. Although expressive law theories do not have predictive power, they do provide a framework for thinking about how the ACA could expressively encourage consumer participation in the new market despite legal choice and weak economic sanctions. The final part of this Article explores this by analyzing the expressive messages of the health reform law, existing norms that the ACA is trying to change, and the potential effects on certain groups of the uninsured, including the "young and healthy," those deemed higher risk, and those adamantly opposed to the ACA.

D. *The Expressive Force of Penalties Versus Taxes*

Before exploring this potential expressive effect, one might wonder about the importance of an expressive "mandate" as opposed to a "tax" label in light of the obvious regulatory character of the shared responsibility payment. Expressive law scholars note that when the government decides to tax or subsidize an action, this is another way of constructing social meaning. Regardless of whether an assessment is labeled as a tax or a penalty, does this not send a clear message that buying insurance is the desirable action?

A number of people have questioned the effectiveness of taxes as a regulatory tool. In a recent paper on *Taxation as Regulation*, Tax Law Scholar Reuven Avi-Yonah says that while regulation may be a legitimate goal of taxation in some cases, it can not effectively serve that function for the ACA.¹⁵³ Avi-Yonah gives two reasons for this. First, as a policy matter, the "health care tax," as he calls it, is relatively complex, has difficult rules

153. Reuven S. Avi-Yonah, *Taxation as Regulation: Carbon Tax, Health Care Tax, Bank Tax and Other Regulatory Taxes* 2-3 (U. Michigan Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-020, 2010), available at <http://ssrn.com/abstract+2102426>.

defining when it even applies, and disproportionately impacts the poor.¹⁵⁴ Second, he says that calling it a tax “may dilute its effect because people tend to have a different reaction to not paying taxes than to avoiding penalties.”¹⁵⁵ In other words, it does not convey a clear, strong social norm about the importance of buying health insurance or to whom the obligation attaches.

Health law scholar John Blum offers an even more troubling critique of the problem with government’s uses of “sin taxes” to perform a regulatory function. In his article, *Sin Tax, Forgiveness and Public Health Governance*, Blum focuses on traditional sin taxes like taxes on alcohol and tobacco, highlighting the disconnect between the government’s regulatory goals of behavior modification with its goals of revenue generation.¹⁵⁶ He notes that these goals are “ultimately contradictory as success in changing public behavior would negatively impact the potential of such taxation to raise revenue.”¹⁵⁷ More importantly, however, he suggests that the “tax” label may implicitly send a message that reinforces existing bad norms and contradicts the government’s regulatory goals:

A lesser explored approach to sin taxes is to analyze the implicit message of this taxing strategy as a type of license to engage in the very conduct such an instrument is directed to prevent. Pushing the implicit inquiry, it can be argued that sin taxes extend beyond a mere gesture of acquiescence and constitute a deliberate form of public forgiveness. Unlike most forms of forgiveness that have been identified in the literature, sin tax seen as a modern day indulgence may, in fact, promote a public health policy that is both irresponsible and counterproductive.¹⁵⁸

Thus, calling the shared responsibility payment a “tax” could send a message that the tax is not only a legally equivalent choice to buying insurance, but is equivalent as a moral or policy matter, which would undermine the government’s primary goal of getting people to buy

154. *Id.* at 8. This criticism is borne out by polling as of July 2012. See KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL: JULY 2012, at 1 (2012), available at <http://www.kff.org/kaiserpolls/upload/8339-F.pdf> [hereinafter KAISER HEALTH TRACKING POLL JULY 2012] (“There is confusion over who will be subject to the tax penalty under the mandate: the poll finds that one in five Americans believe they will have to pay a penalty in 2014, even as experts suggest the share will be considerably smaller.”).

155. Avi-Yonah, *supra* note 153, at 8. This too is borne out by the July 2012 Kaiser poll: “[U]pwards of six in ten [still view] the mandate unfavorably whether it is described as a ‘tax’ or as a ‘fine.’” KAISER HEALTH TRACKING POLL JULY 2012, *supra* note 154.

156. John D. Blum, *Sin Tax, Forgiveness and Public Health Governance* 1-2 (Loyola Univ. Chicago Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 2012-010, 2012), available at <http://ssrn.com/abstract=204267>.

157. *Id.* at 2.

158. *Id.* at 1-2.

insurance. If the tax is viewed as adequate compensation for the social cost of failing to buy insurance, it creates implicit moral permission to stay uninsured. This, in turn, means that one's decision to buy insurance is more likely to only turn on the kind of "private costs and benefits" referred to by Cooter and Siegel.

Another question presented by the ACA mandate is why any incentive or sanction is needed at all in light of what seems to be widespread public understanding of the importance of, and desire for, health insurance.¹⁵⁹ Unlike traditional sin taxes, the "health care tax" is not designed to prevent or dampen behavior that people enjoy or to which they may even be addicted. Rather the ACA's tax/penalty operates as an additional incentive to do something that would provide a clear benefit to people — to be able to access healthcare and avoid potentially ruinous financial debt. Indeed, this was the assumption underlying President Obama's initial resistance to a mandate.

One cannot simply assume, however, that public expressions of a desire for affordable insurance coverage will automatically translate into a decision to buy insurance on the new health benefit exchanges, even if the ACA makes insurance "affordable" by government's standards. People often express preferences or support policies as citizens (through voting, for example) that may not be consistent with the personal decisions they make in their day-to-day lives.¹⁶⁰ Moreover, although the public may understand the importance of insurance and even desire it in the abstract, whether any individual values it enough to purchase it is a more complicated question. The "benefit" of insurance may be valued differently based on one's prior experiences and anticipated health needs. And the cost of buying insurance must be understood not only as its price (which is unpredictable), but in terms of the value of trade-offs. Insurance deemed "affordable" under the law will likely still require those without a lot of disposable income to give up

159. This is distinct from the narrower and more politicized (and misleading) question about whether people supported President Obama's healthcare reform (otherwise referred to as "Obamacare").

