

## BEYOND THE DOCTRINE: FIVE QUESTIONS THAT WILL DETERMINE THE ACA'S CONSTITUTIONAL FATE

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The litigation challenging the constitutionality of the Patient Protection and Affordable Care Act (“ACA” or “Act”) raises a number of interesting and important questions of constitutional law. But in cases of this magnitude and political salience, the Supreme Court’s deliberations typically are shaped by forces that transcend the relevant doctrine. The Court’s response to the ACA is unlikely to be an exception. Specifically, the Justices’ reactions to five questions—all of which go beyond the doctrinal merits—will likely determine the Act’s fate: (1) whether this is the sort of case in which judicial review is necessary, or instead one that the elected branches are capable of solving on their own; (2) whether the states are “separately incompetent” to reform the nation’s health care financing system, such that invalidating the Act will leave a policy void (and whether the existence of such a void should matter); (3) whether Congress’s power to adopt a more radical, single-payer-type system for all Americans should inform whether Congress has the authority to adopt the more incremental ACA; (4) whether the Court can invalidate the ACA, especially with an ideologically predictable 5-4 split, without appearing overly partisan to the American public; and (5) how Chief Justice Roberts will perceive the impact of this case on his legacy—as an opportunity to reaffirm the singular importance of judicial restraint, or as an instance where the Court’s intervention is necessary to preserve foundational principles. Each of these considera-

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tions extends beyond the precise constitutional questions presented. But in a case such as this, it is the Justices' reactions to these broader questions that tend to drive their doctrinal analysis, rather than the other way around.

## I. DOCTRINAL PUZZLES

Since it was signed into law on March 23, 2010,<sup>1</sup> roughly thirty lawsuits challenging the constitutionality of the ACA<sup>2</sup> have been filed in federal court.<sup>3</sup> These suits have raised a broad array of constitutional claims, from whether the ACA infringes on the constitutional right to privacy,<sup>4</sup> to whether it interferes with the

1. See Sheryl Gay Stolberg & Robert Pear, *A Stroke of a Pen, Make That 20, and It's Official*, N.Y. TIMES, Mar. 24, 2010, at A19.

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 21, 25, 26, 29, and 42 U.S.C.), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified in scattered sections of 26, and 42 U.S.C.).

3. See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011); *Liberity Univ., Inc. v. Geithner*, \_\_\_ F.3d \_\_\_, 2011 WL 3962915 (4th Cir. Sep. 8, 2011); *Florida ex rel. Attorney Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011); *Baldwin v. Sebelius*, 654 F.3d 877 (9th Cir. 2011); *N.J. Physicians, Inc. v. President of the United States*, 653 F.3d 234 (3d Cir. 2011); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 4072875 (M.D. Pa. Sep. 13, 2011); *Kinder v. Geithner*, No. 1:10 CV 101, 2011 WL 1576721 (E.D. Mo. Apr. 26, 2011); *Calvey v. Obama*, 792 F. Supp. 2d 1262 (W.D. Okla. 2011); *Purpura v. Sebelius*, No. 10-04814, 2011 WL 15477568 (D.N.J. Apr. 21, 2011); *Physician Hosps. of Am. v. Sebelius*, 781 F. Supp. 2d 431 (E.D. Tex. 2011); *Peterson v. United States*, 774 F. Supp. 2d 418 (D.N.H. 2011); *Bellow v. U.S. Dep't of Human Health & Human Servs.*, 2011 WL 2470456 (E.D. Tex. 2011); *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011); *Bryant v. Holder*, No. 2:10 CV 76, 2011 WL 710693 (S.D. Miss. Feb. 3, 2011); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903 (N.D. Ohio 2010); *Anderson v. Obama*, No. PJM 10-7, 2010 WL 3000765 (D. Md. July 28, 2010); *Complaint Re Section 1501, Patient Protection and Affordable Care Act, Boyle v. Sebelius*, No. 2:11-cv-07868 (C.D. Fla. Sept. 26, 2011); *Second Amended Civil Rights Complaint for Declaratory and Injunctive Relief, Coons v. Geithner*, No. 2:10-cv-1714 (D. Ariz. May 10, 2011) [hereinafter *Second Amended Civil Rights Complaint, Coons*]; *Second Amended Petition for Injunctive and Declaratory Relief, Bryant v. Holder*, No. 2:10-cv-76 (S.D. Miss. Mar. 4, 2011), E.C.F. No. 27 [hereinafter *Second Amended Petition, Bryant*]; *Complaint for Declaratory and Injunctive Relief, Oklahoma ex rel. Pruitt v. Sebelius*, No. 6:2011-cv-00030 (E.D. Okla. Jan. 21, 2011) [hereinafter *Complaint, Oklahoma ex rel. Pruitt*]; *Class Action Complaint for Declaratory and Injunctive Relief, Independent American Party of Nevada v. Obama*, No. 2:10-cv-1477 (D. Nev. Aug. 31, 2010); *Complaint for Declaratory Judgment and Injunctive Relief, Sissel v. U.S. Dep't of Health & Human Servs.*, No. 1:10-cv-01263 (D.D.C. July 26, 2010); *Judgment, Mackenzie v. Shaheen*, No. 10-cv-167 (D.N.H. May 26, 2010); *Class Action Petition for Injunctive and Declaratory Relief, Bullworth v. Holder*, No. 4:10-cv-00258 (E.D. Ark. Apr. 27, 2010), 2010 WL 3229808; *Complaint, Fountain Hills Tea Party Patriots v. Sebelius*, No. 2:2010-cv-00893 (D. Ariz. Apr. 22, 2010).

