

THE ANTI-INJUNCTION ACT, CONGRESSIONAL INACTIVITY, AND PRE-ENFORCEMENT CHALLENGES TO § 5000A OF THE TAX CODE

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Section 5000A of the Tax Code is one of the most controversial provisions of federal law currently on the books. It is the minimum essential coverage provision of the Patient Protection and Affordable Care Act (“ACA” or “Act”)—a provision more popularly known as the individual mandate.¹ Opponents challenged this provision immediately upon its enactment on March 23, 2010.² The Supreme Court is poised to hear arguments about its constitutionality in one of these challenges, just over two years later.³

There is a puzzle surrounding the Supreme Court’s consideration of these cases. Everyone seems to want an answer to the question of whether § 5000A is constitutional. And, at this point, everyone seems to want an answer as soon as possible. But there

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1. See 26 U.S.C. § 5000A (Supp. IV 2010). On the terminological point, see, for example, Nicholas Bagley & Jill R. Horwitz, Commentary, *Why It’s Called the Affordable Care Act*, 110 MICH. L. REV. FIRST IMPRESSIONS 1 (2011), <http://www.michiganlawreview.org/assets/fi/110/bagleyhorwitz.pdf> (describing § 5000A as “titled ‘Maintenance of Minimum Essential Coverage,’ but better known as the ‘individual mandate’”).

2. See, e.g., Kevin C. Walsh, *The Ghost that Slayed the Mandate*, 64 STAN. L. REV. 55, 56 n.3 (2012) (noting that Virginia filed a challenge to the individual mandate “minutes after President Obama signed the Patient Protection and Affordable Care Act into law”); *id.* at 59 n.17 (“In addition to Virginia, many others also filed suit, including a collection of several states led by Florida, along with a smattering of private individuals and organizations.”).

3. See *Granted & Noted List—October Term 2011*, SUPREME COURT OF THE U.S. (Jan. 11, 2012), <http://www.supremecourt.gov/orders/11grantednotedlist.pdf> (noting the cases involving the ACA for which the Court will hear oral arguments in March 2012).

is a serious potential problem with the Supreme Court giving the ruling that everyone seems to want. A federal statute known as the Anti-Injunction Act (“AIA”) prohibits pre-enforcement challenges to certain exactions that are administered through the machinery of tax enforcement.⁴ There are strong arguments that the AIA blocks the current challenges to § 5000A.⁵ If the AIA does, in fact, block these challenges, then no authoritative answer to the question of § 5000A’s constitutionality can be provided until 2015 at the earliest.⁶ The AIA is a rule that Congress made. And it is not too late for Congress to make an exception to that rule. The puzzle, then, is this: If there is a congressionally created obstacle to getting a ruling that everyone in Congress seems to want, and Congress can remove that obstacle, then why has it not done so?

In this “Everything But the Merits” Allen Chair Symposium contribution, I address this puzzle in three ways. First, I consider various explanations for the failure of Congress, thus far, to enact an exception to the AIA that would allow pre-enforcement challenges to § 5000A. I conclude that the best explanation is a dampening of legislative initiative that results from the litigation positions of those who are best situated to appreciate the need for an exception to the AIA. Second, I set forth a simple textual argument for why the AIA does bar the Supreme Court’s consideration of the currently pending challenges of § 5000A. The point is not to present an exhaustive analysis. That will be supplied in the litigation, and the Supreme Court will provide an authoritative answer. The point is to present, in a concise manner, one of the principal reasons why the authoritative answer that the Supreme

4. See 26 U.S.C. § 7421 (2006) (prohibiting lawsuits that seek to restrain the assessment or collection of taxes); *Liberty Univ., Inc. v. Geithner*, No. 10-2347, ___ F.3d ___, 2011 WL 3962915, at *5 (4th Cir. 2011) (explaining that “the AIA prohibits a pre-enforcement challenge to any ‘exaction [that] is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue’” (alteration in original) (quoting *Phillips v. Comm’r*, 283 U.S. 589, 596 (1931))). A provision of the Declaratory Judgment Act also blocks pre-enforcement challenges that seek declaratory relief “with respect to Federal taxes.” See 28 U.S.C. § 2201(a) (2006). The precise scope of this bar is unclear, but it is at least as broad as the bar imposed by the AIA. See *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974).

5. See generally *Liberty Univ., Inc.*, No. 10-2347, ___ F.3d at ___, 2011 WL 3962915, at *15–16; *Seven-Sky v. Holder*, 661 F.3d 1, 21–22 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

6. See 26 U.S.C. § 5000A(a), (b) (Supp. IV 2010) (providing that the minimum essential coverage requirement goes into effect in 2014, and that the penalty for noncompliance is payable with the filing of individual tax returns due the following year).

Court very well may provide—should Congress fail to enact an exception—is that the AIA blocks the currently pending pre-enforcement challenges to § 5000A. Third, I address one of the principal gambits that the challengers have used to get around the AIA—decoupling two judicially inseparable requirements in § 5000A: (1) the requirement to have insurance and (2) the penalty that enforces it. Trying to pull these parts of § 5000A apart is a peculiar move that raises questions about the appropriate unit of analysis in pre-enforcement adjudication. On the one hand, the challengers argue that the minimum coverage provision cannot be severed and that the entire ACA must be rendered unenforceable if the minimum coverage provision is unconstitutional. On the other hand, the challengers argue that they can challenge the requirement to have insurance in § 5000A without necessarily calling into question the enforceability of the tax penalty in the very same section. These claims are not only inconsistent with each other but also with a proper understanding of the federal judicial function of resolving cases and controversies.

I. WHY HAS CONGRESS LARGELY IGNORED THE AIA OBSTACLE?

The puzzle this piece addresses is why Congress has not acted to lift a congressionally created obstacle to obtaining a ruling that everyone in Congress apparently wants. One answer to this puzzle is to challenge the premise. Maybe it is not the case that everyone in Congress wants a prompt ruling on the constitutionality of § 5000A.