160. See Sunstein, *Social Norms and Social Roles*, *supra* note 130, at 959-60 ("There is an evident and pervasive difference between people's choices as consumers and their choices as citizens. This is because people are choosing quite different things. In their private capacity, people may watch silly situation comedies; but they may also support, as citizens, the use of government resources to assist public broadcasting. Some people seek stringent laws protecting the environment or endangered species even though they do not use the public parks or derive material benefits from protection of endangered species — and even though in their private behavior, they are unwilling to do much to protect environmental amenities . . . [W]hat people favor as political participants can be different from what they favor as consumers. It is in part for this reason that democratic outcomes are distinct from those that emerge from markets.").

other goods or services in order to be able to purchase insurance. The trade-offs one is willing to make depends not only on how much consumers value insurance, but also the importance or value of the goods they would need to give up. It is impossible to predict how these trade-offs will factor into each individual's decision making, complicating even the more traditional law and economic approach to predicting behavior.

Thus, both the "taxing" and "penalty" approaches create uncertainty about what choices people will make under the law. But the penalty/mandate rhetoric is more likely to create a powerful expressive message that enables the federal government to achieve its regulatory goals regardless of the amount of economic sanction. The next part considers whether the ACA creates a sufficiently powerful expressive message to influence people to buy insurance rather than pay the tax/penalty.

VI. THE ACA'S MORAL MANDATE: DEFINING THE MEANING OF CHOICE

In light of the fact that the ACA gives consumers a legal choice to not buy insurance and that the economic sanctions are too low to exert meaningful pressure on consumers to buy insurance, the federal government will likely need to harness the ACA's expressive power to generate adequate consumer participation. This part takes a closer look at the potential of this power. Sections A and B identify the norms that the ACA is trying to change and create. Section C considers more specifically how this expressive function may influence people's behavior.

A. Norms Pre-ACA

Few scholars have considered the expressive or norming function of insurance. Deborah Stone provides one of the more in-depth discussions of insurance, asserting that it "is a social institution that particularly invites moral contemplation about suffering, compassion, and responsibility [and in] so doing [] enlarges the public conception of social responsibility."¹⁶¹ Unfortunately, prior to the ACA, we did not have a comprehensive national discussion that allowed public contemplation about whether the health policy decisions being made were fair, smart, and part of a coherent moral philosophy about the role and responsibility of government and other actors in the system. Rather, much of health policy has been crafted in a piecemeal, incremental, and often opaque fashion. This does not mean that it is impossible to identify norms or discern social meaning of action from our pre-ACA healthcare delivery and financing system. But to the extent that

161. Deborah Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, in *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY* 52, 54 (Tom Baker & Jonathan Simon eds., 2002).

program design or certain conduct by insurers, government, or individuals has any social meaning, it is often the product of messages or norms that arise unintentionally out of an incoherent patchwork of public entitlements and private market experiences that can make meaning hard to discern. Recall that the expressive value of law depends on clarity, visibility and the meaning of signals, and context is critically important for drawing moral inferences from action or inaction.¹⁶²

1. Healthcare Financing Patchwork

In order to identify the norms and values communicated through the pre-ACA system, it is first important to understand the system design, including which groups have fallen through the cracks and why. Private insurance coverage depends heavily on employment, and employment-based insurance tends to be more affordable than insurance purchased on the individual market, in part because of the greater bargaining power of employers and a healthier pool of employees. But it is also more affordable because of special legal protections for employees that prevent individualized risk rating and denials of coverage, as well as favorable tax treatment that creates significant financial incentives for employers to subsidize the cost, reducing the premiums employees must pay.¹⁶³ Those without access to employment-based insurance — especially those in low-wage positions and certain service sectors, part-time and temporary employees, and the self-employed — are left to fend for themselves in an individual insurance market that is largely unregulated. Insurance underwriting practices that were legal pre-ACA, such as denials of people deemed too risky, exclusions of care that people need most, and risk rating, have kept the people in greatest need of care from getting it.¹⁶⁴ Moreover, in the last several years frequent rate increases that have not been justified actuarially have resulted in greater numbers of even “healthy” people being effectively excluded from the market.¹⁶⁵

Although there is no constitutional right for all citizens to healthcare,¹⁶⁶ public programs like Medicare and Medicaid create statutory entitlements to

162. Sunstein, *On the Expressive Function of Law*, *supra* note 127, at 2040 (noting that the “complex network of norms governing the purchase of insurance” makes it difficult to infer social meaning from the failure of purchase insurance). In that case, Sunstein was talking about whether any relevant judgment could be made about the lack of insurance for purposes of determining tort liability.

163. See Hoffman, *supra* note 48.

164. *Id.* at 49.

165. *Id.*

166. One narrow exception is applied to those detained by the government. The Eighth Amendment’s prohibition against “cruel and unusual punishment” has been interpreted to

insurance coverage for certain groups — traditionally the elderly, those disabled by illness or injury, very poor children, pregnant women, and some families with children. This system has tended to exclude the working poor and childless adults who are also effectively excluded from an insurance market dominated by powerful insurers allowed to deny coverage or set rates at prohibitively expensive levels. Millions of children also remained uninsured under the old system because their families were not poor enough to qualify for public insurance, yet were too poor to afford insurance in the private individual insurance market. Finally, many documented immigrants have also fallen into this category because federal law temporarily excludes them from public benefits, and they often work in jobs that do not offer health benefits.

It is also important to understand the individual and societal harms suffered as a result of the coverage gaps that existed pre-ACA. Numerous studies have shown that lack of insurance is an impediment to healthcare access, contributes to poor health outcomes, and has been a significant factor in many bankruptcies.¹⁶⁷ Moreover, the individual and societal costs of uninsurance have been growing in light of several troubling trends: job loss caused by economic downturns; cost-shifting to privately insured consumers and the government to subsidize uncompensated medical care; unnecessary health expenditures to treat otherwise preventable conditions and medical crises; and threats to the healthcare infrastructure, especially the safety net providers serving large numbers of uninsured and Medicaid beneficiaries. Healthcare reform is a response to this evidence of a growing crisis.¹⁶⁸

2. Government Messaging

One clear and consistent message from the federal government regarding healthcare is that there is no constitutional right to healthcare, and thus no legal duty by government to ensure affordable healthcare for all. Unfortunately, some federal and state officials have also made off-hand and inaccurate remarks suggesting that insurance is not even that important

require treatment for prisoners' serious medical needs. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

167. See, e.g., Andrew P. Wilper et al., *Health Insurance and Mortality in US Adults*, 99 AM. JUR. PUB. HEALTH 2289, 2292 (2009); David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741, 743 (2009).

