Adversarial Legalism and the Affordable Care Act

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Virginia Social Science Journal | Volume 54 | 2020 | Pages 20 —29

ABSTRACT Adversarial legalism is concerned with policymaking, policy implementation, and the resolution of disputes centered primarily on the work of lawyers (Kagan, 2001). Adversarial legalism in social welfare cases pits the government against an individual or a group willing to assert pertinent rights in accordance with law. Alone or combined, elected officials' policy making, "neutral" adjudications by the judiciary, and/or implementation of policies by government agencies almost always lead to (further) disputation, because not all community members are pleased with a given outcome. This paper contributes to the extant literature by analyzing the adversarial legalism–Affordable Care Act (ACA) nexus. The invocation of law against government by aggrieved persons to curtail, or eliminate, the ACA, a social welfare policy, is a veritable form of adversarialism. Because the American people subscribe to the rule of law, the use of lawsuits in furthering rights assertion would remain the American way of life for the foreseeable future.

Keywords: adversarial legalism, social welfare policy, legal mobilization, Affordable Care Act (ACA), poverty.

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INTRODUCTION

This article contributes to the extant literature by analyzing the unique adversarial legalism–ACA nexus, one of the first papers to do so. The paper employs a theoretical approach to understanding this nexus, using three ACA-related cases to augment the arguments proffered in the paper. In other words, these cases help to emphasize the complex nature of adversarial legalism[1]. While adversarial legalism has played a significant role in American lives and courts, very little scholarly work exists that addresses the adversarialism-ACA nexus. This paper attempts to fill this gap by explaining how adversarial legalism has contributed to the many ACA-related lawsuits that have become a part of the American legal landscape since 2010. In effect, the ACA may be the most litigated social welfare policy in the history of the United States. Indeed, the connection between adversarialism and the ACA shows the durability of adversarial legalism in U.S. social policy in the current political environment, reflecting both the liberal and conservative legal support structures entrenched in U.S. society, as well as the relative ease of bringing cases before a court of law versus using Congress and lobbyists to set the agenda for social welfare policy.

Adversarial legalism, an outgrowth of the intensification of law in advanced societies (Barnes & Burke, 2006; Galanter, 1992), is concerned with policymaking, policy implementation, and the resolution of disputes centered primarily on the work of lawyers (Busch, Kirp, & Schoenholz, 1999; Kagan, 1999, 2001; Melnick, 2008). The work of lawyers has contributed to the endless lawsuits surrounding the ACA. As of January 2019, there have been at least 70 lawsuits filed to repeal the ACA, and some of these lawsuits have already come before the U.S. Supreme Court. In fact, the law on the books is unlikely to effect social change in the absence of legal mobilization (Barnes & Burke, 2006; Epp, 1998). Lawyers tend to be on opposite sides of these adversarial "combats" that pit the government against citizens/groups (Kagan, 1994). Importantly, lawyers serve as advocates for both sides in a dispute, whether the dispute takes the form of a major review before an administrative law judge in an agency, or before a judge in a court of law. In a prophetic sense, Ewick and Silbey (1998) noted that "[t]he law seems to have a prominent cultural presence as well, occupying a good part of our nation's [consciousness]" (p. 16).

Kagan (2001) argued that the aforementioned characterization of adversarialism is distinguishable from other methods of dispute resolution that rely on the discretionary expertise of bureaucrats and judges, the latter a staple of many Western European countries. It appears, however, that the winds of adversarialism are getting stronger in the United Kingdom, where mediation and out-of-court

1 Adversarial legalism and adversarialism are used interchangeably in this article.

settlements are losing some of their entrenched influence in favor of adversarialism. As Mulcahy (2013) has noted, British "courts have also become increasingly receptive to applications for judicial review by people or organizations who wish to assert a public interest in having an issue determined but have no directly affected interest of their own in a dispute" (p. 62). Mulcahy added that, indeed, some of these interventions have been high-profile cases. While Kagan (2001) posited that adversarial legalism is a "vital tool for righting wrongs, curtailing governmental and corporate arbitrariness, and achieving a just society" (p. 14), he also admitted that bureaucrats, who are independent of the justice system, play a significant role in righting social wrongs. If the ACA exists to provide health care coverage to every American who needs it, then although Kagan (2001) ultimately argued that society should rely on bureaucratic expertise to handle disputes, adversarial legalism (and litigation) remains a discretionary tool for community members who consider the ACA an ineffectual tool for meeting basic healthcare needs in U.S. society. Although laws on the books provide a general platform for addressing legal issues surrounding the ACA, individual cases mired in complexity may require litigation to resolve.

