

# COMMENT

“THIS IS A BIG @&%#\*^! [POLITICAL QUESTION] DEAL!”<sup>1</sup>

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## I. INTRODUCTION

You see, our predecessors understood that government could not, and should not, solve every problem. They understood that there are instances when the gains in security from government action are not worth the added constraints on our freedom. But they also understood that the danger of too much government is matched by the perils of too little . . . [T]hey knew that when any government measure, no matter how carefully crafted or beneficial, is subject to scorn; when any efforts to help people in need are attacked as un-American . . . that at that point we don't merely lose our capacity to solve big challenges. We lose something essential about ourselves.

—President Barack Obama<sup>2</sup>

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<sup>1</sup> See Sheryl Gay Stolberg & Robert Pear, *A Stroke of a Pen, Make that 20, and It's Official*, N.Y. TIMES, Mar. 24, 2010, at A19 (referencing Vice President Joe Biden's unintended and impolite congratulations to President Obama the night after Congress passed the Patient Protection and Affordable Care Act).

<sup>2</sup> Barack Obama, President of the United States, Remarks by the President to a Joint Session of Congress on Health Care (Sept. 9, 2009) (transcript available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/)).

Over nine decades of reform efforts.<sup>3</sup> Nine administrations.<sup>4</sup> \$2.5 trillion spent.<sup>5</sup> And 32 million American lives.<sup>6</sup> When Vice President Joe Biden said passage of comprehensive health-care legislation was a “big . . .”—well, momentous occasion—these are the statistics that give credence to his colorful language. Federalism,<sup>7</sup> “death panels,”<sup>8</sup> party-line votes,<sup>9</sup> contemptuous language, and a partisan electorate, on the other hand, are all factors which signal passing comprehensive health-care legislation is a lot more than just a “big [expletive] deal”—health-care reform in this country is a major political controversy, one which may be apt to be described as a “nonjusticiable political question”<sup>10</sup> removable from judicial scrutiny.

Throughout this Comment, this Article will be dedicated to unpacking that query. In so doing, this Comment does not definitively propose that the issue of health-care reform fits neatly

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<sup>3</sup> See *infra* Part II.D.

<sup>4</sup> See *id.* (covering the eras of health-care reform, which involved the following presidential administrations: Wilson (1913-1921), F.D. Roosevelt (1933-1945), Truman (1945-1953), Johnson (1963-1969), Nixon (1969-1974), Carter (1977-1981), G.H.W. Bush (1989-1993), Clinton (1993-2001), Obama (2009-Pres.)).

<sup>5</sup> See Bernadette Fernandez et al., *Health Care Reform: An Introduction*, Congressional Research Service Report to Congress, Aug. 31, 2009, available at [http://assets.opencrs.com/rpts/R40517\\_20090831.pdf](http://assets.opencrs.com/rpts/R40517_20090831.pdf) (finding “[n]ational health-care spending now likely exceeds \$2.5 trillion, more than 17% of the gross domestic product”).

<sup>6</sup> See Jill Jackson & John Nolan, *Health Care Reform Bill Summary: A Look at What’s in the Bill*, CBS News, Mar. 23, 2010, [http://www.cbsnews.com/8301-503544\\_162-20000846-503544.html](http://www.cbsnews.com/8301-503544_162-20000846-503544.html) (reporting that an estimated 32 million uninsured Americans will benefit from health-care reform).

<sup>7</sup> See PHILIP J. FUNIGIELLO, *CHRONIC POLITICS: HEALTH CARE SECURITY FROM FDR TO GEORGE W. BUSH* 6 (2005) (Professor Funigiello is a professor emeritus of history at the College of William and Mary). In his book *Chronic Politics*, Prof. Funigiello explains how issues of federalism have been front and center when it comes to the fate of health-care reform in the United States. He attributes the reason why the United States was the only major industrialized nation without national health insurance to “the hostile political culture that evolved in the formative years of American health policy, beginning with debates over the proper role of government in health care . . .” *Id.*

<sup>8</sup> See Earl Blumenauer, *My Near Death Panel Experience*, N.Y. TIMES, Nov. 15, 2009, at WK12 (attributing former Alaska Governor Sarah Palin as the origin of the “death panel” claims, which surrounded the health-care debate early on). Blumenauer writes, quoting Sarah Palin’s Facebook page:

The most bizarre moment came on Aug. 7 when Sarah Palin used the term “death panels” on her Facebook page. She wrote: “The America I know and love is not one in which my parents or my baby with Down syndrome will have to stand in front of Obama’s ‘death panel’ so his bureaucrats can decide, based on a subjective judgment of their ‘level of productivity in society,’ whether they are worthy of health care. Such a system is downright evil.”

*Id.*

<sup>9</sup> See Alex Wayne & Edward Epstein, *Obama Seals Legislative Legacy With Health Insurance Overhaul*, 68 CONG. Q. WKLY 748, 748 (2010) (noting that health care passed the house by a vote 219-212, no republicans voting “yes”).

<sup>10</sup> See *infra* Part II.B-C.

into political-question packaging since political questions themselves are somewhat uncertain. But this Comment submits that health-care reform lends itself to all the right indicators that have persuaded the courts to find nonjusticiable political questions in the past.

To support that contention, this Comment aims to do three simple things. First, this Comment will introduce the legal concept of political questions to the general readership (and perhaps reintroduce it to the legal community far removed from law school) and identify markers that have shaped the legal concept's outer contours.<sup>11</sup> Next, bearing what a political question is in mind, this Comment will then rehash health-care reform's history up through the Obama administration and extrapolate facts from that history which makes health-care reform an issue ripe for finding a political question.<sup>12</sup> Thereafter, finally, with the facts of health-care reform laid bare, this Comment will apply considerable case law and legal reasoning in an effort to show why challenges to health-care reform may be an issue better suited for resolution at the ballot box than in the four walls of a courthouse.<sup>13</sup>

Some issues simply are just not made to be resolved in a courtroom, and some may argue that hot-button topics like abortion or gay marriage are two in particular. But this Comment submits that health-care reform—unlike abortion or gay marriage, which are deeply divided and personal issues in their own right—is an issue that spans a multigenerational divide, conjuring up the most fundamental of philosophical differences (*i.e.* federalism), and it is an issue uniquely positioned for and deserving the utmost legislative deference. The courts should remain sidelined on this issue, and this Comment now turns to understanding why.

## II. THE NONJUSTICIABLE POLITICAL QUESTION AND THE HISTORY OF HEALTHCARE REFORM

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<sup>11</sup> See *infra* Part II.A-C.

<sup>12</sup> See *infra* Part II.D.

<sup>13</sup> See *infra* Part III.

### A. *The Genesis of Political Questions*

“It is emphatically the province and duty of the judicial department to say what the law is.”

—Chief Justice John Marshall<sup>14</sup>

For legal scholars and Supreme Court enthusiasts alike, no phrase is perhaps more memorable of the thousands of Supreme Court opinions spanning 553 volumes.<sup>15</sup> What is remarkable, however, is that in the same setting that Chief Justice Marshall established judicial review with this one sentence and expanded the power of the judiciary, the average observer of Supreme Court history does not realize Marshall simultaneously carved out an exception of matters beyond the reach of Article III courts. These matters are known as “political questions.”<sup>16</sup>

In the context of *Marbury v. Madison*, what originally constituted a “political question” is different from what a political question is today. When Marshall first articulated political questions in *Marbury*, Marshall’s announcement was particularly limited to Executive Acts (of the President or his agents) arising under a constitutional prescription of power. Marshall wrote:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there

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<sup>14</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

<sup>15</sup> Chief Justice Marshall’s timeless words are not only engraved in the minds of law students, legal scholars, and Supreme Court buffs, but it is memorialized on the Supreme Court’s walls for millions of tourists to see everyday.

<sup>16</sup> There appears to be a divergence of opinion among scholars as to when political questions came to life. *See* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 102 (1988) (recognizing *Marbury* as the genesis of political questions (or, also known as, the political question doctrine)). *But see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-13, at 98 (2d ed. 1988) (attributing the history of the political question doctrine as springing from *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) to *Baker v. Carr*, 369 U.S. 186 (1962)); RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 2.16(b), at 432 (4th ed. 2007) (recognizing *Luther* as an “early and leading case developing the political question doctrine”).

exists, and can exist, no power to control that discretion. The subjects are political.<sup>17</sup>

Although on the one hand Marshall was “emphatically” stating that it was the duty of the courts “to say what the law is,” on the other hand he qualified that duty to matters *not* expressly submitted by the Constitution to another branch of the Federal Government. He wrote:

The province of the court is, solely, to decide on *the rights of individuals*, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, *in their nature political*, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.<sup>18</sup>

By this account, Marshall was not saying anything new. Judicial review may have been a novel concept in our early constitutional democracy,<sup>19</sup> but the framing of “political questions” was really just renaming what was implied in the Constitution from the beginning—namely separation of powers.<sup>20</sup> The effect would be, however, to have a more definitive proscription of judicial jurisdiction over matters innately delegated to the other government branches.

### *B. The Import of Political Questions*

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<sup>17</sup> *Marbury*, 5 U.S. at 165-66.

<sup>18</sup> *Id.* at 171 (emphasis added).