168. See 42 U.S.C. § 18091(2)(E) (2011) (citing Congressional findings that "[t]he economy loses up to \$207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will significantly reduce this economic cost.").

because people can always get care in the emergency room.¹⁶⁹ Such comments seem to reflect officials' assumptions that there is no moral duty on the government to ensure healthcare access beyond the emergency room.

Nonetheless, the federal government has played an important role in facilitating healthcare access, most visibly by creating public healthcare entitlements for certain groups, and through less visible legal protections and incentives that make it cheaper for some employees to purchase private insurance through their employers. According to Stone, these are the kinds of choices that invite moral contemplation about societal responsibility and compassion, and public entitlements are commonly understood as reflecting a moral duty to help those who are in need and "deserving"¹⁷⁰ — Medicaid helps the extremely poor who are also vulnerable to exclusion by the private market by virtue of their age, disability, or condition; Medicare helps beneficiaries considered deserving by virtue of having paid into the system and vulnerable due to advanced age. Each program has been expanded at various times to include more people or certain categories of people who seem to fit the "deserving" criterion. With each expansion or change to the program, there is some moral contemplation and conversation about the need for the expansion; but to the extent that social programs like this have allowed "moral contemplation" to occur, it has tended to be in a very segmented way, with each new policy narrowly focusing on particular services or groups, and without meaningful participation and understanding by the public at large.¹⁷¹ At the other end of the spectrum, economic and legal protections for employees with access to employment-based insurance has received a lot less public attention, which means even less opportunity for an examination of the moral justification underlying these protections.

But in attempting to discern society's values or norms as reflected by these choices, one must also consider the government's choices to exclude

169. See, e.g., Greg Sargent, *Romney: Let Them Go to Emergency Rooms*, WASHINGTON POST OP-ED (Sep. 24, 2012), available at http://www.washingtonpost.com/blogs/plum-line/post/romney-let-them-go-to-emergency-rooms/2012/09/24/3ac90b0e-0680-11e2-aff-d6c7f20a83bf_blog.html (discussing Romney's comments on a CBS interview); see also Timothy Noah, *The Emergency-Room Gap: Putting to Rest a Cherished Myth About the Uninsured*, SLATE.COM (Apr. 14, 2010), available at http://www.slate.com/articles/news_and_politics/prescriptions/2010/04/the_emergencyroom_gap.html.

170. See ROBERT STEVENS & ROSEMARY STEVENS, *WELFARE MEDICINE IN AMERICA: A CASE STUDY OF MEDICAID* 57, 61–62 (1974); see also Guetzkow, *supra* note 50 at 174 ("'Deserving' and 'undeserving' are not categories that politicians and bureaucrats use when devising social policy. Deservingness is instead a second-order analytic tool used by researchers to help make sense of social policies – their scope, their generosity, and their political appeal.").

171. See *generally* STEVENS & STEVENS, *supra* note 170.

certain groups from the public system or to leave certain groups to fend for themselves in a dysfunctional and largely unregulated private market. It is unclear why, for instance, people forced to look to the individual market for coverage should receive less government protection than those fortunate enough to be employed by corporations wealthy and powerful enough to bargain on their employees' behalf, or why childless adults at the federal poverty level are less deserving of government help than those with children. If the government's piecemeal approach to healthcare design reflects a belief that certain groups are more "deserving" of compassion or help than others, then this suggests a very narrow understanding of "social responsibility" in healthcare. But to what extent are these beliefs consistent with the prevailing attitudes of the rest of society? These choices help shape norms with respect to insurance status: certain groups are more likely to be insured than others. But they also raise questions about what meaning, if any, attaches to the status of being insured or uninsured.

Pre-ACA, the social meaning of not having insurance was unclear because of the complicated regulatory and market-based factors impacting such decisions. For example, to the extent that failure to get insurance was linked to unaffordability, some people experienced shame because of their failure to earn enough to afford it — this served as yet another indicia of poverty which was also stigmatized. Interestingly, some of those eligible for Medicaid have not enrolled in order to avoid the stigma or humiliation associated with navigating a difficult and sometimes hostile bureaucracy that requires people to prove their qualifications for help.

On the other hand, many have viewed the unaffordability of insurance as a signal of the unfairness created by bad actors (insurers) in the private system, a general moral failure of government to fix the problem, a lack of concern by the government for the groups most at risk of falling through the cracks, or some combination of all three. This sense of unfairness has grown as greater numbers of people have suffered job loss and lost insurance due to economic factors outside of their control. The implicit message received by these groups was "You're on your own" — if you were not lucky enough to have the right kind of job or deserving enough to receive direct government help. For those at the greatest risk of uninsurance — women, racial and ethnic minorities, members of the LGBT community, and people with a chronic condition or disability that was not totally disabling — this implicit message was potentially even more marginalizing and harmful. Because these groups have been excluded and suffered discrimination more broadly, especially in employment, they have fewer resources to spare and are more vulnerable to falling through the coverage gaps. In this way, the prior healthcare system could be seen as reinforcing a longstanding and broader inequality that devalued these groups.

One group further complicates attempts to glean pre-ACA norms: the “young and healthy.” This group is too old to qualify as dependents on a parent’s plan (if the parents are fortunate enough to have insurance), may not have a job that provides insurance, and is least likely to be able to appreciate the importance or value of paying for insurance as a young adult. Lawmakers have either deliberately or inadvertently reinforced the message that health insurance is not important for this group, by neglecting them in health policy making and by repeatedly referring to them as the “young and healthy.”

3. Messaging by Private Insurers

Discerning even implicit messages from private health insurers is a bit more complicated. On the one hand, the practices described above send a clear message that they do not want to cover people who are too “risky” — they deny, or charge prohibitively expensive rates to, those most in need. Insurance companies have also operated in other explicitly discriminatory ways, such as redlining to avoid predominantly minority communities, charging women rates higher than men, and disproportionately targeting certain kinds of conditions for coverage exclusions or caps, like treatment for HIV or mental healthcare.¹⁷² Such practices send a powerful message that insurers view these groups as less desirable customers and their health needs as less valuable. This in turn creates mistrust and resentment among the very people the government will need to recruit for health reform to be successful.