Political ideology appears intricately tied to support for or opposition to the ACA. For example, liberals tend to readily challenge administrative and legal decisions that, in their view, place minority groups at a disadvantage (Benish & Maron, 2016). Faricy (2011) argued, "Democratic majorities prefer direct social spending programs that assuage societal inequality and progressively redistribute public social and financial benefits" (p. 76). Conversely, conservatives tend to be opposed to social welfare (the ACA is no exception), believing that it sometimes leads to dependence on government for sustenance (Benish & Maron, 2016). While conservatives place individual freedom above equality, and hence are "more likely to favor reductions in government spending" (Jacoby, 2006, p. 718) than their liberal counterparts, liberals place equality above liberty (Faricy, 2011), and hence hold a greater propensity to advocate the redistribution of resources to favor the poor. These opposing ideological viewpoints may have contributed to an increase in adversarialism to redress problems surrounding the ACA. Indeed, it appears that adversarial legalism has broad appeal, with both the ideological left and right benefitting from this very American political playbook (Burke, 2002; Farhang, 2010; Keck, 2014). Burke (2002) noted further that, unlike in many Western democracies where lawyers work within the apparatus of the state, lawyers in the United States "are more closely allied with their clients" (p. 44). This important relationship between lawyers and their clients in the United States also shows the degree to which repeat players on both sides of the ideological divide are mobilized to enhance adversarial legalism. This legal orientation thus contributes to the growth of adversarial legalism and litigation in the United States.

SCHOLARS' ARGUMENTS ABOUT ADVERSARIALISM AS A TOOL FOR RIGHTING (PERCEIVED) WRONGS

Kagan's (2001) thesis on adversarial legalism is not a prescription for legal reform, but one that brings to the fore the peculiarities of the American way of making law. Kagan (2001), nonetheless, conceded that if governments are indifferent to social needs, then citizens' willingness to employ adversarial legalism, even if not a remedy, often is preferable to doing nothing at all. Although several scholars contend that U.S. society is far more litigious than other Western democracies (Kagan, 2001; Olson, 1991), the relatively large number of lawsuits in U.S. society can be partly explained by the need to pursue rights through litigation. Indeed, litigation has the effect of mobilizing groups for direct political action and enlightening the public about the issue being contested (Kagan, 2001; McCann, 1994). Kagan (2001) appeared, then, to endorse a limited use of adversarial legalism as a social change conduit, even if his larger discussion of the role of adversarial legalism in U.S. society is pessimistic.

While Kagan (2001) admitted that adversarial legalism has not had a significant impact on inner-city poverty, it has removed some age-old barriers, such as racial inequality and segregation. Engel and Munger (2003) observed that the study of individual stories is integral to research on rights assertion. Moreover, U.S. culture encourages citizens to pursue and protect their rights (Merry, 1979). Unquestionably, adversarial legalism, epitomized by the landmark legislation Brown v. Board of Education, has brought about significant social reform in U.S. society (Levin, 1979; Rosenberg, 2008). Thus, the importance of Brown cannot be overemphasized, as it targeted racial segregation, undermined Jim Crow laws, and increased educational opportunities for African Americans in U.S. society. This was a case of the courts, rather than Congress, intervening to level the educational playing field for African Americans. As a result, this case marked an important victory in the use of adversarial legalism to confer rights on African Americans.

