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# Journal of Aging Law & Policy



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# ACCREDITED AND AGING: EXPOSING OLDER INVESTORS TO FRAUD THROUGH THE ACCREDITED INVESTOR PROVISIONS

*Sophia Duffy, JD, CPA<sup>1</sup>*

## Abstract

The private, unregistered securities market is the modern-day equivalent of the unsettled American frontier of the 1800s. While this market presents valuable investment opportunities for certain eligible investors, called accredited investors, these investment offers are not as heavily regulated, and are therefore more risky, than publicly-traded securities. While the original intent of the accredited investor provisions were to identify only wealthy and financially sophisticated individuals who could understand investment risks and withstand losses without the threat of financial ruin, the boundaries of the accredited investor definition have eroded severely over time due to several weaknesses in the definition, such as the fallacy of linking wealth and income to financial sophistication and over-inclusion due to lack of inflation adjustments and spousal assets. As a result, an individual can qualify as an accredited investor simply by earning an income and accumulating net worth that, in most places in the US, would describe an average upper-middle class citizen, without having any notable financial knowledge or the ability to withstand significant investment losses. The aging population and the growth in retirement savings has exacerbated the risk exposure to elderly accredited investors because of the detrimental effects of cognitive decline. As these accredited investors age, their wealth grows, but financial literacy sharply drops, and therefore the ability to understand the risks of the investment offerings and manage these

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<sup>1</sup> I would like to thank Dr. Michael Finke, CFP® for suggesting the initial idea for this paper and for his valuable guidance and expertise during my research process.



investments also declines. This places a bullseye on the wealthy elderly for malicious, negligent, and fraudulent individuals who prey upon these accredited investors. Financial abuse of the elderly is a significant societal issue that even the SEC has acknowledged and presented research on, however, the SEC offers only superficial and baseless claims as to why no protections for older accredited investors are instituted. In this paper, I recommend guardrails or provisions that can be implemented to protect elderly accredited investors while still allowing the private market to flourish.

## I. INTRODUCTION

The U.S. investment market is made up of regulated public securities and private offerings. Public securities are generally offered to all investors and are strictly regulated by the Securities and Exchange Commission (SEC). Private offerings, on the other hand, describe investment opportunities only available to select investors, such as angel investors, venture capitalists, and certain financial institutions.<sup>2</sup> Private offerings are also regulated by the SEC, however, these regulations are subject to less rigorous standards than public offerings.<sup>3</sup> Investments in the private market are therefore more risky to investors because the decision to invest must be made with substantially less information due to the less stringent registration and disclosure requirements.<sup>4</sup> Private offerings are more common than any other offering type.<sup>5</sup>

Private placements are offered to institutional investors, such as banks and pension funds, and individuals and institutions who qualify as accredited investors.<sup>6</sup> Accredited investors are individuals and institutions that the SEC has determined have enough

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<sup>2</sup> Akhilesh Ganti, *Private Placement*, INVESTOPEDIA (Mar. 4, 2020), <https://www.investopedia.com/terms/p/privateplacement.asp>.

<sup>3</sup> *Id.*

<sup>4</sup> Brian Beers, *How Private Placement Affects Share Price*, INVESTOPEDIA (July 17, 2019), <https://www.investopedia.com/ask/answers/052815/how-does-private-placement-affect-share-price.asp>.

<sup>5</sup> Report on the Review of the Definition of “Accredited Investor”, 1 S.E.C. 1, 88 (Dec. 18, 2015)

<sup>6</sup> Beers, *supra*.

knowledge, income, and assets to understand and sustain the risk of loss in the private investment.<sup>7</sup> Typically, individual accredited investors are only made aware of private investment opportunities via personal and professional networks or from their financial advisory firms.<sup>8</sup> The impact of investments made by accredited investors on the U.S. securities market is significant. In 2014, private placements raised roughly the same capital registered offerings, over \$1.3 trillion.<sup>9</sup> In 2017, private placements raised \$1.7 trillion, which surpassed registered offerings by \$300 billion.<sup>10</sup>

An individual or institution can qualify as an accredited investor by meeting one of the qualifying provisions in the accredited investor definition. In this paper, we focus on two of the qualifying provisions: the income threshold and the net worth threshold. As we discuss in Part II below, the accredited investor definition is intended to target investors who did not require the protections of registered securities because of their presumed financial sophistication and ability to withstand investments losses. However, these simplistic income and net worth thresholds pose a great risk to unwary investors, because income and net worth thresholds are not reliable predictors of one's financial acumen nor one's real ability to withstand losses. The SEC has responded to these criticisms by simply glazing over these concerns with baseless assertions that lack evidentiary data and conflict with the SEC's own findings. More concerning, elderly populations who have studiously saved for retirement and qualify as accredited investors are exposed to great risk because cognitive decline and mental

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<sup>7</sup> *Id.*

<sup>8</sup> 15 U.S.C.A. §77(d)(a)(2).

<sup>9</sup> Report on the Review of the Definition of "Accredited Investor", S.E.C. 1, 88 (Dec. 18, 2015).

<sup>10</sup> Diane E. McCarthy, Andrew C. Raby & Joshua M. Lindauer, *SEC Proposes Update to Accredited Investor Definition that Would Make Private Markets Available to More Investors*, 10 THE NAT'L L. REV., (Jan. 2, 2020),

<https://www.natlawreview.com/article/sec-proposes-update-to-accredited-investor-definition-would-make-private-markets>.

impairment may impact their ability to understand the investment risks involved, which is only exacerbated by the reduced information made available to accredited investors. The SEC's refusal to institute protections for elderly accredited investors is in direct conflict with its own policy initiatives and the initiatives of other governmental agencies representing the public's best interest.

In this paper, we review the criticisms of the income and net worth thresholds and the SEC's responses to these criticisms. Then, we discuss the risk of financial exploitation for elderly accredited investors due to the impact of cognitive decline on an investor's financial literacy. SEC's in light of the new, more expansive amendments to the accredited investor definition implemented in 2020, and to expose the opposing positions the SEC has taken with regards to the accredited investor definition and purporting to advocate for both the protection of elderly investors against financial abuse and to help Americans save for retirement. The SEC's refusal to amend the definition shows that not only does the SEC miss the mark to protect these elderly accredited investors, they expose this vulnerable population to more risk. Then, we provide several recommendations the SEC can enact to truly protect elderly accredited investors while still maintaining a robust private capital market.

## II. HISTORY AND PURPOSE OF THE ACCREDITED INVESTOR PROVISION

After the stock market crash of 1929, the federal government sought to restore investor confidence in capital markets by instituting laws and regulatory oversight to protect investors from fraudulent investment offerings.<sup>11</sup> The Securities Act of 1933 (1933 Act) was the first law to regulate the offers of securities such as

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<sup>11</sup> *Securities law history*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/securities\\_law\\_history](https://www.law.cornell.edu/wex/securities_law_history) (last visited October 21, 2020); *Registration Under the Securities Act of 1933*, SECURITIES AND EXCHANGE COMM'N, (Sept. 2, 2011), <https://www.sec.gov/answers/regis33.htm>.

corporate stock, treasury stock, futures, and bonds.<sup>12</sup> Under the 1933 Act, issuers of securities must register the securities with the Securities and Exchange Commission and provide investors with material information that is publicly presented to investors, such as a description of the company's operations, management structure, and audited financial statements.<sup>13</sup> However, "Congress ... recognized that in certain situations there is no practical need for registration or the public benefits from registration are too remote," and therefore exempted certain types of securities offerings from the registration requirements.<sup>14</sup> The rationale for these exemptions was to strike a balance between protecting investors and facilitating capital formation and business growth.<sup>15</sup> Onerous regulations for registering securities, such as extensive disclosure and financial reporting requirements, presumably throw up barriers to entry for smaller issuers with less financial resources. Therefore, in the 1933 Act, Congress allowed some issuers to forego registration and offer investments outside of the heavily regulated public market to facilitate the growth of a robust private market.<sup>16</sup> Congress also specified that these exempt private offerings could be made to "accredited investors," defined as "any person who, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under

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<sup>12</sup> 15 U.S.C. §77b(a)(1) (1933).

<sup>13</sup> *Id.* at §77d(a); *Registration Under the Securities Act of 1933*, SECURITIES AND EXCHANGE COMM'N, (Sept. 2, 2011), <https://www.sec.gov/answers/regis33.htm>.

<sup>14</sup> Report on the Review of the Definition of "Accredited Investor", 1 S.E.C. 1 (Dec. 18, 2015).

<sup>15</sup> "Regulation D originated as an effort to facilitate capital formation, consistent with the protection of investors, by simplifying and clarifying existing rules and regulations, eliminating unnecessary restrictions those rules and regulations placed on issuers, particularly small businesses, and achieving uniformity between federal and state exemptions." *See* Report on the Review of the Definition of "Accredited Investor", 1 S.E.C. 1, 2 (Dec. 18, 2015).

<sup>16</sup> Report on the Review of the Definition of "Accredited Investor", 1 S.E.C. 1, 41 (Dec. 18, 2015). ("One of the primary objectives of Regulation D is to facilitate capital formation by simplifying the rules and regulations applicable to small businesses.").

management qualifies as an accredited investor under rules and regulations which the Commission shall prescribe.”<sup>17</sup>

Almost 50 years later, the SEC issued “Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933,” a series of provisions enacted in 1982 that list and discuss exempted transactions under the 1933 Act.<sup>18</sup> Issuers that offer securities that qualify under Regulation D are not required to register the security with the SEC, and are therefore exempt from the rigorous informational disclosure requirements required for registered securities.<sup>19</sup> Exempted offerings under Regulation D include private offerings, offerings of limited size, and intrastate offerings.<sup>20</sup> Under some provisions of Regulation D, public solicitation and advertising cannot be used for private offerings.<sup>21</sup> Presumably, these offerings can be made only by tapping into the issuer’s network of professional and personal contacts.<sup>22</sup> Use of media to solicit investors, such as newspapers, radio, and television, is prohibited.<sup>23</sup> Interestingly, the public solicitation prohibition only applies to some private offerings, but does not apply to sales to accredited investors under Regulation D.<sup>24</sup> Therefore, an issuer offering securities to an accredited investor is not subject to any disclosure requirements and is not prohibited from general

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<sup>17</sup> §77b(a)(15)(ii).

<sup>18</sup> 17 C.F.R. §230.501 et seq. (1982).

<sup>19</sup> *Regulation D Offerings*, SECURITIES AND EXCHANGE COMM’N, <https://www.investor.gov/introduction-investing/investing-basics/glossary/regulation-d-offerings>. (“Under the federal securities laws, any offer or sale of a security must either be registered with the SEC or meet an exemption. Regulation D under the Securities Act provides a number of exemptions from the registration requirements, allowing some companies to offer and sell their securities without having to register the offering with the SEC.”); see also 17 C.F.R. §230.500(a) (1933) (“Regulation D relates to transactions exempted from the registration requirements of section 5 of the Securities Act of 1933 (the Act) (15 U.S.C.77(a) et seq., as amended).”).

<sup>20</sup> *Registration Under the Securities Act of 1933*, supra.

<sup>21</sup> 15 U.S.C.A. §77d(a)(2); *Rule 506 of Regulation D*, SECURITIES AND EXCHANGE COMM’N, (Nov. 27, 2017), <https://www.sec.gov/answers/rule506.htm>.

<sup>22</sup> §77d(d)(2).

<sup>23</sup> 17 C.F.R. §230.502(c) (1933).

<sup>24</sup> *Id.*

solicitation and advertising to accredited investors.<sup>25</sup> In addition, issuers may sell unlimited amounts of securities under this provision.<sup>26</sup>

Under Regulation D, if an issuer wishes to offer an exempt security for investment, the issuer is required to furnish some financial information to potential investors, although this information is not as rigorous as what is required for registered securities.<sup>27</sup> This information includes general financial information and information about the business, a discussion of risk factors, the annual report, and other material information.<sup>28</sup> However, Regulation D went a step further than the 1933 Act with regards to accredited investors. If the investor meets the definition of an accredited investor, “[t]he issuer is not required to furnish the specified information to . . . any accredited investor.”<sup>29</sup>

Though the elimination of any disclosure requirement for accredited investors seems surprising, the SEC’s action aligns with the original intent for exempted securities under the 1933 Act. By removing disclosure and registration requirements for private offerings to accredited investors, more lucrative investment opportunities can be offered to knowledgeable and wealthy investors who understand the risks and who have the financial means to bear a potential loss if those investments fail. In addition, although there is no disclosure requirement for an accredited investor under this provision, issuers are still bound by the anti-fraud provisions of the 1933 Act.<sup>30</sup> In fact, the opening of Regulation D

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<sup>25</sup> *Id.*

<sup>26</sup> Report on the Review of the Definition of “Accredited Investor”, 1 S.E.C. 1, 9 (Dec. 18, 2015).

<sup>27</sup> §230.502(b)(2).

<sup>28</sup> §230.502(b)(1)-(2).

<sup>29</sup> §230.502(b)(1).

<sup>30</sup> [Regulation D transactions] are not exempt from the antifraud [and] civil liability . . . provisions of the federal securities laws.” §230.500(a). The SEC suggests that an issuer “should consider providing such information to accredited investors as well, in view of the anti-fraud provisions of the federal securities laws.” §230.502(b)(1). Information disclosed to a non-accredited investor includes general financial information and

states “[i]ssuers are reminded of their obligation to provide such further material information . . . as may be necessary to make the information . . . not misleading.”<sup>31</sup>

Indeed, accredited investors are a ripe market for companies seeking capital. Accredited investors make up just 8% of the U.S. population yet they hold 76% of the total U.S. household wealth.<sup>32</sup> About 3% of the U.S. population are accredited investors over 65.<sup>33</sup> These older accredited investors hold about 28% of U.S. household wealth, and just under 1% of the entire population are accredited investors over age 75 and hold about 8% of total household wealth.<sup>34</sup> The average wealth of accredited investor households is about \$5 million.<sup>35</sup>

### III. IDENTIFYING AN ACCREDITED INVESTOR

#### A. The Goal of the Definition

As we noted in Part II, the accredited investor provision relies on the assumption that accredited investors should be able to participate in riskier, less transparent private offerings because their financial sophistication and wealth provides them with more protection than a non-accredited investor the definition of an accredited investor becomes a critical issue. In the SEC’s 2015 Report on the Review of the Definition of “Accredited Investor,” it states:

An overly narrow definition that limited the number of accredited investors could risk restricting businesses’ access to a crucial source of capital and be inconsistent with the

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information about the business, a discussion of risk factors, the annual report, and other material information. §230.502(b)(1)-(2).

<sup>31</sup> §230.500(a).

<sup>32</sup> Michael S. Finke & Tao Guo, *The Unsophisticated Sophisticated: Old Age and the Accredited Investors Definition*, at 2-3, (Working Paper, September 22, 2019). Available at SSRN: <https://ssrn.com/abstract=2634818>SSRN.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

Commission's capital formation mandate. An overly broad definition, on the other hand, could potentially be inconsistent with the Commission's investor protection mandate. . . . The... [In footnote 20, quoting Alternative Criteria for Qualifying As An Accredited Investor Should Be Considered] [t]he GAO Report recommended that the Commission consider alternative criteria to help determine an individual's ability to bear and understand the risks associated with investing in private placements.<sup>36</sup>

In the same report, the SEC further stated the accredited investor definition was "intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary."<sup>37</sup> This notion is embraced by the courts as well. In *In re Enron Corp. Sec., v. Enron Corp.*,<sup>38</sup> the court noted: "the concept of the accredited investor 'is intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Security Act's registration process unnecessary.'"<sup>39</sup>

Therefore, the definition aims to identify financially sophisticated individuals, wealthy individuals who could bear a loss without resulting in financial ruin, as well as individuals who have the means to hire skilled advisors, CPAs, and attorneys to guide their investment decisions.<sup>40</sup>

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<sup>36</sup> Report on the Review of the Definition of "Accredited Investor", 1 S.E.C. 1, 4-5 (Dec. 18, 2015).

<sup>37</sup> Report on the Review of the Definition of "Accredited Investor", 1 S.E.C. 1, 2 (Dec. 18, 2015). (quoting the "Regulation D Revisions Proposing Release").

<sup>38</sup> *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 761 F. Supp. 2d 504 (S.D. Tex. 2011).

<sup>39</sup> *Regulation D Revisions; Exemption for Certain Employee Benefit Plans*, Release No. 6683, 52 Fed. Reg. 3015, 3017 (Jan. 30, 1987).

<sup>40</sup> Report on the Review of the Definition of "Accredited Investor", 1 S.E.C. 1, 2 (Dec. 18, 2015).



Research supports this thinking to some extent. Wealthier investors are more likely to purchase advice from skilled advisors<sup>41</sup> and more likely to diversify their investment portfolios and lessen their overall risk.<sup>42</sup> In addition, the concept of waiving certain requirements for sales to and services performed for highly sophisticated clients or investors is not new. There are several other statutes that have similar provisions.<sup>43</sup> Accredited investors benefit from this provision by having access to investment opportunities that are generally not available to non-accredited investors, such as investments in private companies and offerings by hedge funds, private equity funds and venture capital funds.<sup>44</sup>

Interestingly, Regulation D's definition of an accredited investor addresses only some of the factors used to describe an accredited investor in the 1933 Act: financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management.<sup>45</sup> Regulation D, in an attempt to provide more guidance and eliminate confusion, redefines an accredited investor by completely ignoring the subjective factors listed of financial sophistication, knowledge, and experience.<sup>46</sup> Instead, Regulation D creates "bright-line" quantitative tests of income and net worth to identify an accredited investor.<sup>47</sup> As we noted above, the SEC stated that the accredited investor definition under Regulation D "intended to encompass those persons whose financial sophistication . . . render[s] the protections of the Securities Act's registration process unnecessary"<sup>48</sup> so it is clear that the SEC

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<sup>41</sup> Finke et al. *supra* 7.

<sup>42</sup> *Id.*

<sup>43</sup> The prohibition on performance fees is waived for services for "qualified clients" under the Advisers Act, Investment Company Act registration is waived for sales to "qualified purchasers" under the Investment Company Act, and broker-dealer registration is waived for the sale of certain securities for "qualified investors" under the Exchange Act. Report on the Review of the Definition of "Accredited Investor", 1 S.E.C. 1, 22 (Dec. 18, 2015) (Table 3.1 Comparison of Regulatory Standards).

<sup>44</sup> *Id.* at 2.

<sup>45</sup> *Goodwin Properties, LLC v. Acadia Grp., Inc.*, No. 01-49-P-C, 2001 WL 800064, at \*7 (D. Me. July 17, 2001).

<sup>46</sup> Report on the Review of the Definition of "Accredited Investor", 1 S.E.C. 1, 16 (Dec. 18, 2015).

<sup>47</sup> *Id.* at 18.

<sup>48</sup> *Id.* at 2.

intended these quantitative thresholds to serve as a proxy for financial sophistication as well as ability to sustain loss.

## B. Income and Net Worth Thresholds

The bright line tests under Regulation D are fairly simplistic. §230.501 of Regulation D defines an accredited investor as “any person who comes within any of the following categories ... at the time of the sale of the securities...”<sup>49</sup> and lists eight definitions. In this paper, we focus on the two definitions relating to the quantitative thresholds for individual investors, which are “[a]ny natural person whose individual net worth, or joint net worth with that person's spouse, ... exceeds \$1,000,000,”<sup>50</sup> and “[a]ny natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse... in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year.”<sup>51</sup> Regulation D only requires an accredited investor to meet one of the provisions, as it defined an accredited investor as “any person who comes within any of the following categories.”<sup>52</sup> Regarding the net worth test, Regulation D specifies that the calculation excludes the investor's primary residence and includes some of the residence's indebtedness.<sup>53</sup> There is no other consideration given to the quality, liquidity, and characteristics of

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<sup>49</sup> §230.501(a).

<sup>50</sup> §230.501(a)(5).

<sup>51</sup> 17 C.F.R. §230.501(a)(6) (1933).

<sup>52</sup> §230.501(a).

<sup>53</sup> *Id.* at (a)(5)(B)–(C) (“[E]xcept that if the amount of such indebtedness outstanding at the time of sale of securities exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess shall be included as a liability); and (C) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence at the time of the sale of securities shall be included as a liability.”).

the assets held.<sup>54</sup> Regulation D does not provide guidance for the calculation for income,<sup>55</sup> although in later guidance, SEC staff indicated that vested retirement contributions to profit sharing and pension plans were includible in income, but unrealized capital appreciation is not included.<sup>56</sup>

### C. Verifying Accredited Investor Status

Regulation D requires the issuer to verify the status of an investor as an accredited investor at the time of sale, and provides some guidance in how to verify accredited investor status.<sup>57</sup> § 230.506(c) of Regulation D requires issuers to take “reasonable steps” to verify that an individual meets the definition of an accredited investor,<sup>58</sup> and then sets forth “non-exclusive and non-mandatory methods of verifying” an accredited investors status.<sup>59</sup> Although these methods are not mandatory, the provision specifies they would satisfy the “reasonable steps” provision, provided the issuer does not have knowledge that the individual is in fact not actually an accredited investor.<sup>60</sup>

The statute suggests verifying an accredited investor’s status based on net worth by reviewing independent financial statements showing the investor’s assets and liabilities within the last three

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<sup>54</sup> See U.S. SEC. AND EXCH. COMM’N, REP., REP. ON THE REV. OF THE DEFINITION OF “ACCREDITED INVESTOR” 45 (2015), <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

<sup>55</sup> See § 230.501 at (A)(6). “Rule 501(a)(6) does not define the term ‘income.’” 17 C.F.R. 501(a)(6) (1933); U.S. SEC. AND EXCH. COMM’N, REP. REP. ON THE REV. OF THE DEFINITION OF “ACCREDITED INVESTOR” 41–42 (2015).

<https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>. (Explaining an income calculation based on adjusted gross income was proposed, but never adopted).

<sup>56</sup> U.S. SEC. AND EXCH. COMM’N REP., REP. ON THE REV. OF THE DEFINITION OF “ACCREDITED INVESTOR” 42 (2015), <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>. (“See Interpretive Release on Regulation D, Release No. 33-6455 (Mar. 3, 1983) [48 FR 10045] (the “Regulation D Interpretive Release”) at Q. 23.”). *Id.* at 42 no. 154.

<sup>57</sup> 17 C.F.R. § 230.506(c)(2)(ii) (1933).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

months, such as “bank statements, brokerage statements and other statements of securities holdings, certificates of deposit, tax assessments, and appraisal reports issued by independent third parties; and . . . [a] consumer report from at least one of the nationwide consumer reporting agencies[.]”<sup>61</sup> Alternatively, the issuer could obtain a written confirmation from a registered broker dealer, SEC-registered investment advisor, or a licensed attorney or certified public accountant in good standing that they have “taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such purchaser is an accredited investor.”<sup>62</sup>

A complicating factor to this issue is that even though issuers making Regulation D offerings are barred from public solicitation and advertising to some classes of investors, this activity is not barred for accredited investors.<sup>63</sup> Because a company may publicly solicit accredited investors,<sup>64</sup> the company may have no knowledge of an investor’s financial acumen due to the lack of a pre-existing relationship with the investor.

However, even though the legal burden is placed on the issuer to verify accredited investor status, once the investor affirms their status as an accredited investor, they cannot later disavow that status, even if they later believe they were not accredited<sup>65</sup> or even when the issuer admits they did not complete due diligence in verifying accredited investor status.<sup>66</sup> In *Goodwin Props., LLC.*, the investors asserted that they did not understand the nature of the business investment or the risks involved because the issuer did not

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<sup>61</sup> *Id.* at §230.506(c)(2)(ii)(B).

<sup>62</sup> *Id.* at §230.506(c)(2)(ii)(C).

<sup>63</sup> *See* § 230.506(a), (c)(2)(i).

<sup>64</sup> *Id.* at (a), (c).

<sup>65</sup> *Faye L. Roth Revocable Tr., v. UBS Painewebber, Inc.*, 323 F. Supp. 2d 1279, 1301 (S.D. Fla. 2004) (“Plaintiffs cannot disavow their representations that they were accredited investors.”); *Goodwin Props., LLC v. Acadia Grp., Inc.*, Civ. No. 01–49–P–C, 2001 WL 800064, at \*7 (D. Me. July 17, 2001) (finding the plaintiffs avowed in writing that they were accredited investors and could not later disavow their representation).

<sup>66</sup> *See* *Sec. & Exch. Comm’n v. Mahabub*, 343 F. Supp. 3d 1022, 1038 (D. Colo. 2018).

provide any relevant financial information to them, and therefore could not qualify as accredited investors because they were not financially sophisticated.<sup>67</sup> The court ruled that the investors could not disavow their accredited investor status because they had affirmed that status in writing.<sup>68</sup> This notion was affirmed by several other court decisions.<sup>69</sup> In *Mahabub*, “[the issuer] admitted, however, that he overlooked some incomplete questionnaires.”<sup>70</sup>

These court cases highlight an important issue. Although the legal liability for verifying an accredited investor’s status is incumbent on the issuer, the ramifications fall squarely on the supposed accredited investor’s shoulders. The regulation does not require the issuer to verify that the accredited investor truly understands that they will have access to less information compared to a registered security. The court noted this discrepancy in *Goodwin*, “the applicable regulatory definition of an ‘accredited investor’ does not require that the issuer have reason to believe that the purchaser had certain knowledge and experience.”<sup>71</sup> As we describe below, this becomes a critical issue as investors age, because cognitive decline may cause investors to become less financially literate, which negatively impacts their ability to understand the risks involved in an investment and to successfully manage investments.

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<sup>67</sup> See *Supernova Sys., Inc. v. Great Am. Broadband, Inc.*, No. 1:10-CV-319, 2012 WL 425552, at \*5 (N.D. Ind. Feb. 9, 2012), following the ruling in *Wright v. Nat'l Warranty Co., L.P.*, 953 F.2d 256, 260 (6th Cir. 1992) (holding that plaintiffs could not disavow their representation as accredited investors at a later time) and *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 761 F.Supp.2d 504, 532 (S.D. Tex. 2011) (holding that burden of representation falls on the plaintiffs). See also *Pinnacle Commc'ns Int'l, Inc. v. Am. Family Mortg. Corp.*, 417 F. Supp. 2d 1073, 1083 (D. Minn. 2006) and *Faye L. Roth Revoc. Tr.*, 323 F. Supp. 2d at 1301.

<sup>68</sup> *Goodwin Props., LLC*, 2001 WL 800064, at \*7–8.

<sup>69</sup> *Wright*, 953 F.2d at 260–61.

<sup>70</sup> *Mahabub*, 343 F. Supp. 3d at 1038.

<sup>71</sup> *Goodwin Props., LLC*, 2001 WL 800064, at \*7.

#### **IV. FAILURES OF THE ACCREDITED INVESTOR DEFINITION**

As discussed in Part III, the SEC's reliance on only quantitative thresholds in the accredited investor definition means that wealth and income are then used to identify individuals who are able to bear the risk of loss in investments and those who are financially sophisticated. This reliance is deeply problematic. The SEC even admitted as much in its 2015 report on the Review of the Accredited Investor Definition: "Bright-line standards, however, are necessarily under- and over-inclusive. For example, the fact that an individual has a high net worth does not necessarily mean the individual is financially sophisticated . . ." <sup>72</sup> While it is true that the SEC recently added educational criteria and work experience to the accredited investor definition to identify financially sophisticated individuals who fall below the wealth and income thresholds, there is no required education or experience criteria for individuals above the threshold. <sup>73</sup>

This gaping hole in the regulation exposes individual investors to great risk in two critical ways. First, the premise that income and wealth are reliable predictors of financial sophistication or ability to withstand investments losses is faulty. Second, the parameters of wealth and income are not adjusted for inflation and include spousal/joint assets, causing the definition to include more and more individuals as accredited investors without any correlating increase in real wealth or financial knowledge. The SEC's responses to these criticisms are speculative and the SEC offers no evidential basis for these claims. In addition, the SEC's claims are often inconsistent with the SEC's own statements and findings.

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<sup>72</sup> U.S. SEC. AND EXCH. COMM'N, REP., REP. ON THE REV. OF THE DEFINITION OF "ACCREDITED INVESTOR" 89 (2015), <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

<sup>73</sup> See 17 C.F.R. § 230.501(a) (1933).

### A. Income and Net Worth are Not Accurate Predictors of Financial Sophistication or Ability to Sustain Losses

The SEC's principle that wealth is a barometer for financial acumen and resilience is hardly reliable. While wealth and financial sophistication are positively correlated<sup>74</sup> in that wealthier investors have decreased instances of irrational financial behaviors, like excessive trading and lack of diversification,<sup>75</sup> and "economic decision-making quality increases with household wealth,"<sup>76</sup> wealth and income are not accurate predictors that the investor is truly sophisticated.<sup>77</sup> For instance, wealthier individuals may simply have access to professional financial advice but lack their own understanding of the investments.<sup>78</sup> In addition, the net worth evaluation does not require the issuer or accredited investor to evaluate the liquidity, accessibility, and solvency of the investor's assets; therefore, the investor's true ability to withstand losses is completely disregarded.<sup>79</sup> By these measures, financially unsophisticated individuals could be classified as accredited investors simply by virtue of having a respectable retirement account or a firmly upper-middle class job. These individuals could be preyed upon by disreputable issuers or negligent advisors hocking questionable investment opportunities who are under no

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<sup>74</sup> Finke, *supra* note 32, at 2–3; *see also* SECURITIES AND EXCHANGE COMM'N, REPORT ON THE REVIEW OF THE DEFINITION OF "ACCREDITED INVESTOR", (2015), 44, <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

<sup>75</sup> U.S. SEC. AND EXCH. COMM'N, REP., REP. ON THE REV. OF THE DEFINITION OF "ACCREDITED INVESTOR" 44–45 (2015), <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

<sup>76</sup> Finke, *supra* note 32, at 3.

<sup>77</sup> *See* U.S. SEC. AND EXCH. COMM'N, REP., REP. ON THE REV. OF THE DEFINITION OF "ACCREDITED INVESTOR" 44 (2015), <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>. ("See, e.g., 2013 NASAA Letter; letter from Consumer Federation of America (Sept. 23, 2013); Investor Advisory Committee Recommendation.").

<sup>78</sup> U.S. SEC. AND EXCH. COMM'N, REP., REP. ON THE REV. OF THE DEFINITION OF "ACCREDITED INVESTOR" 46 (2015), <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

<sup>79</sup> *See Id.* at 43.

obligation to disclose any information about the investment under Regulation D.

When measuring financial sophistication, subjective factors such as professional experience in the financial services, education in business subjects, and exposure to business management can clearly contribute to an individual's financial sophistication, but are difficult to measure. Other more objective factors, such as education level, ownership in tax-sheltered accounts, stock ownership; and being white, male, and married are more strongly correlated with financial sophistication, but are hardly socially appropriate criteria on which to establish accredited investor eligibility.<sup>80</sup>

Alternately, a widely-accepted objective method of determining an individual's level of financial sophistication is to assess the individual's "financial literacy." Financial literacy is the ability of an individual to understand financial theories and products,<sup>81</sup> the risks associated with financial strategies,<sup>82</sup> and the ability to budget and manage wealth.<sup>83</sup> Studies on financial literacy, such as the National Financial Capability Study conducted periodically by FINRA—an independent regulatory agency for banking and finance—involve surveying the general population with questions related to credit and debt management, investments, and financial theories like inflation and compound interest.<sup>84</sup> Other studies that measure financial sophistication include the Consumer Finance Monthly (CFM) and the Health and Retirement Study (HRS).<sup>85</sup> In these studies, financial sophistication is measured as the percentage of correct responses to financial literacy questions.<sup>86</sup>

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<sup>80</sup> Finke, *supra* note 32, at 14–15.

<sup>81</sup> Jason Fernando, *Financial Literacy*, INVESTOPEDIA, (last updated Sept. 10, 2021), <https://www.investopedia.com/terms/f/financial-literacy.asp>.

<sup>82</sup> Kristina Zucchi, *Why Financial Literacy is so Important*, INVESTOPEDIA, (last updated Apr. 28, 2021), <https://www.investopedia.com/articles/investing/100615/why-financial-literacy-and-education-so-important.asp>.

<sup>83</sup> Fernando, *supra* note 81.

<sup>84</sup> Zucchi, *supra* note 82.

<sup>85</sup> Finke, *supra* note 32, at 8.

<sup>86</sup> *Id.* at 8–9.



When analyzed against the respondents' wealth and income levels, the data from these studies shows that income and net worth do not strongly correlate to the advanced financial sophistication required to understand the types of sophisticated investments offered in the private market.<sup>87</sup> One study found that wealthy individuals often lack "the sophistication to demand access to material information or otherwise to evaluate the merits and risks of a prospective investment"<sup>88</sup> and that "[the wealthy] frequently fail to seek professional advice, particularly if they are focusing on the immediate tax consequences of an investment."<sup>89</sup> In addition, one-time windfalls such as inheritances, lawsuits, lottery winnings, and other income sources that have no bearing on the individual's financial sophistication may catapult these "nouveau riche" individuals into the accredited investor category with no corresponding increase in financial knowledge.<sup>90</sup>

In addition, net worth and income alone do not indicate that the individual is truly able to absorb the risk of loss from an investment.<sup>91</sup> The individual's assets may be primarily illiquid, which is often the case for small business owners,<sup>92</sup> or the bulk of the qualifying assets may be owned by the investor's spouse.<sup>93</sup> The quality and type of the assets owned greatly impacts an investor's ability to withstand losses, but are ignored in the accredited investor definition. The only asset that is specifically mentioned in the net

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<sup>87</sup> *Id.* at 16. "There is no empirical evidence establishing that such investors can fend for themselves, and that plenty of at least anecdotal evidence suggests that "widows and orphans" are not the only suckers in the world." Mark A. Sargent, *New Regulation D: Deregulation, Federalism and the Dynamics of Regulatory Reform*, 68 WASHINGTON UNIVERSITY LAW QUARTERLY, 226, 290 (1990).

<sup>88</sup> Manning Gilbert Warren III, *A Review of Regulation D: The Present Exemption Regimen for Limited Offerings Under the Securities Act of 1933*, 33 AM. U. L. REV. 355, 382 (1984).

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

<sup>90</sup> Finke, *supra* note 32, at 8–9.

<sup>91</sup> Warren III, *supra* note 88, at 382.

<sup>92</sup> Christina Majaski, *Illiquid*, INVESTOPEDIA, (last updated July 13, 2020), <https://www.investopedia.com/terms/i/illiquid.asp#:~:text=Some%20examples%20of%20inherently%20illiquid,often%20illiquid%20assets%20as%20well.>

<sup>93</sup> Warren III, *supra* note 88, at 382.

worth calculation is the exclusion of the investor's primary residence.<sup>94</sup>

Particularly troubling is the consequence of rising net worth levels due to accumulation of retirement funds over time.<sup>95</sup> These precious funds are exposed to more risk of loss due to reduced transparency and greater risk of the private capital market. As these funds accumulate, more and more individuals may be pulled under the accredited investor definition. However, retirement funds are hardly "play money" that can be lost with no significant consequence to the investor. The loss of retirement funds can clearly cause financial ruin for these investors and their families.

## B. Inflation and Spousal Assets Cause Over-Inclusion

In addition to the improper reliance of wealth and income to identify accredited investors, the quantitative thresholds for these factors are over-inclusive due to the inclusion of joint assets in the quantitative thresholds and the SEC's refusal to adjust the thresholds for inflation, causing increased risk that individuals who are not financially sophisticated are classified as accredited investors. The over-inclusion of the definition leaves more individuals exposed to the greater risk of the private market.

### 1. *Spousal Inclusion*

In 1988, income earned and assets held by spouses were added to the net worth and income tests.<sup>96</sup> In 2019, the SEC updated the terminology to include "spousal equivalents," which would

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<sup>94</sup> 17 C.F.R. § 230.501(a)(5) (1933).

<sup>95</sup> Finke, *supra* note 32, at 4.

<sup>96</sup> U.S. SEC. AND EXCH. COMM'N, REP., REP. ON THE REV. OF THE DEFINITION OF "ACCREDITED INVESTOR" 72 (2015), <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

recognize joint assets and income between spouses as well as cohabitating individuals such as those in civil unions and domestic partnerships.<sup>97</sup> The joint thresholds are higher than those for individual investors, but are lower than it would be if the investors were considered individually.<sup>98</sup> As a result, income and assets held by both individuals are pooled together for purposes of calculating the net worth and income for the qualifying thresholds.<sup>99</sup> Upon meeting the tests, both partners qualify as accredited investors.<sup>100</sup> As a result, unsophisticated spouses and partners are stripped of SEC registered security protection by simply contributing to household income and assets. Even if we presume that one partner is financially knowledgeable, the SEC is asking us to assume that the other spouse somehow acquires financial knowledge, perhaps through some kind of romantic osmosis.

Particularly for male–female partnerships, this is a dangerous and inaccurate assumption. Financial literacy levels for women are generally lower compared to men.<sup>101</sup> In addition, wives generally acquire more financial knowledge later in life, however, this is usually out of necessity due to their husbands' decreasing cognitive abilities as they age and because women generally outlive their husbands and must take over managing the household wealth.<sup>102</sup> Unfortunately, because the timeline for acquiring knowledge starts

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<sup>97</sup> *SEC Proposes Update to Accredited Investor Definition that Would Make Private Markets Available to More Investors*, THE NATIONAL LAW REVIEW, (Jan. 2, 2020), <https://www.natlawreview.com/article/sec-proposes-update-to-accredited-investor-definition-would-make-private-markets>; see also *Amending the Accredited Investor Definition*, 85 Fed. Reg. 2,574, 2,590, (Jan. 15, 2020) (to be codified at 17 C.F.R. pt. 230-240), <https://www.federalregister.gov/documents/2020/01/15/2019-28304/amending-the-accredited-investor-definition>.

<sup>98</sup> See *SEC Proposes Update to Accredited Investor Definition*, *supra* note 97.

<sup>99</sup> Press Release, SEC. AND EXCH. COMM'N, *SEC Proposes to Update Accredited Investor Definition to Increase Access to Investments*, (Dec. 18, 2019), <https://www.sec.gov/news/press-release/2019-265>.

<sup>100</sup> *Updated Investor Bulletin: Accredited Investors*, SEC. AND EXCH. COMM'N, (Jan. 31, 2019), <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-3>.

<sup>101</sup> Joanne W. Hsu, *Aging and Strategic Learning: The Impact of Spousal Incentives on Financial Literacy* 1,35 (Networks Fin. Inst. Working Paper 2011-WP-06, April 2011).

<sup>102</sup> *Id.* at 35–36.

so late in life, the level of financial knowledge acquired by the women may increase or even equal the level of knowledge held by the male partner at the time they become widowed, but rarely exceeds the male partner's financial literacy level.<sup>103</sup> In other words, women do acquire more financial knowledge later in life, but generally do not become more knowledgeable than their husbands.<sup>104</sup> So, if the male partner was improperly assumed to be knowledgeable because of the accredited investor definition's reliance on assets and income, the problem is exacerbated by the inclusion of potentially less knowledgeable female partners.<sup>105</sup>

## 2. Inflation

The second factor that causes over-inclusion in the accredited investor definition is the lack of an inflationary adjustment for the net worth or income thresholds. The individual income threshold of \$200,000 was set in 1982.<sup>106</sup> In 1988, the joint income threshold of \$300,000 was established and personal residences were excluded from the net worth threshold of \$1,000,000.<sup>107</sup> These thresholds have not been adjusted for inflation in over three decades.<sup>108</sup> In that time, inflation rates have significantly eroded the spending power of the dollar, and cost of living increases have caused salaries and asset values to rise without any real increase in wealth or purchasing power.<sup>109</sup> In fact, this artificial growth of wealth levels due to inflation actually decreases an investor's ability to withstand losses,

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 18–19. Data not available on same-sex partners.

<sup>106</sup> Report on the Review of the Definition of “Accredited Investor”, *supra* note 5 at 46.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 42.

<sup>109</sup> John Schmidt, *What is Inflation and How Does it Work?*, FORBES, (July, 14, 2020), <https://www.forbes.com/advisor/investing/what-is-inflation/>.

since the value of each dollar has decreased over time.<sup>110</sup> As a result, the scope of the accredited investor creeps steadily outward to capture more and more individuals simply through inflationary growth, which does not correlate in any way to financial sophistication or ability to withstand losses.<sup>111</sup> In the SEC's 2015 report "Review of the Accredited Investor Definition," the SEC acknowledged that inflation and the growth in wealth and income during the 1990s "boosted a substantial number of investors past the accredited investor standard."<sup>112</sup> The SEC also acknowledged that "inflation has increased the likelihood that the current pool of accredited investors may contain individuals the definition did not originally intend to encompass."<sup>113</sup>

To determine the impact of inflation on the accredited investor definition, one simply needs to look at the data provided by the SEC. In 1983, accredited investors by measure of income or net worth made up 1.5% of the U.S. population.<sup>114</sup> Even after the removal of the personal residence in the net worth calculation in 1988, this percentage ballooned to 10.1% as of 2013.<sup>115</sup> If adjusted for inflation, the SEC shows us that each threshold would more than double.<sup>116</sup> The percentage of the U.S. population that is defined as accredited investors through income or assets would fall from 10.1% to 3.5%–4% of the population; however, this would still be more than double than the original 1.5% of the population represented by accredited investors when the thresholds were set in 1983.<sup>117</sup> Below we share the SEC's presentation of the inflation adjusted numbers for the thresholds in the 2015 Review of the Accredited Investor Definition:<sup>118</sup>

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<sup>110</sup> Report on the Review of the Definition of "Accredited Investor", *supra* note 5 at 47. ("...inflation has eroded considerably the individual income and net worth thresholds since their adoption in 1982 and the joint income threshold since its adoption in 1988"); *see also* Schmidt, *supra* note 109.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 47.

<sup>113</sup> *Id.* at 89.

<sup>114</sup> *Id.* at 48.

<sup>115</sup> *Id.* at 48.

<sup>116</sup> Report on the Review of the Definition of "Accredited Investor", *supra* note 5 at 47.

<sup>117</sup> *Id.* at 48.

<sup>118</sup> *Id.* at 47.

	Current Standard	Current Standard Adjusted for Inflation (CPI)	Current Standard Adjusted for Inflation (PCE)
<b>Individual Income</b>	\$200,000	\$490,819	\$432,265
<b>Joint Income</b>	\$300,000	\$600,558	\$528,906
<b>Net Worth</b>	\$1,000,000	\$2,454,093	\$2,161,326 <sup>119</sup>

### 3. *The SEC's Responses to These Criticisms Lack Substance*

The SEC's own reasons for refusing to remedy the weaknesses in the definition to protect vulnerable investors are speculative, inconsistent, and unsupported with evidence. The first criticism is related to the use of quantitative thresholds to identify financially savvy investors or investors who can sustain an investment loss. Although the SEC defends its use of these thresholds in its report on the definition,<sup>120</sup> later on in the *same* report the SEC contradicts its own stance and admits that quantitative thresholds “. . . would not serve as proxies for financial sophistication or identify those individuals who are able to fend for themselves and thus may not, unless coupled with other relevant criteria, serve as effective indicators of those individuals who do not require the protections of registration.”<sup>121</sup>

The SEC made this admission in response to the suggestion that limitations should be placed on the quantitative thresholds. This begs the question, why would the SEC continue to use the threshold limitations when it fully acknowledges their ineffectiveness in the very same report?

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<sup>119</sup> *Id.* at 47.

<sup>120</sup> *Id.* at 48.

<sup>121</sup> *Id.* at 53-54.

The second criticism relates to the lack of an inflation adjustment. The SEC's response to the lack of an inflation adjustment is that the pool of accredited investors would be dramatically reduced and the private market would shrink, thereby reducing potential growth and restricting investors from diversifying their investments.<sup>122</sup> However, as noted in the same report, if adjusted for inflation, the percentage would fall to between 3.6%–4.1%, which is still three times as large as the 1983 population of accredited investors.<sup>123</sup> In addition, the SEC concedes that household income has grown faster than inflation over the past 20 years, so the number of accredited investors and the wealth available for investment in the private market will continue to grow even if the thresholds are adjusted for inflation.<sup>124</sup> In addition, wealth has grown faster for the top 5% wealthiest individuals compared to average wealth growth, so the amount of wealth available for private investments has accelerated beyond the growth at lower wealth levels.<sup>125</sup> It is clear that the private market would not be irreparably damaged if inflation adjustments were instituted. The SEC notes: "If historical trends hold in the future, adjusting accredited investor thresholds for inflation will not shrink the pool of accredited investors, relative to the number of households that would qualify based on approaches identified for consideration in the study."<sup>126</sup>

The SEC's refusal to accept its own findings is bizarre.

The third instance of an ineffective SEC response relates to retirement assets. With regard to prohibiting or limiting the inclusion of retirement assets in the net worth calculation, the SEC simply states, with no corresponding evidence or data, that this action would discourage investors from "contributing to retirement plans or even encouraging them to withdraw assets from retirement plans," and that "defining what assets are included in or excluded

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<sup>122</sup> Report on the Review of the Definition of "Accredited Investor", *supra* note 5 at 49.

<sup>123</sup> *Id.* at 48.

<sup>124</sup> *Id.* at 115-16.

<sup>125</sup> *Id.* at 115-16.

<sup>126</sup> *Id.* at 116.

from the term ‘retirement assets’ could be difficult.”<sup>127</sup> The SEC provides no further discussion as to why the complexity would outweigh the benefits of protecting retirement assets.

## **V. SEC’s Refusal to Amend is in Direct Conflict With Current Efforts in Public Policy to Protect Elders from Financial Exploitation**

As we have described in Part IV above, the SEC is well-aware of the weaknesses in the accredited investor definition and chooses not to address these concerns. However, one of the most potentially devastating impacts of the SEC’s inaction is that the definition’s weaknesses expose elderly accredited investors to the greatest risk of financial exploitation. As accredited investors age, wealth levels generally peak just as financial literacy levels sharply decline due to age-related cognitive impairment. This exposure of our vulnerable elderly population directly conflicts with public policy initiatives to protect the elderly from financial fraud and abuse, and to protect precious retirement assets. Regulators, even including the SEC, have demonstrated that this is an important policy issue. However, the SEC’s conflict with itself and with other regulatory bodies works directly against the public good.

### **A. The Relationship Between Age, Wealth, and Financial Literacy**

As accredited investors age, cognitive decline causes a marked decrease in financial literacy around age 80 and negatively impacts the decision-making skills of investors, causing a decrease in investment performance for investor-managed funds.<sup>128</sup>

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<sup>127</sup> *Id.* at 51-52.

<sup>128</sup> See generally Finke, Michael S. and Howe, John S. and Huston, Sandra J., *Old Age and the Decline in Financial Literacy*, Management Science, (August 24, 2011), available at SSRN: <https://ssrn.com/abstract=1948627>; see also Keith Jacks Gamble et



Unfortunately, cognitive decline also prevents the investor from realizing their financial knowledge and decision-making abilities, so their confidence levels remain high. The devastating confluence of reduced financial comprehension concurrent with peak wealth levels means that accredited investors are unprotected at the exact point at which the greatest amount of their assets are exposed.

The SEC is well-aware of the drop in financial literacy due to increased age and cognitive decline.<sup>129</sup> In the SEC's *Elder Financial Exploitation: Why it is a Concern, What Regulators are Doing About it, and Looking Ahead*, author Stephen Deane notes:

"Cognitive decline is a key factor, whether brought on by disease or other changes in the aging brain even without the presence of disease.<sup>130</sup> When cognitive decline begins, financial impairment is often one of the earliest signs for patients, families, and doctors."<sup>131</sup>

Prior to the impact of cognitive decline around age 80, financial literacy scores for accredited investors tend to rise until the age of retirement and are higher than scores for non-accredited investors in the same age categories.<sup>132</sup> In addition, higher financial literacy scores are positively associated with the respondent being an accredited investor compared to unaccredited investors.<sup>133</sup>

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al., *Aging and Financial Decision Making*, Management Science (2015), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2165564](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2165564).

<sup>129</sup> SECURITIES AND EXCHANGE COMM'N, *Elder Financial Exploitation*, (2018), i, <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

<sup>130</sup> *Id.* at i.

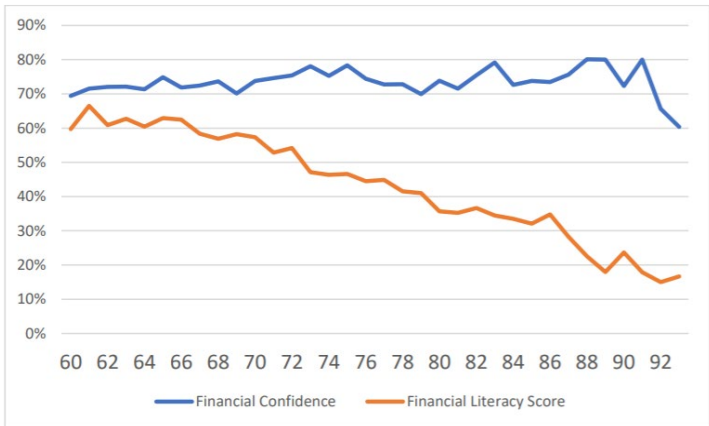
<sup>131</sup> *Id.*

<sup>132</sup> Finke, Michael S. and Guo, Tao, *The Unsophisticated Sophisticated: Old Age and the Accredited Investors Definition*, at 12-14, (Working Paper, September 22, 2019). Available at SSRN: <https://ssrn.com/abstract=2634818>; ("Predictors of cognition show a nearly identical age-related decline in performance among accredited investors after age 80. Accredited investors age 80 and older have cognitive ability scores that are 16% lower than non-accredited investors age 60-64, while non-accredited investors age 80 and older have 14% lower cognition scores.")

<sup>133</sup> *Id.* at 13, 15. ("However, at age 80 and older, more financially literate respondents are not more likely to be an accredited investor, and respondents younger than age 40 are less likely to be accredited if they are more financially literate. Among respondents age 60-

However, as demonstrated in the table below prepared by researchers Finke, Huston, and Howe on the impact of cognitive decline on financial literacy, after age 60, financial literacy scores for both accredited and unaccredited investors begin to fall.<sup>134</sup>

**Figure 1: Age, Financial Literacy, and Financial Confidence**



Source: Finke, Huston and Howe, 2017. Data from the 2008-2011 *Consumer Finance Monthly* survey.

As accredited investor’s wealth levels peak around age 80, the impact of cognitive decline causes financial literacy to decline by almost half.<sup>135</sup> After age 80, the literacy scores for accredited investors is lower than scores for every age group of unaccredited

64, accredited investors are 121% more likely to have high financial literacy than unaccredited respondents of the same age.”)

<sup>134</sup> *Id.* at 5, 12, 15. (“By contrast, scores for nonaccredited investors tend to stay at the same levels before declining around age 60.”)