Insurers’ practices with more “desirable” (especially healthy) customers are more complicated. While insurers want these customers and make them the focus of marketing efforts, repeated rate increases without adequate justification have forced many people to give up coverage before realizing its value, creating some resentment and mistrust. But mistrust is likely highest among those who have been subject to illegal rescissions or discovered that their plan did not provide necessary coverage after becoming seriously ill. The message implicitly sent: insurance is a luxury that only those with resources can afford, and like any other business, insurers will do what they can to limit expenditures and maximize profits, even if it means denying people’s essential health needs.

Despite such confusing and apparently contradictory messages being sent in the health insurance context, Stone provides an example of how some private insurers have successfully leveraged their messaging power to shape the meaning of insurance and influence behavioral norms in the life

172. See generally INST. OF MED., *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* (2003).

insurance context. She shows how in this context, marketing by private insurers has played on and helped to construct notions of family responsibility that make insurance a moral imperative:

In contemporary marketing, life insurance is still often portrayed as a way of meeting one's family obligations and even as a way of strengthening family ties. "Another way to say 'I love you' is with good insurance protection," declares one of the Metropolitan Life Insurance Company ads, showing Lucy (from Charles Schulz's Peanuts comic strip) knitting a pair of baby booties.¹⁷³

In addition to this message of personal responsibility, Stone says that insurers have also helped to "highlight the collective, mutual-aid aspect of insurance and promote conversation about the contours of moral responsibility in a community."¹⁷⁴ In this way, insurance can act as a "kind of moral education of the citizenry."¹⁷⁵

Nonetheless, Stone acknowledges that this collective aspect of insurer messaging can be harder to see in private insurance, "especially those segments that are marketed and organized as individual policies instead of group policies, [because they] may appear more as bilateral market contracts rather than any kind of community-sponsored aid system."¹⁷⁶ The opacity of the mechanics and regulatory environment of private insurance also obscures the role of social and collective participation in the context of group health insurance plans as well. Many people know it is easier to get health insurance through their employer, but they do not understand what role the government played in this. Nor do they understand the importance of collective participation by a large and diverse pool of relatively healthy people, which enables individuals to be responsible by purchasing affordable coverage. Thus discerning norms or meaning in the pre-ACA health insurance context is quite complicated: it is not clear what meaning, if any, should be attached to one's insurance status; it is not clear to what extent the public viewed healthcare as an essential good and the government's piecemeal approach as a moral failure; and it is not clear to what extent people embraced norms of individual or social responsibility.

The government's explicit and implicit messages not only disclaimed government responsibility for healthcare broadly, but also undermined the possibility of discerning a clear social meaning from the state of being uninsured. Mixed messages sent by private insurers engendered confusion

173. Stone, *supra* note 161, at 57-58.

174. *Id.* at 55. Stone also claims that "private insurance marketing is a cultural force that legitimates social obligation and mutual aid [and also] weaves in a strong strand of individual responsibility and self-help." *Id.* at 58.

175. *Id.* at 61.

176. *Id.*

and mistrust, and further ambiguated the meaning of insurance. What was clear, however, was that the number of uninsured was growing, and policy analysts were predicting that things would get worse. The state of being uninsured was already a norm for some groups, and without government intervention, the trend suggested a widening of this norm.

B. *The ACA's Moral Mandate and Other Expressive Functions*

When an existing norm is harmful or an impediment to individual and societal well-being, it is appropriate for government to leverage its expressive power to change these norms. And this is precisely what the ACA tries to do. In addressing the need for healthcare reform, President Obama acknowledged the troubling and harmful messages communicated as a result of the government's piecemeal approach. He also noted inconsistencies between the government's and the public's understanding of healthcare as an essential good and the government's role in ensuring healthcare access for all.¹⁷⁷ He highlighted the unfairness of a system that allowed for-profit insurers to control access, and government's failure to protect consumers who try to act responsibly by purchasing insurance only to find themselves vulnerable to financial ruin or unable to get care because of bad faith denials, illegal rescissions, or the sale of junk insurance. Obama also criticized the fact that private insurance access has depended primarily on certain kinds of employment, especially during a recession when so many people were losing their jobs or did not have access to the kinds of jobs that provided insurance.

Although health reform was not a radical federal transformation of the healthcare system,¹⁷⁸ the ACA does have transformative potential to redefine

177. See, e.g., Katherine Brandon, *The President on Health Care: "We are Going to Get this Done"*, WHITE HOUSE BLOG (July 17, 2009, 5:42 PM), <http://www.whitehouse.gov/blog/The-President-on-Health-Care-We-are-Going-to-Get-this-Done>; see also Peter Orszag, *To Save Money, Save the Health Care Act*, N.Y. TIMES, Nov. 4, 2010, at A29; *The Right Care at the Right Time: Leveraging Innovation to Improve Health Care Quality for All Americans: Hearing Before the Comm. on Finance United States Senate*, 110th Cong. 57-69 (2008) (statement of Peter R. Orszag, Director, Cong. Budget Office).

178. First, it does not create a "constitutional right to health care" nor is the federal government entering the business of delivering care; rather it uses its regulatory power to create a platform for a better functioning private market based largely on the kinds of protections against exclusion and risk rating that already existed for employees, and by strengthening the power to regulate rates that state regulators already had. Second, the federal government continues to rely heavily on and give great deference to states in both the structure and implementation of reform; it contemplates that it will have to play a significant role in operating federal exchanges for residents of states that do not create their own, but this does not seem to be the federal government's preference. Finally, the ACA does not create a universal or centralized system of healthcare financing for all; rather it builds on our existing

the federal government's normative commitment to ensuring affordable care for all, and to create a shared sense of commitment and responsibility to make this work. This transformative idea is embodied in the expressive characteristics of the ACA, as well as lawmakers' messaging about the ACA. The ACA may not have created a true legal mandate, but this Part argues that the federal government uses its expressive power through the ACA to create a "moral mandate" for individuals to do their part by buying insurance based on this transformative idea of shared responsibility.