Two other examples of the use of adversarialism are Memorial Hospital v. Maricopa County and Shapiro v. Thompson. Both cases came to define the "right to trav-

el" principle. The U.S. Supreme Court's ruling on Memorial Hospital v. Maricopa County was important because it removed the waiting-period requirements introduced into social welfare policies in a number of states. Not surprisingly, most states' social welfare policies, created to provide a safety net for society's most vulnerable, covered such basics as health insurance, child welfare, free meals for poor students, and vocational training. Prior to Memorial Hospital v. Maricopa County, the Supreme Court had held in Shapiro v. Thompson that the state of Connecticut and the District of Columbia's refusal to aid welfare applicants, simply because those applicants had not resided in the respective jurisdictions for at least one year, violated the U.S. Constitution. This was a landmark decision because it prevented the creation of two classes of poor citizens – those with and without access to welfare, based simply on length of stay in a jurisdiction. In other words, the Court's ruling ensured that states provided welfare assistance to the poor, based more on need than the artificial requirement of length of stay in the community. Indeed, all these cases exemplify America's unique way of making law, with litigants able to pursue the same case in multiple courts until they are satisfied with the disposition of their cases.

Kritzer (2004) sided with Kagan (2001), who argued that adversarial legalism "does, overall, describe a particular style of legal and political contestation, a style that is deeply embedded in American legal and political processes" (p. 351). But Kritzer (2004) disagreed with Kagan (2001), and with other scholars (Howard, 1994; Kronman, 1993), that adversarial legalism has exploded in the last several decades or that adversarial legalism has had a very negative effect on U.S. society. Some lawyers offer pro bono services to the poor, who may be pursuing important legal issues that these lawyers find to be at once morally defensible and worth pursuing via lawsuits; after all, people who have lawyers do better in court (Galanter, 1974; Harris, 1999). Kritzer (2004) conceded that some courts in the United States certainly experience substantial delays in getting civil cases to trial, but that such delays are not a sufficient reason to abandon justifiable and important social welfare issues that could benefit more than just the particular litigant, because large segments of society tend to benefit from momentous rulings by the courts.

Although Americans approach too many things legalistically and the U.S. style of legalism is too adversarial, these developments came about because, soon after World War II, courts made it easier to litigate, removed procedural limitations, and projected due process into many legal situations (Kagan, 2001). The courts also broadened standing, removed immunities, and increased remedies (Friedman, 1985; Galanter, 2006). For example, in Goldberg v. Kelly, the U.S. Supreme Court ruled that pre-termination hearings should precede decisions to terminate welfare benefits (Goldberg, 1970), which implied that welfare was not a privilege but a right (Kagan, 2001). Thus, the Goldberg v. Kelly decision changed Americans' views about welfare policy, as the ruling improved rights assertion by the poor (Galanter, 2006). With the advent of civil rights and the emergence of the War on Poverty came high hopes among citizens that the law could be used to address, not just the protection of public interests and citizen rights (Galanter, 2006), but also issues such as welfare policy and reform.

Kagan (2001) recognized that adversarial legalism has helped to draw attention to social issues, such as racial discrimination and the plight of handicapped persons, but he also worried about the growth and vast reaches of adversarialism, itself a by-product of a unique American history and culture. Kagan's view of a purported explosion in adversarial legalism was disputed by Galanter (2006), who rejected the widely held notion of a huge increase in litigation in American courts and the associated condition of hyperlexis – that is, the problem of living in a very litigious society (Nelson, 1987). As a final point, Galanter (2006) called Kagan's argument about an ostensible explosion in U.S. adversarial legalism a jaundiced view – that is, the belief that the United States is fraught with extreme litigiousness, compounded by an overactive trifecta of lawyers, juries, and judges. Galanter (1998, 2006) rejected the notion of an explosion in adversarialism because existing empirical data have shown that juries tended to act judiciously and conscientiously in their awards of judgments to plaintiffs. It may be true, then, that some litigants file suit, not for the money, but to regain their rights, which they believe only the courts had the power to rectify.

ADVERSARIALISM AND SOCIAL WELFARE POLICY

In the case of welfare policy in general, the invocation of law by the poor and disadvantaged to alter the distribution of society's resources is a veritable form of legal mobilization. Legal mobilization is not a disconnected panacea, however. As Barnes and Burke (2012) have argued, legal mobilization is only one aspect of the invocation of the law; the response of the organization being sued also matters. In other words, some organizations would respond favorably to being sued, whereas others may "hunker down" in initial defiance (Bardach & Kagan,

