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# Brown v. Board of Education and National Federation of Independent Business v. Sebelius: A Comparative Analysis of Social Change

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*BROWN V. BOARD OF EDUCATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS: A COMPARATIVE ANALYSIS OF SOCIAL CHANGE*

*Brian G. Gilmore*\*

I. INTRODUCTION

In the United States, a political and philosophical battle forged in the early years of the nation's founding is still being waged everyday as the nation collectively comes to terms with its new health care law—The Patient Protection and Affordable Care Act.<sup>1</sup> The conflict is best summarized as follows: equality or liberty. The health care law, the most expansive in the nation's history, encapsulates the debate: is it more important that more of us are equal, or is it more important that all of us retain our natural right to liberty?<sup>2</sup> In the nation's founding document, the Declaration of Independence, it is decreed: "all men are created equal" and are "endowed by their [c]reator with certain inalienable [r]ights."<sup>3</sup> This famous clause summarizes the expectations in the United States for every citizen with respect to both equality and individual liberty.

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\* Clinical Associate Professor of Law, Michigan State University. Most of all, I would like to thank Carmen Dorris, MSU Law 2013, for assistance in completing this article; the staff of the Clinical department at the law college, especially Jesse Alvarez, Office Manager; and Professor Glen Staszewski, Associate Dean for Research during completion of this article. In addition, I would like to thank the many members of the faculty of the Michigan State University College of Law for their thoughtful comments during the 2014 Summer Writing Workshop at the law college, in particular, Professor Tiffani Darden for her very important contribution to the completion of this article at the workshop. Finally, much thanks to Autumn Gear, MSU Law 2016 for her assistance with the final drafts of the article.

1. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of U.S.C.), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-111hr3590enr/pdf/BILLS-111hr3590enr.pdf>.

2. "Liberty" is used here to describe one of the nation's basic founding concepts that has evolved over time. While the original founders likely would describe it as freedom from government oppression (England at the time), this term means much more now. According to Randall C. Holcombe, on page 4 of his book *From Liberty to Democracy: The Transformation of American Government*, the "eighteenth century conception of liberty is completely at odds with twentieth century American government." RANDALL C. HOLCOMBE, *FROM LIBERTY TO DEMOCRACY: THE TRANSFORMATION OF AMERICAN GOVERNMENT* 4 (2002). Holcombe's point is that the configuration of liberty during the days of the nation's break from England is completely different from today's configuration of liberty. Government and the individual co-exist; the individual retains rights and freedoms, and government has authority granted to it by the Constitution. *Id.*

3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

In an effort to explore these ideals as they are implicated in the nation's social structures, this essay compares two noteworthy United States Supreme Court cases: *National Federation of Independent Business v. Sebelius*<sup>4</sup> and *Brown v. Board of Education*.<sup>5</sup> Both *Sebelius*, which centers on The Patient Protection and Affordable Care Act, and *Brown* bring the debate over equality and liberty into proper focus. *Brown* brings the debate into focus because it is a case about how the nation treated citizens of African descent differently than other members of the population. *Sebelius* accomplishes the same because it examines how economically challenged citizens of the nation are treated differently in the delivery of basic health care.

The following will be an examination of the two cases and the Supreme Court's legal holdings, which will also compare the cases in regard to their efforts to achieve social change. The examination will include the long-protracted political struggle that preceded each case, the social impact of the cases (the actual impact in *Brown* and the potential impact in *Sebelius*), and the similarities and differences in the legal opinions rendered by the Court. The overarching themes presented are the political relevance of the two cases in Part II; the political and social struggle of each case over the twentieth century and beyond in Part III; an examination the legal opinions in Part IV; and, finally, the future effect of the cases in Part V, especially *Sebelius* considering it was recently decided in 2012.

## II. FROM *BROWN* TO *SEBELIUS*: CONTROVERSY AND CONVERGENCE

### A. Trashing Chief Justice Roberts

On June 28, 2012, the Supreme Court finally issued its decision and opinion in the case of *National Federation of Independent Business v. Sebelius*.<sup>6</sup> The opinion, written by Chief Justice John Roberts, was a 5-4 decision, upholding the Patient Protection and Affordable Care Act (ACA),<sup>7</sup> a law detractors frequently referred to as "Obamacare."<sup>8</sup> It was a surprise decision by Justice Roberts, as the conservative jurist voted with Justices Stephen Breyer, Sonia Sotomayor, Ruth Bader Ginsburg, and Ellen Kagan, four Justices typically associated with more liberal jurisprudence.<sup>9</sup> The recognized conservatives on the court, Justices Scalia, Alito, Thomas, and Ken-

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4. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

5. *Brown v. Bd. of Educ. of Topeka, Kan.* (Brown I), 347 U.S. 483 (1954).

6. 123 S. Ct. 2566 (2012).

7. *Id.* at 2575.

8. See, e.g., Roger Pilon, *It Now Falls to Congress*, CATO INST., <http://www.cato.org/publications/commentary/it-now-falls-to-congress> (last visited Sept. 19, 2014).

9. *Sebelius*, 123 S. Ct. at 2575.

nedly, were left to dissent from the majority decision when Roberts, a Justice with solid conservative credentials, voted in favor of the law.<sup>10</sup>

Roger Pilon of the Cato Institute described the ACA as an act of “hubris” by progressives<sup>11</sup> and added the following regarding Roberts’s opinion:

Today, the Supreme Court had an opportunity to put a brake on that hubris. Four justices, led by Justice Kennedy, would have done so. But Chief Justice Roberts joined the four justices who are Exhibit A of the modern hubris, writing for the Court to uphold almost all of this monstrous intrusion on our liberty and on the very theory of the Constitution. And he did so on the flimsiest of rationales for deciding a constitutional question—precedent.<sup>12</sup>

Doug Bandow, also of the Cato Institute, was far more critical of Roberts in analyzing the vote and opinion:

Rarely has so smart a judge written so bad an opinion with such ill consequences for the nation. Such is the handiwork of Chief Justice John Roberts in *NFIB vs. Sebelius*, the constitutional challenge to ObamaCare.

His support for the president’s signature legislation has secured plaudits from the Washington establishment, which undoubtedly will make his stay in the nation’s capital more pleasant. But his gain comes at the cost of Americans’ liberties. That Justice Roberts would abandon the Constitution for his reputation was feared, but none expected him to do so in such calculated fashion.<sup>13</sup>

Bandow, unlike Pilon, attacked Roberts’s integrity and honesty, suggesting Roberts’s decision to uphold the law was reached for personal reasons.<sup>14</sup> Such was the vicious nature of conservative commentators’ attacks on Roberts in the aftermath of *Sebelius*.

The *National Review*, a conservative political monthly magazine, described Justice Roberts’s decision as “folly,” a decision that Roberts “cannot justly take pride in,” and one where the Court had “failed to do its duty.”<sup>15</sup> These opinions were likely widespread amongst those who opposed the law when it was first passed in March 2010.

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10. *Id.*

11. Pilon, *supra* note 8. The Cato Institute is a non-profit public policy research foundation headquartered in Washington, D.C., according to [www.cato.org/about](http://www.cato.org/about).

12. *Id.*

13. Doug Bandow, *John Roberts: Rarely Has Such A Smart Judge Written Such A Bad Opinion*, CATO INST., <http://www.cato.org/publications/commentary/john-roberts-rarely-has-such-smart-judge-written-such-bad-opinion> (last visited Sept. 19, 2014).

14. *Id.*

15. Editors, *Chief Justice Roberts’s Folly*, NAT’L REV. ONLINE (June 28, 2012, 2:00 PM), <http://www.nationalreview.com/articles/304311/chief-justice-roberts-s-folly-editors>.

Regardless of one's opinion of Roberts's vote, the Court's decision in *Sebelius* could change the course of social history in the United States if the law is not repealed in the near future. The Roberts opinion upholding the expansion of access to health care in the country through a private-public program will, if it is not repealed, affect millions of citizens.<sup>16</sup> The act will not only extend health care coverage to more Americans if successful, but will also maintain coverage for many who would lose coverage under certain conditions, prevent children from being denied coverage for pre-existing conditions, allow children to remain on their parents' health insurance plans until they are twenty-six years old, and expand coverage of preventive health care.<sup>17</sup> Thus, the law represents decades of protracted political struggle by politicians mostly to expand health care for more citizens in the United States.

B. *Brown v. Board of Education*

The *Brown v. Board of Education* decision of 1954<sup>18</sup> was a decision of major social change in the United States. Although the decision was litigated on education and racial equality, the decision had an effect on every aspect of society. The *Brown* decision was a case about race, but in the most basic terms it was still a decision about the lives of ordinary citizens and their place in a society that declares to treat all human beings equally in its founding documents.<sup>19</sup>

Are we a nation of interdependent citizens driven by a shared moral credo that makes equality a goal, or are we just a collection of independent individuals seeking personal goals based in freedom and economic liberty at the expense of any pursuit of equality? *Brown* attempted to answer this question by focusing upon equality and the nation's declaration in 1776 that "all men are created equal."<sup>20</sup> As Chief Justice Earl Warren famously asked and answered in the opinion: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."<sup>21</sup>

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16. STAFF OF THE WASHINGTON POST, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 73 (2010).

17. *Id.* at 93, 99, 145.

18. 347 U.S. 483 (1954).