As described earlier, the statutory language of the ACA uses mandatory and punitive rhetoric in describing citizens' obligations under the law. The emphasis has been on the "individual coverage requirement" or mandate in public conversations about the law. Moreover, the law requires people who are subject to the mandate and fail to get insurance to pay a "shared responsibility payment," also referred to as a "penalty" throughout the law. The label "shared responsibility payment" simultaneously expresses an individual obligation to buy insurance and a collective obligation to participate in a system in which everyone must share some responsibility for ensuring affordable coverage. The penalty language suggests that failure to buy insurance is wrongful behavior that deserves punishment, implicitly signaling that buying insurance (and not making the shared responsibility payment) is the "right" way to honor one's individual obligation and duty to the collective. Finally, as noted above, the government repeatedly emphasized that increasing insurance coverage through the coverage requirement is essential to creating effective health insurance markets, making clear that an individual's failure to buy insurance has broader consequences that could hurt others' ability to get care.

Importantly, this responsibility rhetoric does not just apply to individuals; the ACA emphasizes a "shared responsibility" that reflects the government's new priority and commitment to consumer healthcare access. In this way, the ACA attempts to counter the prior message of "You're on your own" with a message that is more consistent with Obama's 2012 campaign message, "We're in this together." Through the ACA, the government emphasizes a new commitment with benefits and responsibilities, and tries to educate people about the extent to which everyone's success and well-being is already connected: if people come together in the new health benefit exchange, then this collective action can help ensure affordable insurance and a fair playing field for everyone; this, in turn, allows people to exercise their individual moral responsibility to buy insurance. Like messaging by private insurers in the life insurance context, the ACA's message is one of

public-private system of financing and delivery, a system that continues to be fragmented and depend on the voluntary participation of private insurers, providers, and consumers alike.

collective aid, with a healthy dose of personal responsibility; but in this case, the message is more visible and clear, due in large part to President Obama's use of his bully pulpit in explaining the law.

The government's own moral and legal commitment to ensure affordable and meaningful coverage is a critical part of this message because this commitment is important for people's acceptance of the mandate. For example, although polling showed the mandate itself was controversial, people were more likely to be supportive of the mandate if a public option was included — likely because this was the clearest proxy for government's assurance of affordability and meaningful protection.¹⁷⁹ If consumers are being told to put their money (and faith) into a private insurance market mistrusted for so long, they will understandably be skeptical. But if consumers view the exchanges as vehicles through which government will protect them and help them get the care they need, the mandate is part of a reciprocal responsibility between government and individuals that makes it much more palatable. Indeed, polling shows that many people are predisposed to a collective system that combines mutual aid and individual responsibility. For example, when people who supported the mandate were asked to explain why in their own words, 32% said because everyone needs healthcare/insurance, 17% said it expands coverage, 16% said people should pay their fair share, and 15% said it controls costs.¹⁸⁰ The same poll found that some people originally opposed to the mandate, changed their mind once they were informed about why the mandate was necessary¹⁸¹ and that it would not take away their employment-based healthcare.¹⁸² Other surveys show that significant

179. See, e.g., ISABELLA FURTH ET AL., VIEWPOINT LEARNING, INC., HEALTH COVERAGE FOR ALL CALIFORNIANS: CATCHING UP WITH THE PUBLIC: A REPORT WITH THE PUBLIC AND WITH BUSINESS AND CIVIC LEADERS (2006), available at http://www.viewpointlearning.com/wp-content/uploads/2011/04/Health_Coverage_for_All_Californians.pdf [hereinafter HEALTH COVERAGE FOR ALL CALIFORNIANS] (determining public views on health reform through education and dialogue that considered significant healthcare reforms, as opposed to simply polling people about piecemeal or incremental approaches).

180. See KAISER FAMILY FOUND., *supra* note 29, at 2.

181. See *id.* at 3 (noting that public support for the mandate goes up depending on which messages or information opponents receive). The following information caused support for the mandate to increase: “. . . without such a requirement, insurance companies would still be allowed to deny coverage to people who are sick;” “. . . people would not be held to this requirement if the cost of new coverage would consume too large a share of their income;” “. . . without such a requirement, people may wait until they are seriously ill to buy health insurance, which will drive up health insurance costs for everyone.” *Id.*

182. *Id.* (“Perhaps surprisingly, the most effective information in terms of changing people's minds is the basic reminder that ‘under the reform law, most Americans would still get coverage through their employers and so would automatically satisfy the requirement without

numbers of people are willing to pay more so that others can afford care.¹⁸³ By adopting a more proactive and explicit consumer protection role, the government is sending a message to people that such a system can exist and will be created through the health benefit exchanges.

This commitment is not limited to ensuring access to affordable insurance; the ACA's "Patient Protection" part of the message includes a commitment to ensure a benefits package that is meaningful. As an instrument of social reform, insurance has performed a standard-setting role in many arenas, and the federal government is using the ACA to help define a moral and legal baseline for care that is deemed essential and furthers equity goals.¹⁸⁴ Although the ACA left this guarantee of "essential health benefits" substantially undefined, and the Department of Health and Human Services (HHS) punted responsibility for this to the states,¹⁸⁵ the federal government has affirmed this commitment in other ways. Mandating that preventive care be covered without copayments is one example of this.¹⁸⁶ And HHS has used its expressive power to affirm its commitment to equity, specifically for groups that have been either excluded or not able to get meaningful benefits in the prior system due to express or more subtle forms of discrimination. Women, people with mental health conditions, and people with HIV are a few of the groups that the Administration has targeted with messages of inclusion and assurances that prior inequities or discrimination would be eliminated.¹⁸⁷

Finally, the ACA does not simply focus on the financial costs and benefits of insurance; healthcare access is really at the heart of the ACA's messaging and even its title, the Patient Protection and Affordable Care Act reveals that insurance is simply a means toward this end. During Obama's

having to buy any new insurance.' After hearing that message, favorable views of the mandate went up 28 percentage points to 61%.")

