FOREWORD

LITIGATING FEDERAL HEALTH CARE LEGISLATION AND THE INTERSTICES OF PROCEDURE

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On November 11, 2011, the *University of Richmond Law Review* held its annual Allen Chair Symposium, focused on the litigation challenges to the Patient Protection and Affordable Care Act ("ACA"). Recognizing that much had already been written about the constitutionality of the ACA, but that less scholarly attention had been focused on issues such as jurisdiction, standing, ripeness, and severability, the Symposium was entitled "Everything but the Merits." The timing of this Symposium was both prescient and awkward. Three days after the Symposium was held, the Supreme Court took certiorari on a group of the ACA cases and scheduled an extraordinary three days of argument. Of course once the Court decides these cases, prognostications will be of little significance. Fortunately, the pieces that follow offer insights that go far beyond the issues of the ACA litigation, examining a range of issues about constitutional litigation.

One of the major themes of these pieces is judicial restraint. Edward Hartnett and Tobias Dorsey consider judicial restraint from the perspective of the potential scope of a ruling on the merits of the ACA. Hartnett examines the difference between facial and as-applied constitutional challenges and argues for the restraint inherent in the latter. He observes that facial challenges are a "winner-take-all" proposition and argues that courts are "in

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general better suited to adjudicating on as as-applied basis." He concluded that at least as to challenges to the individual mandate "the Court is being asked to articulate a principle for the first time, it is freer to capitalize on its comparative competence, and . . . render a decision that lowers the stakes rather than raises them."

Tobias Dorsey looks at a different aspect of scope—the issue of severability—and offers the unique insight of a lawyer who worked for many years in the Office of Legislative Counsel of the House or Representatives. He argues that the Court should reject a test that purports to divine whether a particular piece of legislation would have been enacted absent the provision that turns out to be unconstitutional. Having seen up close the legislative sausage being made, Dorsey argues that it is neither possible nor seemly for a court to determine what would have happened had one provision been different. As he explains: "A statute is not the result of a legislative bargain. A statute is the product of a convergence of microbargains, between and among 100 Senators, 435 Representatives, and the White House." The tradeoffs made are not only within a single bill but also "between this bill and that hearing, and between this bill and that nomination." He concludes that the issue of severability "should be treated like any other Article III judicial power—it should be used with restraint." "When the Court decides to strike part of a statute, it should strike as narrowly as possible." To do otherwise, Dorsey argues, is to allow the Court to act as the House of Lords and veto legislation wholesale.

Christopher Bryant considers judicial restraint from a broader perspective and argues that upholding the constitutionality of the ACA would constitute "constitutional forbearance" that would "begin restoration of a distinction between constitutional law and partisan politics." This restoration is, according to Bryant "sorely needed and long overdue." Acknowledging that forbearance might not be appropriate in cases in which the ordinary political processes are unreliable, he argues that this is not the case with the ACA. The most controversial of the law's provisions, the individual mandate, applies to virtually every person in the country, so majoritarian political processes need not be displaced by Court intervention. While Bryant's article is not strictly "procedural" in its focus, it argues for an interpretative stance that has significance beyond "the merits" of the ACA cases.

In contrast, Kevin Walsh would have the Court exercise restraint not by limiting the scope of its ruling or by adopting a particular interpretative stance, but by declining to decide the issue at this time. He focuses his analysis on the Anti-Injunction Act, explaining first how under that Act a constitutional challenge to the ACA is premature. He then situates such restraint in a broader context, arguing that "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." Thus, Bryant and Walsh offer two different visions of Supreme Court legitimacy—Bryant would have the Court prove its non-political stripes by deciding the case contrary to partisan expectations, and Walsh would have it apply jurisdictional doctrines in a precise and lawyerly way that would emphasize that the Courts' job "is not to decide about the validity of law considered in itself, but to decide on the obligations of persons under the law."

A second major theme of these pieces is the role of states both as litigant in challenges to the ACA and participants in the broader debates about health care reform. Stephen Vladeck's essay on state standing sounds some of the same themes as Hartnett, Dorsey, Bryant, and Walsh. Vladeck situates the Virginia litigation in the broader jurisprudence of state standing cases and concludes that the Fourth Circuit reached the right conclusion. However the essay goes beyond doctrinal analysis and argues that "state standing in such circumstances *should* be disfavored" because relaxed state standing rules "create a very real risk of converting the federal courts into councils of revision" and may "short-circuit the principal means through which majorities have traditionally exercised control over the scope of federal power—at the ballot box."

Elizabeth Weeks Leonard approaches the role of states from a different perspective, examining the rhetorical significance of federalism in the debates about the ACA. "States' rights" is not a new battle cry in debates over divisive issues of public policy and Leonard examines how this theme has developed both in the state response to the ACA and in the litigation challenging it. She notes that "[t]he issue of the proper scope of federal power vis-a-vis states has become the central, signature issue of ACA opposition" and argues that rhetorical federalism "should not be disregarded simply as partisan sour grapes by Obamacare or Obama

opponents but instead should be considered valuable to the health care decision making process and state-federal relations."

Robert Claiborne's comment offers a close examination of one state's legislative foray into the ACA and concludes that Virginia's Health Care Freedom Act should not be understood as a traditional state "nullification" effort. Unlike some state resolutions passed in the wake of *Brown v. Board of Education*, Virginia has not denied the legitimate authority of the Supreme Court to decide the controversy. On the contrary, Virginia filed suit in federal court. Claiborne argues that the Virginia legislation should be understood as an effort that respects Supreme Court and federal supremacy but that merely sought to give the state a seat at the table at which the constitutional discussion would occur.

Finally, Bradley Joondeph offers "five questions" that succinctly summarize many of the issues raised in the other pieces. His questions address issues of judicial displacement of the political process, the proper role of states in the health care system, whether Congress's powers to enact even more comprehensive health care reform implies the power to do less, the appearance of court entanglement with partisan politics, and judicial restraint. The questions he raises are ones that are likely to be relevant not only to the ACA litigation but to other critical public policy issues that end up, as so many do, in the courts.

This Symposium issue focuses not on the scope of Congress's power under the Commerce Clause or the meaning of the Tenth Amendment. Instead it focuses on the doctrines and principles that shape constitutional adjudication in this and other cases. Henry Maine famously observed about the common law that "the substantive law [was] . . . secreted in the interstices of procedure."[1] The same may prove to be true of the substantive constitutional law principles at stake in the ACA litigation.

1. HENRY MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOMS 389 (1883).