19. *See id.*

20. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

21. *Brown*, 347 U.S. at 493.

*Brown* was, of course, a legal holding, but it was also a political action. Chattel slavery had been outlawed in the United States since the 1860s.<sup>22</sup> Unfortunately, chattel slavery was replaced with a racial apartheid system known formally and informally as “Jim Crow.”<sup>23</sup> Although no longer considered property, African-Americans became second-class citizens across the nation and were politically, socially, and economically marginalized. *Brown* was not the first successful challenge to the legal and social underpinnings of those laws, but it continues to be the most important and far reaching.

In the immediate aftermath of the decision, it appeared the nation would begin working slowly towards integration. The Washington Federation of Churches called the decision in *Brown* a “new epoch in American history.”<sup>24</sup> The organization, like many, believed that the nation would begin to work towards integration in society as a result of the decision.<sup>25</sup> In the South, where Jim Crow laws were prevalent in schools and in civic society, leaders “expressed shock” at the ruling, believing not only that the holding violated the U.S. Constitution, but also that public schools should be privatized because of the ruling.<sup>26</sup> Resistance to the end of racial segregation (Jim Crow) was fierce by all indications.<sup>27</sup>

Decades later, the analysis of *Brown* would evolve and expand. Michael W. Combs and Gwendolyn M. Combs, professors of political science and management, respectively, wrote in 2004, on the fiftieth anniversary of the decision, that *Brown* transformed “the culture of America” and provided the “catalyst and thrust for the recreation of the boundaries between the ‘we’ and the ‘they’ in America.”<sup>28</sup> Bryant Smith, in his 2008 article, *Far Enough or Back Where We Started: Race Perception From Brown to Meredith*, describes *Brown* as “[p]ivotal, phenomenal, tremendous and fundamental,” and a decision that “made a global impact on society psychologically and prospectively.”<sup>29</sup> Judge Robert L. Carter, it has been reported, said the case

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22. Douglass Massey, *The Past and Future of American Civil Rights*, DAEDALUS: J. AM. ACAD. ARTS & SCI., Spring 2011, at 37–40.

23. *Id.* at 40.

24. *D.C. Churches Laud Ruling of High Court*, WASH. POST, May 22, 1954, at 9.

25. *Id.*

26. Chalmers M. Roberts, *South’s Leaders Are Shocked at School Integration Ruling*, WASH. POST, May 18, 1954, at 2.

27. Lawrence D. Bobo, *Somewhere Between Jim Crow & Post Racialism: Reflections on the Racial Divide in America Today*, DAEDALUS: J. AM. ACAD. ARTS & SCI., Spring 2011, at 11–12.

28. Michael W. Combs & Gwendolyn M. Combs, *Revisiting Brown v. Board of Education: A Cultural, Historical-Legal and Political Perspective*, 47 HOW. L.J. 627, 629 (2004).

29. Bryant Smith, *Far Enough or Back Where We Started: Race Perception From Brown to Meredith*, 37 J.L. & EDUC. 297, 298 (2008).

transformed blacks from being “beggars” to “citizens demanding equal treatment under the law.”<sup>30</sup>

In simple terms, *Brown* is a lawsuit about public education and race, but it is also the entry point for the dismantling of a system of a racial apartheid in the United States.<sup>31</sup> The status of Black Americans at the time of the *Brown* decision explains the impact of the case on life in the United States:

To discriminate based on race in merchandising stores, eating establishments, places of entertainment, and hotels and motels was generally accepted as a fact of life. Negroes seldom occupied positions in American businesses and corporations above the most menial levels. Even lower level management positions were, for the most part, unobtainable. In 1954, only a handful of Negroes attended the prestigious colleges and universities of this country and almost none taught there. . . . In 1954, many places in the country maintained separate water fountains, waiting rooms, transportation facilities, rest rooms, schools, hospitals, and cemeteries for whites and coloreds.<sup>32</sup>

The *Brown* decision would eventually dismantle that system. By holding that school systems that were segregated on the basis of race (in the various jurisdictions in the *Brown* litigation) were unconstitutional, the decision effectively dismantled the entire “separate but equal doctrine” from the *Plessy v. Ferguson* decision of 1896.<sup>33</sup> *Plessy* famously held that the law “is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences,” and “if the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically.”<sup>34</sup> The only problem is blacks and whites were never (and are not now) equal in the United States as the Court in *Plessy* suggested.

Derrick Bell, the late civil rights lawyer, writer, and long-time law professor, believed when the *Brown* decision was rendered it was the “begin-

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30. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980).

31. See generally Adam Liptak, *Brown v. Board of Education, Second Round*, N.Y. TIMES, Dec. 10, 2006, <http://www.nytimes.com/2006/12/10/weekinreview/10liptak.html?pagewanted=all> (last visited Oct. 17, 2014) (arguing that several Justices think “the real point of *Brown* was to achieve and maintain integrated public schools, whether through social progress or through government action that takes account of race,” and stating “in the long line of school desegregation cases that followed, from the Warren to the Burger to the Rehnquist courts, the justices . . . address[ed] the aftermath of state-sanctioned segregation.”).

32. Kevin D. Brown, *Brown v. Board of Education: Re-examination of the Desegregation of Public Education from the Perspective of the Post-Desegregation Era*, 35 U. TOL. L. REV. 773, 778–79 (2004).

33. *Plessy v. Ferguson*, 163 U.S. 537, 540, 547, 551 (1896).

34. *Id.* at 551–52.

ning of the end of Jim Crow oppression in all its myriad forms<sup>35</sup> in the United States. This was, according to Bell, “the majority view” amongst African-Americans at the time of the decision.<sup>36</sup> Yet, years later, the same Derrick Bell, disturbed by racial progress in the *Brown* era, calls the case “racial melodrama” and notes that the case served the country “short term” but not “long term.”<sup>37</sup> Bell’s evolving opinion of the political significance of *Brown* corroborates the significance of the case in history and the continuing struggle with issues related to equality in the United States.

### C. Analysis

In examining the political impact of each case, it is relatively easy to see that both *Sebelius* and *Brown* are seminal moments in the social history of the United States. Both decisions immediately sparked sharp divisions from various observers, as mentioned above. While *Brown* is now sixty years old and *Sebelius* is just two years old, it is not likely that either will be forgotten into history. In fact, it is likely that these decisions will continue to influence public policy in the United States.

## III. *SEBELIUS* AND *BROWN*, AND THE STRUGGLE FOR SOCIAL CHANGE

### A. Health and Social Insurance

*Brown* and *Sebelius* are not only legal struggles involving specific parties in litigation, but also legal efforts seeking social change. Both are complex social battles, but the *Sebelius* decision and social struggle is more complex (but is not necessarily more difficult) than the *Brown* decision and social struggle. The reason *Sebelius* is more complex is that while *Brown* is a legal decision about fundamental change in the affairs of the nation, it is still confined to race. *Brown* is, as the late poet and political activist Amiri Baraka might have noted, about “national oppression.”<sup>38</sup>

*Sebelius*, unlike *Brown*, is not about national oppression, but is about inequality in the United States. *Sebelius* is also different and more expansive than *Brown*; it is not only a challenge to a national law, but also a challenge to the nation’s overarching political and social ideals. Yet, *Sebelius* is also just a challenge to the constitutionality of ACA, a federal law passed by

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35. Derrick Bell, *Brown Reconsidered: Was Education Equity, Rather than Integration Idealism, the Appropriate Goal?*, THE CRISIS, May/June 2004, at 44, 45.

36. *Id.*

37. Derrick Bell, *The Brown Decision: “A Magnificent Mirage,”* ED. WEEK, May 19, 2004, <http://www.edweek.org/ew/articles/2004/05/19/37bell.h23.html?tkn=UZLFu%2BA11cX4nOb3cD42H0%2FMFwfAYmKnIZwN&print=1>

38. Kimberly W. Benston, *Amiri Baraka: An Interview*, 6 BOUNDARY 2 303, 303 (1978).



both houses in Congress and signed into law by the President of the United States.<sup>39</sup>

The struggle for health care in the United States dates back to the very beginning of the twentieth century. The Socialist Party of the United States in 1901 endorsed European-style health care insurance for American workers.<sup>40</sup> This was followed by the American Association for Labor Legislation (AALL), an organization dedicated to promoting labor causes and social security insurance in the United States, endorsing universal health care as early as 1907.<sup>41</sup> The initial proposals of the AALL were based upon a program that had long been established in Germany.<sup>42</sup> The AALL remained consistent over the years in seeking action on health care.<sup>43</sup> Years prior to the AALL's endorsement of universal health care, another social service organization of considerable note, the National Conference of Charities and Correction (NCCC), repeatedly called for health insurance protection in light of the developments in Europe on the issue.<sup>44</sup>

It was in 1912 that the Progressive Party, in its political platform for the election, specifically included universal health coverage as part of its political agenda.<sup>45</sup> According to the Party's platform that year, the Party proposed a contract between their party and society that would protect the "home life against the hazards of sickness."<sup>46</sup> Its candidate was Theodore Roosevelt,<sup>47</sup> an individual who brought credibility to the effort. Roosevelt, the former President of the United States, also was intimately involved in the drafting of the 1912 platform along with many others, including the social reformer Jane Addams and many other progressives.<sup>48</sup> In a speech at the

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39. Robert F. Rich et al., *The Patient Process and Affordable Care Act of 2010: Implementation Challenges in the Context of Federalism*, 16 J. HEALTH CARE L. & POL'Y 77, 77 (2013).

