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## NATIONAL HEALTHCARE AND AMERICAN CONSTITUTIONAL CULTURE

WILLIAM P. MARSHALL\*

There is no serious constitutional argument of which I am aware suggesting that the federal government cannot provide free healthcare to every individual in the United States.<sup>1</sup> Nor is there any sound constitutional claim that the United States could not raise taxes or find other sources of revenue to fund such a program.<sup>2</sup>

But as the public reaction to the passage of the Patient Protection and Affordable Care Act (PPACA)<sup>3</sup> makes clear,<sup>4</sup> the constitutional debate over national healthcare is more than a debate over the specifics of constitutional law. Rather it is debate grounded in constitutional culture—or what may be described as the non-legal traditions, narratives, and understandings that constitute our sense of American exceptionalism<sup>5</sup> and help define who we are as a nation and as a people.<sup>6</sup>

This Article addresses whether the creation of a national healthcare program would be consistent with American constitutional culture. Part I briefly expands upon the legal point that there is no constitutional barrier to the enactment of a national healthcare system. Part II.A then identifies and discusses the two aspects of our constitutional culture that militate against the adoption of national healthcare—our belief in rugged indi-

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1. See *infra* Part I (discussing Congressional power under the Spending Clause).

2. See *id.* (discussing the federal power under the Taxing Clause).

3. Pub. L. No. 111-148, 124 Stat. 119 (2010).

4. For an overview of Americans' immediate reactions to the passage of PPACA, see Lydia Saad, *By Slim Margin, Americans Support Healthcare Bill's Passage*, GALLUP, Mar. 23, 2010, <http://www.gallup.com/poll/126929/slim-margin-americans-support-healthcare-bill-passage.aspx>.

5. See generally Jeremy Rabkin, *American Exceptionalism and the Healthcare Reform Debate*, 35 HARV. J.L. & PUB. POL'Y 153 (2012).

6. See *infra* Part II.B.

vidualism and our distrust of government. As this Part notes, our national commitment to these narratives is deep and well-founded. But our national commitment to both of these aspects of our constitutional culture is necessarily measured. Neither the commitment to individualism nor to distrust of government is unlimited in scope; both are constrained by strong and compelling countervailing concerns. Part II.B then presents two equally fundamental aspects of our constitutional culture that support the adoption of a national healthcare system—our commitment to social mobility and our vision of the United States as a land of equal opportunity. This Article concludes that national healthcare fits well within our constitutional traditions and comports with the aspects of American exceptionalism that best define who we are as a nation.

One important caveat: This Article does not purport to address the specific constitutional claims that have been raised in relation to PPACA. Although I believe that PPACA is constitutional,<sup>7</sup> my comments are aimed at the provision of a system of national healthcare more generally.

#### I. NATIONAL HEALTHCARE AND CONSTITUTIONAL DOCTRINE

It is perhaps not surprising to learn that the passage of Social Security in the 1930s was met with many of the same heated criticisms now aimed at national healthcare.<sup>8</sup> Then, as now, opponents argued that enacting such a program would exceed the constitutional powers of the federal government.<sup>9</sup> Then, as now, opponents argued that the program was fundamentally inconsistent with the vision of limited government and individual freedom that was central to our constitutional foundations.<sup>10</sup> Then, as now, opponents frequently peppered their political rhetoric against Social Security with the claim that the program was akin to socialism.<sup>11</sup>

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7. See *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 895 (E.D. Mich. 2010) (upholding the constitutionality of the individual mandate) *aff'd* 651 F.3d 529 (6th Cir. 2011).

8. See generally NANCY J. ALTMAN, *THE BATTLE FOR SOCIAL SECURITY: FROM FDR'S VISION TO BUSH'S GAMBLE* (2005).

9. See *id.* at 48.

10. *Cf. id.* at 50.

11. *Id.* at 73.

Despite heated political opposition, the Social Security Act (SSA)<sup>12</sup> passed, but like the passage of the PPACA, statutory enactment did not end the controversy. The battle moved to the courts where opponents argued the SSA was unconstitutional. The challengers relied primarily on Article I of the Constitution, asserting that in enacting the SSA, the Congress exceeded its enumerated powers, and on the Tenth Amendment, arguing that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>13</sup> They did not succeed. The Supreme Court, in two major decisions issued on the same day—*Helvering v. Davis*<sup>14</sup> and *Steward Machine Co. v. Davis*<sup>15</sup>—found constitutional authority for Congress to create the Social Security program in the expansive wording of Article I, Section 8, Clause 1, which grants Congress the power to tax and spend for “the general Welfare of the United States.”<sup>16</sup> The Court therefore ruled that the Social Security Act was constitutional.<sup>17</sup>

The Court in *Helvering* and *Steward Machine* understood that its reading of the Taxing and Spending Clause might be controversial<sup>18</sup> and that the debate over the meaning of the Clause dated back to the time of the Framers. James Madi-

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12. Social Security Act of 1935, ch. 531, 49 Stat. 620 (1935).

13. U.S. CONST. amend X.

14. 301 U.S. 619 (1937). The argument in *Helvering* against the Social Security Act’s constitutionality rested on the objection that the payroll tax required of employers was not a tax allowed under the Constitution because Congress had no power to tax and spend for the purposes of providing welfare assistance. *Id.* at 639.

15. 301 U.S. 548 (1937). In *Steward Machine*, the plaintiffs argued that unemployment provisions of the Social Security Act were unconstitutional because the unemployment tax was not an excise tax and was therefore beyond the bounds of the federal government because Congress had no power to tax and spend for the purposes of providing unemployment assistance. *Id.* at 578. The challengers also asserted that the Act was unconstitutional because it operated to coerce the States, and thus violated principles of state sovereignty under the Tenth Amendment. *See id.*

16. U.S. CONST. art. I, § 8, cl. 1. (“The Congress shall have Power To 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; but all Duties, Imposts and Excises shall be uniform throughout the United States . . .”).