<sup>19</sup> See ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 5 (1989) (“[T]he *Marybury* opinion was justified neither by the Constitution nor by legal precedent . . . [T]he doctrine of judicial review was an innovation.”); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1 (1962) (“[T]his power of judicial review . . . does not derive from any explicit constitutional command. The authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself.”).

<sup>20</sup> Courts recognize that the driving principle of separation of powers—deferential respect for the autonomous sphere of power placed in coordinate government branches—is a fundamental characteristic underlying nonjusticiable political questions. See *Nielsen v. Kezer*, 652 A.2d 1013, 1018 (Conn. 1995) (finding that the political question doctrine should be invoked when “adjudication would place the court in conflict with a coequal branch of government in violation of the primary authority of that coordinate branch”). By establishing judicial review and simultaneously carving out the political-question exception, Marshall did not create a “super judiciary” as some may suggest. See Hon. John Charles Thomas, Partner, Hunton & Williams, LLP, *Understanding the Constitution*, Address at the Leadership Conference of the Office of Personnel Management, *available at* [http://www.opm.gov/constitution\\_initiative/speech.asp](http://www.opm.gov/constitution_initiative/speech.asp) (last visited June 1, 2010). Rather he only revealed what was implicit all along—the three branches of government, although interdependent and a check on the others, were autonomous entities in the sphere of their constitutionally prescribed roles. This is the enduring feature of political questions which survive today and resonate outside the bounds of the Court’s political question cases. See *infra* Part III (discussing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), a “standing” decision by the Court holding that vindicating the public interest in Government observance of the Constitution and laws is not the job of the courts).

Political questions presuppose the idea that the judiciary is not competent to handle certain issues because they fall under the purview of a constitutional grant of authority to another branch of the *Federal Government*.<sup>21</sup> To say it differently, the issues ripest for “political question” categorization will almost certainly be those where separation-of-powers violations are implicated if adjudication of those issues could proceed.<sup>22</sup>

The expansion of nonjusticiable political questions bears this out. After *Marbury*, beginning in *Luther v. Borden* and running to *Baker v. Carr*, the majority of the Court’s political-question cases dealt with not stepping on the toes of another branch of government. *Luther*, for instance, originally was a run-of-the-mill trespass action, but it turned into a political “hot potato” because the issue before the Court squared on deciding whether the Rhode Island charter government was the legitimate sovereign.<sup>23</sup> The issue argued by both sides centered on the contention that the Rhode Island charter government was illegitimate because, if the defendants were acting under the lawful authority of the rightful sovereign, their actions were immune from tort liability.

The Court resisted getting to the merits of this case because, the Court reasoned, under Article IV, Section 4 of the United States Constitution,<sup>24</sup> it was for Congress to decide which

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<sup>21</sup> See *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question.’”).

<sup>22</sup> See *Bd. of Educ. v. Town & Borough of Naugatuck*, 778 A.2d 862, 872 (2001); cf. PHILIP J. PRYGOSKI, CONSTITUTIONAL LAW § 25, at 13 (14th ed. 2010) (agreeing that “[a] political question ultimately involves separation of powers issues,” but positing that there may be another category of issues ripe for political questions: “too-hot-to-handle” issues).

<sup>23</sup> See ROTUNDA & NOWAK, *supra* note 16, § 2.16(b)(i), at 432-33. In this case, Massachusetts resident, Martin Luther, was suing defendants, Luther Borden and others, for unlawfully breaking into his house in the course of Dorr’s Rebellion. (A succinct history of Dorr’s Rebellion is given in TRIBE, *supra* note 16, § 3-13, at 98.) Plaintiff was aiding the citizens of Rhode Island in their efforts to usurp the state’s charter government and incorporate a new constitution. The defendants ransacked plaintiff’s home on military orders to quash the insurgency mounting in the state.

<sup>24</sup> “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” U.S. CONST. art. IV, § 4.

government to recognize.<sup>25</sup> Chief Justice Taney argued that “the Constitution ‘has treated the subject [of interference in the domestic concerns of a state] as political in nature, and placed the power in the hands of the [general government].’”<sup>26</sup> If the Court were to reach the parties’ arguments on the merits, clearly the adjudication of the issue would have violated the separation of powers.<sup>27</sup>

Considerations like this guided the Court’s political-question cases during the next eleven decades leading up to *Baker v. Carr*. Not until 1962 when *Baker* was published did political questions really get a semblance.<sup>28</sup> In his majority opinion, Justice Brennan laid out six factors to guide courts in deciding when a nonjusticiable political question exists.

*Baker* was a reapportionment case brought by Tennessee voters against Tennessee’s Secretary of State, Joseph Carr. The plaintiffs—largely underrepresented ethnic minorities—sued the Secretary and other government officers alleging among other things that their federal constitutional rights under the Fourteenth Amendment had been violated.<sup>29</sup> At the trial court, the

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<sup>25</sup> See *Luther v. Borden* 48 U.S. (7 How.) 1, 42 (stating “it rests with Congress to decide what government is the established one in a State . . . . And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal”).

<sup>26</sup> ROTUNDA & NOWAK, *supra* note 16, § 2.16(b)(i), at 432 (alteration in original) (quoting *Luther*, 48 U.S. at 42).

<sup>27</sup> Clearly the fear of doing so compelled the *Luther* Court to find a political question. See *supra* note 16 and accompanying text. But other reasons may exist to support findings that the Court found a nonjusticiable political question for “prudential reasons.” See *Luther*, 48 U.S. at 38-39 (finding that to answer the question whether the charter government existed unlawfully implicated issues like were taxes wrongfully collected, were government officers illegally paid, and were judicial judgments void). Considering the seriousness of the issues tied up in this one question of which Rhode Island government was legitimate, Chief Justice Taney noted that where the stakes were high “it becomes [the Court’s] duty to examine very carefully its own powers before it undertakes to exercise jurisdiction.” *Id.* at 39. This seems to confirm Professor Prygoski’s theory that political questions will also arise if there are issues facing the Court that are “too hot to handle.” See PRYGOSKI, *supra* note 22, § 32, at 16.

<sup>28</sup> See Mulhern, *supra* note 16, at 104-05 (recognizing the *Baker* decision as the Court’s best effort since *Marbury* to clarify political questions).

<sup>29</sup> Because of a 1901 Tennessee statute controlling the apportionment of Tennessee’s General Assembly among the state’s 95 counties, plaintiffs argued their representation in the state legislature was disproportionate to their population mass. The votes of residents of more populous districts paled in comparison with the votes of residents of less populous districts. See TRIBE, *supra* note 16, § 3-13, at 100. “According to the Tennessee Constitution, the General Assembly was required to apportion the members of the General Assembly among the state’s counties, but Tennessee had failed to reapportion the state legislature since [the statute passed].” LEXIS, *Case in Brief: Enhanced Analysis* (*Baker v. Carr*, 369 U.S. 186 (1962)), p.6, available at <http://www.lexis.com>. The old boundary lines created by the statute did not reflect population distribution over the years, so as a consequence “the outdated

plaintiffs, however, never reached the merits of their argument; relying on the Supreme Court’s pronouncement in *Colegrove v. Green*, the United States District Court for the Middle District of Tennessee dismissed the plaintiffs’ suit for lack of subject-matter jurisdiction. Previously, *Colegrove*, which was another reapportionment case, held that legislative reapportionment was an issue beyond the competence of the Article III courts.<sup>30</sup> Justice Felix Frankfurter, writing for the *Colegrove* plurality, “noted his view that a court was without remedial power to reapportion voting districts by itself, and further observed that the Constitution plainly granted authority to Congress to deal with the problem.”<sup>31</sup> Without a question in his mind, the issue was a political question that the “[c]ourts ought not to enter [into].”<sup>32</sup>

Justice Brennan unequivocally repudiated *Colegrove*’s formulation of political questions, however, and found that issues of legislative reapportionment were *not* nonjusticiable political questions. (This is the great irony of *Baker*: the case that announces the rule for discerning political questions failed to make a finding of one on the facts.) Justice Brennan wrote in his opinion: “The doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’ The courts cannot reject as ‘no lawsuit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.”<sup>33</sup> Political questions are much more nuanced than some case or controversy that presents with “political consequences.”<sup>34</sup>

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apportionment diluted the voting power of ethnic minorities and blacks who lived in the cities.” *Id.* The argument was that “these plaintiffs and others similarly situated, [were] denied the equal protection of the laws accorded them by the Fourteenth Amendment . . . by virtue of the debasement of their votes.” *Baker v. Carr*, 369 U.S. 186, 188 (1962).

<sup>30</sup> See *Colegrove v. Green*, 328 U.S. 549, 552 (1946).

<sup>31</sup> See *TRIBE*, *supra* note 16, §3-13, at 100.

<sup>32</sup> *Colegrove*, 328 U.S. at 556 (Justice Frankfurter termed this area a “political thicket”). This author is certain, as the reader reads through Part II.D., *infra*, readers will agree no phrase perhaps better captures the issues surrounding health-care reform than this one by Justice Frankfurter.

<sup>33</sup> *Baker*, 369 U.S. at 217.