<sup>135</sup> Keith Jacks Gamble et al., *Aging and Financial Decision Making*, Management Science (2015), 15, available at

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2165564](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2165564); Finke, *supra* note 129 at 14-15, (“Predicted scores among accredited respondents age 75-59 are 12% lower than non-accredited respondents age 60-64, and predicted scores among accredited respondents age 80 and older are 19.4% lower. The percentage of financial literacy questions correctly answered among accredited investors age 80 and over was about half (45.7%) the score at age 60-64 (78.4%)”).

investors under age 75.<sup>136</sup> Accredited respondents age 80 and above are between 83% - 87% less likely to have high financial literacy scores than younger unaccredited investors.<sup>137</sup> Accredited investors aged 80 and above scored 18.4% lower than among unaccredited respondents age 60-64.<sup>138</sup>

In addition to decreasing financial literacy, older individuals appear to rely more on emotion when assessing risk.<sup>139</sup> As investors age, they lose the ability to effectively assess risk and manage investments, causing investment performance to decline.<sup>140</sup> Investment performance for investors over age 70 is about 3% lower than younger investors, and this increases to 8.3% for older, wealthier investors.<sup>141</sup>

The pernicious effect of cognitive decline extends even further than causing a decline in financial literacy. As individuals age, they also lose the healthy cynicism and critical assessment necessary to identify overly boastful or unrealistic claims.<sup>142</sup> Older investors are more likely to believe “deceptive and misleading advertisements and (buy) falsely advertised products”<sup>143</sup> and are less likely to doubt “false and far-fetched claims”.<sup>144</sup> Similarly, they become unable to infer the intentions of others, including those with the intent to deceive.<sup>145</sup> The risk of elderly individuals being preyed upon by unscrupulous financial advisors is obvious. Cognitive decline is a leading reason “why highly knowledgeable and intelligent older people are often susceptible to deception and fraud.”<sup>146</sup> “Older adults are disproportionally credulous . . . (which has) obvious and

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<sup>136</sup> Finke, *supra* note 132 at 13, 15.

<sup>137</sup> *Id.* at 4-5. (“We find that older accredited investors have significantly lower financial sophistication than younger accredited investors, and after age 80 have lower financial sophistication scores than younger unaccredited investors.”)

<sup>138</sup> *Id.* at 14.

<sup>139</sup> Gamble et al., *supra* note 135 at 15.

<sup>140</sup> Finke, *supra* note 132 at 3.

<sup>141</sup> *Id.* at 14.

<sup>142</sup> Elder Financial Exploitation, *supra* note 129 at 3.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

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

direct implications for older persons' vulnerability to financial fraud."<sup>147</sup>

A particularly cruel effect of cognitive decline is that the victims do not realize their skills have decreased, and therefore don't realize they cannot rely on their own judgement.<sup>148</sup> As age increases, financial literacy declines by approximately half from age 60 to 92, with only a slight decrease in financial confidence.<sup>149</sup> Elderly investors become less able to recognize their own decline and ability to manage investments over time.<sup>150</sup> Individuals in their 70s do not rate their sensory abilities as poor any more so than individuals in their 50s despite significant declines in their measured ability.<sup>151</sup> Therefore, an older investor may not realize they need to seek expertise from an advisor to understand the risks involved, because they felt comfortable with these types of investments in the past.

## B. The Social Ill of Elder Financial Abuse

The financial impact of decreased financial literacy upon aging individuals is that financial exploitation of elderly individuals has received more and more attention from social policy groups and regulators over time. Elderly individuals who have accumulated significant assets over their lifetime are often targeted for financial abuse.<sup>152</sup> In 2011, the net worth of households headed by someone

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<sup>147</sup> *Id.*

<sup>148</sup> Finke, *supra* note 132 at 3.

<sup>149</sup> Gamble et al., *supra* note 135 at 3; see generally Finke, Michael S. and Howe, John S. and Huston, Sandra J., *Old Age and the Decline in Financial Literacy*, Management Science, (August 24, 2011).

<sup>150</sup> See generally Finke, Michael S. and Howe, John S. and Huston, Sandra J., *Old Age and the Decline in Financial Literacy*, Management Science, (August 24, 2011); see also Keith Jacks Gamble et al., *Aging and Financial Decision Making*, Management Science (2015), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2165564](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2165564).

<sup>151</sup> Gamble et al., *supra* note 135 at 3; see generally Finke, Michael S. and Howe, John S. and Huston, Sandra J., *Old Age and the Decline in Financial Literacy*, Management Science, (August 24, 2011).

<sup>152</sup> Elder Financial Exploitation, *supra* note 129 at 1.

aged 65 or older totaled approximately \$17.2 trillion.<sup>153</sup> Americans over the age of 50 currently account for 77% of financial assets in the United States, according to the Securities Industry and Financial Markets Association (SIFMA).<sup>154</sup> By 2013, households headed by someone aged 65 or older had a median net worth of \$202,950, including \$80,000 in retirement accounts.<sup>155</sup> Approximately 20% of accredited investors, or about 2.5 million individuals, are retirees.<sup>156</sup> Nearly one in five accredited investors is age 75 or older, and these older accredited investors control about 13% of total household wealth.<sup>157</sup> In contrast, only 9.5% of unaccredited investors are age 75 or older, and these older households own 4.1% of total wealth.<sup>158</sup>

Unfortunately, retirees who have fastidiously saved for retirement are at the greatest risk of financial exploitation. According to some studies, elder financial exploitation is emerging as the most prevalent form of elder abuse.<sup>159</sup> An estimated 2.7% to 6.6% of elders experience financial abuse.<sup>160</sup> For every documented case of elder financial exploitation, 44 went unreported according to a New York state study.<sup>161</sup> Abuse and fraud from financial professionals such as advisors and attorneys accounted for 18% of the reported cases.<sup>162</sup> The types of abuse included insurance misrepresentation and theft and predatory lending.<sup>163</sup>

The effects of financial abuse on elder individuals are staggering. The 2011 MetLife Study of Elder Financial Abuse estimates the total financial loss from elderly fraud at “at least \$2.9

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Report on the Review of the Definition of “Accredited Investor”, *supra* note 5 at 51.

<sup>157</sup> Finke, *supra* note 132 at 12.

<sup>158</sup> *Id.*

<sup>159</sup> SECURITIES AND EXCHANGE COMM’N, Elder Financial Exploitation, (2018), i, <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Broken Trust: Elders, Family, and Finances, MetLife Mature Market Institute, (March 2009), at 12, <https://www.giaging.org/documents/mmi-study-broken-trust-elders-family-finances.pdf>.

<sup>163</sup> *Id.* at 14.

billion.”<sup>164</sup> The CFPB estimated more than \$6 billion in attempted and actual losses due to elder financial abuse between 2013 and 2017.<sup>165</sup> A research project by New York State estimated victims’ annual losses at \$109 million.<sup>166</sup> In addition to direct financial loss to the victims, public costs are incurred in investigating and intervening in cases of elder financial exploitation.<sup>167</sup> Just in New York State, those costs are estimated at more than \$14.5 million.<sup>168</sup> In 2017, there were 63,500 reports of suspicious financial activity involving elders totaling \$1.7 billion in claimed losses.<sup>169</sup> The U.S. Consumer Financial Protection Bureau estimates the average loss per victim at \$34,200.<sup>170</sup> People ages 80 and older suffered the second-highest average loss, \$39,200.<sup>171</sup> Even worse, if a fiduciary was behind the loss, the amount of money involved was steeper than in any other category, for an average of \$83,600 per victim.<sup>172</sup>

Specifically, retirement assets make up a significant portion of the assets accumulated. As of 2017, retirement assets reached \$28.2 trillion and accounted for 43.8% of all household financial assets in the United States for householders aged 65 and older.<sup>173</sup> The risk to elder individuals who may lose their retirement savings is clear. As more and more retirement plans shifted to defined contribution, rather than defined benefit, the exposure of these funds to loss becomes significant.<sup>174</sup> Some industry experts have called for an

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<sup>164</sup> SECURITIES AND EXCHANGE COMM’N, Elder Financial Exploitation, (2018), 14, <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

<sup>165</sup> Katherine Skiba, *Older Americans Hit Hard by Financial Abuse Fraud*, AARP, (Feb. 28, 2019), <https://www.aarp.org/money/scams-fraud/info-2019/cfpb-report-financial-elder-abuse.html>

<sup>166</sup> SECURITIES AND EXCHANGE COMM’N, Elder Financial Exploitation, (2018), i, <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Skiba, *supra* note 165.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> SECURITIES AND EXCHANGE COMM’N, Elder Financial Exploitation, (2018), 5, <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

<sup>174</sup> *Id.* at 4.

exclusion or limitation of retirement assets in the net worth calculation for this reason.<sup>175</sup> With a defined benefit plan, a perpetrator could only target a periodic retirement payment.<sup>176</sup> With a defined contribution plan, however, the perpetrator can target the entire account balance.<sup>177</sup> The shift from defined benefit to defined contribution plans has placed responsibility onto the elderly themselves to manage their retirement savings—ironically, just at a time in their lives when their ability to do so may become impaired.<sup>178</sup> The devastating impact to the victims cannot be understated. Elder individuals take longer to find employment<sup>179</sup> and do not have a long enough timeline to recoup their losses even if they were to obtain work.<sup>180</sup> These individuals without sufficient resources must turn to government benefit programs such as Medicare and Social Security Income just to survive.<sup>181</sup>

Like a bee to honey, bad actors gravitate towards these vulnerable investors. Brokerage firms with a high percentage of advisers who have records of prior misconduct tend to aggregate in areas with a high percentage of residents over age 65.<sup>182</sup> In 2019, the SEC charged a broker of unregistered securities with operating

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<sup>175</sup> SECURITIES AND EXCHANGE COMM’N, REPORT ON THE REVIEW OF THE DEFINITION OF “ACCREDITED INVESTOR”, (2015), 44, 51, <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>, (“See, e.g., letters from North American Securities Administrators Association, Inc. (Sept. 27, 2013) (the “2013 NASAA Letter”); AFL-CIO (Sept. 23, 2013) (the “AFL-CIO Letter”); Investment Company Institute (Sept. 23, 2013) (the “ICI Letter”).

<sup>176</sup> SECURITIES AND EXCHANGE COMM’N, Elder Financial Exploitation, (2018), 4, <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

<sup>177</sup> *Id.* at 4.

<sup>178</sup> *Id.* at i.

<sup>179</sup> Maurie Backman, *Laid Off in Your 60s? Here’s What to Do Next*, The Motley Fool, (May 18, 2017), <https://www.fool.com/retirement/2017/05/18/laid-off-in-your-60s-heres-what-to-do-next.aspx>.

<sup>180</sup> Erika Beras, *Seniors Are Still Struggling to Recover After the Financial Crisis*, MARKETPLACE, (Dec. 19, 2018), <https://www.marketplace.org/2018/12/19/seniors-still-affected-financial-crash/>.

<sup>181</sup> Statistics and Data, NATIONAL CENTER FOR ELDER ABUSE, <https://ncea.acl.gov/What-We-Do/Research/Statistics-and-Data.aspx#41> (last visited October 15, 2020).

<sup>182</sup> Finke, Michael S. and Guo, Tao, *The Unsophisticated Sophisticated: Old Age and the Accredited Investors Definition*, at 8, (Working Paper, September 22, 2019). Available at SSRN: <https://ssrn.com/abstract=2634818>.

a \$1.2 billion Ponzi scheme fraud that targeted seniors.<sup>183</sup> In another case, two financial advisors invested their elderly accredited investor clients' money into a "speculative" fund with a "high degree of risk" limited to "accredited investors...because of the high risk and speculative nature of the fund."<sup>184</sup> The advisors disclosed the risks involved to the clients, however were able to persuade the clients to approve the investment by misrepresenting the safety of the fund and claiming that the fund could return profits to the clients "in three years with a return of nine percent per year."<sup>185</sup> The court later found "[i]n breach of their fiduciary duty, [the advisors] advised several elderly and/or retired clients to invest in the Fund without preparing them to lose their entire investment."<sup>186</sup>

This problem will only become worse with time as financial products become more complex. Financial product and process innovation over the past three decades have led to more complex financial markets while greatly expanding the set of available investment opportunities.<sup>187</sup> However, they will be unable to perceive their own lack of comprehension of these complex products. In fact, confidence in their ability to manage their own finances and their confidence in their financial knowledge do not decrease with drops in measured cognition.<sup>188</sup> As a result, an older individuals' ability to understand the risks and structure of the products becomes less feasible.

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<sup>183</sup> Finke, Michael S. and Guo, Tao, *The Unsophisticated Sophisticated: Old Age and the Accredited Investors Definition*, at 3, (Working Paper, September 22, 2019). Available at SSRN: <https://ssrn.com/abstract=2634818>.

<sup>184</sup> Sec. & Exch. Comm'n v. MAM Wealth Mgmt., LLC, No. CV1102934SJOJCX, 2012 WL 13008348, at \*1 (C.D. Cal. July 2, 2012).

<sup>185</sup> *MAM Wealth Mgmt., LLC*, 2012 WL 13008348, at \*1.

<sup>186</sup> *MAM Wealth Mgmt., LLC*, 2012 WL 13008348, at \*1.

<sup>187</sup> SECURITIES AND EXCHANGE COMM'N, REPORT ON THE REVIEW OF THE DEFINITION OF "ACCREDITED INVESTOR", (2015), 44, 51, <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

<sup>188</sup> Keith Jacks Gamble et al., *Aging and Financial Decision Making*, Management Science (2015), 15, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2165564](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2165564).



Regulators recognize the importance of protecting the elderly from financial abuse and have taken many steps to institute protective measures. In recent decades, the protection of the elderly from financial abuse and fraud has been a primary focus of many regulatory actions. At the federal level, the Consumer Financial Protection Bureau and the Department of Justice have devoted many educational resources to elderly individuals and caregivers aimed at identifying and preventing financial abuse of elders.<sup>189</sup> The Financial Industry Regulatory Authority (FINRA) issued two rule changes for broker-dealers in February 2018.<sup>190</sup> The FINRA rules allow financial firms to place a temporary hold on disbursements from the accounts of certain clients when financial exploitation is suspected.<sup>191</sup> Previously, firms were cautious to defer or delay a transaction requested by an investor because they could be found liable for violating other FINRA rules, such as a requirement to follow a customer's instructions.<sup>192</sup> One of the rules allows broker-dealers to place a temporary hold on disbursements from a client's account when elder financial exploitation is suspected.<sup>193</sup> The other rule seeks to facilitate communication between a firm and a customer's trusted contact to address possible financial exploitation.<sup>194</sup> At the state level, 13 states have adopted laws that would permit certain financial firms to pause disbursements when financial exploitation is suspected.<sup>195</sup> The state laws are patterned on the Model Act, which was adopted two years ago by the North

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<sup>189</sup> Money Smart for Older Adults, BUREAU OF CONSUMER FINANCIAL PROTECTION AND FEDERAL DEPOSIT INSURANCE CORPORATION, (Sept. 2018), [https://files.consumerfinance.gov/f/documents/201703\\_cfpb\\_money-smart-for-older-adults-resource-guide.pdf](https://files.consumerfinance.gov/f/documents/201703_cfpb_money-smart-for-older-adults-resource-guide.pdf); *see also* National Elder Fraud Hotline, OFFICE FOR VICTIMS OF CRIME, DEPARTMENT OF JUSTICE, <https://stopelderfraud.ovc.ojp.gov/> (last visited October 13, 2020).

<sup>190</sup> SECURITIES AND EXCHANGE COMM'N, Elder Financial Exploitation, (2018), i, <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 15.

<sup>193</sup> *Id.* at 15.

<sup>194</sup> *Id.* at 15.

<sup>195</sup> *Id.* at 15.

American Securities Administrators Association (NASAA), the association of state securities regulators.<sup>196</sup>

Although the FINRA rules are a good first step, they only *permit* the hold on disbursements, but do not *require* a hold if financial exploitation is suspected.<sup>197</sup> The rules do not provide immunity from a civil lawsuit by a disgruntled customer or a legal representative of one.<sup>198</sup> Nonetheless, it might be expected that a broker-dealer's legal defense might point to the safe harbor provisions to argue that the actions were reasonable.<sup>199</sup>

Another limitation of the FINRA rules is that they permit pauses only for disbursements, not from transactions.<sup>200</sup> In addition, the pauses are only allowed in cases of suspected financial exploitation, but not in instances of suspected diminished financial or cognitive capacity.<sup>201</sup> However, the rule does allow the broker to inform the trusted contact of suspected diminished capacity.<sup>202</sup> Imagine, for example, that a customer were making bad financial decisions not because she was being exploited, but solely as a result of Alzheimer's disease or other cognitive impairment.<sup>203</sup> In this case, neither the FINRA Rule 2165 nor the Model Act would allow the broker to place a hold on disbursements from the account.<sup>204</sup>

The SEC's refusal to amend the definition in light of decades of criticism, and even acknowledging its own weaknesses, borders on

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<sup>196</sup> SECURITIES AND EXCHANGE COMM'N, Elder Financial Exploitation, (2018), 15, <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 17.

<sup>200</sup> *Id.* at 17.

<sup>201</sup> *Id.* at 17.

<sup>202</sup> SECURITIES AND EXCHANGE COMM'N, Elder Financial Exploitation, (2018), 17, <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

<sup>203</sup> *Id.* at 17.

<sup>204</sup> Acknowledging this limitation, FINRA observed that diminished capacity is an important issue for future consideration. SECURITIES AND EXCHANGE COMM'N, Elder Financial Exploitation, (2018), 17, <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

intentional negligence that flies in the face of its own public policy initiatives.<sup>205</sup>

## V. RECOMMENDATIONS FOR AMENDING THE ACCREDITED INVESTOR DEFINITION

The SEC has taken the stance that amending the accredited investor definition would devastate the private market, and buries its head in the sand with regard to the impact on the elderly. In this section, we provide recommendations the SEC can implement that would help protect elderly accredited investors while still enabling a robust private market. Many of these recommendations have been put forth by SEC staff themselves, however, we specifically tailor these recommendations for the elderly.<sup>206</sup>

One of the simplest and most common-sense approaches is to enact dual thresholds for younger and older accredited investors. We recommend adjusting the individual and spousal income and net worth thresholds for inflation for investors above age 80.<sup>207</sup> The thresholds could be adjusted annually or periodically, for example, every four years.<sup>208</sup> The adjusted thresholds would be applied to any new investments only. Elderly investors who qualified as accredited investors previously, but are now not eligible due to the increased thresholds, could continue to invest in any investments made prior to age 80. In this way, the private market can still thrive through younger accredited investors, while the instances of elderly individuals being catapulted into accredited investor territory simply

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<sup>205</sup> In 2007, several amendments to the definition were proposed but ultimately failed to be adopted, including changing net worth of \$1m to investments of \$750,000 (showing intent that this should be geared towards investors), adjusting the thresholds for inflation, and providing disclosure and consent requirements for the jointly owned test. SECURITIES AND EXCHANGE COMM'N, REPORT ON THE REVIEW OF THE DEFINITION OF "ACCREDITED INVESTOR", (2015), 20, <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

<sup>206</sup> SECURITIES AND EXCHANGE COMM'N, REPORT ON THE REVIEW OF THE DEFINITION OF "ACCREDITED INVESTOR", (2015), 89, <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

<sup>207</sup> *Id.* at 90.

<sup>208</sup> *Id.* at 91.

due to the impact of inflation at the same time that wealth levels are peaking will be greatly reduced. As we described above, the pool of accredited investors and their associated wealth will continue to grow even with inflationary adjustments.

Another simple solution is to implement investment limitations based on the ratio of certain type of assets in the net worth evaluation for accredited investors above age 80. The SEC staff made the following suggestions in the 2014 Report:

The Commission could consider leaving the current income and net worth thresholds in the accredited investor definition in place, but limiting investments for individuals who qualify as accredited investors solely based on those thresholds to a percentage of their income or net worth (e.g., 10% of prior year income or 10% of net worth, as applicable, per issuer, in any 12-month period).<sup>209</sup>

This simple protection would ensure that even if an investment failed, the remaining portfolio of assets could sustain the necessary living expenses of the investor.

Another provision would be to enact proscriptive measures to protect the most precious types of assets from an investment failure. For example, the definition could require a “liquidity safety net” to exist with regard to these assets. For example, an accredited investor above age 80 would be eligible only if a certain percentage of their portfolio comprised of readily liquid assets after the potential investment is made. Alternately, certain assets, like retirement assets, could be excluded or restricted from being utilized for private investments.<sup>210</sup> Therefore, if the investment completely fails, the investor is ensured a safety net of cash to rely on and a devastating financial collapse is avoided.

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<sup>209</sup> *Id.* at 90.

<sup>210</sup> *Id.* at 51.

A non-quantitative guardrail that could be instituted is to require a financial advisor to certify investment decisions for accredited investors. This requirement would ensure that the accredited investor had access to professional advice, and would help to reduce the instances preying on the elderly by providing negligent or malicious financial advice by holding the financial advisor partially accountable for the investment decisions made.<sup>211</sup>

These simple guardrails can help shield vulnerable elderly investors from falling victim to bad financial advice, while leaving the rest of the private market unchanged.

## **VI. Conclusion**

The fact that the accredited investor definition relies on a faulty premise and is over-inclusive is long-standing and well-known to the SEC. However, the greatest malignant effect of these deficiencies is that elderly investors who have fastidiously saved for retirement may lose their financial acumen due to cognitive decline and are therefore left exposed to fraudulent or negligent financial advice. The plight of financial abuse of the elderly is a significant societal issue that even the SEC has acknowledged. To counteract the risks to the elderly, guardrails can be instituted for investors above age 70, when cognitive decline begins to wreak havoc on the mind. These guardrails include implementing inflation-adjusted thresholds for net income and net worth, restricting total annual new investments to a percentage of total income or net worth, restricting or limiting investments made from retirement assets, requiring a safety net of retirement or liquid assets exists after a potential investment is made, and requiring an elderly investor to be represented by a financial advisor for private investments. By instituting one or more of these simple additional protections within the accredited investor definition, elderly investors can be sheltered from devastating financial loss and the private investment market can continue to grow and thrive.

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<sup>211</sup> Finke, Michael S. and Guo, Tao, *The Unsophisticated Sophisticated: Old Age and the Accredited Investors Definition*, at 5, (Working Paper, September 22, 2019). Available at SSRN: <https://ssrn.com/abstract=2634818>.

# EXPANSIONS OF MEDIGAP CONSUMER PROTECTIONS ARE NECESSARY TO PROMOTE HEALTH EQUITY IN THE MEDICARE PROGRAM

*Kata Kertesz<sup>1</sup>*

## Introduction

This article will set out how expansions of consumer protections for private Medigap supplemental insurance are necessary to promote health equity in the Medicare program. Currently, individuals over age 65 who enroll in traditional Medicare during their initial enrollment period have only a six-month window in which to purchase a Medigap plan, without health underwriting (screening), that covers the remaining, often substantial, out-of-pocket costs in traditional Medicare. These costs include co-insurance and deductibles. In most states, after the six-month window ends, an individual who decides to enroll in a Medigap plan may be subject to higher premiums because of pre-existing conditions or may be rejected outright by health underwriting (screening). If enrolled in a private Medicare Advantage plan for the first time, then individuals can only have access to a Medigap plan if they switch to traditional Medicare during their first year in the Medicare Advantage Plan, the 12-month trial period. Individuals under 65 who become eligible for Medicare due to permanent long-term disabilities have even fewer protections; Medigap insurance companies may deny coverage for this population completely. The

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variability in state protections is due to the lack of comprehensive federal Medigap consumer protections.

This article will outline the background of Medigap and Medicare Advantage and discuss how the limited federal consumer protections in Medigap create barriers for individuals who wish to exit Medicare Advantage in order to enroll in traditional Medicare. Without the financial protection of a Medigap plan to cover many out-of-pocket costs in traditional Medicare, and without an annual out-of-pocket limit on cost-sharing for services covered under Parts A and B in traditional Medicare, many beneficiaries cannot afford to switch from a Medicare Advantage plan to traditional Medicare, even if Medicare Advantage is not best serving their needs. This article reviews the research on the challenges associated with Medicare Advantage for many older, sicker Medicare beneficiaries, and beneficiaries of color, including problems related to limited provider networks and higher out-of-pocket costs, and the health equity considerations these issues raise. Together, this will demonstrate the link between limited federal consumer protections in Medigap, the forced reliance on Medicare Advantage plans, and the resulting equity concerns. The article will conclude with a discussion of possible federal consumer protections that could reduce some of these barriers and improve health equity. These include expanding guaranteed issue for the under 65 Medicare population and expanding enrollment opportunities. The considerations aim to expand consumer protections while limiting increases in Medigap premiums for all beneficiaries.

## **Health Equity**

At the outset, it is important to outline what “health equity means.” While definitions of health equity may vary slightly depending on the source, there are general principles central to all variations. The Office of Health Equity at the Health Resources & Services Administration defines health equity as “the absence of disparities or avoidable differences among socioeconomic and demographic groups or geographical areas in health status and

health outcomes such as disease, disability, or mortality.”<sup>2</sup> The Robert Wood Johnson Foundation (RWJF), which bills itself as the nation’s largest philanthropy dedicated solely to health, provides the following definition, “everyone has a fair and just opportunity to be as healthy as possible. This requires removing obstacles to health such as poverty, discrimination, and their consequences, including powerlessness and lack of access to good jobs with fair pay, quality education and housing, safe environments, and health care.”<sup>3</sup> Central to this discussion is the understanding that health equity entails recognizing and limiting disparities in treatment, access, or costs of care that are not explained by differences in individual preferences or health status.

## **Financial Background of Medicare Beneficiaries**

Medicare is a social insurance program with a defined benefit, which beneficiaries pay into during their working years. Created in 1965, Medicare provides federal health insurance for people ages 65 and over, regardless of their income. The program was expanded in 1972 to cover certain people under age 65 who have a long-term disability. The total number of Medicare beneficiaries in 2020 reached almost 62 million people.<sup>4</sup> The program helps to pay for many medical care services, including hospitalizations, physician visits, prescription drugs, preventive services, skilled nursing facility, home health care, and hospice care.

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<sup>2</sup> Health Resources & Services Administration, *Office of Health Equity*, HRSA (Oct. 2020) <https://www.hrsa.gov/about/organization/bureaus/ohe/index.html>.

<sup>3</sup> P. Braveman, E. Arkin, T. Orleans, D. Proctor and A. Plough, *What is Health Equity?* ROBERT WOOD JOHNSON FOUND., (May 1, 2017), <https://www.rwjf.org/en/library/research/2017/05/what-is-health-equity-.html>.

<sup>4</sup> Kaiser Family Foundation (KFF), *Total Number of Medicare Beneficiaries (2020)*, <https://www.kff.org/medicare/state-indicator/total-medicare-beneficiaries/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.



Medicare completely changed the landscape of health care access in the country, lifting millions of older adults out of poverty. Medicare's promise is that all older adults can age with dignity and know that they will have fair access to affordable health care, thereby supporting families as well as older adults. Before Medicare's enactment in 1965, only about 50% of older adults had health insurance<sup>5</sup> and about 30% lived in poverty.<sup>6</sup> The guaranteed coverage Medicare provides, regardless of income, medical history, or health status, has enhanced the health and financial security of older people and their families. Because of Medicare, virtually all Americans 65 or older are insured.<sup>7</sup>

Despite all that Medicare provides, there are out-of-pocket costs that are left for beneficiaries to cover. Traditional Medicare has deductibles for Parts A<sup>8</sup> (inpatient) and B (physician and outpatient) services, 20% coinsurance for most Part B items and services, and copayments for inpatient hospital and skilled nursing facility stays exceeding a certain number of days.<sup>9</sup> There is no maximum amount beneficiaries can incur in out-of-pocket costs each year for A and B services in traditional Medicare.<sup>10</sup> As a result, these costs can become substantial.

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<sup>5</sup> Karen Davis, Cathy Schoen & Farhan Bandeali, *Medicare: 50 Years of Ensuring Coverage and Care*, The Commonwealth Fund (April 2015)

[https://www.commonwealthfund.org/sites/default/files/documents/\\_\\_\\_media\\_files\\_publications\\_fund\\_report\\_2015\\_apr\\_1812\\_davis\\_medicare\\_50\\_years\\_coverage\\_care.pdf](https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_fund_report_2015_apr_1812_davis_medicare_50_years_coverage_care.pdf).

<sup>6</sup> Ctr. for Medicare Advocacy, 50 Insights for Medicare's 50<sup>th</sup> Anniversary, (Jan. 2015) <https://medicareadvocacy.org/50-insights-for-medicare-50th-anniversary/>.

<sup>7</sup> Davis, Schoen & Bandeali, *supra* note 5, finding that in 2015, only 2% of Americans 65 and older had no insurance.

<sup>8</sup> In general, Part A also covers home health care, hospice care, and skilled nursing facility care.

<sup>9</sup> Ctr. for Medicare & Medicaid Serv., (CMS), *2021 Medicare Parts A and B premiums and deductibles*, CMS.GOV (Nov. 6, 2020), <https://www.cms.gov/newsroom/fact-sheets/2021-medicare-parts-b-premiums-and-deductibles>.

<sup>10</sup> *Medicare & You 2022*, National Medicare Handbook No. 10050, at 6 (Dec. 2021) <https://www.medicare.gov/Pubs/pdf/10050-medicare-and-you.pdf>. While this official government guide is a valuable resource for information, there has been much advocacy among consumer advocates to remove bias toward Medicare Advantage in the Medicare and You Handbook annual iterations, *see* Ctr. for Medicare Advocacy, *MEDICARE & YOU 2022 – An Important First Step Towards Reversing Bias in Favor of Medicare Advantage*, MEDICARE ADVOCACY.ORG (Sept. 20, 2021),

Background information on Medicare beneficiaries' average income and assets provides helpful context for a discussion of out-of-pocket costs and health care spending. Half of all Medicare beneficiaries had incomes below \$29,650 per person in 2019; one quarter had incomes below \$17,000 per person in 2019.<sup>11</sup> It is also significant to note the disparities in income and savings based on race and ethnicity. Median per capita income was considerably higher for beneficiaries who were White (\$33,700) when compared to those who were Black (\$23,050) or Hispanic (\$15,600).<sup>12</sup> Median per capita income was substantially lower for beneficiaries under age 65 with permanent disabilities (\$19,550) than among older adults.<sup>13</sup>

In 2019, half of all Medicare beneficiaries had less than \$73,800 in savings per person, and one quarter of all beneficiaries had savings below \$8,500 per person, while 12% had zero savings or were in debt.<sup>14</sup> The percentage of Black (25%) and Hispanic (27%) Medicare beneficiaries with no savings in 2019 was much higher than the percentage of White (8%) Medicare beneficiaries with no savings.<sup>15</sup> Median savings among beneficiaries under age 65 with disabilities (\$34,050) were significantly lower than among older adults (\$83,850).<sup>16</sup>

Given the limited income and assets for the majority of beneficiaries, particularly for communities of color, the out-of-

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<https://medicareadvocacy.org/wp-content/uploads/2021/09/Medicare-You-2022.pdf?emci=144750ab-161a-ec11-981f-501ac57ba3ed&emdi=ea000000-0000-0000-0000-000000000001&ceid={{ContactsEmailID}}>.

<sup>11</sup> Wyatt Koma, Tricia Neuman, Gretchen Jacobson & Karen Smith, *Medicare Beneficiaries' Financial Security Before the Coronavirus Pandemic*, KFF (Apr. 24, 2020), <https://www.kff.org/medicare/issue-brief/medicare-beneficiaries-financial-security-before-the-coronavirus-pandemic/>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

pocket costs in Medicare can be crushing. In 2016, the average Medicare beneficiary spent \$5,460 out-of-pocket for health care, including premiums, cost-sharing, and expenses for services not covered by Medicare.<sup>17</sup> Women, persons aged 85 and over, individuals who have multiple chronic conditions, and individuals who do not have any source of supplemental coverage had significantly higher expenses than others.<sup>18</sup> Beneficiaries without supplemental coverage were more likely to have lower incomes and be age 85 or older; among beneficiaries with no supplemental coverage in 2016, the average out-of-pocket costs were \$7,473.<sup>19</sup>

According to a 2021 Kaiser Family Foundation analysis, the estimated average monthly premiums for Medigap policies, insurance plans that are designed to fill in some of the gaps of traditional Medicare, including deductibles, coinsurance, and copays, range from \$150 to around \$200.<sup>20</sup> The Medicare Payment Advisory Commission (MedPAC), the nonpartisan legislative branch agency that provides the U.S. Congress with analysis and policy advice on the Medicare program, estimated in its “March 2021 Report to Congress” that beneficiary spending on Medicare premiums and cost sharing consumed “24% of the average Social Security benefit in 2020, up from 14% in 2000.”<sup>21</sup>

A large percentage of Medicare beneficiaries have supplemental insurance either through retiree benefits, Medicaid for those who meet state eligibility requirements, or a Medigap plan. In 2018, the most recent date for which data is available, most traditional

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<sup>17</sup> It is important to note that Medigap generally only covers cost-sharing for services covered by Medicare. See, Juliette Cubanski, Wyatt Koma, Anthony Damico & Tricia Neuman, *How Much Do Medicare Beneficiaries Spend Out of Pocket on Health Care?*, KFF (Nov. 4, 2019) <https://www.kff.org/medicare/issue-brief/how-much-do-medicare-beneficiaries-spend-out-of-pocket-on-health-care/>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Wyatt Koma, Juliette Cubanski & Tricia Neuman, *A Snapshot of Sources of Coverage Among Medicare Beneficiaries in 2018*, KFF (Mar. 23, 2021) <https://www.kff.org/medicare/issue-brief/a-snapshot-of-sources-of-coverage-among-medicare-beneficiaries-in-2018/>.

<sup>21</sup> MEDICARE PAYMENT ADVISORY COMM’N, 117<sup>TH</sup> CONG., *March 2021 Report to Congress*, xiv (Mar. 15, 2021), [https://www.medpac.gov/wp-content/uploads/import\\_data/scrape\\_files/docs/default-source/reports/mar21\\_medpac\\_report\\_to\\_the\\_congress\\_sec.pdf](https://www.medpac.gov/wp-content/uploads/import_data/scrape_files/docs/default-source/reports/mar21_medpac_report_to_the_congress_sec.pdf).

Medicare beneficiaries (83%), had supplemental coverage, either through Medigap (34%), employer-sponsored retiree coverage (29%), or state Medicaid (20%). Almost 1 in 5 (17%) Medicare beneficiaries in traditional Medicare did not have any supplemental coverage.<sup>22</sup> According to Kaiser Family Foundation, “[c]ompared to all traditional Medicare enrollees in 2018, a larger share of beneficiaries with no supplemental coverage had annual incomes between \$20,000 and \$40,000, were under the age of 65 (and eligible for Medicare due to having a long-term disability), and were men.”<sup>23</sup> Only 5% of Black beneficiaries and 7% of Hispanic beneficiaries have Medigap supplemental coverage, compared to 25% of White beneficiaries.<sup>24</sup>

This article will not explore the other types of supplemental coverage; rather, it will focus solely on Medigap plan access. Despite the robust coverage Medicare provides, beneficiary out-of-pocket costs can be substantial. This financial burden is central to the discussion of Medigap access.

## **Background on Medigap Plans**

Medicare Supplement Insurance (commonly known as Medigap) is an optional form of supplemental insurance offered by private insurers to help pay for out-of-pocket costs beneficiaries face.<sup>25</sup> These can include deductibles, copayments, and other out-

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<sup>22</sup> Koma, Cubanski & Neuman, *supra* note 20.

<sup>23</sup> *Id.*

<sup>24</sup> Nancy Ochieng, Juliette Cubanski, Tricia Neuman, Samantha Artiga & Anthony Damico, *Racial and Ethnic Health Inequities and Medicare*, KFF (Feb. 16, 2021) <https://www.kff.org/report-section/racial-and-ethnic-health-inequities-and-medicare-sources-of-coverage/>.

<sup>25</sup> See Ctr. for Medicaid & Medicare Serv., (CMS), *What's Medicare Supplement Insurance (Medigap)?*, Medicare.gov, <http://www.medicare.gov/supplement-other-insurance/medigap/whats-medigap.html>; see also CMS, *Medigap (Medicare Supplement Health Insurance)*, CMS.gov (Dec. 1, 2021), <http://www.cms.gov/Medicare/Health-Plans/Medigap/index.html>.

of-pocket costs. Medigap insurance typically covers only services that Medicare has already approved for payment, and generally does not pay for excluded or omitted items and services in traditional Medicare.<sup>26</sup> Medigap coverage is a key component of health insurance protection for individuals who access health care through the traditional Medicare program. Medigap policies help to protect beneficiaries from unexpected high health care expenses, along with providing beneficiaries the ability to more precisely budget for their health care costs.<sup>27</sup>

Medigap insurance is generally regulated at the state level, but federal law requires insurance companies that sell Medigap policies to abide by certain minimum consumer protection requirements.<sup>28</sup> Insurers are required by statute to provide a one-time, six-month open enrollment period for Medigap policies that begins on the first month that a beneficiary is 65 or older<sup>29</sup> and elects Part B coverage. During this period, these beneficiaries must be “guaranteed issue” of Medigap plans regardless of their age, sex, or health status. While they may be subject to higher premiums, a beneficiary aged 65 or older cannot be denied Medigap enrollment by an insurance company during this six-month period.<sup>30</sup>

All Medigap policies must abide by federal and state laws that dictate the structure of benefits and provide consumer protections. Beginning in 1990, the Health Care Financing Administration (HCFA), now the Centers for Medicare & Medicaid Services (CMS), established a program of mandatory certification of 10

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<sup>26</sup> *Id.*

<sup>27</sup> Gretchen Jacobson, Jennifer Huang & Tricia Neuman, *Medigap Reform: Setting the Context for Understanding Recent Proposals*, KFF (Jan. 13, 2014) <https://www.kff.org/medicare/issue-brief/medigap-reform-setting-the-context/>.

<sup>28</sup> 42 U.S.C. § 1395ss(s).

<sup>29</sup> Many beneficiaries continue to work past age 65, in large part because the age for Medicare (65) is no longer connected to the age for Social Security.

<sup>30</sup> See Ctr. for Medicaid & Medicare Serv., (CMS), *How to Compare Medigap Policies*, MEDICARE.GOV, <https://www.medicare.gov/supplement-other-insurance/compare-medigap/compare-medigap.html>; see also, CMS, *Guaranteed Issue Rights*, MEDICARE.GOV, <https://www.medicare.gov/supplements-other-insurance/when-can-i-buy-medigap/guaranteed-issue-rights>.

standard plans.<sup>31</sup> Under this authority, the Secretary of Health & Human Services (HHS) is required to establish a procedure whereby Medigap policies are certified as meeting minimum standards and requirements.<sup>32</sup>

Private insurers selling Medigap policies in most states may only sell consumers standardized policies that are identified by the letters A through N. Regardless of which insurance company is selling a particular plan, all benefits within each plan must be identical.<sup>33</sup> The only difference between Medigap policies of the same letter is that their premiums may differ among insurance companies.<sup>34</sup> The plans are labeled with the letters A through N to make comparing plans more straightforward.<sup>35</sup> Medigap policies pay most, if not all, of original Medicare's coinsurance amounts and some provide

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<sup>31</sup> See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4353(a), 104 Stat. 1388 (Nov. 5, 1990) (codified at 42 U.S.C. § 1395ss(a)), applicable to policies sold after July 1992; such policies must conform to one of the 10 standardized model policies developed by the National Association of Insurance Commissioners (NAIC).

<sup>32</sup> 42 U.S.C. § 1395ss(a)(1). The Secretary's authority to promulgate rules for the administration of its certification program for Medigap policies is found at 42 U.S.C. § 1395ss(h). The requirements for certification by the Secretary are found at 42 U.S.C. § 1395ss(c). Procedures for certification are found in the regulations at 42 C.F.R. § 403.232.

<sup>33</sup> Some states have allowed insurers ancillary benefits, which vary widely. See NAIC, *2021 Survey of Medicare Supplement New or Innovative Benefits Chart* (July 23, 2021), [https://content.naic.org/sites/default/files/inline-files/2021-New-or-Innovative-Benefit-Chart\\_0.pdf](https://content.naic.org/sites/default/files/inline-files/2021-New-or-Innovative-Benefit-Chart_0.pdf).

<sup>34</sup> In all states except Minnesota, Massachusetts, and Wisconsin, federal law requires insurers to sell Medigap policies that are one of 10 standard supplemental plans. 42 U.S.C. § 1395ss(a). For information on these three states' Medigap plans for 2021 as well as the 10 standardized plans, see Ctr. for Medicaid & Medicare Serv., (CMS), *2021: Guide to Choosing a Medigap Policy*, MEDICARE.GOV, <https://medicarehbs.com/wp-content/uploads/2021/04/2021-Choosing-A-Medigap-Policy.pdf>. For additional updates, see also National Association of Insurance Commissioners, "Home Page," <https://www.naic.org/>.

<sup>35</sup> 42 U.S.C. § 1395ss(a).

coverage for deductibles as well. Medigap does not cover costs for medical services that are not covered by Medicare.<sup>36</sup>

Many changes have been made to the plans over the years. The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) added two new standardized plans in 2006 and changed the benefits under three existing plans.<sup>37</sup>

The Medicare Improvement for Patients and Providers Act of 2008 (MIPPA)<sup>38</sup> made changes to the standardized Medigap policies that may be sold on or after June 1, 2010. MIPPA authorized a reduction in the number of standardized plans offered from 12 to 10. Plans E, H, I, and J were completely eliminated, as Plans H, I, and J became duplicative of other plans after the MMA added a prescription drug benefit to Medicare.<sup>39</sup>

The Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) made major changes to those eligible for certain Medigap policies starting in 2020.<sup>40</sup> Beginning in 2020, Plans C and F have been eliminated as a choice for newly eligible Medicare beneficiaries. This includes all individuals whose 65<sup>th</sup> birthday occurred on or after January 1, 2020, or whose date of eligibility for Medicare occurred on or after January 1, 2020. This includes all

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<sup>36</sup> Ctr. for Medicaid & Medicare Serv., (CMS), *What's Medicare Supplement Insurance (Medigap)?* <https://www.medicare.gov/supplements-other-insurance/whats-medicare-supplement-insurance-medigap>.

<sup>37</sup> Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), Pub. L. No. 108-173 (Dec. 8, 2003), amending 42 U.S.C. §1395ss. The MMA authorized the NAIC to review and revise the model standards to incorporate the new plans and reflect these changes in the existing plans.

<sup>38</sup> MIPPA, Pub. L. No. 110-275 (July 15, 2008).

<sup>39</sup> MMA, Pub. L. No. 108-173 (Dec. 8, 2003). Plan E became unnecessary as a result of the other MIPPA changes. MIPPA also eliminated the “at-home recovery” and “preventive care” benefits from additional benefits Medigap plans could offer. A new hospice benefit, which covers all cost-sharing for Part A eligible hospice care and respite care expenses, was added as a core benefit available with every Medigap plan offered for purchase.

<sup>40</sup> MACRA §401, Pub. L. No. 114-10 (Apr. 16, 2015) (explaining medigap plans D and G are substituted in federal law for C and F for newly eligible beneficiaries, but C and F were not deleted from federal law).

individuals who become eligible for Medicare, whether due to age, disability, or end-stage renal disease.<sup>41</sup>

Those eligible for Medicare before January 1, 2020, but not yet enrolled, may be able to buy one of these plans.<sup>42</sup> Enrollees in Plans C and F prior to 2020 will be able to keep their policies indefinitely and may also change insurance carriers. However, premiums for these plans are expected to rise as the pool of enrollees shrinks.

## **Background on Medicare Advantage Plans**

This paper does not focus on private Medicare Advantage plans or all the changes that have been made to Medicare Advantage over the last few years. Additionally, it does not make recommendations for improving MA plans or oversight. However, in order to fully explain equity issues resulting from barriers to Medigap plan access, background on Medicare Advantage plans, and how those plans serve beneficiaries, is helpful. Some form of managed care has always existed in Medicare; private contracting was formalized through the Balanced Budget Act of 1997 (BBA '97) by adding “Part C” to the Medicare statute and creating the Medicare+Choice (M+C) program.<sup>43</sup> Part C is now known as Medicare Advantage (MA).<sup>44</sup>

Medicare Advantage plans are a type of Medicare health plan that are administered and run by private insurers that contract with Medicare to provide an individual with all of their Part A and Part B benefits. The private Medicare Advantage health plans are

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<sup>41</sup> 82 Fed. Reg. 41, 684 (Sept. 1, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-09-01/pdf/2017-18605.pdf> (defining “newly eligible Medicare beneficiaries,” as well as other clarifications of the MACRA law). For a helpful guide on who is eligible, *see also* Bonnie Burns, Think Advisor, “MACRA and the Medigap Letter Plans” (Nov. 24, 2019), <https://www.thinkadvisor.com/2019/11/24/macra-and-the-medigap-letter-plans/>.

<sup>42</sup> *See*, CMS *supra* note 30.

<sup>43</sup> Balanced Budget Act (BBA '97) of 1997, Pub. L. No. 105-33 (1997).

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



approved by Medicare and regulated by the federal government. A Medicare Advantage enrollee will get his or her Medicare Part A, Part B, and usually Part D prescription drug benefits covered through the private plan, not traditional Medicare. The Health & Human Services (HHS) Secretary is required to establish standards, regulations, and rules for Medicare Part C. The private insurance plans are paid by the Centers for Medicare & Medicaid Services (CMS) on a capitated basis to cover the care of their enrollees.

Every year, all Medicare beneficiaries nationally are able to make changes to their Medicare Advantage and Part D plan selections. This is referred to as the annual coordinated election period (ACEP), which runs every year from October 15 through December 7, with changes becoming effective January 1<sup>st</sup> of the following year. During the annual period, or open enrollment, beneficiaries have the ability to switch from one Medicare Advantage plan to another, can switch from Medicare Advantage to Original Medicare or from Original Medicare to Medicare Advantage, join a Medicare Part D prescription drug plan, switch from one Part D plan to another, or drop Medicare Part D coverage entirely.<sup>45</sup> Medigap plans are not included in this annual open enrollment period.

Determining if traditional Medicare or a private Medicare Advantage plan is appropriate for someone is a highly individualized assessment. The framework in which the programs operate can provide a general foundation for making this decision. For example, Medicare Advantage plans are often viewed as simpler “one-stop shopping” because individuals are able to obtain Part A, Part B and Part D coverage in a single package. Additionally, Medicare Advantage plans are able to offer limited supplemental

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<sup>45</sup> *But see*, Gretchen Jacobson, Tricia Neuman, & Anthony Damico, *Medicare Advantage Plan Switching: Exception or Norm?*, KFF (Sept. 2016)

<https://files.kff.org/attachment/Issue-Brief-Medicare-Advantage-Plan-Switching-Exception-or-Norm>, (finding that “[r]elatively few Medicare Advantage enrollees, roughly one in ten, voluntarily switch from one MA-PD to another MA-PD each year, suggesting that plan switching among seniors is more the exception than norm.”).

benefits such as a fitness benefit or dental care.<sup>46</sup> However, plans can also charge additional premiums for such benefits, and the benefits themselves may be quite limited. For example, the dental benefits are often limited to cleanings, exams, fluoride treatments and x-rays, and do not cover more expensive procedures.<sup>47</sup>

Another advantage for individuals enrolled in Medicare Advantage plans is that since 2011, Medicare Advantage plans have

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<sup>46</sup> See Ctr. for Medicare Advocacy Issue Brief, “*New Medicare Advantage Supplemental Benefits: An Advocates’ Guide to Navigating the New Landscape*” (Oct. 2019) <https://www.medicareadvocacy.org/wp-content/uploads/2019/10/Fully-Informed-Advocates-Guide-to-MA-Supplemental-Benefits-2019.pdf> (showing that beginning in 2019, Medicare Advantage plans have been able to offer additional supplemental benefits that were not offered in previous years); See also, Meredith Freed, Jeannie Fuglesten Biniek, Anthony Damico & Tricia Neuman, *Medicare Advantage in 2021: Premiums, Cost Sharing, Out-of-Pocket Limits and Supplemental Benefits*, KFF (June 21, 2021) <https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2021-premiums-cost-sharing-out-of-pocket-limits-and-supplemental-benefits/>, (finding that “most enrollees in individual Medicare Advantage plans (those generally available to Medicare beneficiaries) are in plans that provide access to eye exams and/or glasses (99%), telehealth services (94%), dental care (94%), a fitness benefit (93%), and hearing aids (93%). Similarly, most enrollees in SNPs are in plans that provide access to these benefits.”).

<sup>47</sup> Meredith Freed, Tricia Neuman & Gretchen Jacobson, *Drilling Down on Dental Coverage and Costs for Medicare Beneficiaries*, KFF (Mar. 19, 2019), <https://www.kff.org/medicare/issue-brief/drilling-down-on-dental-coverage-and-costs-for-medicare-beneficiaries/> (reporting that in 2016, 60% of Medicare Advantage enrollees, or about 10.2 million beneficiaries, had access to some dental coverage. The remaining 40% of all Medicare Advantage enrollees, or almost 7 million beneficiaries, did not have access to dental coverage under their plan. Some Medicare Advantage plans charge an additional premium for dental benefits, and enrollees must pay that premium in order to receive the dental coverage. Overall, almost three in ten (29%) Medicare Advantage enrollees with access to dental benefits under their plan may be required to pay a monthly premium, averaging \$284 per year in 2016, for the plan dental benefits. Of the 7 million Medicare Advantage enrollees in plans that offered both preventive and more extensive dental benefits, about four in ten (43%) are in plans with dollar limits on coverage, and most plans had limits around \$1,000. In addition to dollar limits, Medicare Advantage plans typically limit the number of services covered). See also, Meredith Freed et al., *Dental, Hearing, and Vision Costs and Coverage Among Medicare Beneficiaries in Traditional Medicare and Medicare Advantage*, KFF (sept. 21, 2021), <https://www.kff.org/medicare/issue-brief/dental-hearing-and-vision-costs-and-coverage-among-medicare-beneficiaries-in-traditional-medicare-and-medicare-advantage/>.

been required to provide an annual out-of-pocket limit for services covered under Parts A and Parts B of Medicare.<sup>48</sup> This protection does not exist in traditional Medicare. In 2021, the out-of-pocket limit may not exceed \$7,550 for in-network services and \$11,300 for in-network and out-of-network services combined.<sup>49</sup> These limits apply only to services under Part A and Part B of Medicare, and do not apply to Part D.<sup>50</sup> Whether a plan has only an in-network cap or a cap for in-network and out-of-network services varies based on the type of plan.<sup>51</sup> According to Kaiser Family Foundation research, the weighted average out-of-pocket limits for Medicare Advantage enrollees for 2021 for PPOs, for in-network services was \$5,091 and \$9,208 for both in-network and out-of-network services.<sup>52</sup> While having a cap at any level is beneficial for beneficiaries, a cap that is so high does not alleviate the high costs of care stemming from an unexpected catastrophic medical issue, or for beneficiaries with high annual medical costs.

