THE PARALLEL HEAD TAXES OF MARGARET THATCHER AND BARACK OBAMA: ECONOMICS AS MORALITY AND ITS POPULIST REJECTION

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ABSTRACT

The legacies of Margaret Thatcher and Barack Obama are alike intertwined with failed per capita taxes: Thatcher's infamous local government poll tax and the individual mandate tax at the heart of Obama's signature healthcare reform. Examining these two taxes together reveals that—despite the pronounced differences between the two political leaders—both taxes were conceived, enacted, met with virulent popular opposition, and ultimately repealed under remarkably parallel processes. Both taxes arose out of essentially the same economic idea, and in fact, this animating idea originated from the same small network of think-tank economists in both cases. Crucially, economic theory served as both the technical basis and the moral justification for the taxes. The Thatcher poll tax was morally justified as necessary to increase local government "accountability," defined economically such that an accountable government is one where all citizens equally bear the full marginal cost of local government spending increases. Likewise, the moral basis of the individual mandate tax was "responsibility," defined in economic terms such that a responsible person is one who bears the marginal cost imposed on society by their decision not to purchase health insurance.

Neither Thatcher nor Obama conceived of or initially supported their respective per capita taxes, which instead arose from small, relatively isolated groups, heavily influenced by academic economists. Accordingly, the taxes were designed to fit abstract economic theories crafted by experts, with little regard for popular opinion or practical and historical experience. Not surprisingly, the taxes proved highly unpopular and hard to implement, imposing heavy political costs on Thatcher, Obama, and their respective parties. Despite the intense opposition from the populace, the major opposition parties initially either supported or at least accepted the taxes,

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only opposing them after popular anger became undeniable. The real fault lines that emerged were between the establishment political class and the majority of the electorate. This division was characterized by a preference for expert administration based on science—especially neoliberal economic theory—on the one hand, and a preference for popular sovereignty informed by traditional notions of fairness on the other. Popular perceptions of unfairness were amplified by the regressive nature of the taxes, and I argue that regressivity was a logical consequence of the economic theories undergirding the taxes.

I. INTRODUCTION

John Maynard Keynes famously opined that "[p]ractical men, who believe themselves to be quite exempt from any intellectual influences, are usually slaves of some defunct economist."[1] This article explores how two diametrically different heads of government, Margaret Thatcher and Barack Obama, found themselves fulfilling Keynes' aphorism as each—unknowingly influenced by disciples of F. A. Hayek—enacted regressive, capitation-style head taxes. In the Thatcher government, it was the infamous poll tax or "community charge," imposed as the centerpiece of a local government tax overhaul. For Obama, it was the equally euphemistic "shared responsibility payment," the tax or penalty enforcing the individual mandate at the heart of his signature healthcare reform: the Patient Protection and Affordable Care Act (ACA), popularly known as "Obamacare."[2] For each, the result was popular disapproval and protest, leading to heavy political costs and the repeal of the tax. Yet neither of these talented politicians started out in favor of such taxes, and indeed their political instincts were initially against them. Each leader enacted the tax in the course of pursuing a larger policy goal; Thatcher sought to abolish an unpopular local government property tax, and Obama hoped to increase health insurance coverage. In each case, external circumstances combined to create momentum for reform before each leader had a concrete plan of their own. Into this void stepped economists, shaping the policy of both Thatcher and Obama in remarkably parallel processes. Despite the fact that the two cases are separated by decades of time, took place in two different countries, and happened under leaders of very different political ideologies, the intellectual foundation of both taxes can be traced back to the same small network of Scottish economists, animated by Hayekian economic theories.

The juxtaposition of these two parallel processes occurring in quite different environments produces fascinating insights about public policies founded in economic theory. In isolation, it has been too easy for Thatcher

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[1] JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 383 (1935).

[2] For simplicity, I will hereafter generally refer to the U.K. tax as the "poll tax," as it was most commonly known. I will refer to the tax that enforced the individual mandate under Obamacare as the "individual mandate tax," although it was simultaneously called a fine, penalty, and payment. Likewise, I will refer to the ACA by its popular appellation "Obamacare." While some may object to characterizing the Obamacare individual mandate tax as a capitation or head tax, such objection should not imperil my main arguments, which merely require the reader to accept the tax as a relatively uniform payment employed in order to create economic incentives.

critics to characterize the poll tax as the result of a malicious desire to hurt the poor and help the rich, based on the prevalent media caricature of Thatcher as the "wicked witch." But a more careful assessment takes into account her undeniable political instincts and asks how she could adopt such a disastrously unpopular policy after a long string of popular successes. Likewise, thinking about the individual mandate tax at the heart of Obamacare is easily obscured by the divisive politics and strong emotions surrounding the American healthcare debate. Putting the two cases together allows us to identify a common dynamic at the heart of both reforms, causing each to assume a similar form. We see that despite the differences in political ideologies, time periods, and national political systems, both reforms shared a common theoretical-economic underpinning. In each case, the economic justification for the policy also became the moral justification. Thatcher and her team called it "accountability" while the Obama administration labeled it "responsibility." Despite the different names, both were defined to mean that it is not only inefficient but also morally wrong for people to make choices for which they do not bear the proper monetary price.

When it becomes clear that both reform efforts were founded on the same abstract economic theory—and indeed that the animating idea in both cases arose in part from the same small network of Hayekian economists, as we shall see, then the application of this theory in two distinct environments can be viewed as a useful natural experiment. The theory is held constant, but applied in two different countries, separated by decades of time, with differing political systems, and governed by a prominent figure of the political right in one case and of the left in the other. Obviously, each outcome was the result of many unique historical circumstances and personalities, and it will likely be a long time before we see another attempt at a capitation tax. However, these cases still offer generalizable lessons for students of tax policy today, and more importantly, they produce timely insights that transcend tax policy and speak to a larger phenomenon. Each of these taxes represents the imposition of a policy based on what I call "economics-as-morality," and in each case this resulted in widespread popular anger against the political establishment. As such, they offer clues that help us understand the disruptive phenomenon roiling the globe today whereby populist movements increasingly reject establishment political parties and policies.[3]

In the case of both the United Kingdom ("U.K.") poll tax and the individual mandate tax, the attempted reform revealed deep divisions not between major governing parties but rather between the political establishment and the majority of the electorate. In the U.K., the opposition Labour Party made almost no effort to oppose the poll tax, which was principally defeated by grassroots popular movements. In the United States, the individual mandate tax undergirding Obamacare enjoyed broad bipartisan support among the establishment before popular disapproval erupted. In both places, the popular opposition was visceral and swift,

[3] Obvious examples today include "Brexit" in the U.K. and the election of President Donald Trump in the U.S. This phenomenon extends to increasing gains of far right and far left political parties in nearly all of Europe and Latin America (most notably the election of Andres Manuel Lopez Obrador in Mexico and Jair Bolsonaro in Brazil).

transcending conventional party lines. Both cases examined here illustrate how neoliberal economic ideas came to be adopted across the political spectrum among the educated elite, but how these same ideas resulted in rejection and dissatisfaction among the wider populace. Because the rift between the bipartisan political establishment and the electorate arose from the same dynamic in both instances, and because this dynamic as well as the resulting rift have only strengthened since, these two cases represent precursors that help explain today's growing populist movements.

Besides the instinctive popular distaste for the economic-based reforms studied here, I identify two more specific reasons contributing to the unpopularity of policies founded in economic theory. First, in both cases, insulated policymaking groups first attempted to formulate elegant, abstract theories and then to apply these theories directly. This caused policymakers to ignore the wisdom available from practical and historical experience. In both cases, voices with practical experience warned about the consequences of the per capita taxes, but these warnings were ignored. In both cases, the attempt to impose a top-down, theoretically-derived solution was rejected by bottom-up movements motivated by traditional ideas about fairness. These cases relatedly highlight how a governance philosophy based on policymaking by scientific experts with superior theoretical knowledge is vulnerable to a form of presentism that overestimates present knowledge and discounts historical experience. In both cases policymakers failed to look at historical precedents warning against their chosen policies. The exclusion of practical and historical perspectives greatly contributed to the myriad problems and mistakes involved in the implementation of both policies, increasing popular disapproval and loss of confidence in government.

Second, the economic theories motivating the reforms naturally led them to impose taxes that were regressive. In each case, taxes were designed not primarily as a means of raising revenue, but of shaping behavior. Under this paradigm, it is difficult to argue against regressive taxes so long as those taxes best create the incentives for the desired behavior. Indeed, when the policy primarily targets a relatively poorer demographic as it did in both the U.K. poll tax and the U.S. individual mandate tax, then taxes disproportionately burdening lower income groups are a natural result. Although they may be more efficient from an economic perspective, such taxes violate traditional notions of equity and are therefore unpopular. Stated more broadly, economic theories often do not contain within themselves any moral principle capable of protecting the weak against the strong, winners against losers. This is less of a problem when there is another force or institution supplying and enforcing such moral principles, and economic theory is merely an instrument in service of an externally-supplied end. But when economic theory becomes the driving force behind a policy, it can become the end as well as the means, and a contest where the strong dominate the weak is the likely result. While economists and policymakers do not intend this result, and indeed it likely violates their own normative beliefs, they tend to reason that the regressive features will be compensated for elsewhere through a different policy lever. However, this will not be the case when those policy levers are also animated by economic theory. As there is considerable pressure across the globe toward more regressive taxation, understanding these dynamics is useful.[4] For opponents of regressive taxation, the successful resistance in these cases offers lessons; for advocates of regressive taxation, these cases argue against direct, visible taxes and in favor of less perceptible indirect taxes. This article will explore these concepts in depth.

The remainder of this article will proceed as follows. Section II describes the relevant history of the Thatcher government's enactment of a poll tax, known as the community charge, and Section III does the same for the adoption of the individual mandate tax, or shared responsibility payment, in the U.S. In both cases, I cannot hope to give a complete history adequately covering all of the important people and events, and I refer the reader to the excellent sources already available in this vein.[5] Instead, I maintain a focus on how the key economic idea in each case came to shape the ultimate policy. Then in Section IV, I discuss the important common themes and lessons that emerge, including the relative unanimity of the bipartisan political establishment in contrast to the real division occurring between the establishment and the electorate; how this division arose out of the policies' basis in economic theory where economics supplied the moral as well as the technical justification for the policies; and how the division was exacerbated first by the preference for abstract, theoretical policymaking over practical and historical experience, and finally by the regressive impact of both taxes.

II. THATCHER'S COMMUNITY CHARGE

A. BACKGROUND: ANTI-RATES MOMENTUM

Margaret Thatcher and her Conservative Party Government began the process leading to the poll tax in a state of understandable overconfidence. Large election victories in 1983 and 1987 had accompanied the U.K.'s "economic miracle" and victory in the Falklands war.[6] Even radical reforms that had initially been unpopular, most notably privatization, had afterwards been accepted by the electorate.[7] Immediately prior to the poll tax process,

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[4] *See, e.g.*, Bret N. Bogenschneider, *The Taxing Power After Sebelius*, 51 WAKE FOREST L. REV. 101, 129 (2017) ("neoclassical economic theorists, who often advise sitting U.S. Presidents and members of Congress on tax policy, generally believe that regressive forms of taxation levied on workers are more efficient and preferable for the economy") (citing F*undamental Tax Reform: Hearing Before the H. Comm. on Ways & Means*, 106th Cong. 108 (2000) (statement of Gilbert E. Metcalf, Professor of Economics, Tufts University)); Edward J. McCaffery, *The Death of the Income Tax (or, the Rise of America's Universal Wage Tax)*, 95 IND. L. REV. (forthcoming 2020) (arguing that taxes intended to reach wealth, the income, corporate income, and estate taxes, are gradually dying and morphing into more regressive wage taxes).

[5] For the poll tax, see DAVID BUTLER ET AL., FAILURE IN BRITISH GOVERNMENT: THE POLITICS OF THE POLL TAX (1994) (the best comprehensive account of the poll tax); CHARLES MOORE, MARGARET THATCHER: THE AUTHORIZED BIOGRAPHY (1st ed. 2013) (containing insights from many interviews conducted by the author with key players); MARGARET THATCHER, THE DOWNING STREET YEARS (1st ed. 1993). For the ACA, see STEVEN BRILL, AMERICA'S BITTER PILL: MONEY, POLITICS, BACKROOM DEALS, AND THE FIGHT TO FIX OUR BROKEN HEALTHCARE SYSTEM (2015) (the most comprehensive account); THOMAS DASCHLE & DAVID NATHER, GETTING IT DONE: HOW OBAMA AND CONGRESS FINALLY BROKE THE STALEMATE TO MAKE WAY FOR HEALTHCARE REFORM (1st ed. 2010) (for an insider perspective).

[6] BUTLER ET AL., *supra* note 5, at 5.

[7] *Id*. at 57–58.

Thatcher had triumphed against one of the most powerful trade unions in the country with the defeat of the "Scargill miners'" strike.[8]

Seemingly unstoppable, Thatcher turned her sights to what had become the last bastion of political and financial strength for the left, local government, and specifically to the unpopular form of property taxes that financed local government, known as "the rates" or "rating system." The rates were assessed on the "notional rental value" of domestic residences combined with similar assessments on commercial property and a highly complicated system of central government grants, which supplied the revenues for local government.[9]

In the U.K.'s unitary state, the local governing authority is known as a "council" and is primarily responsible for the provision of a wide array of services such as education and sanitation.[10] The rating system funding these services had long been unpopular, yet had proved difficult to reform due to the lack of more attractive alternatives. However, circumstances in the mid-1980s combined to produce special momentum for action.

There were two important factors driving calls for reform related to the ability of municipalities under the rating system to tax and spend somewhat independently of the central government. First, this was seen as a major impediment to the Thatcher government's goal of reducing aggregate state spending.[11] Second, this allowed municipal governments to serve as independent sources of financing for leftists who used them as bases for "extra-parliamentary" tactics and "local municipal socialism" after the Conservative takeover of the central government.[12] Indeed, the increasingly radical behavior of leftist activists at the local government level was a major factor in provoking Mrs. Thatcher's ire, probably more important than the level of spending itself.[13] In many large municipalities, leftist leaders were able to achieve huge increases in spending during the early-1980s, commonly increasing the rates at levels of 30 percent year-over-year, providing benefits to non-rate-paying voters that were paid for by the minority of property-owning, rate-paying voters.[14] Beyond providing services, this money was used to support a range of progressive causes under the leadership of charismatic figures like Ken Livingstone and "Red" Ted Knight, often in explicitly "extra-legal" fashion.[15] Most recently, Thatcher had believed local government was an important source of support for the

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[8] MOORE, *supra* note 5, at 360.

