THE EIGHTEENTH ANNUAL FRANKEL LECTURE

INTRODUCTION

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The Affordable Care Act[1] has metamorphosed since its passage. And, as chronicled by the Frankel Lecture by Professor Mark Hall and two commentaries by Professors David Orentlicher and William Sage in this Issue of the *Houston Law Review*, the ACA continues to do so. The Act started life in 2010 as legislation that, while decreasing the federal deficit,[2] would,

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1. The Affordable Care Act is the name most frequently given to the combination of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 18, 20, 21, 25, 26, 28, 30, 31, 35, and 42 U.S.C.) and the Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of 19, 20, 26 and 42 U.S.C.). A useful account of its legislative history may be found in John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 LAW LIBR. J. 131 (2013). It has since been amended by the Department of Defense and Full-Year Continuing Appropriations Act, Pub L. No. 112-10, § 1858, 125 Stat. 38, 168 (2011) (eliminating the Free Choice Voucher provisions of the ACA) and the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 642(b)(1), 126 Stat. 2313, 2358 (2013) (eliminating Title VIII of the ACA). The best compilation of the original ACA is the one prepared at the House of Representative's Office of Legislative Counsel and made publicly available at the website of the National Conference of State Legislators at http://www.ncsl.org/documents/health/ppaca-consolidated.pdf. This site integrates PPACA and HCERA in a way that is both understandable and critical for understanding the complex structure of these bills.

2. Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives 2 (Mar. 20, 2010) [hereinafter Pelosi Letter], *available at* www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendreconprop.pdf. President Barrack Obama promised Congress he would not sign any bill that "adds one dime to the deficit, now or in the future, period." President Barrack Obama, Remarks by the President to a Joint Session of Congress on Health Care (Sept. 9, 2009),

among other forecasted accomplishments, seriously reduce the number of uninsureds,[3] bend the cost curve for medical care,[4] provide a federal system of long term care insurance,[5] and change the structures of medical service delivery to the elderly.[6] And the costs for everything were estimated by an expert Congressional Budget Office, backed by studies from institutions as reputable as the Massachusetts Institute of

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available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care. The Center on Budget and Policy Priorities dismissed claims by some that the ACA would cost considerably more than predicted. *See* Paul N. Van de Water & James R. Horney, *Health Reform Will Reduce the Deficit: Charges of Budgetary Gimmickry Are Unfounded*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 25, 2010), http://www.cbpp.org/files/3-25-10health.pdf. There is a litany of contemporaneous advocacy in support of the ACA. Representative examples may be found on the website of the Democratic Policy and Communications Center at http://www.dpc.senate.gov/healthreformbill/healthbill52.pdf and in a wonderful black and white graphic book by ACA architect, JONATHAN GRUBER WITH H.P. NEWQUIST, HEALTH CARE REFORM: WHAT IT IS, WHY IT'S NECESSARY, HOW IT WORKS (2011).

3. The Congressional Budget Office and Joint Committee on Taxation predicted the ACA would reduce the number of uninsured by 32 million by 2019. Pelosi Letter, *supra* note 2, at 9. The Department of Health and Human Service's Office of the Actuary predicted it would reduce the number of uninsured by 34 million by 2019. Memorandum from Richard S. Foster, Chief Actuary, Dep't of Health & Human Servs., Estimated Financial Effects of the "Patient Protection and Affordable Care Act," as Amended 3 (Apr. 22, 2010) [hereinafter Foster Memorandum], *available at* http://waysandmeans.house.gov/uploadedfiles/oact_memorandum_on_financial_impact_of_ppaca_as_enacted.pdf. The RAND Corporation predicted it would reduce the number of uninsured by 25 million by 2019. RAND CORP., ANALYSIS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (H.R. 3590), at 1 (2010), *available at* http://www.rand.org/content/dam/rand/pubs/research_briefs/2010/RAND_RB9514.pdf.