If this premise is false, it would seem to be false because of the Democrats, not the Republicans, who have largely been driving the litigation.⁷ As for the Democrats, the idea of putting off a rul-

7. See Jennifer Haberkorn & Scott Wong, *Health Ruling Is GOP Rallying Cry*, POLITICO (Dec. 13, 2010, 3:08 PM), <http://www.politico.com/news/stories/1210/46319.html>. (“Lawmakers pounced on the news Monday that a federal judge has struck down health reform’s individual mandate—with Republicans welcoming it as a body blow to ‘Obamacare’ and Democrats dubbing it a detour on the road to reform.”). In February 2011, twenty-eight Republican governors sent a letter to President Obama encouraging the Administration to “support an expedited appellate process for each of the pending cases to achieve quick resolution by the United States Supreme Court.” Letter from Governors to President Barack Obama (Feb. 9, 2011). In December 2011, Republican Congressman Leonard Lance introduced the “Americans Need a Health Care Ruling Act” to ensure that the AIA does not block Supreme Court consideration of the current pre-enforcement challenges. See Leonard Lance, *America Needs a Health Care Ruling*, THE HILL (Dec. 5, 2011, 3:10 PM), <http://thehill.com/blogs/congress-blog/healthcare/197265-america-needs-a-healthcare->

ing on the constitutionality of § 5000A would have been more attractive earlier on in the litigation. But now that the challenges have successfully cast a cloud over the constitutionality of a central provision of President Obama's signature legislative achievement, the Democrats appear to have more to gain than to lose in obtaining a prompt ruling.⁸

That appears to be the view of the Obama Administration, which sought and obtained review of the single court of appeals decision holding § 5000A unconstitutional.⁹ The Administration could have attempted to delay the process by seeking en banc review, but did not.¹⁰ Instead, the Administration filed some of its briefs early to move the Supreme Court's consideration along.¹¹

ruling.

8. Democrats have understandably been less insistent than the Republicans on the need for judicial consideration of the constitutionality of § 5000A. Nevertheless, there are indications that some Senate Democrats favor a ruling sooner rather than later. In February 2011, Democratic Senator Bill Nelson sought to introduce a non-binding resolution urging the Supreme Court to decide quickly whether § 5000A is constitutional. See Ted Barrett, *Senator Seeks Expedited Supreme Court Review of Health Care Law*, CNNPOLITICS (Feb. 2, 2011, 5:32 PM), <http://politicalticker.blogs.cnn.com/2011/02/02/senator-seeks-expedited-supreme-court-review-of-health-care-law/>. In September 2011, Democratic Senator Mark Warner stated with respect to the challenges to the ACA that "[t]his is going to end up getting decided by the Supreme Court and candidly, I hope, the sooner the better." Kevin C. Walsh, *Congress Can and Should Enact a Statutory Fix for the Tax Anti-Injunction Act Defect in the Private-Party Constitutional Challenge to the Individual Mandate*, WALSHSLAW (Sept. 9, 2011), <http://walshslaw.wordpress.com/2011/09/09/congress-can-and-should-enact-a-statutory-fix-for-the-tax-anti-injunction-act-defect-in-the-private-party-constitutional-challenges-to-the-individual-mandate/> (internal quotation marks omitted); see also Ryan Nobles, *Appeals Court Dismisses Virginia Health Care Challenge*, NBC12 (Sept. 8, 2011, 6:13 PM), <http://www.nbc12.com/story/15419494/federal-court-tosses-lawsuit-over-health-reform>.

9. See *Petition for Writ of Certiorari, U.S. Dep't of Health & Human Servs. v. Florida*, 565 U.S. ___ (Sept. 27, 2011) (No. 11-398); see also *Order Granting Certiorari, U.S. Dep't of Health & Human Servs. v. Florida*, 565 U.S. ___ (Nov. 14, 2011) No. 11-398; *Florida ex rel. Attorney Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1330 (11th Cir. 2011).

10. See Lyle Denniston, *Key Health Case Moves on Faster Track*, SCOTUSBLOG (Sept. 26, 2011, 4:43 PM), <http://www.scotusblog.com/2011/09/key-health-case-moves-to-faster-track/> ("The Obama Administration, opting not to try to slow down the pace of a major case on the constitutionality of the new health care law, passed up a chance Monday to get the Eleventh Circuit Court to reconsider its decision August 12 nullifying the law's most crucial provision.").

11. Lyle Denniston, *U.S., States Push for Health Care Review (FURTHER UPDATED)*, SCOTUSBLOG (Oct. 18, 2011, 6:50 PM), <http://www.scotusblog.com/2011/10/u-s-spells-out-health-care-review-aim/> (explaining that the federal government filed early responses, adding "further to the likelihood that the Court could act in ample time to review the constitutional controversy in its current Term").

This attempt to ensure Supreme Court review is consistent with the Obama Administration's change of position on the AIA itself. In all of the first-wave cases challenging the minimum coverage provision, the federal government argued, in its motions to dismiss, that the AIA barred pre-enforcement suits seeking to enjoin the operation of § 5000A. Not all of the district courts addressed the issue, as some dismissed for lack of standing, and before one district court was able to rule on the issue, the federal government changed its position on the AIA.¹² But every district court that did reach this issue rejected the government's argument and held that the AIA did not prevent a pre-enforcement challenge to § 5000A.¹³ In a clear strategy shift that corresponded with the appellate phase of the § 5000A litigation, the federal government switched course and no longer asserted that pre-enforcement challenges to § 5000A were barred by the AIA.¹⁴ The most extensive articulation of the federal government's new position came in a supplemental brief filed at the request of the

12. See *Mead v. Holder*, 766 F. Supp. 2d 16, 18 n.1 (D.D.C. 2011) (noting the federal government argued in an August 2010 motion to dismiss that the AIA barred the action, but the government then filed a notice on January 21, 2011 indicating that it no longer sought to press that argument); *Bryant v. Holder*, No. 2:10 CV 76 KS MTP, 2011 WL 710693, at *1 (S.D. Miss. Feb. 3, 2011) (dismissing on standing grounds after noting the federal government had pressed but later withdrew an argument for dismissal based on the AIA); *N.J. Physicians, Inc. v. Obama*, 757 F. Supp. 2d 502, 511 n.2 (D.N.J. 2010) ("Because the Court finds that Plaintiffs have no standing to challenge the Act, it declines to address the issue of whether Plaintiffs' claims are barred by the Anti-Injunction Clause, 26 U.S.C. § 7421(a)."); *Baldwin v. Sebelius*, No. 10CV1033 DMS (WMC), 2010 WL 3418436, at *5 (S.D. Cal. Aug. 27, 2010) (declining to reach the AIA as a ground for dismissal upon concluding that plaintiffs lacked standing).

