No. 11-398

IN THE

Supreme Court of the United States

U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE, JUDICIAL EDUCATION PROJECT, REASON FOUNDATION, THE INDIVIDUAL RIGHTS FOUNDATION, THE HERITAGE FOUNDATION, ENDING SPENDING, INC., AND FORMER SENATORS GEORGE LEMIEUX AND HANK BROWN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION ISSUE)

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QUESTION PRESENTED

Beginning in 2014, the minimum coverage provision of the Patient Protection and Affordable Care Act, as amended, will require virtually every individual American to procure and maintain a minimum level of health insurance or pay a monthly penalty. 26 U.S.C.A. § 5000A.

The question presented is whether this minimum coverage provision exceeds Congress' authority under Article I of the Constitution.

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INTEREST OF *AMICI CURIAE*[1]

Amicus the Center for Constitutional Jurisprudence (the "Center") was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold the principles of the American Founding in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the States or to the people. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as *amicus curiae*, or on behalf of parties before this Court, in a number of cases addressing the constitutional limits on federal power. The interests of the other *amici* are fully set forth in the Appendix hereto.

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (the "ACA" or "the Act"), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, is a nearly 2,500-page bill that set in motion a sweeping and comprehensive overhaul of the heretofore State-based health insurance industry. Although a sharply

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1. Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

divided Congress passed the ACA by an exceedingly narrow margin, the ACA will impact virtually every man, woman, and child in the United States. With procedural irregularities and partisan maneuvering replacing compromise and circumspection, the ACA was enacted in a strikingly different manner than other major pieces of progressive social legislation in our nation's history.[2]

The heart of the ACA is its minimum coverage provision—an unprecedented and oppressive mandate that, with limited exceptions, compels all Americans to enter into and maintain expensive health insurance contracts throughout their lives to obtain "minimum essential coverage," regardless of the individual's health, desires, or economic interests. 26 U.S.C. § 5000A. This mandate is enforced through a monthly monetary penalty. *See id.* at § 5000A(b). As noted by each of the courts below, the mandate "represents a wholly novel and potentially unbounded assertion of congressional authority." Pet. App. 187a; *see also United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) ("The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.").

In its zeal to pass the ACA and the unprecedented mandate that lies at its core, a slim but unyielding congressional majority failed meaningfully to address the

2. *See* Robert Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, N.Y. Times, Dec. 24, 2009, at A1 ("If the bill becomes law, it would be a milestone . . . comparable to the creation of Social Security in 1935 and Medicare in 1965. But unlike those programs, the initiative lacks bipartisan support.").

constitutional questions about the individual mandate that had been raised by the Congressional Research Service (the "CRS") and Congressional Budget Office ("CBO"), among others, or to otherwise consider the limitations of its enumerated powers. Congress' failure to consider such limitations resulted in a bill that exceeds the powers granted to Congress under the Constitution and severely infringes upon the individual liberty that the Constitution was designed to protect and promote. *See Bond v. United States*, 131 S.Ct. 2355, 2364 (2011). In such circumstances, this Court should not accord to the individual mandate the same "presumption of constitutionality" that it typically grants to congressional enactments in the first instance.[3] *See infra* Argument § I.

The unprecedented nature of the ACA and the purely partisan support for its most troubling provision[4] is compounded by the procedural artifice that directly led

3. *See McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

4. The Government attempts to paint the ACA's individual mandate as one enjoying long, bipartisan support—a position wholly at odds with the legislative history discussed herein—and to that end includes a misleading reference to a different mandate originally supported by "the Heritage Foundation and a group of health care economists and lawyers associated with the American Enterprise Institute." Br. for Govt. at 14-15. The insurance mandate at issue in the mid-1990s, however, was markedly different from the mandate in the ACA, in that (a) it was for catastrophic-only insurance, which is forbidden by the ACA, and (b) the limited mandate was coupled with fundamental tax relief to help all families (regardless of economic status) pay for it. Moreover, important public policy research since the mid-1990s led health policy experts at Heritage and elsewhere to abandon support for even such a limited mandate. *See* Brief for The Heritage Foundation as *Amicus Curiae* in Nos. 11-11021 and 11-11067 (CA11), pp. 5-6, 8-13.

to its narrow passage. The bill was first pushed through in a rare Christmas Eve vote in 2009—the first vote on that date since 1895—after the final votes necessary for passage were essentially "bought" with egregious provisions that violated the most basic premise that "law" is to be generally applicable.[5] *See*, *e.g.*, *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law . . . be imposed generally."); Marcus Tullius Cicero, Treatise on the Laws: Book III (Edmund Spettigue, ed., Francis Barham, trans., 1841-42) (51 BC) ("[L]aws should not be enacted in favour of particular individuals, for that is what we call privilege . . . nothing can be more inequitable.").

The normal process of reconciling the Senate bill with an earlier, different version adopted by the House of Representatives was then cast aside when a special election in Massachusetts resulted in the election of a new Senator whose central campaign message was that he would be the vote necessary to stop passage of the ACA. House leaders trolled for mechanisms that would allow the final bill to be adopted without having to return for a second vote in the Senate, at one point even considering a highly irregular "deem passed" maneuver—*i.e.*, "passing" the Senate bill without actually holding a vote. Ultimately, the Senate version of the bill was passed by the House, with the necessary votes secured by an unenforceable assurance by the President not to enforce one provision that was objectionable to some of those who otherwise

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5. *See*, *e.g.*, Robert Pear, *Deep in Health Bill, Very Specific Beneficiaries*, N.Y. Times, Dec. 21, 2009, at A1.

supported the bill,[6] and a promise by House leaders of further significant changes in the form of a "sidecar" reconciliation bill in order to circumvent Senate cloture rules.[7] *See infra* Argument § II.

The ACA's sullied passage stands alone. Prior instances of momentous social legislation—including, among others, the Social Security Act of 1935, the 1965 Medicare and Medicaid Amendments to the Social Security Act and the Civil Rights Act of 1964 and Voting Rights Act of 1965—were not tainted by such abuses of the legislative process. Nor were any of these bills steamrolled through Congress or passed by razor-thin, partisan majorities whose members failed to consider and fix glaring constitutional infirmities before voting on the legislation. *See infra* Argument § III.

To be sure, each piece of legislation discussed below was the subject of heated debate and legislative politicking. Few bills, if any, emerge from the wringer of the lawmaking process unscathed and pristine. On each of these other issues, though, Congress forged compromises between seemingly intractable political positions, with the resulting legislation supported by significant, bipartisan

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6. Lori Montgomery & Shailagh Murray, *In Deal with Stupak, White House Announces Executive Order on Abortion,* Wash. Post, Mar. 21, 2010, at A1.