[9] *Id. at* 343; CRISTOPHER D. FOSTER ET AL., LOCAL GOVERNMENT FINANCE IN A UNITARY STATE 153–57 (1980).

[10] The focus of this paper is on the poll tax that replaced the rates rather than the rates themselves; I avoid any detailed discussion of how the rates work. The actual workings of the rates and the associated grants system are nightmarishly complicated.

[11] MICHAEL LAVALETTE & GERRY MOONEY, *"No Poll Tax Here!": The Tories, Social Policy and the Great Poll Tax Rebellion, 1987-1991*, *in* CLASS STRUGGLE AND SOCIAL WELFARE 199, 202 (2000); MOORE, *supra* note 5, at 344, 376.

[12] LAVALETTE & MOONEY, *supra* note 11, at 206 (citation omitted); MOORE, *supra* note 5, at 349.

[13] BUTLER ET AL., *supra* note 5, at 44; LAVALETTE & MOONEY, *supra* note 11, at 203; MOORE, *supra* note 5, at 348, 354 (Thatcher adviser of Oliver Letwin believes that Thatcher was "motivated even more by the behavior of left-wing extremists than by concerns about financial control").

[14] MOORE, *supra* note 5, at 343–44.

[15] *Id.* at 348 (there was an apparent shortage of clever nicknames for leftists, as Livingstone was also known as "Red" Ken).

striking Scargill miners, and the strike coincided closely with her government beginning to consider the poll tax as serious policy.[16]

The burden of increases in the rates fell hardest on the most reliable Conservative or "Tory" voters, and they vehemently protested the situation. However, the development that finally sparked a major impetus for reform was an impending revaluation in property values in Scotland that would lead to significant rate increases.[17] The Scottish revaluation created furious protests that grabbed the attention of Tory leaders, whose electoral situation in Scotland was already tenuous.[18] Property-owning Tory voters felt exploited by abusive local authorities. As one party official said: "the basis of the poll tax was the old ladies of [desirable Edinburgh neighborhood] Morningside living in six-bedroomed family houses who had no children at home and only had their bins emptied once a week."[19] The level of grassroots fury that erupted shook otherwise staid Tory leaders into action. Viscount William Whitelaw, who normally could have been counted on to urge caution and slow down any policy so radical as a poll tax, was so shaken after being heckled by constituents in his home district of Glasgow that he ever afterwards was a chief proponent of something, anything, to replace the current system.[20] And it would just so happen that exactly as the Scottish furor reached a pitch, the team Thatcher had tasked with reforming the rates was ready with a replacement: a poll tax.

Thatcher understood the importance of property owners as the base of Conservative Party support. But beyond that, she felt a special duty to protect lower middle class homeowners, with whom she most closely identified. Thatcher viewed most issues from the point of view of a proud homeowner who had scrimped and saved to acquire and improve their property.[21] She viewed them as especially vulnerable to exploitation, often making just enough money to pay the full amount of rates but too much to qualify for state benefits.[22] Given this perspective, it was natural that she should have a strong aversion to property taxes. In the words of her official biographer: "Because Mrs. Thatcher believed in property, she did not like property taxes."[23] Thatcher herself wrote: "Any property tax is essentially a tax on improving one's own home. It was manifestly unfair."[24]

Thatcher's personal dislike of the rates, combined with the anger over the Scottish revaluation and the increasing need to tackle local government financing of troublesome leftists, created in her a firm determination to get rid of the rates. However, this strong anti-rates sentiment was not matched by equivalent positive support for any replacement, certainly not for a poll tax. The replacement would be supplied by the "studies team" of policy wonks she appointed to study the issue and provide recommendations.

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[16] BUTLER ET AL., *supra* note 5, at 44.
[17] MOORE, *supra* note 5, at 356.
[18] LAVALETTE & MOONEY, *supra* note 11, at 209; Allan McConnell, *The Birth of the Poll Tax*, 10 CRIT. SOC. POL'Y 67, 69 (1990).
[19] BUTLER ET AL., *supra* note 5, at 63.
[20] *Id.* at 64; MOORE, *supra* note 5, at 357.
[21] MOORE, *supra* note 5, at 365.
[22] THATCHER, *supra* note 5, at 659.
[23] MOORE, *supra* note 5, at 343.
[24] THATCHER, *supra* note 5, at 644.

B. POLL TAX IDEA FIRST APPEARS

The years prior to the enactment of the poll tax had been characterized by repeated official commissions under both major parties to study the rates issue. These exercises, which typically reported their findings in official documents called "Green Papers," had always recommended the continued use of the rates as the least objectionable option.[25] Yet a Green Paper issued at the end of 1981 had one notable exception: among the taxes seriously discussed as alternatives to the rates was a poll tax.[26] Although not adopted at this time, a poll tax was now enshrined as an official, respectable option. Before this, a large-scale poll tax probably had not been seriously considered since the disastrous implementation of a poll tax to fight the Irish rebellion in 1641.[27] What, then, accounts for the sudden appearance of the poll tax as a respectable option in a government report?

There are two likely sources. The first is a book published during the prior year, *Local Government Finance in a Unitary State*, by Christopher Foster, Richard Jackman, and Morris Perlman, three academics at the London School of Economics.[28] Christopher Foster in particular had worked closely with officials in the Department of Environment ("D.o.E."), the ministry responsible for local government, in the late-1970s under the Labour government and "his views had been noted by key officials in the D.o.E.'s local government finance directorate."[29] The book extensively analyzed local government economics and included a section discussing the poll tax, which it praised from an economic perspective due to "the superior economic efficiency of a poll tax above other taxes based on its not being a disincentive to work . . . and [because] it does not distort how income is spent."[30] In preparing a report on local government finance, it seems impossible that officials who had worked closely with Foster would not consult the book he had written on the very subject just the year before. That the Conservative government was very aware of him and his views is further evidenced by his later invitation to officially join the team that produced the poll tax.

The other likely source of the poll tax idea was a pro-poll tax article appearing in the *Daily Mail* shortly before the 1981 Green Paper was published, written by a prominent figure in the community of U.K. think tanks, Madsen Pirie.[31] Pirie, an alumnus of St. Andrews University in Scotland, was one of three co-founders of the Adam Smith Institute, a libertarian think tank that wielded significant influence in the Thatcher government, with Pirie credited as a key figure behind Thatcher's

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[25] *See generally* DEP'T OF THE ENV'T, ALTERNATIVES TO DOMESTIC RATES (1981) [hereinafter ALTERNATIVES TO DOMESTIC RATES]; DEP'T OF THE ENV'T, RATES (1983) [hereinafter RATES]; DEP'T OF THE ENV'T, THE FUTURE SHAPE OF LOCAL GOVERNMENT FINANCE (1971); FRANK LAYFIELD, COMM. OF INQUIRY INTO LOCAL GOV'T FINANCE (1976).

[26] BUTLER ET AL., *supra* note 5, at 29. *See generally* ALTERNATIVES TO DOMESTIC RATES, *supra* note 25.

[27] BUTLER ET AL., *supra* note 5, at 13.

[28] *See generally* FOSTER ET AL., *supra* note 9.

[29] BUTLER ET AL., *supra* note 5, at 31.

[30] FOSTER ET AL., *supra* note 928, at 220.

[31] BUTLER ET AL., *supra* note 5, at 32.

privatization initiatives.[32] Although named after Adam Smith, the institute at the time derived much more of its intellectual heritage from Austrian economist F. A. Hayek, who was chairman of the Institute's advisory board. Pirie's *Daily Mail* article arose out of a discussion between Pirie and Douglas Mason, a frequent writer for the Adam Smith Institute as well as a lecturer in economics at St. Andrews University, who himself would become a strong poll tax advocate.[33] Mason was also active in the Conservative party in Scotland, where he served as a leader of the Tories on the Kirckaldy council, his local government authority in Scotland. Sir John Grugeon was yet another Adam Smith Institute fellow who was also a Tory serving as a local government leader on the Kent County Council. He, too, was a public advocate of a poll tax at this time, writing a letter in support to the *Financial Times* in November 1981.[34] Given the explicit Conservative Party connections of these figures, as well as Pirie's demonstrated influence on Thatcher's policies, it follows that their poll tax advocacy was very likely a factor in making it official government policy. Indeed, the people at the Adam Smith Institute believe that they were responsible for putting the idea on the agenda.[35] Their support, along with Christopher Foster's significant influence, was clearly crucial in first making the poll tax a respectable alternative, and then in providing the intellectual arguments that successfully guided it through the policymaking process.[36]

C. THE FORMATION OF THE STUDIES TEAM

In the summer of 1984, Thatcher was still in the midst of a battle with the striking Scargill miners (financed, she suspected, by leftist local governments) and many local governments thwarted her attempts to impose spending controls by illegally flouting central government authority.[37] At that time, Thatcher determined to tackle the local government finance issue once and for all.[38] She authorized Patrick Jenkin, Secretary of State for the Environment and the minister responsible for local government, to conduct reviews.[39] Aware that such reviews had historically accomplished nothing, Thatcher applied significant pressure for this iteration to actually bring about change.[40] Jenkin responded by tasking a relatively small team to conduct "studies" of the local government finance system and recommend reforms.[41] This new studies team was quite unusual compared to past efforts. For one, the team was allowed to work in relative isolation with little transparency.[42] William Waldegrave, the number three official under Jenkin at D.o.E., ambitiously embraced the studies team as a way to make his name, and asked

[32] *See generally* MADSEN PIRIE, THINK TANK: THE STORY OF THE ADAM SMITH INSTITUTE (2012); ECONOMY AND LOCAL GOVERNMENT (Eamonn Butler & Madsen Pirie eds., 1981).
[33] BUTLER ET AL., *supra* note 5, at 32.
[34] *Id*. at 31.
[35] Eamonn Butler, *The Rates, the Poll Tax and Council Tax*, ADAM SMITH INST. (Mar. 30, 2009), https://www.adamsmith.org/blog/tax-spending/the-rates-the-poll-tax-and-council-tax.
[36] BUTLER ET AL., *supra* note 5, at 32.
[37] *Id*. at 44, 65; MOORE, *supra* note 5, at 354.
[38] BUTLER ET AL., *supra* note 5, at 44, 65; MOORE, *supra* note 5, at 354.
[39] BUTLER ET AL., *supra* note 5, at 44.
[40] MOORE, *supra* note 5, at 351.
[41] BUTLER ET AL., *supra* note 5, at 46–50.
[42] *Id*. at 60, 67–68.

for six months to work with a team of independent minds, bypassing normal channels and reporting directly to Mrs. Thatcher.[43] The team was also notable for the heady intellectual credentials of the members recruited, and the informal relationship between the ministers and the more junior civil servants.[44] The team deliberately took on a think-tank atmosphere, operating "outside traditional civil service conventions."[45] Nearly all in the group shared outside personal connections and enjoyed unusually strong camaraderie, creating a dangerous level of intellectual homogeneity.[46]

At Waldegrave's prompting, Thatcher suggested that Lord Victor Rothschild[47] lead the studies team.[48] The aristocratic scientist had previously led an independent policy review unit within the Cabinet popularly known as "The Think Tank," where he had worked with Waldegrave.[49] Rothschild and his circle have been described as operating in a "world in which clever people bathed difficult problems in the light of reason and ate good lunches at the Capitol Hotel to discuss them."[50] Consequently, the studies team immediately took on a character of elevated intellectualism detached from the gritty realities of the world. For precisely this reason, Nigel Lawson, the Chancellor of the Exchequer who himself was excluded from the studies team, believed the invitation of Rothschild was fatal, for as Lawson put it: "Rothschild prided himself on having no political judgement: he was above that sort of thing."[51]

However, the invitation of another civilian to the team, Christopher Foster, may have proven even more fateful. Foster was one of the authors of the book on local government finance in 1980 that had first helped make the poll tax a legitimate option.[52] He was a well-credentialed economist and consultant with a reputation as a bipartisan expert on local government finance, having officially advised previous governments during the Labour administrations of Harold Wilson, including a stint with the D.o.E. during the late-1970s.[53] Foster would continue to subtly advocate for a poll tax, remaining with the team longer than any other civilian and arguably exercising more influence than any other single person.[54]

D. THE HAYEKIAN "ACCOUNTABILITY" FRAMEWORK

Foster seems to have effectively captured the process of the team from the outset, not by directly advocating for a poll tax, but by framing the issue in Hayekian economic terms such that a poll tax became the inevitable solution. Having established the criteria by which any reform should be judged, Foster "did not propose [the poll tax] as a solution particularly

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[43] WILLIAM WALDEGRAVE, A DIFFERENT KIND OF WEATHER 251 (2015).
[44] BUTLER ET AL., *supra* note 5, at 46–47.
[45] *Id.* at 58; WALDEGRAVE, *supra* note 43, at 222.
[46] BUTLER ET AL., *supra* note 5, at 50.
[47] Refers to Nathaniel Mayer Victor Rothschild, the third Baron Rothschild.
[48] WALDEGRAVE, *supra* note 43, at 224.
[49] MOORE, *supra* note 5, at 353.
[50] *Id.* at 353–54.
[51] BUTLER ET AL., *supra* note 5, at 49.
[52] *Id.* at 30.
[53] *Id.* at 49.
[54] *See, e.g.*, *id.* at 66 (of the other three outside advisors, two were opposed to the poll tax and were quickly marginalized, while Rothschild claimed to be neutral about the poll tax).

vehemently: it was simply that when the other options were ruled out one by one, Foster would explain how a per capita tax was perfectly workable."[55] So what were the criteria that, once established, pushed the team relentlessly towards a poll tax?

Almost from the beginning, nearly all the team members, official documents, and Thatcher herself, began to ceaselessly speak about the poll tax in terms of improving "accountability." This was the term Foster had been using to frame local government finance discussions for at least several years.[56] But while accountability is a broad term implying responsibility for one's actions through unspecified means, accountability began to take on a peculiar economic meaning for the studies team. Specifically, Foster argued for the poll tax "as a way of improving accountability *by ensuring that everyone paid towards the full marginal cost of a council's spending*."[57] Theoretically, any choice was acceptable—and the chooser accountable—as long as its marginal costs could be connected with an accurate price falling on the chooser. Accountability became a very technical economic concept, divorced from common understandings of the word. The redefinition of the term as a vehicle for economic ideals was a savvy move because no one could be opposed to accountability.