<sup>34</sup> Even Justice Jackson would note: “[A]ll constitutional interpretations have political consequences.” *ROTUNDA & NOWAK*, *supra* note 16, § 2.16(a)(i), at 431 (citation omitted). Because a case is viewed as political will not

Bearing that fact out, prior to announcing the six-factor analysis for determining the existence of political questions, Justice Brennan rehashed the appearance of nonjusticiable political questions in the Court's jurisprudence. As was discovered, various groupings of cases lent themselves to form the outer contours of the doctrine.<sup>35</sup> Before *Baker*, areas concerning the Guarantee Clause,<sup>36</sup> foreign affairs,<sup>37</sup> and constitutional amendments,<sup>38</sup> were generally where political questions reared their head. (And after *Baker*, political questions would prominently lend themselves to areas of legislative conduct.<sup>39</sup>) But *Baker* put forth the constitutional standards defining political questions once and for all. From *Baker* onwards, political questions were much more formulaic. Justice Brennan provided the six factors defining every political question. He wrote:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>40</sup>

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necessarily invoke the political question doctrine. *See* *United States v. American Tel. & Tel. Co.*, 567 F.2d 121, 126 (D.C. Cir. 1977).

<sup>35</sup> *See Baker*, 369 U.S. at 213, 215. Justice Brennan points out in *Baker* that the questions of “dates of durations of hostilities” and “the status of Indian tribes” have also been markers where the political question doctrine has showed up.

<sup>36</sup> *See Pac. Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (refraining from making a finding that a state law passed through an initiative and referendum process was unconstitutional because this was a political question to be decided by Congress).

<sup>37</sup> *See Latvia State Cargo & Passenger S.S. Line v. Clark*, 80 F. Supp 683 (D.D.C. 1948) (holding that the recognition of foreign governments are issues dedicated exclusively to the political departments of government and beyond the reach of the courts), *aff'd*, 188 F.2d 1000 (D.C. Cir. 1951).

<sup>38</sup> *See Coleman v. Miller*, 307 U.S. 433 (1939) (finding that it was within the province of Congress to determine whether a proposed amendment lapses after a reasonable time).

<sup>39</sup> *See Nixon v. United States*, 506 U.S. 224 (1993) (holding that the Court cannot decide the rules for a Senate impeachment trial because the Constitution gives the Senate that “sole power” under Article I, Section 3, Clause 6); *Powell v. McCormack*, 395 U.S. 486 (1969) (finding that the Court cannot interfere in matters where either house of Congress has expelled a member by two-thirds vote pursuant to Article I, Section 5, Clause 2).

<sup>40</sup> *See Baker*, 369 U.S. at 217.

For the first time since *Marbury*, the doctrinal “second child” to judicial review received “its fullest judicial treatment,”<sup>41</sup> and for some commentators, like Professor Peter Mulhern of Northern Illinois University College of Law, this was quite remarkable.<sup>42</sup> But for others, Mulhern noted—for those “who make their living writing about constitutional law”—enthusiasm for this development would not be shared.<sup>43</sup> Nonjusticiable political questions may have come to a prominent and influential place in Constitutional Law post-*Baker*, but further scholarly critiques and analysis of political questions would be sure to follow.

### C. Scholarly Critique and Analysis of Political Questions

“[C]ontemporary commentary concerning the political question doctrine is often hostile to it,”<sup>44</sup> Professor Mulhern writes.<sup>45</sup> Even in spite of predictable markers denoting where political questions may exist, some are still willing to challenge their very existence.<sup>46</sup> Like “[s]cholarly arguments about the proper role of judicial review in our constitutional order have consumed a huge quantity of ink,”<sup>47</sup> political questions have also consumed their fair share. They remain a

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<sup>41</sup> See Mulhern, *supra* note 16, at 105.

<sup>42</sup> See *id.* at 99 (memorializing the fact that “[s]ince judges first claimed the power of judicial review, they have tried to define a category of ‘political questions’ outside the scope of that power”).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Prof. Mulhern considered why there exists a scholarly backlash against political questions. He writes: “Limiting the power of judicial review is inconsistent with the assumptions of many modern legal scholars regarding the role of courts in our constitutional order . . . Commentators attack the doctrine as inconsistent with basic principles of our constitutional practice . . .” *Id.*

<sup>46</sup> Professor Louis Henkin is perhaps the leading critic denying the existence of the political question doctrine. He writes:

The thesis I offer for discussion is that there may be no doctrine requiring abstention from judicial review of ‘political questions.’ The cases which are supposed to have established the political question doctrine required no such extra-ordinary abstention from judicial review; they called only for the ordinary respect by the courts for the political domain.

Louis Henkin, *Is There a “Political Question” Doctrine*, 85 YALE L.J. 597, 600-01 (1976). See also ROTUNDA & NOWAK, *supra* note 16, § 2.16(a)(i), at 430 (“The political question doctrine . . . is a misnomer. It should more properly be called the doctrine of nonjusticiability, that is, a holding that the subject matter is inappropriate for judicial consideration.”). *Contra* TRIBE, *supra* note 16, § 3-13, at 106 (“There is . . . a political question doctrine.”).

<sup>47</sup> Mulhern, *supra* note 16, at 108-09.

fluid concept open to scholarly debate and criticism.<sup>48</sup> Professors Rotunda and Nowak remark that “[t]he present scope of the [p]olitical [q]uestion [d]octrine is not easily summarized,”<sup>49</sup> and Harvard Law professor, Laurence Tribe, concurs in that assessment: “[t]he political question doctrine is in a state of some confusion.”<sup>50</sup> Perhaps the best way to describe how the courts have treated political questions is to say there is a “variable commitment.”<sup>51</sup> Nevertheless, as variable as that commitment may be, political questions appear to be supported by recurring rationales, which seem to justify a court finding them time and again.

One scholarly commentator, Philippa Strum, Senior Scholar at the Woodrow Wilson Center, submits two reasons explaining why the Supreme Court will call political questions into action. Strum posits that political questions will be called into play when (1) “it enables the judiciary to maintain its independence by withdrawing from no-win situations,” and (2) when it is necessary to affirm a government system based on popular sovereignty.<sup>52</sup>

The Supreme Court, declaring the presence of a political question, tacitly admits that it cannot find and therefore cannot ratify a social consensus that does not violate basic American beliefs . . . The political question doctrine, which permits the Court to restrain itself from precipitating impossible situations that might tear the social fabric, gives the electorate and its representatives time to work out their own rules . . . .<sup>53</sup>

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<sup>48</sup> For the interested reader, one should consult the following scholarly articles to track the debates concerning nonjusticiable political questions: Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031 (1984). For the purposes of this Comment, due to the constraints of time, this author is only concerned with the formulation of political questions as laid out in *Baker v. Carr* and the underlying rationales that have historically justified its use. This Comment is not interested in the philosophical debate of whether political questions exist or how they dovetail with the theoretical functions of the Supreme Court. This Comment is only concerned with whether political questions lend themselves to being used in the health-care reform challenge bubbling up through the federal courts.

<sup>49</sup> ROTUNDA & NOWAK, *supra* note 16, § 2.16(b)(iv), at 437.

<sup>50</sup> TRIBE, *supra* note 16, § 3-13, at 96.

<sup>51</sup> See Philippa Strum, *Political Question Doctrine*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1949, 1950 (Leonard W. Levy et al. eds., 1986); see, e.g., JONATHAN D. VARAT ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 120 (13th ed. 2009) (alluding *Bush v. Gore*, 531 U.S. 98 (2000) may have been a perfect case, but ultimately missed opportunity, for the Supreme Court to find a nonjusticiable political question).

<sup>52</sup> Strum, *supra* note 51, at 1951.

<sup>53</sup> *Id.*

These reasons seem to capture a prudential view of political questions taken by Professor Prygoski and alluded to by Chief Justice Taney in *Luther v. Borden*.<sup>54</sup> There are some scholars who may be reluctant to admit that such reasons offer viable explanations for political-question posturing by courts.<sup>55</sup> However, history at least seems to bear out, where courts are stuck between a rock and a hard place, political questions follow not too far behind.<sup>56</sup> This Comment now examines whether the current assault on health-care reform in this country may present an ample opportunity for fleshing this point out further.

#### *D. History of United States Health-care Reform*

*Health security*, the term that encompasses not only the early reformers' concept of 'social insurance' (for covering the costs of hospitalization and physicians' services) but also concern for the individual's total health and well-being, is one of the *most pressing political and social concerns of contemporary America*.<sup>57</sup>

“The most pressing political concern”—such a phrase really gives a reader a reason to pause. Of all the political issues that the United States has faced since its inception—from the Civil War and civil rights to post-9/11 security—has health-care reform really topped the list our country's most divisive political issues?

When reflecting on his twenty-six years serving as a member of Congress, Senator Tom Daschle remarked that when he left Congress in 2005 “no other issue was as complex, as personal, and as fiercely contested . . . as health care.”<sup>58</sup> That begs the question: has health-care reform in this county *always* been so political?<sup>59</sup>

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<sup>54</sup> See *supra* note 27.

<sup>55</sup> See ROTUNDA & NOWAK, *supra* note 16, § 2.16(d), at 462 (mentioning Professor Fritz Scharpf as an example of a scholar opposed to the notion that the Court has used the political question doctrine to retreat from difficult cases).

<sup>56</sup> See *supra* text accompanying note 27 (discussing *Luther v. Borden*); see also Strum, *supra* note 51, at 1950 (suggesting the plurality in *Colegrove v. Green* invoked the political question doctrine for fear of the consequences of competing outcomes of the decision).