4. *See, e.g.*, DAVID M. CUTLER, KAREN DAVIS & KRISTOF STREMIKIS, COMMONWEALTH FUND, WHY HEALTH REFORM WILL BEND THE COST CURVE (2009), *available at* http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2009/Dec/1351_Cutler_Davis_Health_Reform_129_CAPAF.pdf. An Independent Payment Advisory Board was intended as a major weapon in bending the cost curve. *See* Nancy-Ann DeParle, *The Facts About the Independent Payment Advisory Board*, WHITE HOUSE BLOG (Apr. 20, 2011, 5:46 PM), http://www.whitehouse.gov/blog/2011/04/20/facts-about-independent-payment-advisory-board.

5. Title VIII of the Affordable Care Act amended the Public Health Service Act to add the "Community Living Assistance Services and Supports Act" or the "CLASS Act." PPACA §§ 8001–8002. The CBO predicted CLASS would bring in $70 billion in net revenue over the first ten years of the ACA. Van de Water & Horney, *supra* note 2, at 2. As many had predicted, actuaries found that without substantial changes, CLASS Act premiums would be far too expensive for most buyers and the entire program was financially unsustainable. *See* Gardiner Harris & Robert Pear, *Still No Relief in Sight for Long-Term Needs*, N.Y. TIMES, Oct. 25, 2011, at D1. The Obama Administration declined to implement Title VIII. *See id.* Congress then repealed the entire Title. The American Taxpayer Relief Act of 2012 § 642(b)(1).

6. The White House's forecast of the accomplishment of the Affordable Care Act for seniors may be found on its website at *Health Reform for American Seniors: The Affordable Care Act Gives America's Seniors Greater Control over Their Own Health Care*, WHITE HOUSE, http://www.whitehouse.gov/files/documents/health_reform_for_seniors.pdf (last visited Mar. 12, 2014).

Technology.[7] What we see revealed in these three articles from early 2014, however, is a law of a different sort taking shape, one sculpted in part by the law of unintended consequences.

Large portions of the ACA have had a very rough beginning. Various villains have been cast as causing the problems. They include the following.

First, Chief Justice John Roberts in *National Federation of Independent Business v. Sebelius* provided a rallying point for those opposed to the law by justifying its lynchpin, the "individual mandate," as a tax on the American people rather than a mere regulation of commerce.[8] And, perhaps borrowing from the technique of Chief Justice John Marshall in *Marbury v. Madison,* who aggrandized judicial power in the early nineteenth century while managing to pacify the other branches of government by purporting to give them exactly the result they wanted in the particular case,[9] the current Chief Justice in the early twenty-first century diverted attention from an irrevocable narrowing of the scope of congressional regulatory powers under both the Commerce Clause and the Necessary and Proper Clause by letting President Obama "win."[10] Chief Justice Roberts further altered the original ACA by finding what he held to be a severable component of the law, expansion of the Medicaid program, unconstitutional, but, then, rather than striking the law down in its entirety and taking the accompanying heat for judicial activism, allowed states, as many have, to opt out of the Medicaid expansion while continuing to participate in the remainder of Medicaid. As a result, although the ACA remains

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7. Jonathan Gruber, *The Impacts of the Affordable Care Act: How Reasonable Are the Projections?* 13–14 & n.8 (Nat'l Bureau of Econ. Research, Working Paper No. 17168, 2011) (citing MIT Dep't of Econ., Documentation for the Gruber Microsimulation Model (2011) (unpublished manuscript), *available at* http://economics.mit.edu/files/9436), *available at* http://economics.mit.edu/files/6829; *see also* URBAN INST., HEALTH INSURANCE POLICY SIMULATION MODEL: METHODOLOGY DOCUMENTATION (2011), *available at* http://www.urban.org/UploadedPDF/412471-Health-Insurance-Policy-Simulation-Model-Methodology-Documentation.pdf (containing the also widely cited Urban Institute's model on how to model health care reform).

8. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608–09 (2012).

9. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

10. Moreover, by labeling the individual mandate as a "tax," Justice Roberts set up an Origination Clause challenge to the ACA which, as a practical matter, originated in the Senate rather than the House of Representatives. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2608–09. *But see* Hotze v. Sebelius, No. 4:13-cv-01318, 2014 WL 109407, at *15 (S.D. Tex. Jan. 10, 2014) (rejecting Origination Clause challenge). Justice Robert's opinion further expands judicial power to use the largely ignored "Proper" component of the "Necessary and Proper" clause as a way of overruling legislation passed by the other two branches of the federal government. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2591–93 (citing U.S. CONST. art. I, § 8, cl. 18).

"on the books," some of its original benefits have become unavailable and essentially invisible to millions.[11]

Second, President Barrack Obama has purported to change the law in eighteen ways at last count.[12] Among those changes is one that has reduced the enrollment in individual exchange plans and therefore heightened the risk that insurers selling there will fall into an adverse selection death spiral.[13] He has permitted insurers, in violation of the terms of the ACA,[14] to sell nonconforming individual health insurance policies outside the health insurance exchanges to persons who previously had individual health insurance policies.[15] And this was done as a corrective for the President's falsely having told Americans[16] that, if they liked their health plan, the ACA would let them keep it. The President has likewise denied perhaps one million Americans access to employer-provided health insurance and reduced tax revenues needed to pay for the ACA by upwards of $20 billion by delaying, again in clear violation of the terms of the ACA itself, enforcement of its "employer mandate" until 2015 or 2016.[17] And, most recently, in response to the severe problems

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11. *See* Sam Dickman et al., *Opting Out of Medicaid Expansion: The Health and Financial Impacts*, HEALTHAFFAIRS BLOG exhibit 3 (Jan. 30, 2014, 10:00 AM), http://healthaffairs.org/blog/2014/01/30/opting-out-of-medicaid-expansion-the-health-and-financial-impacts/ (estimating that 7.8 million people would have been insured if all states had opted in to expanded Medicaid and claiming that at least 7,115 people will die as a result of the absence of coverage).

12. *See* Tyler Hartsfield & Grace-Marie Turner, *35 Changes to Obamacare . . . So Far*, GALEN INST. (Feb. 10, 2014), http://www.galen.org/newsletters/changes-to-obamacare-so-far/. Actually, the correct number may be at least 19, as the President recently extended premium subsidies and cost sharing reduction payments to certain policies sold off the exchange. *See infra* note 17.

13. *See* Hartsfield & Turner, *supra* note 12.

14. *See* Jonathan H. Adler, *Is Another Illegal Obamacare Fix in the Works?*, WASH. POST (Feb. 18, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/18/is-another-illegal-obamacare-fix-in-the-works/ ("While the PPACA does provide for a 'hardship exemption' from the individual mandate, this exemption only applies to individuals—those subject to the individual mandate—and not to insurance companies. So the Administration can excuse individuals for not obtaining qualifying health insurance coverage, but it has no authority to allow insurers to issue policies that do not provide for minimum coverage.").

15. *See* President Barack Obama, Statement by the President on the Affordable Care Act (Nov. 14, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/11/14/statement-president-affordable-care-act ("[T]he bottom line is, insurers can extend current plans that would otherwise be canceled into 2014, and Americans whose plans have been canceled can choose to re-enroll in the same kind of plan.").

16. This statement has been dubbed "Lie of the Year" by one fact-finding organization. *See* Angie Drobnic Holan, *Lie of the Year: 'If You Like Your Health Care Plan, You Can Keep It'*, POLITIFACT.COM (Dec. 12, 2013), http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it/.

