FOREWORD

THE CONSTITUTIONALITY OF THE AFFORDABLE CARE ACT: IDEAS FROM THE ACADEMY

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The Supreme Court of the United States may issue a momentous decision in June 2012.[1] The Court's intervention became nearly certain when the United States Court of Appeals for the Eleventh Circuit invalidated a key provision of the new federal healthcare law,[2] thereby creating a split of authority on the constitutionality of the provision with two other federal courts of appeals.[3] Everyone living in the United States has at least a financial stake in the eventual outcome of the litigation. Many people have additional stakes, whether political, moral, or jurisprudential.

The Patient Protection and Affordable Care Act (ACA),[4] signed into law by President Barack Obama on March 23, 2010, is "the biggest expansion of the social safety net in more than four decades, providing greater economic security to millions of poor and working-class families."[5] Two primary concerns moved

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1. Florida *ex rel.* Att'y Gen. v. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 603 (2011), *cert. granted*, 132 S. Ct. 604 (2011), *cert. granted in part*, 132 S. Ct. 604 (2011). The Court granted certiorari on four questions: (1) whether the federal Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), bars pre-enforcement challenges to the minimum coverage provision; (2) whether Congress had the power under Article I, Section 8 to enact the minimum coverage provision; (3) whether the minimum coverage provision, if unconstitutional, is severable from all or some other provisions of the ACA; and (4) whether it is unconstitutionally coercive under *South Dakota v. Dole*, 483 U.S. 203 (1987), for Congress to condition all existing federal Medicaid funding on the states' acceptance of new expansions to the Medicaid program.

2. *Florida ex rel. Att'y Gen.*, 648 F.3d at 1235 (invalidating the ACA's minimum coverage provision as beyond the scope of Congress's enumerated powers).

3. *See* Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011); Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011). In view of the invalidation and the circuit split, the Court's criteria for certiorari were twice satisfied. *See* U.S. SUP. CT. RULE 10. There is also a circuit split on the question whether the federal courts have jurisdiction to decide the constitutional questions. *See infra* note 16 (discussing the Fourth Circuit's decision with respect to the federal Tax Anti-Injunction Act).

4. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.); *see* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

5. THE STAFF OF THE WASHINGTON POST, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 66–67 (2010) [hereinafter "LANDMARK"].

the President and Congress to act. These concerns have dominated debates over health policy in the United States since the end of World War II.[6] First, Congress wanted to gain control over the increasing costs of healthcare. Although national healthcare spending was only 5.4% of gross domestic product (or $200 billion) in 1960, such spending amounted to 16.2% of GDP (or $2.3 trillion) by 2007 and is projected to be 20.3% of GDP (or $4.4 trillion) by 2018.[7] Second, Congress wanted to reduce the number of people living without health insurance in the United States. According to the U.S. Census Bureau, around nineteen percent of the nonelderly population, or roughly fifty million people, lacked health insurance in 2009.[8]

To address these two concerns, the ACA seeks, among many other things, to achieve near-universal health insurance coverage. The law encourages, and helps, American citizens and other legal residents to obtain adequate and affordable health insurance. The Congressional Budget Office projects that the Act will increase the number of nonelderly individuals who possess insurance by roughly thirty-three million by 2019.[9] If the law operates as intended, around ninety-five percent of all legal residents will be insured.[10]

Although the ACA contains many provisions, the multitude of legal challenges to the statute focus primarily on the constitutionality of the minimum coverage provision, also known as the "individual mandate" by its critics. The provision requires most individuals lawfully living in the United States to either obtain a certain level of health insurance coverage or make a yearly "shared responsibility payment," which the statute calls a "penalty."[11] The most significant constitutional question that is emerging in litigation is whether the provision is within the scope of at least one source of congressional power in Article I, Section 8. The potential candidates are the tax power,[12] the Commerce Clause,[13] and the Necessary and Proper Clause.[14]

To date, no federal court has upheld the minimum coverage provision as within the scope of the tax power.[15] By contrast, the federal courts disagree

6. *See, e.g.*, CHARLES E. PHELPS, HEALTH ECONOMICS 529 (4th ed. 2010) ("It would probably be fair to say that, at least over the post-World War II era, U.S. health policy has emphasized a balancing of two concerns: access to care and control of costs.").