<sup>57</sup> FUNIGIELLO, *supra* note 7, at 1 (emphasis added).

<sup>58</sup> TOM DASCHLE, CRITICAL: WHAT WE CAN DO ABOUT THE HEALTH-CARE CRISIS 45 (2008).

<sup>59</sup> As this Comment explores that question, this author will primarily rely on Senator Daschle's book *Critical*. *Critical* provides a comprehensive yet concise analysis of the critical periods in health-care reform history, and it

The short answer to that question is yes. The next question though is when was the beginning of this political storm and from where did it originate. To that question there appears to be two answers. On the one hand, if one is talking about general government involvement in private medicine, Congress's efforts to establish the Marine Hospital System in 1798<sup>60</sup> may be the spark to the political firestorm. In a country hot off the heels of war with England and passionate about its revolutionary constitutional system that championed limited government and individual liberties, "federal responsibility for financing or intervening in the health care of citizens was viewed as an anomaly."<sup>61</sup> Physicians at the time, weary of government involvement in the sacred physician-patient relationship, fought against government infiltration into medicine by making a rallying call focused on "freedom of enterprise" and "the unfettered marketplace."<sup>62</sup>

In the history of direct legislative antecedents to contemporary health-care reform efforts, however, the upstart of European workers compensation laws in the 1890s appears to be the battleground on which different political ideologies on health-care reform came to a head.<sup>63</sup> On the one side, if government could provide compensation for work-related accidents and diseases, many believed the country might be ready to offer health care on a broader scale.<sup>64</sup> In 1911, Britain's National Insurance Act "became the model for transforming health insurance in the United States into a major political issue, as American reformers argued that health insurance would not only benefit American workers but also yield handsome profits for employers by

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lends itself to bringing to the fore the key events which shaped health care into a political hot topic. Although this author would have liked to develop a more nuanced and in-depth coverage of the historical developments surrounding health-care reform, such a pursuit would have led beyond the parameters of this project, which regrettably is something there was little time for. However, for the curious reader, for further investigation into health-care reform history and how it has taken the political spotlight in the past century, please read Prof. Funigiello's *Chronic Politics*.

<sup>60</sup> The Marine Hospital System was a Congressional initiative "to organize and finance the medical care of mariners." See FUNIGIELLO, *supra* note 7, at 2.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See *id.* at 6.

<sup>64</sup> See *id.* at 8.

creating a healthier, more productive work force.”<sup>65</sup> Naturally, opposition came from the other side that espoused to the general rule: leave as much to the private sector as possible.<sup>66</sup>

The stage was set for a politically charged environment, and both sides of the health-care reform debate waged trench warfare over the next several generations. Each successive decade lent a significant contribution to the health-care quagmire, starting in 1914 when the American Association for Labor Legislation (AALL) put compulsory health insurance on the national agenda for the first time.<sup>67</sup> Proposing its bill to provide free medical care, paid sick leave, and death benefits for workers, the AALL introduced its legislation into fourteen state legislatures.<sup>68</sup> In California, physicians put up staunch opposition to the AALL legislation fearing that the government would regulate their fees.<sup>69</sup> Similarly, in New York, the AALL legislation was part of a 1918 referendum, but the measure was defeated when doctors from upstate New York made loaded charges that the proposal “smacked of socialism.”<sup>70</sup> Inevitably the AALL legislation would die, and serious health-care reform really would not be resurrected till the 1930s.

The Great Depression was the catalyst that would put health-care reform back on the board. The effects of the Great Depression were an eye-opener for many Americans seeing for the first time that the plight of their neighbors was due in large part to the inability to get fee-for-service medicine.<sup>71</sup> So in 1934 President Franklin Roosevelt would launch the Committee on Economic Security to craft the Social Security Act, and national health insurance was included in the preliminary report of the advisory committee.<sup>72</sup> But given the backlash in the medical

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<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 7.

<sup>67</sup> *See* DASCHLE, *supra* note 58, at 47.

<sup>68</sup> *See id.* Only California and New York would seriously consider the legislation. *Id.* at 48.

<sup>69</sup> *See id.*

<sup>70</sup> *See id.* Sen. Daschle writes that during the midst of the Red Scare this was a “loaded charge.” *Id.*

<sup>71</sup> *See* FUNIGIELLO, *supra* note 7, at 2.

<sup>72</sup> *See* DASCHLE, *supra* 58, at 49.

community,<sup>73</sup> a national health-insurance initiative fell by the wayside as a sacrifice to save the Social Security proposal, which included unemployment insurance and aid for the elderly, widows, single mothers, and poor children.<sup>74</sup>

Americans knew that the health of the nation was in dire straits.<sup>75</sup> However, as time passed and the country moved further away from the Great Depression, the country's community ethos wore off as public disdain grew against New Deal programs and government expansion.<sup>76</sup> The outbreak of World War II also did not help—during this period Americans were less willing to invest in new government programs when resources could be better used for supporting the soldiers fighting abroad.<sup>77</sup> In the alternative, Americans would settle for the employment-based system of health insurance,<sup>78</sup> but it would not be too long till President Harry Truman would succeed to office after President Roosevelt's death and put national health care on the top of the government's agenda.<sup>79</sup>

President Truman believed that “government [must be] bold enough to do something about [health care].”<sup>80</sup> In 1945, right after his succession from the vice presidency, Truman

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<sup>73</sup> See *id.* (“After the advisory panel included national health insurance in a preliminary report, doctors mobilized to stop it. They bombarded Congress with postcards, letters, and phone calls; the president's personal physician even lobbied Eleanor Roosevelt.”).

<sup>74</sup> See *id.*

<sup>75</sup> See FUNIGIELLO, *supra* note 7, at 3 (“In 1935, the National Health Inventory, a federally underwritten study of the nation's health, documented . . . the number of Americans who were ill, the nature of their illnesses, the regional distribution of the sick, and . . . the cost to the economy in real dollars of illness-related worker absences.”).

<sup>76</sup> See *id.*

<sup>77</sup> See *id.*

<sup>78</sup> See DASCHLE, *supra* note 58, at 49. What is known as the employment-based system of health insurance grew out of hospital prepayment plans created during the Great Depression. *Id.* Crafted as a mechanism to keep economically strapped hospitals afloat while patients forwent medical care to conserve money, these prepayment plans were primarily offered to employers in return for guaranteeing free medical care when their employees needed it. *Id.* In the long run, these plans would ultimately give birth to the Blue Cross system. *Id.*

<sup>79</sup> See *id.* at 51. Truman served as vice-president for eighty-two days (January 20, 1945–April 12, 1945). See ROBERT H. FERRELL, HARRY S. TRUMAN: A LIFE 173, 176 (1994). Prior to getting involved in national politics, however, when he won a senate seat in 1934, Truman was an administrative judge in Jackson County, Missouri. See *id.* at 99. National health insurance was on his radar from the beginning because while serving as a judge “he had seen ‘people turned away from hospitals to die because they had no money for treatment,’ and he never forgot [that].” DASCHLE, *supra* note 58, at 51 (footnote omitted).

<sup>80</sup> *Id.* at 51 (quoting President Truman's November 1945 address to Congress).

immediately introduced national insurance bills into both houses of Congress, and, in turn, he immediately faced opposition, again stemming from the medical community.<sup>81</sup> The medical community had different opinions than the President did about the role of government in health care. Not only did they believe it was government overreaching and a threat to our constitutional democracy for the government to supply a nationalized system of health insurance, but they viewed it as an assault on their livelihoods and their liberty to pursue their trades.<sup>82</sup>

As strong as the support may have been for government-run health care, the strength of the opposition was equally as profound. On both sides of the issue there were strongly entrenched, unrelenting views and equally powerful voices and resources to go with them.<sup>83</sup> In time the scales would tip in favor of the opposition; the growing fears over the rise of communism in the late 1940s and the self-reliant ethos of the workers' unions contributed to stalling federally backed health insurance in its tracks.<sup>84</sup>

After World War II and up through the early 1950s, the employment-based model of health insurance would begin to set in. The combination of employers fighting against

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<sup>81</sup> See *id.* at 52.

<sup>82</sup> See DASCHLE, *supra* note 58, at 52 (quoting the *Journal of the American Medical Association*, which remarked: “[If this] Old World scourge is allowed to spread to our New World, [it will] jeopardize the health of our people and gravely endanger our freedom”); see also *supra* text accompanying note 62.

<sup>83</sup> Daschle writes that powerful forces like the American Medical Association, the U.S. Chamber of Commerce, and the caucus of southern politicians led opponents of national health insurance. Each organization fueled opposition to the plan in its own ways. The AMA produced pamphlets to be placed in doctors' waiting rooms that read, “The Voluntary Way is the American Way”; the U.S. Chamber of Commerce similarly distributed fliers entitled, “You and Socialized Medicine,” “which alleged that federal officials wanted to take ‘another step toward further state socialism and the totalitarian welfare state’”; and southern congressional leaders that headed key committees blocked federal efforts at health-care reform out of fear that such programs would integrate racially divided hospitals. See *id.* at 52-53 (footnotes omitted).