4. See *Second Amended Petition, Bryant*, *supra* note 3, at 34–35.

free exercise of religion,<sup>5</sup> to whether it violates the Thirteenth Amendment's prohibition on slavery.<sup>6</sup> Most of these arguments have little chance of success; governing law is too much of a barrier. But at least two claims are clearly plausible, and thus raise the specter of the Supreme Court invalidating some of the Act's central provisions—or even declaring the entire ACA unenforceable (if the Court additionally finds that the unconstitutional parts of the Act cannot be severed from what remains).<sup>7</sup>

The first plausible claim, and the one the Court will take up in *U.S. Department of Health & Human Services v. Florida*,<sup>8</sup> is that the ACA's minimum essential coverage provision (also known as the "individual mandate")—which requires most Americans to acquire health insurance by January 2014, or instead pay a penalty to be included on their federal income tax return<sup>9</sup>—exceeds Congress's enumerated powers.<sup>10</sup> To date, three district courts and one court of appeals have held this aspect of the ACA unconstitutional.<sup>11</sup> The second, which the Court will review in *Florida v. U.S. Department of Health & Human Services*,<sup>12</sup> is that the ACA's amendments to Medicaid—which, among other things, require participating states to extend coverage to all adults with incomes up to 138% of the federal poverty level<sup>13</sup>—effect a financial inducement that is "so massive as to leave States with no choice but

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5. See Complaint at 12, *Thomas More Law Ctr. v. Obama*, No. 2:10-cv-11156 (E.D. Mich. Mar. 23, 2010) [hereinafter Complaint, *Thomas More Law Ctr.*].

6. See Request for Declaratory Judgment at 5, 24–25, *Purpura v. Sebelius*, No. 3:10-cv-04814 (D.N.J. Sept. 20, 2010).

7. See *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1298–99, 1305–06 (holding that the minimum essential coverage provision exceeded Congress's enumerated powers and because that provision was so central to the functioning of the legislation, the entire ACA was void and unenforceable).

8. *U.S. Dep't of Health & Human Servs. v. Florida*, \_\_\_ U.S. \_\_\_, cert. granted, 132 S. Ct. 604 (2011).

9. See 26 U.S.C. § 5000A (Supp. IV 2010).

10. Virtually every lawsuit challenging the ACA's constitutionality has raised this claim. See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 601 (E.D. Va. 2010), vacated, 656 F.3d 253, 266 (4th Cir. 2011).

11. See, e.g., *Florida ex rel. Attorney Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1328 (11th Cir. 2011); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, No. 1:10-cv-763, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 4072875, at \*21 (M.D. Pa. Sept. 13, 2011); *Virginia ex rel. Cuccinelli*, 728 F. Supp. 2d at 788.

12. *Florida v. U.S. Dep't of Health & Human Servs.*, 132 S. Ct. 604 (order granting petition for writ of certiorari).

13. See Patient Protection and Affordable Care Act, 42 U.S.C. § 1396a(a)(1) (Supp. IV 2010), amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1004, 124 Stat. 1034 (2010) (codified in scattered sections of 26 and 42 U.S.C.).

to accept it,” passing “the point at which pressure turns into compulsion [to] achieve[] forbidden direct regulation of the States.”<sup>14</sup> The Eleventh Circuit is the only court of appeals to have reached this second question, and it upheld the ACA’s Medicaid provisions unanimously.<sup>15</sup>

Constitutional litigation is often “a continuation of policy by other means,”<sup>16</sup> and the ACA litigation is no exception. It is hardly a coincidence that the leading plaintiffs in some of the high-profile lawsuits are prominent Republicans—governors,<sup>17</sup> state attorneys general,<sup>18</sup> and members of Congress<sup>19</sup>—or that hundreds of elected officials (including Senate Majority Leader Harry Reid and Speaker of the House John Boehner) have filed several *amicus curiae* briefs.<sup>20</sup> But the constitutional questions these cases

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14. Petition for a Writ of Certiorari, *Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health & Human Servs.*, No. 11-400 (Sept. 27, 2011) [hereinafter Petition, *Florida ex rel. Attorney Gen.*]. The federal government will fund most of this coverage expansion, but not all of it. See Health Care and Education Reconciliation Act, 42 U.S.C. § 1396(d) (Supp. IV 2010). Thus, the ACA will substantially increase the minimum cost to a participating state.

15. See *Florida ex rel. Attorney Gen.*, 648 F.3d at 1263–68. Despite the fact this issue was not raised in any of the other lawsuits, the Court will hear an hour of oral argument on this issue. Lyle Denniston, *Analysis: Health Care’s Medicaid Expansion*, SCOTUSBLOG (Dec. 27, 2011, 12:28 AM), <http://www.scotusblog.com/2011/12/analysis-health-cares-medicare-expansion> (“The Obama Administration . . . sought to head off Supreme Court review, relying on . . . the reasoning of the Eleventh Circuit when it found the theory wanting.”).