1982; Barnes & Burke, 2012). Compared to their private counterparts, public agencies are more likely to create written rules and procedures to address changes arising from successful invocation of the law by citizens.
The controversy over social welfare policy in the United States[2] stems from the fact thatneither the federal nor state Constitutions contain language that addresses social welfare. In fact, U.S. governments, at all levels, introduced social welfare unenthusiastically, because Americans have generally been opposed to high taxes (Kagan, 2001; Krietzer, 2004) and some lawfully mandated benefits (Freeman, 1994; Kagan, 2001) needed to sustain the sort of comprehensive welfare programs commonly found in Western Europe (Kagan, 2001; McFate, Lawson, & Wilson, 1995). Under these conditions, adversarial legalism may provide a powerful medium for those seeking a basic, acceptable standard of living. Inasmuch as "[l]aw is, for people on welfare, repeatedly encountered in the most ordinary transactions and events of their lives" (Sarat, 1990, p. 344), lawsuits are increasingly necessary to bring about welfare reform.

The many lawsuits filed over the ACA underscore some Americans' opposition to the healthcare law, and these developments represent the fluid nature of the American legal system, as opposed to the more rigid and hierarchical European system of law. Indeed, the ACA epitomizes the hydra-headed nature of adversarial legalism in U.S. society.

The strong, unyielding opposition to the ACA by Republicans stems from the latter's ideological objection to any type of consolidation of governmental power, which, for many on the right and far right, the ACA has come to represent. Additionally, the large number of lawsuits filed over the ACA is an indication of the complexity of the U.S. legal system, with its concomitant receptivity to lawsuits from individual citizens, enabled by lawyers and supported by a powerful, independent judiciary (Kagan, 2001).

THE AFFORDABLE CARE ACT (ACA)

The Law and Its Passage

The ACA is the comprehensive healthcare legislation passed in 2010 by the Obama administration (Healthcare.gov., n.d.). It was designed, among other things, to provide affordable health insurance to as many Americans as possible and to also provide protections and coverage for people with pre-existing conditions. This means that insurance companies must cover health conditions a patient had before the date the patient's new healthcare coverage began. Because of the 2020 presidential election as well as the politics surrounding the ACA, President Trump, in his 2020 State of the Union address, noted: "I've also made an ironclad pledge to American families: We will always protect patients with pre-existing conditions." At the same time, the Trump administration has backed a Republican-led lawsuit to overturn the ACA. Not surprisingly, Speaker Nancy Pelosi called Trump's statement on the ACA from the State of the Union speech false, noting the president's stentorian call and determination to see the ACA repealed. The ACA continues to engender heated public and private debates throughout the United States since its introduction to the American public as an answer to the "broken" American healthcare system. According to Tanner (2011), the ACA is, perhaps, the most important piece of legislation designed to transform the American healthcare landscape since the creation of Medicare and Medicaid in 1965. Prior to the passage of the ACA, the only legally prescribed healthcare benefits were for older people (Medicare), the indigent (Medicaid), and military veterans (Kagan, 2001). There is also a U.S. Congress-mandated coverage for uninsured children that is managed by state governments (Pear, 1999).

The ACA has been controversial from the beginning. The U.S. Senate passed the bill on December 24, 2009, and the U.S. House of Representatives gave it the nod on March 21, 2010, but no single Republican in either chamber of Congress voted for it. In fact, the passage of the law was so partisan, the final tally in the House of Representatives was 219–212, in favor of the Democrats. The individual mandate in the healthcare legislation required all uninsured Americans to purchase a government-designed healthcare package; thus, opponents have called the ACA a movement toward pro-European social welfare. Many individuals, businesses, and state governments have since called for the repeal of the law. In 2017, President Donald Trump tried to have the ACA repealed and replaced, noting that the law hurt American businesses due to sharply rising premiums in several states, but the Republican Party-led Congress did not garner enough votes to repeal the law.