With this framework established, the studies team quickly adopted a consensus diagnosis of local government finance as suffering from two related flaws. The first was that "[t]hose who voted for local government were different from those who paid for it."[58] This point was clearly articulated by Thatcher herself, writing in her memoir:

> The rates became a painless tax for the large number of local electors who were not liable to pay them. But this was what made the old system defective, ultimately even dangerous. Of the 35 million local electors in England, 17 million were not themselves liable for rates, and of the 18 million liable, 3 million paid less than full rates and 3 million paid nothing at all.[59]

Thatcher believed strongly in the importance of the relationship between voting and paying for government. In fact, she had personally authored a work arguing this point, tellingly titled *Voter & Payer*.[60] If the majority of voters could vote for increases in benefits without bearing the burden of paying for those benefits, then arguably government would grow endlessly.

The second flaw in existing local government finance involved another weakness in the link between voting and paying. The problem was that even those who paid the rates had a hard time discerning how the amount of their tax bill was connected to government spending. This was because any direct relationship between the rates and local government spending was obscured

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[55] Michael Crick & Adrian Van Klaveren, *Poll Tax: Mrs. Thatcher's Greatest Blunder*, 5 CONTEMP. REC. 397, 397–403 (1991).

[56] *See generally* Christopher D. Foster & Richard Jackman, *Accountability and Control of Local Spending*, 2 PUB. MONEY 11 (1982).

[57] BUTLER ET AL., *supra* note 5, at 66 (emphasis added).

[58] *Id.* at 51–52.

[59] THATCHER, *supra* note 5, at 645.

[60] MOORE, *supra* note 5, at 354.

by the complicated system of central government grants that supplemented the rates according to labyrinthine formulas. For example, residents of a frugal local council could actually end up with a larger domestic rates bill because that council would receive a smaller central government grant.[61] The team believed that if, instead, local taxes served as an accurate price signal of the cost of local government, then voters would naturally seek to restrain government spending.[62] This would be especially true if the tax/price were borne by all voters. In contrast, under the rating system, most people were able to consume goods and services for which they did not pay, and those who actually paid did so at an inefficient and opaque price. In economic terms, the majority of voters were "free riders." Under the driving theory of the studies team, this was the antithesis of accountability.

Economist Charles Leathers was the first to illustrate how strongly this reasoning reflected the ideas of F. A. Hayek. The chief criticism of the rates as lacking a connection between voting and paying was "remarkably consistent with Hayek's criticisms of conventional public finance theory."[63] Hayek argued that representative governments are susceptible to capture by special interests because those interests can muster electoral majorities by promising benefits for the majority while shifting the cost to electoral minorities through redistributive tax systems.[64] For this reason, Hayek predicted that democratic systems would suffer from excessive growth of government. This critique parallels almost exactly the diagnosis adopted by the studies team. In their view, leftists in local government successfully won elections by promising benefits to the majority of non-rate-paying voters, while the cost was born by the minority of voters who owned homes and by business rate-payers who could not vote. In the studies team's view, this situation led to the rapidly-rising level of local government spending in the 1980s.

E. THE POLL TAX SOLUTION

Along with a diagnosis, Hayek also offered a cure. For Hayek, the key was to design taxes that operate as automatic, self-enforcing checks on spending. This would happen when voters knew in advance that they would bear a fixed share of the cost of any additional spending.[65] This was exactly the form of the solution adopted by the studies team. Indeed, an official brief to Mrs. Thatcher emphasized that the features of the proposed reform were "informed by the thrust towards disengaging central government and *establishing automatic systems*."[66] Because the problem had already been framed in Hayekian terms, it was relatively simple to argue that only a Hayekian solution would work. In the past, the idea of a fixed per capita tax had been quickly rejected due its regressive nature, difficulty of

[61] WALDEGRAVE, *supra* note 43, at 229. The grant system was devised by none other than John Maynard Keynes. *Id.*

[62] BUTLER ET AL., *supra* note 5, at 51.

[63] Charles G. Leathers, *Scotland's New Poll Taxes as Hayekian Policy*, 36 SCOTT. J. POL. ECON. 194, 194, 198 (1989).

[64] *Id.* at 197; F.A. HAYEK, THE CONSTITUTION OF LIBERTY 314 (1960).

[65] F.A. HAYEK, LAW, LEGISLATION, AND LIBERTY (VOL. 3): THE POLITICAL ORDER OF A FREE PEOPLE (1979); Leathers, *supra* note 63, at 197–98.

[66] MOORE, *supra* note 5, at 366 (emphasis added).

administration, and high likelihood of evasion.[67] However, for the studies team, these were not criteria for judgment so they did not present a problem. They were outside the model. The poll tax might be objectionable on the grounds of fairness or practicality, but it perfectly fit the Hayekian criterion that voters know in advance they will bear a fixed cost of any marginal spending increases.[68]

To put these ideas into practice, the studies team crafted a plan that put all the weight of local government spending increases on domestic taxpayers.[69] Commercial property owners would still pay the rates, but these were to be set in advance by the central government and would not be affected by local authority spending decisions.[70] Next, the central government grants were also set in advance at a fixed level.[71] The essential and final prong was to change domestic rates into a fixed charge per head, or poll tax.[72] With the other two sources of revenue fixed, any spending above the baseline levels set by the central government would have to be met entirely by increases in the poll tax.[73] The influence of Christopher Foster is clear here as this framework closely conformed to a proposal he had authored, along with Richard Jackman, in 1982.[74]

Speaking in economic terms, the studies declared that the "full marginal effect of changes in a council's spending should fall on local taxpayers".[75] In reality, the proposal was designed to aggressively multiply the marginal effect felt by local taxpayers. The new system was structured so that if a local authority spent at the level prescribed by the central government, the poll tax would pay for approximately one-fourth of the spending, with commercial rates and central government grants paying the rest. However, because commercial rates and grants were fixed, the poll tax charged to each resident would bear 100 percent of each additional dollar of spending. This meant that a 1 percent increase in spending above the baseline would result in a 4 percent increase in poll tax.[76] This aggressive form of four-to-one multiplier was bound to be painful for many taxpayers, but that was the intention. In the words of senior Thatcher official Brian Unwin: "[I]f local accountability is to be effective the consequences of excessive spending must be painful for the electorate."[77]

Another striking indication of how local government finance came to be viewed almost completely in economic terms is that the relationship between citizen and state was described purely as a consumer-provider relationship. This is perfectly embodied in the official name given to the new per capita tax: the "community charge."[78] It was not a tax to fund the government but a

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[67] BUTLER ET AL., *supra* note 5, at 23.
[68] Leathers, *supra* note 63, at 198.
[69] BUTLER ET AL., *supra* note 5, at 73.
[70] *Id*.
[71] *Id*.
[72] *Id*.
[73] BUTLER ET AL., *supra* note 5, at 89.
[74] *See generally* Foster & Jackman, *supra* note 56.
[75] BUTLER ET AL., *supra* note 5, at 58–59.
[76] CHRISTOPHER JOHNSON, THE ECONOMY UNDER MRS THATCHER, 1979–1990 138 (1991).
[77] MOORE, *supra* note 5, at 368.
[78] Despite the official name, most outside the government, and many inside, simply called it the "poll tax."

charge for the services that a voter purchased with his or her vote. This was officially the position of the government. Tasked with defending the proposed community charge in parliament, D.o.E. minister Lord Elton denied that the new tax was truly a poll tax or a tax on voting: "It is not paying to vote, . . . it is paying for the use of the services provided by a local authority. I have heard it suggested that it should be called a local service charge and not a local community charge at all."[79]

While this line of argument was intended to transform an unpopular tax into an unremarkable charge, it really represented a radical devaluation of the act of voting and the idea of citizenship. Voting was no longer an act of popular sovereignty by a citizen determining an array of political questions but a consumption decision by a customer, no different than choosing a loaf of bread at the supermarket. The official Green Paper presenting the new system stated that its purpose was "to ensure that the local electors know what the costs of their services are, so that armed with this knowledge they can influence the spending decision of their councils through the ballot-box."[80] Campaigning on a platform including the community charge, the Conservative Party's official manifesto declared, "[l]ocal electors must be able to decide the level of service they want and how much they are prepared to pay for it."[81] When the community charge was rolled out and the different figures calculated, Thatcher was even able to put specific numbers on the price of citizenship in different localities. "It costs £96 more for the privilege of living in Labour Warrington than in neighbouring Tory Trafford," she said, "£108 more in Labour Liverpool than in next-door Tory Wirral; and an appalling £339 more in Labour Camden than in adjoining Tory Westminster."[82]

One consequence of using price signals as the primary restraint on government spending is that the price must apply to everyone who votes, or the system breaks down. For this reason, no one was exempt from the community charge. The amount of the charge could be reduced based on income but never below 20 percent of the full charge amount for that locality.[83] For those living on state assistance, the amount of their support was increased by the amount of their community charge obligation so that they were no worse off but still had to undertake the act of paying the charge.[84] Although the government vehemently denied that the charge was a poll tax, in reality their economic theory required attaching a price to the act of voting—albeit a narrowly redefined act of voting. Labour Party leader Neil Kinnock could accurately quip that the government's slogan was "no representation without taxation."[85]

[79] Rodney Elton, *Statement to the House of Lords: Paying for Local Government*, 470 HL 557–68 (Jan. 28 1986), http://hansard.millbanksystems.com/lords/1986/jan/28/paying-for-local-government-green-paper.

[80] *Id*. at vii.

[81] BUTLER ET AL., *supra* note 5, at 105 (quoting CONSERVATIVE PARTY, Manifesto, *1987 Conservative Party Manifesto*, CONSERVATIVEMANIFESTO.COM, http://www.conservativemanifesto.com/1987/1987-conservative-manifesto.shtml).

[82] THATCHER, *supra* note 5, at 662.

[83] BUTLER ET AL., *supra* note 5, at 81.

[84] *Id*.

[85] *Id*. at 108.

F. APPROVAL

When Thatcher was first presented with the poll tax idea, there was "no sign that Mrs. Thatcher was immediately struck with this suggestion as the idea whose time had come."[86] She was mainly animated by a fierce determination to get rid of the rates but had never espoused or shown affinity for the idea of a fixed charge per person.[87] Her own favored solution for the local government spending problem, proposed earlier in the 1980s, had been to make local authorities hold referendums any time they wished to spend above a centrally-established threshold.[88] Thatcher lamented, however, that the proposal did not go anywhere after it ". . . drew howls of protest from local authorities and the Tory back-benchers whom they so easily influenced."[89] She even proposed the idea again during the turbulent implementation of the community charge, but once again received no support.[90] This indicates that Thatcher's instincts favored a vastly simpler policy, but the Scottish revaluation created an urgency to get something—anything—done. She concluded that "'. . . if everyone sticks to his own pet scheme, we shall not get anywhere."[91] Beyond merely bowing to expediency, though, Thatcher seems to have been genuinely converted by the economic theories underlying the community charge, and she cogently defended them to the end. The boldness of the radical proposal won her over, and it also fit with her strong belief in a link between voting and paying.[92]

After the poll tax plan was adopted by the studies team but before it had been approved by Thatcher's cabinet, it received further support in the form of a new pamphlet authored by Douglas Mason, the economist who had previously written in favor of a poll tax in 1981.[93] The pamphlet, *Revising the Rating System*, was published by the Adam Smith Institute, the libertarian-leaning think tank advised by Hayek.[94] Although Mason had no official ties to the Thatcher government or the studies team other than his status as Tory leader in his local government authority, his language and thinking were remarkably similar to those of Thatcher's government and the studies team, even labelling the poll tax a "uniform charge" that "reflects the idea that individuals' consumption of local services is roughly equal."[95]

Once the poll tax plan emerged from the studies team and it became clear that it would have Thatcher's support, the plan sailed through the Cabinet and received parliamentary approval virtually unopposed and unchanged. The chief opposition came from Nigel Lawson, the Chancellor of the Exchequer, who correctly warned that the implementation and administration of the tax would be a nightmare; leftist councils would use the phase-in of the tax to increase spending; and the starkly regressive tax

[86] MOORE, *supra* note 5, at 351.
[87] THATCHER, *supra* note 5, at 644–647.
[88] *Id*. at 643.
[89] *Id*. at 644.
[90] BUTLER ET AL., *supra* note 5, at 27 (citing KENNETH BAKER, THE TURBULENT YEARS: MY LIFE IN POLITICS 137 (1993)).
[91] McConnell, *supra* note 18, at 67–68.
[92] BUTLER ET AL., supra note 5, at 76.
[93] JOHNSON, *supra* note 76, at 136.
[94] *Id*.
[95] *Id*. (quoting DOUGLAS MASON, REVISING THE RATING SYSTEM (1985)).

would be a political disaster.[96] Officials at D.o.E. sent Christopher Foster to Treasury to try to persuade Lawson, further evincing Foster's outsized role in the process. Lawson was unmoved by Foster's arguments because, Lawson said, "[Foster is] an economist and my objection was essentially a political objection."[97] Indeed, all the objections to the poll tax plan were political and practical in nature, but the insulated group of theoretical thinkers behind the poll tax had established abstract economic criteria for themselves unrelated to such concerns. While Lawson never changed his unequivocal opposition to the poll tax, it was one tax that was not under his purview at Treasury and he was not going to force the matter if his colleagues insisted on "making fools of themselves."[98] Further, he believed that Thatcher was "fixated on the subject" and unlikely to change her mind.[99]

The only major change that occurred to the poll tax plan as it received approval and moved toward implementation was that it went from being gradually phased-in alongside the rates for several years to being immediately substituted 100 percent for the rates.[100] This was logical under the government's thinking, for if a poll tax best satisfied their Hayekian conception of the problem, then what justification could there be for delay? Of course, there were very sound practical and political reasons for delay, but the prevailing mindset was instead theoretical and abstract.

