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AN ANALYSIS OF THE POLITICAL AND LEGAL DEBATES
CONCERNING MEDICAID EXPANSION IN VIRGINIA

*By Rick Mayes, Ph.D. & Benjamin Paul**

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I. INTRODUCTION

The Supreme Court's historic June 2012 ruling regarding the Affordable Care Act (ACA) in *National Federation of Independent Business v. Sebelius* set the stage for a massive federalism battle over Medicaid expansion in the United States. The original language of the Act was intended to nationalize Medicaid by having every state expand their program's eligibility to all individuals up to 138% of the federal poverty level. This would have significantly reshaped Medicaid, a joint federal-state health insurance program, into a universal entitlement for all low-income citizens. Currently, Medicaid eligibility varies dramatically from state to state. The Court held that the ACA's Medicaid expansion, and the additional federal financing that would accompany it, would be optional for the states. The decision instigated a series of intense, state-level political battles, especially in Virginia. This article will provide a basic overview of: Medicaid and its significance in Virginia, how and why the Supreme Court's decision triggered a heated debate over Medicaid expansion, the manner in which the political debate has unfolded in the Commonwealth, and what the major implications are for expanding (and not expanding) the program. This article concludes that Medicaid expansion can be viewed as a valuable investment in the health of vulnerable citizens and the overall healthcare infrastructure of Virginia.

II. MEDICAID AND ITS STRUCTURE AND IMPACT IN VIRGINIA

The largest of all federal grant-in-aid programs, Medicaid is the underappreciated and stigmatized "workhorse of the U.S. health care system."¹ Yet it is also the single largest health insurer in the U.S., covering approximately 72.6 million individuals, costing about \$435 billion annually, and accounting for 20-22% of most individual states' budgets.² The proportion of total Medicaid expenditures that individual states cover varies widely.

¹See OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2015 ANALYTICAL PERSPECTIVES BUDGET OF THE U.S. GOVERNMENT 243-45 (2014), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/spec.pdf>; Alan Weil, *There's Something About Medicaid*, 22 HEALTH AFFAIRS 13, 15, 20-23 (2003).

²Tara Mancini, *MACStats Now Available!*, SAY AHHAH! (Apr. 25, 2013),

<http://ccf.georgetown.edu/all/macstats-now-available/>; see also MACPAC, MACSTATS: MEDICAID AND CHIP PROGRAM STATISTICS 34-35 (2014), available at

http://www.macpac.gov/macstats/2014_03_MACStats.pdf?attredirects=0;

VA. DEP'T OF MED. ASSISTANCE SERV. AND MEDICAID MANAGED CARE ORG.S, PARTNERS IN CARE 2, available at http://www.dmas.virginia.gov/Content_atchs/atchs/wnew_f1.pdf (last visited July 24, 2014).

Poorer states, such as Mississippi and West Virginia, pay just 26-33% of the cost of Medicaid in their states, with the federal government paying the remaining 67-74%.³ Conversely, fifteen states, including Connecticut and Virginia, pay half of the cost of Medicaid in their states.⁴ The variation reflects state differences in per capita income.⁵

Medicaid lacks deep and broad-based political support, as compared to entitlements such as Social Security or Medicare, largely because it is a means-tested welfare program. Nevertheless, the United States health care system would collapse without it.⁶ Medicaid, in addition to other public health programs, covers numerous services and segments of the population who are either voided or missed by private health insurance.⁷ Since the 2008-2009 recession, and the sluggish recovery thereafter, the program's growth in enrollment and costs has sparked political controversy over the extent to which basic access to health care should be a legal right.⁸

Enacted in 1965, and overshadowed by the simultaneous passage of Medicare for senior citizens, state participation in Medicaid remains voluntary.⁹ Arizona was the last to join the program in 1982.¹⁰ Originally Medicaid was available only to those individuals who received welfare cash assistance.¹¹ Medicaid's eligibility has since been extended over time to three additional populations: (a) low-income pregnant women and children who do not receive welfare, (b) those who are deemed "medically needy" by virtue of having high medical or long-term-care expenses, and (c) low-income Medicare beneficiaries who cannot afford to pay their Medicare cost-

³See Kaiser Comm'n on Medicaid and the Uninsured, *Medicaid Financing: An Overview of the Federal Medicaid Matching Rate (FMAP) 2, 6* (2012), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8352.pdf>.

⁴See *id.*

⁵See *id.* at 1.

⁶See Weil, *supra* note 1, at 13, 24-25.

⁷See Weil, *supra* note 1, at 13, 20-23.

⁸See Sara Rosenbaum, *Medicaid and National Health Care Reform*, 361 *New Eng. J. Med.*, 2009, 2009-10 (2009).

⁹See *Medicaid*, Nat'l Conference of State Legislatures, (last visited May 30, 2014), <http://www.ncsl.org/research/health/medicaid-home-page.aspx> (describing state participation); Weil, *supra* note 1, at 13, 16 (providing date of enactment of Medicaid); *Vote Tallies for Passage of Medicare in 1965 Actions in Congress*, Soc. Security Admin., <http://www.ssa.gov/history/tally65.html> (last visited Jun. 10, 2014).

¹⁰Erik Eckholm, *Late Starter in Medicaid, Arizona Shows the Way*, *N.Y. Times*, Aug. 7, 1991, <http://www.nytimes.com/1991/08/07/us/late-starter-in-medicaid-arizona-shows-the-way.html>.