17. *See Steward Mach.*, 301 U.S. at 598; *see also Helvering*, 301 U.S. at 645–46. In a companion case also decided the same day, *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 514 (1937), the Court reaffirmed the holdings of *Helvering* and *Steward Machine* in a challenge to the state portion of the federal-state arrangement under the Social Security Act. *Id.* at 527.

18. *See Steward Mach.*, 301 U.S. at 592; *Helvering*, 301 U.S. at 639–40.

son, for example, believed the Taxing and Spending Clause did no more than allow Congress to tax and spend in reference to its enumerated powers.<sup>19</sup> Alexander Hamilton, in contrast, asserted that the Clause provided Congress with independent authority.<sup>20</sup> The Court in *Helvering* and *Steward Machine* concluded, however, that by the time of the Social Security decisions, the issue had been resolved in favor of Hamilton's view.<sup>21</sup> Justice Story, writing in the early nineteenth century, had adopted Hamilton's position in his Commentaries<sup>22</sup> and the Court itself, relying in part on Justice Story's reasoning, had held in *United States v. Butler* that the broader Hamiltonian reading of the Taxing and Spending Clause was the correct one.<sup>23</sup>

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19. THE FEDERALIST NO. 41 (James Madison).

20. See ALEXANDER HAMILTON, REPORT ON MANUFACTURES 41 (Dec. 5, 1791) (written in his position as Secretary of the Treasury).

21. See, e.g., *Helvering*, 301 U.S. at 640.

22. See *United States v. Butler*, 297 U.S. 1, 66 (1936).

23. See *id.* As the *Butler* Court stated:

Since the foundation of the nation, sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

*Id.* at 65–66 (internal citations omitted).

The only matter then remaining for the Court in *Helvering* and *Steward Machine* was whether the creation of a Social Security system comported with the requirement under the Taxing and Spending Clause that Congress act in furtherance of the “general welfare.” The Court held that the judgment of what is for the general welfare was a matter for Congress and not the courts to decide. Accordingly, it concluded that it would defer to Congress on this issue “unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.”<sup>24</sup> Additionally, despite ruling that it need not provide justifications supporting Congress’s decision to create a Social Security system, the Court offered one anyway:

The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from state to state, the hinterland now settled that in pioneer days gave an avenue of escape. Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co.* has set the doubt at rest. But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.<sup>25</sup>

The Social Security cases and their antecedent authorities thus provide little doubt that a national healthcare program would survive constitutional scrutiny under current doctrine. If Congress has the authority to tax and spend to provide cash payments to individual citizens, it would also have the authority to provide healthcare. This is not to say that a national healthcare program might not raise substantial constitutional issues in the manner in which it is designed or in the specifics of its requirements. Those currently challenging the constitutionality of PPACA, for example, are specifically claiming that PPACA’s individual mandate

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24. *Helvering*, 301 U.S. at 640.

25. *Id.* at 641 (internal citations omitted).

provisions violate the Commerce Clause.<sup>26</sup> But even if the plaintiffs succeed in their Commerce Clause challenge, the result would only be that the individual mandate would be found unconstitutional.<sup>27</sup> The conclusion would not be that the federal government could not have constitutionally created a national health-care program by other means.<sup>28</sup>

Similarly, a hypothetical national healthcare program could potentially impose specific requirements that might violate individual rights. A healthcare program that prevented persons from seeking certain types of medical treatment or independently paying for their own healthcare services might run afoul of constitutional limitations.<sup>29</sup> But even if the government were to impose such requirements, only the provisions violating individual rights would be invalid; the basic provision of healthcare by the federal government would remain untouched.<sup>30</sup>

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26. 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, 583–84 (2010).

27. Such a decision, no doubt, would threaten the continued viability of PPACA because of funding concerns. For example, PPACA's abolishment of preexisting condition exclusions depends upon the individual mandate, to keep insurance premiums low by having healthy individuals in the insurance pool along with individuals with pre-existing conditions. Troy J. Oechsner & Magda Schaler-Haynes, *Keeping it Simple: Health Plan Benefit Standardization and Regulatory Choice Under the Affordable Care Act*, 74 ALB. L. REV. 241, 283 (2010).

28. A holding that the individual mandate is unconstitutional combined with a ruling that the provision is nonseverable would, of course, invalidate the entire PPACA. This would not mean, however, that the government could not provide national healthcare through another mechanism. The constitutional challenges to PPACA have spawned some disagreement among the lower courts concerning the severability issue. *Compare* Florida v. HHS, 648 F.3d 1235, 1327–28 (11th Cir. 2011) (holding that the individual mandate is severable from the rest of the Act), *with* Florida v. HHS, 780 F. Supp. 201 1256, 1305 (N.D. Fla. 2011) *aff'd in part, rev'd in part*, 648 F.3d 1235 (11th Cir. 2011) (holding that the individual mandate is not severable).

29. See generally *Roe v. Wade*, 410 US 113 (1973) (holding that there is a constitutional right for a woman to have an abortion). The government, of course, presumably could choose to refrain from paying for certain types of medical treatments if it so decided. See *Harris v. McRae*, 448 U.S. 297 (1980) (holding that there is no right to a state subsidized abortion).

30. One might assert another type of constitutional argument against national healthcare—specifically, that the welfare state is fundamentally inconsistent with our constitutional structure. The Guarantee Clause of Article IV, after all, demands that the States may have only republican forms of government. See U.S. CONST. art IV, § 4, cl. 1 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”). A parallel argument could be advanced that the federal government similarly requires that the United States

## II. NATIONAL HEALTHCARE AND CONSTITUTIONAL CULTURE

Even though a national healthcare program would be legally constitutional in the sense of not violating any specific formal constitutional requirement, it might not still be consistent with our constitutional traditions or constitutional culture.<sup>31</sup> This Part will explore that possibility. To proceed, however, we first need to develop some sense of what we mean by “constitutional culture” in this setting as constitutional culture is a term that can hold a variety of meanings.<sup>32</sup> Consider, for example, the difference in the meanings of the term “constitutional culture” in the two opinions in which a Supreme Court Justice has actually employed the term. In *Lucas v. South Carolina Coastal Council*,<sup>33</sup> Justice Scalia used the term to find a constitutional prohibition against so-called “regulatory takings” or takings in which the government does not seize

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and the States must have a laissez-faire based economy. The problems with such a theory, of course, are legion. First, unlike the Guarantee Clause, there is no textual basis for such a claim. Second, the Guarantee Clause imposes limits only upon the States and not the federal government and, indeed, actually empowers the federal government to act against the States. Third, the Guarantee Clause has not proven to have much content. It does not prevent States from using direct democracy mechanisms such as initiatives and referenda, rather than legislatures, to enact laws, see *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), and has not even been interpreted to require that state legislative bodies be fairly apportioned. See *Colegrove v. Green*, 328 U.S. 549 (1946).