G. Rebellion

As the poll tax was rolled out first in Scotland, and then one year later in England, it sparked a violent, bipartisan eruption of anger.[101] The Tories would have liked to blame the protests and riots on the opposition to win sympathy from "law and order" voters, but the protests were against Labour-controlled councils just as much as against Conservative authorities.[102] Additionally, many of the demonstrators were not typical protesters but "patently ordinary middle-class people who were affronted by what they saw as the unfairness of the community charge."[103] What distinguished this protest movement from all the previous, unsuccessful attempts to counter Thatcher's policies was its bottom-up, almost spontaneous nature, drawing in a broad base of the electorate.[104] Some academics referred to it as the revolt of "middle England" and seasoned activists were astonished by the size of the response.[105] The several top-down efforts organized by practiced political or civic leaders to oppose the poll tax fizzled out, while the grass roots Anti-Poll Tax Unions (APTUs) came to successfully dominate the movement.[106]

The principal tactic of the APTUs was non-payment. Much of the tax evasion was spontaneous and unorganized, but the APTUs organized groups to shield non-payers from government collections efforts. For example,

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[96] *Id.* at 137; BUTLER ET AL., *supra* note 5, at 77; MOORE, *supra* note 5, at 361.
[97] BUTLER ET AL., *supra* note 5, at 77.
[98] MOORE, *supra* note 5, at 362.
[99] *Id.*
[100] BUTLER ET AL., *supra* note 5, at 110–11.
[101] *See, e.g.*, *id.* at 133–36, 149–50; LAVALETTE & MOONEY, *supra* note 11, at 200, 215–16, 219–22.
[102] BUTLER ET AL., *supra* note 5, at 150.
[103] *Id.*
[104] LAVALETTE & MOONEY, *supra* note 11, at 217–18.
[105] *Id.* at 201, 218.
[106] *Id.* at 212.

phone trees were set up to monitor sheriffs tasked with collection. Once, when a sheriff made the first attempt to seize a woman's goods in payment of the poll tax, over three hundred people arrived to prevent entry to her home.[107] In some areas, the rate of non-payment was as high as 50 percent, and in London a non-payment rate of 27 percent was typical of many areas.[108] However, efforts to calculate non-payment were hampered by the uncertainty of just how many people had failed to even register for the tax rolls.[109] Indeed, the 1991 Census of Population recorded the first decline in population in the United Kingdom in nearly two hundred years.[110] As it started to look like the poll tax would be repealed, an editorial in the *Observer* concluded, "If the Poll Tax is dead it was killed by non-payment, a tactic which each of the three main parties insisted was pointless and wrong."[111]

The anger against the poll tax culminated in massive demonstrations in Glasgow and London involving approximately 250,000 people, which quickly degenerated into a massive riot. After the rioters clashed with police in Trafalgar Square, the event was dubbed the "Battle of Trafalgar."[112] The Conservatives in general and Thatcher in particular were blamed for the riots, and the event seemed to mark a turning point in the poll tax saga.[113] The Tories suffered humiliating losses in local elections, including the loss of a safe Conservative parliamentary seat in Eastbourne, "the Jerusalem of the middle classes," where the poll tax had been almost the sole campaign issue.[114] Shortly after this rout, Michael Heseltine challenged Thatcher for party leadership, and Thatcher resigned soon after failing to win an outright victory in the leadership vote.[115] Although the new prime minister, John Major, had pledged to keep the tax, the continuing administrative train wreck and further electoral difficulties quickly led to its repeal.[116]

III. OBAMA'S SHARED RESPONSIBILITY PAYMENT

Just as the per capita "community charge" was about to be implemented in Scotland, another think tank economist, Stuart Butler, was publishing an innovative healthcare proposal across the Atlantic in the U.S. Despite working in the U.S. for the Heritage Foundation, Butler was in fact Scottish, and one of the three co-founders of the same Adam Smith Institute that had so effectively advocated for a poll tax in the United Kingdom.[117] He proposed a healthcare reform based on economic theories very similar to those undergirding the poll tax, and his ideas would survive for decades, be embraced by elites in both major U.S. political parties, and become the basis

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[107] *Id*. at 219.
[108] BUTLER ET AL., *supra* note 5, at 165, 167.
[109] *Id*.
[110] Peter Smith, *Lessons from the British Poll Tax Disaster*, 44 NAT'L TAX J. 421, 432 (1991).
[111] LAVALETTE & MOONEY, *supra* note 11, at 226–27.
[112] *Id*. at 222–23.
[113] *Id*.
[114] BUTLER ET AL., *supra* note 5, at 168 (Edward Pearce coined the nickname).
[115] *Id*.; LAVALETTE & MOONEY, *supra* note 11, at 224.
[116] LAVALETTE & MOONEY, *supra* note 11, at 224.
[117] Martin Tolchin, *Working Profile: Stuart M. Butler; Shifting Burden to the Private Sector*, N.Y. TIMES, July 22, 1985, at A10.

for Obamacare. In fact, even the official name of the legislation, "Affordable Care Act," seems to have been inspired by Butler's proposal, which he titled "Assuring Affordable Health Care for All Americans."[118]

A. BUTLER'S PROPOSAL

Writing as Director of Domestic Policy Studies at the Heritage Foundation, Stuart Butler diagnosed the U.S. healthcare system with the same fundamental flaw that the studies team had found in British local government. At its heart, the problem was a lack of clear price signals because many people received services for which they did not directly pay. Most Americans received tax-excludable health insurance benefits through their employers, making them relatively apathetic about the price and quantity of services they consumed.[119] Further, healthcare providers, knowing that patients did not directly bear the costs, tended to over-provide services where the costs outweighed the marginal benefits.[120] The most problematic group of people, though, were "free riders": the young, healthy Americans who chose not to purchase health insurance, knowing that they would not be denied emergency care if the need arose.[121] This had the effect of increasing the price of insurance for the responsible households that did purchase coverage.[122] Therefore, just as in the U.K. rating system, the problems were: (1) some people received services for which they did not pay; and (2) even for many who did pay, the connection between what they paid and what they received was so obscure that prices could not play their proper economic role.

Butler relied on an idea he called "responsibility," which was almost identical to the concept of "accountability" that drove the U.K. poll tax. Both concepts were premised on a moral obligation of individuals to pay a proper price for all the services that they consumed and for all the costs that they incurred. Butler provided an example of the prototypical irresponsible person:

> If a man is struck down by a heart attack in the street, Americans will care for him whether or not he has insurance. If we find that he has spent his money on other things rather than insurance, we may be angry but we will not deny him services—even if that means more prudent citizens end up paying the tab.

Irresponsibility was made synonymous with free-riding, and solving the free rider problem would continue to be a focus of major American healthcare reforms for decades, up to and including Obamacare. The solution to this problem for Butler, and for many who followed, was a universal mandate to purchase health insurance. Butler, like those who took up the mandate after him, devoted little space to discussing how the mandate would

[118] Stuart M. Butler, *Assuring Affordable Health Care for All Americans*, 1 J. HEALTHCARE FOR POOR & UNDESERVED 63, 63–64 (1989).
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*

be enforced but briefly proposed one mechanism: fines administered through the tax system.[123]

Two years later, another group of economists led by the Wharton School's Mark Pauly published a slightly altered version of Butler's proposal as a market-based alternative to growing calls for government-run health insurance.[124] Once again, the chief difficulty to be addressed were free-riders—or the "Evel Knievels of health insurance" as Pauly called them—and, once again, the solution was an individual mandate.[125] Like Butler, Pauly's group adopted a concept of responsibility as their moral basis, even labeling their plan "Responsible National Health Insurance." Pauly argued: "There was a kind of an ethical and moral support for the notion that people shouldn't be allowed to free-ride on the charity of fellow citizens."[126] Once again, the broad moral notion of responsibility, like accountability, was narrowed through the lens of price theory. Responsibility meant bearing the correct price for the services one consumes as well as other costs one imposes on society. Under the Pauly plan, the tax system would once again be the focus of enforcement and administration.[127]

B. Hillarycare Alternative Becomes Romneycare Basis

In 1993, Congressional Republicans officially adopted the Butler individual mandate plan as an alternative to the healthcare reform bill pushed by first lady Hillary Clinton, popularly dubbed "Hillarycare".[128] Although the bill faded away once the Clinton proposal died, it received wide Republican support, attracting twenty Republican co-sponsors in the Senate including Chuck Grassley of Iowa and future presidential nominee Bob Dole.[129] It also received the vocal support of House minority leader and future speaker Newt Gingrich.[130]

A decade after the Butler-inspired mandate idea floundered in Congress, it was resurrected by Massachusetts governor Mitt Romney, who was searching for a market-based healthcare reform plan for his state.[131] Following Butler's proposal closely, "RomneyCare," as it became known, required all residents to obtain minimum health insurance coverage or pay a

[123] Stuart M. Butler, *A Framework for Reform*, *in* A NATIONAL HEALTH SYSTEM FOR AMERICA 45, 51 (Stuart M. Butler & Edmund F. Haislmaier eds., 1989).

[124] Mark V. Pauly et al., *A Plan for "Responsible National Health Insurance"*, 10 HEALTH AFF. 5, 5 (1991).

[125] Julie Rovner, *Republicans Spurn Once-Favored Mandate*, NPR (Feb. 15, 2010, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=123670612; *see* N. C. Aizenman, *Health-Care Provision at Center of Supreme Court Debate Was a Republican Idea*, WASH. POST, (Mar. 26, 2012), https://www.washingtonpost.com/national/health-science/health-care-provision-at-center-of-supreme-court-debate-was-a-republican-idea/2012/03/25/gIQAoCHocS_story.html?noredirect=on&utm_term=.ece9f253efd8.

[126] Rovner, *supra* note 125.

[127] Pauly et al., *supra* note 124, at 12–13. Individuals who failed to obtain minimum coverage would automatically become liable for the cost of premiums under a government "fallback" catastrophic insurance plan. *Id*. Unpaid premiums would be withheld from the paychecks of employed taxpayers and would be required as part of self-employed taxpayers' estimated quarterly tax payments, subject to penalties. *Id*.

[128] JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 7–8 (1st ed. 2013); Aizenman, *supra* note 125.

[129] BLACKMAN, *supra* note 128, at 7–8; Aizenman, *supra* note 125.

[130] BLACKMAN, *supra* note 128, at 7–8; Aizenman, *supra* note 125.

[131] BRILL, *supra* note 5, at 30.

penalty to the tax authority. Romney likewise used the idea of responsibility as the moral justification for the plan. In an op-ed for *USA Today*, Romney revealed that his concept of responsibility was exactly that of Butler and Pauly: "First," he wrote, "we established incentives for those who were uninsured to buy insurance. Using tax penalties, as we did, . . . encourages 'free riders' to take responsibility for themselves rather than pass their medical costs on to others."[132] In fact, the free rider problem was an even bigger worry under Romneycare, because it required insurance companies to provide benefits significantly beyond what the Butler and Pauly plans did, notably mandating the coverage of pre-existing conditions.[133] For this reason, the individual mandate took on added significance, because without it people could simply wait to buy insurance until they became sick or injured, a financially disastrous result for insurance companies.[134]

Perhaps the most momentous aspect of Romneycare was the degree to which it attracted bipartisan support. Massachusetts Senator Ted Kennedy, a longtime healthcare reform advocate, eagerly accepted Romney's invitation to help and was instrumental in getting the bill through the Massachusetts legislature.[135] When Romney celebrated the bill's passage at an event in Boston's Faneuil Hall, he was joined onstage by Kennedy as well as a senior fellow from the Heritage Foundation, Robert Moffit.[136] In his speech, Romney thanked another Democrat who had been critical to the reform effort, MIT economist and Clinton administration veteran Jonathan Gruber. Gruber had accepted Romney's invitation to work on a market-based healthcare reform effort, and, in fact, had already been thinking about Butler's mandate plan and believed it made sense.[137] The willing involvement of figures like Gruber and Kennedy showed how much neoliberal economic ideas had come to be accepted by elites in both parties, and the bipartisan success of Romneycare established it as the favored model for healthcare reform at the national level—including and especially among Democrats.[138] In the words of former Senate majority leader Tom Daschle, who would initially lead Obama's healthcare reform efforts, "Romneycare was the game changer."[139]

C. CAMPAIGN OBAMA GIVES WAY TO PRESIDENT OBAMA

The impact of Romneycare was evident in the fact that nearly the entire field of candidates for the 2008 Democratic presidential nomination, including Hillary Clinton, campaigned on some version of the mandate plan as their healthcare platform.[140] Ironically, the only candidate besides the eccentric Dennis Kucinich opposing the mandate was Barack Obama.

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[132] Mitt Romney, *Mr. President, What's the Rush?*, USA TODAY, July 30, 2009, at 7A.
[133] Aizenman, *supra* note 125.
[134] *Id.*
[135] BRILL, *supra* note 5, at 34.
[136] *Id.* at 34–35.
[137] *Id.* at 30–31.
[138] BLACKMAN, *supra* note 128, at 10–11; Aizenman, *supra* note 125 (quoting Harvard Professor of Public Health John McDonough: "The alliance between Romney and Kennedy was of fundamental importance in terms of creating a level of confidence going into 2008 that this could actually be the bipartisan path to achieve universal health care in the United States.").
[139] BRILL, *supra* note 5, at 36.
[140] *Id.* at 18, 36.