40. Beatrix Hoffman, *The Challenge of Universal Health Care: Social Movements, Presidential Leadership, and Private Power*, in SOCIAL MOVEMENTS AND THE TRANSFORMATION OF AMERICAN HEALTH CARE 39, 40 (Jane C. Banaszak-Holl et al. eds., 2010).

41. Forrest A. Walker, *Compulsory Health Insurance: The Next Great Step in Social Legislation*, 56 J. AM. HIST. 290, 292 (1969).

42. Harold Bauman, *Verging on National Health Insurance Since 1910*, in CHANGING TO NATIONAL HEALTH CARE: ETHICAL AND POLICY ISSUES 29, 31 (Robert P. Huefner & Margaret P. Battin eds., 1992).

43. Walker, *supra* note 41, at 292–95.

44. *Id.* at 291–92.

45. See generally SIDNEY M. MILKIS, *THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* 157 (2009) (explaining that Roosevelt argued that "the hazards of sickness, irregular employment and old age" should be provided for through insurance).

46. *Id.* at 157.

47. See *id.* at 156.

48. *Id.* at 157.

Party's 1912 convention, Jane Addams noted the Party's commitment to ideals that would improve social conditions, ideals included in the Party's platform in the "Social and Industrial Justice" plank.<sup>49</sup> Health care was part of this plank as well.

Despite the Progressive Party's platform, which included universal health coverage, Congress never introduced a bill during the Progressive era that would establish comprehensive coverage in the United States for anyone.<sup>50</sup> Two national conferences where National Health Insurance was discussed were held in Washington, D.C., and eight states formed commissions to explore the possibility of health care coverage for all in their states.<sup>51</sup> Needless to say, the political energy, organizing, and optimism did not result in any tangible progress on the issue.

At the same time as the Progressive Party's efforts, the American Medical Association (AMA) also began to seriously ponder the necessity of universal health coverage. In 1916, Dr. Rupert Blue, president of the AMA, announced that "health insurance will constitute the next great step in social legislation."<sup>52</sup> Dr. Blue and many others had begun to react to the slow adoption in Germany of social insurance reforms, beginning with limited health insurance in 1883 and "state aid for the aged" by 1900.<sup>53</sup>

After the failed effort of many during the Progressive Era to achieve universal health insurance, health care insurance for all, as a debatable topic, did not become a serious area of discussion again until the New Deal period of the 1930s. With the collapse of the global economy in the early 1930s, the United States began to seriously consider the fact that the nation did not have basic protections for the general welfare of its citizens.<sup>54</sup> President Franklin Roosevelt spoke to this issue in June 1934 by calling for social insurance that would provide protections to the citizens of the nation against economic instability and acts of God.<sup>55</sup> Roosevelt formed the Committee on Economic Security, which would seek to create social insurance in the United States that would provide for unemployment insurance, old age insurance, and health insurance.<sup>56</sup> Roosevelt's overt support of health insurance,

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49. *Id.*

50. Mark A. Peterson, *Health Care and the Hill: Why Is This Year Different from All Others?*, 27 PS: POL. SCI. & POL. 202, 203 (1994).

51. Milton Terris, *National Health Insurance in the United States: A Drama in Too Many Acts*, 20 J. PUB. HEALTH POL'Y 13, 13 (1999).

52. Walker, *supra* note 41, at 290.

53. *Id.* In Germany, in 1883, Chancellor Bismarck implemented a plan that "provided sickness insurance along with funeral benefits and covered three-fourths of the employees, or about 31 percent of the population. Employees paid two-thirds of the cost, employers one-third." Bauman, *supra* note 42, at 30–31.

54. MICHAEL HILTZIK, *THE NEW DEAL: A MODERN HISTORY* 239 (2011).

55. *Id.* at 238–39.

56. *Id.* at 239.

as well as the support of many others who also expressed a desire to have health insurance for all established across the nation, provided political momentum for the effort. Because the lack of health insurance affects almost everyone, in April of 1934, the American Association for Social Security called for health insurance for all.<sup>57</sup> At this time, the AALL endorsed the idea as well by stating that the failure to establish health insurance in a social insurance law would be a “breach of that ‘solemn covenant’” by Roosevelt with society.<sup>58</sup>

Roosevelt’s efforts to include medical insurance in his social insurance law allegedly began to fail when the AMA voiced opposition to the creation of such a benefit, and universal health coverage was removed from the final law.<sup>59</sup> However, there is no strong evidence that the AMA actually uniformly opposed universal health insurance. Some available evidence suggests that the AMA was split on the issue of national health insurance.<sup>60</sup> However, there is other evidence that strongly suggests that the AMA was opposed to the inclusion of health insurance in Roosevelt’s social insurance law that would provide for dependent children, the unemployed, and the elderly unable to work.<sup>61</sup> The pressure for Roosevelt not to include national health insurance in the social insurance law is described as a “siege” that went “unabated” for a year.<sup>62</sup> In July 1935, Roosevelt withdrew health care from the social insurance bill as the legislation proceeded through Congress towards passage.<sup>63</sup> Roosevelt signed the Social Security Act on August 12, 1935, and it did not contain provisions for national health insurance.<sup>64</sup>

Even though the struggle for health insurance was not completely successful, Roosevelt’s efforts to establish health insurance for all did not end with the passage of the Social Security Act without national health insurance in 1935. In July 1938, a National Health Conference convened with President Roosevelt’s Interdepartmental Committee to Coordinate Health and

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57. *Health Insurance Cited as Real Need*, N.Y. TIMES, Apr. 21, 1934, at 17.

58. *Says People Want Social Laws Soon*, N.Y. TIMES, Dec. 27, 1934, at 11.

59. See ALAN DERICKSON, *HEALTH SECURITY FOR ALL: DREAMS OF UNIVERSAL HEALTH CARE IN AMERICA* 74–75 (2005).

60. Jaap Kooijman, *‘Just Forget About It’: FDR’s Ambivalence Towards National Health Insurance*, in *THE ROOSEVELT YEARS: NEW PERSPECTIVES ON AMERICAN HISTORY, 1933-1945* 30 (Robert A. Garson & Stuart S. Kidd eds., 1999).

61. WENDELL POTTER, *DEADLY SPIN: AN INSURANCE COMPANY INSIDER SPEAKS OUT ON HOW CORPORATE PR IS KILLING HEALTH CARE AND DECEIVING AMERICANS* 90–91 (2011).

62. *Id.*

63. *Id.*

64. Franklin D. Roosevelt Presidential Papers, *Franklin Roosevelt’s Statement on Signing the Social Security Act*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM, available at <http://docs.fdrlibrary.marist.edu/odssast.html> (last visited February 26, 2014).

Welfare Activities playing a significant role in the conference.<sup>65</sup> However, while the conference appeared to gather some momentum again for national health insurance, President Roosevelt did not strongly advocate for national health insurance and the movement for expansion was diminished by his ambivalence.<sup>66</sup>

Yet, the July 1938 conference did produce important ideas on health care reform, and those ideas became part of the Wagner-Murray-Dingell Health Care Bill of 1943.<sup>67</sup> Roosevelt was connected to the bill through the Social Security Board, which was involved in the writing of the bill.<sup>68</sup> While the bill did not pass, it remained an active pursuit by some members of the Democratic Party and organizations outside of the government who remained committed to national health insurance. Further, it was repeatedly introduced in Congress throughout the 1940s, but never came close to passage.

Even when Franklin Roosevelt died in April 1945, the legal pursuit for national health insurance continued. Harry S. Truman, Roosevelt's successor, immediately accepted the challenge by announcing his support for universal health insurance. The fact that the United Kingdom was creating its National Health Service, an agency still in existence today, likely influenced the debate in the United States.<sup>69</sup>

The earlier struggles did not deter President Truman from pushing for universal health coverage as President. When Truman assumed office after Roosevelt's death in 1945, public support for national health insurance was nearly 60%.<sup>70</sup> However, once the war ended in 1945, support diminished to 50%.<sup>71</sup> But of all United States Presidents, few pressed the issue of universal health care like Harry Truman. President Truman introduced national health insurance several times while in office and also had the support of the American Federation of Labor and Congress of Industrial Organizations.<sup>72</sup>

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65. JAAP KOOLJMAN, *AND THE PURSUIT OF NATIONAL HEALTH: THE INCREMENTAL STRATEGY TOWARD NATIONAL HEALTH INSURANCE IN THE UNITED STATES OF AMERICA* 96 (1999).

66. *Id.* at 95–97.

67. CHARLOTTE A. TWIGHT, *DEPENDENT ON DC: THE RISE OF FEDERAL CONTROL OVER THE LIVES OF ORDINARY AMERICANS* 187 (Palgrave MacMillan 2003).

68. Jaap Kooijman, *Soon or Later On: Franklin D. Roosevelt and National Health Insurance 1933-1945*, 29 *PRESIDENTIAL STUD. Q.* 336, 344 (1999).