13. See *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684, 694–97 (M.D. Pa. 2011) (holding that the AIA did not bar a challenge to § 5000A); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 627–29 (W.D. Va. 2010) (same); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 909 (N.D. Ohio 2010) (same); *Florida ex rel. Bill McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1141–42 (N.D. Fla. 2010) (same); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 890–91 (E.D. Mich. 2010) (same); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 603–05 (E.D. Va. 2010) (same).

14. See Brief for Appellant at 6 n.1, *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (Nos. 11-1057 & 11-1058) (noting that the federal government does not challenge the district court's decision that the AIA poses no bar); Brief for Appellees at 5 n.1, *Liberty Univ., Inc. v. Geithner*, ___ F.3d ___ (4th Cir. 2011) (No. 10-2347), 2011 WL 3962915 (same); Brief for Appellees at 5 n.1, *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011) (No. 10-2388) (same). The federal government's briefs in the Eleventh and D.C. Circuits include no mention of the AIA. See Brief for Appellants, *Florida ex rel. Attorney Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021 & 11-11067); Brief for Appellees, *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (No. 11-5047).

Fourth Circuit.¹⁵ That filing acknowledged that the AIA is jurisdictional and that the federal government initially argued for dismissal under the AIA in the district courts.¹⁶ But “[o]n further reflection, and on consideration of the decisions rendered thus far in the ACA litigation, the United States has concluded that the AIA does not foreclose the exercise of jurisdiction in these cases.”¹⁷

Perhaps the Administration’s public positions on the timing of Supreme Court review and the applicability of the AIA diverges from its private strategy. That is, perhaps the Administration still prefers delayed review—which would allow the law to become more entrenched and more difficult for the judiciary to uproot—but the Administration cannot state this position publicly because it would be too politically costly. Doing so would portray weakness and uncertainty, as the position is premised on the belief that prompt review could result in invalidation.

If the Obama Administration is, in fact, pursuing a two-track, public/private strategy, it very well could work. Even though none of the parties to the § 5000A litigation now asserts that the AIA bars the litigation, the Supreme Court must address the issue. That is because the AIA is jurisdictional, and federal courts have an obligation to ensure that they have jurisdiction before they rule on an issue.¹⁸ Accordingly, the Supreme Court has appointed an amicus curiae, Washington, D.C. lawyer Robert Long, to argue the position that the AIA bars the challenges to § 5000A that are pending at the Supreme Court.¹⁹

15. See Supplemental Brief for Appellees at 1–2, *Liberty Univ., Inc. v. Geithner*, ___ F.3d ___ (4th Cir. May 31, 2011) (No. 10-2347), 2011 WL 3962915.

16. *Id.*

17. *Id.* at 2.

18. See *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962) (stating that “[t]he object of [the AIA] is to withdraw jurisdiction from the state and federal courts”). Some have argued that the AIA is not jurisdictional. See, e.g., Patrick J. Smith, *Is the Anti-Injunction Act Jurisdictional?*, 133 TAX NOTES 1093, 1104 (Nov. 28, 2011). While a full defense of the AIA’s jurisdictionality is beyond the scope of this Symposium contribution, suffice it to say that the text of the statute easily satisfies the test for a jurisdictional bar. The statutory command that “no suit [of a certain kind] . . . shall be maintained in any court,” 26 U.S.C. § 7421(a) (2006), clearly governs a court’s “adjudicatory capacity,” *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011).

19. Order Inviting Robert Long as Amicus Curiae, 565 U.S. ___ (Nov. 18, 2011) (“Robert A. Long, Esquire, of Washington, D.C., is invited to brief and argue this case, as *amicus curiae*, in support of the position that the [AIA], 26 U.S.C. § 7421(a), bars the suit brought by respondents to challenge the minimum coverage provision of the [ACA], 26 U.S.C. § 5000A.”).

Because it very well could succeed and because one can think of plausible reasons for the Administration to want to delay review, this explanation of a dual public/private strategy cannot be ruled out entirely. But I do not think it is a persuasive explanation. One should not attribute a secret motive when the reasons for prompt review outweigh the reasons for delayed review—as it seems the Administration and congressional Democrats both do believe and ought to believe.

The principal reason for the Obama Administration and congressional Democrats to favor prompt review is to lift the constitutional cloud hanging over the health care legislation. Attaining that objective obviously depends upon winning on the constitutional merits. But the Obama Administration could reasonably conclude that its likelihood of success on the merits renders the prospect of a prompt ruling an improvement on a status quo in which a cloud lingers over the Administration's most significant legislative achievement.

Another reason for the Obama Administration and congressional Democrats to favor prompt review is that the uncertainty generated by the litigation—which will last until the Supreme Court rules authoritatively—negatively affects important constituencies. The agencies and officials responsible for the ongoing implementation of this massive Act have an obvious interest in removing the litigation overhang from the implementation process. And the private sector, of course, has very strong interests in reducing uncertainty. In designing the legislation, and in crafting litigation positions, the Obama Administration has seemingly been responsive to the concerns of the health insurance industry in particular. The Administration's responsiveness to health insurers' concerns is evident in its litigation position that § 5000A is not severable from the guaranteed-issue and the community-ratings provisions.²⁰ It would be consistent with this litigation position for the Administration to favor prompt review notwithstanding the potential for an unfavorable outcome. Health insur-

20. See Consolidated Brief for Respondents at 10, *Florida v. U.S. Dep't of Health & Human Servs.*, Nos. 11-393 & 11-400 (U.S. 2011) (arguing that the Eleventh Circuit erred "in holding that the guaranteed-issue and community-rating provisions that will take effect in 2014 can be severed from the minimum coverage provision").

ers are in limbo right now, and their only way out is to attain clarity on § 5000A and related provisions.²¹

In sum, there are enough reasons to take the Obama Administration at its word that it is worthwhile to look elsewhere for a better explanation for the failure to address the AIA as an obstacle to pre-2015 review of the constitutionality of § 5000A.

The next explanation to consider is that there really is no AIA obstacle. That is, the concerns that some have expressed about the AIA amount to much ado about nothing.²² This perception that nothing in the AIA would block prompt review is probably part of the explanation for congressional inaction. But this explanation invites the further question of whether the perception is accurate.