17. *See* Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544 (Feb. 12, 2014) (to be codified in 26 C.F.R. pts. 1, 54, 301). The $20 billion

facing several of the websites implementing state-based exchanges, the President through the Centers for Medicare & Medicaid Services has issued a guidance announcing an intent to spend federal tax dollars to subsidize certain individual policies purchased off exchanges even though Sections 1401 and 1402 of the ACA by their terms limit these subsidies to policies purchased on state and federal exchanges.[18]

Third, obstinate Republicans have refused to attempt improvements in the law, even where some people might be helped thereby.[19] An example of such alleged behaviors include failure to support tweaks in the ACA that would permit clergy at smaller churches (though not others) to apply premium subsidies to technically noncompliant church health plans.[20]

Fourth, the executive branch engaged in questionable bidding practices in awarding contracts for website construction[21] and then may have let politics rather than industry customs drive the architecture of the resulting product.[22] As a result, the most visible component of the ACA, healthcare.gov, turned into an initial fiasco that provided fodder for right-wing radio[23] and late night comics alike.[24] Incompetence at the federal level, which

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figure comes from an extrapolation of the CBO's estimate in July 2013 that postponing the mandate by one year would cost $12 billion in tax revenue. *See* Jennifer Corbett Dooren, *CBO: Delay of Business Mandate to Cost Billions*, WALL ST. J., July 31, 2013, at A4. As this Introduction goes to press, the CBO has not updated its estimate of the cost of the employer mandate delay to include the most recent changes, but I see no reason to think that the cost will not at least double, hence the very conservative $20 billion figure in the text.

18. *See* Seth J. Chandler, *Latest Unlawful Obama Administration "Fix" May Create Standing for Challenges*, ACA DEATH SPIRAL (Feb. 12, 2014), http://acadeathspiral.org/
2014/03/02/latest-unlawful-obama-administration-fix-may-create-standing-for-challenges/.

19. *See, e.g.*, Todd S. Purdum, *The Obamacare Sabotage Campaign*, POLITICO (Nov. 1, 2013), http://www.politico.com/story/2013/11/the-obamacare-sabotage-campaign-99176.
html.

20. *See* Church Health Plan Act of 2013, S. 1164, 113th Cong. § 2(a).

21. *See Michelle Obama and CGI Federal*, FACTCHECK.ORG (Dec. 10, 2013), http://www.factcheck.org/2013/12/michelle-obama-and-cgi-federal/.

22. *See* Allison Bell, *Why Did HealthCare.gov Wall Off Price Data?*, BENEFITSPRO (Oct. 23, 2013), http://www.benefitspro.com/2013/10/23/why-did-healthcaregov-wall-off-price-data.

23. *See The Dismantling of the American Health Care System*, RUSH LIMBAUGH SHOW (Oct. 23, 2013), http://www.rushlimbaugh.com/daily/2013/10/23/
the_dismantling_of_the_american_health_care_system; *see also Sebelius in the Hot Seat*, SEAN HANNITY SHOW (Oct. 30, 2013), http://www.hannity.com/article/sebelius-in-the-hot-seat/18240.

24. An anthology of such humor may be found at *From Jon Stewart to Jay Leno: Late-Night Hosts Roast Obamacare Website*, HOLLYWOOD REP. (Oct. 24, 2013), http://www.hollywoodreporter.com/live-feed/obamacare-best-late-night-jokes-650658;

extends to the complete absence to date of the statutorily authorized website for SHOP exchanges (exchanges where small businesses could get group coverage)[25] has been exceeded by worse failings, or potentially criminal conduct,[26] in the construction of several dysfunctional state exchange websites such as those in Oregon and Maryland.

Fifth, there have, as Professor Hall emphasizes, been many naysayers, including perhaps me,[27] who, in criticizing the architecture and implementation of the ACA, have engaged in what Hall believes could be self-fulfilling prophecies highlighting the Act's early failures.

Regardless of one's choice of villains, however, what must be recognized is that most of the public discourse as this Issue goes to press is less about the triumphs of the ACA than about whether it is an unsalvageable complete mess or, aided by the more modest expectations voiced by Professor Hall in his Frankel Lecture, just traversing a legislative adolescence that, if people would only stop making premature and self-fulfilling prophesies about its demise, will actually emerge in its adulthood as a responsible, sensible, and American way of improving American health.[28]

As Professor Hall recognizes, however, even judging the statute by relaxed standards, there are questions as to the success of the ACA to date and in the future.