The main barrier to accessing care when enrolled in Medicare Advantage is the limited network of providers available to enrollees, and the higher costs associated with going outside of

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<sup>48</sup> 42 C.F.R. §§ 422.100 (2018); *See also* §§ 422.101 (2018) (stating that since 2011, local MA plans (and, since 2012, regional preferred provider plans, or PPOs) must establish a yearly maximum out-of-pocket (MOOP) liability amount for enrollees for all Part A and B services that does not exceed the maximum set yearly by CMS).

<sup>49</sup> Freed, Fuglesten Biniek, Damico & Neuman, *supra* note 46.

<sup>50</sup> The separate out-of-pocket threshold for Part D spending is \$6,550 in 2021. It is significant to note there is still cost-sharing in Part D once the catastrophic level is reached as there is no hard cap in Part D. *See* Kaiser Family Foundation, *An Overview of the Medicare Part D Prescription Drug Benefit*, (Oct. 14, 2020), <https://www.kff.org/medicare/fact-sheet/an-overview-of-the-medicare-part-d-prescription-drug-benefit/>.

<sup>51</sup> Freed, Fuglesten Biniek, Damico & Neuman, *supra* note 46.

<sup>52</sup> *Id.* (stating that premiums and other cost sharing is often difficult to compare from one MA plan to another, unlike Medigaps that have standard benefit packages).

the network.<sup>53</sup> By contrast, beneficiaries in traditional Medicare can see any Medicare participating provider,<sup>54</sup> and pay the standard Medicare cost-sharing rate. In most plans, a beneficiary is not able to go to any physician or hospital he or she may choose. While some plan types, such as PPOs, allow enrollees to go out-of-network, usually with higher cost-sharing, HMOs tend to employ limited networks (other than point of service, or POS plans). HMOs continue to enroll the most beneficiaries.<sup>55</sup> For the majority of MA enrollees in HMOs, there are no covered services outside of the network or service area.<sup>56</sup> Because beneficiaries are often limited to the plan's network of providers and facilities with whom they contract, if a beneficiary wishes to see a provider or go to a facility

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<sup>53</sup> See, General Accounting Office (GAO), *Medicare Advantage: Actions Needed to Enhance CMS Oversight of Provider Network Adequacy* (Aug. 2015), <https://www.gao.gov/products/gao-15-710>, (showing how the Centers for Medicare and Medicaid Services (CMS) ensures adequate access to care for Medicare Advantage (MA) enrollees. GAO recommended that “[t]he Administrator of CMS should augment oversight of MA networks to address provider availability, verify provider information submitted by MAOs, conduct more periodic reviews of MAO network information, and set minimum information requirements for MAO enrollee notification letters.”); See also, Gretchen Jacobson et al., *Medicare Advantage Hospital Networks: How Much Do They Vary?* KFF (Jun. 20, 2016), <https://www.kff.org/medicare/report/medicare-advantage-hospital-networks-how-much-do-they-vary/>.

<sup>54</sup> See Nancy Ochieng, Karyn Schwartz & Tricia Neuman, *How Many Physicians Have Opted-Out of the Medicare Program?*, KFF (Oct. 22, 2020), <https://www.kff.org/medicare/issue-brief/how-many-physicians-have-opted-out-of-the-medicare-program/> (stating that currently, physicians and other health care providers may register with traditional Medicare under three options: 1) participating provider, 2) non-participating provider, or 3) an opt-out provider).

<sup>55</sup> See, MedPAC, “*The Medicare Advantage Program: Status Report, March 2021 Report to the Congress Medicare Payment Policy*”, (Mar 2021), [http://medpac.gov/docs/default-source/reports/mar21\\_medpac\\_report\\_ch12\\_sec.pdf?sfvrsn=0](http://medpac.gov/docs/default-source/reports/mar21_medpac_report_ch12_sec.pdf?sfvrsn=0) (stating that according to the Medicare Payment Advisory Commission (MedPAC), as of July 2020, there were 15 million HMO enrollees (24% of all Medicare beneficiaries)).

<sup>56</sup> See, Medicare.gov, “*Doctors, providers & hospitals in Medicare Advantage Plans*,” <https://www.medicare.gov/sign-up-change-plans/types-of-medicare-health-plans/doctors-providers-hospitals-in-medicare-advantage-plans> (explaining the networks, with the exception of urgent or emergent services, though those are often defined in a very limited manner).

outside of the network, they typically pay higher cost-sharing when going outside the network, if they are even able to get coverage.<sup>57</sup> In addition, plans can terminate providers from their networks mid-year, while a beneficiary's corresponding rights to change plans mid-year are limited.<sup>58</sup>

Medicare Advantage plans also employ utilization management and cost containment tools, which often translate to obstacles to care for beneficiaries. For example, a plan can require a beneficiary to obtain prior authorization in order to see certain specialists, or before certain procedures. In contrast, prior authorizations are very limited in traditional Medicare, resulting in fewer barriers to necessary care in the traditional Medicare program. In 2021, 99% of Medicare Advantage enrollees were in plans that required prior authorization for some services.<sup>59</sup> Medicare Advantage plans usually utilize prior authorization requirements for more expensive services, like inpatient hospital or skilled nursing facility stays, or Part B drugs; prior authorization is not used frequently for preventive services.

A 2018 HHS Inspector General report examined whether MA plans were engaging in inappropriate denials of prior authorizations, because the rates of denials were so high.<sup>60</sup> The report found that when beneficiaries and providers appealed preauthorization and payment denials, MA plans "overturned 75% of their own denials."<sup>61</sup> At the same time, "beneficiaries and providers appealed

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<sup>57</sup> *Id.* (stating "In HMO Plans, you generally must get your care and services from providers in the plan's network, except: Emergency care; Out-of-area urgent care; Out-of-area dialysis").

<sup>58</sup> In an effort to strengthen MA enrollee consumer protections, in June 2014, Congresswoman Rosa DeLauro (D-CT) and Senator Sherrod Brown (D-OH) introduced the *Medicare Advantage Participant Bill of Rights Act of 2014* (H.R. 4998/S. 2552). Senator Richard Blumenthal (D-CT) is a strong advocate and co-sponsor of the bill. Among other things, this bill would prohibit MA plans from dropping providers during the middle of the plan year unless they can show cause. It would improve notice to plan enrollees about annual changes to provider networks *before* they commit to joining the plan.).

<sup>59</sup> Freed, Fuglesten Biniek, Damico & Neuman, *supra* note 46.

<sup>60</sup> See Department of Health and Human Services Office of Inspector General, Medicare Advantage Appeal Outcomes and Audit Findings Raise Concerns About Service and Payment Denials, OEI-09-16-00410 (Washington, D.C.: September 2018).

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

only 1% of denials to the first level of appeal.”<sup>62</sup> Such widespread use of prior authorization often leads to problems accessing care.

The OIG report analyzed that:

[H]igh overturn rates when beneficiaries and providers appeal denials, and CMS audit findings about inappropriate denials, raise concerns that some beneficiaries and providers may not be getting services and payment that MAOs [Medicare Advantage Organizations] are required to provide. These findings are particularly concerning because beneficiaries and providers rarely use the appeals process designed to ensure access to care and payment, and CMS has repeatedly cited MAOs for issuing incorrect or incomplete denials letters, which can impair a beneficiary’s or provider’s ability to mount a successful appeal.<sup>63</sup>

These findings demonstrate that prior authorization and other utilization management tools that serve as significant barriers to care are widespread in MA plans.

If care is needed outside of a Medicare Advantage plan’s service area, the plan will generally only cover that care if it meets the plan’s definition of emergency care, and the beneficiary must return to the service area for routine care. This is much more limited than traditional Medicare, which allows beneficiaries to see any Medicare participating provider throughout the U.S. Participating providers agree to traditional Medicare’s fee schedule rates as full payment for their services, so that beneficiaries generally pay 20% as coinsurance. According to a 2020 Kaiser Family Foundation

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

<sup>63</sup> *Id.*

report, almost all providers participate in Medicare.<sup>64</sup> The report found that “only 1% of non-pediatric physicians have formally opted-out of the Medicare program” in 2020, varying by specialty, with “little state-level variation in the percent of physicians opting-out, with only three states (Alaska, Colorado, Wyoming) having opt-out rates at or above 2% in 2020”.<sup>65</sup>

For 2021, the average Medicare beneficiary had 33 Medicare Advantage plans available to them, 27 of which include prescription drug coverage (MA-PDs).<sup>66</sup> There are 3,550 MA plans nationwide available for individual beneficiary enrollment in 2021, representing a 13% increase from 2020.<sup>67</sup> Almost 90% of all MA plans include prescription drug coverage in 2021.<sup>68</sup> This is the largest number of plan options available to beneficiaries in the last decade.<sup>69</sup> There is wide variation in availability of plans by geographic area in the country, with some areas having 35 plan options, and others having two or fewer.<sup>70</sup> Cost-sharing in Medicare Advantage can vary by plan and by service.<sup>71</sup> Premiums in Medicare Advantage vary by plan.<sup>72</sup>

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<sup>64</sup> Ochieng, Schwartz & Neuman, *supra* note 54; See also Center on Budget and Policy Priorities (CBPP), “Executive Order, Other Administration Actions Would Weaken Medicare,” (Nov. 7, 2019) <https://www.cbpp.org/research/health/executive-order-other-administration-actions-would-weaken-medicare>: (explaining that “almost all physicians and practitioners registered with Medicare (96% are participating providers. Participating providers accept Medicare’s fee schedule rates as full payment for their services, and beneficiaries generally pay 20% of the scheduled amount as coinsurance. A few physicians (4%) are non-participating providers. Non-participating providers may charge 15% more than what Medicare pays, and beneficiaries are liable for that additional amount on top of the usual coinsurance. Very few physicians and dentists (0.7% of practitioners) opt out of Medicare. Opt-out providers may charge whatever they and their Medicare patients agree to through a private contract; Medicare pays nothing, and the patient must pay the entire amount.”).

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

<sup>66</sup> Jeannie Fuglesten Biniek et al., *Medicare Advantage 2021 Spotlight: First Look*, KFF (Oct. 2020), <https://www.kff.org/medicare/issue-brief/medicare-advantage-2021-spotlight-first-look/>.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Freed, Fuglesten Biniek, Damico & Neuman, *supra* note 46.

<sup>72</sup> Fuglesten Biniek et al., *supra* note 66.

## Equity Concerns in Medicare Advantage

Though deciding on a Medicare Advantage plan is a personal health decision, some general trends in Medicare Advantage enrollment, and disenrollment are informative, particularly the trends that highlight disparities in care based on health, age, and race. Some of those trends are particularly concerning for older and sicker Medicare beneficiaries. Research suggests that healthier and younger enrollees tend to have more favorable views of their Medicare Advantage plans than sicker and older enrollees. Some research has pointed to the payment structure in Medicare Advantage as favoring healthier and younger beneficiaries.<sup>73</sup> According to research compiled by the Centers for Medicare & Medicaid Services (CMS), quality performance is lower for Black beneficiaries than for White beneficiaries in Medicare Advantage.<sup>74</sup> Kaiser Family Foundation data demonstrate that Black beneficiaries in Medicare Advantage reported cost-related problems at a higher rate than in traditional Medicare; Black beneficiaries in traditional

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<sup>73</sup> Momotazur Rahman, et al., *High-Cost Patients Had Substantial Rates Of Leaving Medicare Advantage And Joining Traditional Medicare*, Health Affairs (Oct. 2015)

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4676406/> (finding that

[b]ecause Medicare Advantage plans receive prospective, capitated payments to finance and deliver services for their enrollees, they operate under strong incentives to manage their members' health care costs. Policy makers have been concerned that capitated payments give Medicare Advantage plans an incentive to enroll healthier beneficiaries and to avoid enrolling those with chronic conditions. Indeed, a large body of literature based on data from the 1990s and early 2000s found that Medicare Advantage plans disproportionately enrolled healthier beneficiaries. This phenomenon, known as favorable risk selection, has historically yielded substantial overpayments to Medicare Advantage plans.).

<sup>74</sup> Ctr. for Medicare & Medicaid Serv., (CMS), "Racial, ethnic, and gender disparities in health care in Medicare Advantage," (Apr. 2021),

<https://www.cms.gov/files/document/racial-ethnic-gender-disparities-health-care-medicare-advantage.pdf>.



Medicare who had supplemental insurance had even lower rates of cost-related problems.<sup>75</sup> According to Kaiser Family Foundation, “[h]alf of Black Medicare Advantage enrollees in fair or poor self-assessed health reported cost-related problems, compared to one-third of Black beneficiaries in traditional Medicare overall and just over one-fourth of Black beneficiaries in traditional Medicare with supplemental coverage.”<sup>76</sup>

The differences were even more striking among Black Medicare beneficiaries who are under age 65 with disabilities. Kaiser Family Foundation found that about half (49%) of those enrolled in Medicare Advantage reported a cost-related problem, which is almost twice the rate reported among those with traditional Medicare overall (26%), and significantly higher than the rate of cost-related problems reported among beneficiaries in traditional Medicare who also had supplemental coverage (19%).<sup>77</sup>

Though this paper does not focus on Medicare Advantage payment, a recent study is illustrative of the racial inequities in quality of care that can result from Medicare Advantage payment

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<sup>75</sup> Jeannie Fuglesten Biniek et. al, *Cost-Related Problems Are Less Common Among Beneficiaries in Traditional Medicare Than in Medicare Advantage, Mainly Due to Supplemental Coverage*, KFF (June 25, 2021), [https://www.kff.org/medicare/issue-brief/cost-related-problems-are-less-common-among-beneficiaries-in-traditional-medicare-than-in-medicare-advantage-mainly-due-to-supplemental-coverage/?utm\\_campaign=KFF-2021-Medicare&utm\\_medium=email&\\_hsmi=136245934&\\_hsenc=p2ANqtz--K3-McLM7FJKUQcUIMXntOZUgey\\_QlmT7VC2qrLku5wJbRUyadXPiZekbW7qx7uC\\_YojxQTWgFZ27P0skPLGxaekmkg&utm\\_content=136245934&utm\\_source=hs\\_email](https://www.kff.org/medicare/issue-brief/cost-related-problems-are-less-common-among-beneficiaries-in-traditional-medicare-than-in-medicare-advantage-mainly-due-to-supplemental-coverage/?utm_campaign=KFF-2021-Medicare&utm_medium=email&_hsmi=136245934&_hsenc=p2ANqtz--K3-McLM7FJKUQcUIMXntOZUgey_QlmT7VC2qrLku5wJbRUyadXPiZekbW7qx7uC_YojxQTWgFZ27P0skPLGxaekmkg&utm_content=136245934&utm_source=hs_email) (finding that a smaller share of Black beneficiaries in traditional Medicare (24%) than in Medicare Advantage (32%) reported cost-related problems. Rates of cost-related problems were lower among Black beneficiaries in traditional Medicare with Medicaid and other forms of supplemental insurance (20%)).

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

<sup>77</sup> Jeannie Fuglesten Biniek, et al., *Cost-Related Problems Are Less Common Among Beneficiaries in Traditional Medicare Than in Medicare Advantage, Mainly Due to Supplemental Coverage*, KFF (Jun 25, 2021), [https://www.kff.org/medicare/issue-brief/cost-related-problems-are-less-common-among-beneficiaries-in-traditional-medicare-than-in-medicare-advantage-mainly-due-to-supplemental-coverage/?utm\\_campaign=KFF-2021-Medicare&utm\\_medium=email&\\_hsmi=136245934&\\_hsenc=p2ANqtz--mOX\\_OKL4NKfeZ1AWqER-Zx-tb7mANv9UxfUAx7DM2z23-eN8t3E5Ogk3WGM3Rb0JQ4M57bDemXcT3z5CZLrtJ0ZkYuA&utm\\_content=136245934&utm\\_source=hs\\_email](https://www.kff.org/medicare/issue-brief/cost-related-problems-are-less-common-among-beneficiaries-in-traditional-medicare-than-in-medicare-advantage-mainly-due-to-supplemental-coverage/?utm_campaign=KFF-2021-Medicare&utm_medium=email&_hsmi=136245934&_hsenc=p2ANqtz--mOX_OKL4NKfeZ1AWqER-Zx-tb7mANv9UxfUAx7DM2z23-eN8t3E5Ogk3WGM3Rb0JQ4M57bDemXcT3z5CZLrtJ0ZkYuA&utm_content=136245934&utm_source=hs_email).

incentives. The research published in September 2021 in Health Affairs, “Medicare Advantage Plan Double Bonuses Drive Racial Disparity In Payments, Yield No Quality Or Enrollment Improvements,” found that double bonuses<sup>78</sup> for Medicare Advantage plans are “not an efficient. . . mechanism for improving the MA program. . . nor are they equitable in allocation of those dollars, disproportionately benefiting White beneficiaries relative to Black beneficiaries,” without improving quality or enrollment in the MA program.<sup>79</sup>

The study found that “Black beneficiaries were substantially less likely to reside in counties offered double bonuses than White beneficiaries, thus contributing to racial disparities in the allocation of double bonus dollars,” disfavoring Black beneficiaries.<sup>80</sup> CMS structures the system with the expectation that quality bonus payments will partially be passed on to beneficiaries through assistance with Medicare premiums or additional benefits like dental benefits for example. Therefore, differences in the allocation of Medicare Advantage bonus payments to counties that are eligible

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<sup>78</sup> Adam A. Markovitz et al., *Medicare Advantage Plan Double Bonuses Drive Racial Disparity In Payments, Yield No Quality Or Enrollment Improvements*, Health Affairs (Sept. 2021), <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2021.00349> (showing that the Health Affairs study describes double bonuses as follows:

An unusual feature of the MA bonus program is the delineation of “double-bonus” counties. In these counties higher-quality plans receive certain MA bonuses at double the dollar level paid to comparably performing plans in counties that are ineligible for double bonuses. Through the ACA, Congress created three criteria that a county must meet to be eligible for double bonuses: historically high MA enrollment (at least 25% in 2009); low Medicare fee-for-service spending (below the national average in a given year); and a 2004 “urban floor” designation, given to Metropolitan Statistical Areas (MSAs) with at least 250,000 residents that qualify for the minimum MA benchmark rate and granted to areas with low fee-for-service spending. Although the proportion of counties qualifying for double-bonus status is small, at around 7% of counties nationally, the impact of their double bonus status is large because 27% of MA beneficiaries live in them, based on our analysis of Medicare data.).

<sup>79</sup> *Id.*

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

and not eligible for double bonuses could result in racial and geographic disparities. These could include differences in availability of enhanced benefits, or “translate to higher premiums for the same benefits when offered to primarily Black versus primarily White populations, which could harm the financial well-being of Black beneficiaries.”<sup>81</sup> These findings, taken together with the Kaiser Family Foundation report revealing that Black beneficiaries had more cost-related problems in Medicare Advantage is concerning. According to Kaiser Family Foundation, “enrollees in Medicare Advantage do not generally receive greater protection against cost-related problems than beneficiaries in traditional Medicare with supplemental coverage, particularly for some enrollees, such as Black beneficiaries in relatively poor health, despite having an out-of-pocket cap and additional benefits.”<sup>82</sup> These disparities are particularly significant given that half of all Black and Hispanic beneficiaries were enrolled in a Medicare Advantage plan, compared to 36% of White beneficiaries in 2018.<sup>83</sup>

Research also indicates that sicker beneficiaries are not as well served by Medicare Advantage. A 2021 Government Accountability Office (GAO) report, “Beneficiary Disenrollments to Fee for Service in Last Year of Life Increase Medicare Spending,” looked for increases in spending in the traditional Medicare program due to beneficiaries disenrolling from Medicare Advantage in the last year of life.<sup>84</sup> Though the report was aimed at investigating costs for the traditional Medicare program, totaling nearly half a billion dollars annually for the years of the study, the underlying data is useful for the Medigap discussion. The report found that beneficiaries in the last year of life disenrolled to join traditional Medicare at more than twice the rate of all other Medicare Advantage beneficiaries, with certain Medicare Advantage Organizations (MAOs), which may offer several plans, experiencing disenrollment at the rate of nearly

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<sup>81</sup> *Id.*

<sup>82</sup> Nancy Ochieng et al., *Racial and Ethnic Health Inequities and Medicare*, KFF (Feb. 16, 2021) <https://www.kff.org/report-section/racial-and-ethnic-health-inequities-and-medicare-sources-of-coverage/>.

<sup>83</sup> *Id.*

<sup>84</sup> Beneficiary Disenrollments to Fee- for Service in Last Year of Life Increase Medicare Spending, 21 GAO 482 (2021).

10 times higher for beneficiaries in the last year of life than all other beneficiaries.<sup>85</sup> As beneficiaries in the last year of life are generally recognized to be high-cost and disproportionately requiring specialized care, the findings underscore that the cost containment measures employed by Medicare Advantage plans appear to limit access to necessary care for sick beneficiaries. “While disenrollment among some beneficiaries is expected, high levels of disenrollment, or disparities in disenrollment among beneficiaries in poorer health, may indicate potential issues with beneficiary access to care or with the quality of care provided.”<sup>86</sup>

The GAO report also cited that a “number of other studies have found that beneficiaries in poorer health may be more likely to disenroll from MA to join FFS [Fee-for-Service, i.e., traditional Medicare].”<sup>87</sup> While the GAO report notes limited CMS review of the reasons behind Medicare Advantage disenrollment in the final year of life, and focuses its recommendations on the increased (substantial) costs to the traditional Medicare program to manage these high cost patients, these important policy issues are not the focus of this paper. However, the underlying data from the report supports this paper’s claim that there are equity concerns regarding the care that Medicare Advantage plans provide to sicker and older beneficiaries.

There has been much research highlighting the fact that Medicare Advantage enrollees who experience adverse health

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<sup>85</sup> *Id.* at 12. Report finding that

Certain MAOs—which may offer multiple MA plans—had substantially higher relative increases in disenrollments to join FFS by beneficiaries in the last year of life compared to other MAOs. For example, in 2017, the MAO with the highest relative increase in disenrollments to join FFS saw beneficiaries in the last year of life disenroll at nearly 10 times the rate of all other beneficiaries. . . . In both 2016 and 2017, the same two MAOs had the highest relative increase in disenrollments by beneficiaries in the last year of life.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

events or who have greater health needs switch from Medicare Advantage into traditional Medicare at higher rates.<sup>88</sup>

A 2015 study in Health Affairs, “High-Cost Patients Had Substantial Rates Of Leaving Medicare Advantage And Joining Traditional Medicare,” found increased rates of switching out of Medicare Advantage into traditional Medicare among people who used home health and nursing home services, when compared to beneficiaries who did not use home health and nursing home care. Conversely, the study found lower rates of switching out of traditional Medicare into Medicare Advantage among people who used nursing home, home health, or acute inpatient care, when

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<sup>88</sup> See David J. Meyers, et al., *Analysis of Drivers of Disenrollment and Plan Switching Among Medicare Advantage Beneficiaries*, JAMA Intern Med (Feb. 25, 2019), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2725083> (finding “[r]esults of this study suggest that substantially higher disenrollment from MA plans occurs among high-need and Medicare-Medicaid eligible enrollees. This study’s findings suggest that star ratings have the strongest association with disenrollment trends, whereas increases in monthly premiums are associated with greater likelihood of switching plans.”); See also Qijuan Li, et al., *Medicare Advantage Ratings And Voluntary Disenrollment Among Patients With End-Stage Renal Disease*, Health Affairs (January 2018), <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2017.0974> (finding that there is “a strong association between MA plans’ star ratings and incident ESRD patients’ voluntary disenrollment from MA plans to traditional Medicare in the year following the initiation of dialysis. These patients’ disenrollment rates, especially rates of switching from MA to traditional Medicare, were significantly higher than disenrollment rates among all MA beneficiaries. These findings suggest that the rate of voluntary disenrollment among high-cost, high-need patients may be an important measure of MA plan quality, that CMS and other policy stakeholders may want to monitor such disenrollment rates, and that low plan quality may lead to increased spending in traditional Medicare by shifting the costs of the ESRD population from some MA plans to traditional Medicare. Further research is needed to understand whether these findings extend to other chronically ill populations.”); Sungchul Park, David J. Meyers & Brent A. Langellier, *Rural Enrollees In Medicare Advantage Have Substantial Rates Of Switching To Traditional Medicare*, Health Affairs (March 2021) <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.01435> (even greater among rural enrollees who were high cost or high need); See also, Patricia Neuman & Gretchen Jacobson, *Medicare Advantage Checkup*, New England Journal of Medicine (Nov. 29, 2018) <https://www.nejm.org/doi/full/10.1056/nejmhpr1804089> (finding evidence that quality of care is mixed with generally higher rates of preventive care and screenings among MA recipients, but “[s]omewhat counterintuitively, there seems to be no difference between Medicare and [MA] plans with respect to care coordination” and “[s]everal studies have flagged concerns about the quality of care received by high-need, high-cost enrollees, on the basis of disenrollment rates and other measures.”).

compared to beneficiaries who did not use these services.<sup>89</sup> “We found that the switching rate from 2010 to 2011 away from Medicare Advantage and to traditional Medicare exceeded the switching rate in the opposite direction for participants who used long-term nursing home care (3% versus 7%), short-term nursing home care (9% versus 4%), and home health care (8% versus 3%). These results were magnified among people who were enrolled in both Medicare and Medicaid.”<sup>90</sup>

In its conclusion, the Health Affairs study summarized its findings of:

substantial switching from Medicare Advantage to traditional Medicare by beneficiaries who used nursing home and home health care, particularly those who were also eligible for Medicaid, and virtually no entry into Medicare Advantage plans by traditional Medicare beneficiaries who used these services or acquired dual eligibility. We found that a high proportion of beneficiaries with nursing home or home health care use choose to exit the Medicare Advantage program by the start of the next plan year. Thus, our study raises questions about the role of Medicare Advantage plans in serving high-cost patients with complex health care needs that span acute, post-acute, and long-term care settings.” The report concluded that “substantial switching from Medicare Advantage to traditional Medicare by beneficiaries who used nursing home and home health care, particularly those who were also eligible for Medicaid, and virtually no entry into Medicare Advantage plans by traditional Medicare beneficiaries who used these services or acquired dual eligibility. We found that a high proportion of beneficiaries with nursing home or home health care use choose to exit the

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<sup>89</sup> Rahman, et al., *supra* note 73.

<sup>90</sup> *Id.*

Medicare Advantage program by the start of the next plan year. Thus, our study raises questions about the role of Medicare Advantage plans in serving high-cost patients with complex health care needs that span acute, postacute, and long-term care settings.<sup>91</sup>

Taken together, the above data underscore health equity concerns with Medicare Advantage. The increased enrollment in Medicare Advantage (Medicare Advantage enrollees now account for more than four in 10 beneficiaries overall)<sup>92</sup> not only raises access issues for beneficiaries enrolled in the plans, but also undermines the social insurance structure central to the Medicare program. With legislative and administrative action over many years, the steady increase in measures that disproportionately favor the private Medicare Advantage program over traditional Medicare has led to increased enrollment in the plans and concerns about the traditional Medicare program being chipped away and slowly becoming privatized.<sup>93</sup> It is vital to the very existence of the Medicare program

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

<sup>92</sup> Koma, Cubanski & Neuman, *supra* note 20, (finding, “In 2018, Medicare Advantage covered about 4 in 10 Medicare beneficiaries (39%), or 21 million people with Medicare. (Based on more current enrollment data, the total number of Medicare Advantage enrollees increased to 24 million in 2020, but the MCBS, which we use here for demographic analysis of coverage sources, is not available beyond 2018.”).

<sup>93</sup> See, Center for Medicare Advocacy, *Tipping the Scales Toward Medicare Advantage*, (Mar. 21, 2018), <https://medicareadvocacy.org/tipping-the-scales-toward-medicare-advantage/>; See also, David A Lipschutz, *Commentary: Don’t Further Privatize Medicare*, Inquiry (Aug 5, 2019), See also, Emily Gee, Maura Calsyn & Nicole Rapfogel, *Trump’s Plan To Privatize Medicare*, Center for American Progress (CAP), (Oct. 11, 2019)

<https://www.americanprogress.org/issues/healthcare/news/2019/10/11/475646/trumps-plan-privatize-medicare/>; See also The New York Times, *Medicare’s Private Option Is Gaining Popularity, and Critics*, (Feb. 21, 2020) <https://www.nytimes.com/2020/02/21/business/medicare-advantage-retirement.html>; See also Bob Herman, *Medicare has become more of a private marketplace — and it’s costly*, Axios, (Aug 11, 2021) <https://www.axios.com/medicare-advantage-enrollment-spending-pandemic-risk-adjustment-d1a608ff-15eb-47bf-8952-0e1c5af097d5.html>; See also, Trudy Lieberman, *This latest under-the-radar program could push Medicare deeper into private hands*, USC Annenberg, Center for Health Journalism, (Mar. 11, 2021) <https://centerforhealthjournalism.org/2021/03/10/latest-under-radar-program-could-push-medicare-deeper-private-hands>; See also, Center for Medicare Advocacy, *MEDICARE &*

that it maintain a social insurance structure, providing reliable, consistent access to care on which all beneficiaries can rely, with a defined benefit and guaranteed coverage regardless of health status, age or income.

This paper examines the equity concerns in Medicare Advantage in order to illustrate the possible perils associated with beneficiaries being unable to exit a Medicare Advantage plan without extreme financial consequences of being exposed to out-of-pocket costs in traditional Medicare without supplemental insurance. While this paper does not address policy proposals aimed at improving Medicare Advantage oversight, payment reform or legislation to achieve parity between Medicare Advantage and traditional Medicare, the clear health equity concerns in Medicare Advantage call out for many policy changes.<sup>94</sup> Addressing the equity concerns in Medicare Advantage would help to address the underlying disparities central to the decision to switch from Medicare Advantage to traditional Medicare.

## **Medigap Consumer Protections Lacking in Most States for Beneficiaries over 65**

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*YOU 2022 – An Important First Step Towards Reversing Bias in Favor of Medicare Advantage*, (Sept. 20, 2021) <https://medicareadvocacy.org/wp-content/uploads/2021/09/Medicare-You-2022.pdf?emci=144750ab-161a-ec11-981f-501ac57ba3ed&emdi=ea000000-0000-0000-0000-000000000001&ceid={{ContactsEmailID}}>.

<sup>94</sup>See Committee for a Responsible Federal Budget, *Reducing Medicare Advantage Overpayments*, (Feb. 23, 2021), <https://www.crfb.org/papers/reducing-medicare-advantage-overpayments>; See also Center on Budget and Policy Priorities, *Medicare Advantage Upcoding, Overpayments Require Attention*, (Oct. 30, 2018) <https://www.cbpp.org/blog/medicare-advantage-upcoding-overpayments-require-attention>; *June 2021 Report to Congress*, (Jun 2021), MedPAC, [http://medpac.gov/docs/default-source/reports/jun21\\_executivesummary\\_medpac\\_report\\_to\\_congress\\_sec.pdf?sfvrsn=0](http://medpac.gov/docs/default-source/reports/jun21_executivesummary_medpac_report_to_congress_sec.pdf?sfvrsn=0).



For beneficiaries ages 65 and older, there are federal guaranteed issue protections for Medigap policies during the six-month Medigap open enrollment period when enrolling in Medicare Part B, as well as in the event of limited, specific qualifying circumstances.<sup>95</sup> Guaranteed issue protections prohibit insurers from denying a Medigap policy to eligible applicants, including people with pre-existing conditions. There are also federal guaranteed issue protections during “trial” periods for Medicare Advantage plans, including during the first year older adults enroll in Medicare.<sup>96</sup> This allows older adults who disenroll from a Medicare Advantage plan within the first year to have guaranteed issue rights to purchase a Medigap policy when they switch to traditional Medicare. Another trial period allows Medicare beneficiaries to cancel their Medigap policy and enroll in a Medicare Advantage plan; these beneficiaries have guaranteed issue protections that allow them to reenroll in the same Medigap policy if, within a year of enrolling in a Medicare Advantage plan, they disenroll from Medicare Advantage and switch to traditional Medicare.<sup>97</sup> Other than a few very specific and limited circumstances, after the initial six months of enrolling in Medicare Part B, or the first year trial in Medicare Advantage, older adults generally do not have federal guaranteed issue protections when applying for a Medigap plan.

Though states have the flexibility to adopt Medigap consumer protections that are more generous than the minimum federal requirements, most states do not exercise this flexibility.<sup>98</sup> Almost all states allow insurance companies to deny Medigap insurance policies to older adults after their initial enrollment in Medicare because of a pre-existing medical condition, with limited

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<sup>95</sup> Guaranteed Issue Rights, Medicare.gov, <https://www.medicare.gov/supplements-other-insurance/when-can-i-buy-medigap/guaranteed-issue-rights>.

<sup>96</sup> 42 U.S.C. § 1395ss(s).

<sup>97</sup> If that former policy is not available, beneficiaries can purchase another Medigap plan.

<sup>98</sup> Boccuti, Cristina et al., *Medigap Enrollment and Consumer Protection Vary Across States*, KFF (Jul. 11, 2018), <https://www.kff.org/medicare/issue-brief/medigap-enrollment-and-consumer-protections-vary-across-states/>.

exceptions.<sup>99</sup> States also have the flexibility to develop rules on whether Medigap premiums may be impacted by factors like a policyholder's age. These factors can be considered even during guaranteed issue open enrollment periods. The three different rating systems states can permit or require Medigap insurers to utilize in developing premiums are community rating, issue-age rating, or attained-age rating. Community rating does not allow premiums to be based on the applicant or policyholder's age or health status, thereby providing the strongest consumer protection.<sup>100</sup> Attained age rating allows premiums to increase as beneficiaries age; these are often set at attractive lower rates for younger beneficiaries and can increase at unpredictable rates.

Only eight states (Arkansas, Connecticut, Massachusetts, Maine, Minnesota, New York, Vermont and Washington) require community rating, meaning all Medigap enrollees are charged the same premium regardless of disease.<sup>101</sup> Only four states (Connecticut, Maine, Massachusetts, and New York) require guaranteed issue, meaning that Medigap insurers must issue policies on demand.<sup>102</sup> Those four states require that Medigap plans be available to all Medicare beneficiaries ages 65 and older either continuously throughout the year or at least one time per year.<sup>103</sup> In all other states and the District of Columbia, insurers may deny a Medigap policy to older adults, except during their initial open enrollment period when they start on Medicare, or when applicants

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* Insurers in states that require community rating may charge different premiums based on other factors, such as smoking status and residential area.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* "Consistent with federal law, Medigap insurers in New York, Connecticut, and Maine may impose up to a six-month "waiting period" to cover services related to pre-existing conditions if the applicant did not have six months of continuous creditable coverage prior to purchasing a policy during the initial Medigap open enrollment period. Massachusetts prohibits pre-existing condition waiting periods for its Medicare supplement policies."

<sup>103</sup> *Id.*

have other specified qualifying events, such as the loss of retiree health coverage.<sup>104</sup> Depending on their state, Medicare beneficiaries who miss these limited periods of enrollment may unintentionally forgo the opportunity to purchase a Medigap policy if they decide they need one, or if they choose to switch to traditional Medicare after being in a Medicare Advantage plan for a couple of years.<sup>105</sup>

The lack of federal consumer protections for guaranteed issue results in serious financial consequences. Aside from the four states with guaranteed issue protections, most Medicare beneficiaries over 65 who are in traditional Medicare and miss this initial open enrollment period, would be subject to medical underwriting, which could result in being denied a Medigap policy due to pre-existing conditions.<sup>106</sup>

This is a particularly significant barrier for Medicare beneficiaries over 65 who enroll in a private Medicare Advantage plan during their initial enrollment period, then decide to switch to traditional Medicare after the one-year trial period. As discussed previously, sicker and older beneficiaries switch from Medicare Advantage to traditional Medicare at higher rates than younger and healthier enrollees. So, it is precisely the group of individuals who are more likely to utilize health care services, and would need Medigap protections for out-of-pocket costs, who may be denied coverage.

Layered on top of the serious financial consequences of not having access to Medigap plans or having extremely costly premiums for plans, is the concern that the barriers to Medigap access deter beneficiaries from switching to traditional Medicare, or

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<sup>104</sup> See 42 U.S.C. § 1395ss(s)(3) (listing the various circumstances).

<sup>105</sup> See Kaiser Family Foundation (KFF), *Traditional Medicare...Disadvantaged?*, (Mar. 31, 2016), <https://www.kff.org/medicare/perspective/traditional-medicare-disadvantaged/>; see also Boccuti, Cristina et al., *Medigap Enrollment and Consumer Protection Vary Across States*, KFF (Jul. 11, 2018), <https://www.kff.org/medicare/issue-brief/medigap-enrollment-and-consumer-protections-vary-across-states/>; See also, The New York Times, *Medicare's Private Option Is Gaining Popularity, and Critics*, (Feb. 21, 2020), <https://www.nytimes.com/2020/02/21/business/medicare-advantage-retirement.html>.

<sup>106</sup> Boccuti, Cristina et al., *Medigap Enrollment and Consumer Protection Vary Across States*, KFF (Jul. 11, 2018), <https://www.kff.org/medicare/issue-brief/medigap-enrollment-and-consumer-protections-vary-across-states/>.

lead them to re-enroll in Medicare Advantage. A 2019 study conducted at Brown University School of Public Health, published in *Health Affairs*, “Limited Medigap Consumer Protections Are Associated With Higher Reenrollment In Medicare Advantage Plans,” highlighted this phenomenon. The study found that “in states without consumer protections in the Medigap market, high-need MA enrollees had a 16.9-percentage-point higher reenrollment rate in MA after switching from it to traditional Medicare, compared to high-need enrollees in states with guaranteed issue and community rating for Medigap. Policy makers should consider consumer protections in the Medigap market that ensure adequate access to coverage for high-need Medicare beneficiaries.”<sup>107</sup> The study’s authors also noted that

“Medicare beneficiaries with complex care needs often face a higher burden of costs and may benefit from a greater continuity of care. In most states these enrollees may face significant barriers to enrollment in Medigap that may increase their exposure to high out-of-pocket spending and lead to disruptions in the continuity of care if they need to switch between MA and traditional Medicare.”<sup>108</sup>

The study identified an association between Medigap consumer protections that require guaranteed issue, and rates of remaining in traditional Medicare after switching from Medicare Advantage.<sup>109</sup> The study provides strong evidence to demonstrate the harm to beneficiaries who attempt to exit Medicare Advantage in order to enroll in traditional Medicare, only to find that they are unable to obtain supplemental insurance to assist with out-of-pocket costs in

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<sup>107</sup> *Id.*

<sup>108</sup> David J. Meyers, Amal N. Trivedi & Vincent Mor, *Limited Medigap Consumer Protections Are Associated with Higher Reenrollment In Medicare Advantage Plans*, *Health Affairs*, (May 2019)

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6541000/pdf/nihms-1031031.pdf>.

<sup>109</sup> *Id.*

traditional Medicare. In almost all states, these individuals are faced with two suboptimal choices: 1) either reenroll in Medicare Advantage—either their previous plan that they determined was not meeting their needs, perhaps due to the limited networks and utilization management that places barriers to care and increases their out-of-pocket spending—or another Medicare Advantage plan in their area, which may also have these limitations, or 2) face exposure to high out-of-pocket costs in traditional Medicare without the buffer of supplemental insurance to protect them from some of those costs.

### **Medigap Consumer Protections Lacking in Most States for Beneficiaries under 65**

Federal consumer protections for Medigap policies do not apply to beneficiaries under age 65.<sup>110</sup> Medigap insurers are not required to sell Medigap policies to the over nine million Medicare beneficiaries under the age of 65, who qualify for Medicare based on their long-term disability. Insurance companies are not required to guarantee issuance of policies to these beneficiaries and therefore can freely deny coverage due to age, sex, and health status.<sup>111</sup>

However, many states have elected to voluntarily extend protections to their under-65 population. Currently, 34 states grant some degree of protection to disabled and end-stage renal disease (ESRD) Medicare beneficiaries.<sup>112</sup> Of the 34 states, some choose to extend the protections only to those with a disability, while some extend it only to those with ESRD. In the 16 states without state-protections, some insurers still voluntarily offer Medigap policies to those with disabilities and ESRD. However, given the health

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<sup>110</sup> 42 U.S.C. §1395ss(s)(2).

<sup>111</sup> *Id.*

<sup>112</sup> Ctr. for Medicare & Medicaid Serv., (CMS), 2021: *A Guide to Choosing a Medigap Policy* (2021), <https://www.medicare.gov/media/9486>, 40, which includes 33 states. Virginia is the 34th state, beginning January 2021; see, State Corporation Commission, *Additional Health Insurance Coverage Options for Medicare-Eligible Virginians Under Age 65*, <https://www.scc.virginia.gov/newsreleases/release/Additional-Coverage-Options-Coming-for-Medicare-El>.

conditions of this population, insurers can often charge much higher premiums based on their health status.

A Kaiser Family Foundation Report, “The Gap in Medigap”<sup>113</sup> provides historical context for the limitations on consumer protections for the under 65 Medicare population. The report details how the 1990 federal law created a gap in Medigap for beneficiaries under 65 with disabilities because insurers were opposed to the idea of providing an open enrollment period with guaranteed-issue rights to those under 65 on Medicare since many Medigap policies then covered some prescription drug costs. Insurers were concerned that higher drug spending among Medicare beneficiaries under 65, when compared to the over 65 population,<sup>114</sup> would drive up insurers’ costs, resulting in higher premiums.

The report outlines how this reasoning is now moot because Medigap policies sold today are prohibited from covering prescription drug costs since Medicare Part D (established in 2006)<sup>115</sup> provides prescription drug coverage. Because Medigap insurers are no longer responsible for drug costs, and Medicare per capita costs are similar for younger beneficiaries with disabilities and the over 65 Medicare population, when Part D spending is excluded, the previous reasoning no longer holds true. The Kaiser Family Foundation report concludes by explaining that because of this change, federal consumer protections for this population are necessary.

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<sup>113</sup> Tricia Neuman & Juliette Cubanski, *The Gap in Medigap*, KFF, (Sept. 27, 2016) <https://www.kff.org/medicare/perspective/the-gap-in-medigap/>.

<sup>114</sup> Data supports the premise that the under 65 population had higher drug costs than the over 65 population: Juliette Cubanski, Tricia Neuman & Anthony Damico, *Similar but Not the Same: How Medicare Per Capita Spending Compares for Younger and Older Beneficiaries*, KFF (Aug. 16, 2016) <https://www.kff.org/medicare/issue-brief/similar-but-not-the-same-how-medicare-per-capita-spending-compares-for-younger-and-older-beneficiaries/>.

<sup>115</sup> *Id.* Beginning in 2006, with the start of the Medicare Part D prescription drug benefit.

“In light of these data, it’s not clear what the justification is for treating younger adults with disabilities differently from older adults when it comes to buying a Medigap policy. Revising federal law related to Medigap open enrollment rights and protections could help to reduce the gap in Medigap coverage between younger and older beneficiaries, help alleviate cost-related access problems among the relatively small but vulnerable group of people under 65 who qualify for Medicare, and provide more equitable treatment to Medicare beneficiaries across the states.”<sup>116</sup>

When these beneficiaries turn age 65, federal law requires that they be eligible for the same six-month open enrollment period for Medigap that is available to new beneficiaries age 65 and older. The limits for those under 65 appear completely arbitrary, as the rest of the Medicare program functions identically for the under 65 population as it does for the over 65 population.<sup>117</sup>

### **Considerations for Expanding Medigap Federal Consumer Protections**

Consumer protections that would promote health equity include making Medigap available to all individuals in traditional Medicare regardless of preexisting condition or age and setting premiums at the same rate for all beneficiaries, thereby improving access to the under 65 population. Expanded enrollment opportunities, like an annual enrollment period similar to the one for Medicare Advantage, or continuous enrollment, should also be explored on the federal level.

Legislation has been introduced in Congress that could address many of these shortcomings in consumer protections. The Elijah E.

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<sup>116</sup> Neuman & Cubanski, *supra* note 113.

<sup>117</sup> With the exception of Medicare Secondary Payer rules and size of employer. See, Ctr. for Medicare & Medicaid Serv., (CMS), Medicare Secondary Payer, (Jun. 30, 2020), <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Medicare-Secondary-Payer/Medicare-Secondary-Payer>

Cummings Lower Drug Costs Now Act, (H.R. 3) passed in the House in the 116<sup>th</sup> session (2019-2021), though it was not taken up by the Senate at the time.<sup>118</sup> The Elijah E. Cummings Lower Drug Costs Now Act would have made progress in reducing the imbalance in enrollment rights between Medicare Advantage plans and Medigap plans by expanding federal Medigap protections to create guaranteed issue rights with respect to Medigap policies to all beneficiaries, thereby removing the exclusion for the under 65 Medicare population.<sup>119</sup> It also provided an additional one-time six month enrollment period for Medigap policies for individuals with Medicare Parts A and B who otherwise would not qualify for guaranteed issue of Medigap policies.<sup>120</sup> The bill also provided a one-time ability to pick up a Medigap policy after disenrolling from a Medicare Advantage plan (after the current one-year trial period right).<sup>121</sup> The Congressional Budget Office (CBO), which together with the staff of the Joint Committee on Taxation (JCT) estimates the costs of bills and resolutions, scored this legislation in 2019.<sup>122</sup> The scoring estimated the cost of the guaranteed issue provision for certain Medicare supplemental insurance policies at \$14 billion.<sup>123</sup> While CBO's analysis did not detail the reasoning for this estimated cost to the Medicare program, it may have factored in an expectation that beneficiaries will utilize more services if they have improved access to supplemental insurance, which would better protect, or completely insulate them from out-of-pocket costs. While that might

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<sup>118</sup> While H.R. 3 was reintroduced in the 117<sup>th</sup> session, this version did not include the Medigap changes. *See*, Elijah E. Cummings Lower Drug Costs Now Act, H.R. 3, 117<sup>th</sup> Cong. (2021).

<sup>119</sup> Elijah E. Cummings Lower Drug Costs Now Act, H.R. 3, 116<sup>th</sup> Cong. § 801 (2019).

<sup>120</sup> *Id.* at § 801 (a)(2)

<sup>121</sup> *Id.* § 801 (b)

<sup>122</sup> CONG. BUDGET OFFICE, 116<sup>TH</sup> CONG., BUDGETARY EFFECTS OF H.R. 3, THE ELIJAH E. CUMMINGS LOWER DRUG COSTS NOW ACT 1 (Dec. 10, 2019)

[https://www.cbo.gov/system/files/2019-12/hr3\\_complete.pdf](https://www.cbo.gov/system/files/2019-12/hr3_complete.pdf).

<sup>123</sup> *Id.* at 5.



increase costs for the Medicare program, it does not mean that the care would not be necessary; it might suggest that beneficiaries currently forgo necessary care out of cost concerns if they do not have supplemental insurance. It is also possible that the estimate anticipated that more beneficiaries who wish to exit their Medicare Advantage plan will be able to join traditional Medicare if they have a new opportunity to access supplemental insurance because of this legislation. Since much research on this topic demonstrates that sicker enrollees are more likely to disenroll from Medicare Advantage, then those additional sicker beneficiaries joining traditional Medicare will tend to be costlier beneficiaries, making it reasonable to expect increases in spending for the traditional Medicare program. Though the CBO score suggests increasing cost to Medicare, it does not express an estimate of the impact on beneficiary Medigap premiums. It is certainly reasonable to expect some increase in premiums for beneficiaries if sicker beneficiaries are given an opportunity to enroll in a Medigap plan that they currently cannot access. There is a lack of comprehensive data or analysis exploring what percentage increase there would be, or the best mechanism to mitigate those possible increases. While improved access to a Medigap plan would certainly improve the financial stability of beneficiaries who are currently unable to obtain supplemental coverage, the impact on all premiums is also an important consideration that would need to be examined and studied when addressing proposals to expand access.

Texas Congressman Lloyd Doggett also sponsored legislation addressing Medigap consumer protections.<sup>124</sup> Rep. Doggett introduced the Close the Medigap Act into Congress in 2021.<sup>125</sup> The legislation makes several changes to the Social Security Act to expand beneficiary access to Medigap plans. The changes include prohibitions on Medigap insurers from denying issuance of coverage or basing policy prices, including premiums, on health status or medical condition.<sup>126</sup> Additionally, the legislation prohibits

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<sup>124</sup> Previously introduced by other members of Congress in previous sessions of Congress.

<sup>125</sup> Close the Medigap Act of 2021, H.R. 4640, 117<sup>th</sup> Cong. (2021).

<sup>126</sup> *Id.* at § 2.

excluding benefits based on preexisting conditions.<sup>127</sup> The legislation also reverses the changes brought about in MACRA, by restoring access to the first dollar coverage through the two most popular Medigap policies (Plans C and F), which were eliminated for new beneficiaries starting January 1, 2020.<sup>128</sup>

The plans MACRA eliminated as an option for new beneficiaries pay benefits for the Part B deductible<sup>129</sup>, which is \$233<sup>130</sup> in 2022. Given their comprehensive first-dollar coverage, the plans are the most popular among enrollees, with over half of Medigap policyholders in one of these two plans.<sup>131</sup> Despite their popularity, Congress eliminated the plans, for new beneficiaries, out of concerns for cost and as a means of curbing utilization under the theory of “skin in the game.”<sup>132</sup> The foundation of the argument being that if all costs are covered for beneficiaries and they have no cost-sharing, beneficiaries will have high utilization of medical services, including high cost, low value care. Further, that if beneficiaries are responsible for cost-sharing (i.e. they have “skin in the game”), they will reduce their utilization of low value, high cost services.<sup>133</sup> However, much research indicates that with increased

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<sup>127</sup> *Id.* at § 2.

<sup>128</sup> *Id.* at § 6.

<sup>129</sup> Bonnie Burns, *2020 Changes to Medicare Medigap Supplement Insurance*, CALIFORNIA BROKER (Oct. 1, 2019), <https://www.calbrokermag.com/in-this-issue/2020-changes-to-medicare-medigap-supplement-insurance/>.

<sup>130</sup> Ctr. For Medicare & Medicaid Serv., (CMS) *Part B Costs*, MEDICARE.GOV (2022), <https://www.medicare.gov/your-medicare-costs/part-b-costs>.

<sup>131</sup> Bob Herman, *Changes Loom As Most-Popular Medigap Plans Face Extinction*, MODERN HEALTHCARE (June 25, 2016), <http://www.modernhealthcare.com/article/20160625/MAGAZINE/306259966>.