¹¹Cheryl A. Camillo, *Implementing Eligibility Changes under the Affordable Care Act: Issues Facing State Medicaid and CHIP Programs*, *St. Health Access Ref. Evaluation 1* (July 2012), http://www.mathematica-mpr.com/publications/pdfs/health/eligibilitychangesstateissues_brief1.pdf. The welfare cash was formerly called Aid to Families with Dependent Children and now referred to as Temporary Assistance to Needy Families. *Id.*

sharing expenses (such as hospital deductibles and premiums for Medicare's physician and prescription drug programs).¹²

However, being poor, defined as having income below 100% of the poverty level, does not guarantee Medicaid eligibility. In 2012, approximately 40% of non-elderly, poor adults were uninsured, primarily because they did not have children.¹³ Virginia's Medicaid eligibility criteria are some of the most stringent in the United States. Childless adults in the Commonwealth cannot qualify for the program at all.¹⁴ And with an income limit of 30% of the federal poverty level (approximately \$5,000 for a family of three), only 6 states¹⁵ make it harder than Virginia does for working parents with dependent children to qualify for Medicaid.¹⁶ Consequently, Virginia ranks 48th in Medicaid spending per capita.¹⁷

Total Medicaid spending in Virginia (\$7 billion in 2013) is skewed towards seniors and the disabled, who comprise a minority (26%) of the program's 1.1 million population.¹⁸ Parents, pregnant women and children make up three quarters of Virginia's Medicaid enrollment, but account for only 31% of the program's expenditures.¹⁹ The program's average annual rate of cost growth has slowed to 3.3% since 2010, as compared to 9.5% per year between 1990 and 2009.²⁰ The majority of Medicaid recipients in Virginia are enrolled in managed care organizations, with most of the program's spending going towards inpatient hospital care (20%), home and community-based care (15.6%), nursing home care (12%), and prescription drugs (8.6%).²¹ The 2008 recession that began around the time of Barack

¹²*See id.*

¹³*The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, Henry J. Kaiser Family Found. (Apr. 2, 2014), <http://kff.org/health-reform/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/>.

¹⁴Cindi B. Jones & William A. Hazel, *Medicaid Overview and Financing*, Va. Dep't Med. Assistance Serv. 14 (June 14, 2013), <http://mirc.virginia.gov/documents/06-17-13/Medicaid%20Overview%20and%20Financing.pdf>.

¹⁵Alabama, Arkansas, Indiana, Louisiana, Mississippi, and Texas. *See Medicaid Eligibility for Adults as of January 1, 2014*, Henry J. Kaiser Family Found. 3 (Oct. 2013), <http://kaiserfamilyfoundation.files.wordpress.com/2013/10/8497-medicaid-eligibility-for-adults-as-of-january-1-2014.pdf>.

¹⁶*See id.* at 1–3.

¹⁷Jones & Hazel, *Medicaid Overview and Financing*, *supra* note 14, at 14.

¹⁸*See Virginia Medicaid at a Glance*, Va. Dep't Med. Assistance Serv. 1 (2013), http://www.dmas.virginia.gov/Content_atchs/atchs/va-medprg.pdf.

¹⁹*Id.* at 18.

²⁰*State Health Facts: Average Annual Growth in Medicaid Spending*, KAISER FAMILY FOUND., <http://kff.org/medicaid/state-indicator/growth-in-medicaid-spending/> (last visited July 24, 2014).

²¹*Review of the Impact of Medicaid Rates on Access to Health Care in Virginia*, JLARC iii (Nov. 2013), <http://jlarc.virginia.gov/reports/Rpt448.pdf>.

Obama's first presidential election increased the states' enrollment in Medicaid.²²

III. THE 2010 AFFORDABLE CARE ACT AND THE SUPREME COURT'S 2012 RULING IN *NFIB VS. SEBELIUS*

On March 23, 2010, President Obama signed the Affordable Care Act (ACA) into law.²³ It was arguably the most expansive and ambitious piece of federal legislation since Medicare was passed in 1965.²⁴ To significantly increase insurance coverage, the Act included a two-part approach of: (1) a mandate that individuals have (or purchase) health insurance, with subsidies for those with lower incomes (a policy pioneered successfully in Massachusetts in 2007),²⁵ coupled with (2) a national expansion of Medicaid eligibility for all U.S. citizens up to 138% of the federal poverty level.²⁶ Expanding Medicaid for the poorest individuals was the most logical policy, because the majority of their incomes fell below the federal tax filing threshold.²⁷ This made federal tax credits (subsidies) to purchase private insurance unworkable, as "most of them would have no federal tax liability to offset with tax credits."²⁸

Within minutes of the ACA's passage, however, Virginia Attorney General Ken Cuccinelli II sued to challenge its constitutionality.²⁹ Thirteen other state attorneys general also sued to stop the new law.³⁰ Over the course of 2011, a number of cases contesting the ACA's legality were decided in both lower district courts and four circuit courts (the 4th, 6th, 11th and D.C.).³¹ The

²²*Medicaid Enrollment: June 2010 Data Snapshot*, HENRY J. KAISER FAMILY FOUND. (Feb. 2011), <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8050-03.pdf>.

²³See JOHN E. MCDONOUGH, *INSIDE NATIONAL HEALTH REFORM* xi (Univ. of Cal. Press, 2011).

²⁴David Leonhardt, *In Health Bill, Obama Attacks Wealth Inequality*, N.Y. TIMES (Mar. 23, 2010), <http://www.nytimes.com/2010/03/24/business/24leonhardt.html?ref=policy>.