16. With apologies to Carl von Clausewitz. See 1 CARL VON CLAUSEWITZ, ON WAR 23 (F.N. Maude ed., J.J. Graham trans., 1966) (“War is a mere continuation of policy by other means.”).

17. See Petition, *Florida ex rel. Attorney Gen.*, *supra* note 14, at i–iii (listing six governors who are plaintiffs in the Florida litigation).

18. See *id.* at ii (listing the twenty-two state attorneys general as parties to the Florida litigation); Petition for a Writ of Certiorari at 1, *Virginia ex rel. Cuccinelli v. Sebelius*, No. 11-420 (Sept. 30, 2011) (lawsuit brought by Virginia Attorney General Kenneth Cuccinelli); Complaint, *Oklahoma ex rel. Pruitt*, *supra* note 3, at 2 (lawsuit brought by Oklahoma Attorney General Scott Pruitt).

19. See Second Amended Civil Rights Complaint, *Bryant*, *supra* note 3 (plaintiffs include Jeff Flake and Trent Franks, both United States Representatives from the State of Arizona).

20. See, e.g., Brief for the Family Research Council and 30 Members of the U.S. House of Representatives as Amici Curiae Supporting Petitioners app. at 1a, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, Nos. 11-393 & 11-400 (11th Cir. Oct. 27, 2011); Brief for the American Center for Law & Justice et al. as Amici Curiae Supporting Petitioners at 2–3, *Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health & Human Servs.*, No. 11-400 (11th Cir. Oct. 26, 2011) (certiorari stage brief on behalf of 105 members of Congress); Brief for Senate Majority Leader Harry Reid et al. as Amici Curiae Supporting Appellants, *Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health & Human Servs.*, Nos. 11-11021 & 11-11067 (11th Cir. Apr. 11, 2011); Brief for Members of the United States Senate and Speaker of the House John Boehner as Amici Curiae Supporting Plaintiffs-Appellees, *Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health & Human Servs.*, No. 11-11021 (11th Cir. May 12, 2011).

raise are not purely political. Rather, the challengers' two principal claims pose a welter of intricate and important doctrinal puzzles, the resolution of which is important in its own right. Consider the following questions concerning the constitutionality of the minimum essential coverage provision:

Exactly how does one define the conduct that a specific federal statutory provision regulates? Is the inquiry confined to the precise subsection being challenged (in this case, 26 U.S.C. § 5000(a))? Or might the regulated activity be conceived more broadly, such that the challenged subsection is properly seen as a *means* of reaching the activity the statute seeks to regulate?

More concretely, does the individual mandate regulate an individual's choice between purchasing health insurance and remaining idle? Or does it regulate the choice between obtaining health care services with or without adequate coverage? Congress can forbid health care providers from offering services to those who lack adequate insurance; this is commercial activity. Can Congress effectively do the same, albeit indirectly, by requiring everyone to acquire coverage in advance? Stated differently, does the minimum essential coverage provision regulate the health insurance market (a market in which only some Americans participate), or instead the market for health care services (a market in which essentially *everyone* participates)?

More abstractly, for purposes of construing Congress's enumerated powers, how do we differentiate (a) Congress's selection of particular legislative means (which, dating to *McCulloch v. Maryland*, have traditionally triggered very deferential judicial scrutiny<sup>21</sup>) from (b) Congress's regulatory objectives? At what point do legislative means become ends in themselves, subject to more searching judicial review?

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21. 17 U.S. (4 Wheat.) 316, 323–25 (1819); *see also* United States v. Comstock, 560 U.S. 1, 7 (2010) (The Constitution “address[es] the ‘choice of means’ ‘primarily . . . to the judgment of Congress’” (quoting *Burroughs v. United States*, 290 U.S. 534, 547–48 (1934))).

If the minimum essential coverage provision, best understood, regulates the decision whether to purchase health insurance, is a person's decision not to acquire coverage properly conceptualized as "passive inactivity"? Or is no one truly "inactive" with respect to the financing of health care, such that every individual is making a decision (and an economic one at that) as to how to pay for the care they almost assuredly will need at some point?

If the individual mandate indeed regulates "passive inactivity," can Congress ever extend its commerce power so far without obliterating the foundational principle that the national government is one of limited and enumerated powers? Or is the activity/inactivity distinction no more promising than other distinctions the Court has drawn and later discarded as unworkable, such as that between "commerce" and "manufacturing," or between "direct" and "indirect" effects?

Finally, if Congress is constitutionally prohibited from regulating "passive inactivity"—at least when regulating interstate commerce—what is the textual, constitutional basis for that limit? And how can we square such a constraint with the various federal statutes that (uncontroversially) do the same in the service of other enumerated powers—for instance, federal laws that compel service in the military, service on juries, and selling property that has been seized by the government through the power of eminent domain?

With respect to the ACA's expansion of Medicaid, consider these questions:

Can the financial inducement that Congress offers state governments as part of a federal spending program—a program in which the states' participation remains formally voluntary—ever be so powerful as to constitute "coercion"?