<sup>132</sup> Richard Stefanacci & Barney Spivack, *Medicare’s Push for More “Skin in the Game,”* ANNALS OF LONG-TERM CARE (June 2012), <https://www.hmpgloballearningnetwork.com/site/altc/article/medicare-s-push-more-skin-game>.

<sup>133</sup> Medicare Payment Advisory Comm’n (MedPAC), *Report to the Congress*, P.L. 105-33 at 20 (March 15, 2021), [https://www.medpac.gov/wpcontent/uploads/import\\_data/scrape\\_files/docs/defaultsource/reports/mar21\\_medpac\\_report\\_to\\_the\\_congress\\_sec.pdf](https://www.medpac.gov/wpcontent/uploads/import_data/scrape_files/docs/defaultsource/reports/mar21_medpac_report_to_the_congress_sec.pdf), finding “Medicare uses beneficiary cost sharing, in part, to deter overuse of services.”

cost-sharing, utilization decreases across the board, including high value services, as beneficiaries broadly forgo care because of the costs. This is especially apparent among older, chronically ill, and low-income beneficiaries.<sup>134</sup> These plans, known as the “Cadillac” policies of the supplement market, were feared to fuel the overutilization of medical services. However, this concern does not comport with the actual structure of Medigap policies as supplemental insurance. Because Medigap plans can only cover the cost-sharing for services that are already covered by Medicare, they are not a driver of unnecessary care. This theory of “skin in the game” is misapplied to this type of insurance. As noted by NAIC in a letter to HHS Secretary Kathleen Sebelius, in 2012, “Medigap plans pay benefits only after Medicare has determined that the services are medically necessary and has paid benefits. Medigap cannot alter Medicare’s coverage determination and the assertion that Medigap coverage causes overuse of Medicare services fails to recognize that Medigap coverage is secondary and that only Medicare determines the necessity and appropriateness of medical care utilization and services.”<sup>135</sup> Medigap plans have no role in medical decisions.

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<sup>134</sup> National Association of Insurance Commissioners, Senior Issues Task Force, Medigap PPACA Subgroup, “Medicare Supplement Insurance First-Dollar Coverage and Cost Shares Discussion Paper,” October 31, 2011:

Multiple studies have called into question the impact of increased cost sharing on the health outcomes associated with vulnerable populations (i.e., the elderly, chronically ill and low-income). Some suggest that increasing cost sharing for elderly patients may have adverse health consequences and may also increase total spending on health care. For example, a study published in the *New England Journal of Medicine* in January 2010 noted that increased cost sharing for ambulatory care for elderly patients led to both reduced outpatient visits and higher rates of hospital admission and inpatient days, as well as a higher percentage of enrollees who were hospitalized. The offsetting increase in hospitalization occurred particularly for those with lower incomes and those with chronic conditions. A Robert Wood Johnson Foundation report released in December 2010 similarly found that cost sharing increases were associated with adverse outcomes for vulnerable populations. It found that elderly, chronically ill and low-income patients had increased expenditures for emergency room visits and hospitalizations when cost sharing for prescription drugs was increased.

<sup>135</sup> Letter from NAIC & to Hon. Kathleen Sebelius, U.S. Dept. of Human and Health Serv., Secretary (Dec. 12, 2019), on file with author.

MACRA's changes are likely to change Medigap buying behaviors, perhaps pushing more beneficiaries into Medicare Advantage plans. The changes only began in 2020, so there has not been extensive data, or comprehensive research or analysis on the impacts yet, but it is an area that should be studied to determine the broader impacts on behavior.<sup>136</sup> Reversing these changes, as the Close the Medigap Act would do, is broadly supported by beneficiaries, experts on Medigap insurance, as well as Medicare beneficiary advocacy groups.<sup>137</sup>

Doggett's Close the Medigap Act also expands enrollment periods for plans by prohibiting waiting periods, elimination periods, look-back periods for preexisting conditions, and limits to periods of enrollment.<sup>138</sup> By expanding enrollment to allow Medicare beneficiaries with pre-existing conditions to purchase a Medigap policy at any time without being denied coverage or subjected to higher premiums, the legislation would bring the Medigap market in line with the rest of insurance industry post

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<sup>136</sup> See Gretchen Jacobson, Tricia Neuman & Anthony Damico, *Medigap Enrollment Among New Medicare Beneficiaries: How Many 65-Year Olds Enroll In Plans With First-Dollar Coverage?*, KFF (Apr. 13, 2015), <https://www.kff.org/medicare/issue-brief/medigap-enrollment-among-new-medicare-beneficiaries/>.

<sup>137</sup> Bonnie Burns, Policy Specialist, California Health Advocates, *Strengthening Public and Private Long-Term Services and Supports*, 7 (Aug. 1, 2013), <http://ltccommission.org/ltccommission/wp-content/uploads/2013/12/Bonnie-Burns-Testimony.pdf>. Ms. Burns is an expert on Medigap, she serves as a consumer representative on the National Association of Insurance Commissioners (NAIC); she has testified before Congress on Medigap issues. Notes on file with author. *See also*, William G. Schiffbauer, Esq., Schiffbauer Law Office. Mr. Schiffbauer's practice is in the areas of federal and state legislation and regulation relating to health insurance, health plans, and health care policy, ERISA, Medicare, Medicaid, and health insurance tax-related matters. Notes on file with author.

<sup>138</sup> Close the Medigap Act of 2021, *supra* note 125.

Affordable Care Act (ACA).<sup>139</sup> Because Medigap plans are permitted<sup>140</sup> to consider preexisting conditions in certain situations for setting premiums and for issuing coverage, they provide fewer protections for individuals with preexisting conditions than most insurance post-ACA. After passage of the ACA, which provided comprehensive protections for people preexisting conditions, this is out of sync with the rest of the insurance market. Prior to the ACA taking effect in 2014, people with pre-existing health conditions were often denied coverage or charged higher premiums for individual market coverage.<sup>141</sup> Post-ACA, people with pre-existing health conditions have not had their health conditions affect their access to health insurance or raise their premiums.<sup>142</sup> This is particularly significant for the Medicare population, who as a group have a higher rate of preexisting conditions. According to CMS data, of all non-dual-eligible Medicare beneficiaries in 2017, 66% were living with two or more chronic conditions.<sup>143</sup> Therefore legislation that would prohibit insurers from factoring preexisting conditions into coverage or premium setting would impact a substantial portion of the Medicare population.

The legislation would also extend protections to other individuals, including those enrolled in Medicare Advantage for more than 12 months, who wish to switch back to the traditional

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<sup>139</sup> Assistant Sec'y for Public Affairs (ASPA), *Pre-existing Conditions*, HHS.GOV (Jan. 31, 2017), <https://www.hhs.gov/healthcare/about-the-aca/pre-existing-conditions/index.html>; see also Ctr. for Medicare & Medicaid Serv. (CMS), *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans: 129 Million People Could Be Denied Affordable Coverage Without Health Reform*, CMS.GOV, <https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-OtherResources/preexisting>.

<sup>140</sup> Though insurers are permitted to consider preexisting conditions in certain situations, experts state that this may be more limited in practice, *See*, Burns, *supra* note 137.

<sup>141</sup> Gary Claxton, Cynthia Cox, Anthony Damico, Larry Levitt & Karen Pollitz, *Pre-Existing Condition Prevalence for Individuals and Families*, KFF (Oct. 4, 2019), <https://www.kff.org/health-reform/issue-brief/pre-existing-condition-prevalence-for-individuals-and-families/>.

<sup>142</sup> *Id.*

<sup>143</sup> Kristen Riley, Thomas Tsai, Jose Figueroa & Ashish Jha, *Managing Medicare Beneficiaries with Chronic Conditions During the COVID-19 Pandemic*, THE COMMONWEALTH FUND (Mar. 18, 2021), <https://www.commonwealthfund.org/publications/issue-briefs/2021/mar/managing-medicare-beneficiaries-chronic-conditions-covid#6>.

Medicare program after the trial period ends.<sup>144</sup> This would provide individuals with a meaningful opportunity to try Medicare Advantage and then switch to traditional Medicare if they determine Medicare Advantage is not working for them.

The Medigap Consumer Protection Act of 2019 (S.2428),<sup>145</sup> introduced by Senator Sherrod Brown of Ohio, also expands Medigap consumer protections. Among other things, Sen. Brown's bill would also expand guaranteed issue of Medigap policies to several groups of individuals, including those with Medicare under age 65 and individuals enrolled in Medicare Advantage who choose to switch to traditional Medicare after their 12-month MA trial period ends.<sup>146</sup>

Absent federal legislation making expanded Medigap consumer protections available uniformly across the country, consumer protections vary widely. Only a handful of states currently have broader consumer protections for Medicare beneficiaries over 65. Connecticut, along with New York and Massachusetts, has a continuous enrollment period.<sup>147</sup> It is worth exploring how those markets function and examining how additional enrollment periods could be expanded on a national level in a way that balances ensuring a stable market with additional consumer protections.

In Connecticut, continuous enrollment coupled with community rating, ensures that beneficiaries have access to Medigap plans if their situation makes it such that their Medicare Advantage plan is no longer serving them well. They are able to switch to traditional Medicare and enroll in a Medigap plan to cover the out-of-pocket costs in Medicare. At the time of this writing, Connecticut has 14

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<sup>144</sup> Close the Medigap Act of 2021, *supra* note 125.

<sup>145</sup> See Medigap Consumer Protection Act of 2019, S. 2428, 116<sup>th</sup> Cong. (2019).

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

<sup>147</sup> Boccuti, Cristina et al., *Medigap Enrollment and Consumer Protection Vary Across States*, KFF (Jul. 11, 2018), <https://www.kff.org/medicare/issue-brief/medigap-enrollment-and-consumer-protections-vary-across-states/>

companies offering various individual and group Medigap plans, indicating that there is market competition in the state.<sup>148</sup>

Maine has an annual enrollment period for Plan A, which allows individuals the right to purchase Medigap Plan A during an annual one-month open enrollment period.<sup>149</sup> The month can vary based on the company. An annual Medigap enrollment period should be studied to determine how to replicate nationally, with a focus on impacts on premiums.<sup>150</sup> The insurance market in Maine clearly has a level of competition as, at the time of this writing, there are 14 companies offering plan A.<sup>151</sup> In fact, two of the insurers go beyond the one-month requirement, and voluntarily elect to offer continuous enrollment into Plan A throughout the year.<sup>152</sup> This seems to indicate that the extended enrollment opportunities do not cause instability in the market; rather, some companies must see a benefit in extending the enrollment opportunity beyond the required one-month to 12 months. Consumer advocates knowledgeable about Medigap plans have called for annual enrollment periods in Medigap similar to the annual enrollment period in Medicare Advantage, and as a means of expanding access to supplemental insurance, while moderating the pricing fluctuations that could

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<sup>148</sup> State of Connecticut Insurance Department, “Monthly Medicare Supplement rates for Standardized Plans, CT.GOV (updated Sept. 27, 2021), [https://portal.ct.gov/-/media/CID/1\\_LifeHealth/Medicare\\_Supplement\\_Insurance\\_Rates.pdf](https://portal.ct.gov/-/media/CID/1_LifeHealth/Medicare_Supplement_Insurance_Rates.pdf).

<sup>149</sup> ME. REV. STAT. ANN. 24-A § 5012 (2021), <https://casetext.com/statute/maine-statutes/title-24-a-maine-insurance-code/chapter-67-medicare-supplement-insurance-policies/section-5012-annual-guaranteed-issue-period>. This states, “[d]uring a guaranteed issue period of at least one month each calendar year, as established by the issuer, every issuer shall offer standardized Medicare Supplement Plan A, as defined by rule, to all applicants on a basis that does not deny coverage to any individual or group based on health status, claims experience, receipt of health care, or medical condition.”

<sup>150</sup> This should be done while also aiming to include more than just the basic plan A in the annual enrollment.

<sup>151</sup> Maine Bureau of Insurance, *A Consumer’s Guide To... Medicare Supplement Insurance (premium comparison chart)*, Dept. of Professional & Financial Regulation 8-12 (Sept. 2021), [https://www.maine.gov/pfr/insurance/sites/maine.gov.pfr.insurance/files/inline-files/consumer\\_guide\\_medicare\\_supplement.pdf](https://www.maine.gov/pfr/insurance/sites/maine.gov.pfr.insurance/files/inline-files/consumer_guide_medicare_supplement.pdf)

<sup>152</sup> *Id.* at 8-13.

arise from continuous enrollment.<sup>153</sup> Maine also extends the Medicare Advantage trial period to three years;<sup>154</sup> this is a significant expansion from the federal minimum of a one-year trial period. Extending the Medicare Advantage trial period is another consumer protection that should be explored at the federal level.

It is crucial to balance expanding access to consumer protections that have a focus on health equity, with the aim of maintaining reasonable and predictable premiums for all beneficiaries. A Medigap expert who has extensive knowledge of the Medigap insurance industry perspective highlights concerns about adverse selection. Reasoning that if individuals who are sicker are more likely to disenroll from Medicare Advantage to join traditional Medicare and obtain Medigap insurance, the pool of beneficiaries in Medigap plans would skew to be sicker and costlier individuals, resulting in increases in premiums for all beneficiaries, including those already in a Medigap plan.<sup>155</sup> The expert notes that Medicare Advantage plans have the ability to use risk adjustment<sup>156</sup> to address

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<sup>153</sup> Comments from Bonnie Burns, California Health Advocates. Ms. Burns is an expert on Medigap, she serves as a consumer representative on the National Association of Insurance Commissioners (NAIC); she has testified before Congress on Medigap issues. Notes on file with author.

<sup>154</sup> Chapter 275: Medicare Supplement Insurance Rule: 2009 Revision, § 12(B)(6), Guaranteed Issue for Eligible Persons, <https://www.maine.gov/sos/cec/rules/02/031/031c275.doc>.

<sup>155</sup> Schiffbauer, *supra* note 137.

<sup>156</sup> Risk adjustment in MA raises many separate issues. A September 2021 HHS OIG report highlighted some of the concerns. It was undertaken “because of concerns that MA companies may leverage both chart reviews and HRAs to maximize risk adjusted payments, without beneficiaries receiving care for those diagnoses.” The OIG report’s recommendations:

CMS should (1) provide oversight of the 20 MA companies that had a disproportionate share of the risk-adjusted payments from chart reviews and HRAs; (2) take additional actions to determine the appropriateness of payments and care for the 1 MA company that substantially drove risk adjusted payments from chart reviews and HRAs; and (3) perform periodic monitoring to identify MA companies that had a disproportionate share of risk adjusted payments from chart reviews and



these concerns, while Medigap does not, also cautioning that limiting enrollment periods creates stability in the insurance market, allowing insurers to more accurately predict membership makeup and expected costs.<sup>157</sup> The expert warns that if Medigap enrollment opportunities are expanded, it would make those predictions more difficult, and could lead to instability.<sup>158</sup>

If expansions result in increased premiums for all beneficiaries to the point that the plans become cost prohibitive, that would undermine the purpose of such protections. Analysis and research on the complexity involved in pricing is necessary. The states that currently utilize broad protections should also be used to guide the discussion and development of proposals, while considering differing demographics across the country.

Though this paper focuses on Medigap protections, a few additional policy considerations naturally arise from the analysis. The need for an out-of-pocket cap in traditional Medicare is evident. A large share of beneficiary expenses come from out-of-pocket

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HRAs. To assist CMS with its efforts, we will provide information on which companies had a substantially disproportionate share of risk adjusted payments from diagnoses that were reported only on chart reviews and/or HRAs. CMS neither concurred nor nonconcurred with our three recommendations and stated that it will take our recommendations under consideration as part of its ongoing process to determine policy options for future years.

*See also* Paul Van De Water, *Executive Order, Other Administration Actions Would Weaken Medicare*, CTR. ON BUDGET AND POLICY PRIORITIES (Nov. 7, 2019)

<https://www.cbpp.org/research/health/executive-order-other-administration-actions-would-weaken-medicare>:

Medicare's payment system attempts to correct for differences in the health status of plans' enrollees through a process known as "risk adjustment." Nonetheless, the Medicare Payment Advisory Commission estimates that MA plans are overpaid by about 1% compared to traditional Medicare because of the way they code their enrollees' health conditions. And some evidence indicates that that the overpayments may be even greater. In a recent study, for example, the Kaiser Family Foundation found that people who switched from traditional Medicare to MA had \$1,253 (or 13%) less Medicare spending, on average, in the previous year than beneficiaries who remained in traditional Medicare, even after risk adjustment. This suggests that "basing payments to plans on the spending of those in traditional Medicare" — as under current law — "may systematically overestimate expected costs of Medicare Advantage enrollees," according to the Kaiser researchers.

<sup>157</sup> Schiffbauer, *supra* note 137.

<sup>158</sup> *Id.*

costs for health care. This fact, coupled with the financial situation of the average Medicare beneficiaries, makes the need for an out-of-pocket cap in traditional Medicare clear. As discussed previously, the out-of-pocket cap in Medicare Advantage on average is still relatively high given the financial circumstances of many Medicare beneficiaries. Many individuals still have cost-related difficulties with Medicare Advantage, especially beneficiaries of color. Some research has suggested that creating a more reasonable cap, such as a \$3,500 annual cap on beneficiary spending for Medicare services, could alleviate much of the financial hardship for Medicare beneficiaries.<sup>159</sup> While such an out-of-pocket cap should be a component of the solution, it would not obviate the need for supplemental insurance. A lower cap would be helpful for middle income beneficiaries, but for lower income beneficiaries the cap is still too high to make supplemental insurance unnecessary. All such proposals must be examined within the context of the financial situation of Medicare beneficiaries. Creating a meaningful annual out-of-pocket cap, coupled with expanded access to Medigap policies would greatly improve the financial outlook for many beneficiaries.

## Conclusion

Expansions in consumer protections for private Medigap supplemental insurance are necessary to promote health equity in the Medicare program. Without consumer protections to improve

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<sup>159</sup>Cathy Schoen, Karen Davis, Christine Buttorff & Amber Willink, *Medicare Benefit Redesign: Enhancing Affordability for Beneficiaries While Promoting Choice and Competition*, THE COMMONWEALTH FUND, (Oct. 24, 2018), <https://www.commonwealthfund.org/publications/issue-briefs/2018/oct/medicare-benefit-redesign-affordability>; *see also*, MEDICARE PAYMENT ADVISORY COMM'N, 112<sup>TH</sup> CONG., *March 2012 Report to Congress*, 10-27 (June 15, 2021) [http://medpac.gov/docs/default-source/reports/jun12\\_ch01.pdf?sfvrsn=0](http://medpac.gov/docs/default-source/reports/jun12_ch01.pdf?sfvrsn=0).

access to Medigap plans, beneficiaries cannot easily exit from a Medicare Advantage plan in order to switch to traditional Medicare, even if Medicare Advantage is no longer serving their needs. This is a particularly concerning issue for older and sicker beneficiaries and beneficiaries of color. Beneficiaries with disabilities under age 65 are completely left out of federal protections. Broader consumer protections that are already in place in some states should be studied to determine their impact on beneficiary access, market competition and stability, and beneficiary premiums, to determine if they can be replicated at the national level.

# CONSTITUTIONAL DESIGN AND THE AMERICAN POLITICAL ETHOS AS BARRIERS TO THE IMPLEMENTATION OF A SUBSTANTIVE NATIONAL HEALTH CARE SYSTEM

*Garth A. Molander*

## ABSTRACT

Current polls indicate that most Americans support a universal healthcare system, yet our political ruling class has failed to deliver one. The best effort to provide health coverage to most Americans has been the Affordable Care Act, but even that act has been politically attacked, and its efficacy to provide healthcare to all Americans has been eviscerated. This article explores the reasons why a universal healthcare system continues to lack political traction among our ruling political class even though a super majority of Americans support one. Under our constitutional democracy it would seem odd that a majority of our political representatives cannot muster the political will to enact a universal healthcare system that is popularly supported by Americans. However, the recent political development of neoliberal constitutionalism has eroded the popular sovereignty principle of deliberative politics, and in its wake the traditional ebb and flow of democratic governance, as intended by the Framers of our Constitution and the American political ethos of popular sovereignty, has been derailed. More specifically stated, neoliberal constitutionalism as a governing ideology has created parity between commercial speech and traditional political speech. This parity has resulted in the popular sovereignty principle of deliberative politics being hostage to corporate governance. As a consequence, the popular sovereignty principle of deliberative politics that underscores our governing concept of self-determination or self-rule has been derailed, thus making it

politically intractable to create a right to healthcare given that the two constitutional avenues for a right to health care—an Article V proceeding or through a transformative political process known as popular constitutionalism, both rely on the democratic principle of self-determination or self-rule.

## I. Introduction

There has been much scholarship regarding the reasons why public health rights have been unrecognized as legal rights in American constitutional jurisprudence.<sup>1</sup> There has also been scholarly discussions of law and aging as to ways to approach defining, expanding, and protecting the right to public health, although none seem too promising.<sup>2</sup> To complicate this issue, our constitutional design further implicates barriers which frustrate the incorporation of elder rights into social insurance programs.<sup>3</sup> At the

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<sup>1</sup> Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONSTITUTIONAL LAW QUARTERLY 267 (1993) (concluding that applying the social contract assumptions held by the Framers concerning public health rights would radically alter the jurisprudence of public health law); see also Anita L. Allen, *Privacy Jurisprudence as an Instrument of Social Change: First Amendment Privacy and the Battle for Progressively Liberal Social Change*, 14 U. PA. J. CONST. L. 885 (2012).

<sup>2</sup> See, e.g., Kim Dayton and Dr. Israel Doron, *Municipal Elder Law: Minnesota Perspective*, 20 ELDER L.J. 33 (2012) (acknowledging that although there is significant room for developing a robust body of municipal elder law, local governments rarely exercise their authority to its fullest extent on behalf of elder persons); see also Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325 (2010) (concluding that state constitutions, although providing stronger textual support for health care rights than the U.S. Constitution, do not, when applied, provide a significantly greater guarantee).

<sup>3</sup> See Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 260-267 (2010). (articulating that some constitutional scholars have postulated that the tier approach to equal protection clause jurisprudence is in disarray and out of this disarray has emerged a less rigid framework that includes a Third Strand jurisprudential analysis whereby heightened scrutiny is imposed in situations where “fairly important rights” are denied to “relatively vulnerable groups.” In essence, using an interpretive approach that merges the Equal Protection Clause and [substantive] Due Process Clause and applying a “rational basis” with bite); Laurelyn R. Schaefer, *Protecting Our Elders from Ageism: Examining and Remedying The Supreme Court’s Failure to Do So*, 7 JOURNAL OF INTERNATIONAL AGING LAW & POLICY 111 (2014) (arguing that ADEA claims concerning elders should be given

core of this debate is the issue of whether a right to health care is consistent with our American political ethos and constitutional order.<sup>4</sup> This debate further implicates the issue of whether judicial review is compatible with the American democratic ethos of popular sovereignty.<sup>5</sup> In short, Lockean liberalism and civic republicanism still impact constitutional discussion on public health rights similar in importance to the Federalist/Anti-Federalist debate of 1787-88 concerning the adoption of the Bill of Rights.<sup>6</sup> Presently, this debate has been described as a “constitutional moment” that may transform public law and, in the process, affect elder rights for generations to

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“heightened scrutiny” analysis rather than a rational basis test analysis); Abigail R. Moncrieff, *Cost-Benefit Federalism: Reconciling Collective Action Federalism and Libertarian Federalism in the Obamacare Litigation and Beyond*, 38 Am. J. L. and Med. 288 (2012); Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine*, 66 STAN. L. REV. 217 (2014).

<sup>4</sup> Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387 (2000) (positing that a moderate minimalist jurisprudential approach avoids informal amendments to the constitution by an expansionist Court, thus maintaining a stable constitutional order by avoiding the dilution of the republican principle of popular sovereignty evidenced during the *Lochner* and *Roe* era of constitutional jurisprudence); *but see* Jack M. Balkin, *Original Ideas on Originalism: Framework Originalism and the Living Constitution*, 103 NW. U.L. REV. 549, 560 (2009) (postulating that the argument of a living constitution and originalism are two sides to the same coin of constitutional construction – originalism leaves space for future generations to construct a constitution in practice by giving generational definition to vague constitutional terms, and living constitutionalism occupies this space by constructing constitutional doctrines that give meaning to these vague constitutional terms or create laws to fulfill constitutional purposes. In sum, living constitutionalism operates within the space provided by constitutional originalism).

<sup>5</sup> Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66 (2013).

<sup>6</sup> LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955); J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975) [hereinafter “Machiavellian Moment”] (describing the Framing Era as a “Machiavellian Moment”); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-87* (1969) [hereinafter “Creation of the American Republic”] (describing the Framing Era as a “Lockean Moment”); *see also* John B. Mitchell, *My Father, John Locke, and Assisted Suicide: The Real Constitutional Right*, 3 IND. HEALTH L. REV. 43 (2006) (Part III discusses the Lockean social contract and civic republicanism as its counter ideology in American constitutional jurisprudence).

come, regardless of its outcome.<sup>7</sup> However, it has also led one scholar to conclude that no theory or conception of justice can ground comprehensive health care reform.<sup>8</sup>

Similar to the Federalist/Anti-Federalist debates surrounding the ratification of the Constitution and Bill of Rights, the health care debate can be described as a synthesis between two dialectical theories<sup>9</sup>—Lockean liberalism and civic republicanism.<sup>10</sup> During the ratification process, the Framers and supporters of the Constitution argued strenuously in the Federalist Papers<sup>11</sup> that the

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<sup>7</sup> David A. Super, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, 66 STAN. L. REV. 873, 875 (2014) (positing if the Affordable Care Act [ACA] is not repealed it will change fundamentally the terms of the American social contract and, if it fails, that failure will initiate a constitutional revolution of its own. Either way, it reinforces the notion that “We the People” can change American fundamental law through a series of ratifying or rejecting elections). *Id.* at 880.

<sup>8</sup> Griffin Trotter, *No Theory of Justice Can Ground Health Care Reform*, 40 J.L. MED. & ETHICS 598, 602 (2012) (explaining that Gallop and Pew polls show that Americans valued equality over freedom at a rate of only 20%, with 72% assigning a higher ranking to freedom; and U.S. citizens choose non-interference by the state over the state meeting public health care needs by a margin of 58% to 34%. Noting, proportions tended to be just about the opposite in Europe).

<sup>9</sup> KARL MARX, *THE POVERTY OF PHILOSOPHY*, 117

([http://www.wealthofnation.com/Charles Kerr & Co., H. Duelch trans. 1913](http://www.wealthofnation.com/Charles_Kerr_and_Co.,_H._Duelch_trans._1913)) (describing the Hegelian dialectic in Chapter II – The Metaphysics of Political Economy).

<sup>10</sup> Cass R. Sunstein, Symposium: *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (articulating that colonial constitutional theory fused pluralism [Lockean liberalism] with republicanism); See POCKOCK, *supra* note 6, at 462-552. (positing that the American Revolution was the last of a series of British revolutions, an episode in the history of the Renaissance and the early modern era, not the first act in a new Age of Enlightenment that embraced Lockean liberalism, thus supporting his thesis that colonialists were experiencing a “Machiavellian Moment” during the ratification of the Constitution). *Id.*; *but see* WOOD, *supra* note 6. (supporting the thesis that the colonialists were experiencing a “Lockean Moment” during the Revolution and Constitution drafting years whereby the dominant political influence was Lockean liberalism).

<sup>11</sup> Letter from James Madison, the author of the Constitution, to Thomas Jefferson (Feb. 8, 1825), in 4 *The Writings of James Madison: 1819-1836*, at 218, 219 (Gaillard Hunt ed., G.P. Putnam’s Sons 1910). Madison articulated that the Federalist Papers were “the most authentic exposition on the text of the Federal Constitution as understood by the body which prepared & the authority which accepted it;” *see* BERNARD SCHWARTZ, *THE ROOTS OF THE BILL OF RIGHTS: AN ILLUSTRATED SOURCE BOOK OF AMERICAN FREEDOM*, 593-623 (Chelsea House Pub. 1971). The author noted “the correspondence between Jefferson and Madison was important ... [because] each influenced the other’s thinking, particularly ... the evolution of the Bill of Rights ....” *Id.*; *see also* GEORGE W. CAREY, *THE FEDERALIST* (Univ. of Ill. Press 1989) (noting that the Federalist Papers are generally accepted as the

Constitution was a fulfillment and not a repudiation of civic republicanism.<sup>12</sup> Thus, although Lockean liberalism found its expression in the Bill of Rights<sup>13</sup>, civic republicanism found its place in constitutional design.<sup>14</sup> Contemporary civic republicans—Sunstein, Michelman, and Tushnet<sup>15</sup>—espouse the central theme of civic republican thought: the government should be more proactive

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authoritative discourse on American political and constitutional theory in the Framing period).

<sup>12</sup> GARY WILLS, *THE FEDERALIST PAPERS* (Gary Wills ed. 2003), In Federalist No. 1, Alexander Hamilton proposes a list of topics for discussion, least of which, is “The conformity of the proposed constitution to the true principles of republican government.” *Id.* at 6. In Federalist No. 9, Alexander Hamilton observed “[T]he science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, ... [and] these are wholly new discoveries, ... [T]hey are the means, and powerful means, by which the excellencies of republican government may be retained, and its imperfections lessened or avoided.” *Id.* at 45. In Federalist No. 37, James Madison also observed “[A]mong the difficulties encountered by the [constitutional] convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty, and to the Republican form.” *Id.* at 212. In Federalist No. 39, James Madison further stated “... we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.” *Id.* at 228. In Federalist No. 63, James Madison stated “[T]he difference most relied on between the American and other republics, consist in the principle of representation.” To Madison, the Senate, as part of a bicameral representative legislature and having sufficient permanency, would act “as a defense to the people against their own temporary errors and delusions” in proposing laws that work against the collective and permanent welfare.” *Id.* at 384. In Federalist No. 73, Alexander Hamilton positing that the “wholly and purely republican” design further protects against executive usurpation of legislative power. *Id.* at 449.

<sup>13</sup> HARTZ, *supra* note 6, at 9. According to Louis Hartz, “[t]he national acceptance of the Lockean creed [was] ultimately enshrined in the Constitution.”

<sup>14</sup> WILLS, *supra* note 12.

<sup>15</sup> Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, at 31-32 (1985) (“[the republican] conception reflects a belief that deliberate politics model helps to reveal that some values are superior to others ... [and] the republican view assumes that ‘practical reason’ can be used to settle social issues.”); Frank I. Michelman, *The Republican Civic Tradition: Law’s Republic*, 97 YALE L.J. 1493, 1495 (1988) (advocating republican constitutionalism, which “involves the ongoing revision of normative histories that make political communities sources of contestable value and self-direction for their members); MARK TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 10 (Harvard Univ. Press 1988).



in molding individuals in socially beneficial ways.<sup>16</sup> Consistent with this republican tenet, the Framers designed a constitutional government where consensus on social policy preferences—individual interests—would be reached through a deliberative politics model operating within a representative form of government—the legislature.<sup>17</sup> However, to safeguard against repressive majoritarian social policy outcomes,<sup>18</sup> the Framers implemented a judicial branch to review majoritarian laws.<sup>19</sup> In short, the constitutional design gave the Court the last word on what Lockean values would be promoted, even if judicial review meant enforcing individual values at the expense of republican principles underlying our constitutional order.<sup>20</sup> Ostensibly, the civic republican form of government was designed to rely on the deliberative politics model in promoting beneficial collective

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<sup>16</sup> Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 810 (1993) (articulating that civic republicanism's reliance on collective deliberation results in [self-determination] being an expendable value).

<sup>17</sup> WILLS, *supra* note 12, at 316. In Federalist No. 51 Madison articulates that “[I]n republican government the legislative authority, necessarily, predominates . . .” *Id.*

<sup>18</sup> See ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (Viking Penguin Pubs. 2014). (positing that the Court's primary role is to “protect the rights of minorities who cannot rely on the political process and uphold the Constitution in the face of any repressive desires of political majorities”). *Id.* at 10; *but see* Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957), reprinted in 50 EMORY L.J. 563 (2001) (postulating that the Supreme Court operates to legitimize the dominant political alliance and very seldom, apart from transitional periods where one political alliance assumes dominance over the other, rules against majority policy preferences; *See also*, GERALD N. ROSENBERG, *THE HALLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (Univ. of Chicago Press 2 ed. 2008) (positing that it is nearly impossible to generate significant social reform through litigation).

<sup>19</sup> See WILLS, *supra* note 12, at 473-475. In Federalist No. 78, Alexander Hamilton defines the Court's duty as “to declare all acts contrary to the manifest tenor of the constitution void.” *Id.* at 473. To Hamilton, the constitution must be regarded by the judges as a fundamental law and its interpretation of laws presupposes “that the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.” *Id.* at 475. However, this conclusion does not “by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.” *Id.*

<sup>20</sup> *Id.* at 471-479, Federalist No. 78. Hamilton argued that “[t]he interpretation of the laws is the proper and peculiar province of the courts.” *Id.* at 474.

preferences by filtering and refining individual interests through structural institutions of government until an optimum social policy preference was obtained that would serve the collective body politic.<sup>21</sup> In essence, deliberative legislation or the people would “control and regulate” changes to the American social contract.<sup>22</sup> However, in designing the government, the Framers also acknowledged that majoritarian democracy could result in social policy preferences inimical to society as a whole.<sup>23</sup> It has been argued that the conflict between the democratic ethos of self-rule and the judicial branch’s role of review of majoritarian preferences has resulted in the Court, at times, acting as a counter-majoritarian institution by imposing its personal values and/or social preferences into the Constitution, thus subverting democratic social preferences achieved through deliberative politics.<sup>24</sup>

Consequently, the Court has been criticized as destabilizing the republican state model and/or constitutional order, as originally designed, during periods where it has expanded its judicial

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<sup>21</sup> *Id.* at 57. In Federalist No. 10, Madison articulated the spatial dynamics of his theory of republican government by extending the republic over a vast and populated area to divide or separate the factious motive from its opportunity to act on that motive, thus avoiding oppressive majority preferences.

<sup>22</sup> *Id.* at 310. (Federalist No. 49, James Madison). In this essay, James Madison notes that because “the people are the only legitimate fountain of power” it is “the people themselves[,] who, as the grantors of the [Constitution], can alone declare its true meaning and enforce its observance[.]” *Id.* at 306-307.

<sup>23</sup> *Id.* at 58. In Federalist No. 10, Madison concludes that the republican design would check democratic excesses by positing: “In the extent and proper structure of the Union, therefore, we behold a Republican remedy for the diseases most incident to Republican Government.” *Id.* In Federalist No. 73, Hamilton argues that the executive veto “... furnishes an additional security against enactment of improper laws. It establishes a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.” *Id.* at 447-448.

<sup>24</sup> Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015). The authors articulate that modern conservative originalism will return to the Court and revisit *Lochner* and enter a doctrinal period marked by libertarian rulings guided by judges’ personal policy preferences. However, the authors further argue that this new originalism – shifting the focus away from textual originalism to one that emphasizes an interpretive model based on the meaning the Framers placed on the original text-justifies a more active court in finding unenumerated rights.

powers.<sup>25</sup> For example, the Warren Court has been described as a jurisprudential period where the Court was more concerned with justice than judicial restraint<sup>26</sup> and where various justice's personal values were substituted in preference for the text and historical meaning of the Constitution.<sup>27</sup> Similarly, the Court has been equally criticized for judicial activism in *Lochner v. New York*<sup>28</sup> when it advanced Lockean liberalism's right to property and the right to contract over social legislation to improve work place regulations.<sup>29</sup> To justify the Court's willingness to find rights unsupported by the Constitutional text, some scholars have argued that Lockean liberalism supports the notion that natural rights and, more specifically, the right to health care is reposed in the Ninth Amendment and, therefore, achievable through the Fourteenth

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<sup>25</sup> Nowlin, *supra* note 4, at 448-467 (arguing that the *Lochner* era [late 1880s-1937] and *Roe* era [late 1940s to present day] illustrates periods where an activist judiciary threatened the stability of our constitutional order). In section IV of this article, it will be argued that the recent trend in neoliberal constitutionalism has destabilized the republican principle of deliberative politics thus subverting our political ethos of democratic self-rule. This trend is ominous since a robust deliberative politics model assures democratic self-rule, which is consistent with our constitutional order of governance.

<sup>26</sup> See Morton Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 9 (1993). Professor Horowitz's thesis is that "*Brown v. Board of Education*, decided one year after Earn Warren becoming the Chief Justice, was the basis for the development of rights discourse as well as the development of the idea of a living constitution."; *but see*, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007). (postulating that the change in fundamental law occurs in two ways – by landmark decisions and landmark law. Ackerman further observes that the Social Security Act and the Civil Rights Acts of the 1960s are examples of landmark law that fundamentally changed our social contract); *see also* William S. Eskridge, Jr., & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215-16 (2001). Super statutes change the fundamental understanding of the constitution in that "ordinary rules of construction are often suspended or modified when such statutes are interpreted." *Id.* at 1216.

<sup>27</sup> 198 U.S. 45 (1905). In *Lochner v. New York* the conservative Court protected an unenumerated right to liberty of contract and invalidated legislative majority social policy preferences concerning New York's legislative initiatives to generally protect public health and, more specifically, to protect the health of bakery employees; *see also* *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1972). Under the Warren Court, the liberal holdings in *Griswold v. Connecticut* and *Roe v. Wade* has been criticized as a return to *Lochner* by identifying and protecting unenumerated rights to marital sexual privacy and abortion. *See* Colby & Smith, *supra* note 24, at 530.

<sup>28</sup> *Id.*, 198 U.S. 45.

<sup>29</sup> *Id.* at 64.

Amendment's due process clause.<sup>30</sup> This argument may have some historical basis, since Alexander Hamilton posited that some rights are reposed in the Ninth Amendment that are fundamental to civil government.<sup>31</sup> Yet, John Jay, also writing under the pseudonym Publius, asserted "[n]othing is more certain than the indispensable necessity of government; and it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers."<sup>32</sup> Therefore, whether the Ninth and Tenth Amendments of the Bill of Rights refer to natural rights is undetermined since the framing generation believed that even these rights could be ceded to the government.<sup>33</sup> If one reviews the text of the entire Bill of Rights, one can conclude that whatever rights are "retained" and "reserved" in the Ninth and Tenth Amendments the "people themselves, rather than another agency of the limited government, have the responsibility for determining what rights they have 'retained' and 'reserved,'"<sup>34</sup> since "the ultimate authority ... resides in the people alone[.]"<sup>35</sup> Hence, the democratic and republican principles of popular sovereignty were part and parcel of the American political ethos

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<sup>30</sup> RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY*, 256-257 (Princeton Univ. Press, 1<sup>st</sup> ed. 2004). (arguing that originalism requires judges to enforce the original meaning of the 9<sup>th</sup> and 14<sup>th</sup> Amendments, which in turn requires judges to protect unenumerated rights).

<sup>31</sup> WILLS, *supra* note 12, at 521. In Federalist No. 84 Hamilton articulates: "... the constitution adopts in their full extent the common and statute law of Great Britain, by which many other rights not expressed in it are equally secured." *Id.*

<sup>32</sup> *Id.* at 7-8 (Federalist No. 2, John Jay); *see also*, RALPH KETCHAM, *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES*, 195 (New Amsterdam Library, Ralph Ketcham ed. 1986) (even the Anti-Federalists agreed that "[a] people, entering into society, surrender such part of their natural rights, as shall be necessary for the existence of that society [ ]").

<sup>33</sup> *Id.*; *but see* Suzanna Sherry, *The Founder's Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1176 (1987) (positing that for three decades after the ratification of the Constitution the Supreme Court decided cases based on natural law principles. However, by 1820 the Court all but phased out a jurisprudential approach based on natural law principles of justice and have relied on an enumerated rights approach).

<sup>34</sup> Nowlin, *supra* note 4, at 418.

<sup>35</sup> WILLS, *supra* note 12, at 285 (Federalist No. 46, James Madison).

during the founding moment.<sup>36</sup> That observation led Madison to articulate that, “in republican government the legislative authority, necessarily, predominates.”<sup>37</sup> It also led Hamilton to conclude nor does judicial review

“by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.”<sup>38</sup>

Ironically, although the Constitution is enshrined in the Lockean liberalism tenant of self-rule,<sup>39</sup> civic republicanism required self-rule to be sacrificed, to a certain degree, in promoting and achieving the collective good.<sup>40</sup> Therefore, civic republicanism is counter ideological to Lockean liberalism because Lockean liberalism is premised on individual rights and/or the autonomy of one’s self.<sup>41</sup> Even healthcare scholars recognize that there is built-in tension in our republican form of government between a Lockean theory of justice based on individual liberty clashing with a republican theory of justice based on communitarian rights, which crosses over into present healthcare issues.<sup>42</sup> Under conventional constitutional theory, the resolution of this conflict is determined by how far the Court, as final arbiter on the textual meaning of the Constitution, will advance social justice through a constitutional interpretation that finds unenumerated rights to support a social theory of justice, which results in a right to a social good or, more

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<sup>36</sup> Nowlin, *supra* note 4, at 403.

<sup>37</sup> WILLS, *supra* note 12, at 316 (Federalist No. 51, James Madison).

<sup>38</sup> *Id.* at 475 (Federalist No. 78, Alexander Hamilton).

<sup>39</sup> HARTZ, *supra* note 6, at 9.

<sup>40</sup> Gey, *supra* note 16.

<sup>41</sup> *Id.* at 854-880.

<sup>42</sup> Leonard, *infra* note 124. Professor Leonard recognizes the tension between individual and communitarian interests being balanced in achieving a right to public health. However, she draws a distinction between a “right to public health” as opposed to a “right to health.” The latter presupposes an affirmative duty of the government to the individual, whereas the former presupposes an affirmative duty to protect and promote public health in the community at large where individual rights are subservient to communitarian rights.

specifically, a right to healthcare.<sup>43</sup> Whereas Madison's form of government would rely on the republican principle of filtering individual self-interest to achieve a collective social good through a deliberative politics model operating within the legislature and more broadly through the institutional design itself,<sup>44</sup> Lockean liberalism would implicitly require the Supreme Court to be more active in constitutional interpretation to achieve the same result, thus subverting popular sovereignty.<sup>45</sup>

A central assumption of this article is that judicial review has demonstrated the presence of a republican-liberal state<sup>46</sup> where

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<sup>43</sup> See LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT*, 10-11 (Univ. of California Press 2008). (espousing the general principle that the study of public health must center on the tension between government coercive power and individual liberty).

<sup>44</sup> BERNARD BAILYN, *THE DEBATE ON THE CONSTITUTION: PART II*, at 766 (The Library of America 1993). In the New York ratifying convention June 17-July 26, 1788, Alexander Hamilton stated: "All governments, even the most despotic, depend, in a great degree, on opinion. In free republics, it is most peculiarly the case: In these, the will of the people makes the essential principle of the government; and the laws which control the community, receive their tone and spirit from the public wishes." Even the Anti-Federalists believed in deliberative politics as an essential principle of government. In *Brutus IV*, an essay published in the *New York Journal*, November 29, 1787, Brutus states: "There can be no free government where the people are not possessed of the power making laws by which they are governed. Either in their own persons, or by others substituted in their stead ... . The great art, therefore, in forming a good constitution, appears to be this, so to frame it, as that those to whom the power is committed shall be subject to the same feelings, and aim at the same objects as the people do, who transfer to them their authority." *Id.*, *Part I* at 423.

<sup>45</sup> See, Horowitz, *supra* note 26; but see WILLS, *supra* note 12, at 476 (Alexander Hamilton). In *Federalist No. 78* Hamilton states: "The interpretation of the laws is the proper and peculiar power of the courts. ... [But], "[I]t can be no weight to say, that the courts on the pretense of a repugnancy, may substitute their own pleasure to constitutional intentions of the legislature." [And], "if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would equally be the substitution of their pleasure to that of the legislative body." *Id.*

<sup>46</sup> See Jordan M. Steiker, *Creating a Community of Liberals*, 69 TEX. L. REV. 795 (1991) (reviewing C. Edwin Baker, *Human Liberty and Free Speech* (Oxford University Press 1989)). Professor Steiker argues that the question becomes whether the framers of the Constitution adopted a liberal republic where a "robust political community with basically liberal values" appeared, or a republican liberal state where the "political community is [first devoted] to individual autonomy and then to republican dialogue ...." *Id.* at 811; see

judicial review has improperly entered the deliberative politics model, which has minimized Madisonian principles of popular constitutionalism that underline Madison's republican design of government.<sup>47</sup> Although, on occasion, the Court has given expression to a liberal republican theory of constitutional liberalism, i.e., the Warren Court era, thus reflecting the presence of a liberal republican state where communitarian rights trump rights of autonomy,<sup>48</sup> more often than not the Court's approach is consistent with a republican-liberal state theory of justice where individual rights trump communitarian rights.<sup>49</sup> It is a further premise of this article that a right to health care will require a present fundamental change in constitutional norms supported by broad public opinion to overcome republican-liberal constitutional norms that dominate the Court's doctrinal approach to Fourteenth Amendment jurisprudence.<sup>50</sup> Moreover, both of Madison's republican principles—the deliberative politics principle and the stability of constitutional order—must merge for a right to healthcare co-existing within our constitutional design.<sup>51</sup> Therefore, this article will explore constitutional scholarship on whether a right's based theory of social justice concerning a right to healthcare can co-exist

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also Ronald Kahn, *The Supreme Court as a (Counter) Majoritarian Institution: Misconceptions of the Warren, Burger, and Rehnquist Courts*, 1994 DET. C.L. REV. 1, 59 (1993) Noting that "[P]olity principles mediate the ways rights issues are debated in the Supreme Court." Thus, concluding that the Warren, Burger, and Rehnquist Courts relied on "deeply-held rights-values and important polity principles when making decisions." Further, noting that the *Lochner* era was a period when both individual rights and polity principles dovetailed. *Id.* at 13. Or, in terms of this article, when both individual rights and constitutional order dovetail.

<sup>47</sup> Larry Kramer, "The Interest of the Man": James Madison, *Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U.L. REV. 697 (2006).

<sup>48</sup> *Id.*

<sup>49</sup> Wiley, *infra* note 132, at 875-880.

<sup>50</sup> Ackerman, *supra* note 26; Eskridge, Jr. & Ferejohn, *supra* note 26. These scholars posit that fundamental social change can occur through both landmark decisions and landmark law. Whereas landmark decisions come from the Court, landmark law emanates from principles of popular sovereignty or through the deliberative processes within our constitutional design.

<sup>51</sup> Molander, *infra* note 95. (positing that deliberative politics [popular sovereignty] is subverted during periods where the state's stability is threatened [or perceived to be threatened] through a constitutional doctrinal approach that is analogous to Machiavelli's theory of justice).

in a constitutional design that relies upon popular sovereignty principles of deliberative legislation.<sup>52</sup>

Part I of this article will be devoted to the Framers design with an emphasis on the Court's role in governance or, stated differently, how the original design sought to restrain the Court from directly participating in the deliberative politics model of governance. Part II will briefly review recent literature of Revolutionary political thought on healthcare as a public good and whether that literature adequately explains the presence of a general government obligation towards promoting public healthcare as a public good. Part II will further explain recent scholarship on health justice principles as being grounded in liberal-republicanism or popular constitutionalism. It is the focus of this article that health justice will not achieve a right to healthcare unless public healthcare initiatives can be merged with principles of popular sovereignty while also maintaining the stability of constitutional order. A further assumption is that under popular sovereignty principles, a right to healthcare can be achieved one of two ways. Either through the traditional amendment process under Article V of the Constitution or through popular constitutionalism.<sup>53</sup> Part III will explore popular constitutionalism as a transformative agent that may provide the possibility of a substantive healthcare system being adopted by the polity, with the power to fundamentally change the American social contract, thus also affecting the expansion of elder rights.<sup>54</sup> More specifically, the interpretive role the legislative branch shares with the judicial branch as institutional structures in developing a positive right to healthcare.<sup>55</sup> This dual role of constitutional interpretation

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<sup>52</sup> Kramer, *supra* note 47.

<sup>53</sup> See e.g., Ackerman, *supra* note 26; Eskridge, Jr. & Ferejohn, *supra* note 26; see also Kramer, *supra* note 47; see also Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN UNIVERSITY LAW JOURNAL 387 (2015) (positing that constitutional norms interact with and sometimes informally alter written constitutions).

<sup>54</sup> Super, *supra* note 7.

<sup>55</sup> Edward Rubin, *The Affordable Care Act, The Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 WILLIAM AND MARY LAW REVIEW 1639, 1694 (2012).



stems from the observation that statutes affect judicial interpretation of the Constitution because the, “statutes themselves are interpretations.”<sup>56</sup> Part IV will explore the current trend of neoliberal constitutionalism and its pernicious effect on the phenomenon of popular constitutionalism. Finally, I will make concluding remarks as to the future of the Patient Protection and Affordable Care Act<sup>57</sup> (ACA) expanding elder rights, given that its survival will be determined by liberal-republicanism’s fundamental principle of majoritarian rule—deliberative legislation.

## **II. Supreme Court Review and Popular Sovereignty: Polar Opposites in the Framers’ Constitutional Design?**

The classical republican influence on the Framers’ constitutional design is evident by numerous references in the Federalist Papers.<sup>58</sup> Simply put, the Constitution is more of a balance between two opposing traditional theories—Lockean liberalism and civic republicanism.<sup>59</sup> What is evident in reviewing the framing moment,<sup>60</sup> is that the Framers and their supporters, as well as their detractors, i.e., the Anti-Federalists, all held similar assumptions and

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<sup>56</sup> *Id.* at 1694.

<sup>57</sup> Patient Protection and Affordable Care Act § 1302(b)(1) (2010), amended by the Health Care and Education Reconciliation Act of 2010 §§ 1302(b)(1), 2707(a) (2010) (codified as amended at 42 U.S.C. § 18022(b)(1) (2012)). This comment refers to the consolidated act, with amendments as the Affordable Care Act or ACA.

<sup>58</sup> WILLS, *supra* note 12, Federalist Nos. 1, 9, 10, 37, 39, 51, 63, 73.

<sup>59</sup> This article assumes two original principal laws of governance fundamental to the constitutional design. First, a system of deliberative politics internalized in the design of the Framers constitutional government as well as, the philosophical fabric of the Constitution; and second, a fervent desire by the Framers to institute a constitutional design of governance with the requisite and necessary powers to go about the business of governing – a process that itself promotes liberty. The latter principal advocates that the former principle of deliberative politics is designed to protect and promote social preferences that result from the collective will of the people. However, the latter principle does not protect social preferences that drastically impede social preferences representing the will of the people, because impeding the very process that the state relies on to achieve the collective good – social preferences arrived at through deliberative politics – would directly affect the democratic stability and/or constitutional order of the state itself, as originally intended. A further premise assumed under this hybrid analytic model is that the state will legislate public health care initiatives when the state’s stability is threatened.