69. William W. Fulton, *General Practice in the U.S.A.*, 1 *BRIT. MED. J.* 275, 275–82 (1961).

70. MONTE M. POEN, *HARRY S. TRUMAN VERSUS THE MEDICAL LOBBY: THE GENESIS OF MEDICARE* 66 (1979).

71. *Id.*

72. Hoffman, *supra* note 40, at 41.

Yet, as under Franklin Roosevelt, the AMA aggressively opposed any effort to establish national health insurance in the United States.<sup>73</sup>

When Truman was elected again in 1948, he pressed forward with efforts to establish universal health coverage.<sup>74</sup> The AMA remained his biggest opponent. In fact, the AMA was so powerful and well organized that President Truman was unable to pass national health insurance despite the fact that the Democrats had congressional control. Republicans in Congress continued to stifle Truman's efforts to achieve any success.<sup>75</sup> Truman continued to insist that his proposal for national health care was "American" and was "not revolutionary."<sup>76</sup> It was, according to Truman, "a better way to pay for medical care."<sup>77</sup>

While Harry Truman's continued efforts were unsuccessful in establishing national health insurance for all, these efforts did eventually lead to the establishment of health care for the aged in the 1960s.<sup>78</sup> Truman embraced establishing health care for the aged as a compromise position just as the Korean War began to intensify in 1950.<sup>79</sup> Truman, in fact, introduced speculative legislative funding in 1952 that would actually extend health care coverage to the aged.<sup>80</sup>

After an additional decade of political struggles and legislative efforts, health care for the aged was passed in 1965 under the leadership of President Lyndon Johnson.<sup>81</sup> The law amended the Social Security Act of 1935 and provided individuals 65-and-over with single-payer health coverage.<sup>82</sup> The law, known as Medicare, has evolved over the decades and now provides full coverage as well as a prescription drug benefit passed during the Bush administration.<sup>83</sup> Medicare is administered completely by the federal government.<sup>84</sup>

In 1965, Medicaid, the nation's health care program for the poor and disabled, was also passed into law.<sup>85</sup> It is administered by the individual states.<sup>86</sup> The Supreme Court aptly described Medicaid as follows:

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73. *Id.* at 39.

74. Poen, *supra* note 70, at 93.

75. *See id.* at 127–29.

76. *Id.* at 130.

77. *Id.*

78. *See* Catherine V. Kilgore, *Health Care and Social Security Update—2001*, 70 *MISS. L.J.* 1007, 1007 (2001).

79. *See* Poen, *supra* note 69, at 174.

80. *Id.* at 189.

81. Kilgore, *supra* note 78, at 1007.

82. *See* Woody R. Clermont, *A Brief Introduction to Medicare and the Office of Medicare Hearings and Appeals*, 5 *PITT. J. ENVTL. & PUB. HEALTH L.* 103, 103–04 (2011).

83. *See* Medicare Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066.

84. *See* Kilgore, *supra* note 78, at 1007.

85. *Id.* at 1014.

The program authorizes federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons. In order to participate in the Medicaid program, a State must have a plan for medical assistance approved by the Secretary of Health and Human Services (Secretary). A state plan defines the categories of individuals eligible for benefits and the specific kinds of medical services that are covered. The plan must provide coverage for the “categorically needy” and, at the State’s option, may also cover the “medically needy.”<sup>87</sup>

It is perhaps the success in passing these laws in the 1960s that motivated many to continue to seek health care for all. In the 1970s, efforts to expand health care coverage continued, but all of the proposals failed, except for the expansion of “Managed Care programs.”<sup>88</sup> The nation then experienced a legislative drought in regards to proposals to expand health care in the United States until the very well-known failed plan by President Bill Clinton in 1993.<sup>89</sup>

Those many decades of struggle led eventually to the ACA in 2010.<sup>90</sup> The story of the passage of the ACA is well known. The ACA’s passage persisted for two years and consisted of lengthy debate both within Congress and in the public sphere, including town hall meetings across the nation. The passage of the ACA began in early 2009 with the introduction of the ACA in Congress and continued slowly and methodically. The effort to pass the ACA was not a typical struggle for change at the grassroots level, but more resembled the effort that Harry Truman sought to implement. In March, 2009, a health care forum was held at the White House, and, not long after, Senate hearings were held in May, 2009.<sup>91</sup> Pharmaceutical companies came out in support of the law at the same time, though the industry collectively received concessions on costs in order to support the law.<sup>92</sup>

By September 2009, more hearings had been held and the health insurance industry had come out in support of the bill.<sup>93</sup> The famous town hall meetings were held that summer and stirred up the debate as the bill pro-

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86. *Id.*

87. *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650–51 (2003) (citations omitted).

88. See Joseph L. Dorsey, *The Health Maintenance Organization Act of 1973 (P.L. 93-222) and Prepaid Group Practice Plans*, 13 *MED. CARE* 1, 2–3 (1975).

89. See Jacob S. Hacker, *Learning From Defeat? Political Analysis and the Failure of Health Care Reform in the United States*, 31 *BRIT. J. POL. SCI.* 61, 61–62 (2001).

90. See Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, with a Flourish*, *N.Y. TIMES*, Mar. 24, 2010, at A19, available at <http://www.nytimes.com/2010/03/24/health/policy/24health.html>.

91. See PBS, *Obama’s Deal: Chronology*, *FRONTLINE*, <http://www.pbs.org/wgbh/pages/frontline/obamasdeal/etc/cron.html> (last updated Apr. 23, 2010).

92. See *id.*

93. See *id.*

ceeded to a vote.<sup>94</sup> While the Senate passed the bill in December 2009, the debate and struggle, as well as political infighting, continued for months. However, in March of 2010, with the strong urging of President Obama, the the House of Representatives passed the bill, without a single Republican vote.<sup>95</sup>

“The bill I’m signing will set in motion reforms that generations of Americans have fought for and marched for and hungered to see,” Mr. Obama stated, “[t]oday we are affirming that essential truth, a truth every generation is called to rediscover for itself, that we are not a nation that scales back its aspirations.”<sup>96</sup>

## B. Killing Jim Crow

### 1. *Pre-Brown Litigation*

The struggle for change, as exhibited by the *Brown* litigation, is as epic and as important as *Sebelius* and ACA. As far back as 1849, in the case of *Roberts v. City of Boston*,<sup>97</sup> parts of the nation have struggled with the question of racial segregation. In *Roberts*, similar to *Brown* more than a century later, a child, Sarah Roberts, sued the city of Boston for denying her an equal education in the city’s public school system.<sup>98</sup> Black (“colored”) students in the city attended separate schools from the white students, and this was the source of the dispute in *Roberts*.<sup>99</sup> Despite the impassioned and well-contemplated arguments by Roberts’s lawyers, the court did not agree with the appellate court and allowed the separate school systems to remain in place.<sup>100</sup> So persisted the basic legal and moral dispute over life in the United States in regards to race.

Arguably, the struggle to overturn legalized segregation in the United States based on race begins the day of the famous *Plessy v. Ferguson*<sup>101</sup> decision that upholds racial segregation. *Plessy* is the case of Homer Plessy, a man who possessed “one-eighth African blood” and was asserting “that the mixture of colored blood was not discernible in him and that he was entitled to every recognition, right, privilege, and immunity secured to the citizens of the United States of the white race by its constitution and laws.”<sup>102</sup> The

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94. *See id.*

95. *Id.*

96. Stolberg & Pear, *supra* note 90.

97. 59 Mass. 198 (1849).

98. *Id.* at 198.

99. *See id.* at 199.

100. *Id.* at 209–10.

101. 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

102. *Id.* at 538.

specific denial of equality in question involved railway cars in Louisiana, as the state, like many at the time, operated separate seating cars for whites and negroes.<sup>103</sup> Homer Plessy was charged with a crime for insisting upon traveling in the railway car for whites rather than the car for negroes.<sup>104</sup> Plessy's social and legal protest resulted in the affirmation of the "separate but equal" doctrine in the starkest terms and suspended any racial progress across the nation for the foreseeable future.

The Court considered it a "fallacy" that "enforced separation of the two races stamps the colored race with a badge of inferiority."<sup>105</sup> The Court also insisted that "social prejudices" could not be "overcome by legislation" and that "enforced commingling of the two races" could not contribute to racial progress.<sup>106</sup> It solidified a racial caste system in United States constitutional law.

But most important to the beginning of the struggle to overturn the doctrine of "separate but equal" is Justice Harlan's dissent in *Plessy*. Justice Harlan's offering has become quite well known in legal circles:

In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.<sup>107</sup>

When the legal struggle against racial segregation in the United States began, Justice Harlan's dissent formed the ideological basis for those seeking change. Harlan's dissent is rooted in the Declaration of Independence's famous statement that "all men are created equal."<sup>108</sup>

The legal architect of the struggle against racial segregation in the United States is Charles Hamilton Houston. Houston, a graduate of Harvard Law School from Washington, D.C., was the first African-American Dean

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103. *See id.* at 541–42.

104. *Id.*

105. *Id.* at 551.

106. *Id.*

107. *Plessy*, 163 U.S. at 554–55 (Harlan, J., dissenting).