In addition to the many concerns pointed out by Professor Hall, there are other emerging issues. The Pre-Existing Condition Insurance Plan,[29] which was supposed to provide

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see also The Daily Show with Jon Stewart: Affordable Horror Story (Comedy Central television broadcast Nov. 5, 2013), *available at* http://www.thedailyshow.com/watch/tue-november-5-2013/affordable-horror-story (providing particularly funny commentary).

25. *See* Timothy Jost, *Implementing Health Reform: The Delay of SHOP Exchange Online Enrollment*, HEALTHAFFAIRS BLOG (Nov. 28, 2013, 1:25 AM), http://healthaffairs.org/blog/2013/11/28/implementing-health-reform-the-delay-of-shop-exchange-online-enrollment/. For a discussion of their slow start, see Alex Wayne, *At Obamacare Small Business Exchanges, Sign-Ups Are Off to Slow Start*, BLOOMBERGBUSINESSWEEK (Feb. 6, 2014), http://www.businessweek.com/articles/2014-02-06/at-obamacare-small-business-exchanges-sign-ups-off-to-slow-start.

26. *See* Nick Budnick, *Former Lawmaker Reported Oregon Health Exchange to FBI*, OREGONIAN (Feb. 5, 2014), http://www.oregonlive.com/health/index.ssf/2014/02/former_lawmaker_reported_orego.html.

27. My blog, acadeathspiral.org, is subtitled, "Exploring the likely implosion of the Affordable Care Act."

28. *See* Mark A. Hall, *Evaluating the Affordable Care Act: The Eye of the Beholder*, 51 HOUS. L. REV. 1029, 1056 (2014).

29. The Pre-Existing Condition Insurance Plan is described in Section 1101 of the Affordable Care Act and is codified at 42 U.S.C. § 18001 (2012).

coverage to 375,000,[30] never enrolled more than 135,000 before declining to 80,000[31] and, notwithstanding the low enrollment, ran out of money only two years into a three year program due to per member costs of over $32,000 per year, way higher than projected.[32] The estimated ten-year net cost of the insurance coverage provisions of the ACA, the ones mostly addressed by Professor Hall, have gone from $788 billion in the March 2010 CBO estimate to $1.49 trillion in the February 2014 CBO report.[33] The effects on employment created by the ACA's effective high marginal tax rates have become clearer over the intervening years, with the current estimate being a loss of 1.5% to 2% of work hours, 2 million to 2.5 million jobs, and considerable associated federal income tax revenue resulting from the law.[34] The reduction in the number of uninsureds, though not known with certainty, is less as of the writing of this Introduction than had been predicted, in part because most of the insurance purchases on the exchanges to date have reportedly come not from those previously uninsured but from those whose insurance was killed off by the ACA or made less competitive.[35]

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30. Foster Memorandum, *supra* note 3, at 16.

31. *State by State Enrollment in the Pre-Existing Condition Insurance Plan*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/pcip-enrollment.html (last visited Mar. 12, 2014).

32. CTRS. FOR MEDICARE & MEDICAID SERVS., COVERING PEOPLE WITH PRE-EXISTING CONDITIONS: REPORT ON THE IMPLEMENTATION AND OPERATION OF THE PRE-EXISTING CONDITION INSURANCE PLAN PROGRAM (2013), *available at* http://www.cms.gov/CCIIO/Resources/Files/Downloads/pcip_annual_report_01312013.pdf.

33. *Compare CBO's Analysis of the Major Health Care Legislation Enacted in March 2010: Hearing Before the H. Subcomm. on Health of the H. Comm. on Energy & Commerce*, 112th Cong. 2 tbl.1 (2011) (statement of Douglas W. Elmendorf, Dir., Cong. Budget Office), *available at* http://cbo.gov/sites/default/files/cbofiles/ftpdocs/121xx/doc12119/03-30-healthcarelegislation.pdf, *with* CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2014 TO 2024, at 106 tbl.B-1 (2014), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/45010-Outlook2014_Feb.pdf. Some of the difference is due to different measuring periods, but most of it is not. I have argued that the Congressional Budget Office has actually underestimated certain costs of the ACA, notably its Risk Corridors program. *See* Seth J. Chandler, *CBO Projection of $8 Billion from Risk Corridors Is Baffling*, ACA DEATH SPIRAL (Feb. 7, 2014), http://acadeathspiral.org/2014/02/07/cbo-projection-of-8-billion-from-risk-corridors-is-baffling/.