If so, how do we define "coercion" in this context, where the states (a) have no pre-existing constitutional entitlement to any federal funding, (b) possess an independent taxing power, and (c) are sophisticated entities rather than natural persons who might be vulnerable to various psychological pressures?

Is there a judicially manageable standard for defining such coercion? Does it depend on the sheer volume of dollars at stake, the proportion of the state's budget affected, or something else? Can it depend on the proportionality of the financial sanction to the gravity of the state's noncompliance? How should we account for a state's decision to become more or less dependent on federal largesse? Would the same spending program be constitutional as applied to some states but not to others?

Does it matter whether the new spending conditions apply to pre-existing streams of federal financial assistance? If so, would such a rule effectively preclude Congress from making any significant changes to joint federal-state spending programs (short of repealing and re-enacting the programs in their entirety)?

These lines of inquiry are hardly exhaustive. Indeed, they omit the many thorny questions surrounding some other significant issues—namely, (1) whether, setting aside the Commerce Clause, the individual mandate (and its accompanying tax penalty) might be justified as a valid exercise of Congress's taxing power;<sup>22</sup> (2) whether the challenge to the ACA on the ground that it exceeds Congress's enumerated powers must be assessed facially—as either within or outside Congress's legislative authority—or instead is amenable to challenges by particular plaintiffs on an as-applied basis;<sup>23</sup> (3) whether, if the individual mandate is unconstitutional, it can be severed from some or all of the Act's hundreds of remaining provisions;<sup>24</sup> and (4) whether the case's jurisdictional complications (both statutory and constitutional) might preclude the Supreme Court from even reaching the merits.<sup>25</sup>

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22. See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 782–87 (E.D. Va. 2010) (concluding that the individual mandate is not a bona fide revenue-raising measure enacted under the taxing power of Congress), *vacated*, 656 F.3d 253, 266 (4th Cir. 2011).

23. See, e.g., *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 554–66 (6th Cir. 2011) (Sutton, J., concurring in part) (concluding that, because the minimum coverage provision is constitutional in several of its applications, the plaintiffs' facial challenge had to fail (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987))).

24. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1299–1305 (N.D. Fla. 2011) (concluding that the individual mandate and remaining provisions are inexplicably bound and therefore the mandate was not severable), *aff'd in part and rev'd in part*, 648 F.3d 1235 (11th Cir. 2011).

25. See *Liberty Univ., Inc. v. Geithner*, No. 10 2347, \_\_\_ F.3d \_\_\_, 2011 WL 3962915,

In short, the legal complexities are numerous and substantial, wholly independent of the case's significance as a matter of public policy or partisan politics. Popular interest is not the only reason the Court took the remarkable step of setting aside three days for oral argument.

## II. BROADER CONSIDERATIONS

As the Justices consider the ACA's constitutionality this spring, they undoubtedly will grapple with these doctrinal puzzles. By all indications, the current members of the Court are sincerely committed to the contemporary norms of judicial practice, and thus take the intricacies of constitutional doctrine quite seriously.<sup>26</sup> While their decisions are hardly immune from political pressures, there is little reason to think that the Court's decision will be "political" in the crudest sense—a blunt expression of the Justices' personal policy preferences.<sup>27</sup>

At the same time, the Justices are sophisticated players. They understand that, in the broader drama of American constitutional development, their roles go beyond the mere rationalization of black letter law. In a case of this magnitude—economically, politically, and perhaps historically—they cannot help but be affected by some broader considerations, matters that lie outside the specific doctrinal frames within which the case is being argued by the parties and their *amici*.

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at \*4–5 (4th Cir. Sept. 8, 2011) (explaining that the Anti-Injunction Act divests federal courts of their subject-matter jurisdiction and resolution of the case therefore turned on whether the plaintiff's suit seeks to restrain the collection or assessment of any tax); *Virginia ex rel. Cuccinelli*, 656 F.3d at 270–73 (dismissing the case for lack of subject-matter jurisdiction because Virginia failed to establish standing).

26. The one partial exception may be Justice Thomas, who seems less bound by the doctrine of *stare decisis* than most judges. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 602 (1995) (Thomas, J., concurring) (arguing that the Supreme Court should "modify" its post-1937 Commerce Clause jurisprudence); *see also* Stephen B. Presser, *Touting Thomas: The Truth About America's Most Maligned Justice*, *LEGAL AFF.*, Jan.–Feb. 2005, at 68, 68 (quoting Justice Scalia as stating that Justice Thomas "doesn't believe in *stare decisis*, period"); Lincoln Caplan, *Clarence Thomas's Brand of Judicial Logic*, *N.Y. TIMES*, Oct. 22, 2011, at SR10 (explaining that "Thomas's brand of originalism means substituting his personal views of the Constitution for those of earlier courts").

27. *See generally* Bradley W. Joondeph, *The Many Meanings of "Politics" in Judicial Decision Making*, 77 *U.M.K.C. L. REV.* 347 (2008) (discussing the various ways in which judicial decisions are shaped by political forces without being "political" in this crudest sense).