A scrutiny of the ACA reveals some merits and demerits. One merit is that insurers no longer are able to impose lifetime caps on the insured (Omurtag & Adamson, 2013); these caps had generally been in the range of $2.5 million to $5 million, prior to the passage of the ACA (Tanner, 2011; Zeltner, 2010). On the contrary, the elimination of lifetime caps could force some insurers to cancel coverage for tens of thousands of low-wage and seasonal work-

2 For a detailed discussion of the development of the U.S. welfare state, see, for example, Pierson (2001), Prasad (2012), and Weir et al. (1988).

ers (Tanner, 2011). Into the aforesaid discussion come adversarial legalism, legal mobilization, and litigation. Before the U.S. Supreme Court heard arguments in March 2012 on the constitutionality of the ACA, particularly the individual mandate portion of it, seven states – Arizona, Idaho, Louisiana, Missouri, Oklahoma, Utah, and Virginia – had passed acts prohibiting mandatory health insurance. Plaintiffs in other court cases that challenged the constitutionality of the ACA included 28 states and a plethora of citizens and businesses. Even as several judges heard arguments on the constitutionality, or a lack thereof, of the ACA, with some courts upholding the law and others ruling against it, the real test of the "survivability" of the ACA rested with the U.S. Supreme Court, which ruled in June 2012 that the healthcare law was constitutional. The healthcare law was upheld once again by the Court in June 2015.

Although the individual mandate, the fulcrum of the law, was eliminated by the U.S. Congress in 2017, thereby removing the penalty[3] associated with not signing up for the ACA, the ACA remains law of the land. U.S. District Judge Reed O'Connor's December 2018 ruling, in Texas v. United States, that struck down the ACA was not completely unexpected, however. In striking down the healthcare law, Judge O'Connor had sided with several Republican state attorneys general and a small number of Republican-leaning governors who filed the suit. Judge O'Connor's decision was based on the fact that, because Congress had passed a new tax bill in December 2017 that removed the penalty for not having health insurance, Congress's decision rendered the ACA unconstitutional. Unsurprisingly, the Attorney General of California and other Democratic state leaders who have supported the ACA rejected the court's decision and subsequently filed an appeal in the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, in a decision rendered in December 2019, did not rule on the severability or otherwise of the individual mandate, but instead found the individual mandate to be unconstitutional and remanded the case back to Judge O'Connor.

Although Judge O'Connor's decision in Texas v. United States elicited condemnation from many Democratic lawmakers, it was also condemned by a number of Republicans, who felt that the decision had gone too far. Democrats' response to Judge O'Connor's ruling only shows what legal battles lie ahead, with individuals and states likely to bring and/or join future lawsuits to prevent the ACA from being repealed. Thus, adversarial legalism would continue to play an important role in whether the ACA remains America's healthcare law. Whether the ACA survives or not is not the main argument of this paper. Rather, the primary argument is on the powerful roles that adversarial legalism, legal mobilization, and litigation have played since the law's passage, resulting in a phalanx of lawsuits and culminating in the U.S. Supreme Court's willingness to hear arguments surrounding the ACA. Not surprisingly, the ACA has been litigated more than 70 times, both before and after the U.S. Supreme Court had ruled that the ACA was healthcare law of the land.

ROLES OF LEGAL MOBILIZATION AND LITIGATION IN ADDRESSING THE ACA

In this paper, three court cases[4] were employed to advance the argument about the roles of legal mobilization and litigation in furthering rights assertion involving the ACA. Legal mobilization occurs when individuals assert claims about their legal rights and use litigation to maintain or advance those rights (Epp, 1998; Kagan, 2001). As Kagan (2001) has argued, "Whereas legislation states general rules, litigation forces judges to focus on the plight of particular individuals whose situations may differ from the typical 'problem situation' envisaged by legislators" (p. 169). Both early and current studies of legal mobilization have observed that society's privileged are the ones most likely to resort to formal legal action during disputes (Abell, 2010; Morill, Edelman, Tyson, & Arum, 2010) – but the poor and those without adequate resources also engage in litigation, sometimes with the help of a support system for legal assistance (Epp, 1998). For individuals and groups to successfully mobilize the law against the government, a particularly effective repeat player in the courts, the former may have to align themselves with organizations that have had a successful track record in court as repeat players themselves (Galanter, 1974).