The course of the litigation in the courts of appeals suggests that the question whether the AIA bars pre-enforcement review to § 5000A is at least a close one. Three court of appeals judges have determined that the AIA does bar pre-enforcement challenges.²³ It is, of course, possible that these judges are wrong. After all, they were in the minority among the federal appellate judges to have addressed the issue.²⁴ But counting noses of lower-

21. See Brief of Am.'s Health Ins. Plans as Amicus Curiae in Partial Support of Certiorari Review at 24, *Florida v. U.S. Dep't of Health & Human Servs.*, Nos. 11-393, 11-398 & 11-400 (U.S. 2011) (arguing that the Supreme Court should consider the question of severability immediately upon resolving the constitutional merits, so that "any resolution of the constitutional challenge to the individual mandate this Term [will] offer a viable measure of certainty and closure to these debates, rather than perpetuate business instability and confusion for both member companies and their customers").

22. See, e.g., Laura Green, *Court Anticlimax on Health Law?*, PALM BEACH POST, Jan. 2, 2012, at A1 (quoting two law professors in support of the proposition that the AIA question is nothing more than "a housekeeping matter the court will dispatch before addressing the question of whether the federal government can require nearly every American to buy health insurance").

23. See *Liberty Univ., Inc. v. Geithner*, No. 10-2347, ___ F.3d ___, 2011 WL 3962915, at *1, *16, *23, *52 (4th Cir. Sept. 8, 2011) (2-1 decision holding that the AIA blocked a pre-enforcement challenge to § 5000A); see also *Seven-Sky v. Holder*, 661 F.3d 1, 4, 12, 21, 54 (D.C. Cir. 2011) (2-1 decision in which the dissenting judge argued that the AIA blocked a pre-enforcement challenge to § 5000A).

24. Six judges determined that the AIA does not bar pre-enforcement challenges to § 5000A, and another three apparently thought that the issue was not even worth addressing. See *Seven-Sky*, 661 F.3d at 4, 12, 21, 54 (2-1 decision holding that the AIA posed no obstacle to plaintiffs' challenge to § 5000A); *Liberty Univ., Inc.*, ___ F.3d ___, 2011 WL 3962915, at *1, *16, *23, *52 (2-1 decision dismissing under the AIA over dissenting judge's argument that the AIA did not bar the challenge); *Florida ex rel. Attorney Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1328 (11th Cir. 2011) (2-1 decision holding § 5000A unconstitutional, but not addressing the AIA in either the majority or dissenting opinions); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 539-40 (6th Cir.

courts is hardly a definitive approach to predicting what the Supreme Court will do. Instead, one must engage in legal analysis and assess what kinds of arguments the Supreme Court Justices are likely to find most persuasive.

The next section sets forth one straightforward argument for the AIA's applicability that may appeal to a majority of the Justices on the current Supreme Court. This argument is one of many advanced by Judge Kavanaugh of the D.C. Circuit, and I find it persuasive, although I recognize that its rejection by Judge Silberman and Judge Edwards reveals that my assessment is far from universally shared.²⁵ I leave it to the reader to judge, noting here only that the argument does not depend on whether one characterizes the penalty in § 5000A as a tax.

Other academic assessors of the AIA's applicability share the view that the potential AIA obstacle to pre-enforcement adjudication is serious enough to warrant legislation. Professor Steve Johnson, a tax law professor and opponent of § 5000A, has written that the "question is close enough that a genuine chance exists" that the Supreme Court would conclude that the AIA blocks a pre-enforcement challenge to § 5000A.²⁶ Johnson asserts that the AIA should not be interpreted to block such a pre-enforcement challenge, but he believes that the chance the Supreme Court could decide that it does is "over 33 percent but under 50 percent."²⁷ Johnson argues that "given the magnitude of the potential harms," legislation to avoid application of the AIA "would be a wise precaution even at a 20 percent or 10 percent level of probability."²⁸

2011) (holding that the AIA does not block a pre-enforcement challenge to § 5000A).

25. See *Seven-Sky*, 661 F.3d at 4, 12, 21, 54. The principal reason for focusing on the argument discussed in the next section is its simplicity. Other persuasive arguments exist for the AIA's applicability that rely on more detailed knowledge of prior case law interpreting the AIA. For example, the basic line of argument advanced by Judge Motz and accepted by Judge Wynn but rejected by Judge Davis in *Liberty Univ., Inc. v. Geithner*, ___ F.3d at ___, 2011 WL 3962915, at *1, *16, *22–23, *52, is persuasive, in my view. It is, however, beyond the scope of this Symposium contribution to provide a full defense of this assessment.

26. Steve R. Johnson, *The Anti-Injunction Act and the Individual Mandate*, 133 TAX NOTES 1395, 1400, (Dec. 12, 2011).

27. *Id.* at 1400 n.62.

28. *Id.* at 1404 n.82.

Michael Dorf and Neil Siegel, constitutional law professors and supporters of § 5000A, have written in a similar vein.²⁹ They offer a novel reading of the AIA to circumvent the problem it might otherwise pose for pre-enforcement challenges to § 5000A. But they acknowledge that they are unsure of “the likelihood that five Justices will be persuaded . . . to reach the merits.”³⁰ Dorf and Siegel state that a majority of the current Supreme Court “could well be persuaded by the arguments advanced for the conclusion that the relevant statutory texts are best read to bar the current suits.”³¹ Accordingly, they recommend that Congress “pass a special-purpose statute” to lift the potential AIA bar to pre-enforcement adjudication of the constitutionality of § 5000A.³² They write that “[t]he time for Congress and the Obama Administration to act is now.”³³

It is noteworthy that Professors Johnson, Dorf, and Siegel all advocate a legislated exception to the AIA even while arguing that the best reading of the AIA does not block a pre-enforcement challenge to § 5000A. They do so because they recognize both that there are creditable (if not compelling) arguments that the AIA does bar such a challenge, and also that there are significant negative consequences to the Supreme Court reaching such a conclusion. These professors differ in their views about the constitutionality of § 5000A, but agree that the Supreme Court should decide the question sooner rather than later. It could be that their legal assessment is wrong, or that their assessment of the potential negative consequences flowing from the absence of pre-enforcement review is wrong. But their view that the AIA, properly applied, does not bar pre-enforcement challenges to § 5000A nevertheless coexists with their view that it would be wise for Congress to make that clear through legislation.