183. See, e.g., PEW RESEARCH CTR., SUPPORT FOR HEALTH CARE OVERHAUL, BUT IT'S NOT 1993 (2009), available at <http://www.people-press.org/2009/03/19/support-for-health-care-overhaul-but-its-not-1993/>.

184. See Stone, *supra* note 161, at 63.

185. State Selection of Benchmark, 77 Fed. Reg. 70,644, 70,648 (Nov. 26, 2012) (to be codified at 45 C.F.R. § 156.100).

186. ACA § 1302(b)(1)(I) (codified at 42 U.S.C. § 18022 (2011)).

187. See, e.g., News Release, U.S. Dep't of Health & Human Servs., Secretary Sebelius Announces Public-Private Partnerships to Turn the Tide Together in Fight Against HIV/AIDS (Jul. 22, 2012), available at <http://www.hhs.gov/news/press/2012pres/07/20120722a.html>; News Release, U.S. Dep't of Health & Human Servs., Health Care Law Gives Women Control over Their Care, Offers Free Preventive Services to 47 Million Women (Jul. 31, 2012), available at <http://www.hhs.gov/news/press/2012pres/07/20120731a.html>; News Release, U.S. Dep't of Health & Human Servs., Health Care Law Increases Number of Mental and Behavioral Health Providers (Sep. 25, 2012), available at <http://www.hhs.gov/news/press/2012pres/09/20120925a.html>.

speeches about health reform, he emphasized how insurance helps people get the right care at the right time — such as preventive care and on-going monitoring of chronic conditions to prevent the kind of crises that lead to hospitalization and more serious and costly problems down the line.¹⁸⁸ Thus insurance is also important because of the behavioral effects it can have — by encouraging people to access preventive and regular care through a “medical home,”¹⁸⁹ insurance serves a teaching function that promotes greater individual responsibility with respect to managing health and promoting wellness.¹⁹⁰ In this way, the ACA treats insurance as an “instrument of social reform,” seeking not only to change norms around insurance status, but expecting coverage to facilitate greater understanding, access, and responsibility in personal health management more generally.¹⁹¹

Thus, through the ACA, the government is emphasizing the moral responsibility to get (and use) insurance — a “moral mandate.” But this is only one part of the message — the moral mandate is part of a new government commitment to society’s health and well-being, as well as to equity in healthcare. It is also an acknowledgment of the important regulatory role government must play in facilitating the kind of collective action and shared responsibility that makes insurance affordable, accessible, and meaningful for everyone on equal terms. The moral mandate’s expressive force depends on the government’s ability to transform the culture of insurance and healthcare in ways that overcome the longstanding apathy, confusion, mistrust, or isolationist feelings generated by the harmful messages and norms that defined the pre-ACA healthcare market.

188. See Brandon, *supra* note 177.

189. The concept of a medical home is defined as a “cultivated partnership between the patient, family, and primary provider in cooperation with specialists and support from the community.” *What is a Medical Home? Why is it Important?*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.hrsa.gov/healthit/toolbox/Childrenstoolbox/BuildingMedicalHome/whyimportant.html> (last visited Apr. 26, 2013).

190. See Stone, *supra* note 161, at 62-63 (“Insurance is a form of what Foucauldian scholars call ‘discipline,’ that is, a system of inculcating norms, supervising behavior, and enforcing compliance with norms [For example], [p]roponents of mandatory automobile liability insurance believe insurance ‘was a way of inculcating a sense of responsibility toward others, teaching the importance of careful driving, and compelling automobile owners to assume financial responsibility for the consequences of their driving.’”).

191. We see this at the federal level with an emphasis on preventive care, medical homes, and tools to encourage better patient education and communication by providers in patient self-management. This is also evident as stakeholders and exchange officials discuss how to not only make insurance accessible, but how to help newly insured consumers understand and realize its benefits, especially for those chronically uninsured populations who have already developed habits of delaying seeking care until it becomes too late.

C. *Implications of the ACA's Moral Mandate: Defining the Meaning of Choice*

Part V revealed how government can expressively influence decisions about health and safety, as well as high stakes financial decisions in the private market place, in the absence of legal enforcement or sanctions. Moreover, Part VI.B noted that private insurance companies were successful in their own marketing attempts to shape the meaning of having life insurance as a signal of responsibility. Both kinds of decisions are implicated by the ACA's coverage requirement, which confronts consumers with a choice between purchasing insurance or paying the tax/penalty — a choice with important health and financial implications. This part considers the ways in which the ACA's expressive mandate to buy insurance may influence this choice.

As should be clear from the above discussion, for many people a moral mandate does not necessarily create a new social meaning as much as it reflects the underlying attitudes of a community that already has a strong sense of personal responsibility to buy insurance and a willingness to participate in a system that ensures affordable healthcare coverage for all.¹⁹² For this group, the most important expressive function of the ACA is the government's commitment to remove existing impediments and make the market more transparent and fair. This commitment is clearest when considering the private and public insurance reforms together — the Medicaid expansion eliminated eligibility categories based on anachronistic assumptions of vulnerability and worth, and the mandate to buy insurance only applies to people who can afford to do so with the help of government subsidies and regulation designed to ensure affordability. In this way, the government signals to the public that it is using its power to fill in coverage gaps by addressing a collective action problem arising out of a fragmented healthcare system and dysfunctional individual insurance market, a problem that states have been unwilling or unable to solve.

It also signals that government will serve an important coordinating function to ensure the kind of collective participation that is necessary to ensure the new market will work, with health exchanges serving as this coordinating mechanism. Thus the moral mandate is important, but as an affirmation and reflection of those beliefs that had previously been obscured or could not be actualized because of market and regulatory failures beyond individuals' control. In this way, the ACA serves an important educative function — explaining regulatory and market changes that will enable people to act in ways that are more consistent with their internal norms of personal and social responsibility.