Similar to Thatcher's initial tepidity toward the poll tax, Obama's political instincts warned him that a mandate would be highly unpopular.[141] Obama used this policy difference repeatedly to attack Hillary Clinton during the primaries. In these exchanges with Clinton, he directly challenged the idea of the "irresponsible" person at the heart of the economic argument for a mandate, based on his firsthand experiences. "As I go around town hall meetings," he said, "I don't meet people who are trying to avoid getting health care. The problem is, they can't afford it."[142] Referencing the experience of Romneycare in Massachusetts, Obama again challenged the notion of the irresponsible free-rider, arguing that ". . . folks are having to pay fines and they don't have health care. They'd rather go ahead and take the fine because they can't afford the coverage."[143]

However, after defeating Clinton and securing the nomination, Obama revealed to insiders that he had already begun to change his thinking. After replacing many of the healthcare advisers from his campaign with former Hillary Clinton staffers, Obama told one of his new advisers, domestic policy adviser Neera Tanden, "You know, I think maybe Hillary was right about the mandate. . . . I'm not going to talk about it in the campaign, but we may need it."[144] He said the same to Tom Daschle, his first choice as Secretary of Health and Human Services.[145] While the shift in positions appeared opportunistic, Obama seemed to have been genuinely persuaded by the economic logic behind the mandate. Shortly after winning the nomination, Obama had spoken to Karen Ignagni, president of America's Health Insurance Plans, the insurance industry's main lobbying group.[146] She argued that the insurers could support a reform plan that required coverage of preexisting conditions, but only if an individual mandate forced healthy people into the pool to make it economically viable.[147] Daschle, who seemed to have Obama's ear on healthcare more than anyone else, also firmly believed in the logic and necessity of a mandate to prevent free-riders.[148] Regardless of the reason, Obama abandoned his political misgivings about a mandate's unpopularity, and at least by the time of the inauguration, the mandate had become "the assumed policy" inside the Obama White House.[149]

D. The Senate Bill

Exhibiting his trademark hands-off style, Obama ceded most of the details of the reform to the Senate, where Senator Max Baucus was the first to move, with support from Ted Kennedy, terminally-ill by that time.[150] Baucus saw the Romneycare model as the blueprint for a bill that would

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[141] *Id.* at 36.
[142] Blackman, *supra* note 128, at 16.
[143] *Id.* at 20.
[144] Brill, *supra* note 5, at 61.
[145] Daschle & Nather, *supra* note 5, at 102.
[146] Blackman, *supra* note 128, at 26.
[147] *Id.*
[148] *Id.* at 27.
[149] *Id.* at 28 (quoting Princeton University professor and Clinton administration health policy adviser Paul Starr).
[150] Brill, *supra* note 5, at 80.

attract bipartisan support, and Kennedy had similarly instructed his staff to create a bill modeled on Romneycare to draw Republican support.[151] With Obama's approval, Baucus formed the "Gang of Six," consisting of three Democrats, including himself, and three Republicans, including Chuck Grassley of Iowa—who had supported the individual mandate as an alternative to Hillarycare in the 1990s—as well as Olympia Snowe of Maine and Mike Enzi of Wyoming.[152] The sudden rise of the Tea Party movement soon halted this bipartisan momentum, though, as its Republican members were taken aback by the level of opposition to the healthcare reform they encountered in tense town hall meetings over the summer recess.[153] Grassley and Snowe had at least seemed to sincerely support the initial efforts but eventually had to bow to overwhelming political pressure from their constituents.[154] In the end, though, their main contribution to the bill, beyond dozens of minor changes made at their request, was to significantly drag out and delay the process.[155] The delay would prove costly after the surprising loss of Kennedy's seat, and sixtieth vote, to Republican Scott Brown in a special election following Kennedy's death.[156]

The key figure on Baucus's staff drafting the bill was healthcare expert Liz Fowler. Her team had produced a white paper shortly after Obama assumed office.[157] The proposal was closely modeled on Romneycare, with a requirement that insurers cover preexisting conditions and a mandate for all individuals to purchase insurance coverage.[158] The paper did not discuss enforcement of the mandate, other than that it would be enforced "possibly through the U.S. tax system."[159] The insurance lobby believed a penalty would have to be quite large in order to compel enough people to sign up.[160] This view was also supported by Obama's economic team and economists such as Jonathan Gruber. They saw the mandate as the linchpin of the whole scheme, which had to be significantly harsh to tackle the ever-present free-rider problem.[161]

The views of the economic team, informed by their knowledge of economic theory, frequently clashed with those of Obama's political team, informed by experience and polling data that showed the unpopularity of a mandate.[162] The economic team, under Harvard economist and Clinton administration veteran Lawrence Summers, opposed tackling healthcare at all; but once it became clear that Obama was set on healthcare reform, the team was determined to be involved due to healthcare's economic

[151] *Id*.

[152] *Id*.; Norm Ornstein, *The Real Story of Obamacare's Birth*, ATLANTIC, July 26, 2015, https://www.theatlantic.com/politics/archive/2015/07/the-real-story-of-obamacares-birth/397742/. The other Democrats were liberal Jeff Bingaman of New Mexico, and moderate Kent Conrad of North Dakota. Enzi, the most conservative member, was suspected of primarily participating as a spy for Republican leadership. *Id*.

[153] BRILL, *supra* note 5, at 148–49; Aizenman, *supra* note 125; Ornstein, *supra* note 152.

[154] BRILL, *supra* note 5, at 135, 137.

[155] *Id*.

[156] Ornstein, *supra* note 152.

[157] BRILL, *supra* note 5, at 77.

[158] *Id*.

[159] *Id*.

[160] *Id*. at 108.

[161] *Id*. at 47. Gruber would eventually become an official consultant for the Obama administration in July, 2009. *Id*. at 136.

[162] *Id*.

importance.[163] Indeed, the lone member of the economic team who had supported tackling healthcare was Congressional Budget Office (CBO) head and, later, Office of Management and Budget (OMB) leader Peter Orszag.[164] He wanted to reform healthcare not as a way of improving coverage or health outcomes but because he saw healthcare costs as a drag on the country's struggling economy.[165] Once involved, the sole focus of the economic team was a rather Hayekian effort to implement automatic mechanisms to cut costs and control spending, but the political team—headed by Jeanne Lambrew with the support of Valerie Jarret—prioritized extending coverage and winning popular approval.[166]

The individual mandate and penalty were the natural focus of conflict between the economic and political perspectives. With the help of Olympia Snowe, New York Senator Chuck Schumer, while focused on the political imperative of midterm elections, successfully passed an amendment that eliminated the penalty in the first year and set it at only ninety-five dollars in the second year.[167] It would rise slowly from there only after the midterm elections. The move was politically savvy in light of polls showing that the mandate was unpopular, but it panicked economists like Gruber, who desperately pleaded with Senate staffers to defeat the amendment.[168] Gruber and others on Obama's economic team saw the mandate as the essential device to make the whole scheme work.[169] While unsuccessful in defeating the amendment initially, the Obama team was later able to undo its effects in the reconciliation "sidecar" bill passed in conjunction with the main act, reinstating the penalty in the first year and increasing it.[170] However, Gruber was still unsatisfied and, when asked later which single aspect of the law he would change, he answered, "I wish the mandate penalty was stronger." [171] For him, the biggest problem was still those economically irresponsible "individuals who are essentially free-riding on the system."[172]

E. FINE, TAX, OR SOMETHING ELSE?

The official name given to the tax that enforced the individual mandate, the "shared responsibility payment," revealed the Hayekian framework underlying the reform. The mandate was morally justified by the principle of "responsibility," defined to mean specifically financial responsibility for one's actions or inactions. In this framework, uninsured free-riders were the embodiment of irresponsibility, but the shared responsibility payment would force them to accept financial responsibility for their decisions. As such, it was very much akin to Thatcher's "community charge." While the term

[163] *Id.* at 64, 67–68; BLACKMAN, *supra* note 128, at 28.
[164] BRILL, *supra* note 5, at 64.
[165] *Id.*
[166] *Id.* at 70–71.
[167] *Id.* at 167–68.
[168] *Id.*
[169] *Id.* at 47.
[170] *Id.* at 192.
[171] Sarah Ferris, *ObamaCare Architect: 'I Wish the Mandate Penalty Was Stronger'*, THE HILL.COM (Oct. 26, 2016), https://thehill.com/policy/healthcare/302906-obamacare-architect-i-wish-the-mandate-penalty-was-stronger.
[172] *Id.*

"payment" indeed captured the economic theory inspiring the reform, the Obama administration and congressional Democrats apparently doubted that the public would buy into this reasoning—and perhaps even they themselves did not fully grasp or accept the idea of an economic payment. As a result, another clash developed both within the Obama administration and Congress over how they should characterize the amount.

On the one hand was the politically-driven desire to call the amount a fine or penalty, consistent with Obama's pledge not to raise taxes on the middle class. On the other hand was the competing desire to call it a tax, better enabling the government's legal team to defend the amount in court as a constitutional exercise of the congressional taxing power.[173] Ultimately, the latter view of the amount as a tax seemed to triumph within the Obama administration and, more importantly, in the Supreme Court.[174] However, a closer examination reveals that, while nominally referring to the shared responsibility payment as a tax, the Supreme Court and the administration really meant something more like a payment or charge. Ironically, therefore, despite a public battle of "fine vs. tax," it was the economic payment idea that emerged, a testament to the enduring power of the Hayekian idea at the core of Obamacare and to the growing acceptance of economic thinking across the political spectrum.

When Senate Republicans offered their mandate proposal in the 1990s, economist Mark Pauly—one of the proposal's authors—recalled that they simply considered the enforcement mechanism to be a tax, and the CBO scored it as such.[175] By 2008, however, the politics were different, and Democrats were careful not to label the payment a tax in the Senate bill, even in the official findings on the bill's constitutionality, where they stuck to arguments founded in the commerce clause.[176] Likewise, Obama was diligent in insisting—most famously in a tense televised exchange with George Stephanopoulos—that the mandate penalty was not a tax, and that therefore he had honored his pledge not to raise taxes on the middle class.[177] On the other hand, the Solicitor General's office pleaded with the White House for permission to call the payment a tax in order to defend the mandate against increasingly serious legal challenges; eventually, the White House relented.[178]

Through the judicial process, the idea of a "tax-as-payment" crystallized. Part of this was clearly the government legal team opportunistically calling it a tax as the best chance of defeating constitutional challenges. Additionally, the pressures of fighting over the nature of the shared responsibility payment at the various judicial levels acted as a sort of crucible to reveal its true character. Indeed, Solicitor General Donald Verrilli came to be convinced that viewing the mandate as an economic choice between either purchasing insurance or paying the tax "was not only a way of avoiding a serious constitutional question, but indeed the best reading of the law."[179]

[173] *See* BLACKMAN, *supra* note 130, at 50–51, 57, 98–100.
[174] *Id*. at 145, 159, 162–65, 179–80, 252–55.
[175] *Id*. at 7.
[176] *Id*. at 50.
[177] *Id*. at 98 (referencing the interview on ABC's *This Week* from September 20, 2009).
[178] *Id*. at 98–99.
[179] *Id*. at 163.

Interestingly, he was strongly influenced in this direction by the views of center-right judges. The most important instance seems to be when he first read Justice Sandra Day O'Connor's decision in the case of *New York v. United States*.[180] At issue in that case was a statute requiring the state to take possession of radioactive waste or pay a penalty. O'Connor upheld the statute through an economic interpretation, finding that the federal government did not impose a mandate, but rather a "series of incentives."[181] Verrilli began to see this as the key to upholding the statute, and after considering Judge Brett Kavanaugh's opinion striking down the mandate in the D.C. Circuit Court of Appeals—where Verrilli felt the government had not spent enough time on the taxing power argument—he was further convinced that the tax-as-economic-incentive interpretation might be critical for another moderate Republican judge: Chief Justice John Roberts.[182]

In front of the Supreme Court, Verrilli stressed the point that the shared responsibility payment was simply an optional payment, structured to provide incentives. To both Justice Sonia Sotomayor's question whether there would be any criminal penalties for not complying with the mandate and Justice Elena Kagan's question whether someone who did not obtain insurance violated any federal law, Verrilli responded with an emphatic "no." [183] The only consequence, he argued, would be the liability to pay the tax, or payment.[184] Therefore, individuals simply faced an economic choice, with incentives designed to push them in the right direction. They could purchase insurance, or pay the tax. Observing the arguments, Professor Lawrence Tribe presciently identified the economic conception that convinced Justice Roberts to uphold the mandate: "You have a choice, it's not really a mandate even though it's called one, you have a choice to either buy insurance or see your tax bill go up a little bit to compensate for the fact that you didn't buy it and are thereby imposing costs on others."[185] The choice to buy insurance was voluntary, but the one thing that was mandatory in this economic framework, just as in Thatcher's poll tax, was to always pay the proper price for one's choices. If an individual made the choice to forgo insurance, then responsibility demanded that he bear the financial burden that his choice imposed on society.

F. IMPLEMENTATION AND REVOLT

As in the U.K., where external circumstances led the government to act quickly, accepting the plan presented by a small, economic-minded group, the Obama administration and Congress also found themselves acting with urgency before they were fully ready. With the shocking victory of Republican Scott Brown in Massachusetts, Senate Democrats lost their sixty-vote majority.[186] As a result, they had to stick with the initial bill they

[180] New York v. United States, 505 U.S. 144 (1992).
[181] BLACKMAN, *supra* note 128, at 163–64. *See generally* 505 U.S. 144.
[182] BLACKMAN, *supra* note 128, at 162–65 (discussing the influence of Kavanaugh's opinion and anticipation of Roberts's thinking).
[183] *Id*. at 179–80.
[184] *Id*.
[185] *Id*. at 183 (quoting comments made in Tribe's "Thinking About the Constitution" undergraduate course at Harvard University).
[186] *E.g.*, *Id*. at 58; BRILL, *supra* note 5, at 193; Ornstein, *supra* note 152.

had passed late on Christmas Eve 2009, thanks in part to the long delay from Baucus's attempts to win Republican support.[187] Senate Democrats had counted on making significant changes in the conference committee reconciling their bill with a separate House bill.[188] Instead, the House had to pass the Senate bill without changes, accepting many mistakes and imperfections that would go on to hamper the bill's implementation.[189] Further difficulties arose as the abstract theories behind the bill encountered the difficult realities of implementation, including bureaucratic red tape and infighting; the creation from scratch of the complex software behind the program's insurance exchanges; and the need for the IRS to acquire the resources and competence to verify coverage, administer the mandate penalty, and manage the system of advance premium tax credits.[190]

The rough rollout of the reform only intensified the strong popular backlash to the bill. While the Troubled Asset Relief Program ("TARP") and related bailouts played a large role, Obamacare was also a principal factor in sparking the rise of the Tea Party movement.[191] This movement helped fuel huge Republican gains in the 2010 midterm elections, propelling the GOP into the majority in the House and significantly narrowing the Democratic majority in the Senate, the largest midterm losses for a single party since 1938.[192] More astonishingly, Republican Scott Brown, campaigning on the pledge to be the forty-first vote in the Senate to defeat Obamacare, earned a shocking victory in the race to fill the seat of beloved liberal icon and Obamacare supporter Ted Kennedy in the Democratic stronghold of Massachusetts, home of Obamacare precursor Romneycare.[193] The first two months of the new health law saw President Obama's approval numbers drop sharply; even in states that stood to receive significant federal money under the law, ambitious attorneys general saw political benefit in challenging the law in court.[194]

Similar to the repeal of the community charge in the U.K. soon after Thatcher's resignation, the shared responsibility payment was effectively eliminated with the election of President Donald Trump, who announced a policy of semi-non-enforcement of the mandate penalty for tax year 2016, and signed the Tax Cuts and Jobs Act, reducing the penalty to zero dollars effective in 2018.[195]

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[187] BLACKMAN, *supra* note 128, at 58; BRILL, *supra* note 5, at 193; Ornstein, *supra* note 152.