²⁵Jon Kingsdale, *Implementing Health Care Reform in Massachusetts: Strategic Lessons Learned*, 28 HEALTH AFFAIRS 588, 590 (2009).

²⁶Sara Rosenbaum, *The Patient Protection and Affordable Care Act: Implications for Public Health Policy and Practice*, 126 PUB. HEALTH REPORTS 130, 131 (2011).

²⁷Sara Rosenbaum & Timothy M. Westmoreland, *The Supreme Court's Surprising Decision on the Medicaid Expansion: How Will the Federal Government and States Proceed?*, 31 HEALTH AFFAIRS 1663, 1664 (2012).

²⁸*Id.* at 1664–65.

²⁹Rosalind S. Helderman, *Cuccinelli Sues Federal Government to Stop Health-Care Reform Law*, WASH. POST (Mar. 24, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/23/AR2010032304224.html>.

³⁰*Id.*

³¹Adam Liptak, *Challenges to the Health Law*, N.Y. TIMES (Nov. 13, 2011), <http://www.nytimes.com/interactive/2011/11/13/us/politics/challenges-to-the-health-law.html>.

D.C., 4th, and 6th Circuit Courts upheld the constitutionality of the ACA's individual mandate,³² with the 4th Circuit concluding that the Medicaid expansion was a "valid exercise of Congress's power under the Spending Clause of the Constitution."³³ But with a Florida district court judge's ruling striking down the ACA and disagreement among appellate courts over why the ACA was constitutional, the Supreme Court agreed on November 14, 2011, to review the ACA by hearing an appeal of the 11th Circuit Court's decision in the Florida case.³⁴ The Court scheduled an unusually long five and a half hours for oral argument to be heard from March 26 to March 28, 2012.³⁵

Three months later, on June 28, 2012, the Court handed down arguably the most significant federalism case since the New Deal, in its ruling in *National Federation of Independent Business v. Sebelius*.³⁶ Writing for the 5-4 majority, Chief Justice Roberts upheld the ACA's individual mandate as a lawful exercise of the government's power to levy taxes.³⁷ The ACA's Medicaid expansion, however, was ruled unconstitutional by a vote of 7-2.³⁸

Chief Justice Roberts, along with six other Justices,³⁹ said that the manner in which the ACA expanded Medicaid eligibility to all citizens up to 133% of the federal poverty level, by requiring states to go along with expansion or risk losing all federal Medicaid money, was too coercive.⁴⁰ It crossed the line of proper power-sharing between the federal and state governments, as Roberts maintained, because threatening to withhold all federal Medicaid funding to states that did not expand eligibility "is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."⁴¹ The ACA Medicaid expansion fundamentally changed Medicaid, Chief Justice Roberts concluded, as it "is no longer a

³²*Id.*

³³Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2572 (2012).

³⁴T. R. Goldman, *Health Policy Brief*, HEALTH AFFAIRS (Nov. 30, 2011), http://healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_58.pdf

³⁵See Adam Liptak, *Justices to Hear Health Care Case as Race Heats Up*, N.Y. TIMES (Nov. 14, 2011), <http://www.nytimes.com/2011/11/15/us/supreme-court-to-hear-case-challenging-health-law.html>; see also *Patient Protection and Affordable Care Act Cases*, <http://www.supremecourt.gov/docket/PPAACAs.aspx> (last visited May 31, 2014).

³⁶Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2566, 2572-74 (2012).

³⁷Adam Liptak, *Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama*, N.Y. TIMES (June 28, 2012), <http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html?pagewanted=all>.

³⁸*Id.*

³⁹Justices Stephen Breyer, Elena Kagan, Antonin Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito.

⁴⁰*Sebelius*, 132 S. Ct. at 2601, 2608-2609.

⁴¹*Id.* at 2605.

program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.”⁴²

IV. THE 2013 GENERAL ASSEMBLY AND THE MEDICAID INNOVATION & REFORM COMMISSION (MIRC)

The Supreme Court’s ruling ignited a debate in each state over whether to expand its Medicaid program. Nearly half of the states quickly elected to expand their programs.⁴³ Some states, including Arkansas and Iowa, negotiated alternative methods with the federal government to expand their programs.⁴⁴ As of mid September 2014, twenty-seven states and the District of Columbia have also expanded their programs.⁴⁵ Twenty-three states, including Virginia, have thus far declined to expand.⁴⁶

Virginia’s state legislature first considered expansion during the 2013 General Assembly.⁴⁷ Medicaid expansion was one of two key issues debated during the session.⁴⁸ The other was a massive transportation funding package championed by former Governor Bob McDonnell.⁴⁹ The two issues merged into one when it became clear that the governor, a Republican opponent of Medicaid expansion, and his allies in the legislature would need votes from Democrats who favored expansion in order to pass the transportation package.⁵⁰ Democrats used this leverage to demand that Medicaid expansion be approved as a condition for passing the transportation bill.⁵¹

⁴²*Id.* at 2606.

⁴³See Michael Cooper, *Many Governors are Still Unsure about Medicaid Expansion*, N.Y. TIMES (July 14, 2012), <http://www.nytimes.com/2012/07/15/us/governors-face-hard-choices-over-medicaid-expansion.html?pagewanted=all>.

⁴⁴Sarah Kliff, *The Feds Sign Off on Expanding Medicaid to 100,000 Iowans*, WASH. POST (December 10, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/10/the-feds-sign-off-on-expanding-medicaid-to-72000-iowans/>.

⁴⁵*Status of State Action on the Medicaid Expansion Decision, 2014*, HENRY J. KAISER FAMILY FOUND., <http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/#note-1> (last updated Mar. 26, 2014).