Apart from the view that the AIA poses no obstacle to a pre-enforcement challenge, another explanation for the apparent lack of congressional concern about the AIA as an obstacle to a pre-2015 determination of the constitutionality of § 5000A is that the

29. 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).

30. *Id.* at 410.

31. *Id.* at 399.

32. *Id.* at 410.

33. *Id.* at 411.

parties to the litigation and their congressional allies believe that the Supreme Court is essentially pragmatic. They couple this belief with the view that the Justices would not incur the negative consequences—not simply for the Court as an institution but also for the country—that could follow from declining to decide. If there are negative institutional consequences that would flow from a decision not to decide, and the technical legal analysis yields plausible arguments for deciding that the AIA is not a bar, then perhaps the looming consequences could nudge at least a majority into reaching that conclusion.

There may be something to this pragmatic assessment. But one need not be naïve about judicial behavior to reject this explanation. As I explain below, there are also pragmatic reasons for the Supreme Court to stay its hand—reasons that may be discounted from an outside-the-Court perspective but that could be persuasive to at least some of the Justices.

Thinking about the potential influence of pragmatic considerations on some of the Justices, however, naturally leads into thinking about the potential influence of pragmatic considerations elsewhere. In my view, there are pragmatic considerations at work in suppressing attention to the AIA as a potential obstacle as the litigation heads into the Supreme Court. Arriving at a position on the AIA requires sustained legal analysis. But those in the best position to engage in this analysis and to have their assessment credited by the relevant decision makers also have the least incentive to broadcast any resulting concerns that the AIA bars pre-enforcement challenges to § 5000A. Lawyers for the parties—both the federal government and the challengers—must publicly profess that the AIA poses no bar. That is their litigating position. And they understandably do not want to undercut it. But it is impossible to avoid undercutting that litigating position, at least somewhat, while pushing a legislative initiative premised on the possibility that the position is wrong.

The desire of those in the know legally not to undercut their litigating positions combines with the powerful force of political inertia. Neither the law's challengers nor its defenders know whether they will win or lose on the merits. But in a merits determination about the constitutionality of § 5000A, there will be a winning side and losing side. Because a jurisdictional loss is better than a loss on the merits, perhaps both Republicans and Democrats who worry privately about losing on the merits would

prefer to leave open the possibility of a jurisdictional dismissal. For Republicans and Democrats in Congress, who wants to facilitate a jurisdictional change that leads to a defeat on the merits?

We come, then, to a plausible explanation. Even though the negative consequences of delayed review are significant, and the legal question whose resolution will determine whether review will be delayed is a close one, none of those most invested in the issue have a strong enough incentive to make the case for a legislative fix. For those who want a merits determination without reserving the possibility of a jurisdictional loss, however, the next section sets forth one of the lead arguments establishing why it would be wise for Congress to enact an exception to the AIA.

II. A SIMPLE ARGUMENT FOR THE AIA AS A BAR TO PRE-ENFORCEMENT CHALLENGES TO § 5000A

The AIA creates a pay-first, litigate-later system for contesting tax payments. It does this by prohibiting pre-enforcement suits aimed at restraining the assessment or collection of taxes.³⁴ The statute provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.”³⁵ With this prohibition, the AIA regulates and regularizes the processes of assessment and collection.

Prior analyses of the AIA’s applicability to the challenges to § 5000A have begun with the AIA’s text. These analyses have focused primarily on whether the penalty imposed by § 5000A is a “tax” within the meaning of § 7421.³⁶ While there are good reasons to believe that the answer to this question is “yes,” most lower court analyses that have addressed this question have concluded that the answer is “no.”³⁷ Having answered this question

34. See 26 U.S.C. § 7421(a) (2006).

35. *Id.*

36. See, e.g., *Thomas More Law Ctr. v. Obama*, 651 F.3d at 529 (6th Cir. 2011); *Seven-Sky Holder*, 661 F.3d 1, at 5–14 (D.C. Cir. 2011); *Florida ex rel. Bill McCollum v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1130–31 (N.D. Fla. 2011).

37. See cases cited *supra* note 36. The only decision holding that § 5000A is a “tax” within the meaning of the AIA is *Liberty Univ., Inc. v. Geithner*, ___ F.3d ___, ___, 2011 WL 3962915, at *16 (4th Cir. 2011). Of the decisions holding that the AIA does not block a pre-enforcement challenge to § 5000A, only the opinion for the D.C. Circuit analyzes in depth the textual argument set forth in this section. See *Seven-Sky v. Holder*, 661 F.3d 1, 6–14 (D.C. Cir. 2011). Judge Vinson addressed the argument as well, but only in passing and unconvincingly. See *Florida ex rel. Bill McCollum*, 716 F. Supp. 2d at 1130–41.

in the negative, these analyses conclude that the AIA does not bar a pre-enforcement challenge to § 5000A—even one that seeks to restrain the assessment or collection of the § 5000A penalty by eliminating its legal basis.³⁸

Statutory text is the best place to start a quest for statutory meaning. But by starting with the AIA’s text alone, some prior analyses have neglected the possibility that the AIA bars a pre-enforcement suit to restrain the assessment or collection of the § 5000A penalty even if it is not a “tax.” Such neglect is not benign, for Congress has commanded that the § 5000A penalty “shall be assessed and collected in the same manner” as a tax.³⁹ And this command cannot be complied with if pre-enforcement challenges to the § 5000A penalty can be maintained in court.

The normal means of assessment and collection of taxes from individuals is via individual tax returns.⁴⁰ The timing of assessment and collection is linked to the return, before any litigation.⁴¹ There are two provisions in the ACA that fold the assessment and collection of the § 5000A penalty into the same process. The text of these provisions provides an alternative starting point to an analysis of whether pre-enforcement challenges to this § 5000A penalty fall within the prohibition set forth in the AIA.