7. *See* David M. Herszenhorn & Robert Pear, *Final Votes in Congress Cap Battle over Health Bill*, N.Y. Times, Mar. 25, 2010, at A17; *see also* David A. Hyman, *Convicts and Convictions: Some Lessons from Transportation for Health Reform*, 159 U. Pa. L. Rev. 1999, 2003, 2007 (2011) (describing the "legislative chicanery" that occurred in the lead-up to the passage of the ACA).

majorities. Many of these compromises, in fact, were necessary to address duly-raised concerns about the constitutionality of certain aspects of the proposed legislation. The ACA enjoyed no such compromises.[8]

ARGUMENT

I. THE PRESUMPTION OF CONSTITUTIONALITY IS SUBSTANTIALLY WEAKENED WHERE CONGRESS PASSES AN UNPRECEDENTED MANDATE WITHOUT ADDRESSING CONCERNS ABOUT ITS CONSTITUTIONALITY

The "presumption of constitutionality" that this Court has traditionally bestowed upon Congressional action is substantially weakened here. The presumption rightly acknowledges Congress' role as a "coordinate branch of Government," *United States v. Morrison*, 529 U.S. 598, 607 (2000), and there is undoubtedly a "substantial element of political judgment in Commerce Clause matters." *Lopez*, 514 U.S. at 579. Yet it would be "mistaken and mischievous for [Congress] to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance *is their own in the first and primary instance*." *Id.* at 577-78 (Kennedy, J., concurring) (emphasis added); *see also* U.S. Const. Art. vi. (all members of Congress are "bound . . . to support

8. *See, e.g.*, Mark Votruba, *Form and Reform: The Economic Realities of the United States Health Care System*, 23 J.L. & Health 89, 90 (2010) (The ACA "was a major piece of legislation, where we normally would have expected the kind of bipartisan compromises represented in other landmark pieces of social legislation. In the last century of U.S. history, all major pieces of social legislation have been passed with broad bipartisan support, including Medicare and Medicaid, the Social Security Act, and the Civil Rights Act.").

this Constitution"). Accordingly, in this unparalleled case, where Congress has effectively abdicated its responsibility to meaningfully consider the constitutional implications of its action, the traditional presumption should carry far less force. *See United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (Jackson, J.) ("The rational and practical force of the presumption is at its maximum only when it appears that the precise point in issue here has been considered by Congress and has been explicitly and deliberately resolved.").[9]

In 2009, the CRS—a nonpartisan and objective research arm of the Library of Congress—advised Congress that the scope of the power that must be asserted to sustain the ACA's constitutionality exceeds any exercise of congressional power that has previously been approved by this Court, and "could be perceived as virtually unlimited in scope." Jennifer Staman & Cynthia Brougher, CRS, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009, at 7; *see also id.*, at 6 (describing the ACA as presenting the "novel issue" "whether Congress can use its Commerce Clause authority to require a person to buy a good or service"). The CRS echoed the same conclusion that was reached years earlier by the equally non-partisan CBO.

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9. *See also* John C. Eastman, *Judicial Review of Unenumerated Rights: Does Marbury's Holding Apply in a Post-Warren Court World*?, 28 Harv. J.L. & Pub. Pol'y 713, 734-35 (2005) (casting doubt on the presumption of constitutionality where "Congress does not even bother to consider the constitutionality of its own actions"); Randy Barnett, Restoring the Lost Constitution: The Presumption of Liberty 260-61 (Princeton Univ. Press 2004) ("The original justification of the presumption of constitutionality rested, in part, on a belief that legislatures would consider carefully, accurately, and in good faith the constitutional protections of liberty before infringing it.").

See CBO, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, Aug. 1994 ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.").

Opponents of the ACA's enactment in both chambers of Congress also repeatedly challenged the constitutionality of the Act generally and the individual mandate specifically. *See, e.g.*, 111 Cong. Rec. S13601 (Dec. 20, 2009) (statement of Sen. Orrin Hatch) ("[T]he Constitution also sets limits on our power. We cannot take advantage of the power without recognizing the limits."); 156 Cong. Rec. H1843 (Mar. 21, 2010) (statement of Rep. Scott Garrett) ("I have been speaking out on the unconstitutionality of this individual mandate on the House floor, in Budget Committee and through the Constitutional Caucus, of which I am the chair."). Indeed, certain Senators filed points of order directly challenging the constitutionality of the ACA and the individual mandate. *See, e.g.*, *id.* at S13728 (Dec. 22, 2009), S13822-26 (Dec. 23, 2009) (point of order of Sen. John Ensign, asserting unconstitutionality of the ACA under Article I, Section 8 and the 5th Amendment); *id.* at S13821-22 (Dec. 23, 2009) (point of order of Sen. Kay Bailey Hutchison, asserting unconstitutionality of the ACA under the 10th Amendment). Several Members raising these constitutional objections cited the detailed analysis set forth in an 18-page Legal Memorandum published by the Heritage Legal Foundation on December 9, 2009.[10]

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10. Randy Barnett, Nathaniel Stewart, & Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, Legal Memorandum No. 49, The Heritage Found. (Dec. 9, 2009), *available at* http://www.heritage.org/research/reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprecedented-and-unconstitutional

The response of those pushing the legislation to these constitutional concerns was, in the main, conclusory and platitudinal. *See*, *e.g.*, *id.* at 111 Cong. Rec. S13581 (Dec. 20, 2009) (statement of Sen. Max Baucus) (concluding, without elaboration, that the individual mandate was constitutional).[11] To the extent the ACA's supporters invoked *any* authority, they merely entered into the record *ipse dixit* editorials or similar statements from academics who advocate a virtually limitless interpretation of the Commerce and Necessary and Proper Clauses. *See*, *e.g.*, *id.* at S13751-13753 (Dec. 22, 2009) (statement of Sen. Patrick Leahy) (entering opinion of Professor Erwin Chemerinsky into the record).[12] Opinion pieces,

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(the "Heritage Legal Memorandum"). The Heritage Legal Memorandum was entered into the Congressional Record twice in support of constitutional points of order asserted by Senators Hatch and Ensign, *see* 111 Cong. Rec. S13015 (Dec. 11, 2009), 111 Cong. Rec. S13723 (Dec. 22, 2009), and was prominently discussed in support of Rep. Steve Scalise's amendment to strip the individual mandate from the legislation. *See* 111 Cong. Rec. D311 (Mar. 20, 2010).