The U.S. Government wins seventy-five percent of its cases at the U.S. Supreme Court(Rosenberg, 2008; Scigliano, 1971; Ulmer & Willison, 1985). And with the U.S. Government's unusual access to, and influence with, the Supreme Court (Ducat & Dudley, 1989; Rosenberg, 2008), the outcome of the ACA decision in 2012 was not completely unanticipated. In the long run, the legal mobilization against the ACA by powerful repeat players – businesses and state governments – was not enough to stop the ACA from remaining law of the land. Although opponents of

3 The removal of the penalty associated with the individual mandate went into effect in January 2019.

4 Three of over 70 cases associated with the ACA are briefly discussed here. The selection of these cases was meant to show the complexity of litigation surrounding the ACA.

the ACA did not prevail at the U.S. Supreme Court, the powerful forces of adversarialism and legal mobilization, themselves unique features of the American way of making law, were on full display. Indeed, the continued implementation of the ACA is not without challenges, as businesses, states, the federal government, and Congress continue to fight over the merits and demerits of the law.

The ACA epitomizes adversarial legalism, the mobilization of law, and the role of repeat players in applying laws on the books to effect social change. The ACA, undoubtedly, represents the complexity of America's adversarial system of law. The many cases filed over the healthcare law point to Americans' access to the courts, and the willingness to use such access to further individual and group rights. To demonstrate the powerful roles that adversarialism, legal mobilization, and lawsuits have played in the aftermath of the passage of the ACA, some of the more prominent court cases are discussed next. I also attempt to answer some pertinent questions in relation to the three court cases discussed: What are the merits and demerits of adversarialism in an age of hyper-partisanship in which passing new social programs would be a daunting task? Who are the notable players using adversarialism to further rights assertion? And how are these players using adversarialism to pursue and, hopefully, attain their goals? Lastly, how is the use of adversarialism leading to a blowback against further use of adversarialism?

National Federation of Independent Businesses (NFIB) v. Sebelius, 567 U.S. 519 (2012)

This case pitted 25 states, the NFIB, and individuals Mary Brown and Kaj Ahburg against the Obama administration. The plaintiffs argued that the ACA was unconstitutional because: (a) Congress did not have the authority under the U.S. Constitution to enforce the individual mandate in the ACA, and (b) the expansion of Medicaid was unconstitutional. The case wound through the lower courts, and finally made it to the U.S. Supreme Court, with the Court holding that the ACA's individual mandate was constitutional, but that states could reject the expansion of Medicaid under the ACA without losing federal funding of Medicaid. As this brief exposition shows, several "combatants" (about half of all U.S. states), with help from lawyers, sued the federal government to have the individual mandate requirement of the ACA revoked. Indubitably, this court case reflects Americans' use of adversarial legalism in rights assertion.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)

This case involved a lawsuit brought by the Christian owners of Hobby Lobby Stores, a national chain of more than 500 stores and several thousand employees. The Greens, who own Hobby Lobby, argued that a provision under the ACA requiring employers to provide contraceptives to employees who requested it violated employers' constitutional rights, specifically the Free Exercise Clause of the First Amendment, as well as the Religious Freedom Restoration Act of 1993. In short, the Green family argued that the exemptions afforded to non-profit organizations should also be extended to for-profit businesses, such as Hobby Lobby. The Court sided with the Greens, noting that, in addition to faith organizations and other religious entities, employers could not be forced to provide contraceptives under the ACA. The Court, however, clarified that the exemption was for the contraceptive requirement only. This case is also an example of the labyrinthine nature of adversarial legalism, with multiple actors on opposite sides fighting in court to change the course of public policy.

King v. Burwell, 576 U.S. 988 (2015)

This case involved a lawsuit that challenged the ACA requirement that states create an "exchange" for people to purchase health care. If states failed to do so, the federal government would create the exchange to allow citizens to purchase health insurance. The ACA also mandated that all citizens not covered elsewhere purchase health coverage through the ACA, unless such citizens fell under a specific threshold for low-income earners. To drastically reduce the number of citizens likely to fall under the aforementioned threshold, the ACA created tax credits based on the specific coverage an individual chose under the healthcare law. While Congress established the tax credits for the "exchanges" created by the states, the Internal Revenue Service (IRS) interpreted the rules to mean that tax credits would be extended to citizens enrolled under either state health insurance plans or the federal health plan. The plaintiffs, all residents of the state of Virginia, where a federal government-run health exchange, rather than a state-run exchange, operated, sued the IRS for overstepping its authority in creating the exchanges for both the states and the federal government. The Supreme Court, in a 6–3 decision, ruled that the IRS did not overstep its authority when it issued tax credits for exchanges created for both state and federal health plans. As in the two cases noted above, King v. Burwell demonstrates the complexities of adversarial legalism.