⁴⁶*Id.*

⁴⁷ See 2012 VA S.B. 1329, 2013 Reg. Sess. (Va. 2013).

⁴⁸David Toscano, *Session Ends with a Bang*, DAVIDTOSCANO.COM (Feb. 12, 2013), <http://davidtoscano.com/general-assembly-2013/session-ends-with-a-bang>.

⁴⁹See Ryan Holeywell, *Virginia’s Bold, New Transportation Funding Idea*, GOVERNING.COM (Jan. 28, 2013) <http://www.governing.com/blogs/view/gov-virginias-bold-new-transportation-funding-idea.html>.

⁵⁰See Fredrick Kunkle and Laura Vozzella, *Virginia Lawmakers Approve Sweeping Transportation Plan*, WASH. POST (Feb. 23, 2013), http://www.washingtonpost.com/local/va-politics/va-lawmakers-approve-landmark-transportation-plan/2013/02/23/712969d8-7de4-11e2-82e8-61a46c2cde3d_story.html.

⁵¹See *id.*

On the last day of the legislative session, the two sides came to a compromise.⁵² In exchange for enough Democratic votes to approve the governor's transportation plan, Republicans agreed to establish a special legislative commission that would be vested with the authority to expand Medicaid pending review of seventeen specific reforms to the existing program.⁵³ Named the Medicaid Innovation and Reform Commission (MIRC), the commission was given oversight to implement the reforms including: a pilot program for Virginians eligible for both Medicare and Medicaid, transition of children in foster care from traditional fee-for-service payment into Medicaid managed care, and establish wellness programs for beneficiaries.⁵⁴

Despite the expectation that the commission would be the vehicle for moving forward with Medicaid expansion, it became clear that the opponents of expansion had outwitted supporters. The MIRC was structured such that three of five voting members from each chamber had to vote yes in order to authorize expansion.⁵⁵ Speaker of the House, Bill Howell, seized on this rule by appointing five anti-expansion legislators from the House of Delegates, effectively killing the MIRC as a vehicle for expansion. Governor Bob McDonnell went so far as to call the House representatives on the MIRC a "firewall against expansion."⁵⁶

The MIRC has met six times since it was established.⁵⁷ While the Department of Medical Assistance Services has fulfilled nearly all of the reforms required by the MIRC, there is little chance that the commission will hold a vote or authorize expansion anytime soon. Instead, legislators from both parties have used the commission as a platform to voice their support or opposition to Medicaid expansion.⁵⁸

⁵²See *id.*

⁵³Christopher Howard, *The Unfinished Debate Over Expanding Medicaid in Virginia*, SCHOLARS STRATEGY NETWORK (June 2013), http://www.scholarsstrategynetwork.org/sites/default/files/ssn_basics_facts_howard_on_expanding_medicaid_in_virginia.pdf.

⁵⁴Tracking Medicaid Reforms, COMMONWEALTH INST. FOR FISCAL ANALYSIS (Oct. 2013), <http://www.thecommonwealthinstitute.org/wp-content/uploads/2013/10/Stoplight-Reform-Tracker-10-22-13.pdf>.

⁵⁵About the Commission, MEDICAID INNOVATION AND REFORM COMM'N, <http://mirc.virginia.gov/about.html> (last visited May 22, 2014).

⁵⁶Letter from Robert F. McDonnell, former Governor of Va., to Kathleen Sebelius, former Sec'y of Health and Human Servs. (Mar. 5, 2013) available at http://mirc.virginia.gov/documents/McDonnell_Sebelius_itr_mirc.pdf.

⁵⁷Meetings, MEDICAID INNOVATION AND REFORM COMMISSION, <http://mirc.virginia.gov/meetings2013.html> (last visited May 22, 2014).

⁵⁸Chariman Putney Announces Medicaid Innovation and Reform Commission Appointments, CHRISPEACE.COM (Feb. 25, 2013), <http://chrispeace.com/2013/02/25/chairman-putney-announces-medicaid-innovation-and-reform-commission-appointments/>.

The Medicaid expansion debate did not end with the legislative session. Elections for governor, lieutenant governor, attorney general, the House of Delegates and a portion of the Senate kept the issue front and center for all of 2013.⁵⁹ Candidates from both parties positioned their support or opposition to Medicaid expansion to be a key piece of their platforms.⁶⁰ The Democratic candidate for governor, Terry McAuliffe, put his support for expansion at the center of his candidacy.⁶¹ McAuliffe's opponent, Attorney General Ken Cuccinelli, campaigned heavily against expansion, even calling the Medicaid Innovation and Reform Commission unconstitutional.⁶²

The election outcomes shook up the state's political composition, marking a new chapter in the debate. Democrats swept the three statewide elections; the first time the party had won all three statewide offices since 1989.⁶³ The sweep also positioned the Democrats to retake control of the Senate. The Senate was split evenly before and after the elections.⁶⁴ By winning the Lieutenant governorship, who also serves as the president of the Senate, Democrats were effectively given control of the chamber.⁶⁵ On the other hand, the House of Delegates remained firmly in Republican control by a margin of sixty-seven to thirty-two.⁶⁶ Virginia had elected a divided government, setting the stage for compromise – or stalemate.

⁵⁹Prue Salasky, Medicaid Expansion at Stake at Ballot Box in November, DAILY PRESS (Sept. 21, 2013), http://articles.dailypress.com/2013-09-21/health/dp-nws-medicaid-expansion-0922-20130922_1_medicaid-expansion-attorney-general-ken-cuccinelli-affordable-care-act/2.