11. In fact, some members of the House leadership even mocked those who asked questions about the individual mandate's constitutionality. *See* Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi Says: 'Are You Serious'?*, Oct. 22, 2009, http://cnsnews.com/node/55971.

12. As the District Court noted below, Professor Chemerinsky holds the remarkable view that Congress' power to regulate under the Commerce Clause is so far sweeping that "'Congress *could* use its commerce power to require people to buy cars.'" Pet. App. 330a (citing Reason.tv, *Wheat, Weed, and Obamacare: How the Commerce Clause Made Congress All Powerful*, Aug. 25, 2010, http://reason.tv/video/show/wheat-weed-and-obamacare-how-t (emphasis in original). Thus, for Professor Chemerinsky, "constitutionality is not among the hard questions to consider" with

however, "do not substitute for reasoned debate about constitutionality of the sort that used to go on regularly in both chambers of Congress." Renée Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 Harv. J.L. & Pub. Pol'y 37, 44 (2012). Remarkably, neither the House nor the Senate held hearings on the constitutionality of the Act prior to its passage, which would have permitted legal scholars to prepare thorough analyses and to be questioned by Members and other witnesses.[13]

It did not have to be this way. When Congress has enacted landmark social legislation in the past, it has often made significant modifications, after considerable internal debate, to fall within the "outer limits" of its enumerated powers. The Social Security Act of 1935, Pub. L. 74-271, 49 Stat. 620 (1935), is instructive. During several months of debate, the bill's opponents raised numerous constitutional concerns, including that Congress was attempting to usurp power from the States. Congress thus carefully circumscribed the original Social Security program to *augment*, rather than supplant, existing state efforts to provide for the unemployed and needy.[14]

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respect to the ACA. Erwin Chemerinsky, *Health Care Reform is Constitutional*, Politico, Oct. 23, 2009, *available at* http://www.politico.com/news/stories/1009/28620.html.

13. Moreover, the bill's proponents in the Senate went so far as to excise a severability clause from the House version of the bill, apparently not even entertaining the possibility that the individual mandate was unconstitutional.

14. Title I of the Act, for example, authorized federal matching grants only to States that had already approved old-age assistance plans, *see* 79 Cong. Rec. 5469-70 (Apr. 11, 1935), and Congress also strove to "limit very strictly" the Social Security

When the Social Security bill met with further resistance,[15] its proponents split the retirement provisions into two separate titles—the "tax" provisions of Title VIII, and the benefits provisions of Title II— hoping that this Court would afford some measure of deference to Congress' taxing authority when considering the newly created scheme. Although the bill still had its critics in Congress, *see, e.g.*, 79 Cong. Rec. 5530 (Apr. 12, 1935) (statement of Rep. Allen Treadway), its proponents garnered a wide majority, and successfully defended the ensuing constitutional challenge. *See Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

In stark contrast here, aside from certain self-serving "statutory findings" about the purportedly economic nature of its legislation, Congress failed to tailor the ACA to fall within the "effective bounds" of its "regulatory authority" under the Commerce Clause as delineated in this Court's decisions in *Lopez*, 514 U.S. at 562-63, and *Morrison*, 529 U.S. at 608. On the contrary, due in large part to the procedural irregularities described below, key leaders in both the House and Senate openly admitted that they had not even *read* the 2,500-page bill, let alone weighed its constitutional infirmities. For example, Senator Baucus contended that "I don't think you want me to *waste my time* to read every page of the healthcare bill . . . You know why? It's statutory language . . . . We hire

Board's power over States in order to ensure a maximum degree of state control. *Id.* at 5469.

15. In June of 1935, for example, Senator Huey Long predicted that "not a single member of the Supreme Court of the United States will hold this bill constitutional as written." 79 Cong. Rec. 9531 (June 18, 1935).

experts."[16] Even Speaker of the House Nancy Pelosi stated unabashedly that "we have to pass the bill so that you can find out what is in it."[17] It should be elemental, though, that "to know whether a legislative act is constitutional requires knowing what it is in the Act." Pet. App. at 4a.

This nation's federalist system "protects the liberty of all persons . . . by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond*, 131 S.Ct. at 2364. "When government acts in excess of its lawful powers, that liberty is at stake." *Id.*; *see also Printz v. United States*, 521 U.S. 898, 933 (1997) (the Constitution divides power "precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.").

Here, Congress has not only exceeded the limitations imposed by federalism, it has done so most cavalierly. In contrast to its more circumscribed approach to drafting prior landmark social legislation (*e.g.*, the Social Security Act), Congress has failed to address the constitutionality of the individual mandate in any meaningful way. Where "one or the other level of Government has tipped the scale too far," and thus undermined "the federal balance

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16. *See* Jordan Fabian, *Key Senate Democrat Suggests That He Didn't Read Entire Healthcare Reform Bill*, The Hill, Aug. 25, 2010, *available at* http://thehill.com/blogs/blog-briefing-room/news/115749-sen-baucus-suggests-he-did-not-read-entire-health-bill (emphasis added).

17. Press Release, Nancy Pelosi, Speaker, U.S. House of Representatives, Pelosi Remarks at the 2010 Legislative Conference for National Association of Counties (Mar. 9, 2010), http://pelosi.house.gov/news/press-releases/2010/03/releases-March10-conf.shtml.

. . . of our constitutional structure," it is left to this Court to intervene and enforce the Constitution's structural protections. *See Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

This principle carries particular force when Congress has sought to legislate in an area of traditional State regulation without adequately considering its own constitutional limitations (or heeding the views of at least 26 States that expressly disagree with this federal intrusion). Because Congress failed to "take a 'hard look'" at the "thoroughness of [its] legislative procedures," a penetrating and incisive judicial review of the defective political process that gave rise to the ACA is appropriate. *Morrison*, 529 U.S. at 663 (Breyer, J., dissenting).

Moreover, it is particularly important for this Court to conduct a searching and meaningful constitutional inquiry because it is confronted with a congressional measure that is wholly without precedent: a requirement that private citizens buy a product from a private company.[18] *See* Pet. App. at 107a, 320a. Given that "earlier Congresses avoided use of this highly attractive power," it follows that "the power was thought not to exist." *Printz*, 521 U.S. at 905, 907-08; *see also Va. Office for Prot. & Advocacy v. Stewart*, 131 S.Ct. 1632, 1641 (2011) ("Lack of historical precedent can indicate a constitutional infirmity."). The unprecedented nature of the individual mandate thus provides another basis for this Court to view Congress'

18. *See, e.g.*, 111 Cong. Rec. S13823 (Dec. 23, 2009) (statement of Sen. Orrin Hatch) ("Even the Roosevelt administration . . . would not go as far as the legislation before us today would go. Even they knew the Constitution put certain means off limits.").

actions with less deference than it traditionally would accord to the actions of the legislative branch.