108. *See* DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).



of Howard Law School in Washington, D.C.<sup>109</sup> Houston formulated the plan to legally overcome racial segregation. He was, as more than one observer has noted, “chief strategist of the campaign against white primaries, restrictive covenants, rail car segregation, and all manner of educational application of the ‘separate but equal’ doctrine.”<sup>110</sup>

Houston implemented his legal strategy when he became special counsel at the NAACP under Walter White.<sup>111</sup> The NAACP under White was already formulating plans to attack Jim Crow segregation in the South in the early 1920s. When Houston arrived at the NAACP in 1933, he immediately began to implement a three-pronged strategy that involved identifying test cases, building constitutional support with legal precedent, and organizing communities to attack racial segregation through social and political organizing and advocacy as well as through legal action.<sup>112</sup> Houston also decided to attack segregation through educational institutions. Initially, this involved attacking racial segregation in the professional public education institutions. Houston’s methodical approach is reflected in the strategy implemented and in the court victories.

In *Missouri ex rel Gaines v. Canada*,<sup>113</sup> Houston and the legal civil rights establishment obtained one of its major victories against the “separate but equal” doctrine. The state of Missouri, at the time, was operating separate school systems (one for whites, one for blacks).<sup>114</sup> Houston and the NAACP Legal Defense Fund sued the state of Missouri for refusing to admit Lloyd Gaines to the law school of the University of Missouri specifically because he was black.<sup>115</sup> Gaines had graduated from Lincoln University in Missouri, a university the state operated for blacks.<sup>116</sup> The state sought to remedy its denial of Gaines’s admittance by paying his expenses so he could attend law school outside the state of Missouri. The Court did not accept this remedy and ruled in favor of Gaines:

We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Mis-

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109. Larry M. Boyle, *Legal Masterpieces: The Giants of American Law*, ADVOC., Sept. 2003, at 26, 29.

110. David W. Blight, *Charles Hamilton Houston: The Legal Scholar Who Laid the Foundation for Integrated Higher Education in the United States*, J. BLACKS IN HIGHER EDUC., Winter 2001/2002, at 107, 107.

111. CHARLES J. OGLETTREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 116–17 (2005).

112. *Id.*

113. 305 U.S. 337 (1938).

114. *Id.* at 343–44.

115. *Id.* at 343.

116. *Id.* at 342.

souri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right.<sup>117</sup>

*Missouri ex el Gaines* was one of many cases that set the stage for the end of legal racial segregation.

In *Sweatt v. Painter*,<sup>118</sup> a case that originated in Texas, the Court was faced with deciding whether the University of Texas Law School had to admit a black man to the school. Herman Sweatt applied to the law college in 1946 and was denied admission on the basis of his race.<sup>119</sup> The Court framed the matter quite simply: “[t]o what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?”<sup>120</sup> In ruling in favor of Herman Sweatt, the Court held that the Fourteenth Amendment to the Constitution “requires” that Mr. Sweatt “be admitted to the University of Texas Law School.”<sup>121</sup> After the ruling in *Sweatt*, it was apparent that the legal struggle against racial segregation in public education, and in other aspects of American life, was about to take a major turn.

## 2. *A People’s Struggle*

As civil rights lawyers continued to file their cases challenging the Jim Crow laws, the battle against the laws and customs was also being implemented. This grassroots movement is quite important to the struggle for racial equality and distinguishes the effort to rid the nation of Jim Crow laws from the effort to establish national health insurance, where there was little to no grassroots efforts.

First, the struggle against Jim Crow began in earnest after the *Plessy* decision with the formation of various organizations dedicated to eradicating racial segregation or assisting blacks in navigating life in the United States. The National Association for the Advancement of Colored People (NAACP)

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117. *Id.* at 349.

118. 339 U.S. 629 (1950).

119. *Id.* at 631.

120. *Id.*

121. *Id.* at 636.

was formed in 1910.<sup>122</sup> The organization, among other things, was dedicated to achieving “cultural uplift, improvement, and political and legal justice for the Negro.”<sup>123</sup> The organization, while not universally accepted, was engaged in the daily struggle for racial equality in the United States in a variety of ways.

At the same time of the formation of the NAACP, the National Urban League was formed in 1910.<sup>124</sup> The organization was a direct response to the *Plessy* decision, as blacks began to seek social uplift due to the impossible conditions imposed upon them by the Supreme Court and legal apartheid system that was in place. The organization’s mission then and now “is to enable African Americans to secure economic self-reliance, parity, power and civil rights.”<sup>125</sup> There were other organizations formed before and after this period to fight for equal rights; however, these two organizations are the most prominent and still function effectively today.

The struggle against “Jim Crow” was not just about social struggle by organizations alone. It was a battle waged in tiny increments both culturally and socially.

In 1941, A. Phillip Randolph and other civil rights leaders “proposed a March on Washington, D.C. to protest racial discrimination.”<sup>126</sup> Franklin Roosevelt was President and his administration was rumored to be kinder to the cause of equal rights for all races. However, he had not really delivered significant political accomplishments. The march was called off when Roosevelt formed the Fair Employment Practices Committee.<sup>127</sup>

In 1944, the book *What the Negro Wants* was first published.<sup>128</sup> It contained numerous articles from leading black intellectuals stating the case for racial equality and justice from a variety of vantage points. The book, compiled by Howard University historian, Rayford Logan, contained essays from sociologist and civil rights pioneer W.E.B. DuBois, educator Mary MacLeod Bethune, and poets Sterling Brown and Langston Hughes. All of the essays demanded what Logan demanded in his essay: “first class citizenship.”<sup>129</sup> It is a definitive statement of the aspirations of many of the nation’s black citizens.

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122. Oliver C. Cox, *The Programs of Negro Civil Rights Organizations*, 20 J. OF NEGRO EDUC. 354, 360 (1951).

123. *Id.*

124. *Mission and History*, NATIONAL URBAN LEAGUE, <http://nul.iamempowered.com/who-we-are/mission-and-history> (last visited Oct. 17, 2014).

125. *Id.*

126. Kevin Gaines, *The Civil Rights Movement in World Perspective*, ORG. OF AM. HISTORIANS MAG. OF HIST., January 2007, at 57, 58.

127. *Id.*

128. WHAT THE NEGRO WANTS (Rayford W. Logan ed., 1944).

129. Rayford W. Logan, *The Negro Wants First Class Citizenship*, in WHAT THE NEGRO WANTS 1, 14 (Rayford W. Logan ed., 1944).

Of course, individuals took actions as well to advance the cause of racial progress. The most notable of many prior to the *Brown* decision is Jackie Robinson integrating Major League Baseball in 1947. While mostly a symbolic event, Robinson's individual sacrifice cannot be dismissed lightly. On the fiftieth anniversary of Robinson breaking the color barrier in Major League Baseball, Oakland Post writer, Charles Aiken wrote, "[T]he general public . . . saw that Jackie's freedom was the same right that others deserved after the Declaration of Independence."<sup>130</sup> Robinson, Aiken asserted, demonstrated that "the black man's economic freedom was entitled to equal protection under the law" and "that men and women of exceptional ability ought to be given the chance to perform at the highest levels."<sup>131</sup> Moments of cultural protest such as Robinson's were important to the struggle against Jim Crow, as well.

In the immediate aftermath of *Brown*, the most important individual was Rosa Parks. It was Parks, a trained civil rights resister and NAACP chapter secretary, who sparked the Civil Rights era on December 1, 1955, when she refused to give up her seat on a Montgomery, Alabama, bus to a white person.<sup>132</sup> Parks, who was arrested for her resistance, had single handedly challenged the entire system of racial oppression and white privilege in her small act of civic disobedience.

The rest of the struggle following Parks's arrest has become a critical part of the American historical narrative slowly since Parks made her stand in 1955. The Reverend Dr. Martin Luther King Jr. emerged as the leader of the Montgomery Bus Boycott in 1955–56, protests began in other cities against the Jim Crow system, student organizations such as the Student Non-Violent Coordinating Committee (SNCC) were formed, and the nation became engulfed in a long political battle that would be waged across the nation in cities and in institutions.<sup>133</sup>

### C. Analysis

The major similarity between the *Brown* anti-racial segregation struggle and the *Sebelius/ACA* health care struggle is the epic scope of each accomplishment. Both social and political struggles took decades to accomplish their goals and experienced resistance throughout the struggle. The major difference between the two is that the *Brown* and the Jim Crow struggle were largely driven by grassroots efforts, in which individuals waged the

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130. Charles Aiken, Jackie Robinson Remembered, OAKLAND POST, April 16, 1997, at 4.

131. *Id.*

132. *Rosa Parks; A Brief History; Civil Rights and Political Activity*, MICH. CHRON., Nov. 30, 2005, at 27.

133. Rod Bush, *The Civil Rights Movement and the Continuing Struggle for the Redemption of America*, 30 SOC. JUST. 42 (2003).

battle for change without government efforts. In the case of *Sebelius* and health insurance, there is some evidence of grassroots efforts through organizations, but for the most part, the accomplishment is a political deal constructed by government and the business sector. Many Presidents and legislators sought national health insurance; resistance from other political forces and the business sector of the medical profession delayed the passage of any laws. Perhaps this is why the ACA is a public-private partnership.