[188] BLACKMAN, *supra* note 128, at 58; BRILL, *supra* note 5, at 193; Ornstein, *supra* note 152.

[189] BLACKMAN, *supra* note 128, at 58; BRILL, *supra* note 5, at 193; Ornstein, *supra* note 152.

[190] *See, e.g.*, BRILL, *supra* note 5, at 202; Noah Rothman, *A Brief History of the Obamacare Disaster*, COMMENT. MAG. (Jan. 2014), https://www.commentarymagazine.com/articles/a-brief-history-of-the-obamacare-disaster/.

[191] Orin Judd, *The Chick Party*, BROTHERS JUDD BLOG: NOV. 2010 ARCHIVE (Nov. 5, 2010, 5:52 AM), http://brothersjuddblog.com/archives/2010/11/; Ornstein, *supra* note 152.

[192] *Id*. (noting the 2010 election was the biggest midterm loss for any party since 1938); Ornstein, *supra* note 152.

[193] BLACKMAN, *supra* note 128, at 62; Joan Vennochi, *Brown's Best Hope Is a Chilly Coakley*, BOS. GLOBE, Jan. 7, 2010, http://archive.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/01/07/browns_best_hope_is_a_chilly_coakley/ (Brown campaigns as forty-first vote against ACA).

[194] BLACKMAN, *supra* note 128, at 55; Rothman, *supra* note 190 (citing RealClearPolitics "poll of polls").

[195] *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017); *Citing Trump's Order, IRS Stops Enforcing Individual Mandate for Health Insurance*, INS. J. (Feb. 16, 2017), https://www.insurancejournal.com/news/national/2017/02/16/442006.htm.

IV. SHARED THEMES

Viewed back-to-back, striking parallels between these two cases emerge. Both trace their intellectual basis to ideas from the same small network of think-tank economists. Both are justified by the same Hayekian idea of accountability or responsibility, defined such that no one should escape bearing the proper monetary price for their choices. This idea serves as not only the technical basis dictating the form of the policy but also the moral basis giving legitimacy to the policy. This framework of economics-as-morality is only possible under a neoliberal worldview that sees people primarily as autonomous, rational, utility-maximizing individuals, where politics is primarily a commercial realm defined by consumption choices. In both settings, this intellectual framework resulted in a regressive per capita tax, plagued by chaotic implementation; the tax was met with a powerful, visceral rejection by the majority of the electorate, imposing heavy political costs on the governing parties and ultimately causing the tax's repeal.

While on one level, both of these stories are about tax policy, the tax stories are also part of a larger theme: the growing divide between the governing political class and the electorate. These two failed taxes offer insights into the sources of this growing phenomenon. In both cases it is apparent that the real divisions and disagreements were not between the major political parties, but between the establishment parties' leadership and their constituents. At the heart of this division is the broad acceptance by the political class of neoliberal economic theory as the basis, both technical and moral, of policymaking, and the rejection of this form of scientific-expert management by broad swaths of the electorate. The remainder of this article is about these dynamics.

I will describe the unanimity of thinking between the major ruling parties, in spite of their ostensible ideological differences, and I will subsequently highlight how the real disagreements existed between the governing establishment and the electorate. Then, I discuss the concept of economics-as-morality adopted throughout the political establishment, despite the apparent rejection of this philosophy by the electorate as inherently incompatible with their values and preferences. Finally, I discuss two further attributes of this economic ideology that help contribute to mass resentment. First, I describe the tendency to focus on abstract theoretical thinking to the exclusion of practical and historical experience, which leads to messy, disordered administration and undermines government credibility. Second, I discuss how economic-based policies tend toward regressive taxes that burden vulnerable minorities and violate popular notions of fairness.

A. ELITE CONSENSUS VS. POPULAR RESENTMENT

Superficially, the U.K. poll tax and the ACA both appear as highly partisan impositions of one party on the other. Thatcher made no attempt to hide that she wanted to reform the rates in order to help "our people" and hurt the leftists operating out of local governments.[196] In the U.S., Obamacare

[196] MOORE, *supra* note 5, at 344.

passed the Senate without a single Republican vote,[197] while opposing it became a defining Republican position. However, upon closer examination, in both cases the major opposition party at first either supported the tax or at least chose not to oppose it, and official antagonism only arose after popular disapproval became overwhelming. Even when the opposition party eventually tried to coopt the popular anger, the most effective opposition still came from grass-roots efforts, with establishment figures primarily voicing disapproval without taking concrete actions.

In the U.K., although the opposing Labour Party never supported the poll tax in the same way that many Republicans supported an individual mandate in the U.S., they voiced very little opposition to the plan, took almost no real steps to oppose it, and diligently worked to implement the tax. The leadership of the Labour Party was keen to distance themselves from the "loony left" in order to be seen as a modernizing "party of government."[198] Fresh from a humiliating defeat in the Scargill miners' strike, Labour leader Neil Kinnock was afraid that voters would perceive opposition to the poll tax as another instance of a radical minority dictating the party's actions.[199] Further, Labour leaders didn't want to be seen as the party fighting to preserve the widely detested rating system.[200] Accordingly, in the 1987 general elections, when the government had enacted but not yet implemented the poll tax, the Labour Party did not make the poll tax a campaign issue.[201] When the tax did go into effect, Labour-controlled local councils worked early and diligently to implement the tax and ensure as smooth a transition as possible.[202] When grass-roots organizations like the APTUs encouraged non-payment, their efforts were strongly opposed by Labour leadership, and both Labour and trade union leadership unsuccessfully urged their members not to participate in the organized protests culminating in the "Battle of Trafalgar."[203]

Perhaps because the poll tax idea was largely based in academic theories, the British academic community did not oppose the poll tax and "was remarkably quiescent about the reforms," albeit with notable exceptions.[204] The academic role in the poll tax is embodied in Christopher Foster, economist at the London School of Economics and the key intellectual figure throughout the process of formulating the poll tax. He was a bipartisan figure himself, having worked closely with Labour officials in the D.o.E. during the late 1970s.[205] In extant records of his involvement, there is no trace of any political motivations or bias. He always spoke purely in terms of economic ideals like efficiency, incentives, and accountability.[206]

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[197] BLACKMAN, *supra* note 128, at 59.

[198] BUTLER ET AL., *supra* note 5, at 105; LAVALETTE & MOONEY, *supra* note 11, at 207.

[199] MOORE, *supra* note 5, at 364–65.

[200] *Id.* at 374.

[201] BUTLER ET AL., *supra* note 5, at 126.

[202] LAVALETTE & MOONEY, *supra* note 11, at 215.

[203] *Id.* at 214.

[204] Peter Smith, *Failure in British Government: The Politics of the Poll Tax*, 48 NAT'L TAX J. 297, 298 (1995) (reviewing DAVID BUTLER, ANDREW ADONIS & TONY TRAVERS, FAILURE IN BRITISH GOVERNMENT: THE POLITICS OF THE POLL TAX (1994)).

[205] BUTLER ET AL., *supra* note 5, at 31.

[206] *See, e.g.*, *id.* at 36, 66 (Foster justifies poll tax in terms of accountability and marginal spending; even Foster's reservations about a poll tax were purely economic, as he worried that it could create perverse incentives for the more affluent to lobby for more services).

In the U.S., the individual mandate was conceived by another, more partisan academic figure, Stuart Butler of the conservative Heritage Foundation; this was followed by similar proposals from other Republican-leaning academics, led by the Wharton School's Mark Pauly. The idea was then quickly adopted by a broad group of Republicans in Congress, including future House Speaker Newt Gingrich, who maintained his support until popular pressure eventually forced him to denounce it when campaigning for president in 2011.[207] Similarly, eventual Republican nominee Mitt Romney would have to awkwardly explain his past support for an individual mandate during the same presidential campaign. It was Romney's successful enactment of Romneycare in Massachusetts that transformed the individual mandate from a Republican idea into a truly bipartisan one.[208] Democratic Senator Ted Kennedy and Democratic MIT economist Jonathan Gruber were instrumental in creating Romneycare, a law approved by an overwhelmingly Democratic state legislature. After Romneycare, the individual mandate became the default position of nearly all influential Democratic leaders and presidential contenders.[209] Their optimism that it would win bipartisan support was justified in the early stages of drafting Obamacare, when Republican Senators like Chuck Grassley and Olympia Snowe appeared to genuinely favor the plan. Indeed, Grassley had been a supporter of the 1990s Republican individual mandate plan. One of Senator Kennedy's staffers recalled attending a bipartisan Senate staff meeting about healthcare where everyone agreed and got along so well that "you couldn't tell the Democrats from the Republicans."[210]

The real disagreement was between establishment leadership and their voters. In the U.S., Republican leaders' support for the reform ended not because of ideological or intellectual disagreement with the plan but rather due to overwhelming popular anger erupting in raucous town hall meetings. Similar to the APTUs in the U.K., the grassroots Tea Party movement was always the more effective source of opposition. Eventually, Republican legislators simply could not support the bill and hope to retain their seats. However, the popular opposition transcended conventional party boundaries. Democrats faced similar pressures from their constituents, evidenced by a group of a dozen Senate Democrats up for reelection in 2014 who tried to undo or postpone the mandate penalty.[211] The even clearer signal of broad popular disapproval transcending party lines was the election of Republican Scott Brown in heavily-Democratic Massachusetts, with Brown defining his candidacy as the forty-first vote needed to kill the pending healthcare bill.[212]

In the U.K. as well, the resistance to the poll tax was a broadly-based popular movement not tied to party affiliation. Seasoned activists were astonished by the unprecedented numbers of people who joined protests, and

[207] BLACKMAN, *supra* note 128, at 11.

[208] *See, e.g.*, *id.* at 10–11 (arguing Democrats are comfortable with the mandate after Romneycare success); BRILL, *supra* note 5, at 36 (Tom Daschle labels Romneycare a "game changer" for Democrats).

[209] BRILL, *supra* note 5, at 18, 36.

[210] *Id.* at 53.

[211] *Id.* at 192 (Senators Schumer and Snowe successfully pass an amendment to reduce and delay the penalty); Rothman, *supra* note 190 (after enactment, twelve Democratic Senators seeking reelection in 2014 tried to delay the mandate penalties until after the election).

[212] BLACKMAN, *supra* note 128, at 61–62.

some academics classified it as a new type of "non-class-based social movement" given the involvement of large numbers of middle-class and poorer voters.[213] Due to the importance of "patently ordinary middle-class people who were affronted by . . . the unfairness of the community charge," some called the movement the revolt of "middle England."[214] This bottom-up movement was huge and successful while every top-down, "politics from above" campaign failed.[215] Along with its broad, non-partisan base, the movement's targets were likewise not defined by conventional political categories, with protests targeting Labour-run as well as conservative local councils.[216]

B. The Framework of Economics as Morality

What was it that united elite opinion, or at least failed to arouse elite disagreement, while at the same time so viscerally upsetting the electorate? The key was the framework, based in economic theory, that supplied both the technical and moral justification for the per capita taxes. For elites in political leadership who had converted to this type of thinking, it fit naturally with the philosophy of expert administration, where "clever people bathed difficult problems in the light of reason."[217] For these scientific-expert policymakers, the criteria by which a policy should be judged were naturally quite different from the criteria that ordinary voters would use. For a policymaker acting on the basis of economic theory, the policies needed to—and did—satisfy requirements like promoting efficiency and creating the proper incentives to achieve economically-defined goals like accountability or responsibility. They could overlook criteria like equity and the practicality of administration, which were excluded from their models. However, to voters unschooled in modern economics, such concerns were paramount and their violation was an affront. A majority subjected to living under the disconcerting rules of an expert administrator will naturally look less favorably upon those rules than the experts empowered to make them.

While differences obviously existed, the underlying economic-moral framework for both the poll tax and the individual mandate tax was nearly the same. Both were premised on the idea that voters must not be able to make choices where they do not pay a proper price for all the costs arising from their decision. To achieve this ideal, it is necessary to transform all activities and choices into economic activities and consumption choices, even though voters may not traditionally perceive them as such. In the U.K., where proponents called this ideal "accountability," the effect was to strip the act of voting in local elections of its noneconomic content and make it equivalent to selecting a restaurant or buying shoes. Hence, Lord Elton stated that the poll tax "is paying for the use of the services provided by a local authority. [Elton] . . . heard it suggested that it should be called a local service charge and not a local community charge at all."[218] The government argued

213 LAVALETTE & MOONEY, *supra* note 11, at 201, 218.
214 *Id.* at 201; BUTLER ET AL., *supra* note 5, at 150.
215 LAVALETTE & MOONEY, *supra* note 11, at 217.
216 BUTLER ET AL., *supra* note 5, at 149–50.
217 MOORE, *supra* note 5, at 353.
218 Elton, *supra* note 79.

that "a system of local government finance which promoted accountability would give clear price signals to the electorate and would therefore help to secure an economically efficient allocation of resources."[219] Beyond price there was no other basis needed to guide a voter's decisions other than their individual consumer preferences constrained by financial costs.

In the U.S., the economic ideal was called "responsibility" and extended beyond the direct consumption of goods and services, so that an individual was responsible to bear the financial costs imposed on others by their decision *not* to purchase a product. Lawrence Tribe summarized this best: "You have a choice, it's not really a mandate even though it's called one, you have a choice to either buy insurance or see your tax bill go up a little bit to compensate for the fact that you didn't buy it and are thereby imposing costs on others."[220] The definition of healthcare in purely commercial terms not only motivated the design of the reform but also was used to legitimize it under the Constitution. To justify why the individual mandate was authorized under the commerce clause, the bill's drafters wrote that "the individual responsibility requirement provided for in this section . . . is commercial and economic in nature," because it "regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased."[221] While this commerce clause argument technically failed, in substance it is not too different from the successful taxing power argument, where the choice not to purchase healthcare is still merely an economic choice for which the individual mandate tax is the associated economic price.