<sup>84</sup> See *id.* at 53, 55-56. Daschle writes:

[R]ank and file members of powerful unions lost their enthusiasm for national health insurance as they secured better and better benefits for themselves in each round of collective bargaining. “We certainly don’t look to the political structure for our wages and working conditions. We get them our way,” said George Meany, secretary-treasurer of the [American Federation of Labor] . . . .

*Id.* at 55-56 (footnotes omitted).

government expansion for fear of a future socialized system, and the need to attract workers that were scarce because so many men were deployed overseas, incentivized the Blue Cross System to grow.<sup>85</sup> If employers could offer health care to employees, not only could they accomplish minimizing the need for government interference but also, they could expand their infrastructure by holding out health benefits as a carrot to work.

This scenario worked out tremendously for Blue Cross for some time, which had a monopoly on the health-care market.<sup>86</sup> However, with rise of for-profit insurers, Blue Cross's system, which was premised on the concept of "community rating," was doomed to the rise of health-insurance plans premised on an "experience-rating" model. The difference between the two plans were essentially in one every participant paid the same premiums and received the same benefits (community-rating),<sup>87</sup> and in the other, premiums were calculated on the use of a group's services in the previous year (experience-rating).<sup>88</sup>

In a market-driven economy, naturally the experience-rating model was destined to win out because it drove down costs. But the advantages that were attendant with an experience-rating system carried with it collateral damage. Tom Daschel writes:

As commercial insurers cherry-picked the young and healthy and community rating diminished, older and sicker Americans found it increasingly difficult to find insurance policies they could afford. This was especially true for the elderly, whose low income and loss of connection with the workplace left them largely uninsured. The unions had a vested interest in government help for the elderly. In the late 1950s and early 1960s, they began to win health benefits for retirees, but these victories came at a high price. With the advent of experience rating, retirees were a significant drain on employers' finances, soaking up money they otherwise might have spent on wage increases. If the government took responsibility for insuring retirees, the unions would be able to bargain for higher wages and better benefits for current workers.<sup>89</sup>

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<sup>85</sup> *See id.* at 50, 54.

<sup>86</sup> *See id.* at 56.

<sup>87</sup> *See id.*

<sup>88</sup> *See id.* at 57.

<sup>89</sup> *Id.*

Thus entered the era of Medicare and Medicaid.<sup>90</sup> Like other efforts at reform, the Medicare program did not come along without bumps along the way.<sup>91</sup> But unlike previous plans, Medicare succeeded where other social-insurance programs failed—it passed Congress and President Lyndon Johnson signed it into law on July 30, 1965.<sup>92</sup> “[T]he final Medicare bill represented the largest expansion of health-care coverage in American history,”<sup>93</sup> and it was a decisive victory for reformers aspiring to a nationalized system of health care in the future. Still, the struggle towards that future would wage on for another forty years. And in the meantime, with the federal government now footing the medical bills for elderly Americans, a culture of exploitation began,<sup>94</sup> which gave rise to a host of new problems—namely spiraling out-of-control medical costs—that plagued the 1970s and 80s.

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<sup>90</sup> One writer summarized the Medicare and Medicaid systems nicely:

To supplement the private-health insurance system, which left many people behind, Congress launched two large public insurance programs in 1965, effectively creating a right—or ‘entitlement’—to health care for two specific groups of Americans. The Medicare program covers the elderly, while Medicaid covers poor mothers with young children and some poor and seriously disabled people.

Marcia Clemmitt, *Health-Care Reform*, 20 CONG. Q. RES. 505, 517 (2010).

<sup>91</sup> See DASCHLE, *supra* note 58, at 59. “[I]n 1960, Congress passed the Kerr-Mills Act, which gave states federal grants to pay for health care for the elderly.” *Id.* As a trailblazer to major legislative reform, the Kerr-Mills Act was the first in the line of fire. The law attracted “a bitter and protracted conflict with the [American Medical Association] and its business allies,” *see* FUNIGIELLO, *supra* note 7, at 3, and in 1963, the Senate found it to be largely ineffective. *See* DASCHLE, *supra* note 58, at 59.

<sup>92</sup> *See* DASCHLE, *supra* note 58, at 62. President Johnson signed the bill in the auditorium of the Harry S. Truman Library in Independence, Missouri.

<sup>93</sup> *Id.*

<sup>94</sup> Daschle writes:

Before Medicare, doctors typically charged what they thought a patient could afford; now, many of them were charging the government as much as they possibly could. “I am very glad to do charity work for my patients, but I certainly do not regard the federal government as an object of charity,” one doctor remarked.

*See id.* at 64 (footnote omitted).

Following the end of Johnson’s presidency in 1969, the next three administrations led by Presidents Nixon, Ford, and Carter would try their hands at cracking the nation’s health-care dilemma, but each would try to no avail because of political setbacks.<sup>95</sup> Not until the 1990s would serious efforts at health reform really reemerge because, with the Regan Revolution of the 1980s, America ran on “a promise to limit government.”<sup>96</sup> An unlikely contender for the Pennsylvania senate seat, Harris Wofford, would be the catalyst that reenergized the health-care reform movement in America.<sup>97</sup>

“Wofford’s stunning victory convinced many politicians and interest groups that it was time to launch another drive for health-care reform. Dozens of health-care bills sprouted on Capitol Hill.”<sup>98</sup> President George H.W. Bush countered with his proposal for health-care reform, which included health-care tax credits, vouchers for low-income families, and purchasing pools for small businesses.<sup>99</sup> The emphasis of his plan followed in the tradition of the Regan years, which was to minimize the role of government as much as possible.

When the 1991 election season came around, however, another model of national health insurance, “pay-or-play,” was gaining momentum and growing in popularity.<sup>100</sup> Pay-or-play models were a balance between extremes: they were neither government overloaded nor purely

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<sup>95</sup> See *id.* at 66-67. President Nixon’s National Health Insurance Partnership Act, which was a health-insurance program premised on an “employer mandate” sunk under the wave of the Watergate scandal; President Ford’s urgings to approve national health insurance was overcome by high inflation during his tenure; and President Carter’s plans for health care “fell by the wayside” due to the Iranian hostage crisis.

<sup>96</sup> See *id.* at 67.

<sup>97</sup> See *id.* at 76. Harris Wofford was tapped by Democratic Governor Bob Casey Sr. to finish the term of the late Republican Senator, John Heinz, who died in a plane crash. When Harris Wofford entered the Senate race, he started by trailing former Pennsylvania governor Richard Thornburgh by a 47-point spread. See *id.* at 75. Backed by Democratic strategist, James Carville, Wofford would turn his campaign around by focusing on health care. Wofford’s campaign seized on polling that showed voters favored Wofford 3 to 1 when they were told that he favored national health insurance. See *id.*; *cf. infra* p. 27 (discussing how Massachusetts Senator Scott Brown won a special election for Ted Kennedy’s senate seat on promise to filibuster health-care legislation). His campaign seized on the idea that “working Americans should have the right to a doctor,” and it put him over the top of Thornburgh with 55 percent of the vote. See DASCHLE, *supra* note 58, 75-76.

<sup>98</sup> *Id.* at 76.

<sup>99</sup> See *id.* at 77.

<sup>100</sup> See *id.*

market-driven plans. Pay-or-play plans were premised on the simple idea that employers would be required to insure their employees or contribute to the cost of their coverage through taxes.<sup>101</sup> Then Arkansas governor Bill Clinton endorsed pay-or-play when seeking the Democratic presidential nomination.<sup>102</sup> But leading up to the general election in November, mounting warnings from Conservatives that pay-or-play would lead to a single-payer system and socialized medicine prompted Governor Clinton to readjust his plan.<sup>103</sup> Clinton adopted, in the alternative, what was then considered as “a carefully regulated version of managed competition.”<sup>104</sup> Managed competition was a health-care reform strategy where “private insurers and health-care providers would compete for the business of ‘health-purchasing alliances,’ entities that would pool the buying power of businesses and individuals.”<sup>105</sup> Clinton’s version “wanted government subsidies to help the unemployed and small businesses purchase coverage through the regional alliances, and global budget caps to keep prices from rising too quickly.”<sup>106</sup> At the outset managed competition garnered widespread support.<sup>107</sup> But once Clinton was in office, his plan, premised on this popular scheme, failed like every president’s plan before his. Distractions, money, and mobilization, killed the Clinton plan in the Senate on September 26, 1994.<sup>108</sup>

As one writer commented: “[T]he [Clinton] proposal’s complexity helped make the plan an easy target for political opponents and businesses and health-care insurers and providers who

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<sup>101</sup> *See id.*

<sup>102</sup> *See id.* at 79.

<sup>103</sup> *See id.* at 78, 80.

<sup>104</sup> *See id.* at 80.

<sup>105</sup> *Id.* at 78.

<sup>106</sup> *Id.* at 80.

<sup>107</sup> *See id.* at 78. Daschle notes that managed competition was pleasing to both liberals and conservatives. The plan was a move towards universal coverage—which was something liberals wanted—and it did not expand public-insurance programs—which was pleasing to conservatives. *Id.* Also, the Conservative Democratic Forum viewed managed competition as the middle ground between President Bush’s plan and the one backed by Democratic leaders. *Id.* Even the *New York Times* endorsed managed competition as “the best answer.” *Id.* at 81 (footnote omitted).