<sup>60</sup> POCKOCK, *supra* note 6; WOOD, *supra* note 6.

theoretical concepts as to government.<sup>61</sup> Therefore, it is not surprising that their “new science of politics”<sup>62</sup> was constructed from both classical traditions.<sup>63</sup> It was the Founding Fathers’ design to create a government that would be capable of filtering individual desires through the government’s structural design so that a deliberate result—the common good—could be reached, while protecting individual liberty.<sup>64</sup> In other words, institutions had to be arranged so as to moderate the conflict between self-interest (individual liberty—individual social preferences) and the public interest (the common good—collective social preferences).<sup>65</sup> Therefore, the Framers felt a need for a governing system consisting of deliberative reflection that would be imposed on the people in order to induce them to act in a collective and civically responsible manner.<sup>66</sup> This republican assertion was based on the Federalists’ observation that, “the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before the public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.”<sup>67</sup> Thus, a central remedy of the Framers’ scheme of government was to install, within the machinery of the government, the processes of due deliberation and reflection in determining enlightened policy outcomes, so that reasoned consideration of social consequences would extend over

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<sup>61</sup> See Frank Goodman, *Mark Tushnet on Liberal Constitutional Theory: Mission Impossible*, 137 U. PA. L. REV. 2259, 2304 (1988) (reviewing Tushnet, *supra* note 15) (arguing that the Federalists and Anti-Federalists shared many theoretical concepts to government including general theories about citizenship and assumptions about human nature, including theoretical assumptions held by classic liberalism).

<sup>62</sup> WILLS, *supra* note 12, at 44-50 (Federalist No. 9, Alexander Hamilton).

<sup>63</sup> *Id.*; see also BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION*, vii-xi, 22-35 (Belknap Press 1967) (arguing that the writings and traditions of English common law, classical philosophical thought, and New England Puritanism influenced the colonialists, in addition to those of Enlightenment rationalism).

<sup>64</sup> See, e.g., MORTON WHITE, *PHILOSOPHY, THE FEDERALISTS, AND THE CONSTITUTION*, 205 (Oxford Univ. Press 1987); see also WILLS, *supra* note 12.

<sup>65</sup> WILLS, *supra* note 12, (Federalist No. 37).

<sup>66</sup> *Id.*, Federalist Nos. 1, 10, 22, 57, 71 & 73, both Hamilton and Madison posit that even self-interest could be made to serve the public good, while avoiding majoritarian tyranny.

<sup>67</sup> *Id.* at 257 (Federalist No. 42, James Madison).

space and time.<sup>68</sup> Although the Framers' promoted a form of governance designed to restrain the deliberative politics model from producing social preferences that reflected majoritarian tyranny,<sup>69</sup> the Framers' insisted that the constitutional design did not permit the Supreme Court to impose its personal social preferences for that of the peoples' social preferences.<sup>70</sup>

Not surprisingly, distrust of judicial review was evident in Anti-Federalist publications<sup>71</sup> and, in response to that concern, the Federalists gave reassurances that the Court did not have the power to impose its will on the people.<sup>72</sup> Although the Federalists admitted that the Court had the power to review positive law enacted by the legislature,<sup>73</sup> they qualified that assertion by observing that the Court was bound by the fundamental laws of the Constitution<sup>74</sup> that, "the will of the people makes the essential principle of government."<sup>75</sup> In short, the Court was not part of the deliberative process and should not enter into that process because in doing so it

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<sup>68</sup> See VINCENT OSTROM, *THE POLITICAL THEORY OF A COMPOUND REPUBLIC*, 43 (University of Nebraska Press 2d ed. 1987).

<sup>69</sup> WILLS, *supra* note 12, Federalist Nos. 10, 51 & 78.

<sup>70</sup> *Id.* at 476, (Federalist No. 78, Alexander Hamilton); *Id.* at 316 (Federalist No. 51, James Madison).

<sup>71</sup> BAILYN, *supra* note 44, Part II at 129-135 Brutus XI (New York Journal, January 31, 1788). Anti-Federalist essay opining on the Court's power in equity: "By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter. ... They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution." *Id.* at 131-132. "this power in the judicial, will enable them to mould the government, into almost any shape they please." *Id.* at 135. In Brutus XV, the Anti-Federalists further reminds his listeners "that this court will be authorized to decide upon the meaning of the constitution, and that, not only according to the natural and obvious meaning of the words, but also according to the spirit and intention of it. In the exercise of this power, they will not be subordinate to, but above the legislature." *Id.* at 375.

<sup>72</sup> WILLS, *supra* note 12, at 476. (Federalist No. 78, Alexander Hamilton).

<sup>73</sup> *Id.* at 474 (Federalist No. 78, Alexander Hamilton).

<sup>74</sup> *Id.* at 475; see also BAILYN, *supra* note 44, Part II at 766. At the New York Convention on June 21, 1788, Alexander Hamilton asserted that "In free republics ... the will of the people makes the essential principle of the government; and the laws which control the government, receive their tone and spirit from the public wishes."

<sup>75</sup> BAILYN, *supra* note 44, Part II at 766.

would be subverting the will of the people to its own will.<sup>76</sup> Hence, the Court's purpose was to interpret positive law in a way that did not violate its fundamental duty of protecting the stability of constitutional order. By restraining its interpretive role, the Court would avoid subverting the popular sovereignty principle of deliberative politics.<sup>77</sup> In designing a constitutional order, the Framers anticipated problems associated with majoritarian rule and its threat on, not only, individual rights, but also on minority rights.<sup>78</sup> Therefore, the American constitutional design imposed Madisonian republican principles to protect individual rights and to protect minorities from an oppressive majority.<sup>79</sup>

The Framers had a republican solution in preventing a majoritarian tyranny from invading individual rights or oppressing minorities.<sup>80</sup> In Federalist No. 51 Madison explained that by extending the republic through the federal principle (federalism), "a coalition of a majority of the whole society could seldom take place

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<sup>76</sup> WILLS, *supra* note 12, at 476.

<sup>77</sup> Kramer, *supra* note 47, at 748-749. Professor Kramer posits that in Madison's theory of deliberative democracy the courts had a modest role that deferred to the authority of the people to interpret and make constitutional law.

<sup>78</sup> Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 971-972 (2005) (The author notes that the Framers were concerned in curtailing self-interested public officials from invading individual rights, as well as, being concerned with majoritarian constituencies developing into factions that would oppress minorities); *see also* COMPLETE WORKS OF NICCOLO MACHIAVELLI, location 16611/16615 of 18254 (Minerva Classics 2013, W.K. Marriott trans., Kindle Edition). In Book VII, Chapter 1 of HISTORY OF FLORENCE AND OF THE AFFAIRS OF ITALY FROM THE EARLIEST TIMES TO THE DEATH OF LORENZO THE MAGNIFICENT, Machiavelli espoused a similar tenet of governance in stating: "The legislator of a republic, since it is impossible to prevent the existence of dissensions, must at least take care to prevent the growth of faction."

<sup>79</sup> Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View From 1787/1791*, 9 U. PA. J. CONST. L. 357, 392 (January 2007). Professor Graber notes that the Framers relied on constitutional design using republican institutions to protect individual rights and minorities from an overly oppressive majoritarian faction. *Id.* at 365.

<sup>80</sup> WILLS, *supra* note 12, at 317. (Federalist No. 51, James Madison). "It is of great importance in a republic, not only to guard the society against the oppressions of its rulers, but to guard one part of the society against the injustice of the other part." *Id.*

... thus less danger to a minor from the will of a major party. . . .”<sup>81</sup> In Federalist No. 10, Madison first introduces the reader to the idea of an extended sphere as a protection against majoritarian oppression since an extended republic would take in many distinct parties with varying interests that would be separated in both motive and opportunity to invade individual rights or oppress a minority.<sup>82</sup> In Federalist No. 45, Madison describes the competition for power between the states and the federal government as a further protection against majoritarian tyranny by creating a self-enforcing set of political safeguards for federalism to thrive.<sup>83</sup> In sum, the Madisonian theory postulates that the deliberative politics model would function within this structural design by filtering self-interest or private preferences so that social outcomes would reflect collective social preferences of the entire national population.<sup>84</sup> This approach would be consistent with the American political ethos of popular sovereignty,<sup>85</sup> since it would allow Lockean individual liberalism’s primary tenant of self-rule to be realized through a deliberative politics model operating within a constitutional order of structural republican institutions designed to give voice to the will of the people who are the “ultimate authority”<sup>86</sup> on “its true meaning”<sup>87</sup> of the Constitution. It would also protect the primary Lockean principle of self-determination,<sup>88</sup> while arriving at the common good defined by republican communitarianism.<sup>89</sup>

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<sup>81</sup> *Id.* at 319. Madison further noted that federalism would also function as an institutional device to protect individual liberty by constructing tiers of protection between the people and the governments, both state and federal. *Id.* at 318.

<sup>82</sup> *Id.* at 57 (Federalist No. 10, James Madison).

<sup>83</sup> *Id.* at 282-84 (Federalist No. 45, James Madison).

<sup>84</sup> GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALISTS*, 223-26 (Doubleday ed. 1981). The author stated that the electoral process purifies the popular vote, since bias and private interest is purged, and the distilled product is disinterest, impartiality, candor, clarity, and virtue. *Id.*

<sup>85</sup> WILLS, *supra* note 12, at 285. In Federalist No. 46, James Madison instructs the reader that “the ultimate authority” in the American constitutional design “resides in the people alone.” *Id.* In Federalist No. 78, Alexander Hamilton posits that “the power of the people is superior to both” judicial review and legislative acts. *Id.* at 475.

<sup>86</sup> *Id.* at 285. (Federalist No. 46, James Madison).

<sup>87</sup> *Id.* at 307. (Federalist No. 49, James Madison).

<sup>88</sup> See e.g., NOWLIN, *supra* note 4, at 456-58.

<sup>89</sup> WILLS, *supra* note 12, at 50-58. (Federalist No. 10, James Madison).

### III. Health Justice, Unenumerated Rights and Popular Sovereignty

The difficulty in understanding what the Framers of the Constitution understood public health care as a public good to mean, to some degree, is underscored by the total lack of any reference to social and economic rights in the Constitution.<sup>90</sup> In recognizing this difficulty, one preeminent scholar in health care has defined public health care to take account of the fact that the discussion of what the government can do or cannot do in providing public health care requires a definition that factors in the balance between the positive power of the government to act on behalf of its citizens' health and restraining that power to protect individual rights to liberty that secure one's autonomy or self-determination, as a public good in itself.<sup>91</sup> In a sense, Lockean liberalism's principle virtue of autonomy conflicts with civic republican's principle virtue of collectively providing for public health care as a public good.<sup>92</sup> This

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<sup>90</sup> See *Harris v. McRae*, 448 U.S. 297, 318 (1980) (the Court held that the Constitution does not impose an affirmative obligation on the government to provide the financial funds to obtain health care and, therefore, Congress was free to exclude medically necessary abortions from the Medicaid program). In sum, the Constitution is a charter of negative rather than positive liberties; *but see* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI L. REV. 864, 864 (1986) (positing that the Supreme Court has found positive duties in various negatively phrased clauses of the Constitution).

<sup>91</sup> GOSTIN, *supra* note 43, at 4. Professor Gostin's definition of public health reflects this conflict in our Constitutional design in the following manner:

Public health law is the study of the legal powers and duties of the state, in collaboration with its partners ... to ensure the conditions for people to be healthy, and of the limitations on the power of the state to constrain for the common good the autonomy, privacy, liberty, proprietary, and other legally protected interests of individuals. The prime objective of public health care is to pursue the highest possible level of mental and physical health in the population, consistent with social justice.

<sup>92</sup> See Wendy E. Parmet, Richard A. Goodman, and Amy Farber, *Individual Rights versus the Public's Health: 100 Years after Jacobson v. Massachusetts*, 352 NEW ENG. J. MED. 652 (2005); *see also*, Mary Ann Glendon, *Interdisciplinary Approach: Rights in Twentieth Century Constitutions*, 59 U. CHI L. REV. 519, 536 (Winter 1992), concludes that the

constitutional struggle permeates and overshadows present social policy preferences that mold and shape the extent to which our national government has historically approached its obligation to provide a substantive national healthcare system.<sup>93</sup> If there are unenumerated rights that support a right to health care, the question becomes what historical basis exists for such an affirmative right.<sup>94</sup> Furthermore, even if there is a constitutional basis for an affirmative right to health care, that right, similar to our traditional enumerated rights, is subject to forfeiture when the state's constitutional order is threatened. This result is consistent with the Framers' civic republican theory.<sup>95</sup>

### A. The Natural Right to Healthcare

In reviewing the political and social assumptions of the colonial and framing era, one scholar concludes that, "the framing generation

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problem of a "Bill of Rights in the Welfare State" presents a great dilemma of resolving the conflict between the two parts of liberalism – individual liberty versus our sense of community for which we accept a common responsibility.

<sup>93</sup> See Michael J. Graetz & Jerry L. Mashaw, *Constitutional Uncertainty and the Design of Social Insurance: Reflections on the Obamacare Case*, 7 HARV. L. & POL'Y REV. 343, 349 (2013). The authors posit that, "the gravamen of the constitutional complaint against the individual mandate was its supposed intrusion on personal freedom."

<sup>94</sup> See Currie, *supra* note 90. Professor Currie argues that there is no historical or textual basis for positive rights under the Constitution. Our constitutional rights are negative, meaning restrictions on government action, and not affirmative rights where the government has a duty protect life, liberty, or property; see Leonard, *infra* note 124, at 1377-78. Noting that *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), as examples of a negative rights interpretive approach; but see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

<sup>95</sup> See Garth Molander, *Machiavellian Jurisprudence: The United States Supreme Court's Doctrinal Approach to Political Speech Under the First Amendment*, 10 Touro LAW REV. 593 (Winter 1994). Similar to my thesis in 1994, the argument advanced in this paper is that universal health care will be accepted by the state when the state perceives universal health care as a public good that secures the stability of the state or the stability of the state's constitutional order. This result is in line with civic republican principles of constitutional interpretation. Obviously, both civic republican principles – deliberative politics principle and the stability of the state principle – must merge for a right to health care co-existing within our constitutional design. In other words, health care as a right will become fundamental law when this individual right is consonant with the state's perception of constitutional order.

assumed that governments had a significant role to play in protecting health ...[and] that governments were empowered to protect and, therefore, legitimate only when they protected the public health.”<sup>96</sup> In relying on William Blackstone’s Commentaries, Professor Parmet’s discussion reveals that under English law, health laws went to the heart of the government’s role.<sup>97</sup> Therefore, colonialists during the framing era would hold similar, if not identical, social health care preferences as rights and exercised those rights in practice, even if in a more simplistic form than presently.<sup>98</sup> Even Alexander Hamilton, in arguing against the necessity of a Bill of Rights, relied on William Blackstone’s Commentaries as a source of rights contained in the Constitution; therefore, the need to enumerate them was not necessary.<sup>99</sup> This gives support to the notion that the framing era generation held social values that materialized in public health care practices, due to the influence of English principles of justice that acknowledged natural rights.<sup>100</sup> However, Professor Parmet admits that these colonial era health care practices generally “appear[ed] in crises and withered away in periods of calm”.<sup>101</sup> During the framing era generation, it would appear public health care initiatives were more readily implemented when the state’s stability was threatened. This observation correlates with the general republican principle that when the state’s stability is threatened by either an internal or external threat,<sup>102</sup> the state will adopt health care

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<sup>96</sup> Parmet, *supra* note 1, at 270. Professor Parmet questions the conventional assumptions underlying current negative rights jurisprudence. *Id.* at 271-78.

<sup>97</sup> *Id.* at 284. Professor Parmet references William Blackstone as including among an Englishman’s rights “[t]he preservation of a man’s health from such other practices as may prejudice or annoy it.” *Id.*

<sup>98</sup> *Id.* at 302-19.

<sup>99</sup> WILLS, *supra* note 12, at 522 (Federalist No. 84, Alexander Hamilton).

<sup>100</sup> Parmet, *supra* note 1, at 305-07.

<sup>101</sup> *Id.* at 285.

<sup>102</sup> WILLS, *supra* note 12, at 320 (In Federalist No. 51, Madison speaks to internal and external controls necessary in government: “If men were angels, no Government would be necessary. If angels were to govern men, neither external nor internal controls on Government would be necessary. In framing a Government which is to be administered by men over men, the great difficulty lies in this: you must first enable the Government to control the governed; and in the next place oblige it to control itself”).



provisions to protect the very polity the state's existence relies upon.<sup>103</sup>

Professor Parmet identifies three regions for her study, colonial New England, principally the Massachusetts Bay Colony; the Mid-Atlantic colonies, principally New York and Pennsylvania; and the Southern colonies.<sup>104</sup> I shall take each one and argue that the health care initiatives implemented during the colonial era are more fully explained as measures taken to protect the stability of the state than public health measures illustrating a value structure viewing public health care as a social good grounded in natural rights. Importantly, a central observation Professor Parmet makes is that most of the colonial public health care initiatives were responses to an epidemic or other contagious diseases which threatened the stability of the colonial community.<sup>105</sup> For example, in her New England colony study, she cites to various laws passed by the General Court of Massachusetts Bay Colony, but many, if not all, were enacted in response to circumstances that could threaten or were threatening the stability of The Massachusetts Bay Colony at its most precarious state of development.<sup>106</sup> She identifies a history of health care laws, beginning from 1629 to the yellow fever epidemic of 1795 and concludes that, "[b]y the eighteenth century, public health regulations had become a common feature of colonial life"<sup>107</sup> thus, demonstrating that colonialists held a common expectation that the government had an obligation to protect the general health of the colony. However, the Massachusetts Bay Colony health care policy

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<sup>103</sup> Parmet, *supra* note 1, at 297-99. Professor Parmet discusses the government response to the 1793 yellow fever epidemic in Philadelphia as one that "never questioned whether the government should exercise extraordinary authority in response to the epidemic. ... Individual rights of property and movement were subordinated." *Id.* at 298. Again, this is the exact response the republican principle of stability of the state requires under our constitutional design. Although Professor Parmet asserts that the Philadelphia response demonstrated a public obligation being served, under liberal-republican analysis, the response had more to do with protecting the state than serving a public obligation. *Id.* at 297-98. See Molander, *supra* note 95, at 614.

<sup>104</sup> Parmet, *supra* note 1 at 286.

<sup>105</sup> *Id.* at 285.

<sup>106</sup> *Id.* at 287. Professor Parmet states that "[t]his earthly jurisprudence is evident in the colony's early republic health policy." *Id.*

<sup>107</sup> *Id.* at 291.

can be explained through the prism of liberal-republican constitutional interpretation as the state's response to circumstances it viewed as threatening the stability of the state itself.<sup>108</sup> First, the early jurisprudence of 1629 and 1647 involving the General Court's response to limiting the number of passengers on ships delivering future colonialists from Europe<sup>109</sup> and the quarantine regulations imposed in response to threats of epidemics being brought from India through the passage of goods<sup>110</sup> can be explained as regulations to protect the state from being destabilized by the occurrence of an epidemic or other contagious disease.<sup>111</sup>

Furthermore, the inoculation practice for smallpox adopted by the colony<sup>112</sup> can also be interpreted as a response to a feared disease that threatened the stability of the state and, therefore, required drastic measures that would protect the state. Finally, although the sanitation regulations dated back to 1634<sup>113</sup> and imposed to prevent disease are arguably health related, they can also be explained under liberal-republican constitutional interpretation as civic-republican regulations implemented to secure the preservation of the state or to maintain order within the state itself.<sup>114</sup>

Professor Parmet's next regional study concentrates on New York and the Mid-Atlantic colonies. Here, restrictions on one's liberties were imposed by the state to either respond to an epidemic or prevent one from occurring.<sup>115</sup> For example, in 1622 the town of East Hampton, in Long Island, New York, implemented a quarantine in response to a small pox epidemic.<sup>116</sup> In New Amsterdam, sanitation regulations dating back to the 1650's were

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<sup>108</sup> Molander, *supra* note 95 at 598.

<sup>109</sup> Parmet, *supra* note 1, at 287.

<sup>110</sup> *Id.* at 288.

<sup>111</sup> *Id.* at 288-90.

<sup>112</sup> *Id.* at 290.

<sup>113</sup> *Id.* at 290.

<sup>114</sup> Molander, *supra* note 95, at 598.

<sup>115</sup> Parmet, *supra* note 1, at 293-99. Professor Parmet asserts: "[a]s in New England, public health regulation in colonial New York was ... ad hoc, disorganized, and often reactive to the threats facing the colony." *Id.* at 293.

<sup>116</sup> *Id.*

implemented.<sup>117</sup> These regulations imposed restrictions on individual liberties.<sup>118</sup> After the 1793 yellow fever abated, New York was faced with another epidemic in 1798.<sup>119</sup> This time “the city council appointed a special health committee with almost unlimited powers.”<sup>120</sup> Finally, Professor Parmet notes the history of the colonial and federal public health in the South is somewhat indeterminate because the South was largely rural and, therefore, public health regulation was less extensive there than in the other two colonial regions. As a result, the rural South was less affected by the subsequent reforms and centralization that followed the yellow fever epidemics of the 1790s.<sup>121</sup> Moreover, since the South was driven by a slave economy, public health initiatives were basically designed to preserve that political economy along with its slave owning class.<sup>122</sup> The question is: Whether the exercise of governmental authority was a civic response connected to a public obligation, or can these government health care initiatives be defined as a liberal-republican response to stabilize the community, thus preserve the state? The answer to this question is important in understanding the dynamic of governance as a conflict between Lockean liberalism and civic republicanism. If, in fact, most of the government’s responses during the colonial era were reactive rather than preventive,<sup>123</sup> there is not much support for the thesis that colonials, prior to the framing era, had a strong associational value to health care as a right.<sup>124</sup>

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<sup>117</sup> *Id.* at 293-4.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 296

<sup>120</sup> *Id.* Professor Parmet explains that the city council’s response to the 1793 epidemic was to reenact the “quarantine laws and granting the Governor extraordinary powers.” *Id.* at 297. This was after, “civil authority effectively broke down.” *Id.*

<sup>121</sup> *Id.* at 302.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 285. In referring to the colonial public health initiatives, professor Parmet notes that, “they tended to appear in crises and wither away in periods of calm.” *Id.*

<sup>124</sup> Elizabeth Weeks Leonard, *The Public’s Right to Health: When Patient Rights Threaten the Commons*, 86 WASH. U.L. REV. 1335, 1339 (2009). Professor Leonard articulates a health right rather than a right to health. *Id.* This approach is consistent with deliberative legislation that “trumps otherwise strongly protected individual liberty, autonomy, privacy, and property rights.” *Id.* “Accordingly, individual rights are constantly in tension with communitarian interests.” *Id.* at 1345.

If anything, the colonial era health care regulations support the thesis that the colonials always thought the general health of the community was to be determined by their own state legislatures<sup>125</sup> and not grounded in natural rights. This can explain why the Framers viewed the States as the providers of the general welfare of the body politic and why legislation and regulation of public health care has been treated as a police power that is reserved to the states under the Tenth Amendment.<sup>126</sup> Moreover, although the right to national health care, as a right of citizenship, is rooted in the Fourteenth Amendment,<sup>127</sup> under Fourteenth Amendment jurisprudence a tier approach determines what rights are fundamental or important to national citizenship and deserving of constitutional protection.<sup>128</sup> Hence, in theory, the Court applies a three tier interpretive approach to determine the implication of a protected class or fundamental right based on varying levels of scrutiny.<sup>129</sup>

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<sup>125</sup> Parmet, *supra* note 1, at 297-98. Throughout professor Parmet's study she refers to public health legislation or regulations which presupposes deliberative legislation through a selectmen institution of governance. *Id.* at 288.

<sup>126</sup> See, *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (referring to the police powers as "that immense mass of legislation, which embraces everything within the territory of a state ... all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description ... are component parts of this mass."); see also, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding that "the police power[s] of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."); see also, WILLS, *supra* note 12, at 501. In Federalist No. 82, Hamilton states: "The principles established in a former paper teach us, that the states will retain all *pre-existing* authorities which may not be exclusively delegated to the Federal head"; and, in Federalist No. 45, Madison states: "The powers reserved to the several States will extend to all the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State." *Id.* at 284.).

<sup>127</sup> Ackerman, *supra* note 26, at 1746. Ackerman observes that the Framers of the 14<sup>th</sup> Amendment elevated national citizenship over state citizenship. *Id.*

<sup>128</sup> Kohn, *supra* note 3, at 259.

<sup>129</sup> Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 McGEORGE L. REV. 473, 474 (2002). Professor Karlan posits that sometimes the Court views the issues stereoscopically and applies the equal protection clause and due process clause synergistically resulting in results neither clause might reach by itself. *Id.*

In conclusion, if natural rights were to exist in the Ninth and Tenth Amendments, as either “retained” or “reserved” to the people, the absolute lack of constitutional jurisprudence since 1820, expressly referencing principles of justice consistent with natural rights as a basis of constitutional jurisprudence in Supreme Court decisions, belies that premise.<sup>130</sup> Therefore, if “[t]he prime objective of public health law is to pursue the highest possible level of mental and physical health in the population, consistent with the values of social justice[,]”<sup>131</sup> where are these social rights coming from given the total lack of reference for social rights in the Bill of Rights? In response to this question, recent scholarship has challenged past health care models as antiquated and, “no longer adequate to address the increasingly social, collective nature of health care institutions.”<sup>132</sup> In an article advocating a health justice model approach, Professor Wiley believes that the present dominating health care model—patient rights model—that has been wholly accepted by progressive judges, policy makers, advocates, and scholars has transformative weaknesses that stand in the way, “for law to serve truly ‘public’ policy.”<sup>133</sup> She further argues that although the Affordable Care Act (ACA)<sup>134</sup> was strongly influenced by past health care models that emphasized individualist interests over collective interests, the ACA does not support “the notion of an individual right to basic health care,”<sup>135</sup> since it omitted a private

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<sup>130</sup> Sherry, *supra* note 33, at 1176.

<sup>131</sup> GOSTIN, *supra* note 43, at 4.

<sup>132</sup> Lindsey F. Wiley, *From Patient to Health Justice: Securing the Public's Interest in Affordable, High-Quality Health Care*, 37 CARDOZO L. REV. 833, 833 (Feb. 2016). Professor Wiley articulates since the enactment of the Affordable Care Act, conditions are ripe for the emergence of a new health law model. *Id.* at 837. One that is grounded in, “communitarian conceptions of social justice”. *Id.* She refers to this model as “health justice.” *Id.* She advances, “four key commitments of the health justice model.” *Id.* at 838. Most importantly, in terms of this article, “the health justice model asserts the role of collective oversight through democratic governance – much in the same way that the market power model champions the role of private payers and market dynamics – in managing resources and securing common goods.” *Id.* at 839.

<sup>133</sup> *Id.* at 838.

<sup>134</sup> Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 119 (2010), Codified as Amended 42 U.S.C. § 18001.

<sup>135</sup> Wiley, *supra* note 132, at 857.

right of enforcement.<sup>136</sup> In essence, the health justice model relies on communitarian conceptions of social justice, but that model faces “two conflicting core values, autonomy and [the] common good.”<sup>137</sup> Professor Wiley further postulates that this conflict is resolved through principles and procedures.<sup>138</sup> Stated differently, the communitarian approach to healthcare reform relies on the republican institutional design in which the deliberative politics model determines what collective good or common good will be adopted through popular sovereignty. In sum, even under a health justice model, the collective good or common good is decided by the legislature or through deliberative legislation.<sup>139</sup> However, this deliberative process also threatens the health justice model’s ideal of access to health care as a right of citizenship,<sup>140</sup> because it precariously relies on the tug and pull of popular sovereignty.<sup>141</sup> In practice, the ACA is a statutory right and not a true entitlement because it can be denied or limited through subsequent statute.<sup>142</sup> By contrast, popular constitutionalism scholars believe that the ACA has the transformative power to change the moral structure of our government, creating new rights that the Supreme Court will ultimately be called upon to enforce.<sup>143</sup> In short, these scholars

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 864.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 885 (Professor Wiley posits: “The health justice model would emphasize the role of the public governance, viewing health insurance as ‘a common-pool resource requiring stewardship’ and access to basic health care as an entitlement of citizenship, ‘the proper design and operation [of which] ... are collective responsibilities.’”).

<sup>140</sup> *Id.* at 888; *but see*, Leonard, *supra* note 124, at 1384 (Professor Leonard asserts that “the public health right [is a negative right, since it] contemplates that the public, as a body, merits protection from the interference by individual members of society.”).

<sup>141</sup> *See* Katherine L. Record, *Litigating the ACA: Securing the Right to Health Within a Framework of Negative Rights*, 38 AM. J.L. & MED. 537 (2012); *see also* David Orentlicher, *Rights to Healthcare in the United States: Inherently Unstable*, 38 AM. J.L. & MED. 326 (2012).

<sup>142</sup> Orentlicher, *supra* note 141, at 336.

<sup>143</sup> Rubin, *supra* note 55, at 1701-05 (Professor Rubin posits that the emerging positive rights movement is based on the notion that statutes affect judicial interpretation because statutes themselves are constitutional interpretations through the process of popular

believe that through popular sovereignty principles of lengthy public debate and political discourse, and through several ratifying national elections, the ideal of a right to healthcare will become so entrenched in our society that it will transform a right of access to healthcare into a right to healthcare.<sup>144</sup> Furthermore, as a final step towards developing a right to healthcare, the Court will be called upon to legitimize these popular statutory norms as constitutional norms, thus transforming the American social contract in securing the right to healthcare.<sup>145</sup>

Strikingly, although the health justice model relies on principles of social justice, it does not espouse reliance on natural law rights to achieve health care reform. Illustrative of this point is that the health justice model rejects the notion that access to health care is a human right in and of itself, since that perspective would not distinct itself from a patient rights perspective.<sup>146</sup> In Professor Wiley's words, from a population based perspective, access to health care is primarily a means to an end and not an end in itself.<sup>147</sup> "The health justice perspective would emphasize that those ends include protecting collective, as well as individual interests."<sup>148</sup> Yet, Professor Wiley's observation is nothing more than asserting that the degree of access to health care should be left to the people to decide, in the first instance, rather than through constitutional interpretation.<sup>149</sup> Therefore, implicit in the health justice model is a reliance on the deliberative politics model or deliberative legislation acting as the medium in which the social justice model, as a means, achieves its end.<sup>150</sup> The health justice model would rely on the deliberative politics model to secure public interest while balancing

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sovereignty. Concluding that the ACA is an example of this emerging positive rights movement.).

<sup>144</sup> *Super*, *supra* note 7, at 880-89.

<sup>145</sup> *Id.*

<sup>146</sup> Wiley, *supra* note 132, at 879.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 854.

<sup>150</sup> *Id.* at 885. Professor Wiley asserts that "the health justice model would emphasize the role of public governance, ... and access to basic care as an entitlement of citizenship, 'the proper design and operation [of which] ... are collective responsibilities.'" *Id.*

collective needs and individual interests.<sup>151</sup> In a political and legal sense, it can be argued that the health justice model relies on popular constitutionalism to institute health care reform.<sup>152</sup> This comports with the republican democratic ethos of self-rule.<sup>153</sup> It also comports with the Framers' design of judicial restraint, recognizing that the people are the ultimate authority on the meaning of the Constitution.<sup>154</sup>

## B. Popular Sovereignty and the Right to Healthcare

As a transformative theory of constitutional change, popular constitutionalism is viewed as an informal method of instituting fundamental change that traditionally was achieved through the formal amendment process under the Article V of the Constitution.<sup>155</sup> Popular constitutionalism recognizes that deliberative legislation, at times, enacts landmark<sup>156</sup> or super-statutes<sup>157</sup> that have transformative importance resulting in fundamental change to the American social contract.<sup>158</sup> These transformative periods or "constitutional moments"<sup>159</sup> inspire fundamental change to American society. This fundamental change

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<sup>151</sup> *Id.* at 881.

<sup>152</sup> Super, *supra* note 7, at 892-95 (discussing how the ACA fits the elements of a constitutional moment).

<sup>153</sup> WILLS, *supra* note 12, at 228 (Federalist No. 39, James Madison); *see also* Adam Shinar, *The End of Constitutional Law?* 29 CONST. COMMENTARY 181, 188 (2014). Professor Shinar describes Bruce Ackerman's "constitutional moments" as "moments [where] the people speak and reveal their true preferences...[And], respecting [those preferences is] adhering to the 'real' popular will of the people" thus "enforcing the Constitution is simply enforcing the people's will." Ackerman's "constitutional moments" theory basically relieves the tension between judicial interpretation and democratic rule. *Id.*

<sup>154</sup> WILLS, *supra* note 12, at 476; *see also* Kramer, *supra* note 47 (accompanying text).

<sup>155</sup> Super, *supra* note 7, at 879. Professor Super posits that "... at least since through the New Deal, major pathbreaking statutes have increasingly replaced formal amendments proposed under Article V as the major vehicles for constitutional debate and realignment." *Id.*

<sup>156</sup> Ackerman, *supra* note 26, at 1742.

<sup>157</sup> Eskridge Jr. & Ferejohn, *supra* note 26, at 1215-16.

<sup>158</sup> Super, *supra* note 7, at 875.

<sup>159</sup> Ackerman, *supra* note 26.



is not instant, but through the ratification process of subsequent popular national elections and other political means, these landmark statutes become fundamental law, having constitutional dimension.<sup>160</sup> Hence, if opponents of the substantive terms of the statute are unsuccessful in reversing popular support for the statute, the law eventually becomes so entrenched in our political ethos that it becomes fundamental law under popular sovereignty principles.<sup>161</sup> In this sense, popular constitutionalism will achieve what natural rights proponents cannot achieve—fundamental change of this country's social contract. Constitutional moments of this magnitude have been identified in our constitutional history, as illustrated by the ratification of the Constitution, the enactment of the Reconstruction Amendments, and the establishment of the modern regulatory state of the New Deal legislation.<sup>162</sup> Also, the Social Security Act and the Civil Rights Act of 1964 have been described as landmark statutes.<sup>163</sup> These historic periods witnessed vast fundamental change to this country's constitutional law which generated vast social change that has affected social, economic and political interrelationships.<sup>164</sup> More recently, the enactment of the ACA) has been viewed as triggering a constitutional moment.<sup>165</sup> The question becomes whether subsequent popular national elections, further political debate, and subsequent Court decisions will ratify or reject the ACA. If the ACA evolves into a durable statute with landmark legislative prominence that affects fundamental social change,<sup>166</sup> the manner that the Supreme Court

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<sup>160</sup> Larry Kramer, *What's a Constitution for Anyway—Of History and Theory*, Bruce Ackerman and the New Deal, 46 CASE W. RES. L. REV. 885, 894 (1996). Professor Kramer posits that Ackerman's regime feature compels courts to "engage in ... broad new principles and to integrate these with existing principles in a way that has implications across the entire constitutional firmament." *Id.*

<sup>161</sup> Super, *supra* note 7, at 884–888.

<sup>162</sup> *Id.*

<sup>163</sup> Ackerman, *supra* note 26, at 1742.

<sup>164</sup> *Id.*

<sup>165</sup> Super, *supra* note 7, at 885 (noting that the political battle over the whether the health care reform of the ACA will be entrenched or repealed provides a rare opportunity to study a constitutional moment in real time).

<sup>166</sup> Eskridge, Jr. & Ferejohn, *supra* note 26 (explaining that the authors posit those super statutes become durable through a deliberative process characterized by heightened public debate and political confrontations spanning several years or more).

views these now-popular norms may determine whether they become constitutional norms.<sup>167</sup> In this sense, popular constitutionalism relies on the principle of popular sovereignty or the deliberative politics model as the means of enacting transformative law that brings about fundamental change in the American constitutional order.<sup>168</sup> Constitutional moments also have the potential to transform the Court's jurisprudential approach in reaction to these landmark statutes.<sup>169</sup> The effects of which may be presently found in the observation that the tier approach to equal protection clause jurisprudence is in disarray, and out of this disarray has emerged a less rigid framework that applies an interpretive approach that merges the Equal Protection Clause and (substantive) Due Process Clause, resulting in a level of judicial scrutiny described as "rationality-with-bite".<sup>170</sup> In fact, the effects of the constitutional moment of the New Deal, coupled with the constitutional moment of the Civil Rights Acts of the late 1960s, may still be having an influential effect on constitutional construction.<sup>171</sup> One scholar explained the transformative process as

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<sup>167</sup> Super, *supra* note 7, at 880.

<sup>168</sup> Rosen, *supra* note 5, at 128 (explaining that the authors observe that popular constitutionalism is premised on the Court viewing itself as a participant in a broader dialogue about the meaning of the Constitution that includes all branches of the government and, more importantly, the people as the ultimate authority of its meaning, thus aligning judicial review with the democratic principles underlying American constitutional order).

<sup>169</sup> Super, *supra* note 7.

<sup>170</sup> Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209, 1228–29 (1999) (explaining that the tier approach to the equal protection clause jurisprudence is transforming from a rational basis test to "rationality-with-bite." In essence, the Court is using an interpretive approach that merges the Equal Protection Clause and (substantive) Due Process Clause giving greater protection, in certain circumstances, contrary to the ruling in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

<sup>171</sup> Kramer, *supra* note 160, at 893–94; *but see* Frank I. Michelman, *Unenumerated Rights under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121, 140–141 (2006) (arguing that constitutional moment theorists must reject the existence of unenumerated constitutional rights because, under this theory, unenumerated rights such a privacy can be arrived at through "synthetic" constitutional interpretation, which is nothing more than a standard legal method of constitutional interpretation).

a two-step process of constitutional construction, where (1) the courts give meaning to the transformation by articulating new principles out of the core constitutional principles lodged in the statutory material that has gained popular support; and (2) courts then synthesize these principles with prior constitutional regime principles, thus merging both new and old regime principles that harmonizes the way the people actually understand their constitutional tradition.<sup>172</sup> Not surprisingly, this normative disarray is also present in due process clause jurisprudence.<sup>173</sup> In sum, the legal environment may be ripe for a third strand approach to constitutional construction given the disarray of the constitutional doctrinal approach of both Equal Protection Clause jurisprudence<sup>174</sup> and Due Process Clause jurisprudence.<sup>175</sup> Moreover, if society and law are co-constitutive,<sup>176</sup> then the synergy between society and law can be described as the synthesis of past constitutional regime norms with present or popular constitutional regime norms during constitutional moments.<sup>177</sup> Professor Ackerman describes this process of judicial review as “synthetic interpretation.”<sup>178</sup> The theory of synthetic interpretation explains how fundamental values at the time of the framing era pass from one generation to the next, giving early American fundamental values present meaning within

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<sup>172</sup> Kramer, *supra* note 160.

<sup>173</sup> Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C.L. REV. 63 (2006).

<sup>174</sup> Nice, *supra* note 170, at 1226; *see also* Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 631, 672 (2011) (explaining that First Amendment decisions depend on merging equality and liberty interests. In *CLS v. Martinez*, Professor Nice concludes that the Court “align[ed] expressive association with the other constitutional doctrines of protecting equality”).

<sup>175</sup> Conkle, *supra* note 173, at 97.

<sup>176</sup> Nice, *supra* note 170, at 1222–1223 (positing that law and society are mutually constitutive in that law shapes society and society shapes law).

<sup>177</sup> Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 515–545 (1989) (using the term “synthesis” to describe the method where informal constitutional amendments take place through a jurisprudential doctrinal approach where the court synthesizes prior jurisprudential norms with popular statutory norms, thus aligning the country with current traditional notions of our political ethos. He refers to this jurisprudential method as “synthetic interpretation.” *Id.* at 519. *See also* Nice, *supra* note 170, at 1261–1263 (noting that “the third strand of equal protection doctrine fits squarely into Ackerman’s analysis”).

<sup>178</sup> Ackerman, *supra* note 177, at 521.

the context of present circumstances.<sup>179</sup> Professor Ackerman further postulates that the promulgation of the Constitution was a constitutional moment where a synthesis between two dialectical theories of justice—Lockean liberalism and civic republicanism—were merged, connecting Constitutional norms with the fundamental norms expressed in the Declaration of Independence.<sup>180</sup>

This has led to some constitutional scholars asserting that the ethos of our popular sovereignty that existed at the founding moment produced a social contract with both enumerated and unenumerated rights.<sup>181</sup> These unenumerated rights surface during constitutional moments.<sup>182</sup> In effect, synthetic interpretation legitimizes popular sovereignty's right to tap into the penumbra of rights within the Bill of Rights,<sup>183</sup> giving popular sovereignty (deliberative politics process) justification in finding expression and meaning to other fundamental and traditional notions of the

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<sup>179</sup> *Id.* at 515–544.

<sup>180</sup> See POCOCK, *supra* note 6 and accompanying text; WOOD, *supra* note 6 and accompanying text.

<sup>181</sup> Sherry, *supra* note 33, at 33, at 1155–1176 (positing that the founders' vision of a written constitution was never intended to displace prior traditional notions of fundamental law); see also Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 556–572 (2011). Professor Williams argues that although the Ninth Amendment has a limited rule of construction interpretation, that implication supports the notion of constitutional status of “unenumerated” rights).

<sup>182</sup> See Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1778 (1997) (observing that Professor Ackerman illustrates *Griswold v. Connecticut* as representing the modern Court's effort to find a liberty interest of privacy based on fundamental law during the Founding era); see also, *Griswold v. Connecticut*, 381 U.S. 479, 517 (S. Ct. 1965). (Notably, out of the 5 Justices that formed the majority, 3 of the majority Justices relied on the Ninth Amendment to support the recognition of a non-textual right to privacy).

<sup>183</sup> *Griswold*, 381 U.S. at 484 (Justice Douglas wrote: “. . . specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . The Ninth Amendment provides: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”).

American political ethos through the “retained” and “reserved” rights reposed in the Ninth and Tenth Amendments, respectively.<sup>184</sup>

### C. Present Fourteenth Amendment Jurisprudence and the Right to Healthcare

The disarray of Fourteenth Amendment jurisprudence can be similarly explained as an emergence of a positive rights movement in constitutional interpretation that recognizes statutes as having constitutional interpretive effect.<sup>185</sup> As professor Rubin articulates, the Constitution is a device designed to serve the people in achieving three notable purposes: equality, liberty and a strong national government.<sup>186</sup> Theoretically, as the Court searches to give meaning to these purposes consistent with the current sovereign will of the people, as expressed in progressive statutes, the traditional three tier approach becomes unraveled and resembles a constitutional doctrinal approach that is in disarray. Simply put, this jurisprudential disarray can be viewed as a product of “synthetic interpretation”<sup>187</sup> brought on by a constitutional moment<sup>188</sup> triggered by the Civil Rights Acts of the late 1960s.<sup>189</sup> Therefore, if

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<sup>184</sup> Wills, *supra* note 12, at 556; *but see*, Jennifer Fahnestock, *Renegotiating the Social Contract: Healthcare as a Natural Right*, 72 U. PITT. L. REV. 549 (2011) (arguing penumbral reasoning cannot create a natural right for healthcare).

<sup>185</sup> Rubin, *supra* note 55, at 1684–85 (positing that the constitution is an instrumentality of the people that is used to achieve its purposes of equality, liberty and a strong national government, and the recent progressive movement has moved constitutional doctrine consistent with the documents underlying purposes: toward greater equality and greater liberty for citizens. Theoretically, as the Court searches to give meaning to these purposes consistent with the current sovereign will of the people, the traditional three tier approach becomes unraveled and is presently described as in disarray).

<sup>186</sup> *Id.* at 1667.

<sup>187</sup> Ackerman, *supra* note 177, at 519.

<sup>188</sup> *Id.* at 545 (postulating that the people, in rare moments, engage in “higher lawmaking” that reunites the present American political ethos with early American traditional values thus revising constitutional order to align it with present notions of early American values).

<sup>189</sup> Tom Donnelly, *Judicial Constitutionalism We the People, Volume 3: The Civil Rights Revolution*, 30 CONST. COMMENTARY 541, 551 (2015) (reviewing Bruce Ackerman’s third book on popular constitutionalism and notes that popular constitutionalism should be viewed as a rule of constitutional construction, that is, when the people have reached a considered judgment in providing meaning to unclear Constitutional text, the peoples’

the ACA has the transformative effect as some scholars have identified,<sup>190</sup> it may set in motion another round of constitutional interpretation where the Court is forced to give constitutional meaning to statutes having constitutional interpretive affect concerning a right to health care.<sup>191</sup> Popular constitutionalism, as an informal method of amending the Constitution, stabilizes constitutional order by harmonizing present popular norms with past norms while maintaining the essential governing principle that the will of the people makes laws which control the government.<sup>192</sup>

However, even if one were to embrace the principle that fundamental social change can come about through popular constitutionalism in reuniting the present American political ethos with early American traditional values, thus creating “new” constitutional norms, the question remains whether we are presently experiencing a constitutional moment illustrated by the ongoing debate concerning the legitimacy of the ACA.<sup>193</sup> Just as important, will an elder civil rights movement<sup>194</sup> be necessarily similar to the 1960s civil rights movement to secure a right to health care?<sup>195</sup> In principle, the purpose of the ACA is to have private health insurance provide the means to spread costs in extending health benefits to all by recognizing that health insurance has become as necessary as

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meaning should be given considerable weight in constitutional interpretation as a default rule).

<sup>190</sup> Super, *supra* note 7; Eskridge, *supra* note 26; Rubin, *supra* note 55.

<sup>191</sup> Rubin, *supra* note 55, at 1643 (observing that the intense opposition to the ACA stems out of the realization that the ACA will trigger a constitutional revolution in the way Americans generally view the moral structure of its government and in the manner it redefines constitutional doctrine by creating new rights that will encourage the Court to declare them part of the Constitution).

<sup>192</sup> BAILYN, *supra* note 44, Part II at 766.

<sup>193</sup> Super, *supra* note 7.

<sup>194</sup> Marie-Therese Connolly, *Aging in the US: The Next Civil Rights Movement?: Policy Update: How Change Happens*, 21 TEMP. POL. & CIV. RTS. L. REV. 329, 334–35 (2012); see also Michele Mathes, *Aging in the US: The Next Civil Rights Movement?: Health Care and the Aged: Arguing Equality in the Absence of a Right*, 21 TEMP. POL. & CIV. RTS. L. REV. 337, 344–45 (2012) (observing that the Third Strand approach is an example of the synthetic method of analysis, which approach is similar in Professor Ackerman’s theory of constitutional moments).

<sup>195</sup> *Id.*

healthcare.<sup>196</sup> The ACA is trying to achieve the right to access healthcare by utilizing modern health insurance methods.<sup>197</sup> Recent Republican dialogue indicates that the manner the ACA will be funded will emphasize less public funding and more private health insurance choices involving the establishment of high risk pools within states,<sup>198</sup> thus preserving the patient rights model based on one's liberty to contract, which supports the argument that the continued debate on the legitimacy of the ACA is moving further away from a health justice model,<sup>199</sup> opening the door to a libertarian model of health justice, dominated by constitutional norms more characteristic of the *Lochner* era.<sup>200</sup> This possibility is real<sup>201</sup> and is why a health justice model calls for a detachment from the present patient rights model, because the latter relies on principles of economic autonomy<sup>202</sup> consistent with one's individual liberty to contract.<sup>203</sup> However, the manner healthcare is funded is not the only problem the statute faces in transforming constitutional norms in alignment with popular statutory norms and supporting a right to healthcare. Another problem lies in the method essential health benefits (EHBs) are delivered—given the way they

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<sup>196</sup> Wendy K. Mariner, *Health Insurance is Dead; Long Live Health Insurance*, 40 AM. J.L. AND MED. 195, 214 (2014).

<sup>197</sup> *Id.* at 201.

<sup>198</sup> Drew Altman, Kaiser Family Foundation, *The Bigger Story, and Agenda, Behind GOP Changes to Obamacare, Medicare and Medicaid*, (Nov. 21, 2016) available at <http://www.kff.org>; see also Drew Altman, *Preexisting Conditions and Republican Plans to Replace Obamacare*, (December 9, 2016), available at <http://www.kff.org>.

<sup>199</sup> Wiley, *supra* note 132, at 879.

<sup>200</sup> *Lochner v. New York*, *supra* note 27, at 64; see Colby and Smith, *supra* note 24, at 529–30 (commenting on a return to a new *Lochner* era); see also Super, *supra* note 7, at 945–950 (arguing that the public-private line in the ACA sets the stage for future constitutional decisions as to the extent privatization will dominate access to healthcare).

<sup>201</sup> Mariner, *supra* note 196, at 214 (articulating that the ACA's social insurance conception of health insurance straddles four conceptions of insurance and, concludes that health insurance will likely operate within the "contract conception" of insurance rather than the "product conception," "public utility/regulated industry conception," or "governance conception"). *Id.* at 203.

<sup>202</sup> Wiley, *supra* note 132, at 847–853. Professor Wiley postulates that the "patient rights model," the "market power model," and the "health consumerism model" all focus on individual decision-making that prohibits collective, social healthcare goals, and each is evident in the ACA.

<sup>203</sup> *Id.*

are defined and protected under the statute.<sup>204</sup> Significantly, under § 18022(b)(4)(C) of the ACA,<sup>205</sup> EHBs cannot be discriminated against on the basis of age.<sup>206</sup> In terms of the elderly receiving Medicare benefits, the ACA strictly prohibits age-weighted theories of priority setting.<sup>207</sup> If these proscriptions are not disturbed by repealing legislation, the courts will eventually be called upon to formulate constitutional norms that give constitutional meaning to age discrimination proscriptions in the context of the right to access healthcare under the ACA.<sup>208</sup> These particular sections of the ACA further place “age” within the protected class of “race,” “color,” and “sex”; in addition to “national origin,” “disability,” “gender identity,” or “sexual orientation.”<sup>209</sup> Since these terms would have to be given constitutional meaning by the courts in the context of healthcare, constitutional norms relied on in past (prior) jurisprudence regarding age discrimination claims may need adjustment to harmonize with these popular statutory norms. In sum, the Court will be called upon to synthesize prior jurisprudential norms with popular statutory norms, thus aligning the country with current traditional notions of our political ethos.<sup>210</sup> For example, the constitutional norm relied on in the Court’s decision of *Massachusetts Board of Retirement v. Murgia*<sup>211</sup> is at odds with the

<sup>204</sup> Mariner, *supra* note 196, at 207–212; see generally Govind Persad, *Priority Setting, Cost-Effectiveness, and the Affordable Care Act*, 41 AM. J. L. & MED. 119, 147 (2015).

<sup>205</sup> 42 U.S.C. §18001; see also 45 C.F.R. § 156.125 (2014).