⁶⁰Emile Scherers, Medicaid Fight in Virginia Takes Off, PEOPLES WORLD (Jan. 28, 2014), <http://www.peoplesworld.org/medicaid-fight-in-virginia-takes-off/>.

⁶¹Laura Vozzella, If Elected, McAuliffe Faces Showdown with Va. House Republicans Over Obamacare, WASH. POST (Sept. 14, 2013), http://www.washingtonpost.com/local/virginia-politics/if-elected-mcauliffe-faces-showdown-with-va-house-republicans-over-obamacare/2013/09/14/29b11f98-1c17-11e3-a628-7e6dde8f889d_story.html

⁶²See David A. Patten, Cuccinelli: Va. Governor's Race 'A Referendum on Obamacare', NEWSMAX (Nov. 1, 2013, 05:40 PM), <http://www.newsmax.com/Politics/obamacare-ken-cuccinelli-terry-mcauliffe-virginia/2013/11/01/id/534408/>; 2013 Op. Va. Att'y Gen. 13-013, available at <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/OPINIONS/2013opns/13-013%20Marshall.pdf>.

⁶³See Jeff E. Schapiro, Analysis: Newly Minted Governor Opens Term with Short List of Goals, RICHMOND TIMES-DISPATCH (Jan. 12, 2014, 12:00 AM), http://www.timesdispatch.com/news/state-regional/virginia-politics/analysis-newly-minted-governor-opens-term-with-short-list-of/article_bbc6b04-e29e-580a-87bf-b3a52da2d9c6.html; Justin Baragona, Virginia's Top Three State Offices Held by Democrats as Obenshain Concedes in AG Race, POLITICUSUSA (Dec. 18, 2013, 4:14 PM), <http://www.politicususa.com/2013/12/18/top-offices-held-democrats-virginia-obenshain-concedes-ag-race.html>.

⁶⁴See Laura Vozzella & Rachel Weiner, *Democrats Take Control of Virginia Senate*, WASH. POST (Jan. 28, 2014), http://www.washingtonpost.com/local/virginia-politics/democrats-seize-control-of-va-senate/2014/01/28/94b92664-8823-11e3-a5bd-844629433ba3_story.html

⁶⁵See *id.*

⁶⁶See *Republicans Take Down Several Challengers in Bid to Retain Solid Va. House Majority*, FOXNEWS (Nov. 5, 2013), <http://www.foxnews.com/politics/2013/11/05/republicans-take-down-several-challengers-in-bid-to-retain-solid-va-house/>.

V. THE 2014 GENERAL ASSEMBLY AND SPECIAL SESSION ON MEDICAID EXPANSION

The Medicaid expansion debate continued during the 2014 legislative session, which began on January 8, 2014.⁶⁷ Despite the election of a pro-expansion governor and cross partisan coalition for expansion in the Senate, momentum stalled in the face of unified opposition from the House of Delegates.⁶⁸ Seizing on the botched rollout of the Affordable Care Act and cancellation of millions of Americans health insurance plans, expansion opponents in the House of Delegates dug in their heels.⁶⁹ Early optimism for a compromise to move forward quickly gave way to a stalemate.

On February 6, Senator John Watkins, a Republican in favor of using the federal dollars to provide coverage, proposed Marketplace Virginia.⁷⁰ The proposal drew from the model passed by Arkansas a year earlier.⁷¹ Instead of expanding Medicaid eligibility, Marketplace Virginia proposed negotiating a deal with the federal government to use the federal dollars to help Virginians under 100% of the Federal Poverty Line purchase private, managed-care insurance plans.⁷² The plan would also require some beneficiaries to contribute a small amount of their income toward their health care as well as incentives for job search activities.⁷³ Marketplace Virginia was designed to appeal to resistant Republicans who might have been open to pur-

⁶⁷See VIRGINIA GENERAL ASSEMBLY SESSION CALENDAR, http://dls.virginia.gov/pubs/calendar/cal2014_2.pdf (last visited June 16th, 2014); Happy Carlock, *Legislators Deny McAuliffe's Wish for Medicaid Expansion*, ROCKBRIDGE REPORT (Mar. 13, 2014), <http://rockbridgereport.washingtonandlee.net/?p=11661>.

⁶⁸See Gary Robertson, *Virginia Governor, Lawmakers Fail to Reach Medicaid Deal*, REUTERS, Mar. 24, 2014, 7:26 PM, available at <http://www.reuters.com/article/2014/03/24/us-usa-virginia-politics-idUSBR EA2N11020140324>.

⁶⁹See Travis Fain, *Virginia Legislative Session Ends, But Lawmakers Have Work to do*, DAILY PRESS (Mar. 8, 2014), <http://insurancenewsnet.com/oarticle/2014/03/08/virginia-legislative-session-ends-but-lawmakers-have-work-to-do-a-471449.html#.U453QBasaDV>.