<sup>108</sup> *See id.* at 89, 93, 99 (discussing the implications the deaths of eighteen U.S. Army Rangers in Somalia and the \$100 million spent in opposition to health care had on President Clinton’s plan).

feared its complicated rules and high costs.”<sup>109</sup> Submitted with 1,342 pages to pick over, President Clinton’s health-care plan was a beckoning call for special-interest groups to mobilize around.<sup>110</sup> Two groups in particular, the Health Insurance Association of America (HIAA)<sup>111</sup> and National Federation of Independent Business (NFIB),<sup>112</sup> “emerged as the leaders of the burgeoning anti-Clinton plan coalition.”<sup>113</sup> The HIAA and NFIB together with countless other groups contributed to spending over \$100 million dollars to defeat health-care reform.<sup>114</sup>

When Senator Daschle reflected on the demise of the Clinton health-care bill and the reasons it floundered, he wrote:

Many groups were generally sympathetic to the president’s plan . . . and they supported the principle of managed competition. But they worried that purchasing alliances would end up with too much regulatory authority, and feared the creation of a national health board that could cap prices. Large manufacturers straining under the financial burden of covering their workers and retirees were clamoring for reform, but they ended up abandoning the president’s plan because they worried that its basic benefits package was too generous and its safeguards against lawsuits by employees were too weak.<sup>115</sup>

Another observer of health-care reform put it another way. Yale University professor, Jacob Hacker, said: “The failure of the Clinton health plan . . . vividly demonstrates . . . that most

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<sup>109</sup> Clemmitt, *supra* note 90, at 517. Tom Daschle quotes in his book a White House Communications staffer who likens the health-care bill to “a target the size of Philadelphia.” See DASCHLE, *supra* note 58, at 90 (footnote omitted).

<sup>110</sup> *See id.*

<sup>111</sup> “[Health Insurance Association of America] represented about 270 small and medium-size insurers.” *Id.* at 91. HIAA was responsible for the famous “Harry and Louise” television spots, which depicted a middle-age, middle-class white couple sitting around the kitchen table expressing concerns about how the president’s plan would affect them. Today, HIAA is now part of America’s Health Insurance Plans (AHIP). *See* <http://www.ahip.org/content/pressrelease.aspx?docid=165> (last visited July 6, 2010).

<sup>112</sup> “The National Federation of Independent Business is the leading small business association representing small and independent businesses. A nonprofit, nonpartisan organization founded in 1943, NFIB represents the consensus views of its members in Washington and all 50 state capitals. NFIB’s mission is to promote and protect the right of our members to own, operate and grow their businesses.” <http://www.nfib.com/tabid/389/Default.aspx> (last visited July 6, 2010). The NFIB opposed the Clinton health-care plan through a massive grassroots lobbying campaign. *See* DASCHLE, *supra* note 58, at 93. Daschle writes that the NFIB used “Fax Alerts” and “Actions Alerts” to brief their members and prepare them for lobbying their representatives; orchestrated mass mailings to constituents highlighting how the president’s plan would harm local business; and sent polling results every two months to congressional offices on health-care opinions. *Id.*

<sup>113</sup> *Id.* at 91.

<sup>114</sup> *See id.* at 93.

<sup>115</sup> *Id.* at 94-95.

Americans—even the underinsured and the soon-to-be-insured, the potentially uninsurable and the one-illness-from-bankruptcy—can be scared into fearing that changing America’s inadequate public-private patchwork means higher costs and lower quality.”<sup>116</sup>

That emotion—fear—remained a resonating theme streaming the course of health-care reform history. Fear was stifling in the Clinton era, it was overwhelming 50 years prior, and in 2010, although America finally passed comprehensive health-care reform legislation, there was no less anxiety and preoccupation with fear attendant to passing H.R. 3590—the Patient Protection and Affordable Care Act.

On March 23, 2010, the President and Congress closed the chapter on what Senator Ted Kennedy called “the great unfinished business of our society.”<sup>117</sup> But, although President Obama and the 111th Congress were able to do what their predecessors could not, the final work product of the health-care reform legislation did not come without its share of hardships.<sup>118</sup> Like health-care reform efforts of the past 80 years, the plans to overhaul health care began with public support.<sup>119</sup> In July 2009, a Gallup poll showed 56% of Americans favored Congress

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<sup>116</sup> Clemmitt, *supra* note 90, at 517 (alteration in original) (citing Jacob S. Hacker, *Yes We Can? The New Push for American Health Security*, POL. & SOC’Y, Mar. 2009, at 14).

<sup>117</sup> See Obama, *supra* note 2 (President Obama read this phrase from a letter Ted Kennedy wrote before he died, which he asked to be delivered after his death.).

<sup>118</sup> See Wayne & Epstein, *supra* note 9, at 749. The article reads:

Before taking office, Obama had counted on a bill on his desk by last summer. But a series of circumstances—the immediate need to deal with the country’s financial crisis; the sudden withdrawal of the nomination of former Sen. Tom Daschle . . . as Obama’s Health and Human Services Secretary; unsuccessful attempts throughout most of 2009 by Senate Democrats to win some Republican support for the overhaul; and [Senator Scott] Brown’s election—bogged down the legislation.

*Id.*

<sup>119</sup> See DASCHLE, *supra* note 58, at 53, 59 (citing polling data from the Truman-era and Clinton-era indicating overwhelming support for national health insurance); see also *id.* at 41 (citing a *New York Times*/CBS News Poll showing in 2007 “a majority of Americans wanted the federal government to guarantee health insurance to every citizen”).

passing major health-care reform legislation.<sup>120</sup> However, as time went on, health-care reform lost support<sup>121</sup> and, like in years past, partisan attempts to kill reform flared up.<sup>122</sup> The President had presented health-care overhaul as his top legislative priority in February,<sup>123</sup> and by summer the electorate was energized and mobilized.<sup>124</sup> When members of Congress went home for the August recess, heated town-hall meetings swept over the nation producing “video loop of high-decibel rants,” which captivated the nation.<sup>125</sup>

On September 9, 2009, President Obama addressed a joint session of Congress and addressed the issues surrounding health-care reform. The President talked about the town-hall meetings and the escalating partisan rancor throughout the summer.<sup>126</sup> He called the months leading up to his address a “partisan spectacle,” where “[i]nstead of honest debate, [America saw] scare tactics.”<sup>127</sup> However, even as the President addressed these issues and talked about misconceptions surrounding health-care legislation,<sup>128</sup> in an unprecedented television moment the “partisan spectacle” over health-care reform showed itself in the House chambers.

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<sup>120</sup> See Jeffrey M. Jones, *Majority in U.S. Favors Healthcare Reform This Year*, Gallup, July 14, 2009, <http://www.gallup.com/poll/121664/Majority-Favors-Healthcare-Reform-This-Year.aspx> (“When asked separately how important it is for Congress to pass major legislation this year, half of Americans say it is extremely (26%) or very important (24%) to them, but 47% do not assign a high degree of importance to it.”).

<sup>121</sup> See Frank Newport, *Constituents Divided, High Partisan on Healthcare Reform*, Gallup, Aug. 11, 2009, <http://www.gallup.com/poll/122234/Constituents-Divided-Highly-Partisan-Healthcare-Reform.aspx> (finding 36% of Americans would advise their representatives to vote against a health-care reform bill, 35% would advise a vote in support of a bill, and 26% have no opinion).

<sup>122</sup> See Dan Eggen & Perry Bacon Jr., *Alliances in Health Debate Splinter; Once-Friendly Groups Split as Details Emerge*, WASH. POST, July 18, 2009, at A1 (“Hundreds of conservatives gathered in congressional districts around the county . . . for health-care protests organized by Tea Party Patriots.”); see also Dan Eggen & Philip Rucker, *Loose Network of Activists Drives Reform Opposition*, WASH. POST, Aug. 16, 2009, at A1 (“The rowdy protests that threaten President Obama’s health-care reform efforts have been spurred on by a loose network of activists—from veteran advocacy groups with millions of dollars in funding to casual alliances of like-minded conservatives . . .”).

<sup>123</sup> See Wayne & Epstein, *supra* note 9, at 752 (2010).

<sup>124</sup> See *supra* note 122.

<sup>125</sup> See Kevin Sack, *Calm, but Moved to be Heard In the Debate Over Health Care*, N.Y. TIMES, Aug. 25, 2009, at A1; see also James Fishkin, *Town Halls by Invitation*, N.Y. TIMES, Aug. 16, 2009, at WK9 (observing lawmakers finding their town-hall meetings disrupted by hecklers “echoing anti-health-care-reform messages from talk radio and cable television”).

<sup>126</sup> See Obama, *supra* note 2.

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

<sup>128</sup> See *id.* (exposing as patently false and misleading the allegation that a health-care bill would set up “death panels” that would have the power to “kill off senior citizens”).

Republican Congressman Joe Wilson shouted from the audience, “You lie!” in retort to the President’s claim that a health-care reform bill would not cover illegal aliens.<sup>129</sup> In the following weeks, Representative Wilson’s comment would earn him \$4 million in political contributions.<sup>130</sup>

Such behavior and reward was the norm in a partisan political climate that consumed the latter half of the Obama administration’s first year. In fact, Republican Massachusetts Senator Scott Brown, for example, won Ted Kennedy’s Senate seat on January 19, 2010, on a promise that, if elected, he would filibuster health care in the Senate.<sup>131</sup> The Republican touted the election as a “referendum” on President Obama’s health-care agenda.<sup>132</sup>

There was very little that was apolitical leading up to the health-care bill’s passage on March 23, 2010, and even less was apolitical following that date. President Obama have may scored one of the most coveted legislative victories of the past century, but following on its tails has been one of the most volatile political climates in America’s history.<sup>133</sup> Millions of Americans now have a “promise” of health-care security in the future, yet the country still has not escaped the potent politics of health-care reform.