31. Indeed, Justice McReynolds appeared to make a similar claim regarding the legality of Social Security in his *Steward Machine* dissent. Quoting President Franklin Pierce, McReynolds wrote: “I can not find any authority in the Constitution for making the Federal Government the great almoner of public charity throughout the United States. To do so would, in my judgment, be contrary to the letter and spirit of the Constitution and subversive of the whole theory upon which the Union of these States is founded.” *Steward Machine Co. v. Davis*, 301 U.S. 548, 603 (1937) (McReynolds, J., dissenting) (internal quotation marks omitted).

32. See, e.g., Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 899 (2005) (defining constitutional culture as “a larger community-wide discourse that includes judicial and nonjudicial actors, a mixture of legal norms and political actions, and a wide range of interpretive expression”); Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671, 672 (2005) (describing constitutional culture as the relationship between the people and the Constitution, that the people recognize the Constitution’s authority and reach, that it was created by the people, and that it is not set in stone but can be changed or revoked by the people); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: the Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1349 (2006) (recognizing the flexibility that the Constitution provides, constitutional culture is what allows new understandings to be created and upheld, so long as these understandings take a form that “officials can enforce and the public will recognize as the Constitution”).

33. 505 U.S. 1003 (1992).



an owner's property but rather deprives the land of any economically beneficial use by imposing regulatory restrictions on its use.<sup>34</sup> Based upon his understanding of what constitutional culture entailed, Justice Scalia then concluded that an anti-erosion measure that prevented a landowner from building on his property was unconstitutional because it rendered the owner's land valueless without compensation.<sup>35</sup> For Justice Scalia, principles derived from constitutional culture can have actual legal force.<sup>36</sup>

Chief Justice Rehnquist, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>37</sup> however, used the term constitutional culture in an entirely different way. For Chief Justice Rehnquist, constitutional culture is akin to the beliefs about constitutional meaning that are embedded in what he calls the "national psy-

34. For a discussion of regulatory takings, see *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). As the Court in *Lingle* explained, regulatory takings arise when a government's regulatory action is "so onerous that its effect is tantamount to a direct appropriation or ouster . . ." *Id.* at 537.

35. *Lucas*, 505 U.S. at 1028.

36. For the argument that Justice Scalia's reliance on constitutional culture is inconsistent with his originalist methodology see, for example, William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1399–1400 (1993) (arguing that Justice Scalia's use of the term "constitutional culture" in *Lucas* might suggest that "the relevant social contract is not the one supposedly entered into by the persons who ratified the original Constitution and its first set of amendments, but rather the one entered into by the government and the current citizens of the United States when the latter first became active members of the polity"); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 81 (1992) (Justice Scalia's use of the phrase "constitutional culture" in *Lucas* might indicate that "[t]he culture and customs of the people have become his interpretive guide and apparently now 'tradition is a living thing' for him as well"); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 808 (1995) ("Justice Scalia's approach in *Lucas* is at odds with his announced commitment to a doctrine of originalism and his explanation of what originalism means.").

37. 505 U.S. 833 (1992). Justice Scalia's opinion in *Lucas* and Chief Justice Rehnquist's in *Casey* are the only instances, according to my research, where a Supreme Court Justice has used the actual term "constitutional culture." The Justices, have, of course, used such parallel terms as constitutional tradition in a variety of cases. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."); *Printz v. United States*, 521 U.S. 898, 918 (1997) ("Even assuming [that certain laws] represent assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text."); *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) ("We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.").

che.”<sup>38</sup> Thus, in responding to the joint opinion’s claim in *Casey* that the people of this country have “ordered their thinking and living around”<sup>39</sup> the right to abortion set forth in *Roe v. Wade*,<sup>40</sup> Chief Justice Rehnquist questioned how that opinion could “view the ‘central holding’ of *Roe* as so deeply rooted in our constitutional culture, when it so casually uproots and disposes of that same decision’s trimester framework.”<sup>41</sup>

The current public debate over national healthcare, including the accompanying articles by Professors Rabkin<sup>42</sup> and Rao<sup>43</sup> in this volume of the *Harvard Journal of Law & Public Policy*, tends to use the term constitutional culture more in line with Chief Justice Rehnquist’s meaning of the term in *Casey* than Justice Scalia’s meaning in *Lucas*. That is, it uses the term to refer to the set of American traditions, narratives, and understandings that guide popular perception of what the Constitution means and not, as in *Lucas*, an actual constitutional protection under which the constitutionality of a particular legislative enactment can be formally adjudged. This Article, accordingly, will use the term “constitutional culture” in the same manner.<sup>44</sup>

#### A. Constitutional Culture and the Arguments Against National Healthcare

There are at least two fundamental aspects of our constitutional culture that can be used to argue against national healthcare. The first is our traditional celebration of rugged individualism and the individual who decides the major choices in life

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38. *Casey*, 505 U.S. at 957 (Rehnquist, C.J., concurring in part and dissenting in part).

39. *Id.* at 856 (joint opinion of O’Connor, Kennedy, Souter, JJ.).

40. 410 U.S. 113 (1973).

41. *Casey*, 505 U.S. at 957 (Rehnquist, C.J., concurring in part and dissenting in part).