7. LANDMARK, *supra* note 5, at 64. *See* PHELPS, *supra* note 6, at 530 ("In constant dollars per capita, total spending is estimated to have increased more than 8-fold between 1960 and 2010, and the comparable spending increase for drugs is almost 10-fold for that period.").

8. Census Bureau Report, Income, Poverty, and Health Insurance Coverage in the United States: 2009, at 23, table 8; *see* PHELPS, *supra* note 6, at 531 ("Recent estimates put the number of Americans without insurance at 47 million in 2006, representing 17% of people under 65. The rate of uninsurance climbs to 30% for the 18- to 24-year-old population.").

9. Letter from Douglas W. Elmendorf to John Boehner, Speaker, U.S. House of Representatives (Feb. 18, 2011).

10. LANDMARK, supra note 5, at 73.

11. 26 U.S.C. § 5000A(b)(1).

12. U.S. CONST. art. I, § 8, cl. 1.

13. *Id.* § 8, cl. 3.

14. *Id.* § 8, cl. 18.

15. *But cf.* Liberty Univ., Inc. v. Geithner, No. 10-2347, 2011 WL 3962915, at *16 (4th Cir. Sept. 8,

about whether the provision is within the scope of the Commerce Clause, either alone or in combination with the Necessary and Proper Clause.[16] Three district courts and two courts of appeals rejected commerce power challenges to the minimum coverage provision, reasoning that going without insurance is economic activity that substantially affects interstate commerce. These courts held alternatively that the minimum coverage provision is necessary and proper to carrying into execution the ACA's commerce power regulations of the insurance industry.[17]

Three other district courts and another court of appeals held that the minimum coverage provision is beyond the scope of the Commerce Clause. These courts reasoned that Congress may regulate only economic activity using its commerce power, and that the minimum coverage provision regulates only the inactivity of declining to purchase health insurance. These courts also held that the Necessary and Proper Clause could not save the provision.[18]

The articles published in this volume of *Law and Contemporary Problems* address the constitutionality of the minimum coverage provision, either directly or indirectly. They were originally presented at a conference at Duke Law School on September 16, 2011. Entitled "The Constitutionality of the Affordable Care Act: Ideas from the Academy," the conference was inspired by the belief that legal academics who specialize in U.S. constitutional law, health

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2011) (Wynn, J., concurring) ("[W]ere I to reach the merits, I would uphold the constitutionality of the Affordable Care Act on the basis that Congress had the authority to enact the individual and employer mandates under its plenary taxing power."). For an argument that the ACA exaction for non-insurance is a tax for purposes of Congress's tax power, see generally Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: A Theory of the Tax Power for a Court that Limits the Commerce Power*, 99 VA. L. REV. (forthcoming 2013).

16. The United States Court of Appeals for the Fourth Circuit did not reach the merits of any of these questions, ruling for the federal government on jurisdictional grounds. *See* Liberty Univ., Inc. v. Geithner, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011) (holding that the federal Tax Anti-Injunction Act (TAIA) bars the action); Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011) (holding that Virginia lacks Article III standing to bring the action). Other courts have disagreed with the Fourth Circuit's conclusion that the TAIA bars pre-enforcement challenges to the minimum coverage provision. The Supreme Court's view of the TAIA will determine whether it reaches the merits. The contributions to this volume do not address the jurisdictional question. For an argument that the TAIA does not bar the present challenges to the minimum coverage provision regardless of whether the ACA exaction for non-insurance is deemed a TAIA "tax," see generally Michael C. Dorf & Neil S. Siegel, *"Early-Bird Special" Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision*, 121 YALE L.J. ONLINE 389 (2012), http://yalelawjournal.org/2012/01/19/dorf&siegel.html.

17. *See* Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011), *aff'd sub nom*, Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011); Liberty Univ. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010), *vacated*, 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010), *aff'd*, 651 F.3d 529 (6th Cir. 2011).

18. Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011); Florida *ex rel.* Bondi v. U.S. Dep't Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla. 2011), *aff'd in part, rev'd in part sub nom.*, Florida *ex rel.* Att'y Gen. v. U.S. Dep't Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 603 (2011), *cert. granted*, 132 S. Ct. 604 (2011), *cert. granted in part*, 132 S. Ct. 604 (2011); Goudy-Bachman v. U.S. Dep't of Health & Human Servs., 811 F. Supp. 2d 1086, (M.D. Pa. 2011).

law and policy, or statutory interpretation are making distinctive contributions to the national debate over the constitutionality of the ACA.[19]

Some of these legal academics are able appellate lawyers, but that is not the only source of their contributions. These academics are less constrained by their clients or their offices than are other legal actors, they are blessed with the time to study constitutional doctrine or health law for a living, and they often possess interdisciplinary expertise that is pertinent to the proper resolution of legal problems.

To be sure, these characteristics of legal academics can be vices when exhibited in the practice of constitutional adjudication—particularly if creative impulses and theoretical ambitions are undisciplined by the necessity of deciding particular cases soundly. But these attributes can be virtues as well. Among many other activities, legal academics conduct original historical research, perceive connections among constitutional doctrines or provisions that have previously gone unnoticed, use relevant methods or insights of other disciplines to shed light on legal problems, and bring to bear their specialized legal knowledge to help courts of general jurisdiction decide between the client-centered arguments of generalist appellate lawyers.[20]

These contributions can be relevant to the outcome of constitutional and statutory cases. This may help to explain why the Justices routinely cite the work of legal academics.[21] Both the data and casual empiricism attest to the real-world relevance of much legal academic writing.[22]

The authors of the following articles, as well as the participants in the companion conference, collectively exhibit the qualities noted above.[23] Included

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19. For a useful collection of legal academic writing on the constitutionality of the ACA, see ACA Litigation Blog, *Some Essential Reading*, http://acalitigationblog.blogspot.com/2011/06/some-essential-reading.html.

20. On the last point, see, for example, Brief of Deborah A. DeMott as Amica Curiae Supporting Petitioner, Maples v. Thomas, No. 10-63 (informing the U.S. Supreme Court of the views of a leading academic authority on agency law regarding whether a procedural default attributable in fact to the pro bono attorneys of a death row inmate seeking federal habeas relief is in law attributable to the inmate himself). The Court applied principles of agency law in ruling 7–2 in favor of the inmate. Maples v. Thomas, 132 S. Ct. 912 (2012).

21. *See* Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. (forthcoming 2012) (analyzing the Court's use of legal scholarship between 1949 and 2009, and finding that the Court cited such scholarship in 32.21% of its decisions during that period; that it has referenced legal scholarship more frequently in recent years; and that it is more likely to cite academic writing in the most important and contentious cases, including when the Court is closely divided, when its decision alters existing precedent, and when it holds legislation unconstitutional).

22. *Accord* David F. Levi, *Dean's Message*, 29 DUKE LAW MAG., no. 2 (Summer 2011), http://www.law.duke.edu/magazine/story?id=6659&u=56 ("Although there may be [legal] academic scholarship that is primarily of interest to other academics, . . . I submit that the legal scholarship produced and fostered by Duke Law faculty and students is of very great importance to lawyers and judges.").

23. In addition to the authors of the articles in this volume, conference participants included Matthew Adler, Jack Balkin, Guy Charles, Robert Cooter, James Boyle, Gillian Metzger, Abigail Moncrieff, Arti Rai, and Barak Richman.

in their ranks are experts in U.S. constitutional doctrine, theory, and history; experts in health law and policy; legal economists; and legal scholars with substantial training in ideas and methods of modern economics and political science. This introduction, however, cannot offer much more than assertions. The proof is in the publications that follow.

Some of these papers adopt the internal perspective of the faithful legal practitioner. They inquire whether the minimum coverage provision is within the scope of Congress's enumerated powers in Article I, Section 8 of the Constitution. Thus Erwin Chemerinsky, Stephen Sachs, and Neil Siegel examine some or all of the potential constitutional bases for the minimum coverage provision from the perspective of legal doctrine and with help from social science.[24]