<sup>206</sup> Persad, *supra* note 204, at 147. The Federal Secretary of Health and Human Services, charged with defining EHB under the code, has stated that “an insurer of insurance fails to provide essential health benefits if ‘its benefit design, or the implementation of its benefit design, discriminates based on an individual’s age, expected length of life, present or predicated disability, degree of medical dependency, quality of life, or other health conditions’ or discriminates ‘on the basis of race, color, national origin, disability, age, sex, gender identity or sexual orientation.’” *Id.*

<sup>207</sup> *Id.* at 136–138. (stating § 1320e-1(c)(1) of the ACA prohibits “age-weighted” theories of priority setting concerning access to Medicare treatment for the elderly). Priority setting is a cost benefit technique applied to healthcare treatment options to determine which specific individuals should receive which treatments. *Id.* at 122.

<sup>208</sup> Rubin, *supra* note 55.

<sup>209</sup> 42 U.S.C. §18001.

<sup>210</sup> Ackerman, *supra* note 177, at 515–545.

<sup>211</sup> *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 327 (1976).



statutory norm in the ACA, particularly given that under the ACA if an insurer's benefit design (or the implementation of its benefit design) discriminates based on an individual's age in providing essential health benefits, it will be in violation of the ACA.<sup>212</sup> Also, it would further appear that the government now has an affirmative obligation to root out age discrimination in the manner an insurer fails to provide essential health benefits to the elderly, pursuant to ACA statutory norms.<sup>213</sup> Interestingly, the ACA statutory norms, as expressed in these relevant sections,<sup>214</sup> differ in context to the holding in *Murgia*. Simply put, *Murgia* and its Supreme Court progeny<sup>215</sup> dealt with age discrimination in the employment context, whereas the Court will now be confronted with giving meaning to the equal protection clause and due process clause in the context of healthcare, due to the enactment of the ACA.<sup>216</sup> Therefore, access to health care is crucial to the popular debate of whether the government has an affirmative obligation to provide the means for elders to receive adequate health care.<sup>217</sup> This observation is highlighted by the majority opinion in *National Federation of Independent Business v. Sebelius*,<sup>218</sup> which noted that its ruling is

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<sup>212</sup> 42 U.S.C. §18001; *see also*, *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 151–154 n.4 (1938) (articulating that a greater level of scrutiny is necessary when a statute is directed at discrete, insular minorities).

<sup>213</sup> Persad, *supra* note 204, at 147.

<sup>214</sup> 42 U.S.C. §1320e-1(c)(1) (2012) and 42 U.S.C. §18022(b)(4)(C) (2012).

<sup>215</sup> *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (holding age is not a suspect class, applying the rational basis review); *City of Cleburne, Tex. v. Cleburne Learning Ctr.*, 473 U.S. 432, 442–45 (1985) (holding disability is not a suspect class, applying rational basis review). *But see Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991) (explaining that Justice O'Connor wrote for the majority finding that the Missouri state constitution requiring judges to retire at age 70 was rationally related to the "legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform." Notably, Justice O'Connor's dicta suggests the Court's rational basis review was undergoing some transformative change consistent with intermediate scrutiny by identifying the government's interest as "compelling" and declaring the provision not merely rational, but "reasonable").

<sup>216</sup> Kohn, *supra* note 3, at 230.

<sup>217</sup> Super, *supra* note 7, at 877.

<sup>218</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 587 (2012).

not the ultimate constitutional decision on the ACA, the final decision will rest with the people.<sup>219</sup>

#### **IV. Healthcare, Elder Rights and Popular Constitutionalism: The Synergetic Effect of Popular Constitutionalism and Stability of the Original Constitutional Order**

Although the United States Constitution does not expressly or explicitly guarantee a right to health care, and the Supreme Court has not found such a right to it,<sup>220</sup> there is agreement among scholars that enactment of the ACA was a step towards the realization of a right to health care in the United States.<sup>221</sup> However, the continued realization of a right to health care depends on whether political challenges to the ACA will stall further implementation of it or even dismantle it.<sup>222</sup> Therefore, it is widely recognized that the present statutory right to access health care, in a truly non-discriminatory manner, is precariously linked to the political alignments of popular sentiment.<sup>223</sup> One commentator has noted that even in the event of strong political opposition to the ACA, it is unlikely that the ACA will be repealed.<sup>224</sup> If this is correct, the political struggle over the ACA will determine whether its statutory norms will fundamentally change the terms of this country's social contract in ways that expand elder rights or one's right to healthcare.<sup>225</sup>

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<sup>219</sup> *Id.* at 587 (noting—Chief Justice Roberts in his *de facto* majority opinion—“[b]ut the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people”).

<sup>220</sup> *Harris v. McRae*, 448 U.S. 297, 318 (1980) (holding medical care is not a fundamental interest); *Maher v. Roe*, 432 U.S. 464, 469 (1977) (holding medical care is not a fundamental interest).

<sup>221</sup> Benjamin Mason Meier, *US Efforts to Realize the Right to Health Through the Patient Protection and Affordable Care Act*, 13 HUMAN RIGHTS L. REV. 169 (2013).

<sup>222</sup> Super, *supra* note 7, at 876.

<sup>223</sup> Orentlicher, *supra* note 141.

<sup>224</sup> Super, *supra* note 7, at 878.

<sup>225</sup> *Id.* at 948 (positing that the ACA sets the stage for future constitutional decisions about privatization of the right to access the healthcare system).

A. Popular Constitutionalism and Transformative Fourteenth Amendment Jurisprudence Concerning the Right to Healthcare

Under popular constitutionalism, judicial review is the means to link one generation to the next generation, thus transforming society by aligning past constitutional norms with present statutory norms, while preserving a stable constitutional order.<sup>226</sup> Popular constitutionalism scholars assert that our constitutional order has changed repeatedly throughout American political history, starting with the promulgation of the Constitution. Subsequent transformation periods, also referred to as constitutional moments, are identified as the Reconstruction Amendments, the New Deal era, and the Civil Rights Movement of the late 1960s.<sup>227</sup> All of these transformative periods were either triggered by formal amendments under Article V or informal amendments through the enactment of landmark statutes.<sup>228</sup> In short, landmark statutes during these transformative periods provided the impetus for aligning popular American fundamental values with early American traditional values, in changing this country's fundamental law while preserving constitutional order.<sup>229</sup> In this sense, statutory norms and constitutional norms are co-constitutive in their operation of changing fundamental law and realigning constitutional order with that fundamental law. Many effects of this process are evident, particularly the disarray of Fourteenth Amendment jurisprudence during the most recent transformative period brought on by the Civil Rights Movement of the late 1960s.<sup>230</sup>

For example, professor Kohn has observed that because the Supreme Court has not had the opportunity to show how it would apply equal protection jurisprudence to age discrimination in other contexts in which older adults are discriminated based on age, such as in the right to access healthcare, *Murgia* and its Supreme Court

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<sup>226</sup> Ackerman, *supra* note 177.

<sup>227</sup> Super, *supra* note 7, at 883.

<sup>228</sup> *Id.* at 885–86.

<sup>229</sup> *Id.* at 884.

<sup>230</sup> Ackerman, *supra* note 26, at 1742–43.

progeny should not be read as precluding that certain forms of age classification may not be rational outside the employment context.<sup>231</sup> Hence, Professor Kohn concludes that the court can apply heightened scrutiny to certain age based classifications that deny older adults important rights without rejecting *Murgia's* reasoning or rejecting prior rulings.<sup>232</sup> This assertion is further supported by the observation that Fourteenth Amendment jurisprudence is in disarray, as reflected in recent Fourteenth Amendment jurisprudence, balancing one's due process clause interest with his or her equal protection clause interest and applying heightened scrutiny in those cases.<sup>233</sup> Professor Kohn attacks the court's reasoning in *Murgia* on several grounds.<sup>234</sup> First, relying on popular traditional notions of how current age groups are defined using real social and physical differences rather than defining them as a single homogeneous group—as the *Murgia* court did—demonstrates that the *Murgia* Court's application of rational basis review is now out of sync with popular definitions of age-based classifications rendering what previously appeared to be rational in 1976, as irrational today.<sup>235</sup> In addition, since the *Murgia* holding, there has been steady attacks on limiting social programs and benefits that have made some age classifications in need of protection from majoritarian legislation that has effectively reduced disposable incomes, placing more older adults close to or at poverty levels, resulting in these particular groups falling within a vulnerable group that the Court may be willing to protect.<sup>236</sup> However, rather than rely on the court finding parity between age and gender classifications, Professor Kohn believes that the most promising avenue to seek heightened scrutiny for age-based classifications is due to the tiers approach being “in a state of disarray, if not total

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<sup>231</sup> Kohn, *supra* note 3, at 231.

<sup>232</sup> *Id.* at 282.

<sup>233</sup> Nice, *supra* note 170, at 672; *see also* Karlan, *supra* note 129, at 474.

<sup>234</sup> Kohn, *supra* note 3, at 238–48

<sup>235</sup> *Id.* at 239–40.

<sup>236</sup> *Id.* at 241–42.

collapse.”<sup>237</sup> In sum, Professor Kohn draws similarities between Professor Nice’s third strand approach<sup>238</sup> to Fourteenth Amendment equal protection jurisprudence and Justice Thurgood Marshall’s sliding scale approach,<sup>239</sup> since both approaches rely on a level of scrutiny that would vary based on weighing of the interest involved and the consequences of the adverse legal treatment.<sup>240</sup>

Professor Nice’s third strand approach basically espouses that the equal protection and due process clauses should be used in tandem to heighten judicial scrutiny where “official discrimination targets relatively vulnerable groups for the denial of rights particularly important to them, even if the class is not deemed to be suspect, and the right is not determined to be fundamental.”<sup>241</sup> The emphasis in this interpretive approach is the interrelationship between the important interest at stake and the effect of its deprivation on a targeted class, even if the class that is targeted is not a suspect class.<sup>242</sup> Thus giving the analysis a co-constitutive insight that rights be understood by reference to the class that holds them and classes in the context of which rights they can fully exercise.

In terms of popular constitutionalism, the present disarray of Fourteenth Amendment jurisprudence is not surprising, since the Civil Rights movement of the late 1960s provided landmark legislation that has called upon the court to give constitutional meaning to popular notions of early American traditional values.<sup>243</sup> To achieve this task, the court had to apply heightened scrutiny to certain classifications that, in the past, it would not have applied under the old tier approach, since past constitutional norms of interpretation were inefficient to address the statutory norms

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<sup>237</sup> *Id.* at 259.

<sup>238</sup> Nice, *supra* note 170 (evaluating *Romer v. Evans*, 517 U.S. 620 (1996); *Plyler v. Doe*, 457 U.S. 202 (1982); and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), as third strand equal protection jurisprudence).

<sup>239</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting and Douglas, J., concurring in dissent).

<sup>240</sup> Kohn, *supra* note 3, at 262.

<sup>241</sup> Nice, *supra* note 170, at 1270.

<sup>242</sup> *Id.*

<sup>243</sup> Ackerman, *supra* note 177, at 519.

formulated out of the popular will of the people.<sup>244</sup> Another study illustrated this phenomenon.<sup>245</sup> Professor Karlan's study reviewed several Supreme Court cases where the synthesis of the equal protection clause and the due process clause determined the outcome.<sup>246</sup> More particularly, in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), Professor Karlan noted the convergence of these two clauses resulted in the court recognizing the interrelationship between the right to access judicial process and one's ability to pay filing fees that adversely impacted full access to that right.<sup>247</sup> In converging due process principles with equal protection principles, the court applied strict scrutiny review even though there was no fundamental right or suspect class identified by the court that would trigger strict scrutiny.<sup>248</sup> Essentially, the court's decision underscored the co-constitutive nature of the important interest at stake in a way that gave it substantive due process protection by making laws equal in operation or result.<sup>249</sup> In short, equal access to important rights do not necessarily require those rights to be fundamental. Professor Karlan concluded that neither clause alone could have reached this result.<sup>250</sup> Professor Karlan argues that in some cases before the Supreme Court, the Court recognizes the convergence of due process and equal protection principles, and out of this synergy between the equal protection clause and the due process clause the Court invariably finds further protection where important interests are at stake.<sup>251</sup>

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<sup>244</sup> *Id.*

<sup>245</sup> Karlan, *supra* note 129. (Professor Karlan identifies this interpretive approach as a stereoscopic approach converging due process principles and equal protection principles in a way that gives important or fundamental interests substantive due process protection by making laws equal in operation or result).

<sup>246</sup> *Id.* at 483 (concluding that the cases under study resulted in the Court "importing due process into the equal protection inquiry").

<sup>247</sup> *Id.* at 491.

<sup>248</sup> *Id.* at 492.

<sup>249</sup> *Id.* at 481–484.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 483.

## B. ACA Statutory Norms and the Right to Healthcare

In terms of a right to healthcare, access to healthcare is an important start in the realization of that right.<sup>252</sup> Similar to the Court finding a meaningful right of access to litigate important rights,<sup>253</sup> a meaningful right to access healthcare will depend on the synergy between the equal protection clause and the due process clause, because alone neither clause will be able to achieve meaningful access to healthcare, given the present reliance on private funding as the means of access.<sup>254</sup> Therefore, analogous to the Court's reasoning in *M.L.B. v. S.L.J.*, ACA age proscriptions to eliminate discriminatory practices impacting elder access to health care should also be strictly scrutinized, because they invoke an important right of access to EHBs that require substantive due process protection by making laws equal in operation or result in accessing those statutory benefits. Obviously, this result will depend on whether the Court will employ either a stereoscopic review<sup>255</sup> or a third strand interpretive approach<sup>256</sup> in enforcing the right to access healthcare under the ACA.

Understandably, the ACA is viewed as a prominent statute having landmark significance towards the realization of a right to health care and expanding and redefining elder rights.<sup>257</sup> Given the economic and social challenges presented by the ever-increasing costs of health care, proposals to limit health options to the elderly has included, inter alia, healthcare rationing,<sup>258</sup> cost benefit ratios,<sup>259</sup> age-weighted priority treatment,<sup>260</sup> or quality adjusted life years

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<sup>252</sup> Meier, *supra* note 221; *see also* Mariner, *supra* note 196, at 201.

<sup>253</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

<sup>254</sup> Altman, *supra* note 198.

<sup>255</sup> Karlan, *supra* note 129.

<sup>256</sup> Kohn, *supra* note 3.

<sup>257</sup> Super, *supra* note 7.

<sup>258</sup> Karen DeBolt, *What will Happen to Granny? Ageism inn America: Allocation of Healthcare to the Elderly & Reform Through Alternative Avenues*, 47 CAL. W. L. REV. 127 (2010).

<sup>259</sup> Magnus Johannesson & Bengt Jonsson, *Economic Evaluation in Health Care: Is There a Role for Cost-Benefit Analysis?*, 17 HEALTH POL'Y 1, 1-23 (1991).

<sup>260</sup> Persad, *supra* note 204.

(“QALYs”).<sup>261</sup> The ACA has implemented provisions that would basically eliminate or severely limit these discriminatory health care practices.<sup>262</sup> In combination with the present disarray of Fourteenth Amendment jurisprudence and the Court’s willingness to view issues stereoscopically, the Court has applied the equal protection clause and due process clause synergistically, resulting in the Court applying heightened scrutiny rather than rational basis scrutiny in those instances where important rights are at stake.<sup>263</sup> Therefore, the likelihood that the Court will apply a sliding scale review with varying levels of scrutiny as an interpretive approach in Fourteenth Amendment jurisprudence concerning ACA statutory norms is reasonable. Similarly, assuming the implementation of the ACA is not severely stalled or repealed, the likelihood of the ACA transforming the present social contract is also a reasonable probability under the present disarray of Fourteenth Amendment jurisprudence.

As professor Kohn has noted, the Court has not had the opportunity to show how it would apply its equal protection jurisprudence to age discrimination cases in non-employment contexts, such as healthcare; therefore, this leaves the door open for the Court to consider age discrimination claims outside of the employment context.<sup>264</sup> Given the present political attention the ACA is receiving, it is a certainty that the Court will be called upon to give further constitutional meaning to the popular statutory norms that this statute presents.<sup>265</sup> That ratifying process, if it has any popular constitutional meaning, “will determine the basic principles that guide the development of federalism, social insurance, tax policy, and privatization[.]”<sup>266</sup> which will transform the right to

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<sup>261</sup> John Harris, *QALYfying the Value of Life*, 13 J. MED. ETHICS 117, 117-23 (1987) (arguing that QALY is a defective method of priority setting and dealing with problems of scarce resources).

<sup>262</sup> Persad, *supra* note 204.

<sup>263</sup> Karlan, *supra* note 129, at 474.

<sup>264</sup> Kohn, *supra* note 3, at 230.

<sup>265</sup> Super, *supra* note 7.

<sup>266</sup> *Id.* at 874.



access healthcare into a substantive right, similar to a health justice model that emphasizes communitarianism, rather than the continuation of a patient rights model, which emphasizes individual choices.

## **V. Neoliberal Constitutionalism's Derailement of Our Traditional Civic Republican Deliberate Politics Model**

### **A. Neoliberal Constitutionalism's Retrogressive Effect on the Republican Principle of Popular Sovereignty and/or the American Political Ethos of Popular Sovereignty**

As argued herein, the founding republican principle of popular sovereignty requires the deliberate politics model, operating in alignment with our traditional constitutional norm of democratic governance, predominately by "legislative authority."<sup>267</sup> The constitutional Framers argued strenuously that this fundamental governing norm guarantees, within our republican form of government, that the democratic "will" of the people would remain the ultimate source of authority.<sup>268</sup> However, current constitutional scholarship has expressed concern regarding recent developments in First Amendment speech norms that threaten the very structure of

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<sup>267</sup> WILLS, *supra* note 17 (Madison posits in Federalist No. 51 that legislative authority predominates in a republican form of government); *supra* note 12, (In Federalist No. 39 Madison defines a republic as "a government which derives all its powers directly or indirectly from the great body of the people. ..."); *supra* note 19 (Hamilton posits in Federalist No. 78 that although the courts possessed interpretive power he cautioned that such a conclusion does not "by any means suppose a superiority of the judicial to the legislative power."), Bailyn, *supra* note 44, Part II at 766 (at the NY Constitutional Convention, Hamilton orated that "[I]n free republics, it is most peculiarly the case: In these, the will of the people makes the essential principle of the government; and the laws which control the community, receive their tone and spirit from the public wishes."); *see also*, *supra* note 59 (explicating this article's theoretical conception of the deliberative politics model within the constitutional design).

<sup>268</sup> WILLS, *supra* note 17; *see also*, WILLS, *supra* note 87 (In Federalist No. 46 Madison posits that the people alone possess the ultimate authority in democratic republican government).

our democratic constitutional design;<sup>269</sup> and in the process, it threatens popular sovereignty or democratic self-rule as originally intended.<sup>270</sup> This polemic development has been labeled neoliberal constitutionalism.<sup>271</sup> Further, neoliberal constitutionalism reflects the presence of a neoliberal political economic ethos, which attempts to synthesize current popular notions of democratic Lockean individualism with an individualistic market ethos where the resolution of tensions between democratic individualism and market individualism transforms the politics of public policy into a process where “opportunities and guarantees supposedly provided to citizens by collective agreement becomes a simple question of supply and demand, dictated only by wealth and power.”<sup>272</sup> It has been remarked that neoliberal constitutionalism has embedded this economic ethos in the sphere of public discourse by introducing a market view of speech where currency of the economic sphere—money—is transformed into the currency of the political sphere—speech.<sup>273</sup> Not surprisingly, the decision in *Citizens United* v.

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<sup>269</sup> Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 393 (2014) (Noting that “while a popular conception of the Court is that it is designed to protect vulnerable minorities at the hands of majoritarian impulse, the Court, instead, is helping to protect a very powerful minority at the expense of the majority”).

<sup>270</sup> Foreman, *infra* note 335 (concluding that only by enacting a transformational amendment on campaign finance – a publicly funded campaign system - that effectively strips the economically elite of their disproportionate political influence can undo the damage the Supreme Court has done to representative government in its decisions under *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Citizens United v. FEC* and its progeny, *infra* note 274).

<sup>271</sup> Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROB. 195 (2014) (noting that Constitutional *neoliberalism* is broad in that it touches many areas of legal regulation, from state controls on pharmaceutical marketing to the federal individual-insurance mandate to corporate campaign contributions.”).

<sup>272</sup> MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY, 73 (Cambridge University Press 2005).

<sup>273</sup> Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y & L. 395, 415 (2011) (Traces neoliberal jurisprudence as espoused in *Citizens United* back to the mid-1970s, in particular to *Buckley v. Valeo*, 424 U.S. 1 (1976) and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which imported economic theory to determine the meaning of democracy)) *Id.* at 414-459.

*FEC*<sup>274</sup> has been recognized as an example of “neoclassical economic theory as judicial reasoning.”<sup>275</sup>

The importance of *Citizens United* lay in its announcement that corporations’ political speech enjoys the same constitutional protection as individuals’ speech.<sup>276</sup> Clearly, holding that corporate political spending is a form of political speech expanded political speech into areas of socioeconomic discourse that was previously and predominately occupied and protected by our traditional political speech doctrine, whose historical development is aligned with our republican political ethos of democratic self-rule or popular sovereignty realized through deliberative politics.<sup>277</sup>

A further constitutional development that is consistent with the neoliberal ruling in *Citizens United* is the Court's growing protection

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<sup>274</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010) (a decision emphasized by most critics as risking the loss of our republican form of government by opening the floodgates for corporate interests - including foreign corporations - to spend without limit in U.S. elections); *see also*, *McCutcheon v. FEC*, 572 U.S. 185 (2014) (entrenching the decision of *Citizens United* by rejecting the notion that large donations create even the appearance of corruption).

<sup>275</sup> Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 182 (2016) (identifying *Citizens United* as a product of neoliberal constitutionalism); *see also*, Kuhner, *supra* note 273, at 397 (describing *Citizens United* as neoliberal jurisprudence, which is the “use of neoclassical economic theory as judicial reasoning”).

<sup>276</sup> Kuhner, *supra* note 273, at 417 (positing that “Once this logic is neutralized, limits on money in politics are limits on political expression, a form of censorship, and therefore deserving of strict scrutiny. This line of reasoning, in which economic currency is transformed into political currency, represents the path through which economic power obtains political legitimacy, avoids regulation, and continues translating into political power.”).

<sup>277</sup> *See*, John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015) (demonstrating that businesses are increasingly displacing individuals as the beneficiaries of First Amendment protection); *see also*, Shanor, *supra* note 275 (arguing the new *Lochner* Era is ushering in growing protection of commercial speech, a sort of *Lochner*ian constitutional economic deregulation embedded not in substantive due process but the First Amendment, and further noting that the similarities between the current trend in commercial speech doctrine and laissez-faire economic theory advanced by *Lochner v. New York*, 198 U.S. 45 (1905) are pronounced. Both pit business freedom to choose against government structuring or facilitation of choice. Both privilege the negative over the positive state. And both render courts, not the political branches, the arbiters of our economic life).

for businesses' commercial speech.<sup>278</sup> The expansion of commercial speech in the free market sector is simply a natural progression of neoliberalism's social theory of justice that minimalizes the importance of socioeconomic rights as being incompatible with a free society.<sup>279</sup> Similar to the *Lochner* Court when it advanced Lockean liberalism's right to property and the right to contract over social legislation,<sup>280</sup> the present Court's retrogressive judicial activism in First Amendment jurisprudence is expanding commercial speech under a market-modeled conception of liberty that has moved the discourse for universal health care from the political arena to the free-market arena.<sup>281</sup> The present judicial perspective on liberty stresses an individual's right to contract, or freedom to exercise individual autonomy by enabling individuals to

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<sup>278</sup> Post & Shanor, *infra* note 322 (arguing "if commercial speech is accorded the same protections as public discourse, democratic governance will not be possible"); *see also*, *Sorrell v. IMS Health Inc.*, *infra* note 314 (the *Sorrell* decision came 15 months after *Citizens United* whose impact further rejuvenated and extended neoliberal jurisprudence in the health care industry and, as with *Citizens United*, the Court also applied a heightened First Amendment scrutiny test).

<sup>279</sup> HAYEK, *infra* note 283 (Hayek's political economic theory was the antithesis to Keynesian economics. The differences between Keynesian theory and classical economy theory affect government policies, because one side believes government should play an active role in controlling the economy, while the other school thinks the economy is better left alone to regulate itself. The battle between the two competing ideologies has significant implications as to whether democratic capitalism will allow a socioeconomic right to health care, health care entitlements or, simply access to healthcare by providing consumer choices).

<sup>280</sup> *Supra* note 27, 198 U.S. at 64 (The *Lochner* Court struck down social legislation that improved working conditions in the baking industry reasoning the New York State social legislation was unconstitutionally infringing on the baker's liberty to contract his employment).

<sup>281</sup> Shanor, *supra* note 275, at 200-202 (noting the present business-led social movement in First Amendment jurisprudence demonstrates how social movements can alter constitutional principles absent Article V amendment, thus merging economic constitutional norms with democratic constitutional norms that result in corporate governance over democratic governance of public goods. Therefore, neoliberal constitutionalism advances a version of democracy that privileges elite over public preferences, which in practice curtails public participation in determining public policies).

select market choices freely,<sup>282</sup> in which selection would define the socioeconomic rights the individual could obtain in a neoliberal political economy.<sup>283</sup> In sum, market forces would determine how expansive the bundle of socioeconomic rights or entitlements an individual would be able to purchase.<sup>284</sup> Thus, Lockean liberalism, in its economic form, would redefine democratic capitalism.<sup>285</sup> This

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<sup>282</sup> Lars Thorup Larsen & Deborah Stone, *Governing Health Care Through Free Choice: Neoliberal Reforms in Denmark and the United States*, 40 J. HEALTH POL. POL'Y & L. 941, 941-42 (2015) (describes "enabling citizens to choose among multiple insurance plans" as one of three elements that "characterize neoliberal reforms." The other two elements are the placement of health insurance under the control of private firms, and the introduction of "market competition where formerly there had been public-sector dominance or monopoly.").

<sup>283</sup> See FRIEDRICH AUGUST HAYEK, *LAW, LEGISLATION AND LIBERTY*, VOL. 2: THE MIRAGE OF SOCIAL JUSTICE (University of Chicago Press 1976), 101-106 (F. A. Hayek, probably the most influential theorist associated with neoliberalism, expressly rejected socioeconomic rights as being incompatible with a free society); see also LUDWIG VON MISES, *LIBERALISM IN THE CLASSICAL TRADITION*, 52 (Cobden Press 1985 3d ed., Ralph Raico trans.) (Ludwig von Mises was considered the leading spokesman of the "Austrian" school of economics which found academic expression in the Chicago University School of Economics in the 1930's, but gained prominence in the U.S. political economy after two neoliberal economists were awarded the Nobel Memorial Prize in Economic Sciences: F.A. Hayek (1974) and Milton Friedman (1976). Importantly, Mises' views on government's minimalist role in preserving social cooperation under which the free market can function is a fundamental principle of neoliberalism. Similarly, the main tenets of the Chicago School of Economics are that free markets best allocate resources in an economy and that minimal, or even no, government intervention is best for economic prosperity. The Chicago School adopted Mises's belief that in a democratic state "the masses also, in whose hands democracy entrusts the supreme power of government, are only too easily inclined to excesses," *Id.* at 52. It should be noted that Mises's observation echoes James Madison's concerns expressed in Federalist No. 10, *infra* note 23); see also, DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (Oxford University Press 2007) (see Chapter 3, *The Neoliberal State*, for a general discussion on the principles of neoliberalism which extend into the realms of welfare, education, health care, and even pensions. Neoliberal theorists are profoundly suspicious of democratic governance. Governance by majority rule is viewed as a potential threat to individual rights and constitutional liberties).

<sup>284</sup> Grewal and Purdy, *infra* note 340, at 15 (identifying a social ordering system under neoliberal constitutionalism known as market-modeled liberty defined by "a vision of personal liberty that centers on individual choice in spending, consumption, and self-expression").

<sup>285</sup> Wolfgang Streeck, *The Crisis in Context: Democratic Capitalism and Its Contradictions*, Max Planck Institute for the Study of Societies, 1-21 (2011) (Downloaded under [www.mpifg.de](http://www.mpifg.de)). Defines democratic capitalism as "a political economy ruled by two conflicting principles, or regimes, of resource allocation: one operating according to marginal productivity, or what is revealed as *merit* by a "free play of market forces," and

would be accomplished by stressing neoliberal free-market or laissez-faire capitalism<sup>286</sup> under a new *Lochner* era.<sup>287</sup> This new era would be characterized by an expanded doctrine of corporate speech coupled with the deregulation of corporate campaign financing giving neoliberalism hegemonic control over the political narrative which concerns the importance of socioeconomic rights.<sup>288</sup> In this manner, present neoliberal constitutionalism is retrogressive since current constitutional jurisprudence has Locknerized the First Amendment forcing public discourse to be dominated by a political economic vision similar, if not identical in result, to the *Lochner* era

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the other following social need, or *entitlement*, as certified by the collective choices of democratic politics.”

<sup>286</sup> Grewal and Purdy, *infra* note 340, at 1 (“*Neoliberalism*” refers to the revival of the doctrines of classical economic liberalism, also called laissez-faire, in politics, ideas, and law).

<sup>287</sup> Kapczynski, *infra* note 311.

<sup>288</sup> Shanor, *supra* note 275; Post & Shanor, *infra* note 322; Foreman, *infra* note 335; *see also*, Joe Wills, *The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights, and Hegemony*, LEIDEN JOURNAL OF INTERNATIONAL LAW, 27, 11-35 (2014) (analyzing neoliberalism and its effect on socioeconomic rights through Antonio Gramsci’s concept of hegemony); *see also*, ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS, 259-260, 170 (Kindle Edition, trans. Quintin Hoare and Geoffrey Nowell Smith 1971) (“for though hegemony is ethical-political, it must also be economic, must necessarily be based on the decisive function exercised by the leading group in the decisive nucleus of economic activity.”); *see* Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 B.Y.U.L. REV. 515 (2000) (discussing Gramsci’s theory of hegemony as social control, which “Gramsci describes as “force and... consent, coercion and persuasion, authority and hegemony, violence and civilisation.” The first type of domination commonly associated with coercive state action is by the courts, the police, the army, and the national guard. The second type of control - “hegemony” proper - is more insidious and complicated to achieve. It involves subduing and co-opting dissenting voices through subtle dissemination of the dominant group’s perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of common sense.” *Id.* at 519. “Gramsci’s point is that domination can be found at many levels of a cultural totality - at the levels of politics, education, entertainment, news, and common sense. Gramsci points out that every ruling group gives rise to a class of intellectuals who perpetuate the existing way of life at the level of theory. Here, Gramsci uses the term “intellectual” in the broadest possible sense to include lawyers, professors, politicians, scientists, and journalists.” *Id.* at 526).

of the early 1900s.<sup>289</sup> Ironically, the constitutional norms flowing from neoliberal constitutionalism can be viewed as the product of popular constitutionalism, but led by a wealthy minority - the business or corporate class.<sup>290</sup> In short, the constitutional norms emanating from neoliberal constitutionalism do not reflect “collective choices of democratic politics,” because neoliberal policy choices are the product of a wealthy minority having overwhelming political power that allows it to dominate public discourse within the deliberate politics model concerning socioeconomic rights, i.e., a right to healthcare. For this reason, neoliberal constitutionalism has been attacked as being antidemocratic jurisprudence, because it stunts the will of the people from exercising collective self-determination.<sup>291</sup> Stated differently, neoliberal constitutionalism relies on the workings of free markets to determine efficiency and proper allocation of resources, whereas popular constitutionalism relies on the “collective choices of democratic politics” filtered through the deliberate politics model of governance that operates under the assumption that a democratic-capitalistic political economy must find its legitimacy through the democratic politics of self-determination or self-rule.<sup>292</sup>

Additionally, the deliberate politics model also presupposes that the exercise of political liberty through public discourse must have

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<sup>289</sup> Kuhner, *supra* note 273, at 281 (“The more voices that have access to the political discourse, the more voters will be empowered to exercise their right in a meaningful and informed manner.”).

<sup>290</sup> Shanor, *supra* note 275 (traces a business-led social movement mobilized to embed libertarian-leaning understandings of the First Amendment in constitutional jurisprudence that is creating increasing conflict between the modern regulatory state and the First Amendment).

<sup>291</sup> Tebbe, *infra* note 331, at 965 (“The ideal of democracy that is implicit in jurisprudence on freedom of speech ... has at its root the precept that democratic government derives its legitimacy from those subject to its power. People formulate their own personal convictions and political conceptions, working out reasons for their views in dialogue with others. ... In that way, they manage the tension between collective self-determination and individual self-determination.”).

<sup>292</sup> WOLFGANG STREECK, *THE POLITICS OF PUBLIC DEBT: NEOLIBERALISM, CAPITALISM, AND RESTRUCTURING THE STATE*, 2 (Max Planck Institute for the Study of Societies 2013) (“In democratic capitalism, or capitalist democracy, governments are expected to intervene in markets to secure social justice and stability as defined and demanded by a voting majority.”)

meaningful value.<sup>293</sup> Hence, neoliberal constitutionalism can be further distinguished from popular constitutionalism because the former's reliance on a market-modeled conception of liberty, economic liberty,<sup>294</sup> has led to a disparate level of wealth. This has resulted in a disparate level of political power in the hands of a wealthy minority or corporate class, which devalues each's political currency for popular sovereignty or democratic self-rule to flourish.<sup>295</sup> Therefore, the Supreme Court's neoliberal rulings in campaign financing of corporate commercial speech has had the effect of monetizing our political system to the point that our representative form of governance is now ruled by a wealthy corporate class. This results in a neoliberal ideology which advocates a market-modeled conception of liberty.<sup>296</sup> In stark contrast to neoliberal constitutionalism, popular constitutionalism relies on a democratic conception of liberty - political and personal liberty - that finds expression in the "collective choices of democratic politics"<sup>297</sup> through majoritarian rule.<sup>298</sup>

In terms of market neoliberalism operating within our healthcare system, disparate wealth affects market access to health care, since access entails a fee that not all individuals would be able to afford, thereby diluting their liberty to select one health plan over another or to freely choose provider preferences.<sup>299</sup> In effect, neoliberal

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<sup>293</sup> Sunstein, *infra* note 318 (arguing that the Court's trend in expanding First Amendment protection to commercial speech in the political arena will ultimately devalue one's political vote since the Court's decision in *Buckley v. Valeo* increased the likelihood of corporate campaign finance enhancing corporate domination in the sphere of public discourse); see, Tebbe, *infra* note 331.

<sup>294</sup> Grewal and Purdy, *infra* note 340, at 15.

<sup>295</sup> Gilman, *supra* note 269; Coates, *supra* note 277; Sunstein, *infra* note 318; Tebbe, *infra* note 331.

<sup>296</sup> See, *supra* notes 269, 270; see *infra* notes 299, 301, 302, 303, 309, 311, 316, 336, 363, 364.

<sup>297</sup> Streeck, *supra* note 285, at 3.

<sup>298</sup> WILLS, *supra* note 12, at 316. In Federalist No. 51 Madison articulates that "[I]n republican government the legislative authority, necessarily, predominates ... ." *Id.*

<sup>299</sup> Larsen & Stone, *supra* note 282 (arguing that choice is an illusion because once the consumer selects a managed care plan the consumer is forced to access health services



ideology forces health care access to be determined by a market exchange relationship rather than determined by a social relationship between citizen and representative.<sup>300</sup> Consequently, neoliberal constitutionalism has produced judicial rulings that have facilitated the reconceptualization of socioeconomic rights as market outcomes, which has transformed the social relationship between citizen and state to one of “market citizens.”<sup>301</sup> By reconceptualizing socioeconomic rights as market outcomes, neoliberalism’s social theory of justice, or lack thereof,<sup>302</sup> has

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within the insurer’s network of providers or else pay an additional fee to access services outside the network. For low-income consumers this effectively restrains, and in some cases eliminates, the free exercise of choice. This income bias further operates as a rationing mechanism in allocating healthcare resources. In sum, the institutionalization of income bias is intended and designed to restrict individuals’ choices of providers, and in turn, restrict providers’ health care services. It is, in short, designed to govern.); *see also*, Ross II, *infra* note 360, at 1143 (noting that empirical studies support the conclusion that the primary indirect means by which the wealthy influence public policy is through access to elected representatives via campaign donations (access fees) where their influence can frame public policy agendas. Thus, the shape public policy takes is a function of wealth providing greater political access.).

<sup>300</sup> Allison K. Hoffman, *Health Care’s Market Bureaucracy*, 66 UCLA L. REV. 1926 (2018) (arguing the theory that consumer choice will drive better health care quality and prices is not supported by empirical data and, concluding that the dominance of market-based ideas in health care have created an illusion of autonomous choice which will eventually recede and create space for alternatives that enhance meaningful healthcare choice structures).

<sup>301</sup> Wills, *supra* note 288, at 18 (“The reframing of socioeconomic rights as market outcomes discursively incorporates them into the neo-liberal fold in a number of ways. First, socioeconomic rights are completely subject to the logic of the market rather than the market being subjected to the logic of human rights. Second, the holders of socioeconomic rights are effectively reconfigured as market citizens (*‘homo economicus’*) whose rights consist of the opportunity to secure goods in the marketplace rather than have them as legal entitlements vis-a-vis the state. And third, the obligation of the state shifts from the direct duty to ensure access to welfare goods and services to the duty to provide the framework in which individuals exercise economic freedoms to secure their own access to welfare goods and services.”); *see*, Chadwick, *infra* note 309 (neoliberalism is now understood as a project of reconstituting the state and reordering social relations in order to position impersonal market forces as the optimal arbiters of what should be produced and consumed in an economy); *see also*, Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 786 (2003) (arguing under neoliberalism’s “vision, citizens’ primary role is to maximize their private rational self-interest as buyers and sellers in market exchanges” that erodes the ideal of social citizenship – a social relationship with a democratic society that views political, as well as social economic rights, defining public well-being).

<sup>302</sup> HAYEK, *supra* note 283.

become the dominant ideological narrative.<sup>303</sup> This has resulted in defining the right to healthcare as a negative right, not positive.<sup>304</sup> Moreover, in framing socioeconomic rights as market outcomes, “the market not only assumes primacy over human rights discourse, but becomes the means through which socioeconomic rights are attained.”<sup>305</sup> Therefore, individuals in a neoliberal healthcare economy exercise libertarian autonomy by selecting healthcare alternatives or options based on weighted access fees. These fees are “intended and designed to restrict individuals’ choices of providers,

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<sup>303</sup> See KEVIN MATINIDIS, *LOOKING THROUGH GRAMSCI’S EYES*, 86-105 (2018 Kindle Edition) In explicating Gramsci’s theory of hegemony and the role of courts in charter governments, the author notes that charter governments – constitutional governments – purposively provide abstract principles of social justice to enable judges to interpret these principles in a way that aligns subgroups of society with the dominant ideology of the dominant social group or ruling class. The author states: “Constitutional values by remaining abstract allow for different interpretations and means of applications to different circumstances. The courts as can the legislatures justify raising the level of civilizing in support of the interests of the ruling class by interpreting abstract values rather than being held to the letter of the law.” *Id.* at 87. The author concludes his book by stating: “Without the law and the educative forces of the courts as an institution, there is no hegemony as Gramsci had meant it to mean and be understood.” *Id.* at 133; *see also* Thomas R. Bates, *Gramsci and the Theory of Hegemony*, *Journal of the History of Ideas*, vol. 36, no. 2, 351-366 (Apr. - Jun. 1975) JSTOR, [www.jstor.org/stable/2708933](http://www.jstor.org/stable/2708933), accessed November 23, 2021 (the author noting that “[T]he concept of hegemony is really a very simple one. It means political leadership based on the consent of the led, a consent which is secured by the diffusion and popularization of the worldview of the ruling class.” *Id.* at 352).

<sup>304</sup> Record, *supra* note 141, at 544-543 (describing the ACA as written “in strictly economic terms, evoking Congress’s authority to regulate interstate commerce and to tax and spend, rather than creating an entitlement to healthcare as previously provided to senior citizens and veterans. [In sum,] the government’s strategy has been to focus on the economic-not public, ... it merely invokes the Commerce Clause or taxing and spending powers not whether the ACA expands on any semblance of a right to health, ... thus, stabilizes healthcare markets” within the perspective of healthcare as a negative right, not positive.); *see also*, David Orentlicher, *Rights to Healthcare in the United States: Inherently Unstable*, 38 AM. J. L. & MED. 326 (2012) (Positing that because Constitutional rights are largely limited to “negative” rights, healthcare rights in the United States are formulated in a way that leaves them inherently unstable because they rely on common law or statutory rights to healthcare. This observation is problematic given that neoliberal thought is suspicious of the collective will of democratic institutions and prefers adjudication by judges over legislation created by elected officials); *but see e.g.*, Alstott, *infra* note 327 (Describing the ACA as neoliberal legislation).

<sup>305</sup> Wills, *supra* note 288, at 16.

and in turn, to restrict providers' ability to supply services.<sup>306</sup> It is, in short, designed to govern."<sup>307</sup> Although a market-modeled conception of liberty is justified as being more effective and efficient than a public healthcare system in allocating finite health care resources, it is nothing more than a governing system which "stabilizes healthcare markets within the perspective of healthcare as a negative right, not positive".<sup>308</sup> On a global scale, social relations between citizen and nation state is reconceptualized as a social relationship between nation state citizens and international markets that allows a global governing system to evolve and obscures nation state sovereign borders, giving neoliberalism's market-modeled conception of liberty global dominance.<sup>309</sup>

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<sup>306</sup> *Id.*

<sup>307</sup> Larsen & Stone, *supra* note 282, at 967.

<sup>308</sup> Record, *supra* note 304, at 537; *see also* Grewal & Purdy, *infra* note 341.

<sup>309</sup> Janine Brodie, *Globalization and the Underinvestment in Families: Globalization, Canadian Family Policy, and the Omissions of Neoliberalism*, 88 N.C.L. REV. 1559, 1562- (2010) (neoliberal globalism is a political rationality that has been linked to changes in contemporary social policy regimes forcing all countries to make dramatic cuts in social spending. Neoliberal globalism, promotes a universal worldview and standardized governing practices that potentially trump national policy preferences and state sovereignty); *see*, David Harvey, *Is This Really the End of Neoliberalism*, Counterpunch, pub. March 13, 2009, available at <https://www.counterpunch.org/2009/03/13/is-this-really-the-end-of-neoliberalism/> (last visited September 29, 2021) ("neo-liberalism ... is a class project, masked by a lot of neo-liberal rhetoric about individual freedom, liberty, personal responsibility, privatization and the free market. These were means, however, towards the restoration and consolidation of class power, and that neo-liberal project has been fairly successful."); *see* QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM*, 271-72 (Harvard University Press 2018 Kindle Edition) (In summing up neoliberalism's fundamental principles for world order professor Slobodian notes that "[C]onsumer sovereignty trumps national sovereignty, and "[G]lobalism trumps nationalism." Additionally, since "[D]emocracy is a potential threat to the functioning of the market order, [A]djudication by judges and scholars is preferable to legislation created by parliaments."); *see also* PETER PHILLIPS, *GIANTS, THE GLOBAL POWER ELITE*, (New York: Seven Stories Press 2018, Kindle Edition) (identifies a Transnational Capitalist Class composed of seventeen global financial Giants, twelve of which are U.S. asset management firms controlling assets worth 31 trillion dollars or 75% of the total asset value held by the entire 17 financial giants. This Global Power Elite functions as a nongovernmental network that systematically influences and uses international institutions controlled by governmental authorities—namely, the World Bank, International Monetary Fund (IMF), NATO, World Trade Organization (WTO), G7, G20, and many others to set socioeconomic policy on a global level. Thus, a shadow Transnational Capitalist Class reigns over a global governing system where its enormous concentration of economic

Under neoliberal healthcare systems there is very little or no government interference in the manner healthcare resources are allocated, since an assumption of neoliberalism is that individuals operating *en masse* democratically do not have perfect knowledge to effectively allocate limited healthcare resources.<sup>310</sup> Contrary to popular sovereignty or democratic self-rule, neoliberalism operates under the assumption that only a free-market system has access to complete knowledge, which would enable it to arrive at an optimal choice in determining fair and just allocation of healthcare resources.<sup>311</sup> In essence, neoliberal constitutionalism has forced Lockean liberalism to operate within a healthcare system with limited public oversight due to “Supreme Court decisions that have ‘weaponiz[ed]’ the First Amendment, turning it into a powerful tool against a range of ordinary socioeconomic legislation.”<sup>312</sup> This phenomenon has been recognized and commented on by dissenting

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power translates into enormous influence over global policy making.); *see also*, Stephen Gill and Solomon Benatar, *Global Health Governance and Global Power: A Critical Commentary on the Lancet-University of Oslo Commission Report*, INTERNATIONAL JOURNAL OF HEALTH SERVICES, vol. 46, no. 2, 2016, pp. 346–365. JSTOR, www.jstor.org/stable/48513046 (last visited Oct. 5, 2021) (criticizing the Oslo Commission Report analysis and recommendations as not significantly departing from the prevailing neoliberal market-based paradigm for global health governance, a system characterized by a complex set of international agreements or treaties that creates a global form of economic governance and law that reshapes the constitutional order of particular nations or jurisdictions in conformity with global corporate interests).

<sup>310</sup> Anna Chadwick, *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project*, EUR. J. INT. LAW (2019) 30 (3): 1071 (“For neoliberal thinkers, this mode of market ordering is necessary in order to ensure that individual freedom is paramount, and in order to prevent ill-adept, ill-informed governments from trying to direct processes of economic production and consumption towards concrete social goals (an objective that is doomed to fail according to the influential neoliberal Friedrich Hayek, as government is too easily captured by ‘special interests’ and is fundamentally incapable of marshalling or acting on the vast quantity of data needed to manage markets effectively.”)).

<sup>311</sup> *Id.*

<sup>312</sup> Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy: Response to the Columbia Law Review’s 2018 Symposium*, 118 COLUM. L. REV. Online 179, 189 (2018) (referring to the dissenting opinion of Justice Kagan in *Janus v. AFSCME*).

members of the Court,<sup>313</sup> who have characterized this trend in constitutional jurisprudence as a return to the *Lochner* era. Not surprisingly, a few scholars have noted that structural elements of the ACA are also a product of neoliberalism.<sup>314</sup>

### B. Neoliberal Constitutionalism's Pernicious Antidemocratic Effect

As previously alluded to, neoliberal constitutionalism is not only evident in campaign finance jurisprudence, exemplified by *Citizens United*, but is also evident in the further *Lochnerization* of the First Amendment in *Sorrell v. IMS Health Inc.*<sup>315</sup> The importance of *Sorrell* is that it ushered in a progeny of commercial speech decisions that have effectively recast free speech jurisprudence consistent with neoliberalism's market-modeled conception of liberty.<sup>316</sup> This juridical trend has facilitated the reconceptualization of socioeconomic rights as market outcomes rather than entitlements, since under present First Amendment jurisprudence the Court has given commercial speech constitutional parity with

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<sup>313</sup> See *Janus v. AFSCME*, 138 U.S. 2448, 2501 (2018) (Kagan, J., dissenting) (warning that the Court had "weaponized" the First Amendment "in a way that unleashes judges ... to intervene in economic and regulatory policy"); see *Nat'l. Inst. of Family & Life Advocates v. Becerra*, 138 U.S. 2361, 2381-83 (2018) (Breyer, J., dissenting) (recognizing that the Court's approach "invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation" and citing *Lochner v. New York*, 198 U.S. 45 (1905)); see also *Sorrell*, *infra* note 315, at 602-603 (Breyer, J., dissenting) ("At worst, [the majority decision] reawakens *Lochner*'s pre-New Deal threat of substituting judicial for democratic decision making where ordinary economic regulation is at issue.").

<sup>314</sup> Alstott, *infra* note 328.

<sup>315</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (striking down as unconstitutional a Vermont statute that restricted the sale, disclosure and use of prescriber histories for marketing purposes without the physician's consent, holding that the statute restricted speech based on its content and on the identity of the speaker and, therefore, warranted heightened constitutional scrutiny under the First Amendment—although it did not specify that level of higher scrutiny).

<sup>316</sup> Grewal & Purdy, *infra* note 341, at 11 (Identifying *Citizens United* and *Sorrell* as cases illustrating "neoliberal constitutional doctrines [extending] market-modeled liberty into areas of law where other versions of liberty have previously been important (such as campaign-finance law) or where legislatures have long regulated market transactions to address distributive concerns (such as transfers of prescription data for marketing purposes.").

political speech. This parity has worked to protect market order from democratic governance.<sup>317</sup> This trend has been bolstered by neoliberal ideology that expressly rejects socioeconomic rights as being incompatible with a free society.<sup>318</sup> For this reason, First Amendment scholarship has criticized neoliberal constitutionalism as eroding our republican form of government,<sup>319</sup> because of its destabilizing effect on democratic self-determination or, in terms of this article, the destabilization of the deliberative politics principle in our republican democracy.<sup>320</sup> In short, rather than serving democracy, current constitutional protections of commercial speech are undermining democracy,<sup>321</sup> because

“when we engage in commercial speech, we are not participating in democratic self-determination; we are instead transacting business in the marketplace.<sup>322</sup> We are accordingly communicating as ‘subjects’ who are ‘ruled.’ If we were to attribute the prerogatives of autonomy appropriate for self-governance to commercial speech, we could never

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<sup>317</sup> Kapczynski, *supra* note 312, at 182.

<sup>318</sup> HAYEK, *supra* note 283; *see also*, HARVEY, *supra* note 283.

<sup>319</sup> Kapczynski, *supra* note 312 (arguing the recent jurisprudential trend in First Amendment commercial speech doctrine stunts democratic self-rule); *see also*, Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392-1393, 1398 (1994) (Twenty-four years ago Cass Sunstein had made the same point in commenting on the impact the Court’s decision in *Buckley v. Valeo* will have on our republican form of government in extending First Amendment protection to commercial speech. Essentially, Sunstein argued that politics plays an important deliberative function in our constitutional design. *Buckley v. Valeo* distorted that deliberative function by promoting disparities in wealth that would ultimately be translated into disparities in power over government, thus de-democratizing our form of government. “Just as the due process clause once forbade government “interference” with the outcomes of the economic marketplace, so too the First Amendment now bans government “interference” with the political marketplace, with the term “marketplace” understood quite literally.” In this manner, *Buckley* and its progeny replicates the Court’s *Lochner* era jurisprudence).

<sup>320</sup> *Id.*

<sup>321</sup> Kapczynski, *supra* note 312, at 201 (positing “*Sorrell* was a triumph for the brand of neoliberal thought that seeks to shield market actors and structures from democratic power.”).