However, another view of *Sebelius* and the ACA is that the decision and the law represent parts of anti-government sentiments that have grown in the United States over the past fifty years.<sup>134</sup> While *Sebelius* upholds the law, the law is upheld on very narrow grounds and does not affirm the power of Congress to compel citizens to obtain health insurance under the Commerce Clause. In addition, the ACA lacks a public health insurance option for consumers to select when seeking health insurance, a development in the law during the fierce debate over the law.<sup>135</sup> It also should be noted that the fundamentals of the health care law—particularly the individual mandate—were “originally proposed by the far-right Heritage Foundation.”<sup>136</sup> The Heritage Foundation “is a research institute founded in 1973. Its mission is 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.”<sup>137</sup>

### III. *BROWN* AND *SEBELIUS*: CONTENTIOUSNESS AND MODERATION

The *Brown* opinion and the *Sebelius* opinion as rendered by the Supreme Court are similar and different. Both decisions reflect the political climate of the nation at the time they were rendered. *Brown* was decided in 1954, when overt legal racial discrimination and racism became a difficult institution for the nation to continue to accept for a variety of reasons.<sup>138</sup> On the other hand, *Sebelius* was rendered in 2012. The nation has dismantled its

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134. In 1964, Senator Barry Goldwater ran for President as a Republican and lost in a landslide to Lyndon Johnson, the Democrat incumbent. Goldwater ran on a platform highly critical of an active federal government that sought to provide ordinary citizens with various essential life services such as access to health care. Goldwater’s defeat oftentimes is described as the beginning of an anti-government movement. Adam Clymer, *Barry Goldwater, Conservative and Individualist, Dies at 89*, N.Y. TIMES, May 29, 1998, <http://www.nytimes.com/books/01/04/01/specials/goldwater-obit.html>.

135. Erin C. Fuse Brown, *Developing A Durable Right to Health Care*, 14 MINN. J.L. SCI. & TECH. 439, 456 (2013).

136. David A. Super, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, 66 STAN. L. REV. 873, 893 (2014).

137. Richard Dolinar & S. Luke Leininger, *Pay for Performance or Compliance? A Second Opinion on Medicare Reimbursement*, 3 IND. HEALTH L. REV. 397, 397 (2006).

138. *Brown v. Bd. of Educ. of Topeka, Kan.* (Brown I), 347 U.S. 483, 487 (1954).

legal system of racism, but economic inequality continues to exist and is, in fact, steadily on the rise. More importantly, the nation's historic division over equality and economic freedom is more pronounced in society.

#### A. Justice Roberts Speaks

There have been few Supreme Court decisions in the modern era as monumental as the decisions the Court rendered in June 2012 regarding the ACA. The Supreme Court held oral argument for the cases challenging the law over three days in March 2012.<sup>139</sup> The organizations that filed amicus briefs in support or in opposition to the law included the American Association of Retired Persons (AARP), the American Public Health Association, the National Indian Health Board, the American Civil Rights Union, the Family Research Council, and the Western Center for Journalism.<sup>140</sup> The wide range of ideological groups that filed legal briefs in the case is representative of the ideological divisions created by the law's passage in March 2010. Many supporters of the law had been working for decades to achieve health care access for all in the United States. The law, in effect, represents the pursuit of a more just society that seeks more equality and is more collective in nature.

In the simplest terms, the law, if it ever achieves its goals, expands health care coverage to millions of people who otherwise cannot afford to pay for basic health care.<sup>141</sup> While the law does not achieve "universal coverage," the law does "make the biggest dent" in the nation's uninsured population ever in a single law.<sup>142</sup> It is estimated that at least 32 million people will be able to obtain health care coverage as a result of the ACA and that 95% of the population will have coverage within six years of the law's passage.<sup>143</sup> The law also, in principle, brings the United States in line with other well-developed nations that provide universal health care for their citizens. Germany, for example, has provided universal health care to their citizens

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139. Adam Liptak, *Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama*, N.Y. TIMES, June 28, 2012, <http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html?pagewanted=all>.

140. Report, *National Federation of Independent Businesses v. Sebelius*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/national-federation-of-independent-business-v-sebelius/> (last visited Oct. 18, 2014).

141. STAFF OF THE WASHINGTON POST, *supra* note 16, at 66–67.

142. *Id.* at 73.

143. *Id.*

since 1888.<sup>144</sup> Further, the United Kingdom has provided universal health coverage since 1948 to its citizens.<sup>145</sup>

As some have noted, the passage of the ACA and the Supreme Court's legal validation of the law "settles . . . a decades old debate over whether the government should be in the business of providing insurance directly or helping people buy private policies."<sup>146</sup> The government does both in the new law in order to extend the health care contract to more citizens. Many countries provide universal health coverage for all of their citizens with a public-private approach, including Germany, Switzerland, Japan, and the Netherlands.<sup>147</sup>

In voting to uphold the ACA, Chief Justice John Roberts probably did not even consider the philosophical relevance presented by the decision. His vote, however, will likely have long-lasting implications. His opinion does contain philosophical language relevant to the overall struggle for health care. This can be found in the section of his opinion discussing the law's all-important "individual mandate," a key provision of the law that was the focus of opponents of the law.<sup>148</sup> If the "individual mandate" were not upheld, the collective nature of the law would be removed, and it is not likely the law would survive into the future.

Justice Roberts describes the individual mandate as follows in the majority opinion:

Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. That payment, which the Act describes as a "penalty," is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance.<sup>149</sup>

In effect, this is the execution of a social compact in the ACA, a pursuit for more equality in society, though one wonders if Roberts identifies any such relationship. The mandate provides the economic basis for providing

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144. *Id.*

145. *Creation of NHS Heralds New Era in British Healthcare*, THE GUARDIAN, July 5, 1948, <http://www.theguardian.com/theguardian/2013/jul/05/nhs-national-health-service-beveridge-labour>.

146. STAFF OF THE WASHINGTON POST, *supra* note 16, at 73.

147. T.R. Reid, *Five Myths About Health Insurance in the Rest of the World*, WASH. POST, Aug. 23, 2009, available at [www.washingtonpost.com/wp-dyn/content/article/2009/08/21/AR2009082101778.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/08/21/AR2009082101778.html).

148. Michael Cooper, *Conservatives Sowed the Idea of a Health Care Mandate, Only to Spurn it Later*, N.Y. TIMES, Feb. 14, 2012, at A15, available at <http://www.nytimes.com/2012/02/15/health/policy/health-care-mandate-was-first-backed-by-conservatives.html>.

149. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012) (citations omitted).

coverage to those throughout the country who cannot afford health insurance. As the excerpt from the Roberts's opinion explains, it is the government mechanism that financially sustains the law. The fact that Roberts describes the mandate as "shared responsibility" demonstrates the connection between the law and the nation's founding principles that all are equal in the United States. If all are required to participate in the execution of health care delivery for all, it renders everyone the same in society.

As the law proceeded to passage and was eventually ratified as legal by the Supreme Court, it is not just Justice Roberts's support of the law that is notable. Support of the individual mandate by America's Health Insurance Plans (AHIP), the nation's top health insurance lobbying organization, is further proof of the importance of the individual mandate to the execution of the law. AHIP is a trade organization that represents the interests of the health insurance providers.<sup>150</sup> Their support of the mandate (the shared responsibility) is based on simple economics: if the health insurance companies are to be able to comply with the new requirements (with regard to pre-existing conditions, coverage of children on their parents' policies until the children reach the age of 26, and other important expansions of coverage), the companies will need additional financing. The individual mandate provides the financing because it will increase the number of premium payments in the market. In effect, without the mandate, there is no contract and no law.

In a letter by AHIP released prior to the introduction of the ACA in 2009, the organization expressed clear support of the all-important individual mandate as vital to their ability to execute and comply with the future challenges of health insurance coverage in the U.S.:

Health plans today proposed guaranteed coverage for people with pre-existing medical conditions in conjunction with an enforceable individual coverage mandate.

Under the new proposal, health plans participating in the individual health insurance market would be required to offer coverage to all applicants as part of a universal participation plan in which all individuals were required to maintain health insurance.<sup>151</sup>

As for the Roberts's opinion, it is interesting for two reasons: first, Roberts, in upholding the law, is aligned with the more liberal justices of the

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150. *About Us*, AMERICA'S HEALTH INS. PLANS, <http://www.ahip.org/about/> (last visited May 15, 2013).

151. Press Release, America's Health Insurance Plans, Health Plans Propose Guaranteed Coverage for Pre-Existing Conditions and Individual Coverage Mandate (Nov. 19, 2008), available at <http://www.ahip.org/News/Press-Room/2008/Health-Plans-Propose-Guaranteed-Coverage-for-Pre-Existing-Conditions-and-Individual-Coverage-Mandate.aspx>.



Court; and, second, Roberts upholds the law, but not on the grounds that observers expected.

The critical and most important part of the Roberts decision relates to the constitutionality of the “individual mandate.” Roberts begins this all-important analysis by viewing the mandate within the context of the Commerce Clause and the Necessary and Proper Clause.<sup>152</sup> According to Roberts, whether the individual mandate was constitutional under the Commerce Clause was a question of whether Congress’s authority to regulate commerce could be extended to compel all citizens to enter the commercial sphere by purchasing health insurance coverage.<sup>153</sup> In the opinion, Roberts writes:

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it.<sup>154</sup>

Ultimately, Roberts ruled against the individual mandate on Commerce Clause grounds and on Necessary and Proper grounds but upheld the law in the end, to the surprise of nearly everyone.<sup>155</sup> With respect to the Commerce Clause analysis, Roberts contends that if the Court were to accept “the Government’s theory” on the individual mandate, it “would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.”<sup>156</sup> Roberts ruled in this manner because the individual mandate compels the consumer to enter the market or pay a tax as explained above. However, there is legal precedent that supports the authority of Congress to regulate commerce even when there is no commercial activity by a person.