Stuart Benjamin, Joseph Blocher, Ilya Somin, and Mark Hall address two constitutional objections to the minimum coverage provision. The first objection stresses "slippery slopes." This is the concern that upholding the minimum coverage provision would justify and produce a variety of future federal mandates, economic or otherwise. Professor Somin argues that this objection is fatal to the minimum coverage provision.[25] Professor Hall disagrees, stressing instead that invalidating the provision could disable the federal government from exercising the "very power [that] might someday be absolutely essential to saving a million or more lives, based on solid public health science, in the event of a catastrophic public health emergency."[26]

The second objection to the minimum coverage provision involves "bootstrapping."[27] This is the concern that upholding the provision only because of its relationship to other ACA provisions or other federal laws would allow Congress to expand its constitutional authority by imposing regulations that would be unconstitutional if imposed by themselves.[28] Professors Benjamin and Blocher reject this objection.

Other contributions to the volume broaden the interpretive perspective from which the ACA litigation may be viewed.[29] They adopt the external

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24. *See generally* Erwin Chemerinsky, *Political Ideology and Constitutional Decision-Making: The Coming Example of the Affordable Care Act*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 1; Stephen E. Sachs, *The Uneasy Case for the Affordable Care Act*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 17; Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 29.

25. *See generally* Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Case a Slippery Slope?*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 75.

26. Mark A. Hall, *Constitutional Mortality: Precedential Effects of Striking the Individual Mandate*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 107, 107.

27. *See generally* Stuart M. Benjamin, *Bootstrapping*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 115; Joseph Blocher, *What We Fret About When We Fret About Bootstrapping*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 145.

28. More generally, Professor Benjamin focuses on situations in which "an actor undertakes permissible action *Y* and thereby renders its action *Z* legally permissible, as the actor's undertaking of *Z* absent *Y* would raise serious legal problems." Benjamin, *supra* note 27, at 116.

29. Professor Chemerinsky also broadens his interpretive perspective in part of his contribution, arguing that "the outcome [of the ACA litigation] in the Supreme Court is very much in doubt because

perspective of the analyst of the constitutional system.[30] Thus Ernest Young and Bryan Leitch examine the relationship between constitutional doctrine and the Constitution outside the courts, inquiring whether the plaintiffs in the ACA litigation are engaged in conservative popular constitutionalism. They further examine whether such social movement advocacy is compatible with fidelity to law, and whether political conditions in the United States make it likely that this advocacy will succeed in changing the content of constitutional doctrine.[31]

Theodore Ruger also privileges the external point of view by exploring problems with the U.S. healthcare system that will endure however this litigation is resolved by the federal courts.[32] He views the current debate over the ACA as part of an ongoing process of contestation about the proper locus of medical authority in America that dates back to the 1800s.

On behalf of Duke Law School, I thank the friends and colleagues who participated in this project, whether at the conference or in writing. I am also grateful to the editors of *Law and Contemporary Problems* for their excellent work in bringing the conference articles to print.

We are all indebted to Dana Norvell of Duke Law School's Program in Public Law. She ensured that everyone made it to the conference, that they had a nice place to stay and good food to eat when they got there, and that the conference proceedings themselves went off without a hitch.

Dean David Levi has been unwavering in his support of worthwhile intellectual endeavors at Duke Law School. These endeavors include events of simultaneous significance to the bench, the bar, the academy, and the public.

Finally, I am honored to acknowledge Rick Horvitz, Duke Law Class of 1978. His profound generosity makes possible the Program in Public Law, which in turn makes possible projects like this one.

Happy reading.

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of the way in which the constitutional issue has come to be defined by political ideology." Chemerinsky, *supra* note 24, at 2.

30. For an examination of the internal and external points of view in constitutional law, see generally Neil S. Siegel, *Jack Balkin's Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System*, 111 MICH. L. REV. (forthcoming 2013); Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473 (2007).

31. *See generally* Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 157; Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight Over Health Care*, 27 J.L. & POL. 177 (2011). Mr. Leitch, a third-year law student at Duke, participated in the conference and contributed this article to the proceedings. His article would have been published in this volume had it not already been slated for publication elsewhere. He has instead contributed a response to Professor Young. *See generally* Bryan Leitch, *On the Difficulty of Separating Law & Politics: Federalism & the Affordable Care Act*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 203.

32. *See generally* Theodore Ruger, *Of Icebergs and Glaciers: The Submerged Constitution of American Healthcare*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 215.