192. See McAdams, *An Attitudinal Theory of Expressive Law*, *supra* note 127, at 362.

There are two groups of people for whom the expressive function may need to do heavier lifting. The first is the group commonly referred to as the “young and healthy.” This group is less likely to have dependents (that would have triggered the responsibility norm even pre-ACA), and may be less likely to appreciate the health and financial benefits of insurance. Yet attracting these “healthy” members is critical to achieving a diverse enough pool to keep rates affordable. Indeed, this group is considered a primary target of the mandate. For these reasons, creating a moral obligation to participate in the system may be more challenging. Here again, the ACA’s educative function about the importance of their participation is what gives the moral mandate expressive force, and there are two important educative components. The ACA is a good platform to try to debunk the myth that young means healthy or that these adults do not need to think about healthcare yet. For example, some of the stories told and statistics cited throughout the debate and in *NFIB*¹⁹³ help illustrate this problem, though the constant rhetorical use of the label “young and healthy” likely undermines this message.

An equally important challenge is for government to educate these groups about the serious health and financial stakes driving healthcare reform, and the fact that reforms to ensure affordable and meaningful coverage will only work with a significant collective commitment to participate in this new system. To decide to gamble by not buying insurance has profound implications for others’ ability to access insurance — especially those most in need. In light of these social costs, one is not free, at least as a moral matter, to treat the decision to buy health insurance as an individual problem subject to one’s own cost-benefit analysis. As noted above, polling suggests some people already have an internal sense of fairness and appreciation for the collective good that might encourage them to comply with a mandate once they understand the implications.

For those without this internal norm, or where this norm is not enough to overcome an unfavorable cost-benefit analysis, the ACA may still influence their behavior, by stigmatizing the failure to purchase insurance as free-riding and not doing one’s fair share. To the extent the Obama Administration is successful at creating a market that is more accessible and affordable, more people will become insured. The social meaning of uninsurance changes if the promise of affordability is realized — no longer will people be able to blame the market or government’s regulatory failures. Discerning a clear meaning may still be tricky though. Unless one admits to paying the assessment, lack of insurance could still mean that one cannot

193. Although it did not seem to penetrate the joint dissenters’ understanding of the problem, Ginsburg relies on such statistics heavily in her dissent on the commerce question. See *NFIB*, 132 S. Ct. at 2611 (Ginsburg, J. dissenting in part, concurring in part).

afford it. Evidence of the correct meaning may not be easily visible, and thus it may be more difficult to create the kind of stigmatizing effect that would influence behavior. In contrast to the case of underwater mortgages, there also may not be enough opportunities in the healthcare context for the kind of frequent shaming needed to increase the social cost of foregoing insurance. This is an example of how the complexity of the law can undermine its moral mandate in ways that make the message less powerful.

The final category, and one that poses another significant challenge, is the group of people ideologically opposed to the ACA. Ideological opposition was salient in the political attacks on reform; these attacks reflected a struggle over the definition of social norms and the meaning of insurance and evidenced a deep philosophical divide about the proper role of government and individuals' responsibility to the broader community. Opponents characterized the mandate as an invasion of individual liberty and threat to freedom; "freedom," in turn, was defined as the freedom to not buy insurance or the kind of insurance required by government.¹⁹⁴ If not buying insurance is a symbol of their resistance to government's infringement on their liberty and government's attempt to redefine social norms to "socialize" health risk, then the failure to buy insurance will not be stigmatizing and this group will not be vulnerable to social shaming on this basis. Depending on how deeply this philosophical opposition runs, this group is unlikely to be swayed by a moral mandate justified by how it serves the collective good.

On the other hand, many of those ideologically opposed to the reform and the mandate, may have a strong internal sense of personal responsibility that would lead them to take advantage of the protections and subsidies offered in the new system once up and running. Much of the opposition to the reform seemed based on wrong information about the law — for example, that it was a federal takeover that would install death panels and hurt Medicare beneficiaries.¹⁹⁵ In fact, polls and surveys show a

194. Proponents have challenged the reality of this construction, arguing that meaningful liberty includes health and that real freedom to get and pay for healthcare cannot exist without government regulation of markets that make insurance affordable and meaningful.

195. See Angie Drobic Holan, *Top 5 Falsehoods about the Health Care Law*, POLITIFACT.COM (Jun. 27, 2012, 5:54 PM), <http://www.politifact.com/truth-o-meter/article/2012/jun/27/top-5-falsehoods-about-health-care-law/> (listing as the top five false claims about health reform that it is a government takeover of healthcare, that people could be jailed for not buying insurance, that the law rations care and denies treatments, and that it would create "death panels"). *But* see Sidney D. Watson, *Metaphors, Meaning, and Health Reform*, 54 ST. LOUIS U. L.J. 1313, 1314 (2010) (noting that some statements, for instance people speaking out about "death panels," "government rationing" and "getting government out of Medicare" do not necessarily reflect ignorance about health reform; rather these words are metaphors that reflect the moral values of those opposing reform).

disconnect between people's opposition to the health reform law proposed by Obama, especially when phrased as support for "Obamacare" or the "Affordable Care Act," and their support for many of the same consumer protections and market reforms when asked about these outside of the context of the ACA.¹⁹⁶ More importantly, when people are given information that educates them about the various reform proposals and they are encouraged to engage in a meaningful dialogue about the strengths and weaknesses of different approaches outside of the political context (like the explosive town hall meetings led by law-makers), people's positions change in ways that often defy typical partisan divides.¹⁹⁷

Now that the legal fate of reform has been settled, and the polarizing rhetoric is starting to die down, policy-makers and consumer organizations can do the kind of outreach that will engage the public in these more constructive ways. As we move into implementation, it should be easier to ensure that people receive more objective and accurate information about the ACA and how it will impact them.¹⁹⁸ This paves the way for the ACA to serve an educative function that, if successful, may reveal people's true preferences as their own sense of personal and familial responsibility leads them to take advantage of the new subsidies and legal protections that empower them to purchase health insurance on the exchanges.¹⁹⁹ Indeed, one of the criticisms of Republican or conservative opposition was that it was

196. KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL: MARCH 2012, at 10 (2012), <http://www.kff.org/kaiserpolls/upload/8285-F.pdf> [hereinafter KAISER HEALTH TRACKING POLL MARCH 2012] ("One of the consistent contradictions in public opinion on the ACA is this: while the law as a whole has never gained majority support, its component parts – from the relatively narrow to the core and comprehensive – have been consistently popular over the past two years, with the glaring exception of the individual mandate. And many provisions of the law are popular even among Republicans.").