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

<sup>130</sup> *See* Jeff Zeleny & Robert Pear, *Lawmaker-Candidates Race Toward a Money Deadline in a Flurry of Meals*, N.Y. TIMES, July 1, 2010, at A20 (stating that Representative Wilson’s outburst “made him something of a celebrity in some conservative circles”; the congressman raised four times as much money than he did in the prior election cycle).

<sup>131</sup> *See* Brian C. Mooney, *Voter Anger Caught Fire in Final Days*, BOSTON GLOBE, Jan. 20, 2010, at A1.

<sup>132</sup> *See id.*

<sup>133</sup> *See* Michael Cooper, *Accusations Fly Between Parties Over Threats and Vandalism*, N.Y. TIMES, Mar. 26, 2010, at A11 (documenting acts of vandalism and threats ten Democrats and two Republican members of Congress received after the health-care vote; examples include: gas lines deliberately cut at the home of a Democratic member’s relative; pictures of nooses faxed to the offices of two Democratic congressmen; a shooting at the campaign office of the Republican whip; and a profanity-laced voicemail message left with a Republican congresswoman making racial charges).

On the same day that the Patient Protection and Affordable Care Act passed Congress, thirteen Republican state attorney generals<sup>134</sup> filed a lawsuit in the United States District Court for the Northern District of Florida. The basis of the petitioners' complaint<sup>135</sup> is the health-care bill is an unconstitutional exercise of Congress's power under Article I of the Constitution, and it is a violation of the States' rights under the Tenth Amendment.<sup>136</sup>

Front and center, and at the heart of this legal challenge, is the longstanding issue of federalism.<sup>137</sup> In his September 9 address to Congress, President Obama said "figuring out the appropriate size and role of government has always been a source of rigorous and . . . sometimes angry debate," and "[t]hat's our history."<sup>138</sup> But to add to the President's sentiment, it is also most certainly our future. A question that remains, however, is whether that future—whether this debate on the role of government in the health-care system—belongs in the four walls of a courthouse or behind the curtain of an election booth? "[H]ealth care is an issue of *politics* and *public policy*, intersecting on questions of cost, coverage, accessibility, and quality."<sup>139</sup> This Comment submits that given the history of health-care reform and the import of political questions, this issue is not the sort of issue that is ripe for judicial review.

### III. ANALYSIS

The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and

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<sup>134</sup> Bill McCollum (Florida); Henry McMaster (Nebraska); Greg Abbott (Texas); Mark Shurtleff (Utah); Troy King (Alabama); Michael Cox (Michigan); John Suthers (Colorado); Thomas Corbett (Pennsylvania); Robert McKenna (Washington); Lawrence Wasden (Idaho); Marty Jackley (South Dakota).

<sup>135</sup> See Complaint, *Florida v. Sebelius* (N.D.F.L. 2010) (No. 3:10-cv-91).

<sup>136</sup> "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." U.S. CONST. amend. X.

<sup>137</sup> See Compl. ¶ 58, *supra* note 135 ("The [Patient Protection and Affordable Care] Act . . . runs afoul of the Constitution's principle of federalism."); see also FUNIGIELLO, *supra* note 7, at 6. Prof. Funigiello writes, federalism has been front and center all along when it comes to the fate of health-care reform. He attributes the reason why the United States was the only major industrialized nation without national health insurance to "the hostile political culture that evolved in the formative years of American healthy policy, beginning with debates over the proper role of government in health care . . ." *Id.*

<sup>138</sup> Obama, *supra* note 2.

<sup>139</sup> FUNIGIELLO, *supra* note 7, at 6 (emphasis added).

that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

—Justice Byron White<sup>140</sup>

“‘[An] assertion of a right to a particular kind of government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements [of an Article III case or controversy],’” for which the Court has the power of judicial review.<sup>141</sup> So acknowledged Justice Scalia in *Lujan v. Defenders of Wildlife*, a landmark decision enunciating a rule for the Court’s jurisprudence on standing. Justice Scalia said in *Lujan* that where claimants allege “an injury amounting only to the alleged violation of a right to have the Government act in accordance with the law” such a claim does not pass muster as being “judicially cognizable.”<sup>142</sup> Harkening back to Chief Justice Marshall’s announcement in *Marbury v. Madison* that “[t]he province of the court is, solely, to decide on the rights of individuals,”<sup>143</sup> Justice Scalia added, “[v]indicating the public interest (*including public interest in Government observance of the Constitution and laws*) is the function of Congress and the Chief Executive.”<sup>144</sup>

*Lujan* may have been an opinion about standing to assert a judicially cognizable claim, but the Court’s opinion surely rang with overtones inherent of nonjusticiable political questions. Consider the *Lujan* Court’s holding in light of the following generalized principle laid down by the Michigan Supreme Court, which provided a cogent reminder of what the judiciary’s role is when it comes to cases of the political persuasion.

The courts cannot serve as political overseers of the executive or legislative branches, weighing the costs and benefits of competing political ideas or the wisdom of the executive or legislative branches in taking certain actions, but may

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<sup>140</sup> *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

<sup>141</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Allen v. Wright*, 468 U.S. 737 (1984)).

<sup>142</sup> *Id.* 504 U.S. at 575.

<sup>143</sup> *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 171 (1803)).

<sup>144</sup> *Id.* (emphasis added).

*only determine whether some constitutional provision has been violated by an act (or omission) of the executive or legislative branch.*<sup>145</sup>

Scalia’s admonition that the Article III courts are not suited to hear claims posturing over Government observance of the Constitution and laws dovetails nicely with this point. The federal judiciary (or the state judiciaries for that matter) is not in the business to weigh “the costs and benefits of competing political ideas”<sup>146</sup> nor is it open to hearing generalized grievances about what the Congress and the President can or cannot do under the Constitution.<sup>147</sup>

Nevertheless, considering the debate over health-care reform and the attendant legal challenge<sup>148</sup> to the health-care legislation passed this year, that is what the struggle over health care is about and what it has always been about—weighing the costs and benefits of competing political ideas and the interest in the government following the Constitution.<sup>149</sup> Admittedly the basis of the complaint filed by the state attorney generals challenging the Patient Protection and Affordable Care Act may be founded upon alleged “violations” of Constitutional provisions,<sup>150</sup> but beneath the surface of this challenge, the heart of the States’ legal arguments are founded on the aged-old battle over federalism.<sup>151</sup>

If the Court’s political-question jurisprudence means anything, such elusive, generalized challenges should have no standing before the courts. Where the issue involved falls within the traditional role accorded courts to interpret the law or constitutional provisions, the political

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<sup>145</sup> *Straus v. Governor*, 592 N.W.2d 53, 55 (Mich. 1999) (emphasis added).

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

<sup>147</sup> *See Lujan*, 504 U.S. at 575, 576.

<sup>148</sup> *See Compl.*, *supra* note 135.

<sup>149</sup> *See FUNIGIELLO*, *supra* note 7, at 4. Prof. Funigiello wrote: “*Political partisanship, ideology, rugged individualism, uncritical devotion to impersonal market forces*, all too frequently have substituted for pragmatism, purposive cooperation, and community ethos that should have been as much the hallmarks of good health care and health security as they were of the national character.” *Id.* (emphasis added). *See generally supra* Part II.D.

<sup>150</sup> *See Compl.*, *supra* note 135 (alleging the Patient Protection and Affordable Care Act violates Article I, Sections 8 and 9, and the Tenth Amendment of the Constitution).

<sup>151</sup> *See supra* note 137.

question doctrine will not apply.<sup>152</sup> But in this circumstance, the legal challenge to health care no where advocates for a change to the law, rather it only asserts a legal assault on the rightness of a congressional policy initiative over which the Constitution gives the Congress the power to act under the Commerce Clause.<sup>153</sup> “The political question doctrine excludes from judicial review those controversies which revolve around [such] policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive branch.”<sup>154</sup>

Health care is the ultimate policy initiative prescribed to the legislature, and, after years of debates and failures, courts should not treat that fact lightly when asked to weigh in on the rightness of government-run health care. If health care is an issue—described by those who have worked closely with it over the years—that is perhaps the most complicated of policy problems Congress has faced in this past century,<sup>155</sup> should this fact not signal that an issue this complex appropriately belongs right where it has been—on the threshing floors of Capitol Hill where the people’s representatives are best equipped to hash out the details?

Health care is a multifaceted problem and it does not lend itself to easily contrived manageable standards for resolution.<sup>156</sup> Not only does it intersect over sensitive issues of morals and ethics,<sup>157</sup> but it envelopes serious, practical economic issues, which are of considerable

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<sup>152</sup> See, e.g. *Narragansett Tribe of Indians v. S. R.I. Land Dev. Corp.*, 418 F. Supp. 798, 815 (D.R.I. 1976).

<sup>153</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>154</sup> *Japan Whaling Ass’n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986).