Some of these considerations—external political forces with the potential to shape the Court’s deliberations—appear to have been settled already. First, though the American public remains somewhat confused about what the ACA actually does, it is clear that the Act is not especially popular.<sup>28</sup> A majority of Americans seem to view the ACA unfavorably, and they seem particularly hostile to the minimum coverage provision.<sup>29</sup> A recent poll conducted by the Associated Press and the National Constitution Center found that an astounding 82% of respondents believe that “[t]he Federal Government should not have the power to require all Americans to buy health insurance.”<sup>30</sup> Broad-based popular support for the ACA would have made it more difficult for the Court to invalidate the Act. But such support has not materialized.

Second, since the enactment of the ACA, the political climate has turned against President Obama and the Democratic Party. Of course, Obama remains the President, and the Democrats continue to hold a majority in the Senate. Moreover, political fortunes can change quickly; things might look quite different by the time the Court hands down its decision. But the President’s approval ratings have declined substantially since his inauguration,<sup>31</sup> and the Democrats were trounced by the Republicans in

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28. For example, a poll conducted by the *Washington Post* and *ABC News* between September 29, 2011, and October 2, 2011, found that 43% of Americans would be more likely to vote for a presidential candidate, if the candidate “[w]ants to repeal [the] new health care law,” while only 29% would be less likely to vote for that candidate. *Washington Post-ABC Poll*, WASH. POST, [http://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll\\_100211.html](http://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll_100211.html) (last visited Feb. 24, 2012).

29. See *CNN Poll: Majority Oppose Individual Mandate*, CNNPOLITICS (June 9, 2011 12:17 PM), <http://politicalticker.blogs.cnn.com/2011/06/09/162714/> (showing 54% opposition to mandate versus 44% support of mandate); HENRY J. KAISER FAMILY FOUND., KAISER POLLS, KAISER HEALTH TRACKING POLL: FEBRUARY 2011 1, 3 (2011) (indicating that 48% view the ACA unfavorably, 85% of whom favor repealing the mandate; 67% oppose the mandate). *But see* HENRY J. KAISER FAMILY FOUND., KAISER POLLS, KAISER HEALTH TRACKING POLL: SEPTEMBER 2011, at 4 (2011) (showing that 43% view the ACA unfavorably while 41% view it favorably; yet, “more than half (52%) want Congress to keep the law as is (19%) or expand it (33%), while fewer than four in ten (37%) want it repealed and replaced with a Republican-sponsored alternative (16%) or repealed outright (21%)”).

30. GFK ROPER PUB. AFFAIRS & CORP. COMMC’NS, ASSOCIATED PRESS, THE AP-NATIONAL CONSTITUTION CENTER POLL: AUGUST 2011, at 4 (2011).

31. A Gallup poll for November 7 through November 13, 2011, found the President’s approval rating to stand at 41%, which is down significantly from its high of 69% in January 2009, and his term average of 50%. *Barack Obama Presidential Job Approval*, GALLUP, <http://www.gallup.com/poll/116479/barack-obama-presidential-job-approval.aspx> (last visited Feb. 24, 2012).

the 2010 midterm elections.<sup>32</sup> Thus, were the Court to invalidate the ACA, the Justices would not face a wall of united political opposition. Make no mistake, a decision striking down the ACA would still be intensely controversial, probably as controversial as any Supreme Court decision since *Bush v. Gore*.<sup>33</sup> But the Court would not be threatened institutionally the way it might have been were the Democrats firmly in control of both elected branches. These two political facts—that the individual mandate is unpopular, and that the national government is politically fractured—afford the Justices ample breathing space to reach the constitutional result they sincerely prefer.<sup>34</sup>

At the same time, several other questions—ones apt to influence the Court's decision—remain unresolved. It is to these questions that I now turn.

### III. FIVE QUESTIONS

In my view, there are five open questions that will determine whether the Supreme Court upholds or invalidates the ACA. Some are jurisprudential, while some are purely extralegal. What they share in common is that they extend beyond the doctrinal puzzles highlighted above. By their nature, these questions lack correct answers, and it is unclear how the Justices will respond to them. But my goal here is not to offer my own answers or to predict the Court's. Instead, my aim is merely to identify the deeper, institutional concerns that will shape the Court's decision making. For, rather than the doctrine driving the outcome, it is the

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32. See Peter Baker, *Tide Turns, Starkly*, N.Y. TIMES, Nov. 3, 2010, at A1. Republicans gained sixty-three seats in the House of Representatives and six seats in the Senate, and six governorships. See Chris Cillizza, *Who Had the Worst Year in Washington? Michael Steele*, WASH. POST, Dec. 19, 2010, at B1.

33. 531 U.S. 98 (2000) (refusing to order a manual recount of votes in the 2000 presidential election).

34. See Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 L. & SOC. INQUIRY 511, 517 (2007) (“[T]he governing [national] coalition is so often divided on important matters that the [J]ustices will have multiple acceptable alternatives in most cases.”); see also Keith E. Whittington, *“Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 594 (2005) (stating the judiciary may be willing and able to act because they are insulated from the competing pressures faced by political leaders).

Justices' responses to these underlying questions that will likely determine their answers to the doctrinal puzzles.