In *Wickard v. Filburn*, Roberts notes, the Court held Congress had the power to regulate the commerce of an individual farmer who was growing wheat only for his own use.<sup>157</sup> This case renders Roberts’s ruling against the Commerce Clause as almost suspect in its analysis. It is also important to note that Justice Roberts’s basic argument was not that there was a basis to limit the commerce power, but it was that he decided to limit the power on

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152. *Sebelius*, 132 S. Ct. at 2577.

153. *See id.* at 2586–87.

154. *Id.* at 2587.

155. *See id.* at 2591.

156. *Id.* at 2589.

157. *Id.* at 2587 (citing *Wickard v. Filburn*, 317 U.S. 111, 114–15, 128–29 (1942)).

this basis (along with the other justices who did, in fact, also vote against the law). In examining Justice Robert's decision, Professor Mark A. Hall wrote:

No matter which view courts take, they lack binding precedent. The Supreme Court has never expressly validated or prohibited Commerce Clause regulation of pure inactivity. The constitutional text could be read either way, but following the modern development of the federal commerce power, allowing this form of regulation is more principled than forbidding it. Some limit on the commerce power is necessary, and more limits might be desirable, but that does not mean that limits should be set willy-nilly. The opportunity to set this particular limit exists mainly because it has not previously been addressed. That is more an accident of history than a creature of logic.<sup>158</sup>

For these reasons, Roberts's decision in the *Sebelius* case has been criticized as being based upon politics and not legal precedent and authority.<sup>159</sup>

In regards to the Necessary and Proper Clause analysis, Roberts rejected these arguments, as well. While the commerce power allows Congress to exercise authority to carry out its enumerated powers, Roberts rejects the claim that the individual mandate qualifies for such use without much legal precedent to support the position. Roberts, in the end, decided the case on Congress's taxing power:

The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.<sup>160</sup>

While the mandate was upheld, Roberts's decision to vanquish the government's arguments using the Commerce Clause and the Necessary and Proper Clause are as much a mystery as Roberts's decision to vote to uphold the mandate. If his arguments had stronger historical support, perhaps the decision might make more sense. However, at least one critique of Roberts's holding is particularly on point:

The Court in *NFIB*—in fact, the Court since 1995—has simply taken it as axiomatic that there must be a judicially enforceable limit on Congress's power under the Commerce Clause. The Court has recited the undisputed point that the Constitution establishes a federal government of limited powers and has assumed, from there, that it is the Court's job to enforce the limits on the Commerce Clause. The Court has not tried to

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158. Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1839 (2011).

159. David Orentlicher, Response, *Constitutional Challenges to the Health Care Mandate: Based in Politics, not Law*, 160 U. PA. L. REV. PENNUMBRA 19, 20 (2011).

160. *Sebelius*, 132 S.Ct. at 2600.

explain why the approach taken throughout most of the twentieth century was wrong—except for the bare fact that it did not supply any limiting principle—or why the Court will have more success this time than it did before 1937.<sup>161</sup>

The above observer noted that Roberts seemed to be attempting to establish a right to avoid regulation by the federal government even though no such right can possibly exist.<sup>162</sup>

Ultimately, Roberts drafted an opinion quite limited in scope and weak on counter-argument that continues to attempt to narrow congressional power. The fact that he rejected the Commerce Clause arguments in the face of solid precedent demonstrates his view of the limited power of the federal government that he set forth early in the opinion. Nevertheless, his quite-limited opinion upholding the individual mandate was a disappointment to many conservative legal observers as stated in the introduction. Even his rejection of the expansion of Medicaid in the ACA in his opinion did not repair the ill-will that the final decision in *Sebelius* created.<sup>163</sup>

## B. *Brown v. Board of Education*

*Brown v. Board of Education*<sup>164</sup> carries the same historical importance as the *Sebelius* decision. In fact, there are few Supreme Court decisions more important than *Brown*. Any decision that purports to advance the social and political equality in the United States should be compared to *Brown* as a barometer for potential impact.

If the *Brown* decision had never occurred and the United States were still a nation legally separated along racial lines, the *Sebelius* decision would be important, but it would be difficult to describe the United States as a country committed in any way to a more equal society. A nation that announces in its founding documents that “all men are created equal” cannot realize such an ideal if millions of citizens, because of their racial background, are denied equal protection of the laws and equal justice.

Strangely enough, Justice Earl Warren’s famous opinion is not all revolutionary in scope, though the decision, along with other events, sparked a call for revolutionary change in race relations in the United States. The opinion was unanimous, and Warren drafted it in such a way that it would effec-

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161. David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 3 (2012).

162. *See id.* at 21.

163. The holding in *Sebelius* also ruled on whether the federal government could require states to expand Medicaid. While this essay does not discuss that part of the holding the decision is noteworthy because it is the one small victory for opponents of ACA. *Sebelius*, 132 S.Ct. at 2574.

164. 347 U.S. 483 (1954).

tuate the legal mandate the Court felt was warranted in such a case. The decision was a moment of great triumph for Warren as he, alone, forced the nation, at least legally, to enter the modern age. According to at least one account years later, Warren wrote the opinion because he “could not understand how, in this day and age, one group could be set apart on the basis of race and denied rights given to others.”<sup>165</sup> Racial segregation “violated the Thirteenth, Fourteenth, and Fifteenth Amendments—amendments clearly designed to make slaves equal with all others.”<sup>166</sup> In addition, it is true that Warren sought a unanimous opinion by drafting an opinion many different legal minds could accept.<sup>167</sup> The Court, at the time, included Justices who hailed from the South, where segregation remained a way of life.<sup>168</sup>

Warren’s *Brown* decision, while usually focusing on the first listed case, *Brown v. Board of Education*, actually addresses racial segregation in public education in four jurisdictions—Washington, D.C.; Kansas; Virginia; and Delaware—in four separate cases.<sup>169</sup> The central question in each instance was whether the segregation of the black children deprived the black children of “equal educational opportunities.”<sup>170</sup>

In holding that the “separate but equal doctrine” was unconstitutional, Warren wrote that the doctrine “has no place” in “the field of public education” because “separate educational facilities are inherently unequal.”<sup>171</sup> Warren’s constitutional basis for this holding was the equal protection guarantees found in the Fourteenth Amendment.<sup>172</sup> The decision, among other things, was described as “the most significant opinion of the twentieth century.”<sup>173</sup>

### C. Analysis

As for *Brown* and *Sebelius*, the connections and parallels in the opinions are readily identifiable in three ways.

First, the decisions are similar because of the large number of individuals affected by each case. As previously stated, it is estimated that *Sebelius* will extend coverage to 30–40 million individuals who did not previously have access to health care before the law was passed. The efficiency or quality of the health care provided is yet to be examined, but the ACA was spe-

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165. S. Sidney Ulmer, *Earl Warren and the Brown Decision*, 33 J. POL. 689, 692 (1971).

166. *Id.* at 692.

167. *Id.* at 698.

168. *Id.* at 694.

169. *Brown*, 347 U.S. at 486.

170. *Id.* at 493.

171. *Id.* at 495.

172. *Id.*

173. OGLETREE, *supra* note 111, at 3.

cifically designed to cover more individuals and to be cost efficient in the process. It can also be assumed that if the law continues into the future it will cover even more individuals as the population in the United States increases and participation in the insurance market increases due to the law.

When the *Brown* decision was rendered, it directly impacted millions of black children across the southern states and other areas that practiced racial segregation. However, the decision ultimately impacted the lives of most Black Americans at the time because of how it dismantled the system of racial apartheid—not just segregation in the school system. In fact, there are indications that the basic racial segregation in public education in the United States has never actually been dismantled. But as for the overall African-American population, according to the United States Census of 1950, there were 15 million Black Americans residing in the United States at the time<sup>174</sup> and nearly all of them were impacted in some way by the decision in *Brown*. Black Americans can vote now in elections legally,<sup>175</sup> eat in restaurants, reside in hotels, and otherwise seek a decent life in society legally, though barriers still exist.

The impact of *Sebelius* on the entire population is still undefined, but it is likely all citizens will be affected. Will the law increase health insurance premiums for everyone at some point? Will service delivery improve or deteriorate for those seeking health services because of the rise in number of individuals that are required to be covered by the law? What will happen in areas of the country (or states) where the law is unpopular; will this impact delivery of services to those covered by the law? How will corporations and small businesses handle an environment where health care is required for all? If the law fails and is repealed, will the United States ever again consider universal health care for its population? The questions relating to this possibility are extensive.

Second, *Brown* and *Sebelius* are similar on the issue of exclusion. The *Brown* decision represents the moment when the United States would be forced to stop excluding its black citizens from public life. *Sebelius*, on the other hand, is also the end of exclusion for individuals once deprived of access to basic health care as a result of poverty. Millions of citizens excluded from access to health care in the United States now have access as a result of the *Sebelius* decision. They are no longer second-class citizens with respect to health care access.

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174. Table A-9. Race for the United States, Regions, Divisions, and States: 1950, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/documentation/twps0056/tabA-09.pdf> (last visited Sept. 14, 2014).