DISCUSSION

The aforementioned ACA-related Supreme Court cases

are just a handful of court cases filed to challenge the legality of the various components of the ACA. Indeed, adversarialism, legal mobilization, and litigation were on full display in the three cases discussed. Revisiting and analyzing the questions asked in the "Roles of Legal Mobilization and Litigation in Addressing the ACA" section of the paper, and elucidating the questions vis-à-vis the three lawsuits discussed, hyper-partisanship leads to an endless stream of lawsuits to seek redress in the courts. This problem is compounded by the fact that we live in a litigious society, one in which access to repeat players – attorneys and powerful lobbies and organizations – makes it fairly easy to challenge the legality of government programs. Although the ACA has been law of the land for a number of years, a section of American society is still determined to get rid of the law, leading to near-limitless litigation over the healthcare law. This explosion in lawsuits is possible because of the work of lawyers, who play a crucial role in advancing the system of adversarialism. The endless stream of litigation surrounding the ACA may discourage well-intentioned members of government from proposing new welfare policies because of Americans' propensity for contesting welfare policy in general. As Provine (2005) has warned, "Nations should also consider the cost of relying heavily on the adversarial process to resolve policy issues. Litigation is expensive, creating costs and inefficiencies" (p. 314).

In further addressing the questions advanced, some of the ACA-related lawsuits involved a collaboration between individuals and states, as in NFIB v. Sebelius. Provine (2005) addressed this overlapping collaboration by explaining the rationale of the founders of the American state. She argued that the founders were clear about the role of the American people in maintaining a Constitutional democracy. As a result, the founders introduced checks and balances to prevent overreach by one single branch of government. Provine (2005) noted: The American "system creates an additional layer of complexity by providing for both a national and a state level of governance, each with separate constitutional mandates. The complicated, carefully delimited, overall plan suggests that founders were interested in restraining governmental power" (p. 316). And by anticipating the judicial review of executive branch decision-making, the founders put in place a complex system to prevent abuse of power. This process, in effect, has led to cases winding through the courts both in large numbers and in slow "procession." By employing the protracted and cumbersome process of litigation, citizens, groups, organizations, and even state governments have consistently fought against some components of the ACA.

In addition, the extensive use of adversarial legalism in furthering rights assertion has not received universal support among the American people. One of the fears arising out of the abundant use of lawsuits is the creation of the phenomenon called "black-robed politics," a form of judicial activism. The American Constitution delineates the roles of the legislature and judiciary: while the legislature is tasked with making laws, the judiciary is assigned the task of interpreting law. Provine (2005) argued that the idea of separation of powers had for many years insulated the judiciary from heavy criticism because the institution was deemed apolitical. Americans' attitudes toward the judiciary have been changing over the years, however, because of the perception that some members of the judiciary have taken advantage of their permanent appointments to legislate from the bench. The temptation to legislate from the bench is heightened by adversarial legalism: as judges confront more and more welfare-related cases pitting government against citizens/states/interest groups, they are likely to legislate, rather than simply interpret the law.

Some supporters of judges who advertently or inadvertently make law argue that law is normative, hence the possibility of human intervention in the interpretation of the law. Conversely, those who reject judicial activism in all of its forms posit that judges hide behind the normative nature of law, and use it as an excuse to make law. In other words, judicial activists, intentionally or otherwise, do not separate their personal convictions from their interpretation of the law from the bench. There is also some evidence of judicial activism parsed along ideological lines, hence the constant battles that erupt between conservatives and liberals when there is a vacancy on the U.S. Supreme Court. It appears, then, that the more the American people have to contend with adversarial legalism, the more likely it is that there will be a general blowback against adversarialism.

The ACA appears to be a "resilient" law, and has been so since its inception. This is because the ACA has so far survived the many avenues used by both litigants and elected officials to repeal it. The ACA may or may not survive the current political climate, but it appears that any new healthcare law would end up in litigation, just as the ACA has been litigated tens of times since its inception. This is the American way of making law, and will remain so for the foreseeable future.