A. *Is This a Case in Which Judicial Intervention Is Appropriate?*

For the past seventy-five years, the Supreme Court's conception of its role in our constitutional system has been formed in reaction to the *Lochner* era and its demise.<sup>35</sup> The persistent, existential question for the Justices has been this: When, exactly, is the Court justified in overriding the majoritarian preferences of the People, as expressed through their elected representatives? This is the so-called "counter-majoritarian difficulty" that has preoccupied constitutional lawyers for nearly a century.<sup>36</sup> The general rule since 1937, at least in the realm of economic and commercial regulation, has been deference to the political process.<sup>37</sup> As the Justices have often recognized, "[w]hen this Court is asked to invalidate a statutory provision that has been approved by both Houses of Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons."<sup>38</sup> On the other hand, more exacting scrutiny is appropriate in defense of those constitutional values unlikely to be vindicated through ordinary politics—for instance, to protect the rights of unpopular speakers, to prevent discrimination against discrete and insular minorities, or to uphold fundamental principles that the elected branches are apt to slight or ignore.<sup>39</sup>

Into which category does this case fall? Is this an instance in which the various sides in the debate are well represented—where the issue is highly salient, and the politicians' positions have determined (and are likely to determine) the results of elec-

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35. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 217 (2002).

36. The most famous articulation of the problem is found in *The Least Dangerous Branch*. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962). See generally Friedman, *supra* note 35, at 162 (stating that ever since Franklin Roosevelt appointed enough Justices to the Court to change its politics to the left of the political spectrum, liberal legal academics have struggled to justify judicial review).

37. See *id.* at 222–23.

38. *Clinton v. City of New York*, 524 U.S. 417, 447 n.42 (1998) (Stevens, J., concurring in judgment) (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986)).

39. See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

tions, such that the political process can be trusted to devise a constitutionally satisfactory answer? Is this essentially a case where the losers in a fiercely fought political debate have turned to the courts seeking a second bite at the apple? Or instead, is this a case in which only the Court can safeguard our deepest constitutional commitments against the opportunistic encroachment of the elected branches? Is this a place where the Court is constitutionally *obligated* to step in and draw a line—even an arbitrary one—because the government has failed to articulate a meaningful “limiting principle,” and upholding the ACA would effectively mean that Congress’s powers are limitless?

B. *Are the States “Separately Incompetent” to Enact Health Care Reform?*

A second consideration involves the broader purposes of Article I, and the creation story of Congress’s legislative powers in particular. As the recent scholarship of Jack Balkin, Robert Cooter, and Neil Siegel reminds us, the enumeration of powers in Article I, Section 8 has its roots (at least to some degree) in Resolution VI of the Virginia Plan, the document prepared by the Virginia delegation to the Constitutional Convention (specifically, James Madison and Edmund Randolph).<sup>40</sup> The Virginia delegation introduced its plan to the Convention on May 29, 1787, and the plan’s sixth resolution proposed that the “National Legislature” be vested with the power “to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.”<sup>41</sup> The Convention modified this language over the next six weeks, but only slightly. On July 17, 1787, the Convention approved, by a margin of eight states to two, a proposal to grant Congress the authority “to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”<sup>42</sup> This provision was then referred to the Committee of De-

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40. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 8–10 (2010); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 130 (2010).

41. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1966); see Balkin, *supra* note 40, at 8–9.

42. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed.,

tail, which proceeded to draft what would become Article I, Section 8—the specific enumeration of Congress’s discrete legislative powers.<sup>43</sup> There remains a lively academic debate as to what this history implies: What should we infer from the Framers’ decision to enumerate these powers seriatim, rather than to retain the more amorphous phrasing approved by the Convention before referring the matter to the Committee of Detail?<sup>44</sup> But there is little doubt that, at least in the minds of several Framers, a catalytic spirit behind Article I (and the adoption of the Constitution more generally) was to empower Congress to solve those problems that, owing to coordination difficulties and spillover effects, state governments were incapable of addressing on their own.

In the context of the ACA, then, the relevant question is twofold. First, is health care reform a matter on which the states are “separately incompetent”?<sup>45</sup> Are the problems of inefficiency and inequity that currently plague the system inherently *interstate* in nature, with coordination problems and spillover effects, such that a state-by-state approach is bound to fail?<sup>46</sup> Second, if the states are indeed “separately incompetent” in this regard, is such incompetence constitutionally relevant? In more practical terms, would the Justices be uncomfortable with placing health care reform (or at least a version that builds on the private insurance market and thus includes some form of an individual mandate) in a constitutional “no man’s land”—beyond Congress’s authority, yet also beyond the states’ practical capacities? Or instead, would they be untroubled concluding that the ACA is constitutionally *ultra vires*, no matter the uncertain, difficult-to-predict policy consequences?

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rev. ed. 1966); see Balkin, *supra* note 40, at 9–10.

43. See Balkin, *supra* note 40, at 10.

44. See Kurt T. Lash, “Resolution VI”: *The Virginia Plan and Authority to Resolve “Collective Action Problems” Under Article I, Section 8*, at 7–11 (Ill. Pub. L. & Legal Theory Research, Working Paper No. 10-40, 2011).