34. CONG. BUDGET OFFICE, *supra* note 33, at 117 app. C; *see also* Seth J. Chandler, *The Architecture of Contemporary Healthcare Reform and Effective Marginal Tax Rates*, 29 MISS. C. L. REV. 335 (2010) (predicting that precisely such an effect was likely). *But cf.* Avik Roy, *White House: It's a Good Thing That Obamacare Will Drive 2.5 Million Americans out of the Workforce*, FORBES (Feb. 5, 2014), http://www.forbes.com/sites/theapothecary/2014/02/05/white-house-its-a-good-thing-that-obamacare-will-drive-2-5-million-americans-out-of-the-workforce/ (noting but criticizing White House response that these Americans were trapped in their jobs).

35. A good summary on recent research in this field is provided in Sarah Kliff, *A Guide to Understanding Obamacare's Sign-Up Numbers*, WASH. POST: WONKBLOG (Feb.

The plan for long term care insurance contained in the ACA has been revealed as a fantasy, so much so that even a highly polarized Congress agreed unanimously to scuttle the plan—along with the anticipated $70 billion the CBO had counted on it yielding.[36] The employer mandate, forecast to bring upwards of $20 billion over the next two years[37] to help pay for the program, has been administratively and perhaps unlawfully postponed with a commensurate decline in revenues.[38]

The authors in this Issue thus have an extremely challenging task before them: assessing a target in which the data is moving, the law is moving, and the goalposts are moving. Professor Mark Hall, certainly one of the leading scholarly proponents of the ACA whose work in health care regulation is generally prescient, precise, and insightful, asks, as we confront the unquestionably troubled birth of the law, to scale down our expectations. He argues first that, rather than achieving actual universal coverage, the ACA's central accomplishment is universal insurability.[39] And on that end, the ACA has succeeded.

Professor Hall further diminishes the expectations of some by contending that "reducing the cost of care should not be seen as one of the ACA's principal objectives."[40] Having made this concession, however, Hall argues that the ACA might indeed succeed in reducing the costs. The existence of exchanges at least potentially heighten the competition in the individual insurance market, although to date, as Professor Hall acknowledges, this is a bit of a mixed picture and as others have noted and my own research confirms, there are a great many counties in the United States in which only one plan per metal tier is available through the exchange, and there may be no affordable plan for many

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13, 2014, 11:05 A.M.), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/02/13/a-guide-to-understanding-obamacares-sign-up-numbers/ (reporting that up to 89% of those purchasing policies on exchanges already had insurance).

36. *See supra* note 1. The $70 billion initial estimate is contained in Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Harry Reid, Majority Leader, U.S. Senate tbl 2 (Mar. 11, 2010) [hereinafter Reid Letter], http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11307/reid_letter_hr3590.pdf.

37. The figure comes from an extrapolation of a CBO estimate. *See supra* note 17 (explaining the computation).

38. For arguments relating to the illegality of the employer mandate delay, see Seth J. Chandler, *A Roadmap for Legal Attacks on the Employer Mandate Delay*, ACA DEATH SPIRAL (Feb. 12, 2014), http://acadeathspiral.org/2014/02/12/a-roadmap-for-legal-attacks-on-the-employer-mandate-delay/.

39. *See* Hall, *supra* note 28, at 1034.