⁷⁰Michael Martz, *Senate Panel Backs New Private Insurance Marketplace*, RICHMOND TIMES DISPATCH (Feb. 4, 2014), http://www.timesdispatch.com/news/state-regional/virginia-politics/senate-panel-backs-new-private-insurance-marketplace/article_ad641d5b-ecc6-58cc-96f8-537948f2af13.html

⁷¹Michael Martz, *Lawmakers on Both Sides of Debate Get Insight from Ark.*, RICHMOND TIMES DISPATCH (Feb. 19, 2014), http://www.timesdispatch.com/news/state-regional/virginia-politics/general-assembly/lawmakers-on-both-sides-of-debate-get-insight-from-ark/article_d2bea938-98c3-11e3-b6d8-001a4bcf6878.html

⁷²Presentation to Virginia Senate Finance Committee on Marketplace Virginia (Feb. 6, 2014) available at http://sfc.virginia.gov/pdf/committee_meeting_presentations/2014/020614_Marketplace_Virginia_Briefing.pdf

⁷³*Id.* It is worth noting that the Department of Health and Human Services has never approved a waiver that requires work search requirements.

suings an approach to closing the coverage gap that did not expand traditional Medicaid.⁷⁴

Republicans in the House of Delegates did not budge. They countered by proposing a full-scale audit of Virginia's existing Medicaid program before they would consider any form of expansion.⁷⁵ They also offered to restore \$81 million in inflation adjustments for payments to hospitals as well as \$6 million for free clinics and community health centers.⁷⁶ The Senate's Marketplace Virginia plan and the House's proposal were both adopted in their respective chambers, setting up a conference committee to craft a compromise.⁷⁷ However, they were unable to reach a compromise. Budget conferees could not come to an agreement, and the budget process came to a stalemate that has not yet been resolved.⁷⁸ Despite coming to agreement on most other items in the budget, the contentious Medicaid expansion debate kept negotiators on each side from finding a path forward. The deadlock is particularly disconcerting because state lawmakers must pass a budget by July 1, 2014 to fund the government.⁷⁹ Nonetheless, the 2014 legislative session ended on March 8th, 2014 with no resolution in sight.⁸⁰

Legislators returned to Richmond on March 24th for a special session to continue their debate over Medicaid expansion and the budget.⁸¹ During the two-week intermission, however, Medicaid expansion opponents shrewdly opened a new line of attack by calling on the governor and Senate Demo-

⁷⁴*No Signs of Compromise on Va. Medicaid Expansion*, MODERN HEALTHCARE (Feb. 9, 2014), <http://www.modernhealthcare.com/article/20140209/INFO/302099990#>

⁷⁵Rob Stuart, *Virginia Senate Offers Path to Accepting Medicaid Expansion Funds*, NEWS VIRGINIAN, Feb. 19, 2014, http://www.dailyprogress.com/newsvirginian/news/local/virginia-senate-offers-path-to-accepting-medicaid-expansion-funds/article_1a968df4-991c-11e3-ac96-0017a43b2370.html

⁷⁶Michael Martz et al, *Va. House, Senate Budgets Show Sharp Split*, RICHMOND TIMES-DISPATCH (Feb. 17, 2014), http://www.timesdispatch.com/news/state-regional/va-house-senate-budgets-show-sharp-split/article_3f15af5c-9755-11e3-b36f-001a4bcf6878.html.

⁷⁷Michael Laris & Laura Vozzella, *House and Senate in Virginia at Loggerheads Over Medicaid expansion*, WASH. POST (Feb. 20, 2014), http://www.washingtonpost.com/local/virginia-politics/house-and-senate-in-virginia-at-loggerheads-over-medicaid-expansion/2014/02/20/7bdf47f0-9a3d-11e3-b931-0204122c514b_story.html.

⁷⁸Lyndsey Price, *Virginia Lawmakers Not Close to Budget Compromise*, WCYB.COM (March 28, 2014), <http://www.wcyb.com/news/virginia-lawmakers-not-close-to-budget-compromise/25218124>.

⁷⁹Laura Vozzella, *Va. General Assembly Adjourns Without Budget or Medicaid Expansion*, WASH. POST (March 8, 2014), http://www.washingtonpost.com/local/virginia-politics/va-general-assembly-adjourns-without-budget-or-medicaid-expansion/2014/03/08/3c894862-a613-11e3-84d4-e59b1709222c_story.html.

⁸⁰*Id.*

⁸¹Laura Vozzella, *Virginia Lawmakers Return to Richmond to try to Break Impasse Over Medicaid Expansion*, WASH. POST (March 22, 2014), http://www.washingtonpost.com/local/virginia-politics/virginia-lawmakers-return-to-richmond-to-try-to-break-impasse-over-medicaid-expansion/2014/03/22/99c3e1dc-b03f-11e3-9627-c65021d6d572_story.html

crats to decouple their Medicaid expansion proposal from the budget.⁸² Their pretext was that by decoupling the two issues, legislators could pass a budget, thereby avoiding a government shutdown, and debate Medicaid during a separate special session.⁸³ The underlying strategy was to take away the leverage expansion supporters held through the must-pass budget. The governor and Senate rejected this approach knowing that their best chance for finding a compromise would be through the budget.⁸⁴ The House of Delegates initially passed a new budget with no form of expansion.⁸⁵ The Senate doubled down on the Marketplace Virginia proposal and passed a revised budget that continued to include Marketplace Virginia.⁸⁶ Neither chamber took action on the other's budget, leading to a temporary halt in the legislative process.⁸⁷ The debate shifted to individual legislative districts in town hall meetings, op-eds, and rallies for and against expansion.⁸⁸

In late June 2014, Virginia lawmakers averted a state government shutdown by finalizing a budget that did not include Medicaid expansion. Governor McAuliffe signed the bill into law, but tried to veto specific language in the legislation that required that the legislature approve any funds used to expand Medicaid. His veto was excluded from the final bill by Virginia House Speaker William J. Howell (R-Stafford).⁸⁹ In early July, Speaker Howell called for a special General Assembly session the last full week of September 2014 to debate the issue of Medicaid expansion.⁹⁰

⁸²Jim Nolan, *Medicaid Issue May Push Budget to the Brink*, RICHMOND TIMES-DISPATCH, (April 27, 2014), http://www.timesdispatch.com/news/state-regional/medicaid-issue-may-push-budget-to-the-brink/article_7cec031a-af69-5d21-8e59-15d877a75121.html?mode=qjm.