45. Balkin, *supra* note 40, at 6.

46. See Akhil Reed Amar, *The Lawfulness of Health-Care Reform*, YALE L.J. ONLINE (forthcoming 2012) (manuscript at 23–24), available at <http://ssrn.com/abstract=1856506>; Balkin, *supra* note 40, at 6, 11–13, 46; see also Neil Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. (forthcoming 2012) (manuscript at 42–45, 47, 54–56), available at <http://ssrn.com/abstract=1843228>.

C. *Should the Greater Power Inform the Assessment of a Lesser One?*

The consensus among constitutional lawyers is that, under well-established precedent, a complete government take-over of the American health care financing system—a tax-and-spend, automatic-enrollment, Medicare-for-all scheme—would be perfectly constitutional.<sup>47</sup> The Supreme Court’s 1937 decision in *Helvering v. Davis*, which rejected a constitutional challenge to the Social Security Act,<sup>48</sup> foreordains this result, as does the entrenched understanding of Congress’s authority to tax and spend for the general welfare. The ACA is more modest in its aims. Instead of creating something akin to a single-payer system, the ACA builds on the existing private insurance market, subsidizing greater participation in that market by employers and individuals, and imposing a host of new rules intended to cure some of its imperfections. For example, the Act prohibits health plans from engaging in medical underwriting or excluding coverage for pre-existing conditions.<sup>49</sup> In general terms, the ACA seeks to preserve and improve the existing private insurance market, rather than replace it with a government-run system.

Of course, there are hundreds of places in constitutional law that the government’s greater power does not imply the lesser. To name just a few: the state can punish all “fighting words,” but it cannot punish only those that “arouse[s] anger, alarm or resentment in others on the basis of race, color, creed, religion or gen-

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47. See, e.g., Randy E. Barnett, Carmack Waterhouse Professor of Legal Theory, Georgetown Univ. Law Cntr., *Our Pending National Debate: Is Health Care Reform Constitutional*, AALS Hot Topic Panel Question & Answer Session (Jan. 7, 2011) in 62 MERCER L. REV. 605, 660 (2010) (stating that “if Medicare is constitutional, then Medicare for everyone is constitutional,” and noting that that he did not think “there is any question under existing doctrine” that Medicare is constitutional).

48. 301 U.S. 619, 645–46 (1937).

49. Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg-11(a)(1) (Supp. IV 2010) (setting no lifetime or annual limits); *Id.* § 300gg-12 (prohibition on rescissions); *Id.* § 300gg-15 (development and use of uniform explanation of coverage documents and standardized definitions); *Id.* § 300gg-16 (prohibition on salary-based discrimination); *Id.* § 300gg-3 (prohibition of preexisting condition exclusions); *Id.* § 300gg-4 (prohibition of discrimination against individual participants and beneficiaries based on health status); *Id.* § 300gg-7 (prohibition on excessive waiting periods); 42 U.S.C. § 18061 (Supp. IV 2010) (transitional reinsurance program for individual and small group markets in each State); *Id.* §§ 18062–63 (establishment of risk corridors for plans in individual and small group markets and risk adjustment); *Id.* §§ 18071, 18081 (establishing refundable tax credits for premium assistance and reduced cost-sharing for individuals enrolling in qualified health plans).

der.”<sup>50</sup> A state can entirely eliminate its courts of appeal, but it cannot create such courts on the condition that litigants seeking an appeal (including indigent criminal defendants) pay a fee for their trial transcripts.<sup>51</sup> The government has no obligation to provide individuals with all sorts of benefits (such as cash welfare payments, food stamps, or health insurance), but once it does, it cannot withdraw those benefits without affording beneficiaries some measure of due process.<sup>52</sup> And an individual has no constitutional right to serve as a public school teacher, but a school district cannot fire a teacher for expressing her views on a matter of public concern, at least when her speech does not interfere with the school’s operations.<sup>53</sup> In other words, the government’s exercise of a purportedly “lesser” power can often be invalid, no matter the constitutionality of a “greater” assertion of the same authority.

In many of these circumstances, though, the constitutional problem lies in the risk of unequal or arbitrary treatment—for instance, that affluent criminal defendants will be treated more favorably than those who are indigent, or that speakers with popular messages will be entitled to speak freely while unpopular views will be suppressed. By contrast, many of the constitutional objections to the ACA concern the size and scope of the governmental power being exercised.<sup>54</sup> Indeed, it is the breadth of the federal government’s authority contemplated by the ACA to which many of the Act’s challengers most strenuously object.<sup>55</sup>

It might therefore strike some of the Justices as ironic that an approach to health care reform granting the federal government substantially *more* authority would be perfectly constitutional, but that the ACA’s less ambitious approach could be invalid—and precisely because it claims too much power for the federal gov-

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50. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380, 391 (1992) (quoting *ST. PAUL, MINN., LEGIS. CODE* § 292.02 (1990)) (internal quotation marks omitted).

51. See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (citing *McKane v. Durston*, 153 U.S. 684, 687–88 (1894)).

52. See *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (citing *Kelly v. Wyman*, 294 F. Supp. 893, 961 (S.D.N.Y. 1968)).

53. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574–75 (1968).

54. See Brief in Response for Private Respondents at 1, *U.S. Dep’t of Health & Human Servs. v. Florida*, No. 11-398 (11th Cir. Oct. 14, 2011) (“[T]he ACA’s mandate to purchase an unwanted commercial product is an unprecedented and unbounded exercise of federal authority.”).