42. Rabkin, *supra* note 5.

43. Neomi Rao, *American Dignity and Healthcare Reform*, 35 HARV. J.L. & PUB. POL’Y 171 (2012).

44. For scholarly works addressing the meaning of “constitutional culture,” see, for example, Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 592 (2009) (defining constitutional culture as “what ordinary citizens and legal and political elites believe the Constitution means and who they believe has authority to make claims on the Constitution”); J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1978 (1992) (“[T]he way that the courts, Congress, and the executive interact with each other, and the way that law is understood, promulgated, argued about, experienced, and assimilated.”).

for herself. The second is distrust of government. Each will be discussed in turn.

### 1. *Rugged Individualism*

The vision of the rugged individual is a powerful one and generally a good one. The belief that we are the “masters of our fate,” in Neomi Rao’s words,<sup>45</sup> has no doubt contributed to the deep spirit of optimism that Americans enjoy and the degree of accomplishment and innovation that we have achieved as a society. It also is one of the reasons why we so stubbornly and laudably resist any encroachments on what we perceive are our individual freedoms.<sup>46</sup>

But the individualist claim runs up against a number of harsh realities that diminish its force. Some of these realities are the result of historical change. In upholding Social Security, for example, the Court in *Helvering v. Davis* expressly referenced historical change, noting that in the “pioneer days,” Americans could move to unsettled areas and physically escape from whatever bad economic conditions had enveloped them.<sup>47</sup> By the 1930s, however, as *Helvering* recognized, the “hinterland” had closed and these opportunities were no longer available.<sup>48</sup> Programs such as Social Security, therefore, became necessary.

Societal changes since the 1930s have only exacerbated the weaknesses in the individualist account. The entry costs needed to succeed in this economy, for example, are far greater because of shifts in the types of jobs that are available and because of the greater expectations placed on those joining the workforce. One reason for this is education. Succeeding in the current economy requires sophisticated training that cannot be mastered by the individual acting alone.<sup>49</sup>

The individualist account also has been weakened because population expansion and the changing of the economy from primarily agricultural to manufacturing to high-tech to infor-

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45. See Rao, *supra* note 43.

46. See generally Rabkin, *supra* note 5.

47. *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

48. *Id.*

49. See generally COURTNEY MCSWAIN & RYAN DAVIS, INST. FOR HIGHER EDUC. POLICY, COLLEGE ACCESS FOR THE WORKING POOR: OVERCOMING BURDENS TO SUCCEED IN HIGHER EDUCATION (2007), available at <http://www.ihep.org/assets/files/publications/a-f/CollegeAccessWorkingPoor.pdf>.

mation-based, have created more intricate and unavoidable interdependencies among citizens and communities—an interdependency for which the individualist model cannot begin to account. It has become popular recently for some to criticize the Supreme Court's decision in *Wickard v. Filburn*,<sup>50</sup> which held that the Commerce Clause extended to the regulation of wheat grown for on-farm use. But the economics of that decision were correct.<sup>51</sup> In an integrated economy, wheat grown for home consumption in a small farm in Ohio *does* affect the price of the commodity nationwide.<sup>52</sup>

The individualist model also is under siege because its corollary implication that unencumbered individualism leads to the betterment of American society as a whole also has become more difficult to support as a sustaining myth. A recent article in *The Atlantic*, for example, noted that the major beneficiaries of the expansion of the global economy are a wealthy class of global elites who have no particular national allegiance at all.<sup>53</sup> There is no American exceptionalism in such an economy. There is only concentrated wealth—with much of it lying outside American borders.

Finally, any discussion of the merits of the individualist assertion also must take into account corporate power. Although the virtues of limited government often are expounded as part of the individualist account, it often is forgotten that the primary beneficiaries of nonregulation are corporations. This is significant. The Framers, for example, never celebrated corporate power as a form of individual freedom. They distrusted the corporate form.<sup>54</sup> Accordingly, corporations were highly regulated during the founding era. Corporate charters were limited in scope<sup>55</sup> and the activities of corporations were tightly monitored.<sup>56</sup>

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50. 317 U.S. 111 (1942).

51. For one criticism, see LIBERTY LEGAL FOUNDATION, *What's Wrong with Wickard?*, <http://www.libertylegalfoundation.net/574/whats-wrong-with-wickard/>.

52. See *Gonzales v. Raich*, 545 U.S. 1, 19 (2005).

53. Chrystia Freeland, *The Rise of the New Global Elite*, ATLANTIC, Jan./Feb. 2011, at 44.

54. See *Citizens United v. FEC*, 130 S. Ct. 876, 949 (2010) (Stevens, J., dissenting) (“It was assumed that [corporations] were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare.”) (citation and internal quotation marks omitted).

55. Rather than gaining corporate status through general corporate law, corporations in the post-Revolutionary War period were specifically chartered by the state.

The nature of the corporate entity bears out the Framers' skepticism. Corporations have the legal obligation to maximize shareholder profits—not to better the world around them.<sup>57</sup> Although improving shareholder profit can at times coincide with the national interest, this is not always the case. Without externally imposed environmental regulations, for example, corporations would be unlikely to spend much to curb pollution because there is little or no financial incentive for them to do so.<sup>58</sup> Without labor law regulations, corporations might be tempted to engage in objectionable cheap labor measures such as using child labor.<sup>59</sup> Without safety regulations, corporations might engage in cost-cutting that would result in the manufacture of defective or dangerous products.<sup>60</sup>

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Their businesses were generally of a public character, such as operating banks or establishing companies to build bridges and roads. Corporations were not formed automatically, but were created through special legislative acts: a special bill had to be put before the state legislator, it would have to pass both houses, and the governor would have to sign the bill into existence before a corporation could be formed. JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 2:3 (3d ed. 2010) (discussing the early history of American corporations).

56. *Id.*

57. See Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 *STETSON L. REV.* 23, 23 (1991).

58. Andrew G. Keeler, *Regulatory Objectives and Enforcement Behavior*, *ENVTL. RES. ECON.*, July 2005, at 73, 73–85.

59. See Dana C. Nicholas, Note, *China's Labor Enforcement Crisis: International Intervention and Corporate Social Responsibility*, 11 *SCHOLAR* 155, 156–58 (2009) (arguing that without regulation or enforcement, economic pressure for high output at low cost can be an irresistible inducement to using child labor).