40. *Id*. at 1040.

individuals.[41] Moreover, the existence of exchanges in which pricing is prominent has increased the attractiveness of "narrow networks" being created by insurers, which should reduce costs, although, as some have started complaining, narrow networks almost by definition also reduce access to preferred or proximate medical providers. Finally, as Professor Hall points out, provisions in the ACA that compel insurers to rebate to their insureds excessive overhead amounts have already effectively lowered the cost of insurance.[42]

Our commentators in this Issue, Professors Orentlicher and Sage, both zero in on the cost issue highlighted by Professor Hall. Professor Orentlicher's commentary asks us to consider the extent to which participation in policies sold on the individual and SHOP exchanges created by the ACA will, rather than reduce the number of uninsureds as hoped, simply transfer the source of insurance. And, as recent reports suggest, this appears to be significantly what is happening. Early reports from sources ranging from the respected consulting firm McKinsey to insurers themselves show that from 65% to 89% of those enrolling thus far on the exchanges already had coverage.[43] In some cases the coverage these transferees are receiving may be superior to that which they had originally; in others, however, particularly perhaps for young males whose exchange premiums are particularly high relative to their actuarial risk,[44] the transfer may not be beneficial. At any rate, however, more recent estimates by the Congressional Budget Office foretell that instead of the number of uninsureds being immensely reduced by the ACA, in fact 31 million people in the United States will

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41. *See* Jayne O'Donnell & Paul Overberg, *Lack Aid? Many Counties Have Only Pricey Plans*, USA TODAY (Dec. 26, 2013), http://www.usatoday.com/story/news/nation/2013/12/25/affordability-healthcaregov-plans-usa-counties/4165513/.

42. This program is known as Medical Loss Ratios and may be found at Section 10101(f) of the ACA (amending Section 2718 of the Public Health Service Act), codified at 42 U.S.C. § 300gg-18 (2012).

43. *See* Christopher Weaver & Anna Wilde Mathews, *Exchanges See Little Progress on Uninsured: Early Estimates Suggest That Majority of Sign-Ups Already Had Health Plans*, WALL ST. J. (Jan. 17, 2014), http://online.wsj.com/news/articles/SB10001424052702304149404579326992266662838. *But cf.* Press Release, NY State of Health, Enrollment of New Yorkers on NY State of Health Tops 412,000 (Feb. 10, 2014), *available at* http://www.healthbenefitexchange.ny.gov/news/press-release-enrollment-new-yorkers-ny-state-health-tops-412000 (noting that 66% of those enrolling for Medicaid and in New York Exchange did not previously have coverage, although discrepancy between this number and that of other studies could be due to conflation of Medicaid and private insurer enrollments).

44. *See* Seth J. Chandler, *Gender Equity and the Affordable Care Act*, ACA DEATH SPIRAL (Jan. 25, 2014), http://acadeathspiral.org/2014/01/25/gender-equity-and-the-affordable-care-act/.

remain uninsured even ten years into passage of the Act, a reduction of 25 million over what the CBO otherwise believes would have occurred.[45]

More fundamentally, however, Professor Orentlicher provokes us to consider whether the revised goal Professor Hall puts forth for the ACA—eliminating not lack of insurance but uninsurability—is worth the enormous cost of the ACA and the monumental upheaval created by its complexities. If, as Professor Orentlicher suggests, the benefits to health resulting from insurance are considerably less than often asserted, then the greater access to insurance, particularly when not taken advantage of, matters far less than might other means, such as creation of low-cost clinics, of healthcare reform. Moreover, others have asserted that "health-status insurance" that would protect against the risk of one's premiums going up due to deteriorating health would protect most of the currently uninsurable against the problem Professor Hall highlights of uninsurability.[46]

Professor Sage takes us deep into the little traversed waters of the ACA, including Titles III and IV of that bill, which address problems he evocatively compresses into that of the prescription pen fueling physician moral hazard and the french fry symbolizing American behaviors that, fostered by "suburban sprawl and American demographic and economic change," have forced American medicine to play a never ending game of catch up against the ever deteriorating basic levels of fitness of American patients.[47] Whereas others have glibly found synergy between the goals of Titles I and II of the ACA—better health insurance access for the middle class and poor—and Titles III and IV—attempting to provide incentives for healthier behaviors—Professor Sage questions this synergy and analyzes the potential for tension between these goals and the threat of diverting resources into the wrong cure. "When insuring 85% of the U.S. population costs nearly twice as much per capita as any other country pays to cover