<sup>322</sup> *Id.*

govern ourselves at all. If the speech of ‘subjects’ were confused with that of ‘rulers,’ the First Amendment would simultaneously authorize democratic deliberation and render powerless the government produced by that deliberation.”<sup>323</sup>

This development is undoubtedly inimical to our republican form of government as envisioned by the Framers of the Constitution,<sup>324</sup> who theoretically employed the principle of democratic self-determination in creating the Constitution through popular enactment.<sup>325</sup> Thus reminding us that in a democracy, the primary social contract is, and should be, the one between citizens and their elected officials, not between consumers and corporations, and that the First Amendment’s constitutional role is to act as “the guardian of our democracy”<sup>326</sup> rather than a medium for consumer choice.<sup>327</sup>

### C. Neoliberal Constitutionalism’s Destabilization of Our Constitutional Design

Notwithstanding the above, the entrenchment of neoliberal constitutionalism has internalized neoliberal principles of governance which shape and form our contemporary political ethos in a manner that has propelled the shift to an individualistic, rather than a collective, conception of social justice.<sup>328</sup> In sum, we are

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<sup>323</sup> Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 171-172 (2015) (explicating Alexander Meiklejohn’s reasoned explanation in *Political Freedom* concerning the synergetic relationship between the First Amendment and self-rule - democratic self-determination - in our constitutional democracy).

<sup>324</sup> See, Michelman, *supra* note 15; WILLS, *supra* note 12 (Madison states in Federalist No. 51 that “[I]n republican government the legislative authority, necessarily, predominates ...”); BAILYN, *supra* note 44.

<sup>325</sup> Grewal & Purdy, *infra* note 337.

<sup>326</sup> *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

<sup>327</sup> See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (Harper Brothers Publishers 1948) (“The principle of the freedom of speech springs from the necessities of the program of self-government.”).

<sup>328</sup> Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. U.L. REV. 341, 347-354 (2019) (articulating neoliberalism’s political economic theory as relying on the power of the state to protect free markets while at once restructuring the social order, which is envisioned as the necessary and appropriate mechanism for ensuring individual liberty

revisiting a jurisprudential era of classical individualism similar to the *Lochner* Era.<sup>329</sup> However, unlike the *Lochner* Era that depended on laissez-faire free market principles, neoliberal political economic theory promotes the alignment of government with corporate interests while ostensibly delivering public goods to the American polity.<sup>330</sup> In fact, neoliberalism has become so hegemonic that its principles of justice have distorted the historical significance of Lockean liberalism by imposing market-modeled conceptions of liberty<sup>331</sup> that have actually devalued political/personal liberty to the point of crippling democratic deliberation on public policy choices.<sup>332</sup> In brief, the economic liberty advanced by neoliberal constitutionalism has created disparities in wealth that have created

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and choice, as well as economic success and the reduction of poverty. In this social justice model the state protects markets and encourages markets to allocate resources in achieving a liberal social order. Further concluding the current progressive individualism perspective on social justice is in lock step with neoliberal ideology since both rely on the belief that the market is the social institution through which individuals will gain freedom and autonomy.); *see also*, Harvey, *supra* note 283 at 64-65 (2007) (discussing the specific form of the neoliberal state where both corporations and businesses act as mediating economic institutions between the state and its citizens); *see*, Anne L. Alstott, *Neoliberalism in the U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROB. 25, 41 (2014) (Noting that the Affordable Care Act (ACA) incorporates neoliberal elements in the form of tax exemptions for market workers while ratifying market distribution by relying on private-market provision of insurance and partial private financing).

<sup>329</sup> Shanor, *supra* note 275; Kapczynski, *supra* note 312; Post & Shanor, *supra* note 323.

<sup>330</sup> Grewal and Purdy, *infra* note 341, no. 4, at 3 (noting that “market-modeled concepts of efficiency and autonomy shape policy, doctrine and other discourses of legitimacy outside traditionally ‘economic’ areas”).

<sup>331</sup> *Id.* at 11.

<sup>332</sup> JOHN RAWLS, POLITICAL LIBERALISM, 327 (Columbia University Press 2005, Kindle Edition) (positing that “the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity ... to influence the outcome of political decisions”); *see also*, Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 Cornell L. Rev. 959, 966-967 (2020) (Collective self-determination or “cooperative authorship cannot happen where some occupy a subordinate rank, so that their participation is devalued or discounted, nor can it happen where their exercise of fundamental freedom is unfairly discouraged or disallowed. In other words, democracy entails a commitment to a meaningful measure of civic efficacy and equality”).



disparities in political power,<sup>333</sup> giving a corporate class or wealthy minority a heightened degree of political currency that translates to overwhelming influence in framing public policy discourse.<sup>334</sup> Therefore, neoliberal jurisprudence has destabilized our original constitutional design by eviscerating popular sovereignty's democratic importance in preserving a republican form of government that relies on deliberative politics to maintain constitutional self-rule, as originally intended.<sup>335</sup> Similarly stated, commercial speech has attained the significance of political speech and in the process the authority of the people is now being subverted by corporate governance<sup>336</sup> guided by a neoliberal ideology that has led some scholars to conclude that "the U.S. Constitution no longer works from the point of view of popular sovereignty."<sup>337</sup> Critics argue extending constitutional protection to commercial and

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<sup>333</sup> Gilman, *supra* note 269; Coates, *supra* note 277.

<sup>334</sup> Sunstein, *supra* note 319.

<sup>335</sup> Gilman, *supra* note 269 (arguing that the Court has been acting as the protector of a wealthy minority rather than as a protector for a minority against a majority).

<sup>336</sup> See, e.g., Conrad Foreman, *Money in Politics: Campaign Finance and its Influence Over the Political Process and Public Policy*, 52 J. MARSHALL L. REV. 185 (2018) (concluding that corporate governance exists and it predominates over public policy as a result of corporate finance laws); see also, Gilman, *supra* note 269 (positing that Court is helping to protect a very powerful and wealthy minority at the expense of the majority due to Court rulings that have augmented the rise of corporate influence over politics, the economy, and the courts); see, John C. Coates IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL LEGAL STUD. 657 (2012) (supporting the finding that observable corporate political activity (lobbying and PAC donations) increased sharply after *Citizens United* with empirical data).

<sup>337</sup> David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 668 (2018) (In reviewing Richard Tuck's book, *The Sleeping Sovereign*, the authors remark that "Tuck shows that today's originalism, for all its talk of fidelity to law's origins, is profoundly unfaithful to the very theory of constitutional self-rule." *Id.* at 667); see also, RICHARD TUCK, *THE SLEEPING SOVEREIGN*, 283 (Cambridge University Press 2016, Kindle Edition) (reviewing the historical origins and development of constitutional democracy based on popular sovereignty and concluding that distinctions between originalist constitutionalism and 'living' constitutionalism are irrelevant, since "it is the facts that we are democrats and that the structures of the Constitution are fundamentally democratic that make it 'living'"). In this sense, principles of popular sovereignty filtered through the deliberate politics model make it possible for unenumerated rights, such as the right to health care, becoming a right in itself through a legitimizing process Tuck refers to as constitutional self-rule. *Id.* at 212. Obviously, Professor Ackerman's theory of popular constitutionalism and Tuck's constitutional self-rule (democracy) have similar theoretical underpinnings concerning constitutional change.

corporate speech protects only economic liberty - the kind of liberty protected by the *Lochner* Court - and does little to protect the political or personal liberty that the First Amendment values for democratic self-determination to function.<sup>338</sup>

This phenomenon becomes problematic for popular constitutionalism as a mechanism to transform access to health care into a right to health care, since popular constitutionalism relies on a democratic ethos to operate within a majoritarian model of constitutional democracy, known as constitutional self-rule.<sup>339</sup> Conversely, neoliberal constitutionalism has facilitated corporate governance based on a market-modeled conception of liberty.<sup>340</sup> Importantly, since “[N]eoliberalism refers to the revival of the doctrines of classical economic liberalism, also called *laissez-faire*, in politics, ideas, and law,”<sup>341</sup> it has become a hegemonic ideological institution in itself.<sup>342</sup> Thus, popular constitutionalism loses its normative traction under corporate governance, since corporate governance is simply rule by a wealthy minority under neoliberal economic theory. For example, recent polls demonstrate that a majority of all Americans favor a universal health care system provided by the government.<sup>343</sup> Yet, under a market-modeled

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<sup>338</sup> Post & Shanor, *supra* note 323; *see also*, MEIKLEJOHN, *supra* note 327 (excellent discussion on the functional relationship between traditional political speech and self-government).

<sup>339</sup> Grewal & Purdy, *supra* note 337, at 667.

<sup>340</sup> Foreman, *supra* note 336.

<sup>341</sup> David Singh Grewal and Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *Law & Contemp. Prob.* 1, 2 (2014) (“*Neoliberalism* is an overlapping set of arguments and premises that ... are united by their tendency to support market imperatives and unequal economic power in the context of political conflicts that are characteristic of the present historical moment.”).

<sup>342</sup> WILLS, *supra* note 288, at 3 (explaining hegemony as a concept to explain the means by which dominant classes legitimate their rule through the medium of ideology.).

<sup>343</sup> *Poll Findings KFF Health Care Plans: Public Opinion on Single-Payer, National Health Plans, and Expanding Coverage to Medicare Coverage* (Oct. 16, 2020) <https://www.kff.org/slideshow/public-opinion-on-single-payer-national-health-plans-and-expanding-access-to-medicare-coverage/> (suggesting that most Americans prefer government involvement in extending health care to the public, but when it comes to specifics, a careful reading of this poll suggests that there is greater support for the

conception of liberty, neoliberal economics is steered by a wealthy corporate minority<sup>344</sup> armed with inordinate political influence. This results in the adoption of a patient rights model that stresses individual choice without regard to whether those healthcare choices are financially accessible to all Americans.<sup>345</sup> Neoliberalism aligns with that reading by casting access as choice. The question remains whether principles of popular sovereignty will prevail in delivering a right to health care given that a majority of Americans favor a communitarian health justice model.<sup>346</sup> To complicate matters, recent scholarship has suggested that neoliberalism has become so hegemonic that its principles of justice have distorted the historical significance of the Lockean democratic liberalism, which gives stability to our constitutional order.<sup>347</sup> This phenomenon is illustrated by the ACA public option for health insurance which evidences how the government is acting commercially rather than as a sovereign power by offering more affordable versions of retail goods and services in an attempt to introduce competitive pricing for healthcare. This forces the delivery of health care to stay within the confines of neoliberalism's market-modeled conception of liberty while avoiding sovereign regulatory tools of constitutional and administrative governance.<sup>348</sup> Although the government's private-sector competitors may feel commercial rather than sovereign pressure to emulate the State's business,<sup>349</sup> in actuality neoliberalism has forced the government to cast itself in the role of commercial competitor rather than sovereign overseer in enhancing a right to healthcare thus diminishing its governing role to one that

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incremental reforms of improving ACA and adding a public option than there is for replacing the current system with M4A or a single payor system); see, *Gallup Poll: Healthcare System* (November 5-9, 2020) <https://news.gallup.com/poll/4708/healthcare-system.aspx> (last visited on September 29, 2021) (asking the question: Do you think it is the responsibility of the federal government to make sure all Americans have healthcare coverage, or is that not the responsibility of the federal government? 56% responded that the federal government was responsible for health insurance);

<sup>344</sup> Gilman, *supra* note 269; Piketty & Saez, *infra* note 362.

<sup>345</sup> Larsen & Stone, *supra* note 282.

<sup>346</sup> Polls, *supra* note 343.

<sup>347</sup> WILLS, *supra* note 12.

<sup>348</sup> Michaels, *infra* note 364, at 470.

<sup>349</sup> *Id.*

subtly shapes industry norms through its own market practices rather than shaping healthcare policy as a sovereign power.<sup>350</sup> Hence, the government's participatory role as a competitive actor, which has been characterized as a libertarian paternalistic modeling approach,<sup>351</sup> will not create a right to healthcare, but only an entitlement, because it tacitly accepts a subservient position to neoliberalism's market-modeled conception of liberty.<sup>352</sup>

#### D. Neoliberal Constitutionalism and its Pernicious Effect on the Survival of the ACA

Although, in *Sebelius*,<sup>353</sup> the Court parenthetically concluded that the survival of the ACA rests with the people,<sup>354</sup> ironically, the Court's expansive development of commercial speech under neoliberal constitutionalism<sup>355</sup> now works to obstruct the will of the people.<sup>356</sup> Significantly, the Court in *Citizens United* as well as the Court's rulings in recent commercial speech cases gave corporate market players an expansive form of commercial speech that would allow corporate elites financial and political leverage to dominate the ACA narrative.<sup>357</sup> Thus, neoliberal constitutionalism paved the way for greater corporate control of government institutions and their bureaucracies in defining how the ACA will be implemented in the future.<sup>358</sup> Just as *Citizens United* deregulated the political arena by opening the spigot to campaign finance, *Sorrell* and its progeny allows the deregulation of the market system by

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<sup>350</sup> *Id.*

<sup>351</sup> Sunstein & Thaler, *infra* note 375 and 376.

<sup>352</sup> Friedman, *infra* note 378; *see also*, Sunstein & Thaler, *infra* note 375 (admitting freedom of choice theory operates in the public and private sectors).

<sup>353</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, *supra* note 218.

<sup>354</sup> *Id.*

<sup>355</sup> Shanor, *supra* note 275; Kapczynski, *supra* note 312; Post & Shanor, *supra* note 323.

<sup>356</sup> Elizabeth Leonard, Susan Scholz, & Raquel Alexander *Employers United: An empirical Analysis of Corporate Political Speech in the Wake of the Affordable Care Act*, 38 J. Corp. L. 217, 254 (2012-2013).

<sup>357</sup> Foreman, *supra* note 336.

<sup>358</sup> Hoffman, *supra* note 300.

deregulating commercial speech.<sup>359</sup> This has allowed corporate governance to dominate the political narrative concerning healthcare reform or, just how far the ACA will transform traditional American values regarding the need for a national health care system.<sup>360</sup> In sum, the economic inequality created by neoliberal policies perpetuates political inequality, which stunts the democratic will of the people.<sup>361</sup> In a seminal study of wealth creation, economist Thomas Piketty finds that the “one percent” in America are now enjoying a share of the national income that it previously enjoyed during the *Lochner* era.<sup>362</sup> It is within this backdrop of inequality brought on by neoliberal constitutionalism that public discourse has been framed regarding whether access to healthcare, as a protected interest, should be elevated to a right to healthcare.<sup>363</sup> The question becomes whether our constitutional order can survive

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<sup>359</sup> Shanor, *supra* note 275.

<sup>360</sup> Leonard et al., *supra* note 356; see MITANIDIS, *supra* note 303, at 30-33 (The author notes that Gramsci’s perspective of the law and the courts’ hegemonic role in ideological production is enhanced in common law systems where judges are able to influence outcomes by providing their own opinion and interpretation of the law, thus making the courts in common law systems identifiable as an institution that produces the means of ideological production for the dominant social group or ruling class to maintain obedience to its dominant ideology that is purposively designed to serve the dominant social group or ruling class interests); see also Bates, *supra* note 303.

<sup>361</sup> Bertrall L. Ross II, *Addressing Inequality in the Age of Citizens United*, 93 N.Y.U. L. REV. 1120, 1200 (2018) (Concluding that although models of democracy predict a redistributive policy response to growing income inequality, the exact opposite is occurring. The affluent class has an inordinate amount of political power that can only be attributed to the income disparity between economic classes. In short, concentrations of wealth bring overabundant political influence exerted by those at the top of the income scale. Concentrated wealth brings greater access in terms of influencing public policy agendas).

<sup>362</sup> Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 Q. J. ECON. 1 (2003) (finding that since the mid-1970s the “one percent” in the United States had received an ever-growing share of the national income); see also, THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Harvard University Press 2014, Arthur Goldhammer trans., Kindle Edition) (discussing the historical effects of capitalism and the inequality it creates).

<sup>363</sup> Shanor, *supra* note 275 at 188 (arguing that the expansion of commercial speech has made neoliberal free market principles more readily legitimized as a core value of individual autonomy realized through exercising one’s market choice within a free market system).

its present *Lochner* Era<sup>364</sup> where the current imposition of neoliberal governance, as well as neoliberal constitutionalism, threatens to destabilize our constitutional democracy.<sup>365</sup> This will diminish the transformative effect popular constitutionalism will have in creating a right to health care. Importantly, popular constitutionalism relies on the principle of popular sovereignty, or the deliberative politics model, as the means of enacting transformative law that brings about fundamental change in the American constitutional order.<sup>366</sup> But, as argued herein, the deliberate politics model has been coopted by a wealthy corporate minority enabled by neoliberal constitutional norms that have fundamentally changed the socioeconomic relationships of deliberative politics thus curtailing popular sovereignty's importance as a democratic transformative construct

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<sup>364</sup> Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465 (2020) (noting that the U.S. political economy "oscillated, from primarily a laissez-faire regime during the *Lochner* era to a state welfarist regime that spanned the mid-1930s to the mid-1970s, and then back to a more libertarian resting point" called neoliberalism); see, KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME*, 136 (Beacon 2d ed. 2001) (Polanyi termed systemic changes under capitalism "double movement." First, there is the historical movement of the market, a movement that has no inherent limits and therefore threatens society's very existence. In response, the society defends itself by creating institutions for its protection. The rise of laissez-faire capitalism under the *Lochner* Era and the subsequent rise of the welfare state in the 1930s exemplify this phenomenon); Wolfgang Streeck, *Democratic Capitalism*, 71 NEW LEFT REV. 5 (2011) (defining democratic capitalism, as market democracy. A political and economic system that combines capitalism and strong social policies. It integrates resource allocation by marginal productivity [synonymous with free-market capitalism], with policies of resource allocation by social entitlement. Neoliberalism, in this frame, is ascendancy of the first principle at the expense of the latter).

<sup>365</sup> David Singh Grewal, *Three Theses on the Current Crisis of International Liberalism*, 265 IND. J. GLOBAL LEG. STUD. 595, 604 (2018) (Professor Grewal argues that the crises in "international liberalism" has exposed the recent erosion of the democratic principle of popular sovereignty, which legitimizes domestic political representation because economic globalization or the geopolitics of neoliberalism ultimately requires a *depoliticization* of policy-making within and between countries: thus, collective decision making or popular sovereignty is suppressed to the extent that it deviates from what the private market ordering would require. In sum, the crises of democratic governance and of global governance emerge from the expansion of neoliberalism within countries and between them).

<sup>366</sup> Ackerman, *supra* notes 26 and 177.

essential for popular constitutionalism to transform health care into a socioeconomic right.<sup>367</sup> Rather than stabilizing constitutional order by harmonizing present popular norms with past norms, while maintaining the essential governing principle that the will of the people makes laws which control the government, neoliberal constitutionalism has allowed corporate governance to thrive at the expense of democratic self-determination or popular sovereignty.

## VI. Conclusion

Our present political ethos concerning the right to health care is undoubtedly connected to public opinion on the issue of whether the ACA should be further implemented.<sup>368</sup> Without strong public opinion favorable to further implementation it is unlikely that the ACA statutory norms will transform the constitutional order in a manner that will redirect the American social contract towards the realization of a right to healthcare.<sup>369</sup> Recent public opinion polls have demonstrated that most Americans prefer government involvement in extending health care to the public.<sup>370</sup> Yet, while most Americans favor a national health plan,<sup>371</sup> few who favor a "Medicare for All" plan want it to become the only form of health insurance available.<sup>372</sup> Six in 10 would want it to compete with private health insurance as a choice for those who want it, rather than replace all private insurance.<sup>373</sup> This phenomena is reasonably explained by our contemporary democratic ethos being subservient

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<sup>367</sup> Rosen & Schmidt, *supra* note 5, at 128 (popular constitutionalism is premised on the Court aligning its jurisprudence with the democratic principles underlying American constitutional order).

<sup>368</sup> Super, *supra* note 7.

<sup>369</sup> *Id.* at 874.

<sup>370</sup> See, Polls, *supra* note 343.

<sup>371</sup> *Id.*

<sup>372</sup> NPR/PBS NewsHour/Marist Poll, *Do you think Medicare for all, that is a national health insurance program for all Americans that replaces private health insurance, is a good idea or bad idea?* (Jul. 17, 2019).

<sup>373</sup> Fred Backus and Jennifer De Pinto, *CBS News Poll: Most Americans favor a national health plan.* (Pub. Oct. 15, 2019), <https://www.cbsnews.com/news/2020-polls-national-health-care-plan-favored-by-most-americans-cbs-news-poll-finds/> (last visited September 29, 2021).

to a neoliberal ideology that has successfully legitimized a healthcare system based on a market rationality of consumer choices.<sup>374</sup> In response to a purely neoliberal market rationality, some scholars have advanced an alternative market rational called “libertarian paternalism.”<sup>375</sup> This phrase has varying degrees of application as a means to soften the harsh assumptions of neoliberalism by allowing the state to intervene in shaping preferences to reduce bias and achieve better overall social outcomes.<sup>376</sup> Therefore, it is not surprising that the ACA, under the tutelage of Cass Sunstein, President Obama's head of OMB's Office of Information and Regulatory Affairs from 2009 to 2012, worked within the neoliberal framework, since both neoliberalism and libertarian paternalism view liberty as freedom of choice.<sup>377</sup> However, “soft” libertarian paternalism has been criticized as not being “hard” enough in providing choices that would compel the selection of welfare-enhancing consumer choices necessary to

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<sup>374</sup> Shanor, *supra* note 275.

<sup>375</sup> Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175, 175 (2003) (coining the term “Libertarian Paternalism”). Libertarian paternalism is the idea that it is both possible and legitimate for private and public institutions to affect behavior while also respecting freedom of choice, as well as the implementation of that idea. Since the Sunstein/Thaler thesis posits it is better to set the default option to the welfare-enhancing choice, the thesis can also be viewed more than a practical approach in providing meaningful health care choices, but as means to nudge those choices in alignment with a right to healthcare by nudging consumer healthcare choices in a direction that, in the end, produces a healthcare system that equitably distributes health care resources. *See*, CASS R. SUNSTEIN & RICHARD H. THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (Yale University Press 2008).

<sup>376</sup> Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1201 (2003) (concluding that libertarian paternalism moderates “freedom of choice ... [to] encourage both private and public institutions to steer people in directions that will promote their own welfare.”); *but see*, Gregory Mitchell, *Libertarian Paternalism is an Oxymoron*, 99 NW. U.L. REV. 1245 (attacks the Sunstein/Thaler thesis that the “libertarian paternalist” will “steer people's choice in directions that will improve the choosers' own welfare” but will not prescribe or proscribe any particular choices, thus preserve autonomy while regulating one's freedom of choice by state control over the structure of choice options.).

<sup>377</sup> *Id.* at 1159 (“... it is both possible and desirable for private and public institutions to influence behavior while also respecting freedom of choice.”).



correct distributional disparities in our health care system.<sup>378</sup> This is the Achilles heel in the structural design of the ACA that may deprive it of becoming a transformative agent in delivering a right to healthcare, a consequence that will continue to distinguish the United States as the only developed nation without a universal healthcare system.<sup>379</sup>

In short, as a result of neoliberalism, the level of broad popular engagement is presently insufficient to align popular norms expressed in the ACA with early American traditional values existing during the colonial era. Some colonial healthcare scholars have asserted it was expected that the government had an obligation in delivering healthcare to the public as a common good.<sup>380</sup> Stated differently, since our democratic ethos of governance relies on public opinion being filtered through the institutional design in reaching a deliberate and principled decision as to whether health care is a common good, without broad popular engagement no definitive new principles will be established to transform access to healthcare into a right to healthcare.<sup>381</sup> More to the point, popular constitutionalism, as an informal amendment process, requires public traction to transform the constitutional order and align it with popular notions of early American values.<sup>382</sup> Given that process, unless the public stands strongly behind the ACA as a delivery system for a national health care plan, popular constitutionalism, as a means of achieving a right to healthcare, may initiate the reverse

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<sup>378</sup> See, e.g., David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687 (2014) (for a general discussion on application distinctions between “soft” paternalism and “hard” paternalism).

<sup>379</sup> Chris Slaybaugh, *International Healthcare Systems: The U.S. Versus the World*, 1 <https://axenehp.com/international-healthcare-systems-us-versus-world/> (last visited September 29, 2021) (data from a 2017 report reveals the US still remains the only industrialized country in the world that does not have universal health coverage for all citizens); but see, Crossley, *infra* note 392 at 71 (arguing that “the community health needs assessment (“CHNA”) requirement of the ACA holds the potential to make many hospitals aware of how addressing disparities in their communities could advance their own financial interests. By doing so, the CHNA requirement could catalyze a convergence of hospitals’ interests with the interests of health justice advocates.”).

<sup>380</sup> Parmet, *supra* note 1.

<sup>381</sup> Super, *supra* note 7.

<sup>382</sup> David Super, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, STAN. L. REV. 873, 884 (2014).

effect.<sup>383</sup> Significantly, neoliberalism's stronghold on public discourse concerning a right to healthcare is emboldened by the Court's neoliberal rulings regarding First Amendment free speech.<sup>384</sup> Illustrative of this point is the Court's ruling in *Sorrell* that struck down a Vermont statute, which arguably was nothing more than an example of "soft" libertarian paternalism which attempted to regulate the content of prescription labels.<sup>385</sup> The Court's reasoning in striking down the Vermont statute was that state proscriptions on commercial speech violate the First Amendment, since they "burden the speech of others in order to tilt public debate in a preferred direction."<sup>386</sup> Ironically, this ruling did nothing more than tilt public debate in the direction of further implementing a free-market or laissez-faire governance of healthcare "that seeks to shield market actors and structures from democratic power,"<sup>387</sup> which consequently diminishes the transformative power of popular constitutionalism that relies on the process of democratic self-determination.

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<sup>383</sup> Colby and Smith, *supra* note 24 (Arguing that the Court may enter a period of jurisprudence marked by libertarian rulings similar to the *Lochner* era, because of present modern conservative originalism).

<sup>384</sup> Shanor, *supra* note 275, at 201 (arguing First Amendment commercial speech jurisprudence was preceded by a business-led social movement mobilized to embed libertarian-leaning understandings of free speech which demonstrates how social movements can alter constitutional principles absent Article V amendment, and of the role social mobilization has in the transformation of constitutional norms. In sum, the influence of a business-led social movement upon commercial speech jurisprudence lends additional support for the existence of popular constitutionalism's transformative effect on constitutional change, thus explaining the emergence of neoliberal constitutionalism); *see*, Post & Shanor, *supra* note 323, at 171 (noting traditionally the First Amendment functioned as protecting the freedom and autonomy to engage in public discourse which fosters participatory democratic self-determination, but present the First Amendment jurisprudence functions to protect one's freedom and autonomy to transact business in the market place); *see*, Kapczynski, *supra* note at 312 ("First Amendment, long understood as a protector of democracy, has come to pose a threat to democratic authority over markets").

<sup>385</sup> *Sorrell*, *supra* note 315.

<sup>386</sup> *Id.* at 578-579 ("The State may not burden the speech of others in order to tilt public debate in a preferred direction.").

<sup>387</sup> Kapczynski, *supra* note 312, at 201.

Obviously, old constitutional regimes will require merging with new constitutional regimes to achieve a right to healthcare, but Court activism can either promote a right to health care or impede its progression. However, whatever the Court's interpretive approach is the Court should be reminded that the doctrine of judicial restraint<sup>388</sup> exists to curb judicial enthusiasm importing its subjectivity for that of the will of the people and in the process guaranteeing constitutional self-rule.<sup>389</sup> Popular constitutionalism strives to explain how the deliberative politics model was an institutional design created by the Framers to allow our constitutional order the ability to respond to popular notions of our early traditional values, thus aligning present notions of traditional

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<sup>388</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 138 (Harvard University Press 1978) (Professor Dworkin posits that the theory of judicial deference recognizes moral rights (socioeconomic rights) but holds the executive and legislative branches are better suited to give content to such rights. This is consistent with our democratic ethos because a decision that strikes down social legislation displaces legislative judgment on social policy); *see also*, *California v. Texas*, 2021 U.S. LEXIS 3119 (The Court invoking Article III standing doctrine in upholding the ACA, which effectively amounted to the Court exercising principles of judicial restraint); *but see*, e.g., *King v. Burwell*, 576 U.S. 473, 498-518 (2015) (Scalia, J., dissenting) (Similar to its ruling in *NFIB* the Court used avoidance and severability doctrines to uphold the ACA and was criticized for engaging in judicial legislation). It is the opinion of this author that the Court's rulings in the trilogy of ACA cases were not intended to create fundamental law or to create a new constitutional norm or order consistent with popular constitutionalism, but simply saving a neoliberal model of health care that relies on libertarian paternalism as originally designed and intended in delivering health care.

<sup>389</sup> Singh Grewal Purdy, *supra* note 337, at 212 ("the essence of popular sovereignty was a mechanism whereby one had to appeal in some way to the people in order to pass fundamental laws"); *but compare* Carissima Mathen, *Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on "Charter Dialogue Revisited"*, *Osgoode Hall Law Journal*, vol. 45, no. 1, 125-146 (2007) (In analyzing the judicial-legislative relationship of power in the Canadian Charter [Constitution] the author questions "How can a people be considered self-governing if they permit critical issues of law and policy to be resolved by judicial fiat?" *Id.* at 141.; and further comments that even where the Canadian Supreme Court employs judicial restraint or deference to deliberative democratic rights-based limits on legislative power "... the variable levels of deference do not disturb the fact that, in the end, the Court remains the final arbiter of whether the *Charter* has been adequately respected.") *Id.* at 145; *see also*, Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, 38 *Wake Forest L. Rev.* 451, 454 (2003) (arguing "democracy" means a process where "ordinary people [enjoy the right] to participate on an equal basis in public decision-making" therefore democracy it is a governing system where the legislative and judicial branches mutually share power through a process of give-and-take between equally matched institutions).

values with our earlier traditional values that existed during the founding moment.<sup>390</sup> Hence, each subsequent constitutional regime has a generational connection to its preceding constitutional regime while transforming our fundamental law. In the process this revises the Constitution while preserving its order or stability.<sup>391</sup> In sum, popular constitutionalism relies on principles of popular sovereignty to operate efficiently in maintaining a stable constitutional order. As a conservative Justice noted in *National Federation of Independent Business v. Sebelius*, whether the ACA survives “[U]nder the Constitution, that judgment is reserved to the people.”<sup>392</sup> Understandably, that judgment is reserved to the people because “the people are the only legitimate fountain of power, ... who, as grantors of the [Constitution], can alone declare its true meaning and enforce its observance[.]”<sup>393</sup> And, whether the Court’s rulings regarding the trilogy of ACA cases<sup>394</sup> that have upheld the ACA were intended to create a new constitutional order or norm consistent with popular constitutionalism is debatable, since it can be argued that the Court simply saved a neoliberal model of healthcare within the framework of libertarian paternalism consistent with a market rationality of consumer choices.

In any event, whether by informal or formal amendment to the Constitution, without such fundamental change to our constitutional order a national healthcare system is virtually impossible. In sum, popular constitutionalism relies on the synthesis of constitutional norms, implicit in present deliberative laws, with early American

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<sup>390</sup> Kramer, *supra* note 47.

<sup>391</sup> Ackerman, *supra* note 177, at 518. Professor Ackerman describes the Court’s jurisprudence during the Reconstruction era as a multigenerational synthesis of merging (synthesizing) new constitutional ideals sprouting from the Reconstruction Amendments with old Federalist constitutional ideals, thus a new constitutional order was created.

<sup>392</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, *supra* note 218, at 2608.

<sup>393</sup> WILLS, *supra* note 12, at 306-307 (Federalist No. 49, James Madison); *see also*, Grewal & Purdy, *supra* note 337, at 74 (Noting that “liberal theory grounds the state’s legitimacy in democratic accountability and the ability of individuals to come together, as equals, to institute a collective vision of the common good.”).

<sup>394</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, *supra* note 218; *King v. Burwell*, 576 U.S. 473 (2015); *California v. Texas*, 2021 U.S. LEXIS 3119 (2021).

values to achieve a right to healthcare. Popular constitutionalism is an acknowledgment that the synergy between Lockean values of autonomy and civic republican communitarian values expressed in political discourse can transform our constitutional order thus making it compatible with present notions of our traditional fundamental values while elevating the right to health care to the status of a public good. However difficult it may be in light of the strong presence of a neoliberal economic ethos in our political arena,<sup>395</sup> and the antidemocratic constitutional norms created by neoliberal constitutionalism; universal health care will be accepted by the state when the state perceives universal health care as a public good that secures the stability of the state or the stability of our constitutional order. Obviously, both civic republican principles – deliberative politics principle and the stability of the state principle – must converge for a right to health care co-existing within our constitutional design. In short, health care as a right will only become fundamental law when this individual right is perceived as being consonant with the preservation of our democratic republican constitutional order. As observed through the lens of our present neoliberal political ethos, a right to health care will be accommodated when that public good interest converges with the interests of those of the corporate class in policy making positions concerning the health care industry.<sup>396</sup>

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<sup>395</sup> Wills, *supra* note 288, at 2, 4 (observing neoliberalism as “a hegemonic concept that is seeping into and co-opting the whole spectrum of political life” ... “by which dominant classes legitimate their rule through the medium of ideology [that] accommodate[s] and incorporate[s] the interests and demands of diverse social groups through the acquisition of political legitimacy and the consent of the governed. Consent is generated primarily through the exercise of moral and intellectual leadership; that is, leadership that articulates an entire ‘ethical-political’ world view via an array of ideological and institutional practices. Such consent must be cultivated continually through the dominant group articulating its own sectional interests in ways that take on a universalistic appeal.”).

<sup>396</sup> DERRICK BELL, *SILENT COVENANTS*, 69 (Oxford University Press, Inc. 2004, Kindle Edition) (introducing Rule 1 of his interest-convergence theory to explain how racial equality has been historically managed in America by postulating “the interest of blacks in achieving racial equality will be accommodated only when that interest converges with the interests of whites in policy-making positions”. To professor Bell, the interest-convergence phenomenon is illustrated in the Civil War amendments to the Constitution that allowed Republican post-Civil War electoral dominance for over 40 years; *see also*, Mary Crossley,

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*Black Health Matters: Disparities, Community Health, and Interest Convergence*, 22 MICHIGAN JOURNAL OF RACE & LAW 53, 68 (2016) (“Applying Professor Derrick Bell’s interest-convergence theory to the problem of health disparities suggests a reason, namely that progress will occur only when addressing disparities advances the interests of Whites and others in power”). Similarly applied to the thesis of this article, the interest to a right to healthcare for all will be accommodated when that interest converges with the interests of the neoliberal corporate/business class in policy-making positions.



# THE “NOT SO” FRESH START: ARE WE DOING ENOUGH TO PROTECT THE ELDERLY’S FINANCES?

Alexis Ercia<sup>1</sup>

## I. Introduction

*Sally Mae Ericson<sup>2</sup> is an elderly female in a difficult financial situation. In her earlier years, Sally Mae was the primary caretaker to her children; Catherine, Jessy, and Bridget; while Daniel, her husband, was the family’s bread winner.<sup>3</sup> While Daniel made a modest income, the Ericson’s were still making monthly house payments on their 1965 home well into the twenty-first century.<sup>4</sup> In 2010, Daniel passed away leaving Sally Mae with a small life insurance policy,<sup>5</sup> social security income, and a mortgage.<sup>6</sup> In 2012,*

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<sup>2</sup> This is a hypothetical for the purpose of this paper.

<sup>3</sup> Currently, an American household is more likely to have a dual income. Julie Sullivan, *Comparing Characteristics and Selected Expenditures of Dual- and Single-Income Households with Children*, U.S. Bureau of Labor Statistics (Sept. 2020), <https://doi.org/10.21916/mlr.2020.19>. However, statistics show about 20% of American households still only have one income. *Id.*

<sup>4</sup> Statistics show individuals are more likely to have mortgage debt into their later years. Paul Span, *They’re Growing Older. Their Mortgage Debt is Growing Deeper*, THE NEW YORK TIMES (last visited April 13, 2022), <https://www.nytimes.com/2016/11/22/health/new-old-age-mortgage-debt.html>. In fact, “those in their 60s saw debt, such as mortgages and auto loans, balloon by 471% to \$2.14 trillion.” Greg Iacurci, *Debt Among Oldest Americans Skyrockets 543% in Two Decades*, CNBC, (Feb. 26, 2020, 10:22 AM EST), <https://www.cnbc.com/2020/02/26/debt-among-older-americans-increases-dramatically-in-past-two-decades.html>.

<sup>5</sup> A little bit over half of all Americans have life insurance policies. Nupur Gambhler, *Life Insurance Statistics in 2021*, POLICYGENIUS (Jan. 31, 2021) <https://www.policygenius.com/life-insurance/life-insurance-statistics/>.

<sup>6</sup> Julie Sullivan, *supra* note 3.



*Sally Mae was diagnosed with Alzheimer's disease,<sup>7</sup> resulting in overwhelming medical debt.<sup>8</sup> Shortly after, Sally Mae began losing her memory. Her children petitioned the court to appoint their mother a guardian.<sup>9</sup> The court selected Sarah, a court appointed guardian, with plenary guardianship.<sup>10</sup> Given Sally Mae's debt, Sarah thought it would be best for Sally Mae to file for Bankruptcy.<sup>11</sup>*

Although the government has enacted several financial protections, elderly<sup>12</sup> still fall victim to financial abuse. Elderly are more susceptible to predatory lending,<sup>13</sup> financial exploitation,<sup>14</sup>

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<sup>7</sup> In the United States, one out of ten people over sixty-five have Alzheimer's disease. Texas Department of State Health Services, *What is Alzheimer's Disease? Questions and Answers*, TEXAS DEPARTMENT OF STATE HEALTH SERVICE (last updated April 1, 2021), <https://dshs.texas.gov/alzheimers/qanda.shtm>. Once an individual turns eighty-five, that statistic increases to approximately every one in three people. *Id.*

<sup>8</sup> Medical Debt: Is Our Healthcare System Bankrupting Americans?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 11th Cong. 4 (2009) (finding that elderly are more likely to initiate a bankruptcy proceeding because of medical debt).

<sup>9</sup> FLA. STAT. § 744.102(9) (2020) defines guardian as, "a person who has been appointed by the court to act on behalf of the ward's person or property, or both."

<sup>10</sup> Courts can appoint either a plenary or limited guardian. § 744.102(9)(a)-(b). Plenary guardians "exercise all delegable legal rights and powers of the ward after the court has found that the ward lacks the capacity to perform all of the tasks necessary to care for his or her person or property." § 744.102(9)(b). Limited guardians are given limited "legal rights and powers". § 744.102(9)(a).

<sup>11</sup> A guardian can file for bankruptcy on behalf of an incompetent adult. FED. R. BANKR. P. 1004.1. Florida allows for guardians who are not acting in the best interest of the individual to be removed. FLA. STAT. § 744.474. Florida statute outlines twenty-one reasons, one of which is, "a material change in the ward's financial circumstances such that the guardian is no longer qualified to manage the finances of the ward, or the previous degree of management is no longer required." § 744.474(17).

<sup>12</sup> Hereinafter, for the purpose of this paper, elderly will be classified as anyone sixty-five or older.

<sup>13</sup> See generally *Katline Realty Corp. v. Avedon*, 183 So.3d 415 (Fla. Dist. Ct. App. 3d 2014) (describing an instance in which an elderly couple fell victim to predatory lending and the couple's mortgage broker violated both the Truth in Lending Act and the Homeownership Equity Protection Act of 1994).

<sup>14</sup> U.S. Trustee Program Annual Report Fiscal Year 2019, U.S. Department of Justice (2019), [https://www.justice.gov/ust/file/ar\\_2019.pdf/download](https://www.justice.gov/ust/file/ar_2019.pdf/download) (describing an case where a mortgage broker defrauded several elderly out of millions).

acquiring mountains of debt,<sup>15</sup> and make poor financial decisions.<sup>16</sup> These susceptibilities create financial stresses and a loss of earned income. To mitigate these susceptibilities, elderly could turn to family, government assistance, or even the Bankruptcy Court. However, these options might not be enough. Given these financial vulnerabilities, it is time to establish an avenue of reform for elderly, an *enhanced fresh start*.

Part two provides a brief history of bankruptcy and discusses several financial enactments meant to aid elderly. Part three analyzes financial vulnerabilities experienced by elderly. Part four explains the need for an *enhanced fresh start* and discusses potential avenues for reform.<sup>17</sup> Part five concludes the paper.

## II. Historical Background

The United States retains a large amount of global wealth.<sup>18</sup> The elderly hold the largest amount of that wealth.<sup>19</sup> However, according to the United States Census Bureau, the median income for

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<sup>15</sup> Medical Debt: Is Our Healthcare System Bankrupting Americans?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 11th Cong. 4 (2009) (finding that elderly are more likely to initiate a bankruptcy proceeding because of medical debt).

<sup>16</sup> Taylor Tepper, *America's Seniors In Debt: A Growing Problem*, FORBES ADVISOR (Mar. 29, 2021, 4:28 AM),

<https://www.forbes.com/advisor/retirement/seniors-debt-statistics/>; Iacurci, *supra* note 4.

<sup>17</sup> Given the great depth of these laws, this paper will primarily focus on both Federal and Florida Specific Laws.

<sup>18</sup> Ana Hernandez Kent & Lowell Rickets, *Has Wealth Inequity in America Changed Time? Here are Key Statistics*, Federal Reserve Bank of St. Louis (Dec. 2, 2020), <https://www.stlouisfed.org/open-vault/2020/december/has-wealth-inequality-changed-over-time-key-statistics>. The United States' total wealth in 2019 is approximately ninety-six trillion. *Id.*

<sup>19</sup> Avery Koop, *Visualizing Net Worth by Age in America*, DataStream (Feb. 15, 2021), <https://www.visualcapitalist.com/visualizing-net-worth-by-age-in-america/>. “The age group with the highest net worth [is made up of] those aged 65-74, sitting at \$1.22 million.” *Id.* Although elderly hold the largest wealth in the United States, a large majority of their wealth is neither liquid nor cash ready. Joseph Friedman & Jane Sjogren, *Assets of the Elderly as they Retire*, Social Security Bulletin (Jan. 1981), <https://www.ssa.gov/policy/docs/ssb/v44n1/v44n1p16.pdf>

households with individuals over 65 is \$47,357.<sup>20</sup> The median income increases to \$77,873 when the household has individuals under 65.<sup>21</sup> Since the number of elderly employees in the workforce are on the rise,<sup>22</sup> there has become a need for enactments that are meant to protect wealth and aid those who struggle financially. A brief history of Bankruptcy, focusing on individual filers, is discussed in Part A. Current financial protection enactments are discussed in Part B.

## A. The Evolution of Bankruptcy and the Filing Process of an Individual Debtor

### 1. *Bankruptcy Began with the United States Constitution*

In 1787, the United States Constitution authorized Congress to enact uniform bankruptcy laws.<sup>23</sup> During the nineteenth century, Congress authorized four “Bankruptcy Acts,” laying the foundation for bankruptcy today.<sup>24</sup> Notably, Congress granted individuals, or debtors,<sup>25</sup> to voluntarily bring forth a case.<sup>26</sup> Congress also provided district courts with original jurisdiction over bankruptcy matters,<sup>27</sup>

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<sup>20</sup> Jessica Semega et al., UNITED STATES CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2019 (report number: P60-270) (Sept. 2021), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf>.

<sup>21</sup> *Id.* One might attribute this to retirement. Erik Carter, *4 Reasons Your Taxes in Retirement May be Lower Than You Think*, FORBES (May 26, 2020, 10:00 AM EDT), <https://www.forbes.com/sites/financialfinesse/2020/05/26/4-reasons-your-taxes-in-retirement-may-be-lower-than-you-think/?sh=4cc7493a5e3c>.

<sup>22</sup> Loraine A. West, *Older Workers Are Staying Longer in the Workforce*, UNITED STATES CENSUS BUREAU (June 30, 2014), <https://www.census.gov/newsroom/blogs/random-samplings/2014/06/older-workers-are-staying-longer-in-the-workforce.html>.

<sup>23</sup> U.S. CONST. art. 1, §8, cl. 4 (giving Congress authority, “To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States”).

<sup>24</sup> THE EVOLUTION OF U.S. BANKRUPTCY LAW: A TIME LINE (2012).

<sup>25</sup> 11 U.S.C. §101(13) (2020) (defining a debtor as a “person or municipality concerning which a case under this title has been commenced”).

<sup>26</sup> BANKR. ACT 1841, 5 Stat. 440 (allowing individuals to voluntarily bring forth a bankruptcy case).

<sup>27</sup> BANKR. ACT 1867, 14 Stat. 517 (providing jurisdiction of bankruptcy matters).

and established the U.S. Trustee’s Office.<sup>28</sup> In 1819, the Supreme Court gave states authority to enact bankruptcy provisions not interfering with Federal Laws.<sup>29</sup> Until the Great Depression, Congress was relatively silent on bankruptcy matters.<sup>30</sup> However, once the Great Depression started, Congress created the Chandler Act of 1938 which restructured the Bankruptcy Act into chapters.<sup>31</sup>

In 1978, Congress established the “Bankruptcy Code,”<sup>32</sup> which repealed and replaced the Bankruptcy Acts.<sup>33</sup> Although there are 90 districts with unique local rules, the Bankruptcy Code oversees all bankruptcy matters.<sup>34</sup> Within the Bankruptcy Code, there are six main chapters:<sup>35</sup> Liquidations,<sup>36</sup> Individual Debt Adjustment,<sup>37</sup> Reorganization Under the Bankruptcy Code,<sup>38</sup> Family Farmer or Family Fisherman Bankruptcy,<sup>39</sup> Municipality Bankruptcy,<sup>40</sup> and

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<sup>28</sup> BANKR. ACT of 1898, 30 Stat. 544 (creating the U.S. Trustee’s Office).

<sup>29</sup> *Sturges v. Crowninshield*, 17 U.S. 122, 126 (1819) (allowing both the Federal and State Government to create bankruptcy regulations).

<sup>30</sup> THE EVOLUTION OF U.S. BANKR. LAW: A TIME LINE. (2012).

<sup>31</sup> CHANDLER ACT of 1938 (making it easier for U.S. citizens to bring forth voluntary cases in the bankruptcy court).

<sup>32</sup> THE EVOLUTION OF U.S. BANKR. LAW: A TIME LINE. (2012). The “Bankruptcy Code”, also known as “the Bankruptcy Reform Act of 1978” is now Title 11 of the United States Code. *Id.* For the purpose of this paper, it will only be referred to as, the “Bankruptcy Code.” Bankr. Judge Div., *Bankruptcy Basics*, Admin. Office of the United States Courts, 1, 5 (Nov. 2011). The United States Code, established in 1926, is a permanent body of law that can be codified by the legislature. United States Code, 1994 to Present, Govinfo (last visited April 11, 2022), <https://www.govinfo.gov/help/uscode>.

<sup>33</sup> THE EVOLUTION OF U.S. BANKR. LAW: A TIME LINE, *supra* note 30.

<sup>34</sup> Bankr. Judge Div. *supra* note 32. Given the “Bankruptcy Code” oversees all bankruptcy matters, it trumps all state law. *Id.*

<sup>35</sup> *See generally* Bankr. Judge Div., *supra* note 32. When filing for bankruptcy, a debtor can file under any chapter if they meet the requirements under 11 U.S.C. (2020). *Id.*

<sup>36</sup> 11 U.S.C. § 7 (2020) (covering cases where a trustee liquidates a debtor’s assets to pay back creditors).

<sup>37</sup> § 13 (2020) (covering cases where a debtor keeps certain assets by proposing a plan to pay back creditors).

<sup>38</sup> § 11 (2020) (covering cases where a debtor, wanting to continue running their business, enters into a reorganization plan so that they can pay back creditors).

<sup>39</sup> § 12 (2020) (covering cases with debtors, classified as family farmers or fishermen, propose a plan to pay back creditors to keep their business).

<sup>40</sup> § 9 (2020) (covering the bankruptcy process for municipalities).

Ancillary and Other Cross-Border Cases.<sup>41</sup> However, this paper will focus solely on Liquidations and Individual Debt Adjustment Cases, the two most common types of bankruptcy cases for elderly.<sup>42</sup>

In the 1980s, Congress created the Bankruptcy Amendments and Federal Judgeship Act of 1984, which notably provided bankruptcy courts with original jurisdiction over bankruptcy matters.<sup>43</sup> In 2005, Congress created the Bankruptcy Abuse Preventing and Consumer Protection Act (BAPCPA), thus amending the 1978 bankruptcy code.<sup>44</sup> BAPCPA added several provisions including a requirement that debtors must attend pre-bankruptcy credit and pre-discharge education courses.<sup>45</sup> BAPCPA also established a means test for liquidations,<sup>46</sup> altered the waiting period for re-filing in bankruptcy court,<sup>47</sup> and made certain debtor's properties non-dischargeable.<sup>48</sup> These notable events contributed to today's bankruptcy proceedings.<sup>49</sup>

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<sup>41</sup> § 15 (2020) (covering the bankruptcy process for cases concerning cross-border and ancillary).

<sup>42</sup> Cara O'Neill, *Senior Citizens & Bankruptcy*, NOLO (last visited April 4, 2022) <https://www.nolo.com/legal-encyclopedia/senior-citizens-bankruptcy-should-elderly-file.html> (explaining that elderly often file for bankruptcy through liquidating property or entering into an individual debt adjustment plan).

<sup>43</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (taking jurisdiction of bankruptcy matters from the district court and giving it to the bankruptcy courts).

<sup>44</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

<sup>45</sup> *Id.* The pre-bankruptcy credit counseling must be completed before filing whereas the pre-discharge education course is completed after filing for bankruptcy. *Id.*

<sup>46</sup> Means test, "is a formula that uses in bankruptcy law to decide if the debtor is eligible for Chapter 7 bankruptcy. If the debtor fails the means test, the debtor can only apply for chapter 13 bankruptcy." *Means Test*, Cornell Law School (last updated July 2020), [https://www.law.cornell.edu/wex/means\\_test](https://www.law.cornell.edu/wex/means_test).

<sup>47</sup> Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, § 312, 119 Stat. 23 (extending the bankruptcy filing period from six to eight years).

<sup>48</sup> 11 U.S.C. § 523 (2020) (providing a list of non-dischargeable debts). Non-dischargeable debts are debts the debtor must pay for despite the fact that they entered into bankruptcy. *Id.* Non-dischargeable debts are debts such as child support. *Id.*

<sup>49</sup> See generally *Research Institute: Global Wealth Report 2020*, Credit Suisse (October 2020). Given the current global pandemic, COVID-19, it will be interesting to see what Bankruptcy enactments are next. *Id.*

## 2. *Individuals Filing for Bankruptcy*

When individuals file for bankruptcy, they typically enter into a liquidation or an “Individual Debt Adjustment Plan.”<sup>50</sup> Individuals also have the option of filing a reorganization plan, but this is rarely done.<sup>51</sup> Liquidations are court supervised cases in which trustees liquidate a debtor’s assets<sup>52</sup> to acquire capital to pay off debts.<sup>53</sup> In Individual Debt Adjustment Plans, courts create a plan for a debtor to pay debts over a period of time.<sup>54</sup> Dependent upon the debtor’s income, plans are either three or five years.<sup>55</sup>

When filing for bankruptcy, debtors might want to keep property they anticipate being sold.<sup>56</sup> To keep property, debtors enter into voluntary reaffirmation agreements.<sup>57</sup> Entering into reaffirmation agreements allow debtors to keep property, while contractually

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<sup>50</sup> O’Neill, *supra* note 42.