60. See UPTON SINCLAIR, *THE JUNGLE* (1906). Corporate actions in pursuit of profit can, and have, endangered the national interest in others ways. Abuses in the financial markets causing serious economic crises are almost too numerous to mention. See generally ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES* (2009); RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (2009).

My point about how corporate power can lead to results other than social betterment can be illustrated, however, by a different kind of example. In 1996, *The New York Times* ran an article on W. R. Timken, Jr., the then-head of the Timken Corporation in Canton, Ohio, and his connections to the Republican Party. In noting the Timken Corporation's relative lack of success on Wall Street, the *Times* reported as follows:

The rap on the Timken Company from Wall Street analysts is that it could be even more profitable if it would only be more aggressive about downsizing its work force of 18,000, if it were not so preoccupied with striving to produce the highest quality bearing and steel products in the

But what does the decline of the descriptive accuracy of the rugged individual have to do with healthcare? The answer is quite a bit. Even if we celebrate the individual as master of her fate, the individual is not, after all, the master of her own health. Developments in transportation and population growth, among other factors, makes our respective medical conditions interdependent on each other. Just as we can no longer run away to the “hinterland[s]” to escape economic hardship,<sup>61</sup> we can no longer completely insulate ourselves from the effects of others’ health. If someone sneezes in North Carolina today, for example, that action may negatively affect someone’s health in Minnesota tomorrow. If a highly contagious epidemic breaks out at O’Hare International Airport in Chicago tomorrow, it is not unlikely that every state in the country will feel its effects by next week.

The economics of healthcare also are not insular to the individual. The individual’s healthcare decisions affect the price, quality, and availability of healthcare products and services for all the people around him.<sup>62</sup> The individual’s decision not to buy health insurance raises the costs of healthcare for all of those around him,<sup>63</sup> particularly if he is not able to independently pay for all of

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world and if it was less worried about its responsibility to the people of Canton.

“The company is so focused on quality and its reputation and pleasing its customers,” said . . . an analyst with Smith Barney, “to some degree, it hurts profit margins.”

Michael Winerip, *Canton’s Biggest Employer is Out of Step, and That’s Fine With Him*, N.Y. TIMES, Dec. 2, 1996, at B8.

Perhaps, then, it is a part of our constitutional culture to limit government in order to respect the rights of individuals to frame their own destinies, as Jeremy Rabkin contends. See Rabkin, *supra* note 5. But I am not sure that our constitutional culture should be interpreted as including a set of incentives that discourage community responsibility, protecting the workforce, and manufacturing the best products in the world.

61. *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

62. *Cf. Gonzalez v. Raich*, 545 U.S. 1, 19 (2005).

63. See *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 893–94 (E.D. Mich. 2010) (“The decision whether to purchase insurance or to attempt to pay for health care out of pocket . . . [has] clear and direct impacts on health care providers, taxpayers, and the insured population who ultimately pay for the care provided to those who go without insurance . . . [C]hoosing to forgo insurance . . . collectively shift[s] billions of dollars, \$43 billion in 2008, onto other market participants.”), *aff’d* 651 F.3d 529 (6th Cir. 2011).

his eventual healthcare.<sup>64</sup> The bankruptcy that a person suffers because she was not able to pay her medical bill affects her neighbors and her community. Healthcare, in short, is the classic example of something which we are, in fact, all in together.

## 2. *Distrust of Government*

A second narrative militating against national healthcare is distrust of government. Again, the principle is deeply ingrained in our constitutional culture. It is expressly codified in the Bill of Rights by the creation of specific individual liberties that lie against the state.<sup>65</sup> It also is evidenced in the constitutional structures of separation of powers and federalism that are designed to dilute government authority.<sup>66</sup>

The distrust of government narrative has been invaluable in protecting us from the types of totalitarian mischief that have engulfed other countries, and I, for one, do not need to be convinced of the depth and importance of maintaining a healthy level of government distrust for preserving our democratic system.<sup>67</sup> It is the prime reason, for example, for opposing concentrating power in the presidency.<sup>68</sup>

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64. Under the Emergency Medical Treatment and Active Labor Act, hospitals may not turn away indigent patients who have no money to pay for their emergency care. See 42 U.S.C. § 1395dd (2003).

65. See, e.g., U.S. CONST. amend I.

66. *U.S. v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (“The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties’”) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (internal quotations omitted)).

67. After all, I grew up in New Hampshire, a state whose motto is “Live Free or Die.” Of course, New Hampshire’s insistence that this motto be displayed on all state license plates once led the state to run afoul of the First Amendment. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (upholding a First Amendment challenge to New Hampshire’s mandatory display of the state motto on its license plates).

68. See, e.g., William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 506 (2008); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L. J. 2446, 2470 (2006).

In this regard, I should point out parenthetically that if one were truly committed to a general notion of distrust of government, it would make far greater sense to be more opposed to concentrating power in the presidency than in the Congress because allowing one person to exercise power secretly and unilaterally is far more dangerous than allowing five hundred thirty-five persons to exercise power through legislative deliberation and compromise. I also would suggest that if the motivating concern of expansive federal power is the threat of government tyranny, we should be far more wary of efforts to allow a President to imprison and detain American

That said, problems also arise when a government is too weak. One of the primary motivating concerns animating the adoption of the Constitution was, after all, that the Articles of Confederation created a national government with insufficient authority to meet the demands of a burgeoning nation.<sup>69</sup> As this early history taught us, a strong central government is necessary not only for national defense but also for resisting the parochial interests that come to the fore when power is too decentralized.<sup>70</sup>

Equally fundamental, strong government is necessary to combat the abuses of the private sector. As discussed earlier, the profit motive is one that easily leads to abuse,<sup>71</sup> and for that reason one of our other cultural narratives is a distrust of private power. After all, when the mythic cowboy hero rode into town to fight for justice, he was generally not fighting for trickle-down economics. He was often fighting a landed gentry that was not allowing co-citizens the opportunity to succeed. The problem with overly limiting the power of government, in short, is that it leads to another type of social ill, the unchecked dominance of entrenched power elites.<sup>72</sup>

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citizens without outside oversight than attempts to allow the Congress to provide a system of national healthcare—even if such a healthcare system imposes a mandate on some to purchase health insurance. *Cf. Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005) (noting the apparent attempt of the United States government to avoid judicial review of the legality of seizing an American citizen pursuant to the war on terror).