55. *Id.*

ernment. The question for the Court, then, is whether this matters. Should the constitutionality of a Medicare-for-all scheme inform the Justices' appraisal of the ACA's more incremental approach? Or are the constitutional issues raised by the two types of reform wholly incommensurate? Is the real problem with the ACA not so much the amount of power being exercised, but the type of power it claims—the means Congress seeks to employ? Alternatively, might some of the Justices be thinking several steps (and years) ahead—and might they conclude that invalidating the ACA will only make the eventual adoption of a single-payer-type, Medicare-for-all program all the more likely?

#### D. *What is at Stake for the Court?*

This case is the most partisan, ideologically charged dispute to reach the Court since *Bush v. Gore*.<sup>56</sup> Despite the intense controversy that surrounded the Justices' intervention in the 2000 presidential election, the Court seemed to survive that trauma relatively unscathed, without any measurable damage to its diffuse support from the American public.<sup>57</sup> Its approval rating with the American public remained essentially unchanged.<sup>58</sup> Recent polling, however, suggests that the public's approval of the Court has slipped.<sup>59</sup> Might the nation's tolerance for the appearance of partisanship at the Court be analogous to that for bee stings: the venom is harmless up to a point, but toxic once it exceeds a certain threshold? More generally, how will the Court's concern for its own institutional legitimacy—its very practical need to maintain its appearance as an arbiter of constitutional principle rather than of partisan politics—affect the Justices' deliberations?<sup>60</sup> To

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56. 531 U.S. 98, 111 (2000).

57. Gallup polling of whether Americans approved or disapproved of the way the Supreme Court was handling its job was essentially unaffected by the Court's decision in *Bush v. Gore*. Its approval rating was 62% in August and September 2000, 59% in January 2001, and 62% in June 2001. *Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/Supreme-Court.aspx> (last visited Feb. 24, 2012).

58. *See id.*

59. A recent Gallup poll found that the Supreme Court's approval rating among Americans had dipped to 46%, which was down 5 points from 2010 and 15 points from 2009. *See* Jeffrey M. Jones, *Supreme Court Approval Rating Dips to 46%*, GALLUP (Oct. 3, 2011), <http://www.gallup.com/poll/149906/supreme-court-approval-rating-dips.aspx>.

60. *Cf.* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865–66 (1992) (“The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices

what extent might the Justices feel impelled to avoid a 5-4 decision, especially if its division is along predictable partisan lines? Might the pressure to avoid such a result be particularly acute if the Court, at roughly the same time, decides any other high-profile, politically charged cases—such as *Arizona v. United States*, which concerns Arizona's controversial law regulating undocumented immigrants<sup>61</sup>—with the same 5-4 split?

#### E. *What is at Stake for the Chief Justice?*

From his first day on the job, John Roberts has seemed keenly interested in his legacy as Chief Justice.<sup>62</sup> This will be the biggest case to date to reach the Court on his watch, and it might ultimately be the biggest decision of his tenure. How will that affect the Chief Justice's thinking? Will he see this decision as an opportunity to demonstrate, in a way every American would understand, that the Court is truly above partisan politics—that his lasting legacy is a deep and abiding commitment to “judicial modesty,” even at the expense of his own ideological inclinations?<sup>63</sup> Or will he instead see this as a case where the Justices must take a potentially heroic stand in defense of the Constitution's structural principles, no matter the reputational consequences—to him or to the Court?<sup>64</sup>

### IV. END GAME

To be clear, my claim is not that each of the Justices will consciously grapple with all of these questions (though I am confident some Justices will be thinking about some of them). Again,

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that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”)

61. See *United States v. Arizona*, 641 F.3d 339, 343 (9th Cir. 2011); Petition for Writ of Certiorari at 3, *Arizona v. United States*, No. 11-182 (Aug. 10, 2011).

62. See, e.g., Jeffrey Rosen, *Roberts's Rules*, ATLANTIC MONTHLY, Jan.–Feb. 2007, at 104.

63. Cf. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005) (statement of John G. Roberts, nominee to be Chief Justice of the United States) (“I think that general approach results in a modest approach to judging which is good for the legal system as a whole. I don't think the courts should have a dominant role in society and stressing society's problems.”).

64. See *id.*; Rosen, *supra* note 62.

the current Court seems quite conscious of its role in our constitutional system, a role that requires the Justices to engage in a distinct, judicial form of constitutional analysis. Thus, they surely will engage with the myriad doctrinal questions presented, and will reach a result that reflects their sincere views of the law. Their conscious decision making will not be predominantly “political” or extra-legal.

At the same time, we should not lose sight of the broader plane on which the Supreme Court operates, particularly in deciding cases of this nature. On that plane, history shows that it is typically these external, institutional, or political considerations that drive the Court’s conclusions. What tends to matter is not so much how the Justices solve the technical, doctrinal puzzles, but the broader questions posed—questions that are logically prior to the legal questions presented. Identifying these considerations hardly tells us what the Court is likely to do with the ACA. But perhaps it moves us closer to understanding the reasons for the Court’s decision.