⁸³*Id.*

⁸⁴*Id.*

⁸⁵Michael Martz, *House Approves Own Budget Plan, Then Recesses*, RICHMOND TIMES-DISPATCH, (March 25, 2014), http://www.timesdispatch.com/news/state-regional/house-approves-own-budget-plan-then-recesses/article_a9dc9440-b460-11e3-aeaf-001a4bcf6878.html.

⁸⁶Jim Nolan, *Senate Passes Budget with Private Health Care Option*, RICHMOND TIMES-DISPATCH, (April 8, 2014), http://www.timesdispatch.com/news/state-regional/senate-passes-budget-with-private-health-care-option/article_31146816-bf3d-11e3-bd58-0017a43b2370.html.

⁸⁷*Id.*

⁸⁸Laura Vozzella, *Virginia's Fight Over Medicaid Expansion Shifts from Capitol to Cities, Towns, and Rural Enclaves*, WASH. POST (Mar. 12, 2014), http://www.washingtonpost.com/local/virginia-politics/virginias-medicaid-war-shifts-from-capitol-to-cities-and-towns-across-the-commonwealth/2014/03/12/00df81f0-aa05-11e3-b61e-8051b8b52d06_story.html.

⁸⁹Laura Vozzella, *Virginia's Fight Over Medicaid Expansion Shifts from Capitol to Cities, Towns, and Rural Enclaves*, WASH. POST (Mar. 12, 2014), http://www.washingtonpost.com/local/virginia-politics/virginias-medicaid-war-shifts-from-capitol-to-cities-and-towns-across-the-commonwealth/2014/03/12/00df81f0-aa05-11e3-b61e-8051b8b52d06_story.html.

⁹⁰Laura Vozzella, *Virginia's Fight Over Medicaid Expansion Shifts from Capitol to Cities, Towns, and Rural Enclaves*, WASH. POST (Mar. 12, 2014), http://www.washingtonpost.com/local/virginia-politics/virginias-medicaid-war-shifts-from-capitol-to-cities-and-towns-across-the-commonwealth/2014/03/12/00df81f0-aa05-11e3-b61e-8051b8b52d06_story.html.

VI. CONCLUSION: THE COMPANY THAT VIRGINIA KEEPS

The vitriolic debate over Medicaid expansion in Virginia reflects the lack of consensus among elected leaders and the general public over what government should (and should not) provide in the area of health care. It also reflects profound disagreements over what causes—and what to do about—the large, permanent underclass in the United States.⁹¹ Opponents of expansion point to a program that consumes more and more state and federal resources, often at a rate that exceeds overall economic growth.⁹² They also argue that while expanding Medicaid does decrease enrollees' financial strain and improve their mental health, it may not lower costs in the short-term.⁹³ And it actually increases emergency room use, which is a major source of expense.⁹⁴ Some opposition by GOP members relates to party politics, specifically the very real possibility that a vote for anything that buoys Obamacare could result in an internal primary challenge.⁹⁵

Supporters of expansion respond by pointing to individual states that have responded to this concern by only expanding coverage through private health insurance and private health care organizations, which are better equipped and organized to deliver cheaper care with sufficient quality.⁹⁶ Supporters add that states that refuse to expand “effectively intensify the huge uncompensated care burden faced by their hospitals, deprive other health care industry players of important revenues, and keep their medically underserved communities from receiving an enormous economic infusion . . .

⁹¹See Annie Lowrey, *Income Gap, Meet the Longevity Gap*, N.Y. TIMES (Mar. 15, 2014), <http://www.nytimes.com/2014/03/16/business/income-gap-meet-the-longevity-gap.html>.

⁹²William J. Howell & Kirk Cox, *Medicaid Expansion: Promises on Future Costs Don't Ring True*, RICHMOND TIMES-DISPATCH (Feb. 2, 2014), http://www.timesdispatch.com/opinion/their-opinion/columnists-blogs/guest-columnists/howell-and-cox-medicare-expansion-promises-on-future-costs-don/article_0285f36b-9652-5a5a-9524-ae0f914d4afc.html#facebook-comments.

⁹³See Sam Dickman et. al, *Opting Out of Medicaid Expansion: The Health and Financial Impacts*, HEALTH AFFAIRS BLOG, (Jan. 30, 2014, 10:00 am), <http://healthaffairs.org/blog/2014/01/30/optiming-out-of-medicare-expansion-the-health-and-financial-impacts/>; see generally Cathy J. Bradley et al., *Lessons for Coverage Expansion: A Virginia Primary Care Program for the Uninsured Reduced Utilization and Cut Costs*, 31 HEALTH AFFAIRS 350 (2012) (regarding a local study at VCU that suggests that well-coordinated primary care can reduce costs for patients that were previously uninsured).

⁹⁴Sarah L. Taubman et al., *Medicaid Increases Emergency Department Use: Evidence from Oregon's Health Insurance Experiment*, 343 SCIENCE 263, 265 (2014).

⁹⁵David K. Jones, et al., *Pascal's Wager: Health Insurance Exchanges, Obamacare and the Republican Dilemma*, 39 J. HEALTH POL.POL'Y & L. 97, 129 (2014).