69. See Max Farrand, *The Federal Constitution and the Defects of the Confederation*, 2 AM. POL. SCI. REV. 532, 532 (1908) (“That the Constitution was framed because of defects in the Articles of Confederation is universally accepted . . .”); see also Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1337 (1934) (“The Constitutional Convention was called because the Articles of Confederation had not given the Federal Government any power to regulate commerce.”).

70. 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 321 (J.B. Lippincott & Co., 1865) (1787) (As James Madison observed in discussing the shortcomings of decentralized regulation of commerce, “[t]he practice of many States in restricting the commercial intercourse with other States . . . tends to beget retaliating regulations . . . destructive of the general harmony.”).

71. See *supra* notes 54–60 and accompanying text.

72. At this point it might be argued that even if government power is necessary to combat private-sector abuse, that power does not have to be exercised at the federal level. Enforcement power against private excess could still be maintained at the state level without feeding the federal behemoth. I share part of this sentiment in that I believe that state and federal power are imbalanced and that more enforcement should be pursued at the state level. I see no reason, for example, why crimes like carjacking should become federal offenses. See William P. Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL’Y 139, 145 (1998). Indeed I



Limiting government also means that deep societal problems might never be remedied. True, there are reasons to distrust whether government will act efficiently. A government-run healthcare program runs the risk of bloat, but history has taught us that the private sector is not always efficient or pristine either. Moreover, even if the caricature of private-sector efficiency is maintained, there is one thing about private-sector behavior that is certain—the private sector will not act when it is not in its economic interest to do. A laissez-faire private health insurance system may well work for some, but it provides no incentive for companies to insure those with pre-existing conditions or those who are unable to afford minimal insurance costs.<sup>73</sup>

B. *Constitutional Culture and the Arguments  
In Favor of National Healthcare*

1. *Maintenance of Social Mobility*

One of the most sustaining narratives in our constitutional culture is that unlike the Europeans we live in a class-free society.<sup>74</sup> Indeed, our cultural, if not political, separation from England was based in part on the rejection Old World's class-based

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have devoted major parts of my career to working in state government. But, for exactly this reason, I know state government's limitations firsthand. In my time with the Minnesota Office of the Attorney General our office tried to sue one of the major oil companies for pricing violations. But the reality was that we did not have the resources to do the job right. We were outmanned, outgunned, and outspent. More recently, when I served as the Solicitor General of Ohio I had to deal with the fact that we could only afford to give our first-year lawyers salaries in the low \$40,000's. Contrast that figure with the salaries given to first-year lawyers in the large firms and ask whether state government can truly be an effective check against large private-sector abuse. The only entity that can stand up to the excesses of large corporate power is the federal government. Most, if not all, state attorneys general offices simply do not have the size to take on large multinational corporations on complex legal matters. A notable exception to this is the litigation brought by the states against the tobacco companies, but those suits were only able to succeed by the hiring of private counsel and the possibility of massive damage awards at the end of the litigation. David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315, 317–19 (2001).

73. See Karen Eggleston, *Risk Selection and Optimal Health Insurance-Provider Payment Systems*, J. RISK INS., June 2000, at 173, 174.

74. See *Middle of the Class*, ECONOMIST, July 14, 2005, at 9–13 (noting “[a] decline in social mobility would run counter to Americans’ deepest beliefs about their country”); see also *Ever higher society, ever harder to ascend*, ECONOMIST, Jan. 1, 2005, at 22–24 (discussing belief in American meritocracy).

systems that inhibited the individual's chances to get ahead.<sup>75</sup> And in fact, the belief in American exceptionalism could be just as much about our Nation's rejection of class as it is about our rejection of a comprehensive welfare state. Caste as well as welfare can work to undercut the individual sense of dignity about which Professor Rao is concerned.<sup>76</sup> Caste as well as welfare can undercut the individual's sense of optimism and ambition celebrated in Professor Rabkin's Article.<sup>77</sup>

The problem, of course, is that the descriptive accuracy of the United States as a class-free nation is fading. Social mobility in the United States is now lower than in many European countries.<sup>78</sup> In fact, we are beginning to take on the vestiges of the class-based society from which we originally rebelled.<sup>79</sup> Social mobility, for example, is stagnant particularly at the highest and lowest ends of the economic spectrum.<sup>80</sup> Fully forty-two percent of children born into the bottom quintile and thirty-nine percent of children born into the top quintile remain in the same quintile as their parents.<sup>81</sup> Similarly, according to one study of intragenerational mobility, about fifty percent of individuals who start in the bottom quintile remain there ten years later.<sup>82</sup> Meanwhile, in 2007 a mere 130,000 families received eleven percent of our nation's wealth.<sup>83</sup> In-

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75. See *Ever higher society*, *supra* note 74, at 22. Consistent with this principle the Constitution provides that "No Title of Nobility shall be granted by the United States . . ." U.S. CONST. art 1, § 9.

76. See Rao, *supra* note 43.

77. See Rabkin, *supra* note 5.

78. The Economic Mobility Project, an initiative of the Pew Charitable Trusts, has classified the United States, along with the United Kingdom and Italy, as "low-mobility countries" while studies tend to group Canada, Sweden, Norway, Finland and Denmark as having higher rates of mobility than the United States. See JULIA B. ISAACS, ECON. MOBILITY PROJECT, ECONOMIC MOBILITY OF FAMILIES ACROSS GENERATIONS 5 (2007).