II. THE LEGISLATIVE PROCESS LEADING TO THE PASSAGE OF THE ACA WAS SYSTEMICALLY FLAWED

Compounding its failure to conduct a rigorous constitutional inquiry, it is well chronicled that Congress passed the ACA by the slimmest of margins in the wake of various procedural irregularities. Not a single Republican in either the House or the Senate voted in favor of the final bill.[19] Not surprisingly, then, many commentators have derided the ACA as "the most blatantly partisan and divisive piece of social legislation in the past half-century; the only thing bipartisan about [the ACA] was the opposition to it." David A. Hyman, *PPACA in Theory and Practice: The Perils of Parallelism*, 97 Va. L. Rev. In Brief 83, 98 (Nov. 4, 2011).

The passage of the ACA was made possible by an unseemly mix of trade-offs, arcane legislative maneuvers and politically expedient promises. Earmarks were doled out to several skeptical legislators in exchange for their support; the highly controversial tactic of budget reconciliation was employed to allow the bill's supporters to circumvent traditional debate and amendment rules; a last-minute promise was made by the President not to enforce one provision concerning abortion funding; and $70 billion in projected cost savings turned out to be illusory when a program touted to reduce the deficit was abandoned as ill-conceived and fiscally unsound.

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19. *See* Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, *supra* n.2; *see also* Montgomery & Murray, *supra* n.6.

A. Giveaways to Secure Support

The ACA is rife with *quid pro quo* measures that were included in the bill for the sole purpose of securing the votes of individual members of Congress.[20] As one Democratic Congressman put it in explaining why he was voting against the ACA:

> I am also concerned about the unsavory deal-making that occurred in the United States Senate when the health care bill was considered in December. Some states received special benefits at the expense of other states . . . . For example, the states of Louisiana, Tennessee, Connecticut and Montana have each received special benefits in the health care reform legislation not made available to other states. I simply cannot countenance this kind of deal-making which goes well beyond the bounds of normal legislative negotiations.[21]

Notably, Senator Baucus—the chairman of the Senate Finance Committee and a principal author of the ACA (despite admittedly not "wast[ing] his time to read" all of it)—succeeded in obtaining additional Medicare funding for individuals affected by asbestos-related illnesses from mining operations in Libby, Montana—his home State. *See* 42 U.S.C. § 1395rr-1; *see also* Pear, *Deep in Health Bill, supra* n.5. Likewise, after initially

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20. *See* Chris Frates, *Payoffs for States Get Harry Reid to 60 Votes*, Politico, Dec. 19, 2009, *available at* http://www.politico.com/news/stories/1209/30815.html.

21. *See* 156 Cong. Rec. H1907 (Mar. 21, 2010) (statement of Rep. Rick Boucher).

expressing opposition to the bill, Senator Mary Landrieu of Louisiana only agreed to support it after a provision was inserted to provide hundreds of millions of dollars to her State. *See* ACA § 2006 (increasing Medicaid payments to certain "states recovering from a major disaster"); Brian Montopoli, *Tallying the Health Care Bill's Giveaways*, CBS News (Dec. 21, 2009), *available at* http://www.cbsnews.com/8301-503544_162-6006838-503544. Yet another holdout, Vermont Senator Bernie Sanders, "took credit for $10 billion in new funding for community health centers," including at least two more for Vermont. *See* Frates, *supra* n.20.

In a particularly infamous example, Senator Ben Nelson of Nebraska—the critical 60th Senator to endorse the bill—originally announced his opposition to the ACA but then reversed course after securing a promise from Majority Leader Harry Reid that Nebraska would receive a subsidy for its share of the cost of the ACA's Medicaid expansion.[22] No other State was slated to receive such a windfall, which was dubbed the "Cornhusker Kickback."[23]

Yet other provisions included in the Act granted $100 million to an unspecified "health care facility" and

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22. Although this subsidy—which was included in the ACA at § 10201—was later repealed by the Health Care and Education Reconciliation Act §§ 1201-1203, it was vital to securing enough votes to pass the ACA.

23. Senator Nelson and Senator Carl Levin of Michigan also carved out an exception for nonprofit insurers in their States from a multi-billion dollar excise tax on insurance companies. Nonprofit insurers located in any of the other 48 States would not benefit from this exemption. *See* Frates, *supra* n.20.

increased Medicare payments to hospitals and doctors in "frontier counties" in Montana, North Dakota, South Dakota, Utah and Wyoming. *See* Pear, *Deep in Health Bill, supra* n.5. Indeed, Majority Leader Reid publicly boasted about the use of such tactics, doubting the existence of any "senator that doesn't have something in this bill that was important to them."[24]

B. The Use of Budget Reconciliation

Capping this undignified process, exactly 60 Senators—the bare minimum under Senate Rule XXII—voted to end debate on a final Senate bill, S. Amend. No. 2786 to H.R. 3590, 111th Cong. The Senate passed the bill the following day—Christmas Eve 2009—by an identical, 60-39 margin. *See* Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, *supra* n.2. The ultimate passage of the bill, however, remained uncertain due to the January 19, 2010 election of Scott Brown in Massachusetts, who had run to fill the seat previously occupied by Paul Kirk, one of the 60 Senators who had voted in support of the bill. Senator Brown had expressly promised during the campaign to be "the 41st vote" against the ACA's passage, and the Massachusetts race thus commanded national attention as a mandate on the popularity of the bill.[25] With Senator Brown's election, the proponents of

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24. David Welna, *On Health Bill, Reid Proves the Ultimate Deal Maker*, National Public Radio (Dec. 23, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=121791736.

25. *See, e.g.*, *Mass. Race Draws Millions to Pay for Ads*, Associated Press, Jan. 17, 2010, *available at* http://www.msnbc.msn.com/id/34908023/ns/politics-more_politics/t/mass-race-draws-millions-pay-ads/.

the bill fell one vote shy of the 60 votes needed to prevent a filibuster on future votes. *See* Liz Robbins, *Riding Wave of Disaffection, Brown Pushes for an Upset*, N.Y. Times, Jan. 18, 2010, at A20.

This threatened to derail the bill's final passage, because both Houses of Congress had not yet enacted a single bill. In the ordinary course, two versions of a bill passed by the House and Senate would be reconciled through conference committees, with the final bill requiring a new vote by both chambers. Here, however, because the Senate no longer had the votes necessary to approve any bill resembling that which passed the Senate in December 2009, the House was forced to accept the bill in the exact form in which it had passed the Senate. *See* H.R. Res. 1203, 111th Cong. (2010).