⁹⁶Sara Rosenbaum & Benjamin D. Sommers, *Using Medicaid to Buy Private Health Insurance—The Great New Experiment?*, 369 NEW ENG. J. MED. 7, 7–9 (2013); KAISER COMM'N ON MEDICAID & THE UNINSURED, HENRY J. KAISER FAMILY FOUND., MEDICAID EXPANSION THROUGH PREMIUM ASSISTANCE: ARKANSAS, IOWA, AND PENNSYLVANIA'S PROPOSALS COMPARED, (2014), available at <http://kaiserfamilyfoundation.files.wordpress.com/2014/04/8463-04-medicare-expansion-through-premium-assistance-arkansas-iowa-and-pennsylvania.pdf>.

. [a]nd residents of states that do not expand will still be paying federal taxes (from other parts of the ACA) to cover the expansion in states that do expand.⁹⁷

The authors of this article maintain that Medicaid expansion can be viewed as a valuable investment in the health of the most vulnerable citizens and in our state's overall health care infrastructure. Recent studies have found that mortality rates in Massachusetts dropped significantly after it attained near-universal coverage by 2010,⁹⁸ and (not surprisingly) that states that expanded Medicaid eligibility have experienced larger declines in their uninsured rates than nonexpanding states.⁹⁹ Moreover, in the most recent Commonwealth Fund's Scorecard on State Health System Performance, Virginia ranked 24th in terms of health care access and affordability, prevention and treatment, avoidable hospital use and cost, healthy lives, and equity.¹⁰⁰ Of the 23 states, including Virginia, that have rejected Medicaid expansion to date, 16 of them rank in the bottom half of overall performance in the Commonwealth Fund's Scorecard.¹⁰¹ They include, among others, Mississippi, Oklahoma, Louisiana, Alabama, Georgia, Texas, Florida, Tennessee, and South Carolina.¹⁰² Many of these states are experiencing unprecedented declines in life expectancy, especially among women, in many of their low-income counties.¹⁰³ Virginia is home to roughly 400,000 low-income, uninsured residents who would gain health coverage if the

⁹⁷Timothy Stoltzfus Jost & Sara Rosenbaum, *The Supreme Court and the Future of Medicaid*, 367 NEW ENG. J. MED. 983, 983-84 (2012).

⁹⁸Benjamin D. Sommers, Sharon K. Long & Katherine Baicker, *Changes in Mortality After Massachusetts Health Care Reform*, 160 ANNALS OF INTERNAL MED. 585, 588 (2014).

⁹⁹SHARON K. LONG ET AL., URB. INST. HEALTH POL'Y CENTER, QUICKTAKE: NUMBER OF UNINSURED ADULTS FALLS BY 5.4 MILLION SINCE 2013 (2014), available at <http://hrms.urban.org/quicktakes/changeInUninsurance.html>.

¹⁰⁰DAVID C. RADLEY ET AL., COMMONWEALTH FUND, AIMING HIGHER: RESULTS FROM A SCORECARD ON STATE HEALTH SYSTEM PERFORMANCE 12 (2014), available at http://www.commonwealthfund.org/~media/files/publications/fund-report/2014/apr/1743_radley_aiming_higher_2014_state_scorecard_final.pdf.

¹⁰¹Douglas McCarthy, Cathy Schoen & David Radley, *State Health System Performance: A Scorecard*, JAMA (Apr. 30, 2014), <http://jama.jamanetwork.com/data/Journals/JAMA/0/jvp140067.pdf>.

¹⁰²Medicaid Expansion, COMMONWEALTH FUND, <http://www.commonwealthfund.org/interactives-and-data/maps-and-data/medicaid-expansion-map> (position your cursor over the legend section to highlight the states in each category)(last visited May 31, 2014).

¹⁰³S. Jay Olshansky et al., *Differences in Life Expectancy Due to Race and Educational Differences are Widening, and Many May Not Catch Up*, 31 HEALTH AFF. 1803 (2012); Haidong Wang et al., *Left Behind: Widening Disparities for Males and Females in US County Life Expectancy, 1985-2010*, POPULATION HEALTH METRICS, July 10, 2013, at 1; BARRY P. BOSWORTH & KATHLEEN BURKE, BROOKINGS INST., DIFFERENTIAL MORTALITY AND RETIREMENT BENEFITS IN THE HEALTH AND RETIREMENT STUDY (2014), available at <http://www.brookings.edu/research/papers/2014/04/differential-mortality-retirement-benefits-bosworth>.

state joins the 27 other states that have expanded Medicaid eligibility.¹⁰⁴ And the state would receive federal funding to pay at least 90% of the cost of expansion.¹⁰⁵ Virginia will need to pay for the other 10 percent, and that will require additional taxes, increased premiums or other budget cuts. Nevertheless, it is a unique opportunity that state leaders should consider very seriously.

¹⁰⁴*Medicaid Expansion Delay Costs Millions Each Day*, THE COMMONWEALTH INST., <http://www.the-commonwealthinstitute.org/2013/02/07/medicaid-expansion-delay-costs-millions-each-day/> (last visited June 16, 2014).

¹⁰⁵SHERRY GLIED & STEPHANIE MA, COMMONWEALTH FUND, *ISSUE BRIEF: HOW STATES STAND TO GAIN OR LOSE FEDERAL FUNDS BY OPTING IN OR OUT OF THE MEDICAID EXPANSION (2013)*, available at <http://www.commonwealthfund.org/publications/issue-briefs/2013/dec/federal-funds-medicaid-expansion>.