This economic philosophy envisions a state that does not directly interfere with or even openly opine about what choices may be right or wrong, but instead ensures that the proper price is attached to every choice, even when that choice is inaction. This idea is related to another Hayekian concept present in both cases: the idea of automatic mechanisms designed to ensure restraints on spending. This idea had the strongest impact in the U.K., where the policymakers were closer—geographically, politically, and chronologically—to the Hayekian source of the policy. There, the poll tax was designed so that local voters would bear the entire marginal cost of spending increases, and would know this in advance, so that threatened price increases were an automatic means of restraining spending. In the U.S., by loosely tying the individual mandate tax to the price of certain insurance premiums, the goal was similarly to signal to taxpayers in advance the costs they would bear if they chose to remain uninsured. Automatic spending checks beyond this were not effectively implemented, but Obama's economic team consistently fought to do so. For example, the team under Larry Summers repeatedly advocated proposals for "bending the cost curve" downwards, but they were consistently rebuffed by Obama's political team.[222] Their proposals, some of which they managed to get over the political team's head and into an earlier economic stimulus bill, followed the model of using automatic financial incentives to shape behavior, such as

[219] Smith, *supra* note 110, at 424 (summarizing the argument in Elton, *supra* note 79).
[220] BLACKMAN, *supra* note 128, at 183.
[221] Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 1501(a), 124 Stat. 119 (2010).
[222] BRILL, *supra* note 5, at 84.

fines triggered when hospitals had too many patients discharged and then readmitted.[223] In both countries, these automatic spending checks would further the shift away from political decisions mediated through the messy channels of debate, persuasion, and elections, towards a more efficient model where all societal decisions flow from individual economic decisions shaped by incentives.

With the twin economic ideals of accountability and responsibility established as the benchmarks for successful reform, policymakers in the Thatcher and Obama administrations ignored conventional notions of fairness that were not part of their framework.[224] These considerations were simply not variables in their models; even when they tried to speak in terms of fairness, they merely reverted to the same economic ideas. For example, in the U.K., an official ministerial statement argued, "rates are also unfair because they bear little relation to the use people make of local services."[225] Fairness was defined in terms of price theory and a benefits principle of taxation, ignoring traditional alternative principles of fairness, such as the ability to pay.[226] The transformation of Thatcher's and Obama's thinking is evident in their speeches over time. A younger Margaret Thatcher talked about problems of local government in very non-economic terms, lamenting the loss of values like "community spirit" and "civic pride" from a time when "voluntary service" was performed by "men of high calibre."[227] Yet after converting to the economic framework of the poll tax, she stopped talking about these civic ideals and spoke instead of every voter having "the information and the incentive to insist on efficiency."[228] Obama's initial position was based on a simple, common sense view of the human person, where "the problem is not that people are trying to avoid getting healthcare coverage[,] [i]t is folks like that who are desperately in desire of it, but they can't afford it."[229] However, Obama was clearly influenced by his economic team as he shifted to talking about healthcare primarily as an economic problem where "the cost of our health care is a threat to our economy," to be tackled with a data-driven economic approach based on "incentivizing excellence" through mechanisms like "bonuses for good health outcomes."[230] For top economic adviser Larry Summers, ideas that did not conform to "correct" ideas of economic incentives, however politically appealing, were simply "stupid" and "dumb."[231]

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[223] *Id.*

[224] *Barack Obama in Congressional Black Caucas Debate,* ON THE ISSUES, https://www.ontheissues.org/Archive/2008_CBC_Dems_Barack_Obama.htm (last updated Dec. 1, 2018).

[225] Smith, *supra* note 110, at 424 (quoting Press Release, Department of the Environment, Rate Reform on its Way Says Michael Howard (Jun. 25, 1987)).

[226] *Id.*

[227] Margaret Thatcher, *Article on Local Government*, CONSERVATIVE OXFORD (Oct. 31, 1949), https://www.margaretthatcher.org/document/100843.

[228] THATCHER, *supra* note 5, at 653–54.

[229] *Barack Obama in Congressional Black Caucus Debate*, *supra* note 224.

[230] Barack Obama, Speech at the 158th Annual Meeting of the American Medical Association (June 15, 2009), https://www.cbsnews.com/news/text-obamas-ama-speech-on-health-care.

[231] BRILL, *supra* note 5, at 120.

C. Abstract Theoretical Thinking Over Practical and Historical Experience

Another defining feature of policymaking processes under both governments was a reliance on abstract theoretical thinking and scientific expertise to the exclusion of intelligence available from practical experience, historical lessons, or popular opinion. The consequence in both cases was chaotic implementation and popular rejection. The Lord Rabbi Jonathan Sacks has identified a similar dynamic in the French and Russian Revolutions. These revolutions were based on what he calls "truth as system," where the revolutionaries use the tools of philosophy to derive ideal policies and then immediately attempt to implement them throughout society.[232] In contrast, he posits that the relatively orderly American and English revolutions arose from a sense of "truth as story," rooted in a biblical sense of history where progress occurs gradually over time.[233] "Systems are theoretical constructs," he argues, "but stories are about people and the time it takes for them to change. Revolutions inspired by philosophy attempt the impossible: to create a new social order overnight."[234] Clearly, the poll tax and the individual mandate tax are something much less dramatic than a revolution, but they were likewise based in philosophy—specifically, economic philosophy—where elegant theoretical ideas were imposed quickly, widely, and to disastrous effect.

In the case of the U.K. poll tax, the philosophic approach—enlightened policymakers, removed from the distractions of daily life, deriving true principles and applying them to society in their purity—is perfectly captured by the *ex post* protest of D.o.E. official Terry Heiser: "We did it so carefully, with *so* many papers."[235] Another observer concluded that the group responsible for the poll tax was too much like "clever schoolboys in science laboratories" removed from political realities.[236] Key studies team figure William Waldegrave later faulted himself for putting "clever-silly" arguments ahead of practical political considerations.[237] This was possible because the policy was formed by a group composed of like-minded academic and think-tank types allowed to work in isolation. The group shared similar elite educational backgrounds as well as many outside connections.[238] Studies team leader Lord Rothschild was an independently wealthy star of the think tank world who loved "thinking outside the box" and "examin[ing] the issue with a mind uncluttered by political preconceptions."[239] Although one person close to the team described them as "the brightest selection of people ever gathered", their relative uniformity

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[232] Jonathan Sacks, The Great Partnership: Science, Religion, and the Search For Meaning 139–40 (2012).

[233] *Id.*

[234] *Id.*

[235] Moore, *supra* note 5, at 375.

[236] *Id.* (quoting Stephen Sherbourne, Thatcher's political secretary).

[237] *Id.* at 368.

[238] *Id.* at 353 (noting that Waldegrave is a former employee of Rothschild, and was at one time engaged to marry Rothschild's daughter); Butler et al., *supra* note 5, at 47, 50 (detailing the team's many outside personal connections).

[239] Butler et al., *supra* note 5, at 49 (quoting Nigel Lawson, The view from No. 11: Memoirs of a Tory Radical 570 (1992)); Moore, *supra* note 5, at 353.

created some deficiencies.[240] For one, the team excluded not only Treasury head Nigel Lawson but also all other Treasury representatives outside of one junior civil servant—despite Treasury being the largest repository of tax expertise.[241] Similarly, the team completely excluded any representatives of local government who understood the rating system on the ground level and would be tasked with administering any new system.[242]

Obamacare also came largely from isolated groups with a bias towards academic credentials. Unlike Thatcher's team, the American groups also had considerable private industry experience, but almost exclusively in large financial firms with frequent "revolving door" moves between the public and private sectors. This may have helped to enhance the financial-economic perspective of the reform and the close collaboration with major industry groups. The bill was largely written by the Senate staff of Max Baucus, with input from Obama's political and economic teams. The Senate staff was led by Liz Fowler, a longtime staffer who had helped craft Medicare Part D, had briefly worked for the for-profit health insurance giant WellPoint, and would eventually become a pharmaceutical lobbyist for Johnson & Johnson.[243] She would enlist the help of former Lehman Brothers analyst Antonios Clapsis to negotiate pricing deals with healthcare companies.[244] Leading the healthcare effort for the White House was Nancy-Ann DeParle, a Harvard Law School alum and Clinton administration veteran who had also worked in private equity, specializing in healthcare industry investment.[245] The White House economic team was led by Harvard Economist and Clinton administration veteran Larry Summers, and included Peter Orzsag, another Clinton veteran who had landed at Citigroup before joining the Obama administration.[246] Summers's protégé and MIT economist Jonathan Gruber also consulted, and later officially joined, the Obama administration.[247] Gruber had also worked in the Clinton administration and afterwards, at Summers's urging, made a career for himself packaging econometric research for government officials in order to better influence real time policymaking.[248] The economics team also featured Dr. Zeke Emanuel, who obtained the position by virtue of his brother, Obama Chief of Staff Rahm Emanuel.[249] Notably excluded were representatives of the IRS, later tasked with administering the individual mandate tax along with other new taxes and tax credits, as well as verifying minimum coverage.

In both settings, the policymaking teams showed a persistent ability to ignore correct warnings about the taxes' likely administrative problems and unpopularity, likely because the insulated teams were working from theoretical economic premises where popularity and ease of administration were not important variables. The policy teams were effectively speaking a

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240 BUTLER ET AL., *supra* note 5, at 47.
241 MOORE, *supra* note 5, at 353, 363.
242 BUTLER ET AL., *supra* note 5, at 71.
243 BRILL, *supra* note 5, at 37–44; Howard Waitzkin & Ida Hellander, *The History and Future of Neoliberal Health Reform: Obamacare and Its Predecessors*, 46 INT'L J. HEALTH SERV. 747, 752 (2016).
244 BRILL, *supra* note 5, at 95.
245 *Id*. at 83–84.
246 *Id*. at 676–68.
247 *Id*. at 29–30.
248 *Id*.
249 *Id*. at 68.

different language than their critics. As U.K. Treasury head Nigel Lawson explained concerning why he was unpersuaded by economist Christopher Foster's attempts to convert him to the poll tax: "[H]e's an economist and my objection was essentially a political objection."[250] Lawson's experience-based political objections would prove accurate, including that the regressive nature of the tax would be highly unpopular, administration would be a nightmare, and local authorities would bump-up spending during the transition knowing the central government would be blamed for associated tax increases.[251] Yet Foster did not argue that these things would not happen; he simply argued that a poll tax would best advance accountability, as he defined it. To the extent that Conservatives in local government slowly learned about the details of the poll tax, they were also cynical and unreceptive. Their perspective, based on "bitter experience" as opposed to theory, was that "complicated, centrally devised formulae designed to restrain spending often had perverse effects".[252] Home Secretary Douglas Hurd noted that the country already had one per capita tax, known as the "television license," and it was widely evaded and difficult to collect.[253] This was because people were far more numerous than houses, and far more mobile.[254] Once again, these accurate objections were dismissed because they did not directly relate to the economic concept of accountability.

More distant historical experiences were also available as warnings against a poll tax. Britain had previously implemented large scale poll taxes three times in its history, in 1377, 1380 and 1641, and all had been short-lived disasters.[255] This should have been especially salient to William Waldegrave, a direct descendant of Sir Richard Waldegrave, a poll tax administrator whose life had been threatened by revolting peasants in 1381.[256] In fact, perhaps mindful of this, the younger Waldegrave's father had specifically warned him against a poll tax.[257] The history of poll taxes should have taught the government a clear lesson: "[E]ither they were flat and produced rebellion, or else they were graduated and the yield was severely disappointing."[258] More recently, the numerous government commissions tasked to review the rating system—including those under Thatcher's government—had always concluded that the rates were the best alternative for the practical reasons that they were cheap to administer and difficult to evade.[259] Ignoring these lessons, the government was guilty of a sort of presentism, believing that scientific expertise and state-of-the-art economic theories had progressed beyond the constraints of the past.

In the U.S., the belief was that expert scientific knowledge was the soundest basis for policymaking even when contrary to popular opinion. This was infamously captured in a statement by Romneycare and Obamacare

[250] BUTLER ET AL., *supra* note 5, at 77.
[251] *Id.*
[252] MOORE, *supra* note 5, at 346.
[253] *Id.* at 369.
[254] *Id.*
[255] BUTLER ET AL., *supra* note 5, at 11–14.
[256] WALDEGRAVE, *supra* note 43, at 233.
[257] *Id.*
[258] BUTLER ET AL., *supra* note 5, at 14.
[259] *See generally* ALTERNATIVES TO DOMESTIC RATES, *supra* note 25; LAYFIELD, *supra* note 25; RATES, *supra* note 25.

architect Jonathan Gruber. He explained why the law was written in a "tortured way", stating: "Lack of transparency is a huge political advantage. And basically, call it the stupidity of the American voter or whatever, but basically that was really, really critical to get the thing to pass."[260] The statement expresses the sentiment that, lacking the requisite education and knowledge, the average voter is not positioned to understand what policies are in their own self-interest, therefore requiring government by objective experts. This view explains why Gruber and others bitterly opposed any reductions or delays in the individual mandate tax.[261] For them, the issue was simple: without a harsh mandate compelling healthy people into the risk pool, the economic logic of their model would break down. For them, popular preferences based in ignorance were not a component of scientific analysis. But more politically-minded figures, like Senator Chuck Schumer and others concerned with future elections, knew that the regressive mandate penalty would be hugely unpopular.[262] Obama himself opposed the mandate initially, sensing its unpopularity and citing the lived experience of dissatisfied Massachusetts residents under Romneycare; however, he was ultimately convinced by the theoretical logic, as well as the reality of insurance industry rent-seeking.[263]

The clean theory behind the individual mandate began to unravel when it confronted the real world. People simply did not respond to the combination of economic subsidies and penalties according to predictions and failed to enroll. Even those inclined to enroll were often unable to do so because premiums were higher than projected.[264] Additionally, the real-world challenge of constructing a complicated website from scratch and within an enormous bureaucracy proved much greater than anticipated by policymakers.[265] Likewise in the U.K., implementation required the government to confront countless variables that had not popped up in their models. Should the same per capita tax be charged to non-working housewives, the elderly, the handicapped, or college students?[266] How could a list of residents be compiled without also discouraging voter registration? How to make up for revenue shortfalls resulting from mass nonpayment? These questions went unanswered, and popular anger was amplified when the actual poll tax figures proved substantially higher than estimates.[267]

The fact that the U.K. policymakers never considered whether or not the same rate should apply to different groups such as students, the elderly, or non-working wives, arises from another feature of abstract economic thinking: the view of people as primarily autonomous, homogeneous individuals. Such an individual may have unique preferences, but guided by

[260] Jose A. DelReal, *Obamacare Consultant Under Fire for 'Stupidity of the American Voter' Comment*, WASH. POST (Nov. 11, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/11/11/obamacare-consultant-under-fire-for-stupidity-of-the-american-voter-comment/?utm_term=.6c6542ea8c74 (quoting remarks by Gruber at the 24th Annual Health Economics Conference at the University of Pennsylvania's Leonard Davis Institute of Health Economics in October 2013).