To enact substantive "fixes" to the Senate bill while avoiding a filibuster, the majority party resorted to a legislative maneuver known as "budget reconciliation." The reconciliation process was created in 1974 as a deficit-reduction tool and provides an expedited means to change federal spending programs, revenues and public debt levels. *See* Martin B. Gold, Senate Proc. & Practice 155 (Rowman Littlefield 2d ed. 2008). Reconciliation bills may only be debated in the Senate for a maximum of twenty hours, *see* 2 U.S.C. § 641(e)(2), thus preventing the possibility of a filibuster. Aware that this fast-track process could lead to abuse, Senator Robert Byrd helped amend the 1974 act to bar any extraneous matter from reconciliation bills. *See* Gold, *supra,* at 155. Accordingly, such bills may only include provisions that have direct budgetary impacts. *See* 2 U.S.C. § 644(b)(1)(A).

Notwithstanding its technicalities, the reconciliation process was never intended to be used to enact substantive changes to broad-reaching social legislation. In fact, Senator Byrd stated publicly that using the reconciliation process to achieve health-care reform would be "an outrage that must be resisted" and that "misuse of the arcane process of reconciliation—a process intended for deficit reduction—to enact substantive policy changes is an undemocratic disservice to our people and to the Senate's institutional role." Robert C. Byrd, *Opinions*, WASH. POST, Mar. 22, 2009, at A17.

Despite Senator Byrd's prior exhortations and undivided opposition from the minority party, the narrow majority—at the urging of President Obama[26]— used the reconciliation process to pass a final bill, the Health Care and Education Reconciliation Act of 2010, by a simple, party-line vote of 220-207 in the House and 56-43 in the Senate. *See* Herszenhorn & Pear, *supra* n.7. Notably, the reconciliation bill made a number of substantive changes to central provisions of the ACA as passed in December 2009. These changes included, among other things, increasing tax-credits for middle-income families who buy insurance; lowering the penalty for not buying insurance; requiring that doctors that care for Medicaid patients be fully reimbursed; imposing a Medicare tax on certain unearned income; and enacting student loan reform.[27]

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26. *See* Shailagh Murray & Lori Montgomery, *Obama Calls for Reconciliation to Prevent Filibuster on Health-Care Reform*, WASH. POST, Mar. 4, 2010, at A07.

27. *See id.*; *see also Breaking—Reconciliation Bill Posted,* POLITICO, Mar. 18, 2010, *available at* http://www.politico.com/livepulse/0310/BREAKING__Reconciliation_bill_posted_.html.

C. The Last-Minute Executive Order

Both the President and leaders of the majority party in Congress engaged in additional eleventh-hour wrangling to secure the votes of wavering House Democrats. In the weeks prior to the final vote on the reconciliation bill, certain House members, including Democratic Representative Bart Stupak of Michigan, became increasingly concerned about provisions of the bill providing for taxpayer funding of abortion. *See* William L. Saunders, Jr. & Anna R. Franzonello, *Health Care Reform and Respect for Human Life: How the Process Failed*, 25 N.D. J. L. Ethics & Pub. Pol'y 593, 623 (2011). To address these concerns, President Obama agreed to issue an Executive Order that purported to restrict public funding of abortions, which he signed on March 24, 2010 (behind closed doors and with no reporters present). *See* Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 24, 2010). With this "assurance" in hand, the House and Senate passed the reconciliation bill the following day.

The President's Executive Order, however, did not and cannot nullify the ACA's provisions, as executive orders are only entitled to the "force of law" when they do not contradict statutory language. *See* Saunders, *supra*, at 625 (noting that a presidential Executive Order "cannot change or negate statutory law"). Nor is the language of the Executive Order codified anywhere in federal law. The use of an Executive Order to attempt to make substantive modifications to the bill further delegitimizes the process underlying the ACA.[28]

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28. Similar problems of "delegating" difficult constitutional and political issues to administrative agencies threaten to severely

D. Illusory Projected Cost Savings

The passage of the ACA was also induced by the promise of tens of billions of dollars in illusory cost savings from a fatally-flawed entitlement program that was designed to provide insurance for long-term care (the "Community Living Assistance Services and Supports Act," or "CLASS Act"). During the legislative debate, there was bipartisan opposition to the use of the CLASS Act as a purported savings mechanism given that serious questions about the long-term fiscal solvency of the program were being raised by "an array of groups—including the [CBO] and the American Academy of Actuaries."[29] When the CBO scored the budgetary effects of the pending bill, it counted the $70 billion in premium payments expected to be collected in the CLASS program's first decade toward the ACA's alleged deficit reduction—even though

compromise the liberty of a host of religious organizations. For example, the Catholic Church and others have strongly objected to recent healthcare mandates imposed not by an Act of Congress, but by regulations of the Department of Health and Human Services (HHS) to "implement" the ACA. *See*, *e.g.*, Timothy M. Dolan, Op.-Ed., *ObamaCare and Religious Freedom*, Wall St. Journal, Jan. 25, 2012, at A17. If left undisturbed, these HHS regulations require that insurance policies under the ACA cover a variety of contraceptive and sterilization services, including the insurance policies for religiously-affiliated charities, social-service agencies, universities, and hospitals. *See* Robert Pear, *Obama Reaffirms Insurers Must Cover Contraception*, N.Y. Times, Jan. 20, 2012, at A17.

29. *See* Lori Montgomery, *Proposed Long-Term Insurance Program Raises Questions*, Wash. Post, Oct. 27, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/10/27/AR2009102701417.html.

those premiums were eventually supposed to pay for the program's benefits.[30] Even a supporter of the ACA in the Senate, Senate Budget Committee Chairman Kent Conrad, publicly called the CLASS Act "a Ponzi scheme of the first order." *Id.*

Indeed, the CLASS Act has now been widely accepted to be fiscally unsustainable, and the HHS's decision in October 2011 to scrap the program erased about 40% of the savings that the CBO had estimated the ACA would generate for the government. *See* Sam Baker, *HHS Decision Erases Nearly $100B of Projected Savings from Reform Law*, The Hill, Oct. 14, 2011 (noting that "Congressional Republicans have long insisted the CLASS Act was a financial gimmick designed to get healthcare reform passed.").