CONCLUSION

Adversarial legalism is a two-pronged issue (Kagan, 2001), producing an expected result in one case and a different outcome in another. In the particular case of the ACA, legal scholars and judicial behaviorists are baffled by the Republican-leaning Court's unwillingness to strike down the ACA. One argument is that Supreme Court justices are sensitive to the plight of ordinary citizens who seemingly benefit a great deal from the provisions of the ACA, hence the justices' willingness to temporarily shelve party loyalty and pursue the common good.

An important feature of adversarialism is the platform that it provides for citizens to seek justice in a court of law. This opportunity to pursue one's rights embodies the tenets of American lawmaking and democracy. Engel and Munger (2003) argued that rights must be asserted, or those whose rights have been violated would end up feeling belittled and inconsequential. Epp (1998) contended that a support structure for legal mobilization is essential for furthering individual rights claims. Many of the ACA-related court cases have followed a familiar path: the amalgamation of resources by individuals, businesses and/or states to attack, in a court of law, certain provisions of the ACA that they deem harmful to themselves and others.

As noted earlier in this paper, creating new social programs is difficult because we live in a litigious society. This problem is worsened by the fact that there are repeat players – lawyers and powerful organizations – that are willing and ready to test the lawfulness of any new welfare programs in court. This argument explains the determination of a segment of the U.S. population to continually challenge aspects of the ACA through lawsuits. This culture of litigation also means that elected officials may be wary of creating new social programs, even if there is a clear need to do so. The executive branch's wariness is understandable: any new welfare program would go through the grinders of American jurisprudence to survive. Scholars have warned against excessive litigation, however, noting that the process is expensive and disruptive (Provine, 2005). Provine (2005) also explained the importance of collaboration between different entities. For example, some of the ACA-related cases discussed in this paper involved collaborations between citizens and state governments. These collaborations were expected by the founders of the United States, hence the founders' introduction of checks and balances to prevent one branch of government from usurping the powers of other branches. This process also means that litigation has become one means of addressing any perceived usurpation or misuse of power by the branches of government, including the judiciary. Despite the advantages of using legal action to address complex issues in American society, there is a primary downside: too many lawsuits make it hard to arrive at court decisions with broad appeal.

Unsurprisingly, not everyone in the United States approves of adversarialism. Some fear that judges, who are themselves not neutral persons, may use the opportunity presented to them to make law, instead of interpret law. For many years, Americans were unwilling to criticize the judiciary because of the latter's "neutral" role in adjudication. However, a section of the population has begun to criticize judges for engaging in judicial activism. While some have denounced judges who appear to make law, others have argued that law is normative, hence its interpretation cannot be completely divorced from prevailing belief systems. It appears, then, that the current blowback against adversarialism is directly tied to U.S. society being too litigious.

Because social welfare is a vital mainstay of decent societies, disagreements between the government and its citizens about benefits should receive extensive public debate, leading to rudent and equitable policymaking. If adversarial legalism (and litigation) forces government to pay closer attention to the substantive cases brought against it, then, despite the calls by some that adversarial legalism is out of control in the United States, it is a good thing, in this narrow sense, as it forces the government (and its agencies) to pay closer attention to the needs of some of its citizens. After all, many reforms at all levels in American society were possible only because of the nation's decentralized methods of lawmaking, as well as the society's willingness to grant a formal hearing to those who feel wronged. I argue, then, that the drumbeat of litigation surrounding the ACA may not ebb anytime soon, because the stakes are too high and the costs too heavy for some. As a result, adversarial legalism, advanced by the work of lawyers, would remain the way forward regarding the ACA.

Adversarial legalism may not be the answer to large-scale changes to the distribution of wealth in American society; such changes would require "a sustained intellectual and political movement yielding sweeping legislative changes in American tax, labor, and educational policy and in traditions of local home rule" (Kagan, 2001, p. 180). Until Americans attain this utopian goal, however, there will be individuals who would seek redress in court, and whose requests would need to be addressed by a government entrusted with important duties. Individuals, businesses, and local and state governments will continue to use legal

mobilization and lawsuits as mechanisms for achieving small and great victories within the populace.

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SUGGESTED CITATION

Pryce, D. K. (2020). Adversarial Legalism and the Affordable Care Act. Virginia Social Science Journal, Vol. 54 pp. 20-29.