[261] BRILL, *supra* note 5, at 167; Ferris, *supra* note 171.

[262] BRILL, *supra* note 5, at 167–68, 192.

[263] *Id.* at 61; BLACKMAN, *supra* note 128, at 1–2, 20, 26; Aizenman, *supra* note 125.

[264] Rothman, *supra* note 190.

[265] *Id.*

[266] MOORE, *supra* note 5, at 373.

[267] BUTLER ET AL., *supra* note 5, at 86, 157–58.

these preferences he or she will rationally maximize her utility in the same manner as all other individuals. It follows that if all individuals are autonomous and homogeneous, they all should pay the same tax. Hence, like the poll tax, the individual mandate tax was roughly equal for all adult individuals, and, going even further than the poll tax, it could also apply to children of any age.[268] As policymakers in both countries discovered upon implementation, this individualist paradigm was a strong abstraction from the complexities of reality.

D. REGRESSIVE IMPACT

One of the consequences of designing tax policies not primarily for raising revenue but instead for shaping behavior is that taxes may tend to become regressive. It is only natural that a tax be structured to best accomplish its primary goal. If a regressive tax creates the best incentives for achieving the desired behavior, and there are no overriding norms against regressivity, then a regressive tax is the likely result. When asked to defend the regressivity of his "soda taxes," former New York City mayor Michael Bloomberg answered that the regressive impact was actually desirable.[269] The primary goal of the taxes was to shape the behavior of lower-income residents, and a regressive tax amplified the impact among this demographic.[270] In contrast, the U.S. income tax assumed a very progressive shape because this fit with its primary goal of raising revenue and because the tax was enacted within a larger moral system that prioritized fairness based on the idea of ability-to-pay.[271] However, in the cases of the poll tax and the individual mandate tax, surviving norms against regressive taxation were only strong enough to ensure basic provisions protecting the lowest income citizens. But these norms became subservient to the economic theories justifying the taxes, resulting in overall regressivity.

For both the poll tax and the individual mandate tax, the economic theories that shaped the functional form of the taxes also served as their primary moral justification. Thatcher's community charge was designed to achieve the economic goal that voters bear the entire marginal cost of local government spending increases. At the same time, the tax was morally justified as the best way to improve "accountability" because "accountable voters" are those who bear the entire marginal cost of local government spending increases. With Obamacare's individual mandate tax, the economic goal was to compel as many individuals as possible to sign up for minimum health insurance coverage by ensuring that individuals bear the cost if they choose not to purchase coverage. The moral imperative was to ensure individual "responsibility," also defined such that responsible people were

[268] For example, for tax years 2016–2018, the shared responsibility payment was $695 per adult, or 2.5% of income above the filing threshold, whichever is lesser. *See* 26 U.S.C. § 5000A (2018); *Individual Shared Responsibility Provision*, IRS.GOV, https://www.irs.gov/affordable-care-act/individuals-and-families/aca-individual-shared-responsibility-provision-calculating-the-payment (last updated Dec. 12, 2019).

[269] Interview by Christine Lagarde with Michael Bloomberg, CEO, Bloomberg, in Wash., D.C. (Apr.19, 2018).

[270] *Id.*

[271] Joshua Cutler, *The Religious Roots of the Progressive Income Tax in America*, 68 CATH. U. L. REV. 473, 488–89, 493–504 (2019).

those who bore the costs of their own health insurance choices—including the choice not to purchase coverage.

In both of these essentially equivalent economic-moral frameworks, accountability and responsibility, there is nothing that argues against regressivity. Therefore, it is unsurprising that both resulted in regressive taxes. While the government made some attempts to deny or obscure the regressive incidence of the poll tax, the fact of its regressivity was generally conceded.[272] As Thatcher adviser Oliver Letwin responded, "That was the idea!"[273] The tax had to be painful enough for poorer voters to serve as a disincentive from voting for too much spending. In the U.S., the regressive nature of the individual mandate tax was obscured by the initial attempt to deny that it was a tax at all, the exemption of many low-income individuals, and the simultaneous enactment of new health benefits and spending. In its short history, though, the incidence of the shared responsibility payment was indeed regressive.[274] In the moral view espoused by Obama during his primary campaign, this would be wrong. As he had noted, uninsured individuals are not irresponsibly shifting their costs onto others; rather they simply cannot afford coverage. In contrast, under the economic view that prevailed, the regressive tax was proper, and in fact should have been higher.[275]

In both countries, the per capita taxes took on a particular form of regressivity that had the harshest impact on middle class couples just above income cutoffs for receiving certain subsidies or benefits. In the U.K., it was the middle-class couple who had managed to save just enough to purchase a house, but also earned just enough to make them ineligible for any subsidies, who was required to pay the full poll tax. Nigel Lawson pointed out that a pensioner couple in London would pay a tax of approximately 22 percent of their income, while a wealthy suburban couple paid 1 percent.[276] Ironically, it was these middle class homeowners and pensioners that Thatcher saw as her special constituency and whom she had set out to help with rates reform. She seemed to genuinely regret the poll tax and its impact on this group, but she had committed to abolish the rates and would not turn back.[277] While she personally intended to help those groups, she accepted a plan based on an economic theory that gave them no special consideration. Similarly, under Obamacare, a couple just above the threshold to receive insurance subsidies—400 percent of the federal poverty level—could experience harsh

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[272] *See, e.g.*, MOORE, *supra* note 5, at 376 (to the objection that poll tax favors "the rich man in his castle" over the "poor man at his gate," Thatcher responds, "The rich man . . . is already paying through the nose in tax!"); WALDEGRAVE, *supra* note 43, at 224 ("Would the new tax be regressive? Of course: it was . . . not meant to redistribute income or capital."). For a detailed analysis of the poll taxes actual regressive impact, as well as government claims to the contrary, see JOHN GIBSON, THE POLITICS AND ECONOMICS OF THE POLL TAX: MRS THATCHER'S DOWNFALL (1990).

[273] MOORE, *supra* note 5, at 368.

[274] Alexandra Minicozzi, *Modeling the Effects of the Individual Mandate on Health Insurance Coverage*, CONG. BUDGET OFF. (2017), https://www.cbo.gov/system/files/115th-congress-2017-2018/presentation/53105-presentation.pdf (showing that for tax year 2015, 58 percent of individuals paying individual mandate tax have Adjusted Gross Income (AGI) of less than $58,000, and 86 percent have AGI of less than $100,000).

[275] *See, e.g.*, Ferris, *supra* note 171 (quoting Jonathan Gruber, "I think probably the most important thing experts would agree is we need a larger mandate penalty.").

[276] MOORE, *supra* note 5, at 361; THATCHER, *supra* note 5, at 658 ("What hurt me was that the very people who had always looked to me for protection . . . were those who were suffering most").

[277] MOORE, *supra* note 5, at 375–76.

consequences. For example, a 63-year-old couple in 2013 earning $62,000 per year could expect to pay approximately $5,000 in premiums, after receiving a $9,024 subsidy, but earning just $50 more would push them over the threshold and cost them the entire $9,024 subsidy.[278] It is possible that the harmful impact on such middle class taxpayers is a coincidental feature of both laws. However, if policies are consistently based on economic theories that do not take such groups into account, it is natural to expect similar results. This dynamic is important to anyone concerned about the continued erosion of the middle class and the concomitant increase in income inequality.

Regardless of views about regressivity within economic theories, the electorate instinctively opposes regressive per capita taxes as unfair. In the U.K., many low income individuals vehemently protested the tax despite receiving an increase in their welfare payments equal to their poll tax liability. In the U.S., many voters seem to viscerally disapprove of the very possibility, whether or not it is realized in practice, that someone who must already go without health insurance due to circumstances that do not qualify for an official exemption, could be "kicked while they are down" and have to pay a tax penalty as well. While most people seem to find the regressive impact of the tax objectionable, it should be noted that they may have an even stronger aversion to the direct, uniform nature of the per capita taxes. That is likely why there is far less outcry over other common regressive taxes such as Value Added Taxes (VATs), sales taxes, and payroll taxes, which are more indirect and hidden.

V. CONCLUSION

Alexis De Tocqueville predicted a future American government that satisfied the contradictory impulses of the people, who desired freedom and popular sovereignty on the one hand but a powerful and centralized tutelary state on the other.[279] To be free and yet to be led. Such a government would exercise supreme power, but "with a network of small complicated rules, minute and uniform" where "[t]he will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting."[280] The state is gentle yet supreme, not tyrannizing but compressing.[281] Do the poll tax and the individual mandate tax serve as a fulfillment of this prophecy, or do they represent something else?

We seem to see a state abdicating direct interventions, staying in the background, and exercising control through a system of automatic checks. Modern economics seems to be the perfect instrument for this philosophy of government. The state merely needs to put in place the right incentives, and then watch them do the work of governance. Citizens will operate under a form of freedom, making their own choices in the presence of those incentives. In the U.K., policymakers plausibly viewed themselves as taking a step back out of local government and taking their hands off the wheel to

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[278] BRILL, *supra* note 5, at 395.
[279] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 337 (2nd ed., 1960).
[280] *Id.*
[281] *Id.*

restore control to local voters. An official Cabinet document stated that the purpose of the tax was "disengaging central government" and "putting the control of local expenditure with the local elector" by "establishing automatic systems."[282] But in reality, the new system had left local authorities with less autonomy than before, restrained not directly by explicit laws but indirectly by economic strictures. In the U.S. it was the same, with policymakers able to claim that they had used a market-based solution that preserved individual choice and responsibility, not mandating but merely providing a choice constrained by incentives.

Yet perhaps De Tocqueville was not quite right; perhaps the state has not been quite so subtle or efficient and accordingly the people not quite so timid. Thatcher's poll tax went beyond softening, bending, and guiding, and instead attempted a more coercive and direct intervention to curb local spending. In the U.S., despite Jonathan Gruber's lament that opacity was needed to avoid arousing the ire of the public, the reform effort was actually too transparent, with voters perceiving that there was an attempt at coercion. Where De Tocqueville saw the state achieving an equilibrium between popular sovereignty and a centralized tutelary power, here the state swung too far in one direction, upsetting the balance. In the long run, though, the successful popular reaction may have merely restored the balance and validated De Tocqueville's vision. The U.K. poll tax was partially replaced with a more hidden, but still regressive, VAT, and in the U.S., the individual mandate and tax penalty are still technically enshrined in law (although the tax was reduced to zero dollars).[283] The final fate of Obamacare is still very much uncertain.

While the flashpoints arousing popular anger—the poll tax and the individual mandate tax—have been removed, the deeper divisions still remain. Policymakers and establishment leaders in both cases have not fundamentally revised their beliefs and in fact maintain that they were mostly correct. Thatcher steadfastly insisted that the community charge would have worked with some adjustments if wobbly members of her party had simply held their resolve.[284] For their part, the economist authors of the poll tax believed that their ideas were sound and blamed the tax's failure on poor implementation and Thatcher's leadership style.[285] In the U.S., supporters and economist-architects of the mandate idea likewise maintain that it would have worked if it had been implemented properly according to their prescriptions and if Republicans had cooperated in good faith.[286] Correct or not, their diagnosis represents a doubling-down on the philosophy of expert-

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[282] MOORE, *supra* note 5, at 365–66.

[283] 26 U.S.C. § 5000A (2018); BUTLER ET AL., *supra* note 5, at 175. With the tax reduced to zero dollars, a Federal District Judge declared the entire law unconstitutional; but the law remains in effect pending appeal. *See* Texas v. United States, 340 F. Supp. 3d 579 (N.D. Tex. 2018).

[284] THATCHER, *supra* note 5, at 642, 667.

[285] CHRISTOPHER D. FOSTER, BRITISH GOVERNMENT IN CRISIS, OR, THE THIRD ENGLISH REVOLUTION 101–102 (2005) (blaming Thatcher's leadership style for poll tax failure); Butler, *supra* note 35 ("If anything sunk the poll tax, it was disastrously bad implementation, rather than the idea itself.").

[286] *See, e.g.*, Jonathan Gruber, *Trump Says Obamacare is Broken. He's the One Who Broke It*, WASH. POST (May 5, 2017), https://www.washingtonpost.com/opinions/trump-says-obamacare-is-broken-hes-the-one-who-broke-it/2017/05/05/29434658-31b7-11e7-8674-437ddb6e813e_story.html?utm_term=.d092511fe7a5; Dana Milbank, *The GOP Masterminds Behind the Obamacare Sabotage*, WASH. POST (Mar. 14, 2017), https://www.washingtonpost.com/opinions/the-gop-masterminds-behind-obamacares-death-spiral/2017/03/14/ad798b5a-08ed-11e7-b77c-0047d15a24e0_story.html?noredirect=on&utm_term=.2943e4cbd8d3.

scientific government based in economic theory. In this view, the creation and administration of policy by centralized academic experts failed, not because it was flawed as a form of governance but because it was not tried in pure enough form. The experts were simply not given sufficient power to apply their knowledge, and instead politicians and elections corrupted the process and doomed the reforms. Yet it is safe to say that large swaths of the electorate in both countries—the parts that voted for Brexit, Bernie Sanders, and Donald Trump—have also doubled down on their opposition to this philosophy. They hold fast to the idea of popular sovereignty, yet feel that no option at the voting booth represents their interests. Even when they are able to express their preferences electorally, they are still somehow thwarted, often by the forces of expert scientific administration acting to protect voters from themselves. In sum, events have only served to reinforce the conflicting positions of each side. Indeed, both sides are arguably correct. Economist policy architects would likely be much more successful if they had unfettered scope to design and implement their ideas, and many voters would be happier—measured by their own non-economic criteria—if their expressed preferences were simply implemented with less resistance. The trouble is that both visions cannot operate simultaneously. Until this tension is resolved, we are likely to see continued episodes of societal division and populist discontent.