III. PRIOR INSTANCES OF LANDMARK SOCIAL LEGISLATION WERE PASSED WITH WIDE MARGINS AND REFLECTED A BROAD CONSENSUS

In stark contrast to the subversion of the legislative process that gave birth to the ACA, major pieces of social legislation throughout modern American history have

30. *See* Peter Suderman, *ObamaCare's Disastrous New Long-Term Care Entitlement*, Reason.com, May 27, 2011, http://reason.com/archives/2011/05/27/obamacares-disastrous-new-long. HHS Secretary Kathleen Sebelius in fact conceded to Congress that "we determined pretty quickly that [the CLASS program] would not meet the requirement that the act be self-sustaining and not rely on taxpayer investments." Testimony of HHS Sec. Sebelius, Feb. 15, 2011, *available at* http://www.c-spanvideo.org/appearance/599563386.

uniformly commanded bipartisan congressional support, reflecting a broad and enduring political consensus on momentous issues. *See Henry J. Aaron, The Mid-Term Elections—High Stakes for Health Policy*, 363 N.E. J. of Medic. 1685, 1685-86 (2010) (compiling data quantifying the broad bipartisan support for major social reform legislation prior to the ACA, and noting that "the evidence of party polarization" concerning the ACA "is overwhelming").

While the debate preceding the enactment of the following bills was undoubtedly fierce and rancorous, the resulting legislation uniformly enjoyed wide bipartisan support, reflecting a legislative process shaped by compromise, not gamesmanship. As Senator Olympia Snowe remarked during debate on the health care vote, "policies that will affect more than 300 million people simply should not be decided by partisan, one-vote-margin strategies . . . just consider for a moment if Social Security, civil rights, or Medicare could have been as strongly woven into the fabric of our Nation had they passed by only one vote and on purely partisan lines." 111 Cong. Rec. S11889-11892 at S11890 (Nov. 20, 2009) (statement of Sen. Olympia Snowe).

A. The Social Security Act

The Social Security Act of 1935 was supported by an overwhelming 372-33 margin in the House of Representatives, and by 77 of 83 voting Senators. *See Vote Tallies: 1935 Social Security Act*, http://www.ssa.gov/history/tally.html (last visited Feb. 10, 2012). 81 out of 102 House Republicans, and 16 out of 25 Senate Republicans, voted to support the bill. *Id.* So did 269 out of

284 House Democrats, and 60 out of 61 Senate Democrats. *Id.* Reflecting this broad, bipartisan consensus, the conference bill reconciling the House and Senate versions of the legislation was passed on a voice vote due to the large bipartisan support underlying the final bill. *Id.*

These majorities did not coalesce accidentally, but rather were the byproduct of a consensus-based approach. First proposed as the "Economic Security Act" in January 1935, the bill was debated in House and Senate committees for two months, and was not signed into law until August. *Id.* Over fifty amendments to the bill were debated and cast aside.[31] Although President Roosevelt had initially envisioned a vast regulatory scheme in which "everybody ought to be in on it . . . cradle to the grave they ought to be in a social insurance system," his administration ultimately acceded to a number of compromises with both Republican and conservative Democratic legislators in order to attract a broad coalition of supporters and to minimize constitutional objections.[32]

These compromises included abandoning plans for universal health care, curtailing coverage and benefits for certain categories of employees (such as farmers and domestic workers), enacting a regressive payroll tax system as a method of financing, and leaving unemployment relief largely to the States.[33] Many of these

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31. *See* Dennis W. Johnson, The Laws that Shaped America 189 (Routledge 2009) (citing *House Routs Radical Bills for Security*, Wash. Post, Apr. 19, 1935, at 1).

32. *See* David M. Kennedy, *Compromise 4: Whittling Down The New Deal,* 60 Amer. Heritage (2010), *available at* http://www.americanheritage.com/content/new-deal-compromised.

33. *Id.*; *see also Historical Background and Development*

compromises, as explained above, were forged specifically to head off concerns about Congress' constitutional authority under Article I to enact such a measure. *See supra* pp. 10-11. Moreover, historians have long noted that the "abundant compromises that attended the Social Security Act's enactment" laid the foundation for subsequent social legislation, including the creation of Medicare and Medicaid in the 1960s. Kennedy, *supra* n.32. These "abundant compromises" did not, however, include the systematic "buying-off" of legislators by diverting federal funds to pet projects in their States.

B. The Social Security Amendments (Medicare and Medicaid)

The Social Security Amendments of 1965, Pub. L. 89-97, 79 Stat. 286 (1965), which created the Medicare and Medicaid programs, enjoyed similarly broad bipartisan support in Congress. After a spirited debate and the consideration of over 500 minor amendments,[34] the House of Representatives passed Medicare and Medicaid by a 307-116 margin, and the Senate voted 70-24 to do the same. Once more, a sizable number of the Republican minority joined with the vast majority of Democrats to vote in favor of a core social initiative promoted by a Democratic administration and Democrat-controlled Congress.

This remarkable consensus was forged through incremental compromises arising out of a "legislative struggle reaching back to the late 1930s." Johnson,

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of Social Security, http://www.ssa.gov/history/briefhistory3.html ("The Social Security Act did not quite achieve all the aspirations its supporters had hoped.") (last modified Dec. 6, 2011).

34. Johnson, *supra* n.31, at 353.

supra n.31, at 333. Indeed, proponents of the Social Security Amendments thought it necessary, in a clear demonstration of legislative circumspection, to restrict their efforts to narrowly targeted groups with special health-coverage needs. Congress rejected initial efforts to enact universal coverage, instead limiting Medicaid only to "the medically indigent, aged, blind, and disabled persons, dependent children and their parents." 111 Cong. Rec. 7396 (Apr. 8, 1965). Medicare, for its part, was likewise "tailored to meet the needs of our elderly." *Id.* at 7360.

In 1965, the Johnson Administration supported legislation that had been introduced years earlier, the King-Anderson bill, which concentrated on federal assistance for hospital care. The American Medical Association, a fierce opponent of that legislation, backed an alternative program called "Eldercare," while the Republicans, through Representative John Byrnes, proposed a third plan, voluntary in nature and focused on doctors' fees, which would be funded by a small monthly payment from each enrollee with federal funds taken out of general revenue. Johnson, *supra* n.31, at 348-353.