First, § 5000A(b)(2) requires that “[a]ny penalty imposed by this section . . . shall be included with a taxpayer’s return.”⁴² Second, § 5000A(g)(1) sets forth a general rule that any penalty imposed by this section shall be assessed and collected in the same manner as a tax.⁴³ That is not what § 5000A(g)(1) says, in so many words, but that is what it means when one carefully attends to the text. The text says that the penalty “shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68” of the Code.⁴⁴ And in that part of the Code, § 6671 says that such assessable penalties are to be assessed and collected in the same manner as taxes.⁴⁵

38. See cases cited *supra* note 24.

39. 26 U.S.C. § 5000A (Supp. IV 2010).

40. See *id.* § 6011(a) (2006).

41. Compare *id.*, with *id.* § 7403(a) (2006).

42. *Id.* § 5000A(b)(2) (Supp. IV 2010).

43. *Id.* § 5000A(g)(1).

44. *Id.*

45. *Id.* § 6671(a).

The basic argument for the AIA's applicability to the § 5000A challenges is that pre-enforcement challenges to assessment and collection of § 5000A penalties must be barred, just as pre-enforcement challenges to assessment and collection of taxes are barred, in order for § 5000A penalties to be assessed and collected in the same manner as taxes. The AIA speaks directly to how taxes are to be assessed and collected—without pre-enforcement judicial interference. Codified at § 7421(a) of the Internal Revenue Code, it states that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.”⁴⁶ And § 5000A(g)(1), together with § 6671, speaks directly to how § 5000A penalties are to be assessed and collected—in the same manner as taxes.

Notice: This argument does not depend on the answer to the question that dominated lower-court consideration of the AIA as a bar—whether the § 5000A penalty is a “tax” within the meaning of § 7421. What matters is that Congress has directed in § 5000 (g)(1) and § 6671 how § 5000A penalties are to be assessed and collected—in the same manner as taxes.

The most persuasive rejoinder to this argument is the federal government's, which is that § 5000A(g) does not speak to the availability of pre-enforcement review.⁴⁷ Instead, the provision means only that the IRS should use the same methods and procedures in assessing and collecting the § 5000A penalties as it uses for taxes.⁴⁸ In Judge Silberman's words, “[t]hese directions tell the IRS *how* to calculate and obtain certain sums, not *when* to do so.”⁴⁹

The problem with this response is that one cannot neatly separate the “how” of assessment and collection from the “when” of assessment and collection. The individual tax return is the typical instrument for enabling the government's assessment and collection of individual taxes, and it is also the congressionally commanded instrument for enabling the federal government's assessment and collection of individual penalties under § 5000A.⁵⁰ If

46. *Id.* § 7421(a) (2006).

47. *See Seven-Sky v. Holder*, 661 F.3d at 1, 11 (D.C. Cir. 2011).

48. *See id.*

49. *Id.*

50. *See* 26 U.S.C. § 5000A(b)(2) (Supp. IV 2010) (requiring inclusion of § 5000A penalty with tax return); *Id.* § 6011(a) (2006) (requiring the filing of tax returns).

the AIA does not bar pre-enforcement challenges to § 5000A, then taxpayers can go to court rather than file any penalty due under § 5000A with their returns.⁵¹ On the tax collection side, the IRS would not be able to collect the penalties until litigation has ended, in contrast with its collection of taxes that—because of the AIA—must be collected before judicial proceedings can be commenced.⁵² Tax penalties that the IRS does not assess and collect via an individual's tax return, but only by means of court-ordered payment after litigation, are not “assessed and collected in the same manner” as taxes.

Another problem with the how-not-when interpretation of § 5000A(g)(2) is the statutory language, which is set in the passive voice.⁵³ The use of the passive voice reflects a generality of reach about the congressional directive. As the Supreme Court has observed, “[t]he passive voice focuses on an event that occurs without respect to a specific actor”⁵⁴ By using the passive voice, Congress has commanded that a certain state of affairs shall obtain—one in which § 5000A penalties are “assessed and collected in the same manner” as taxes.⁵⁵ It is incumbent not only on the IRS, but also on the courts and individuals governed by § 5000A to cooperate in bringing about the state of affairs in which this command is honored. That state of affairs is one in which no court maintains a pre-enforcement challenge to the § 5000A penalty.

A third problem for the how-not-when interpretation is that pre-enforcement litigation could preclude the § 5000A penalty from ever being assessed or collected.⁵⁶ Because of the AIA, even illegal taxes are assessed and collected before they are required to be refunded.⁵⁷ That is a feature of a pay-first, litigate-later system. To except the § 5000A penalties from the litigation prohibition in the AIA would create a litigate-first, pay-later system. That system would be inconsistent with the statutory command

51. *Seven-Sky*, 661 F.3d at 32 (Kavanaugh, J., dissenting) (“[I]f the [AIA] did not apply, a tax could be assessed and collected only after the litigation was resolved in favor of the IRS (if it was resolved in favor of the IRS), by means of a payment to the IRS in the wake of a court order.”).

52. *Id.*

53. *See* 26 U.S.C. § 5000A(g)(1) (Supp. IV 2010).

54. *Dean v. United States*, 556 U.S. 568, ___, 129 S. Ct. 1849, 1853 (2009).

55. 26 U.S.C. § 5000A(g)(1); *see id.* § 6671(a) (2006).

56. *See Seven-Sky*, 661 F.3d at 33 (Kavanaugh, J., dissenting).

57. 26 U.S.C. § 7422(a) (Supp. IV 2010).

that § 5000A penalties “shall be assessed and collected in the same manner” as taxes.⁵⁸

More can be said in support of the AIA’s applicability.⁵⁹ But the point of the present analysis is not to be exhaustive. I have said enough to draw a simple line from statutory premises in the Tax Code to the interpretive conclusion that the AIA blocks pre-enforcement challenges to § 5000A. Whether the Supreme Court will reach the same conclusion is anyone’s guess at this point. But the arguments for this conclusion are sufficiently strong that those who wish to avoid such a ruling should favor corrective legislation to prevent the necessity for finding out the hard way how the Supreme Court will rule.

Congress is responsible for both § 5000A and the AIA. If the unavailability of a pre-enforcement challenge to § 5000A because of the AIA is a problem, then, the problem is one that Congress has made. And Congress is responsible for fixing it. Important questions about details of legislative design must be addressed, but crafting narrow legislation that would enable already existing pre-enforcement challenges to be litigated to conclusion should not present a difficult drafting problem. According to Steve Johnson, “[t]wo sentences of legislative language would suffice to defuse the AIA issue.”⁶⁰

III. CONSEQUENCES AND CONCRETE REVIEW

Suppose that Congress does not enact an exception to the AIA. What should the Supreme Court do? The simple answer, with which nobody disagrees, is that the Court should determine whether it has jurisdiction, should rule on the merits of the challenge if it does, and should decline to rule on the merits if it does not.