<sup>51</sup> 11 U.S.C. § 109 (2020) (explaining the only technical requirement to file for a reorganization is to be a person).

<sup>52</sup> 11 U.S.C. § 363 (2020). Debtor’s assets are combined to form their estate. 11 U.S.C. § 541 (2021). A debtor’s estate includes both tangible and intangible property. *Id.* Tangible property includes both real and personal property. *Id.* Intangible property is property such as interest in real property. *Id.*

<sup>53</sup> BANKR. JUDGE DIV. & ADMIN. OFFICE OF THE UNITED STATES, 1, 6–7 (3d ed. 2011) (explaining that liquidation agreements often allow a debtor a quicker discharge which in turn allows a debtor a faster fresh start).

<sup>54</sup> *Id.*, at 22. These plans are also known as “wage earner’s plans” because debtors can use their income to pay creditors in either a three-year or five-year plan. *Id.* “A particular advantage of chapter 13 is that it provides individual debtors with an opportunity to save their homes from foreclosure by allowing them to ‘catch up’ past due payments through a payment plan.” *Id.* at 14.

<sup>55</sup> BANKR. JUDGE DIV., *supra* note 53, at 22. “If the debtor’s current monthly income is less than the applicable state median, the plan will be for three years unless the court approves a longer period ‘for cause.’” *Id.* “If the debtor’s current monthly income is greater than the applicable state median, the plan generally must be for five years.” *Id.*

<sup>56</sup> *Bankruptcy: Understanding Reaffirmation Agreements*, CITY BAR JUSTICE CENTER 1, 3 (last updated July 2013), <https://www.citybarjusticecenter.org/wp-content/uploads/images/stories/publications/understanding-reaffirmation-agreements.pdf>. Debtors could want to keep property for necessity or sentimental reasons. *See Id.*

<sup>57</sup> 11 U.S.C. § 524 (2020) (laying out the legal process for entering into a reaffirmation agreement).

binding them to pay back lenders.<sup>58</sup> Since reaffirmation agreements tie debtors into their original debt, this agreement should not be rushed to ensure the individual sticks to the payment schedule and thus eliminating the changes of financial consequences.<sup>59</sup>

The Bankruptcy Code allows a debtor to keep certain property, or exempt property, which a creditor cannot obtain by any means.<sup>60</sup> Both the Federal and State Governments have the authority to define their own exempt property.<sup>61</sup> The Bankruptcy Code allows states to determine whether a debtor can claim either federal or state exemptions.<sup>62</sup> Federal exemptions include retirement funds, interest in property, and various personal property.<sup>63</sup> State exemptions vary by state.<sup>64</sup>

Florida opted-out of all federal exemptions, except one, allowing debtors to keep certain benefits such as alimony.<sup>65</sup> Florida debtors are also afforded separate exemptions found within the Florida Constitution<sup>66</sup> and Florida Statutes.<sup>67</sup> The Florida Constitution allows debtors to exempt personal property up to \$1,000<sup>68</sup> and

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<sup>58</sup> See generally *Bankruptcy: Understanding Reaffirmation Agreements*, *supra* note 56.

<sup>59</sup> *Id.* at 4. “Reaffirming a debt imposes ongoing obligations on a debtor to make payments and may have significant financial consequences.” *Id.*

<sup>60</sup> 11 U.S.C. § 522 (2020) (describing the property a debtor can keep, or “exempt property”).

<sup>61</sup> *Id.* (listing Federal Exemptions); *Bankruptcy Exemptions by State*, NOLO (lasted visited April 4, 2021), <https://www.nolo.com/legal-encyclopedia/bankruptcy-exemptions-state> (listing all state exemptions).

<sup>62</sup> See 11 U.S.C. § 522(b)(3)(A) (allowing states to either opt-in or opt-out of Federal Exemptions).

<sup>63</sup> *Id.* (listing all of the Federal Exemptions that a debtor can claim if the state they are filing in permits).

<sup>64</sup> *Bankruptcy Exemptions by State*, NOLO (lasted visited April 4, 2021), <https://www.nolo.com/legal-encyclopedia/bankruptcy-exemptions-state> (listing the variation of State Exemptions).

<sup>65</sup> 11 U.S.C. § 522(d)(10); FLA. STAT. ANN. § 222.20 (2020) (explaining the only Federal Exemption a debtor can have in the state of Florida is 11 U.S.C. § 522(d)(10)).

<sup>66</sup> FLA. CONST. art. X, § 4(a)(1)–(2).

<sup>67</sup> FLA. STAT. ANN. § 222.13 (2020) (explaining the life insurance policy exemptions); FLA. STAT. ANN. § 175.241 (2020) (explaining different tax exemptions); FLA. STAT. ANN. § 222.22 (2020) (explaining exemptions regarding education, medical savings, and hurricane savings).

<sup>68</sup> FLA. CONST. art. X, § 4(2).

exempt any equity they own on their home, regardless of its worth.<sup>69</sup> The Florida Statutes allow debtors to exempt a range of property including life insurance with a specific beneficiary,<sup>70</sup> different types of pensions,<sup>71</sup> \$1,000 worth of equity in a motor vehicle,<sup>72</sup> educational savings,<sup>73</sup> health aids,<sup>74</sup> and \$4,000 worth of personal property if the debtor opts-out of the personal property exemption within the Florida Constitution.<sup>75</sup>

### 3. *Two Main Purposes of Bankruptcy are to Allow Debtors’ Fresh Starts and Allow Creditors’ Fair and Equitable Distribution*

Debtors file for bankruptcy to receive a fresh start.<sup>76</sup> Congress’ underlining purpose is to “relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes.”<sup>77</sup> According to the Bankruptcy Code, debtors receive a *fresh start* through means of an automatic stay,<sup>78</sup>

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<sup>69</sup> *Id.* at § 4(a)(1) (explaining that equity in a debtor’s home is exempt regardless of the price, the homestead exemption).

<sup>70</sup> § 222.13 (explaining life insurance policy exemptions).

<sup>71</sup> FLA. STAT. ANN. § 175.241 (2020) (exempting firefighter’s pensions); FLA. STAT. ANN. § 185.25 (2020) (exempting municipal police pensions); FLA. STAT. ANN. § 238.15 (2020) (exempting teacher’s retirement benefits).

<sup>72</sup> FLA. STAT. ANN. § 225.25(1) (2020) (explaining a debtor may exempt \$1,000 of equity in a car).

<sup>73</sup> FLA. STAT. ANN. § 222.22(1), (3) (explaining educational savings exemptions).

<sup>74</sup> FLA. STAT. ANN. § 225.25(2) (explaining health aid exemptions).

<sup>75</sup> FLA. STAT. ANN. § 225.25(4) (explaining debtors can exempt \$4,000 in personal property if they do not claim Florida Constitution’s exemption).

<sup>76</sup> See *Local Loan Co. v. Hunt*, 292 U.S. 234, 242 (1934) (emphasizing the importance of a fresh start).

<sup>77</sup> *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904); *Florida Bd. Of Bar Examiners v. G.W.L.*, 364 So.2d 454, 459 (1978).

<sup>78</sup> 11 U.S.C. § 362 (2020) (defining standard for an automatic stay). Automatic stay temporarily prohibits creditors from seeking payment. *Id.*



a break from aggressive credit collectors,<sup>79</sup> and a possible discharge.<sup>80</sup> An automatic stay halts creditors from collecting debts and “immediately stops most civil lawsuits filed against [a debtor].”<sup>81</sup> Filing for bankruptcy also prevents aggressive creditors from consuming all of a debtor’s assets.<sup>82</sup> A discharge prohibits creditors from later seeking payments on all dischargeable debts.<sup>83</sup> Filing for bankruptcy affords creditors the opportunity for fair and equitable dealings.<sup>84</sup> When dispersing available funds to creditors, the court prioritizes secured creditors and uses a pro rata distribution<sup>85</sup> to ensure all participating creditors receive their fair share of available funds.<sup>86</sup>

For years, elderly have been easy targets for classic scams like credit card fraud, predatory lending, and financial exploitation.<sup>87</sup> These scams are as simple as tricking someone into registering for a credit card with higher-than-usual interest rates.<sup>88</sup> Scams targeting

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<sup>79</sup> Cara O’Neill, *When a Creditor Tries to Lift (Remove) the Automatic Stay*, NOLO (last visited April 13, 2022), <https://www.nolo.com/legal-encyclopedia/creditor-lift-remove-bankruptcy-automatic-stay.html>.

<sup>80</sup> 11 U.S.C. § 524 (defining standard for a possible discharge).

<sup>81</sup> Cara O’Neill, *How Bankruptcy Stops Your Creditors: The Automatic Stays*, NOLO (last visited April 13, 2022), <https://www.nolo.com/legal-encyclopedia/how-bankruptcy-stops-creditors-automatic-29723.html>. There are approximately twenty-eight exemptions for an automatic stay. 11 U.S.C. § 362.

<sup>82</sup> O’Neill, *supra* note 79.

<sup>83</sup> 11 U.S.C. § 727 (2020) (defining process to receive a discharge). While more debts are dischargeable, certain debts that are non-dischargeable. § 523(a).

<sup>84</sup> *Chapter 11 – “101”*, column, AM. BANKR. J. (Jul/Aug. 2004), <https://www.abi.org/abi-journal/chapter-11-101>. By filing for bankruptcy, creditors can no longer “race to the courthouse” and consume all of a debtor’s estate leaving nothing for others. *Id.*

<sup>85</sup> *Id.* Pro rata distribution ensures that each creditor receives a proportionate share of the estate. *Id.* For example, if a debtor has \$500,000 of debt and one creditor is owed \$100,00. *C.f. Id.* That means the creditor would be entitled to one-fifth of a debtor’s available funds. *See Id.*

<sup>86</sup> 11 U.S.C. § 726(b) (2020) (explaining when distribution of a debtor’s estate should be made pro rata).

<sup>87</sup> *See* 145 Cong. Rec. S3457, S3499 (daily ed. March 25, 1999) (statement of Sen. Tom Daschle (D-S.D.), discussing the 1999 Seniors Safety Act) (explaining, “[s]eniors are often targeted by criminals because of their lack of mobility, isolation, and dependence on others”).

<sup>88</sup> Donna S. Harkness, *When Over-the Limit is Over the Top: Addressing the Adverse Impact of Unconscionable Consumer Credit Practices on the Elderly*, 16 ELDER L.J. 1, 19 (2008).

elderly are on the rise,<sup>89</sup> and victims are unlikely to seek help.<sup>90</sup> “Low income, limited education, health problems, fear of dying, limited mobility, loneliness, and isolation contribute[s to their likelihood to ask for help].”<sup>91</sup>

While elderly could file for bankruptcy, seek government assistance,<sup>92</sup> or rely on a federal enactment, “[e]xisting laws are incapable of effectively addressing the sheer volume and staggeringly sophisticated methodologies employed by telemarketers, who pose a particular problem for the elderly.”<sup>93</sup> Given these gaps, the bankruptcy process needs extra protection for elderly, an *enhanced fresh start*.

## B. Financial Protection Enactments

There are several financial protections enacted to aid vulnerable individuals like the elderly. This section discusses the: (a) Fair Debt Collection Practices Act; (b) Social Security; (c) Medicaid, Medicare, & the Affordable Care Act; and (d) Reverse Mortgages. While these protections can aid elderly, they often times fall short, leaving elderly in difficult financial situations.

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<sup>89</sup> Steven Harrass, 'Romance,' other financial scams targeting elderly surge, FinCEN says, 2019 CQBNKRPT 0870 (last visited April 13, 2022) (explaining Suspicious Activity Report (SAR) filings of elder financial exploitation filed by banks, brokerages, credit unions, and money services businesses increased from 2,000 per month in 2013 to nearly 7,500 per month in August 2019).

<sup>90</sup> *Frauds Against the Elderly: Boston, Mass.: A Briefing by the Select Committee on Aging*, H.R. Comm. Pub. No. 309, 97th Cong., 1st Sess., at 132, § 7:2 (1981).

<sup>91</sup> Joan M. Krauskopf et al., *Elderlaw: Advocacy for the Aging* § 7:2, 215 (2d ed.) (2d ed. 1993).

<sup>92</sup> *Government Benefits*, USA.GOV (last visited April 13, 2022), <https://www.usa.gov/benefits> (explaining the requirements needed to qualify for government assistance).

<sup>93</sup> Nathalie Martin, *Consumer Scams and the Elderly: Preserving Independence Through Shifting Default Rules*, 17 ELDER L.J. 1, 3 (2009).

### 1. *Fair Debt Collection Practices Act*

The Fair Debt Collection Practices Act (FDCPA)<sup>94</sup> was enacted in March 1978.<sup>95</sup> FDCPA's purpose is "to eliminate abusive, deceptive, and unfair debt collection practices."<sup>96</sup> To try to eliminate deceptive practices, FDCPA includes provisions like prohibiting creditors from calling debtors late at night or early in the morning.<sup>97</sup> Creditors also cannot falsely represent themselves to customers.<sup>98</sup> "FDCPA applies only to the collection of debt incurred by a consumer primarily for personal, family, or household purposes."<sup>99</sup> To enable FDCPA, there must be a transaction<sup>100</sup> that obligated a payment.<sup>101</sup> To avoid violating FDCPA, creditors must send written notice within 120 hours of first contact.<sup>102</sup> Although FDCPA is great in theory, it limits individuals to a maximum of only \$1,000 in damages and attorney's fees and, ultimately, does not prohibit the collection from continuing.<sup>103</sup>

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<sup>94</sup> See generally *Fair Debt Collection Act*, Pub. L. No. 111-203, 124 Stat. 2092 (2020).

<sup>95</sup> *Fair Debt Collection Act*, CONSUMER COMPLIANCE HANDBOOK, 1 (last accessed April 11, 2021), <https://www.federalreserve.gov/boarddocs/supmanual/cch/fairdebt.pdf>.

<sup>96</sup> *Id.* The FDCA, "protects reputable debt collectors from unfair competition and encourages consistent state action to protect consumers from abuses in debt collection."  
*Id.*

<sup>97</sup> *Id.* For example, it would be unreasonable for a creditor to call a debtor at three o'clock in the morning. *Id.*

<sup>98</sup> See generally *Fair Debt Collection Act*, *supra* note 95, at 2-3.

<sup>99</sup> *Fair Debt Collection Act*, *supra* note 95 at 1. An example of a recoverable debt under FDCPA includes a debt incurred by a reciprocal service arrangement. *Id.*

<sup>100</sup> A transaction is, "some kind of business dealing or other consensual obligation." *Oppenheim v. I.C. Sys., Inc.*, 627 F.3d 833, 838 (11th Cir. 2010) (quoting *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1371 (11th Cir. 2010)).

<sup>101</sup> *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d at 1371 (11th Cir. 1998); *Aluia v. Dyck-O'Neal, Inc.*, 205 So.3d 768, 773 (Fla. 2d DCA 2011).

<sup>102</sup> *Debt Collection FAQs*, FTC CONSUMER INFORMATION (March 2021), <https://www.consumer.ftc.gov/articles/debt-collection-faqs>. Written notice must include the creditor's name, amount of debt, and list steps an individual can take if they believe this notice was a mistake. *Id.*

<sup>103</sup> *Id.*

## 2. Social Security

Almost all Americans will benefit from Social Security.<sup>104</sup> The Social Security Act was established in 1935.<sup>105</sup> Originally, social security was geared towards a limited group,<sup>106</sup> but now it supplements the income of the retired and disabled and deals with death benefits.<sup>107</sup>

Today, individuals pay for social security through taxes withheld at work.<sup>108</sup> Once someone reaches full retirement age,<sup>109</sup> they can begin collecting monthly checks.<sup>110</sup> Individuals can receive social security early by either qualifying for early eligibility<sup>111</sup> or disability benefits.<sup>112</sup> A major benefit of social security is that it is one of the hardest incomes for a creditor to attack.<sup>113</sup>

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<sup>104</sup> See generally Strengthening Protection for Social Security Beneficiaries Act of 2018, Pub. L. No. 115-165, 115 Stat. 4547 (2018) (demonstrating governments continual support for Social Security). “As of June 2021, about 180 million people worked and paid social security taxes and about 65 million people received monthly social security benefits”; *Understanding the Benefits*, SSA.GOV (Jan. 2022) 1,1, <https://www.ssa.gov/pubs/EN-05-10024.pdf>.

<sup>105</sup> 42 U.S.C.A. § 301 (1935) (enabling each state to create Social Security Guidelines).

<sup>106</sup> West’s Florida Practice Series: § 8:5, Social Security and the Florida Workers’ Compensation Law (2020) (finding social security benefits use to provide for public health workers, vocational rehabilitation, maternal and child welfare).

<sup>107</sup> *Id.*

<sup>108</sup> See generally Zhe Li *The Social Security Retirement Age*, CRS REPORT, Congressional Research Services (last updated Jan. 8, 2021), <https://fas.org/sfp/crs/misc/R44670.pdf>.

<sup>109</sup> *Id.* at 1. In 2021, full retirement age is, 66 and 10 months for workers who become eligible for retirement in 2021. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* Early eligibility age is sixty-two. *Id.* With early eligibility age, an individual gets approximately seventy percent of their total social security. *Id.*

<sup>112</sup> See generally Li, *supra* note 108. Qualifying for disability is rare. *Id.* at 16. For example, “one study showed that more than half of workers aged 50-64 in the bottom 20% of the function ability did not receive any disability related-benefits.” *Id.*

<sup>113</sup> 11 U.S.C. § 522(d)(10)(a) (exempting debtor’s social security benefits).

While social security is a tool for supplementing income, it only covers a portion of one's income.<sup>114</sup> For example, an individual is currently making \$60,000 a year and plans to retire in May 2025.<sup>115</sup> If that person is sixty-four and ten months by 2025, they could currently receive \$1,491 per month in social security checks.<sup>116</sup> That person could wait to collect social security until May 2025 and receive \$1,645 a month.<sup>117</sup> The approximately \$150 difference could be the reason why an individual is able to maintain the payments of certain debts. Could that individual afford to live off of social security? Would that person be able to financially retire?

### 3. *Health Care for All: Medicare, Medicaid, and the Affordable Care Act*

In 1965, President Johnson signed Medicare into law, encompassing Medicare and Medicaid as Social Security amendments.<sup>118</sup> The goal was to aid Americans in obtaining affordable health care.<sup>119</sup> Medicare is funded by the federal government whereas Medicaid is funded by both the federal and state governments.<sup>120</sup>

Medicare provides health coverage for individuals over sixty-five, individuals with disabilities, or individuals with certain

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<sup>114</sup> *Social Security Benefit Amounts*, SOCIAL SECURITY (last visited March 25, 2022), <https://www.ssa.gov/oact/cola/Benefits.html>.

<sup>115</sup> *Social Security Quick Calculator*, SOCIAL SECURITY ONLINE (last visited March 25, 2022), <https://www.ssa.gov/OACT/quickcalc/index.html> (allowing individuals to calculate their estimated monthly social security checks). This calculator allows individuals to anticipate their monthly social security checks and anticipate future retirement date options. *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *1965 – The Medicare and Medicaid Act*, NATIONAL HEALTH LAW PROGRAM (last visited March 25, 2022), <https://healthlaw.org/announcement/medicare-and-medicare-act-1965-2/>.

<sup>119</sup> *Differences Between Medicare and Medicaid*, MEDICAREINTERACTIVE.ORG (last visited March 25, 2022), <https://www.medicareinteractive.org/get-answers/medicare-basics/medicare-coverage-overview/differences-between-medicare-and-medicare>.

<sup>120</sup> *Id.*

diseases.<sup>121</sup> Originally, Medicare only covered hospital bills or inpatient medical services.<sup>122</sup> Later, Medicare added outpatient service coverage.<sup>123</sup> In 1997, the Balanced Budget Act amended Medicare, “to contract with public or private organizations to offer a variety of health plan options for beneficiaries.”<sup>124</sup> In 2003, Medicare was amended to allow individuals over 65 to purchase prescription drug coverage although is only available to the elderly.<sup>125</sup>

While Medicaid provides health care to low-income individuals,<sup>126</sup> the program are different from state to state.<sup>127</sup> To receive federal funding, each state enters into a Medicaid state plan with the federal government where states outline how they plan to run their Medicaid programs.<sup>128</sup> The federal government requires states to include certain outpatient and inpatient procedures within

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<sup>121</sup> *Medicare v. Medicaid: What’s the Big Difference?*, BENEFITS.GOV (Nov. 23, 2019), <https://www.benefits.gov/news/article/384>.

<sup>122</sup> *Id.* Medicare Part A covers hospital costs including home health care, skilled nursing facility care, and inpatient hospital care. *What Part A Covers*, MEDICAIRE.GOV (last visited March 25, 2022), <https://www.medicare.gov/what-medicare-covers/what-part-a-covers>. Medicare Part B covers outpatient medical services including durable medical equipment and clinical research. *What Part B Covers*, MEDICAIRE.GOV (last visited March 25, 2022), <https://www.medicare.gov/what-medicare-covers/what-part-b-covers>.

<sup>123</sup> *Financial Management*, MEDICAIRE.GOV (last visited March 25, 2022), <https://www.medicaid.gov/medicaid/financial-management/index.html>.

<sup>124</sup> *Health Plans – General Information*, CMS.GOV (last visited March 25, 2022), <https://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo>. The 2003 amendment was renamed Medicare Part C. *Id.* Medicare Part C is optional to individuals over sixty-five, but often viewed as a better form of health care. *Who is Eligible for Medicare Part C (Medicare Advantage)?*, MEDICAL NEWS TODAY (last visited April 13, 2022), <https://www.medicalnewstoday.com/articles/medicare-part-c-eligibility>. Medicare Part C is private insurance. *Id.*

<sup>125</sup> *See generally* Medicare Prescription Drug, Improvement and Modernization Act of 2003, Pub. L. No. 108-173, 108 Stat. 1 (2004) (expanding Medicare Part D to include prescription drugs); 42 U.S.C. § 1396u-5 (2020)

<sup>126</sup> 42 U.S.C. § 1396a (2020) (explaining that state’s plan must provide benefits for low-income individuals).

<sup>127</sup> 42 U.S.C. § 1396a (2020) (explaining that state’s plan must provide benefits for low-income individuals).

<sup>128</sup> 42 U.S.C. § 1396w(a)(1) (2020) (explaining Medicaid funding).

their Medicaid programs.<sup>129</sup> The Center for Medicare & Medicaid Services (CMS) approves any amendments to a state's plan.<sup>130</sup>

In Florida, individuals qualify for Medicaid if they are low-income and classify as over 65, pregnant, responsible for a minor, disabled, blind, or have a disabled individual inside their household.<sup>131</sup> If eligible, recipients will likely enroll in a statewide Medicaid Management Program.<sup>132</sup>

On March 23, 2010, the Affordable Care Act (ACA), known as "Obamacare," was signed into law.<sup>133</sup> The ACA was created to aid in the protection of patients and provide affordable healthcare to all.<sup>134</sup> Originally, all citizens without healthcare were required to subscribe to the ACA or would receive a tax penalty.<sup>135</sup> However, today qualified individuals have a choice to join the ACA without any tax penalties.<sup>136</sup>

#### 4. Reverse Mortgages

Reverse mortgages are a special exception Congress enacted solely for elderly.<sup>137</sup> They are tools to aid elderly who have equity

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<sup>129</sup> *Medicare v. Medicaid: What's the Big Difference?*, *supra* note 121.

<sup>130</sup> 42 U.S.C. § 1396a, *supra* note 126.

<sup>131</sup> *Florida Medicaid*, BENEFITS.GOV (last visited March 25, 2022), <https://www.benefits.gov/benefit/1625> (outlining Florida's Medicaid eligibility requirements).

<sup>132</sup> *Health Plans and Programs*, STATEWIDE MEDICAID MANAGED CARE (last visited March 25, 2022),

<https://www.flmedicaidmanagedcare.com/health/comparehealthplans>. Statewide Medicaid Management Programs often aid recipients in three areas: (1) Medical Assistant; (2) Long Term Planning; and (3) Dental Insurance. *Id.*

<sup>133</sup> *See generally* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 111 Stat. 3590 (2010).

<sup>134</sup> *History and Timeline of the Affordable Care Act*, EHEALTH (last updated Oct. 24, 2020), <https://www.ehealthinsurance.com/resources/affordable-care-act/history-timeline-affordable-care-act-aca> (explaining the original purpose of Obamacare).

<sup>135</sup> *See generally* National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) (explaining the tax penalty originally mandated in the Affordable Care Act).

<sup>136</sup> Pallavi Suyog Utterak, *Is Obamacare Still Active?*, MEDICINENET (Nov. 23, 2020), [https://www.medicinenet.com/is\\_obamacare\\_still\\_active/article.htm](https://www.medicinenet.com/is_obamacare_still_active/article.htm). (explaining the Affordable Care Act was originally passed through the Reconciliation Act).

<sup>137</sup> 15 U.S.C. § 1648 (2020) (explaining the general process of reverse mortgage).

within their homes but lack liquid assets.<sup>138</sup> “Reverse mortgages are designed to allow elderly homeowners to borrow money against the accumulated equity in their homes.”<sup>139</sup> Elderly individuals do not have to pay back the mortgage unless certain events occur.<sup>140</sup> A consequence of reverse mortgages is that individuals lose assets that could be passed down to their heirs.<sup>141</sup>

Three types of reverse mortgages are single-purpose reverse mortgage,<sup>142</sup> proprietary reverse mortgage,<sup>143</sup> and home equity conversion mortgage.<sup>144</sup> These mortgages allow individuals to turn their homes into a stream of income.<sup>145</sup>

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<sup>138</sup> Celeste M. Hammond, *Reverse Mortgages: A Financial Planning Device for the Elderly*, 1 ELDER L. J. 75, 76 (1993). To qualify for a reverse mortgage, one’s home must either be paid off or have a significant line of credit. *Id.*

<sup>139</sup> OneWest Bank, FSB v. Smith, 135 A.D.3d 1063, 1063 (N.Y. App. Div. 2016).

<sup>140</sup> *When do I have to Pay Back a Reverse Mortgage Loan?*, CFPB (last updated Aug. 30, 2019), <https://www.consumerfinance.gov/ask-cfpb/when-do-i-have-to-pay-back-a-reverse-mortgage-loan-en-236> (providing basic examples for when a reverse mortgage would have to be paid back).

<sup>141</sup> *Reverse Mortgages*, FTC CONSUMER INFORMATION (June 2015), <https://www.consumer.ftc.gov/articles/0192-reverse-mortgages>. Given that all reverse mortgages must be paid back, an heir who cannot afford the reverse mortgage would have to give up their rights to the home. *Id.*

<sup>142</sup> *Id.* Single-Purpose Reverse Mortgage are government loans used for only one purpose. *Id.* Often times, these loans tend to provide individuals with the lowest interest rate. *Id.* “For example, the lender might say the loan may be used only to pay for home repairs, improvements, or property taxes.” *Id.*

<sup>143</sup> *Reverse Mortgages*, *supra* note 141. Proprietary Reverse Mortgages are private loans that are designed by the companies that created them. *Id.* Most likely, “if you own a higher-end home, you may get a bigger loan advance from a proprietary reverse mortgage” *Id.*

<sup>144</sup> *Id.* Home Equity Conversion Mortgages (HECMs) are Federal loans issues through FHA-approved lenders. *Home Equity Conversion Mortgages for Seniors*, HUD.GOV (last visited March 25, 2022), [https://www.hud.gov/program\\_offices/housing/sfh/hecm/hecmhome](https://www.hud.gov/program_offices/housing/sfh/hecm/hecmhome). HECMs allow the recipient to receive a portion of their home equity dependent upon, “age of the youngest borrower or eligible non-borrowing spouse; current interest rate; and lesser of appraised value or the HECM FHA mortgage limit or the sales price.” *Id.*

<sup>145</sup> Jane Sjogren & Judith Feins, *Home Equity Conversion Through Reverse Annuity Mortgages: An Income Supplement for the Elderly*, FED. HOME LOAN BANK BOARD J., 1,15 (Jan. 1983).



Although reverse mortgages are meant to assist, they can place elderly in difficult situations.<sup>146</sup> For example, an elderly individual enters into a Single-Purpose Reverse Mortgage. The individual originally took out a \$100,000 mortgage on their home and now have \$50,000 worth of equity in the home. This means the individual has paid off \$50,000 of the original \$100,000 and now owns half of the home. Having \$50,000 worth of equity, the individual seeks a \$50,000 single-purpose reverse mortgage for needed home improvements. Two years later, the individual needs a car. Given the individual indicated their \$50,000 would go towards home improvement, they cannot use that money to purchase a car.<sup>147</sup> Unless they had paid off more money from their original mortgage, the individual could not seek another reverse mortgage on their home.

### III. Given the Vulnerabilities of the Elderly, They are in Need of More Protection

Regardless of an elderly's financial situation, they are still susceptible to financial abuse.<sup>148</sup> Although there are several enactments meant to protect the elder community, there seems to be a void within legislation which calls for reform, an *enhanced fresh start*. This section discusses four hypotheticals where Sally Mae and Daniel experience financial troubles. Each situation will show the need for true reform, an *enhanced fresh start*. An analysis of Sally Mae's financial vulnerabilities will be discussed in Part A. Following, an explanation of why Sally Mae is susceptible to predatory lending will be discussed in Part B, and an analysis of why

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<sup>146</sup> Amy Fontinelle, *5 Signs a Reverse Mortgage is a Bad Idea*, INVESTOPEDIA, (last updated Aug. 30, 2020), <https://www.investopedia.com/mortgage/reverse-mortgage/5-signs-reverse-mortgage-bad-idea/> (explaining that reverse mortgages prevent you from moving and might not be a good idea if you live with others).

<sup>147</sup> This example would not be an issue if the individual selected a proprietary reverse mortgage or a home equity conversion mortgage. However, if the whole \$50,000 was used at the time the mortgage was sought, this would be an issue regardless of the reverse mortgage.

<sup>148</sup> See generally *Trust Rises with Age*, NEWS IN HEALTH (Jan. 2013), <https://newsinhealth.nih.gov/2013/01/trust-rises-age> (explaining that all elderly are more likely to be trust others).

Sally Mae’s vulnerabilities to financial exploitation will be discussed in Part C. Lastly, an analysis of why Sally Mae could experience financial troubles and mountains of debt will be discussed in Part D.

A. Elderly Often have a Lower or Fixed Income than Average

*Hypothetical 1:*<sup>149</sup> Daniel was the sole provider for the family. Sally Mae spent her days caring for their children, but never returned to work. Daniel is now retired.<sup>150</sup> The two live off of a small savings,<sup>151</sup> and Daniel’s social security check.<sup>152</sup> Now, in their late seventies, Sally Mae and Daniel spend most of their time at home tending to chores. One day, while trying to fix a lightbulb, Daniel slipped and fell, causing a broken leg and serious back pain. Daniel is now left with astronomical medical bills.<sup>153</sup> The two would like to stay in their home. What can the couple do?

Any avenue Sally Mae and Daniel could take to stay in their home has their own set of hurdles. They could choose to file for

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<sup>149</sup> This is a hypothetical for the purpose of this paper.

<sup>150</sup> “U.S. Census Bureau data shows that the retirement age in the United States averages 65 for men and 63 for women.” Dana Anspach, *Average Retirement Age in the United States: Is Retiring at the Average Age a Smart Move?*, THE BALANCE (last updated Oct. 25, 2021), <https://www.thebalance.com/average-retirement-age-in-the-united-states-2388864>.

<sup>151</sup> Upon retirement, Americans will need to have more money saved up dependent on their locations. “U.S. Census Bureau data shows that the retirement age in the United States averages 65 for men and 63 for women.” *Id.*

<sup>152</sup> In 2022, the average social security check is approximately \$1,657. *How Much Will I Get from Social Security?*. AARP (last visited March 24, 2022), <https://www.aarp.org/retirement/social-security/questions-answers/how-much-social-security-will-i-get.html>.

<sup>153</sup> Given that Daniel paid into Social Security, he qualifies for Medicare. *2021 Medicare Part A&B Premiums and Deductibles*, CMS.GOV (Nov. 6, 2021), <https://www.cms.gov/newsroom/fact-sheets/2021-medicare-parts-b-premiums-and-deductibles>. However, unless Daniel chooses an advantage plan or supplemental insurance, he still has co-insurance and deductibles which will have been the reason for his large medical bills. *Id.*

bankruptcy and reaffirm any home mortgage.<sup>154</sup> However, this requires the couple to be financially able to afford a reaffirmation agreement.<sup>155</sup> They could seek a reverse mortgage, but reverse mortgages are given out sparingly and require individuals to have a significant amount of equity in the home.<sup>156</sup> Daniel and Sally Mae could ask their children for money; however, their children might be financially incapable nor willing to assist.<sup>157</sup> Lastly, Daniel and Sally Mae could seek government assistance, but government assistance is given on a case-by-case basis.<sup>158</sup> These limited choices combined with statistical backing that elderly prefer to stay in their homes,<sup>159</sup> proves a need for a true avenue for reform, an *enhanced fresh start*.

## B. Elderly are More Susceptible to Becoming Victims of Predatory Lending

*Hypothetical 2:*<sup>160</sup> Sally Mae is the primary care taker to her children and Daniel is the family's sole bread winner. Daniel had a very successful career acquiring over three million dollars in savings.<sup>161</sup> When Daniel passes away, Sally Mae suddenly contracts

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<sup>154</sup> See generally *Bankruptcy: Understanding Reaffirmation Agreements*, *supra* note 56 (describing the basic process of reaffirmation agreements).

<sup>155</sup> See generally *Bankruptcy: Understanding Reaffirmation Agreements*, *supra* note 56 (explaining that reaffirmation agreements contractually bind the individual to the original debt).

<sup>156</sup> Amy Fontinelle, *Guide to Reverse Mortgages*, INVESTOPEDIA (last updated March 16, 2022), <https://www.investopedia.com/mortgage/reverse-mortgage/>.

<sup>157</sup> While this could be a great option. One should remember that not everyone has this option.

<sup>158</sup> *Government Benefits*, *supra* note 92. There are many different government programs that Sally Mae and Daniel could apply for, such as food stamps to help alleviate daily expenses. *Id.* However, the two would first have to qualify for the program. *Id.*

<sup>159</sup> Joanne Binette & Kerri Vasold, *2018 Home and Community Preferences: A National Survey of Adults Ages 18-Plus*, AARP (last updated July 2019), <https://www.aarp.org/research/topics/community/info-2018/2018-home-community-preference.html>. Approximately three in four people over fifty want to stay in their home, but only two in four people see that as a likely possibility.

<sup>160</sup> This is a fictional hypothetical for the purpose of this paper.

<sup>161</sup> This is unlike the median bank account of an elderly which ranges between \$8,000 and \$9,300. Karen Bennet, *The Average Amount in U.S. Savings Accounts – How Does*

*Alzheimer’s disease. Sally Mae’s children petition the court to appoint a guardian for Sally Mae.<sup>162</sup> The court appointed Sarah guardianship over Sally Mae but appoints no guardian to control Sally Mae’s property. According to Sarah, Sally Mae wants to buy Sarah a house. Sarah assists Sally Mae in taking out a one-million-dollar loan with an 18% interest rate to buy Sarah a house.<sup>163</sup> Were Sarah’s actions reasonable?*

The elderly are more susceptible to fall victim to predatory lending.<sup>164</sup> Predatory lending takes place when the loaner takes advantage of the loanee, typically an elderly or an unsophisticated borrower, by trapping the individual into paying higher interest rates than normal.<sup>165</sup> Victims of predatory lending are rarely properly compensated.<sup>166</sup>

The Truth in Lending Act,<sup>167</sup> Homeownership Equity Protection Act,<sup>168</sup> and the Federal Consumer Credit Protection Act<sup>169</sup> are all Federal enactments implemented to assist in the prevention of

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*Your Cash Stack Up?*, BANKRATE (Dec. 3, 2018), <https://www.bankrate.com/personal-finance/savings-account-average-balance/>.

<sup>162</sup> FLA. STAT. § 744.102(9) defines guardian as, “a person who has been appointed by the court to act on behalf of the ward’s person or property, or both.”

<sup>163</sup> FLA. STAT. § 687.02(1) (2020) (prohibiting loans exceeding \$500,000 to have more than an eighteen percent interest rate).

<sup>164</sup> *See generally* Trust Rises with Age, *supra* note 148.

<sup>165</sup> Predatory Lending, UNITED STATES DEPARTMENT OF JUSTICE (last visited March 24, 2022), <https://www.justice.gov/usao-edpa/divisions/civil-division/predatory-lending>.

<sup>166</sup> *See generally* Katline Realty Corp., 183 So.3d 415 (Fla. 3d DCA 2014) (describing an instance in which an elderly couple feel a victim to predatory lending and the couples mortgage broker was found in violation of both the Truth in Lending Act and the Homeownership Equity Protection Act of 1994). In Florida, violating trapping an individual into an abnormal interest rate is punished by making the individual, “forfeit the entire interest rate.” FLA. STAT. § 687.04 (2020).

<sup>167</sup> *See generally* 15 U.S.C. 1601 (2020).

<sup>168</sup> *See generally* Home Ownership and Equity Protection Act Pub. L. No. 103-325, 108 Stat. 2190 (codified as 15 U.S.C. §§ 1601-02, §§1639-41).

<sup>169</sup> 15 U.S.C. 41 (2020) (outlining consumer credit protection). The Truth in Lending Act was replaced by the Consumer Credit Protection Act. *Id.*

predatory lending.<sup>170</sup> The Truth in Lending Act (TILA) requires all lenders to provide prospective clients with loan costs prior to commitment.<sup>171</sup> Once accepting the loan, the TILA allows individuals a seventy-two hour grace period to reconsider.<sup>172</sup> The Homeownership of Equity Protection Act (HOEPA) was first enacted in 1994 to amend TILA.<sup>173</sup> HOEPA was meant, “to address abusive practices in refinances and closed-end home equity loans with high interest rates or high fees.”<sup>174</sup> Its primary purpose was to safeguard borrowers who were looking to obtain a home mortgage.<sup>175</sup> The rule was amended by the Consumer Financial Protection Bureau in 2013 to further safeguard the voids in TILA and implement mandatory education classes.<sup>176</sup> At the beginning, the Federal Consumer Credit Protection Act of 1968 (FCCPA) mandated certain disclosures to the lender.<sup>177</sup> FCCPA pertains to a class of lenders including credit card companies and banks.<sup>178</sup> Since its beginning, FCCPA has since been amended to assist in prohibiting discrimination and eliminating deceitful

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<sup>170</sup> *Predatory Lending*, UNITED STATES DEPARTMENT OF JUSTICE (last visited March 24, 2022), <https://www.justice.gov/usao-edpa/divisions/civil-division/predatory-lending>. Congress wants to prevent predatory lending because there is public interest to protect not only all citizens but protect the vulnerable individuals within our society. *Id.*

<sup>171</sup> *Truth in Lending*, OFFICE OF COMPTROLLER OF THE CURRENCY, (last visited March 24, 2022), <https://www.occ.treas.gov/topics/consumers-and-communities/consumer-protection/truth-in-lending/index-truth-in-lending.html>.

<sup>172</sup> *Truth in Lending*, *supra* note 171. The seventy-two hour wait period allows a buyer time to think over their decision. *Id.*

<sup>173</sup> *See generally* Home Ownership and Equity Protection Act Pub. L. No. 103-325, 108 Stat. 2190 (codif’d as 15 U.S.C. §§ 1601-02, §§1639-41).

<sup>174</sup> *2013 Homeownership and Equity Protection Act (HOEPA) Rule*, SMALL ENTITY COMPLIANCE GUIDE 1, 5 (Jan. 10, 2013), [https://files.consumerfinance.gov/f/201305\\_compliance-guide\\_home-ownership-and-equity-protection-act-rule.pdf](https://files.consumerfinance.gov/f/201305_compliance-guide_home-ownership-and-equity-protection-act-rule.pdf).

<sup>175</sup> *What is the Home Ownership and Equity Protection Act?*, BANKRATE (last visited April 11, 2022), <https://www.bankrate.com/glossary/h/home-ownership-and-equity-protection-act/>. Therefore, the rule requires the loanee to be made of certain disclosures such as loan interest rates. *Id.*

<sup>176</sup> *2013 Homeownership and Equity Protection Act (HOEPA) Rule*, *supra* note 174 at 5.

<sup>177</sup> 15 U.S.C. 41 (2020) (outlining consumer credit protection). Disclosures include providing an information sheet with the loan interest rate. *Id.*

<sup>178</sup> Adam Hayes, *Consumer Credit Protection Act of 1968*, INVESTOPEDIA (last updated Dec. 15, 2020), <https://www.investopedia.com/terms/c/consumer-credit-protection-act-of-1968.asp>.

advertisements.<sup>179</sup> Although all these enactments mandate disclosures, they do not prevent the loan from happening.

Although these enactments attempt to prevent predatory lending on a larger scale, there are issues with effectively regulating predatory lending on a local level. For example, in Florida, “counties and municipalities may not enact or enforce ordinances, resolutions, and rules regulating financial or lending activities.”<sup>180</sup> This makes it harder to enforce on a local level.

While these enactments are meant to protect elderly from being exploited, it still does not prevent the transaction from occurring. Given these gaps, there needs to be a true avenue for reform, an *enhanced fresh start*.

### C. Elderly May Be Financially Exploited by Family Members

*Hypothetical 3:*<sup>181</sup> Sally Mae was the primary caretaker to her children. Her husband, Daniel, was the sole breadwinner. Daniel always went above and beyond to provide for their family. Sadly, in his late seventies, Daniel passed. Sally Mae and Daniel had been married for over 50 years. When Daniel passed, Sally Mae was extremely heartbroken. On the day of Daniel’s passing, their daughter, Bridget, asked Sally Mae for \$5,000 to pay off some “loans”. In a vulnerable state, Sally Mae gave Bridget the money leaving Sally Mae financially exploited.

Many elderly people, like Sally Mae, are often financially exploited, especially by those closest to them.<sup>182</sup> For various reasons, many cases go unreported leaving those elderly stranded

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<sup>179</sup> *Id.*

<sup>180</sup> 2.28 Predatory Lending, Residential Mortgage Lending: State Regulation Manual South Eastern, Florida Mortgage Lending (RML-SRSE FL 2.28).

<sup>181</sup> This is a hypothetical for the purpose of this paper.

<sup>182</sup> U.S. Trustee Program Annual Report Fiscal Year 2019, *supra* note 14.

without recourse.<sup>183</sup> Florida has implemented protections, both civilly and criminally, to help combat the abuse.<sup>184</sup> However, while protective statutes exist, financial abusers are seldomly prosecuted<sup>185</sup> and civil litigation often takes too long. Therefore, it is imperative courts consider other ways to prevent financial exploitation and provide recourse for elderly individuals like Sally Mae.

While these solutions might not all be feasible, they will hopefully spark a dialogue into the need to provide the elderly with better financial opportunities.

#### D. Mountain of Bills

*Hypothetical 4:*<sup>186</sup> *Sally Mae was the primary caretaker to her children, and Daniel was the sole breadwinner*<sup>187</sup>. *However, both Sally Mae and Daniel are currently undergoing medical treatments and their joint medical bills have skyrocketed.*<sup>188</sup> *What can be done to help Sally Mae and Daniel?*

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<sup>183</sup> While we will never know the exact number of elderly who are financial exploited on a yearly bases, the National Council on Aging indicates that, “up to five million older Americans are abused every year, and the annual loss by victims of financial abuse is estimated to be at least \$36.5 billion.” Get the Facts on Elder Abuse, NATIONAL COUNCIL ON AGING (2021), <https://www.ncoa.org/article/get-the-facts-on-elder-abuse>.

<sup>184</sup> FLA. STAT. § 825.103 (2020) (creating criminal charges for individuals who financially exploit the elderly); FLA. STAT. § 415.1111 (2020) (creating civil remedies, or the “recovery of actual and punitive damages”, for elderly exploited individuals).

<sup>185</sup> In 2019, Adult Protective Services, pursuant to the ELDER ABUSE PREVENTION AND PROSECUTION ACT OF 2017, investigated 195,459 potential instances of elder abuse over 32 states which divided equally, would total 6,108 cases per state. EAPPA Data Overview, U.S. DEPARTMENT OF JUSTICE (last updated August 30, 2021), <https://www.justice.gov/elderjustice/eappa-data-overview#NationalAdult>. Of the 6,108 cases per state, not every investigation turns out being a valid case of elder abuse. *Id.* An even smaller percentage of those cases lead to prosecutions. *Id.*

<sup>186</sup> This is a hypothetical for the purpose of this paper.

<sup>187</sup> Julie Sullivan, *supra* note 3.

<sup>188</sup> Given that Daniel paid into Social Security, he qualifies for Medicare. 2021 Medicare Part A&B Premiums and Deductibles, CMS.GOV (Nov. 6, 2021), <https://www.cms.gov/newsroom/fact-sheets/2021-medicare-parts-b-premiums-and-deductibles>. However, unless Daniel choses an advantage plan or supplemental insurance, he still has co-insurance and deductibles which will have been the reason for his large medical bills. *Id.* *Sally Mae could qualify*

Just like Sally Mae and Daniel, many elderly people who require medical attention have large medical bills and turn to avenues such as filing for bankruptcy.<sup>189</sup> Elderly people often also experience high credit card debt.<sup>190</sup> One could attribute this to their trustworthy nature or lack of technological experience.<sup>191</sup> Regardless, elderly are still susceptible to having both medical and credit card debt.

Elderly like Sally Mae and Daniel could file for bankruptcy, seek financial support, or government assistance. However, each of these options comes with their own hurdles that do not make the individual whole. This is yet another reason for a true avenue for reform, an *enhanced fresh start*.

#### IV. A True Avenue for Reform, An Enhanced Fresh Start

The elderly are in need of a true avenue for reform, an *enhanced fresh start*. As illustrated above, the elderly are more susceptible to fall victim to predatory lending, acquire mountains of debt, and be financially exploited. Although one of their options might be to file for bankruptcy, this could lead to a whole set of new problems.

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<sup>189</sup> Medical Debt: Is Our Healthcare System Bankrupting Americans?: Hearing Before the Sumbcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 11th Cong. 4 (2009) (finding that elderly are more likely to initiate a bankruptcy proceeding because of medical debt).

<sup>190</sup> Taylor Tepper, *America's Seniors In Debt: A Growing Problem*, FORBES ADVISOR (Mar. 29, 2021, 4:28 am), <https://www.forbes.com/advisor/retirement/seniors-debt-statistics/>; Greg Iacurci, *Debt Among Oldest Americans Skyrockets 543% in Two Decades*, CNBC (Feb. 26, 2020), <https://www.cnbc.com/2020/02/26/debt-among-older-americans-increases-dramatically-in-past-two-decades.html>.

<sup>191</sup> *See generally Trust Rises with Age*, NEWS IN HEALTH (Jan. 2013), <https://newsinhealth.nih.gov/2013/01/trust-rises-age> (explaining that elderly are more likely to trust someone who is scamming them); Joelle Renstrom, *Why Older People Really Eschew Technology*, SLATE.COM (July 13, 2020 9:00 AM), <https://slate.com/technology/2020/07/seniors-technology-illiteracy-misconception-pandemic.html> (explaining the technological deficiencies of elderly).



To rectify the lack of options, the State and Federal Legislature need to work together.<sup>192</sup> One solution could be to provide training to government officials that are likely to encounter elderly during times of exploitation. Given that bankruptcy courts deal with people in poor financial situations, it could be beneficial to mandate government training to help spot financial exploitation of elderly. The Bankruptcy Courts and the Bankruptcy Bar Associations could provide training to government officials and bankruptcy lawyers to help spot elderly debtors who are being financially exploited. The Bankruptcy Courts could also consider working with Florida's Adult Protective Services to provide victims with additional resources. For example, those able to help guide the elderly might be unaware that the State of Florida will assist victims of elderly abuse by providing them with on-going services to allow them to live as independent of a life as possible.<sup>193</sup>

Second, the *enhanced fresh start* could also look to better educate elderly in common scams and exploitations. To greater understand how many elderly people financially struggle each year, the Bankruptcy Courts could recommend the expansion of research to the Consumer Bankruptcy Project database or the U.S. Trustee's Office. Although not openly available to any researcher, the Consumer Bankruptcy Project does collect the age of filers who voluntarily complete their survey.<sup>194</sup> The U.S. Trustee's Office also already collects data on Bankruptcy filers, which is readily accessible to any researcher.<sup>195</sup> Therefore, Bankruptcy Court could recommend to either the U.S. Trustee's Office or the Consumer Bankruptcy Project to collect more data on elderly filers.

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<sup>192</sup> For example, Florida legislature can work to make predatory lending consistent. Florida legislature could eliminate the "counties and municipalities may not enact or enforce ordinances, resolutions, and rules regulating financial or lending activities." 2.28 Predatory Lending, Residential Mortgage Lending: State Regulation Manual South Eastern, Florida Mortgage Lending (RML-SRSE FL 2.28).

<sup>193</sup> Adult Protective Services, FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES (last visited April 13, 2022), <https://www.myflfamilies.com/service-programs/adult-protective-services/protecting-vulnerable-adults.shtml>.

<sup>194</sup> CONSUMER BANKRUPTCY PROJECT (last visited April 13, 2022), <http://www.consumerbankruptcyproject.org/>.

<sup>195</sup> Bankruptcy Data & Statistics, U.S. DEPARTMENT OF JUSTICE (last updated Nov. 17, 2021), <https://www.justice.gov/ust/bankruptcy-data-statistics>.

Lastly, the Bankruptcy Courts could provide more tailored training to elderly debtors to help make them aware of their financial vulnerabilities. The Bankruptcy Courts could work with places such as Adult Protective Services to hopefully reduce the number of elderly who file for Bankruptcy. This preventative training could help fill the educational void several elderly experience in relation to their finances.

These are just some potential ways in which Bankruptcy Courts could help individuals like Sally Mae. While these solutions might not all be feasible, they will hopefully spark a dialogue into the much-needed true avenue for reform, an *enhanced fresh start*.

## V. Conclusion

As illustrated, there are many financial vulnerabilities experienced by elderly today. Hence, it is time to establish a true avenue for reform, an *enhanced fresh start* by beginning to spark a dialogue.

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