The bill that ultimately advanced through Congress in 1965 "included elements of the proposals from the Democrats, the Republicans, and the [American Medical Association]."[35] President Lyndon Johnson worked closely with Representative Wilbur Mills, the House Ways and Means Committee chairman (and

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35. *See* Rick Swedloff, *Can't Settle, Can't Sue: How Congress Stole Tort Remedies from Medicare Beneficiaries*, 41 Akron L. Rev. 557, 570 (2008).

previously an ardent critic of health care legislation), to craft a series of compromise measures to ensure the passage of a bipartisan bill.[36] Mills "cobbled together the administration's bill (hospital coverage), with a Republican substitute (doctors' fees), and joined them with medical assistance for the poor (Medicaid). Mills characterized it as a 'three-layer cake,' and it soon became the law of the land." Johnson, *supra* n.31 at 335. By sharp contrast, the ACA contained no such attempts at compromise, whether of a constitutional nature or otherwise, as reflected in the final voting tallies.

C. The Civil Rights Act and the Voting Rights Act

The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964)—which outlawed various forms of discrimination based on race, national origin, and gender—ultimately garnered broad bipartisan support and passed by a margin of 73-27 in the Senate and 289-126 in the House of Representatives.

The path to such broad consensus was not smooth. After momentum for civil rights legislation had built in the 1950s and early 1960s, President Kennedy sent a proposed civil rights bill to Congress on June 19, 1963. It was immediately condemned by many Southern lawmakers as "unconstitutional, unnecessary, unwise and beyond the realm of reason." *See* Johnson,

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36. *See* Robert Dallek, *Compromise 5: Medicare's Complicated Birth*, 60 Amer. Heritage (2010), *available at* http://www.americanheritage.com/content/medicare%E2%80%99s-complicated-birth ("To combat charges of socialized medicine and signal his desire to reach an accommodation with the opponents of his initiatives, Johnson advanced a limited bill . . . .").

supra n.31, at 307. Recognizing the threat of a Senate filibuster, the administration first approached the House of Representatives, which heard testimony from 275 witnesses over 70 days of public hearings. The House debated the bill for nine days and considered nearly 100 amendments before passing H.R. 7152 on February 10, 1964.

Debates in the Senate were even more contentious. Southern Democrats followed a three-week filibuster on a procedural question with the longest continuous filibuster in Senate history. *See* Johnson, *supra* n.31, at 313-14. As the stalemate continued, Republican Senate Minority Leader Everett Dirksen and Senator Hubert Humphrey, the Democratic whip, worked together to redraft controversial language in the legislation to garner support among moderate Republicans and to address concerns that the existing legislation exceeded Congressional authority under the Constitution and granted powers to the Federal Government that should properly be reserved to the States.

The Senate bill thus gave States and local communities more authority to address complaints in cases of employment discrimination and public accommodations.[37] While the Senate bill allowed the Attorney General to initiate suits in these areas upon a finding of a "pattern of discrimination," it imposed a period for voluntary compliance before the Attorney General could act, and

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37. *See* The Dirksen Congressional Center, *A Case History: The 1964 Civil Rights Act, available at* http://www.congresslink.org/print_basics_histmats_civilrights64text.htm (last visited Feb. 10, 2012).

precluded suits brought by the Attorney General on behalf of individuals. *Id.* These efforts produced a coalition of 27 Republicans and 44 Democrats who voted for cloture and ended the marathon filibuster. The bill passed the Senate nine days later by a large majority and the House accepted the Senate version on July 2, 1964. President Johnson signed the bill that same day.

The Voting Rights Act of 1965, Pub. L. No. 89-100, 79 Stat. 437 (1965), which outlawed discriminatory and intimidating voting practices, was also the product of a broad bipartisan consensus. Following a speech by President Johnson before a joint session of Congress on March 15, 1964, voting rights bills were introduced in both the Senate and the House. Sixty-six Senators introduced and co-sponsored the Senate bill, which assured that the bill would not be subject to a filibuster. The bill passed the Senate on May 26, 1964. Despite a few attempts at parliamentary maneuvering by Southern Congressmen, the House passed its own bill in July. Overwhelming majorities of Democrats and Republicans in both chambers of Congress passed the Voting Rights Act (by a final vote of 328-74 in the House and 79-18 in the Senate), and President Johnson signed the Act into law on August 6, 1965.

Although the Voting Rights Act entailed an expansive exercise of Congressional authority, *see South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), its proponents in the political branches were mindful of the limitations imposed by the Constitution and crafted a measure "that went as far as [they] thought that any legislation could go in light of relevant constitutional proscriptions." Luis Fuentes-Rohwer, *Judicial Activism and the Interpretation of the*

Voting Rights Act, 32 Cardozo L. Rev. 857, 878 (2011). Attorney General Katzenbach, for example, repeatedly testified before Congress that he had "reservations" about the "constitutionality" of certain proposed changes to expand the scope of the legislation—changes that were not included in the final version of the statute. *See* Hearings on S. 1564 Before the S. Comm. on the Judiciary, 89th Cong., 1st Sess., 143 (1965). Hence, in enacting the initial Voting Rights Act, Congress ultimately promulgated "a detailed *but limited* remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified." *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 373 (2001) (emphasis added).

In marked contrast here, the scope of the ACA is anything "but limited," any reservations regarding its constitutionality went unheeded, and consequently it did not garner the support of a single Republican in the House or Senate.

D. The Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (the "ADA"), Pub. L. No. 101-336, 104 Stat. 327 (1990), evolved out of numerous proposals over a course of years to expand existing civil rights legislation to afford protections to persons with disabilities. In the 1980s, Congress had established the National Council on Disability (the "Council"), an independent Federal body comprised of 15 members appointed by President Reagan, to review all relevant federal laws and make recommendations

to improve upon them.[38] The Council issued a report in 1986 which proposed, among other things, an omnibus "Americans with Disabilities Act."

Congressional committees developed drafts of the ADA in the ensuing years, and in 1988, a bill was introduced in the Democrat-controlled Senate by Republican Senator Lowell Weicker, Jr. and 13 co-sponsors from both sides of the aisle. *See* Americans with Disabilities Act of 1988, S. 2345, 100th Cong. (1988). A bipartisan group of 46 co-sponsors introduced similar legislation in the House. *See* Americans with Disabilities Act of 1988, H.R. 4498, 100th Cong. (1988).

The two companion bills were significantly revised in the 101st Congress; between May 1989 and July 1990, the bill was subject to "numerous amendments, negotiations, markups, and compromises. Throughout this process, the business community's concerns were considered and addressed." Arlene Mayerson, *The Americans with Disabilities Act—An Historic Overview*, 7 The Labor Lawyer 1, 6 (1991). The parties also worked together to address constitutional issues concerning the separation of powers, as an amendment to the proposed legislation introduced in the Senate would have subjected all of Congress, including the House of Representatives, to a private right of action under the ADA and would have vested the executive branch (in the form of the Equal Employment Opportunity Commission or the Attorney

38. *See* Rehabilitation Amendments of 1984, Pub. L. No. 98-221, tit. I §§ 141(b)(1), 142(b), 98 Stat. 17, 26-27 (codified as amended at 29 U.S.C. §§ 780a, 781 (1988)).