175. The Voting Rights Act of 1965 was passed to address the issue of the right to vote that long denied many African-Americans the right to vote in many of the nation's southern states.

Third, *Brown* and *Sebelius* are similar in that they are decisions rendered by Republican-appointed Chief Justices of the United States Supreme Court. Chief Justice Earl Warren<sup>176</sup> (appointed by Dwight Eisenhower) wrote the decision in *Brown*,<sup>177</sup> while Chief Justice John Roberts<sup>178</sup> (appointed by George W. Bush) wrote the decision in *Sebelius*.<sup>179</sup> The decisions are also quite modest in their holdings, as both Justices, for different reasons, wrote opinions that were limited.

Justice Roberts, in upholding the ACA, limits congressional power under the Commerce Clause and reaches quite far to ignore established precedent.<sup>180</sup> Roberts upheld the ACA but on fairly weak grounds. Justice Warren, in ridding the nation of the *Plessy* disaster,<sup>181</sup> wrote an opinion that was an effort to obtain a coalition. Warren, the new Chief Justice at the time, accomplished his goal, and the nation's social history on race actually did change.

However, one aspect of his opinion will be debated perhaps for all eternity: while Warren declared that the racial segregation in public education had a detrimental effect upon the black children,<sup>182</sup> what kind of effect did he believe (or fail to identify or fail to explore) racial segregation had upon the white children who were also denied opportunity and were, instead, saddled with the historical paradox of class privilege based upon race that afforded few, if any, tangible advantages?

Yet, *Brown* and *Sebelius*, as opinions, present an important contrast worthy of note for history, law, and politics. A comparison of Justice Roberts's decision and Justice Warren's decision reveals a crucial difference in motive worth noting as the country moves forward with these decisions that are now the law of the land.

Justice Warren, in *Brown*, sought a unanimous decision in his compromise opinion.<sup>183</sup> Justice Roberts, on the other hand, likely voted in the manner he voted to forge an activist agenda rooted in conservative ideals. Roberts, with *Sebelius*, is advancing goals that are remarkably indifferent to the current era.<sup>184</sup> More explicitly, Roberts cites cases in *Sebelius* that rely

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176. *Earl Warren, 1953-1969*, THE SUP. CT. HIST. SOC., <http://www.supremecourthistory.org/history-of-the-court/chief-justices/earl-warren-1953-1969> (last visited Sept. 14, 2014).

177. *Brown*, 347 U.S. at 486.

178. *Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 14, 2014).

179. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2567 (2012).

180. *See generally id.* at 2594–601.

181. *Brown*, 347 U.S. at 494–95.

182. *Id.* at 495.

183. Ulmer, *supra* note 165, at 692.

184. Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 779–80 (2013).

upon the Tenth Amendment and resurrect arguments that lack “sound” jurisprudence and seek a return to the country to the *Lochner* era.<sup>185</sup> In sum, Warren’s *Brown* opinion sought to move the country forward and close the nation’s history on the nineteenth century, long-associated with the ugliness of racial inequality. Roberts’s *Sebelius* opinion is an attempt to reassert the values of that century, ideals foreign to many citizens but also values with a history of inequality for the average citizen.<sup>186</sup>

## V. THE FUTURE

If the ACA continues to survive in the United States as law and is fully implemented, there is not any doubt that the decision will define Justice John Roberts’s career as a Supreme Court Justice. The ACA, and what it seeks to accomplish, will impact the lives of millions of people, not just those who otherwise would have no access to health insurance coverage. Logically, it is easy to predict that the law also will likely affect the health care industry overall, companies, institutions, entities, and any other people in society.

Immediately following the now controversial opinion of *National Federation of Independent Business v. Sebelius*, Yale Law School professor, Jack M. Balkin, wrote the following of the decision:

Whenever the federal government expands its capabilities, it changes the nature of the social compact. Sometimes the changes are small, but sometimes, as in the New Deal or the civil rights era, the changes are big. And when the changes are big, courts are called on to legitimate the changes and ensure that they are consistent with our ancient Constitution. In this way, courts ratify significant revisions to the American social contract.<sup>187</sup>

Professor Balkin, in his analysis of Justice Roberts’s decision, links the opinion ideologically with the Court’s various decisions that have interpreted the social contract.<sup>188</sup> To a certain degree, this links *Sebelius* with *Brown* in a philosophical way. However, only time will tell if *Sebelius* stands to accomplish the kind of social change similar to that which *Brown* has achieved over the past 60 years.

*Brown* resulted in the end of legal Jim Crow segregation in the United States (segregation is still widespread, but it is not legal under state or feder-

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185. *Id.* at 780–81.

186. *See generally id.* at 781.

187. Jack M. Balkin, *The Court Affirms Our Social Contract*, THE ATLANTIC (June 29, 2012, 5:00 PM), <http://www.theatlantic.com/national/archive/2012/06/the-court-affirms-our-social-contract/259186/>.

188. *See generally id.*

al law). Today, any citizen, regardless of race, is able to seek the legal protections of or relief from the state in all aspects of civic society including education, public accommodations, voting, housing, etc. Blacks have been able to achieve some degree of stability in society today as a result of *Brown*, though there are still serious racial problems in the United States. For example, voting problems persist, racial segregation still exists in residential housing in many areas, and public school systems are highly segregated as well.<sup>189</sup> However, the nation has changed dramatically.

The ACA, on other hand, is experiencing some early problems. The law's initial implementation was clouded by the failure of the federal government's health care sign-up website—[healthcare.gov](http://healthcare.gov).<sup>190</sup> However, the site was repaired, and millions of individuals have obtained health care access through the repaired site, as well as in individual state health exchanges.<sup>191</sup> As evidence of improvement, eight million individuals enrolled in a health insurance plan as a result of the law, a number that exceeded the goals of the law.<sup>192</sup>

The law also has its supporters, as indicated in a recent news commentary out of Wisconsin that proclaimed that the law is “making a difference in people's lives all over Wisconsin with affordable premiums and tax credits to help you cover the costs.”<sup>193</sup> In addition, “[t]he most recent numbers from early January show that nearly 2.3 million people now have coverage thanks” to the law.<sup>194</sup> “Many of these people did not have access to coverage prior to the law.”<sup>195</sup>

In addition, the fact that many states, controlled by Republicans, refused to cooperate with the law has created problems in these states.<sup>196</sup> Enrollment is lacking in these states and many citizens, who are otherwise eli-

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189. See generally A Report to the McKnight Foundation, *Examining the Relationship Between Housing, Education, and Persistent Segregation*, INST. ON RACE AND POVERTY (1997), available at <http://www.maclester.edu/~wests/urban/McKnight%20FINALREPORT.pdf>.

190. Ernest Dumas, *Obamacare Will Help People, Not Politicians*, ARK. TIMES, November 21, 2013, at 7, available at <http://www.arktimes.com/arkansas/obamacare-will-help-people-not-politicians/Content?oid=3114325>.

191. Jonathan Cohn, *Obamacare Signups Hit 8 Million: And Both Young and Old Are on Board*, NEW REPUBLIC, Apr. 17, 2014, <http://www.newrepublic.com/article/117410/obamacare-enrollment-hits-8-million-age-mix-looks-massachusetts>.

192. *Id.*

193. Jason Rae, *Obamacare is Making a Difference*, MILWAUKEE COURIER, Feb. 8, 2014, <http://milwaukeecourieronline.com/index.php/2014/02/08/obamacare-is-making-a-difference/>.

194. *Id.*

195. *Id.*

196. Eugene Robinson, *ACA Has Put Us on the Road to Universal Health Care*, SPRINGFIELD NEWS-LEADER, Jan. 8, 2014, <http://www.news-leader.com/story/news/2014/01/09/aca-has-put-us-on-the-road-to-universal-health-care/4378921/>.



gible for the ACA's protections and who would otherwise benefit from the new legal mandates for private companies, have few options and will not be able to obtain coverage unless they move to another state. It is the continued political division that has existed in the debate over health care since before the time of Theodore Roosevelt and the Progressive Party.

Moreover, the legal challenges to the law continue. Recently, the Supreme Court addressed another issue relating to the ACA.<sup>197</sup> That decision, forever known now as *Hobby Lobby*, upheld a challenge by closely held corporations to the ACA's contraceptive mandate for women using the Religious Freedom Restoration Act (RFRA).<sup>198</sup> Justice Alito wrote that the ACA "substantially" burdened the "exercise of religion" by these corporations (by way of their owners) in forcing them to provide contraceptive services indirectly to their female employees.<sup>199</sup> While some have described the decision as absurd on its face (corporations now have religious beliefs), the doubt the holding creates regarding the ACA and the future of the law cannot be ignored.

As for supporters of the law, it is widely assumed by some, at least, that the ACA will eventually lead to a true national health insurance law in the United States, like the true national health insurance laws in other developed nations, such as Germany and Japan, who have long ago addressed this fundamental function of a civilized, developed nation. This latest struggle, in other words, is just a continuation of the struggle for a more equal society.

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197. See generally Jaime Fuller, *Here's What You Need to Know about the Hobby Lobby Case*, WASH. POST, Mar. 24, 2014, <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/24/heres-what-you-need-to-know-about-the-hobby-lobby-case/>.

198. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

199. *Id.* at 2761.