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Our Pending National Debate: Is Health Care Reform Constitutional?

This Article originated as a transcript of the remarks from the Hot Topic Panel Discussion on health care reform held at the Association of American Law Schools (AALS) meeting on January 7, 2011. After the panel discussion, the conversation has continued, and the Mercer Law Review is now publishing several noteworthy perspectives in various forms to provide the most complete picture of the debate. Contributions for this Article include: portions of the original transcript from the AALS panel discussion, a scholarly article by Professor Randy Barnett, a scholarly response to Professor Gillian Metzger's panel remarks by Professor David Oedel, and a Question and Answer session from the AALS panel discussion.

While the transcribed portions of the panel discussion have been lightly footnoted, the supplemental pieces have been edited as scholarly works in accordance with Mercer Law Review's standard editing procedures.

Introduction of Speakers at the AALS Hot Topic Panel Discussion on January 7, 2011

by Brad Joondeph

My name is Brad Joondeph, and I teach at Santa Clara University School of Law. It is my honor and distinct pleasure to moderate the panel this morning. This group represents a terrific lineup of panelists, several of whom have been directly involved in the litigation that is

currently ongoing throughout the United States. Before getting to the introductions, let me provide a quick summary.

There are currently about twenty cases being litigated in the lower federal courts that challenge—in some way, shape, or form—the constitutionality of the Patient Protection and Affordable Care Act,¹ as amended by the Health Care and Education Reconciliation Act of 2010,² also affectionately known as the ACA or “Obamacare.” Thus far, three district courts have dispositively ruled on the merits of the constitutional challenges: one from the Western District of Virginia,³ one from the Eastern District of Virginia,⁴ and one from the Eastern District of Michigan.⁵ So we now have three cases that are essentially in the courts of appeals. There are in the neighborhood of fifteen other cases continuing to percolate in the district courts.

These challenges raise a number of constitutional issues, from the Takings Clause to commandeering to the free exercise of religion to the right to privacy. But there are two issues that have garnered the most attention and raise the most serious constitutional questions. The first concerns the constitutionality of the ACA’s so-called “individual mandate,” which requires almost every American to acquire “minimally adequate health coverage” by January 1, 2014.⁶ The second concerns the ACA’s amendments to Medicaid, amendments that substantially expand the baseline scope of coverage every state participating in Medicaid must offer.⁷ The states that are parties to the *Florida ex rel. Bondi v. U.S. Department of Health & Human Services*⁸ litigation, which is currently pending in the Northern District of Florida, are challenging these changes to Medicaid as an impermissible intrusion on their constitutionally protected sovereignty—sovereignty protected by the Tenth Amendment, or perhaps the structural principles that the Tenth Amendment presupposes.

Our panelists will be addressing several of these issues—though, like the litigation generally, we will probably focus a great deal on the individual mandate. Let me now introduce the panelists in the order in which they will speak.

1. Pub. L. No. 111-148, 124 Stat. 119 (2010).

2. Pub. L. No. 111-152, 124 Stat. 1029.

3. *Liberty Univ. v. Geithner*, No. 6:10-cv-00015-nkm, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010).

4. *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010).

5. *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

6. ACA § 1501(b).

7. See, e.g., ACA § 2001(a)(1) (requiring participating states to expand Medicaid coverage to all non-elderly adults with incomes up to 133% of the federal poverty level).

8. No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

First, Professor Randy Barnett is the Carmack Waterhouse Professor of Legal Theory at Georgetown University Law Center. He is the author, among many fine works, of *Restoring the Lost Constitution: The Presumption of Liberty*.⁹ As directly relevant here, in addition to having delivered several lectures on the topic of today's panel, he has filed amicus briefs in *Virginia v. Sebelius*, *Florida v. HHS*, and, most recently, in *Thomas Moore Law Center v. Obama*, the case currently pending before the Sixth Circuit.

Second, Dean Erwin Chemerinsky is the founding Dean and a distinguished Professor of Law at the University of California-Irvine School of Law. He has been one of the nation's most authoritative commentators and scholars on constitutional law for nearly a generation, and he is the author most recently of *The Conservative Assault on the Constitution*.¹⁰

David Oedel is a Professor of Law at Mercer University School of Law. There, he heads a team of lawyers and economists exploring whether excessive partisanship in American political life could be reduced through independent redistricting. He is currently serving in special assignment as a Deputy Special Attorney General for the State of Georgia, appointed by Georgia Governor Sonny Perdue, to represent the State of Georgia, and the Georgia Governor in particular, as one of the plaintiffs in *Florida v. HHS*.

And last, but certainly not least, Gillian Metzger is a Professor of Law at Columbia Law School. She has authored several important articles in the field of constitutional law, including, most recently, *Ordinary Administrative Law as Constitutional Common Law*¹¹ and *Administrative Law as the New Federalism*.¹² Relevant to this morning's panel, she has co-authored amicus briefs defending the constitutionality of the minimum coverage provision, specifically addressing questions of Congress's taxing power, in *Virginia v. Sebelius* and *Florida v. HHS*.

Thanks to all four of you for joining us today, and thanks in particular to David Oedel for organizing this panel discussion. Without further ado, Randy, the dais is yours.

(continued on next page)

9. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

10. ERWIN CHEMERINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* (2010).

11. Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010).

12. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008).