<sup>155</sup> See DASCHLE, *supra* note 58, at xii.

<sup>156</sup> See generally Fernandez et al., *supra* note 5.

<sup>157</sup> See DASCHLE, *supra* note 58, at 3. Daschle writes: “We like to boast that we have the highest standard of living in the world, and yet at the dawn of the twenty-first century, we are the only industrialized nation that does not guarantee necessary health care to all of its citizens. It is stunning and shameful.” *Id.*; see also Obama, *supra* note 2 (quoting a letter by the late Sen. Ted Kennedy calling health care a “moral issue”).

importance considering the state of the economy.<sup>158</sup> As President Obama phrased the issue, he said: “[O]ur health care problem is our deficit problem.”<sup>159</sup>

Health care represents one-sixth of our economy,<sup>160</sup> and “[w]e spend one and a half times more per person on health care than any other country, but we aren’t any healthier for it,” President Obama said.<sup>161</sup> Each year the United States health-care system not only failed those who were sick and uninsured, but it accounted for close to half of filed bankruptcies.<sup>162</sup> Taking all of that into account, the failures of health care were not merely felt on a deeply personal level, but, in the aggregate, the failures of the nation’s health-care system substantially affected the nation’s infrastructure.<sup>163</sup>

Under the Supreme Court’s holding in *United States v. Lopez*, which held Congress could regulate any economic activity that had substantial effects on interstate commerce,<sup>164</sup> one would think that no issue could clearly have been more warranted for congressional action than health care was under Article I, Section 8 of the Constitution. Over the decades, the Supreme Court found a textually demonstrable constitutional commitment in the Commerce Clause of issues

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<sup>158</sup> See generally Fernandez et al., *supra* note 5 (citing the national expenditures on health care as exceeding \$2.5 trillion). But see Jackson & Nolan, *supra* note 6 (reporting health-care reform is expected to lower the federal deficit by \$1.3 trillion over the next 20 years).

<sup>159</sup> Obama, *supra* note 2.

<sup>160</sup> See Fernandez et al., *supra* note 5 (health care makes up 17% of the nation’s GDP).

<sup>161</sup> Obama, *supra* note 2.

<sup>162</sup> See DASCHLE, *supra* note 58, at 5.

<sup>163</sup> See *id.* at 19. Daschle writes:

Our large uninsured population and fast-rising costs are huge impediments to our economic competitiveness. The Institute of Medicine estimates that our economy loses as much as \$130 billion each year because of the untreated illnesses of uninsured Americans. Uninsured workers tend to be absent more than those with insurance, and they are more likely to switch jobs—both of which diminish firms’ productivity. Furthermore, the fear of going without health insurance dissuades many people from starting their own businesses, to the detriment of our overall economy.

*Id.*

<sup>164</sup> See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

affecting interstate commerce as being placed in Congress's discretion.<sup>165</sup> Come 2010, however, when the thirteen state attorney generals filed their lawsuit challenging the health-care reform legislation, that challenge made it seem as if that line of Supreme Court precedent never existed, as if the health-care bill had no grounding in the law.<sup>166</sup> The States' principle challenge, that the health-care legislation violates the Tenth Amendment, even appeared to discount the Court's current Tenth Amendment jurisprudence under *Printz v. United States*. There the Court has interpreted the Tenth Amendment to mean the federal government cannot *compel* the States' legislatures or executives to enact or administer federal regulatory programs;<sup>167</sup> and the health-care bill implicates no such mandate—it contains an individual mandate that requires uninsured persons to purchase health care.<sup>168</sup> Nevertheless, absent federal commandeering of the States' administrative powers, the state attorney generals invoke the Tenth Amendment to support their arguments that the health-care bill is unconstitutional. However, in light of Justice Scalia's opinion in *Printz*, it is hard to see how that argument is legally sound. Consider the following by Scalia:

We held in *New York [v. United States]* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.<sup>169</sup>

From this it is seemingly clear that the States do not have a Tenth Amendment argument to stand on. Furthermore, considering the States' challenge of the individual mandate as

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<sup>165</sup> See *id.* (consolidating the case history making up the Court's Commerce Clause jurisprudence).

<sup>166</sup> See Compl., *supra* note 135.

<sup>167</sup> See *Printz v. United States*, 521 U.S. 898, 935 (1997).

<sup>168</sup> See Wayne & Epstein, *supra* note 9, at 750 (providing a summary of key provisions of the health-care bill, including the individual mandate); see also Clemmitt, *supra* note 90, at 509 (discussing the individual mandate and its previous support by Republicans); DASCHLE, *supra* note 58, at 88 ("The Senate Republicans opposed an employer mandate, but they hoped to achieve universal coverage with a mandate on individuals to purchase insurance.")

<sup>169</sup> *Printz*, 521 U.S. at 935.

unconstitutional, reading of the Court's opinion in *United States v. California* also seems to make this challenge shaky as well. There the Court said: “[T]here is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.”<sup>170</sup>

In light of these compelling precedents, without even the mention that current constitutional interpretation should be changed, the States' challenge to health care seems to be principally partisan arguments in the guise of legal dressing. They represent a last ditch effort to stop a barreling policy initiative which has been gaining momentum over the past century. And the question is, given the place that health care holds in our history,<sup>171</sup> the implications reform has for our country,<sup>172</sup> and the amount of legislative laboring and political emotion that has been expended to get health care to this point,<sup>173</sup> should the final say on this issue be left to a branch of unelected officials who do not represent the will of the people? Should almost a century's worth of congressional policymaking be thwarted by the courts, which appear to have their own political hang-ups?<sup>174</sup>

In a CNN news article of March 11, 2010, Chief Justice Roberts was reported as having “grown increasingly frustrated at what he views as the growing partisanship aimed at the federal courts,” and a source close to the Chief Justice relayed that Chief Justice Roberts has concerns that the “courts have become a political football.”<sup>175</sup> If Chief Justice Roberts wishes to maintain

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<sup>170</sup> *United States v. California*, 297 U.S. 175, 185 (noted for the principle that individuals are subject to regulation under Congress's Commerce Power), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>171</sup> *See supra* Part II.D.

<sup>172</sup> *See supra* note 158.

<sup>173</sup> *See generally supra* Part II.D.

<sup>174</sup> Jeffery Toobin, *Supreme Court Riven By Partisan Politics*, <http://www.cnn.com/2010/OPINION/03/15/toobin.court.partisan/index.html> (last visited July, 19, 2010) (arguing that the Supreme Court is not exempt from partisan politics).

<sup>175</sup> Bill Mears, *Chief Justice Chides State of the Union as 'Political Pep Rally'*, <http://www.cnn.com/2010/POLITICS/03/10/obama.supremecourt/index.html> (last visited July 19, 2010).

the appearance of an independent judiciary and not fuel the flames of existing political strife, then the Chief Justice would be wise—as far as it is within his control—to leave this issue for the people to sort out at the polls. The courts cannot afford the blow that is likely to come from deciding this issue one way or another and neither can the country.<sup>176</sup> Justice White’s admonition as set forth in *Vance* at the top of this section remains highly relevant, and the courts would do well to heed its counsel. Because deciding this issue would upturn close to a century’s worth of established Commerce Clause jurisprudence, which confers a textually demonstrable constitutional commitment of this issue to Congress; and it would be impossible for a court undertaking independent resolution of health care not to express a lack of respect due to Congress, which has labored over this agenda for decades, finding a political question in the States’ challenge to health-care reform seems most appropriate. In fact, the courts might do well to pay close attention to Justice Blackmun’s opinion in *Garcia v. San Antonio Metro. Transit Auth.* There Justice Blackmun notes:

State sovereign interests [] are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations.

[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the “States as States” is one of process rather than one of result.<sup>177</sup>

#### IV. CONCLUSION

The nonjusticiable political question, from the moment of its inception in *Marbury v. Madison*, has been a fundamental legal formula predominately concerned with *process* over

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<sup>176</sup> The stakes are high for the courts: to find in favor of the States, the courts delivery a major victory for our federalist tradition; however, on the other hand, strengthening federalism comes at a great cost to the lives of 32 million uninsured Americans and our national economy, which health care makes up one-sixth of.

<sup>177</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 553, 554 (1985).

*result.* At the expense of expedient solutions to complicated problems, the courts have been guided by nonjusticiable political questions to restrain the judicial power from “precipitating impossible situations that might tear the social fabric.”<sup>178</sup>

The history of health-care reform in this country unquestionably presents with one of these “impossible situations” where the courts are positioned between the Sylla and Charbydis of our time. Whether the courts accept the States’ legal challenge and rule favorably on their behalf or not, the competing concerns of 32 million Americans, one-sixth of our struggling economy, and the integrity of our federalist system hangs in the balance. Given the nature of our current volatile political climate it may not be such a bad idea, considering these concerns, that the judiciary takes a lesson from the past and “examine carefully its own powers before [] undertak[ing] jurisdiction” in this matter.<sup>179</sup> In the words of Vice President Joe Biden, health-care reform is surely a “big [expletive] deal.” But before the courts enter the health-care arena, it might be prudent on the part of the judiciary to note health-care reform also has all the markings to be a “big political question.”

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<sup>178</sup> See *supra* text accompanying note 53.

<sup>179</sup> See *supra* note 27 and accompanying text.