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45. *See* CONG. BUDGET OFFICE, INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT—CBO'S FEBRUARY 2014 BASELINE tbl.2, *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/43900-2014-02-ACAtables.pdf. At the time the ACA was enacted, the CBO had estimated that the bill would reduce the number of uninsureds by 31 million. *See* Reid Letter, *supra* note 36, tbl.3.

46. *See* John H. Cochrane, *Health-Status Insurance: How Markets Can Provide Health Security*, POL'Y ANALYSIS (Cato Inst., Washington, D.C.), No. 633, Feb. 18, 2009, at 1, *available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/pa-633.pdf (detailing how private health-status insurance would work, though not costing out how much program would cost for people who already have pre-existing conditions).

47. William M. Sage, *Putting Insurance Reform in the ACA's Rear-View Mirror*, 51 HOUS. L. REV. 1081, 1085–86 (2014).

its entire citizenry, adding the remaining 15% to the insurance pool without ironclad guarantees of cost containment would seem a bad bet," Professor Sage writes.[48]

He also notes, however, the ways in which the Supreme Court decision in *National Federation of Independent Business v. Sebelius* both reflected and reinforced a sense in which the Affordable Care Act was less a collective investment in mutual assistance than a compelled transfer of resources from the better-off to the less fortunate. The Affordable Care Act ultimately depends, like most legislation, on winning the hearts and minds of the American people. And on that count, as Professor Sage recounts, the Act has been a dismal, unequivocal, and worsening failure.[49] That situation may get worse as the small group market is further disrupted later in 2014 as a potentially large number of insurance policies become subject to the new law and forced to assume lower cost sharing and greater coverage—all at a likely greater price.[50]

It is for this reason that Professor Hall faces an important and challenging intellectual and practical task in his Frankel Lecture: explaining the ideas behind a bill that promised to transform American healthcare and whose winners would vastly outnumber its losers. As Professor Hall recognizes, that task has been made all the more difficult with each passing month, however, as implementation of the ACA becomes yet more problematic and as many of its proponents beat strategic and sometimes lawless retreats from its central provisions and premises. Although it may not persuade all, it is refreshing to hear as powerful an advocate as Professor Mark Hall provide a temperate, balanced, and factual exposition of the concept behind the ACA, its early evolution, and the hope that it will grow from a troubled adolescence into a uniquely American way of improving health.

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48. *Id*. at 1087.

49. *See Kaiser Health Tracking Poll: January 2014*, HENRY J. KAISER FAMILY FOUND. (Jan. 30, 2014), http://kff.org/health-reform/poll-finding/kaiser-health-tracking-poll-january-2014/.

50. In a report issued two years in late February, 2014, the Office of the Actuary at the Centers for Medicare & Medicaid Services predicted that 65% of small businesses will see their health insurance premiums rise as a result of the community-rating mandated by the Affordable Care Act. *See* OFFICE OF THE ACTUARY, CTRS. FOR MEDICARE & MEDICAID SERVS., REPORT TO CONGRESS ON THE IMPACT ON PREMIUMS FOR INDIVIDUALS AND FAMILIES WITH EMPLOYER-SPONSORED HEALTH INSURANCE FROM THE GUARANTEED ISSUE, GUARANTEED RENEWAL, AND FAIR HEALTH INSURANCE PREMIUMS PROVISIONS OF THE AFFORDABLE CARE ACT (2014), *available at* http://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/ACA-Employer-Premium-Impact.pdf; Seth J. Chandler, *Small Businesses and Obamacare*, NAT'L REV. ONLINE (Jan. 13, 2014), http://www.nationalreview.com/article/368241/small-businesses-and-obamacare-seth-j-chandler.