58. *Id.* § 5000A(g)(1).

59. *See generally* Liberty Univ., Inc. v. Geithner, No. 10-2347, ___ F.3d ___, 2011 WL 3962915 (4th Cir. Sept. 8, 2011); *Seven-Sky*, 661 F.3d at 21–54 (Kavanaugh, J., dissenting). More can, of course, also be said on the opposite side as well. In addition to the analyses of the Sixth and the D.C. Circuits, Michael Dorf and Neil Siegel have developed an interpretation of the AIA that would, if correct, allow the present pre-enforcement challenges notwithstanding the argument presented above and the arguments developed by Judge Motz and Judge Kavanaugh. *See* Dorf & Siegel, *supra* note 29, at 392.

60. Johnson, *supra* note 26, at 1402.

It is a different question how far the Court should strain to reach or to avoid a conclusion that the AIA bars pre-enforcement challenges to § 5000A. Some Justices may weigh the consequences of delayed review more heavily than others.⁶¹ But all of them should keep in mind that Congress and the President have not found the prospect of delayed review sufficiently worrisome to act to prevent it.

In light of the considerable uncertainty already generated by the litigation, and the costs to the country of going forward under a provision that may later be held unconstitutional, it may appear prudent to some Justices to read the AIA in a way that does not bar the Court's authority to resolve the constitutionality of § 5000A in the cases that have already made their way to the Court. But it would not be wise to count on this. To the extent that Justices do rely on consideration of consequences, the consequences that matter most to them may differ from those that are most salient from an external perspective. Two considerations likely to be more salient from an inside-the-Court perspective are the Justices' views about the desired shape of substantive constitutional doctrine and their views about the role of the Supreme Court more generally.

The Justices differ in their views about the optimal scope of congressional power under the Commerce Clause and the power to tax and spend. Whatever a particular Justice's views may be, a decision about the constitutionality of § 5000A presents a risk either of expansion or contraction of congressional power. Doctrine enshrining such an expansion or contraction is more enduring than the political forces presently pressing for prompt review. As Judge Kavanaugh wrote in his dissenting opinion, "history and precedent counsel caution before reaching out to decide difficult constitutional questions too quickly, especially when the underlying issues are of lasting significance."⁶² This inclination may be felt with particular force by those directly responsible for the potential doctrinal expansion or contraction.⁶³

61. See, e.g., Stephen G. Breyer, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 73–74 (2010) (including "consequences" on a list a of traditional tools of statutory interpretation).

62. *Seven-Sky*, 661 F.3d at 53 (Kavanaugh, J., dissenting).

63. None of this is to deny the costs that constitutional avoidance can impose through continued uncertainty, or to argue that the costs from uncertainty should be ignored. These costs are obviously incommensurable with the costs of moving constitutional doctrine in

Views about the Supreme Court's role as an institution present a related blend of considerations. Justices on the Supreme Court do not want the institution to be, or to be perceived as, weak. They might worry such a perception could result from declining to address an important constitutional issue based on a seeming technicality. But Justices of the Supreme Court may also believe that it is important not to privilege short-term, tangible consequences over long-term, hard-to-measure consequences. And a decision not to decide could strengthen the Supreme Court, in a way, since its legitimacy derives in part from its identity as a court of limited jurisdiction that resolves concrete cases.

The Justices on the Supreme Court should also recognize that uncertainty about the constitutionality of § 5000A is just one source of uncertainty surrounding the health care legislation. While the litigants are pressing their cases in court, officeholders and candidates for office have been taking their case to the people. Nothing that the Court does can eliminate the uncertainty generated by the 2012 election.

Regardless of how the Supreme Court ultimately answers the question of whether the AIA bars pre-enforcement challenges to § 5000A, the Court's need to ask the question provides a beneficial corrective to the tendency to view the judicial role in cases like these as divorced from the remedy-providing function of the federal courts. In challenges like those that have been brought against § 5000A, the lawsuit is not against the law but against its enforcement. This is what makes the challenge a justiciable case: someone claiming injury caused by its actual or threatened operation seeks judicial relief that would redress the injury. Whether this sort of relief can be issued anticipatorily in circumstances like those now facing the Supreme Court is a statutory question insofar as the AIA is concerned. But there would be a constitutional problem if the request for a constitutional ruling were uncoupled from the request for a judicial remedy.⁶⁴ And adjudicating

one way or another. The point of the present discussion is to observe that the pragmatic calculus about costs and benefits of a merits determination made sooner rather than later (or perhaps never if § 5000A is repealed or modified) looks different from inside the Supreme Court than from outside.

64. *See, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (internal quotation marks omitted)).

a lawsuit against the mandate itself, considered apart from its enforcement through the penalty, would involve such an uncoupling.

The job of a federal court in a case like the present challenges to § 5000A is not to decide about the validity of law considered in itself, but to decide on the obligations of persons under law. In an attempt to avoid the AIA's application, however, the challengers have argued that they are not challenging the tax penalty itself, only the underlying requirement to possess insurance.⁶⁵ According to the National Federation of Independent Business ("NFIB"), the purpose of the lawsuit is not to restrain the government's enforcement by means of a tax penalty, but rather "to 'restrain' the mandate's free-standing legal requirement that *they must buy costly insurance* Petitioners' 'purpose' here obviously has nothing to do with 'restraining' the sanction for non-compliance with the mandate"⁶⁶

As an initial matter, this characterization of the NFIB's challenge to § 5000A is inaccurate. The characterization appears in a petition for a writ of certiorari in which the question presented is "whether the ACA must be invalidated in its entirety because it is nonseverable from the individual mandate that exceeds Congress's limited and enumerated powers under the Constitution."⁶⁷ The challengers cannot have it both ways. They are in fact, seeking for the ACA to be "invalidated in its entirety."⁶⁸ They are not seeking a declaration of unconstitutionality with no consequences for the enforcement of the § 5000A penalty.