General) with authority over the legislative branch. That amendment was voluntarily withdrawn.[39]

The ultimate votes on the bill that came out of the conference committee reflected deep bipartisan support. The House passed the bill on July 12, 1990 by a vote of 377-28 and the Senate followed the next day by a 91-6 margin. 136 Cong. Rec. 17296-97 (July 12, 1990). President George H.W. Bush signed the bill into law in short order. There is simply no comparison between this broad consensus—reflected in a majority that exceeded 90% in each chamber—and the acrimonious passage of the ACA amid bipartisan opposition and without *any* bipartisan support.

E. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform)

In 1996, a Republican-controlled Congress worked with President Bill Clinton to pass a landmark welfare reform bill—the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996)—that commanded bipartisan majorities of 78-21 in the Senate and 328-101 in the House. *See* 142 Cong. Rec. D851 (July 31, 1996); *id.* at D857 (Aug. 1, 1996). Although welfare reform had been a signature part of the Republicans' legislative agenda, more Democrats supported the bill than opposed it. *Id.*

39. *See* 136 Cong. Rec. S7449-50 (June 6, 1990) (withdrawal of motion by Sen. Charles Grassley to provide aggrieved congressional employees with a private right of action against Congress based on the "assurances" he received from Sen. Tom Harkin that "he will be sensitive to the significant constitutional issues involved").

The final bill reflected several compromises between the political parties, ending a standoff that had seen President Clinton veto two prior welfare reform bills, which had both passed by strict party-line votes. *See generally* Ron Haskins, Work Over Welfare: The Inside Story of the 1996 Welfare Reform Law (Brookings Ins. Press 2002) (detailing the collaboration among Democrats and Republicans in drafting a final, compromise bill). Among other things, the Democrats agreed to the bill's five-year lifetime limit on individuals' welfare benefits, which cohered with the Republicans' vision on how best to transition welfare recipients to the workforce. Democrats also accepted the bill's immigration provisions with reservations. Republicans, in turn, accepted various provisions concerning child support that had been drafted by the Clinton Administration's Department of Health and Human Services. In short, as President Clinton later observed, "[n]either side got exactly what it had hoped for." Bill Clinton, Op-Ed., *How We Ended Welfare, Together*, N.Y. Times, Aug. 22, 2006, at A19. This is the very nature of compromise—a feature absent from the steamrolling process that begot the ACA.

At bottom, the ACA represents a fundamental departure from this history of legislative compromise and respect for constitutional boundaries in matters of vast societal importance. Whereas the drafters of these prior bills repeatedly sought to curtail their legislation to meet constitutional and/or political objections en route to overwhelming bipartisan majorities, the proponents of the ACA barreled ahead without regard to serious and duly-raised constitutional concerns.

CONCLUSION

For the foregoing reasons, the presumption of constitutionality that is traditionally applicable to acts of Congress as a coordinate branch of Government has been significantly weakened (if not effectively eliminated) by the structural and procedural deficiencies that accompanied the passage of the ACA: the abdication by Congress of its obligation to make any meaningful effort to consider the constitutionality of the individual mandate; the unprecedented and onerous nature of this congressional measure; and the legislative chicanery that led to the passage of the ACA on a strict party-line vote of a kind never before seen on legislation of great social importance. Accordingly, this Court should conduct a searching and meaningful inquiry into the validity of the ACA's minimum coverage provision and whether Congress has infringed on individual liberty by acting in excess of its authority under the Constitution. This Court should affirm the judgment of the Court of Appeals on this issue.

Respectfully submitted,

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APPENDIX

APPENDIX — INTERESTS OF THE OTHER AMICI

Amicus the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. The Project educates citizens about these constitutional principles, and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of the judiciary on our society. JEP's educational efforts are conducted through various outlets, including print, broadcast, and internet media.

Amicus Reason Foundation ("Reason") is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, www.reason.com and www.reason.tv, and by issuing policy research reports, available on www.reason.org, that promote choice, competition, and a dynamic market economy as the foundation for human dignity and progress. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

Amicus The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation and file amicus curiae briefs in cases involving fundamental constitutional issues. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

Amicus The Heritage Foundation ("Heritage") is a nonpartisan and nonprofit 501(c)(3) research and educational institution with the mission "to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense." Soon after its inception in 1973, Heritage's domestic policy scholars began analyzing, and educating policymakers and the public about, health policy issues and proposals for health policy reform. In several publications and statements over the last decade, Heritage health policy experts have opposed on purely policy grounds a government-enforced mandate that individuals or families buy health insurance. In addition, Heritage's Legal Center published the Heritage Legal Memorandum in December 2009, examining the constitutionality of the "individual mandate" provision in the then-pending health care bill, which noted the costly implications of the individual mandate then being debated, and concluded that it would be unconstitutional as drafted.

Amicus Ending Spending, Inc. is a non-partisan and non-profit organization dedicated to educating and engaging American taxpayers about wasteful and excessive government spending. Through its website and other media, Ending Spending is dedicated to combating the debt crisis and is focused on the nation's broader fiscal challenges. Formerly known as "Taxpayers Against Earmarks," Ending Spending has a particular interest in raising awareness about the questionable legislative procedures that accompanied the passage of the health care bill, including the use of earmarks to win the votes of wavering legislators.

Amicus George LeMieux is a former United States Senator of the 111th Congress, and a current candidate for the United States Senate from the State of Florida. As a former Senator and current candidate for office, *Amicus* LeMieux has a keen interest in passing health care reform that eliminates healthcare fraud and does not increase the federal deficit. *Amicus* LeMieux also has an interest in the constitutional issues that are at stake in this litigation, as he is cognizant of Congress' duty to uphold the Constitution of the United States and to ensure that the Legislative Branch stays within the bounds of the powers afforded it by the Constitution.

Amicus Hank Brown is a former United States Representative (1981-1991) and former United States Senator (1991-1997) from the State of Colorado. *Amicus* Brown has taught political science courses at the University of Colorado-Boulder, where he is President Emeritus. As a former Member of the Legislative Branch,

Amicus Brown is familiar with and has worked upon prior pieces of social legislation; has witnessed first-hand the evolution of healthcare reform; and has a deep interest in ensuring that Congress does not act in excess of its authority under the Constitution.