79. *Id.*

80. *Id.*

81. *Id.*

82. See GREGORY ACS & SETH ZIMMERMAN, LIKE WATCHING GRASS GROW? ASSESSING CHANGES IN U.S. INTRAGENERATIONAL ECONOMIC MOBILITY OVER THE PAST TWO DECADES 6 (2008).

83. Bob Herbert, *A Recovery's Long Odds*, N.Y. TIMES, Sept. 14, 2010, at A29; see also Nicholas D. Kristof, *Taxes and Billionaires*, N.Y. TIMES, July 7, 2011, at A23 (noting that the top one percent of Americans have more collective wealth than the bottom ninety percent of Americans).

deed, not only is American society less mobile than before,<sup>84</sup> but Americans are now becoming increasingly pessimistic about the future mobility of their children.<sup>85</sup> No wonder so many are lamenting the end of the American Dream.

Enter healthcare. The importance of healthcare to social mobility cannot be overstated.<sup>86</sup> Access to healthcare is critical to mobility. Many people have to stay in their jobs because of fear of losing their health insurance if they pursue other options.<sup>87</sup> And even aside from maintaining insurance coverage, healthcare has particularly strong influence on social mobility in the manner it affects individuals entering and exiting employment.<sup>88</sup>

Healthcare and social mobility are clearly entwined in other ways.<sup>89</sup> Numerous studies have shown that health inequalities and social class inequalities are linked,<sup>90</sup> and that health issues

84. "[The] American Dream . . . is showing signs of wear, with both public perceptions and concrete data suggesting that the nation is a less mobile society than once believed." ISABEL V. SAWHILL & JOHN E. MORTON, ECON. MOBILITY PROJECT, ECONOMIC MOBILITY: IS THE AMERICAN DREAM ALIVE AND WELL? 13 (2007).

85. Fifty-nine percent of Americans today think that it will be harder for their children to climb the income ladder, compared with only forty-six percent in 2009. Letter from The Mellman Group, Inc. & Public Opinion Strategies to the Economic Mobility Project (May 17, 2011), [http://www.economicmobility.org/poll2011/Mellman\\_Poll\\_Document.pdf](http://www.economicmobility.org/poll2011/Mellman_Poll_Document.pdf).

86. To be sure, some of the issues dealing with social mobility that are discussed in this section might be products of poor health rather than poor healthcare. But the two are inherently related. Preventative healthcare promotes long-term health, and the economic circumstances of someone facing a healthcare crisis are not as dire when her medical bills are covered by her medical insurance as when she has to incur the full cost herself.

87. David Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 YALE J. HEALTH POL'Y L. & ETHICS 23, 28 (2001); see also Ezra Klein, *More Americans Fear Losing Their Health Insurance Than Being in a Terrorist Attack*, AMERICAN PROSPECT, May 21, 2008, available at <http://www.alternet.org/health/85947>.

88. Myung Ki et al., *Health selection operating between classes and across employment statuses*, J. EPIDEMIOLOGY CMTY HEALTH, Sept. 4, 2010, available at <http://jech.bmj.com/content/early/2010/09/01/jech.2009.107995.full.pdf> (demonstrating that health is a predictor for social mobility when leaving and entering employment).

89. For a clear illustration on the relationship between poor health and inequality, see Alexander Hertel-Fernandez, *The Corrosive Effects of Inequality on Health*, ECON. POL'Y INST. (Jan. 19, 2010), [http://www.epi.org/economic\\_snapshots/entry/snapshot\\_20100119/](http://www.epi.org/economic_snapshots/entry/snapshot_20100119/); see also Myung Ki, *Health Selection and Health Inequalities* (2009) (unpublished Ph.D. dissertation, University College London), available at [eprints.ucl.ac.uk/18913/18913.pdf](http://eprints.ucl.ac.uk/18913/18913.pdf).

90. For the seminal report demonstrating the relationship between health inequalities and class, see Peter Townsend & Nick Davidson, *Inequalities in Health: The Black Report* (1982).

have been shown to play a large role in personal bankruptcy.<sup>91</sup> Furthermore, although not all poor health results from poor health care, there is demonstrated correlation between poor health and downward mobility.<sup>92</sup> Most profoundly, poor health has lasting effects on the social mobility of children, both in their early and adult years.<sup>93</sup> The unavailability of healthcare to redress poor health issues can therefore freeze an individual in a lower class for life,<sup>94</sup> a not insignificant social problem when one considers that there are currently 8.1 million children in the United States without health insurance.<sup>95</sup>

Any constitutional cultural commitment to the rejection of a class system, then, would seem to virtually require healthcare, not merely permit it. If healthcare is essential to social mobility and social mobility expresses who we are as a nation, then providing healthcare is consistent with who we are as nation.

## 2. Equal Opportunity

The final part of our constitutional culture that I will discuss might be the most celebrated of all—equality of opportunity.<sup>96</sup>

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91. See, e.g., Melissa B. Jacoby & Mirya Holman, *Managing Medical Bills on the Brink of Bankruptcy*, 10 YALE J. HEALTH POL'Y & ETH. 239, 261–62, 286 (2010) (reporting on range of estimates of medical-related bankruptcy, including the recent estimate of sixty-two percent, and critiquing alternative method of measurement); Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. 535, 551 (2006) (using 2001 data, reporting ways to estimate medical-related bankruptcy as a percentage of all personal bankruptcy filers and finding that medical-related bankruptcy accounts for up to sixty-three percent); Melissa Jacoby et al., *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 377 (2001) (showing that in 1999 “[n]early half of all bankruptcies involved a medical problem”).

92. See GREGORY ACS & SETH ZIMMERMAN, ECON. MOBILITY PROJECT, SUMMARY OF KEY FINDINGS: U.S. INTRAGENERATIONAL ECONOMIC MOBILITY FROM 1984 TO 2004: TRENDS AND IMPLICATIONS (2008); see also Steven A. Haas, *Health Selection and the Process of Social Stratification: The Effect of Childhood Health on Socioeconomic Attainment*, 47 J. OF HEALTH & SOC. BEHAVIOR 339–54 (2006); Myung Ki et al., *supra* note 88.