Moreover, the challengers' AIA-avoiding, ACA-destroying position on severability is exactly backwards. Section 5000A is an integrated whole, while the ACA contains a mish-mash of parts, some of which are as unrelated as requiring individuals to have insurance and requiring employers to accommodate breastfeeding

65. See *Petition for a Writ of Certiorari at 18, Nat'l Fed'n of Indep. Bus. v. Sebelius*, No. 11-393 (U.S. Sept. 28, 2011) (asserting that the purpose of the suit is not to restrain the so-called tax but only the mandate's free-standing legal requirement that they must buy costly insurance).

66. *Id.* (quoting 26 U.S.C. § 7421(a) (2006)).

67. *Id.* at i.

68. *Id.*; see also *id.* at 19 (stating that the Eleventh Circuit Court of Appeals incorrectly severed the mandate from the rest of the ACA and finding that the ACA could not survive without the mandate).

employees.⁶⁹ A federal court ruling about the constitutionality of § 5000A need not imply anything about the continued enforceability of other parts of the ACA.⁷⁰ But there is no way to slice up § 5000A itself to result in a ruling on the constitutionality of the insurance requirement that has no necessary implications for the continued enforceability of the tax penalty.

One can appreciate the interweaving of various subsections of § 5000A by beginning with the question of which subsection contains the challenged insurance requirement. As it turns out, no single subsection fits the bill. Rather, the requirement is spread across multiple subsections. Subsection 5000A(a) states that each “applicable individual shall . . . ensure that the individual . . . is covered under minimum essential coverage.”⁷¹ But subsection (a) does not define either “applicable individual” or “minimum essential coverage.” Subsection (d) defines “applicable individual,” and subsection (f) defines “minimum essential coverage.”⁷² The tax penalty provisions are located in subsections (b), (c), (e), and (g).⁷³ And those provisions cannot be understood apart from subsections (a), (d), and (f).⁷⁴ For example, consider subsection (b)(1), which explicitly cross-references subsections (a) and (e) (as well as (c)): “If . . . an applicable individual . . . fails to meet the requirement of subsection (a) for 1 or more months, [during any calendar year beginning after 2013,] then, except as provided in subsection (e), there is hereby imposed . . . a penalty with respect to such failures in the amount determined under subsection (c).”⁷⁵ Subsection (e), which sets forth categories of those exempt from paying the penalty, begins by stating: “No penalty shall be imposed under subsection (a).”⁷⁶ Subsection (a), of course, is the provision that the challengers view as somehow separable from the penalty.⁷⁷ Yet, Congress described the penalty as one “imposed

69. Compare 26 U.S.C. § 5000A (Supp. IV 2010), with 29 U.S.C. § 207 (Supp. IV 2010).

70. Indeed, the very fact that standard formulations of severability doctrine appear to underwrite judicial power to “invalidate” this legislation in its entirety suggests that there is something deeply wrong with that doctrine. See generally Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738 (2010).

71. 26 U.S.C. § 5000A(a) (Supp. IV 2010).

72. *Id.* § 5000A(d), (f).

73. *Id.* § 5000A(b), (c), (e), (g).

74. See *id.* § 5000A(a), (d), (f).

75. *Id.* § 5000A(b)(1).

76. *Id.* § 5000A(e).

77. *Id.* § 5000A(a); see Petition for a Writ of Certiorari, *supra* note 65.

under subsection (a).”⁷⁸ Additionally, subsection (g)(1) describes the penalty as “provided by this section,” that is, the entire § 5000A.⁷⁹

Apart from the fact that § 5000A is an integrated whole, there is another reason that the requirement to have insurance cannot be challenged in federal court apart from the penalty that enforces it. Federal courts do not sit to decide abstract questions of law, but cases and controversies involving concrete actual or threatened injury. There would be no Article III case or controversy in the absence of threatened enforcement or some other negative legal consequence arising out of failure to comply with § 5000A. In the absence of a penalty or some other negative legal consequence, the requirement to maintain minimum essential coverage would not threaten any injury that a federal court could remedy. More fundamentally, there would be no proper defendant for an action to challenge the constitutionality of a legal provision that could not be enforced in some way.

The Supreme Court cannot, and should not, take up the constitutionality of § 5000A’s insurance requirement without regard to its potential enforcement through the section’s accompanying tax penalty. Whatever the Court ultimately decides about the applicability of the AIA, one can hope that the Court’s method of reasoning rests on a properly judicial understanding of the power that it is exercising with respect to § 5000A.

CONCLUSION

Congress’s inaction in the face of a serious obstacle to obtaining a ruling on the constitutionality of § 5000A appears attributable

78. 26 U.S.C. § 5000A(e) (Supp. IV 2010).

79. *Id.* § 5000A(g)(1). The fact that § 5000A is an integrated whole not only provides a stand-alone reason why the insurance requirement cannot be challenged apart from the penalty; it also shows why the D.C. Circuit was wrong to accept such an uncoupling, even under that court’s too narrow interpretation of *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974), and *Alexander v. “Americans United” Inc.*, 416 U.S. 752 (1974). In responding to Judge Kavanaugh’s claim that these decisions foreclosed plaintiff’s attempt to avoid the AIA through characterizing their challenge as one to the insurance requirement apart from the penalty, the majority opinion states that *Bob Jones* and “*Americans United*” came out as they did only because the challenges there were “*inextricably linked* to the assessment and collection of taxes.” See *Seven-Sky v. Holder*, 661 F.3d 1, 10 (D.C. Cir. 2011). Contrary to Judge Silberman’s description of § 5000A and the plaintiff’s challenge, *Seven-Sky* simply is not a case in which the plaintiffs challenge a “discrete regulatory requirement” apart from a tax imposed by Congress “in a separate provision.” *Id.*

to a combination of inertia and strategic calculation about the costs and benefits of altering an uncertain status quo. Uncertainty about how the Supreme Court will rule on the merits of the constitutional challenge contributes to the maintenance of a status quo that holds the possibility of a jurisdictional loss for both challengers and defenders of the law. Such a jurisdictional loss would individually be better for both than a loss on the merits, but worse for both than a win on the merits. The costs to delayed review are sufficient to justify Congress in acting to avoid it. But if Congress and the Administration do not act, then neither should the Court strain one way or the other in deciding whether the AIA bars the present pre-enforcement challenges.