197. See, e.g., HEALTH COVERAGE FOR ALL CALIFORNIANS, *supra* note 179.

198. See KAISER HEALTH TRACKING POLL MARCH 2012, *supra* note 196, at 6. ("[F]or the average American, the ACA is *not* yet real. Despite passage, and because of the longer term implementation framework, for many it seems to remain a remote political debate, one of many taking place against the backdrop of a public clearly cynical about the capacities of its political leaders. And from that perspective, the widespread level of confusion Americans express over the law is less surprising."). The poll also notes continued misperceptions about the law, including 36% who believe that the law creates a government panel to make end-of-life decisions for people on Medicare, also known as the "death panels." *Id.* at 7. Only a little over half of those polled were familiar that the law provisions that prove generally more popular with the public, such as the basic benefits package, subsidies, guaranteed issue, tax credits to small businesses, no cost sharing for preventive services, and a medical loss ratio that assures a certain percentage of premiums are spent on medical care. *Id.*

199. See *id.* (finding that of those opposing health reform, a larger proportion say this is based in part on their displeasure with the direction of the country or government, than say it is based on what they know about the law, and that division over the ACA reflects a partisan divide).

hypocritical — the mandate embodied a notion of personal responsibility that seemed quintessentially Republican, and which, not surprisingly, originated out of a conservative think tank.²⁰⁰

In fact, we have seen these kinds of trends at the state level among officials who have initially resisted health expansion but then ultimately embraced it. For example, when first enacted Medicaid was vigorously resisted by some states, but today it has 100% state participation. And we are starting to see this unfold in the case of states deciding whether to participate in the Medicaid expansion or establish health benefit exchanges. Even some of the most vocal state opponents to reform are coming to terms with the reality of their options: states can participate in a system that allows them to benefit from generous federal funding to expand healthcare for their constituents, while at the same time allowing them to retain a great deal of control over system design; if not, states risk being viewed by their constituents as shirking a moral responsibility to help ensure the health and safety of its people, and they ultimately relinquish significant control of their citizens' access to private insurance to the federal government.²⁰¹

But attempts to win over ideological opponents will be challenging. As Professor Sidney Watson has explained in her paper, *Metaphors, Meaning, and Health Reform*,²⁰² lawmakers cannot expect that simply educating people about the facts of healthcare reform will lead them to behave rationally — either in their own best interest or for the collective good. Rather lawmakers must be conscious about framing, tailoring their messages in a way that resonates with these groups' own moral values.²⁰³

VII. CONCLUSION: CONCEIVING THE ACA AFTER *NFIB*

The theme of "choice" has played a critical role in the health reform debate and legal challenges. Its importance in *NFIB* is clear as it determined the fate of both the public and private insurance parts of reform. It was used by the Court to save the law, but it also underscored an uncertainty that could undermine reform's success.

The implications of choice are perhaps more prominent in the other big substantive question the Court took up — whether the Medicaid expansion was constitutional. The Medicaid expansion was structured as an amendment, which meant that continued participation in Medicaid (and thus a state's existing Medicaid funding) was contingent on the state's

200. Michael Cooper, *Conservatives Sowed Idea of Health Care Mandate, Only to Spurn It Later*, N.Y. TIMES (Feb. 14, 2012), http://www.nytimes.com/2012/02/15/health/policy/health-care-mandate-was-first-backed-by-conservatives.html?_r=0.

201. Ezra Klein, *A Medicaid Offer too Good to Refuse*, WASH. POST, July 3, 2012, at A12.

202. See generally Watson, *supra* note 195, at 1313.

203. *Id.* at 1314-15.

participation in the expansion.²⁰⁴ It was successfully challenged under the Tenth Amendment as coercive because the Court found that the states did not have a “genuine choice” about whether to participate.²⁰⁵ Choice was also important in crafting the remedy: the Court held that this constitutional violation could be remedied simply by ruling that the expansion was not an amendment to the program enforceable by threat of withdrawal of existing Medicaid funds.²⁰⁶ It relied on a severability clause in the Medicaid Act to preserve the expansion as a true choice for the states (also termed the “red-state” option) rather than taking the dissent’s approach to strike down the entire expansion and eliminating the ability for any state to participate.²⁰⁷ After the decision, there was a flurry of speculation and questions by media, health advocates, and state officials about what this would mean for the fate of reform: Now that states had a choice to participate, would this undermine reform goals?²⁰⁸

Unlike the Medicaid coercion holding, the Court’s decision to uphold the mandate under the taxing power did not create new choice in the law. It merely reflected a legal reality and counter narrative about the choice that existed prior to *NFIB*, but did not get much attention. *NFIB*’s decision implicitly and explicitly reflects assumptions about consumer decision-making that underscores uncertainty about the ACA’s goals of increased insurance coverage, in light of this element of choice. To the extent that *NFIB* changes the reform narrative to one that emphasizes choice, this could undermine reform enrollment goals. But the federal government, in conjunction with state and private partners, can leverage the expressive power of the ACA to educate people about the reciprocal benefits and responsibilities that are critical for expanding affordable care and to shape new norms that reflect a collective commitment to make the system work. Indeed, government must successfully define the meaning of the choice provided in the ACA in a way that instills this moral obligation and sense of shared responsibility if healthcare reform is to succeed.

204. *NFIB*, 132 S. Ct. at 2606-07.

205. *Id.* at 2603-05 (opinion of Roberts, C.J., and Breyer & Kagan, JJ.); *Id.* at 2657-66 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

206. *Id.* at 2602-07 (opinion of Roberts, C.J., and Breyer & Kagan, JJ.); *Id.* at 2642 (opinion of Ginsburg & Sotomayor, JJ.).

207. *Id.*

208. See, e.g., Michael Cooper, *Many Governors Are Still Unsure About Medicaid Expansion*, N.Y. TIMES, July 17, 2012, at A17; Aaron Carroll, *Why Medicaid expansion is key part of health reform*, CNN.COM (July 5, 2012), <http://www.cnn.com/2012/07/05/opinion/carroll-medicaid-expansion/index.html>.