93. Haas, *supra* note 92, at 349 (noting that poor health in childhood has significant, direct and large adverse effects on education attainment and wealth accumulation).

94. See generally ISAACS, *supra* note 78.

95. CHILDREN'S DEFENSE FUND, STATE OF AMERICA'S CHILDREN 2010 REPORT, at xiii (2010), available at <http://www.childrensdefense.org/child-research-data-publications/data/state-of-americas-children-2010-report.html>

96. Equality of opportunity and social mobility are, of course, related. But although social mobility is concerned with the ability of the individual to move across class lines and with the corollary harms to society as a whole created when

The notion that every individual should have equal opportunity not only is deeply ingrained in our culture but also is fundamental to our constitutional understandings.<sup>97</sup> Liberals and conservatives might disagree as to its meaning, but both sides are firmly committed to its promise.

There is no equal opportunity, however, for those whose lives are sidelined by ill health. We all know people who have had to sacrifice their own educations and opportunities for advancement because they had to take care of loved ones. We all have friends who had to abandon their own education and job opportunities because they were beset by accident, or disease, or other kinds of trauma. When this happens, these people are disqualified, through no fault of their own,<sup>98</sup> from taking advantage of the opportunities that would otherwise have been available to them.

Healthcare can work to even the playing field for those who have been sidelined. It can cover the healthcare expenses that might otherwise be economically disabling. Even more ideally, it can offer the preventative care that might have lessened the chance that the illness or condition would have developed in the first place.

At this point, however, one might argue that our cultural commitment to equal opportunity does not mean that we believe in government-assisted equal opportunity. But this assertion is incorrect. We have long recognized that government assistance in overcoming externally imposed barriers to opportunity is often necessary.<sup>99</sup> That is the lesson of the Civil Rights laws.<sup>100</sup> Nor is the

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social movement stagnates, equality of opportunity is more personal, reflecting the ability of the individual to take advantage of whatever options she chooses.

97. See U.S. CONST. amend. XIV.

98. I am not, of course, claiming that all illnesses and traumas are random.

99. Numerous presidents have affirmed the importance of Social Security. See, e.g., President Richard M. Nixon, Special Message to the Congress on Social Security (Sept. 25, 1969) ("This nation must not break faith with those Americans who have a right to expect that Social Security payments will protect them and their families. . . . In the 34 years since the Social Security program was first established, it has become a central part of life for a growing number of Americans. . . . Almost all Americans have a stake in the soundness of the Social Security system."); President Ronald Reagan, Remarks on Signing the Social Security Amendments of 1983 (Apr. 20, 1983) ("This bill demonstrates for all time our nation's ironclad commitment to Social Security. It assures the elderly that America will always keep the promises made in troubled times a half a century ago. It assures those who are still working that they, too, have a pact with the future. From this day

fallback position persuasive that, unlike antidiscrimination laws, healthcare assistance does more than simply protect the individual's unencumbered access to opportunity because it subsidizes that person's effort rather than merely removing an obstacle. There might be, as some notable conservatives argue,<sup>101</sup> a distinction between programs that promote equality of result rather than equality of opportunity.<sup>102</sup> But even if there is such a distinction, it should not be controversial to place healthcare on the equality of opportunity end of the spectrum. Money spent for healthcare is not disposable income. It is spent so the individual can physically continue to function.

#### CONCLUSION

National healthcare is not a newfound, radical idea. It was proposed by political leaders as diverse as Presidents Richard Nixon and Harry Truman<sup>103</sup> and until recently the proposal enjoyed significant bipartisan support.<sup>104</sup> The reason why this is true is because the concept of national healthcare fits so well within our constitutional culture and traditions and is not, as others have argued, inconsistent with our constitutional commitments. There is nothing in our belief in individualism or in our distrust of government that suggests that the United States cannot act to alleviate health-related burdens on its citizenry.

Currently, there are 52 million people without health insurance,<sup>105</sup> and 8.1 million of them are children.<sup>106</sup> These millions

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forward, they have one pledge that they will get their fair share of benefits when they retire.”).

100. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5, 2000e-16 (2009).

101. *But see* MICHAEL NOVAK, *THE SPIRIT OF DEMOCRATIC CAPITALISM* 123–25 (1982).

102. David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, 34 WM. & MARY L. REV. 171, 173 (1992) (“The call for ‘equality of opportunity, not equality of result,’ is sometimes offered as a reason for opposing welfare state measures.”).

103. *See* Karen Davis, *Universal Coverage in the United States: Lessons and Experience of the 20th Century*, 78 J. URBAN HEALTH 46, 47 (2001).

104. *Cf.* Michael Isikoff, *White House used Mitt Romney health-care law as blueprint for federal law*, MSNBC.COM (Oct. 11, 2011, 6:05 AM), [http://www.msnbc.msn.com/id/44854320/ns/politics-decision\\_2012/t/white-house-used-mitt-romney-health-care-law-blueprint-federal-law/#.TrRCnnLdP48](http://www.msnbc.msn.com/id/44854320/ns/politics-decision_2012/t/white-house-used-mitt-romney-health-care-law-blueprint-federal-law/#.TrRCnnLdP48).

105. Pat Wechsler, *Americans Without Health Insurance Rise to 52 Million on Job Loss, Expense*, BLOOMBERG (Mar 16, 2011), <http://www.bloomberg.com/news/2011-03-16/americans-without-health-insurance-rose-to-52-million-on-job-loss-expense.html>.

do not share the level playing field that those of us with health insurance enjoy. Those that become ill or injured do not have the path to achievement that hard work and individual initiative provide for the rest of us; instead they become mired in physical and economic difficulties caused by matters outside their control.

The promise of American exceptionalism is that it provides a class-free society in which all have the equal opportunity to succeed. National healthcare promotes this vision. It not only comports with, but also furthers, the best aspects of American exceptionalism and the ideals that we share as a nation.

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106. *See supra* note 95 and accompanying text.