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Kevin C. Walsh

University of Richmond, kwalsh@richmond.edu

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HEALTH CARE: Why Jurisdiction Matters

By Kevin C. Walsh

Congress's enactment of comprehensive healthcare reform legislation last year was the culmination of one round of an intense debate that continues today. The second round began the same day that the first round ended, when President Obama signed the legislation. In this second round, the locus of debate has shifted from Congress to the courts, which are processing a slew of lawsuits filed immediately after enactment.

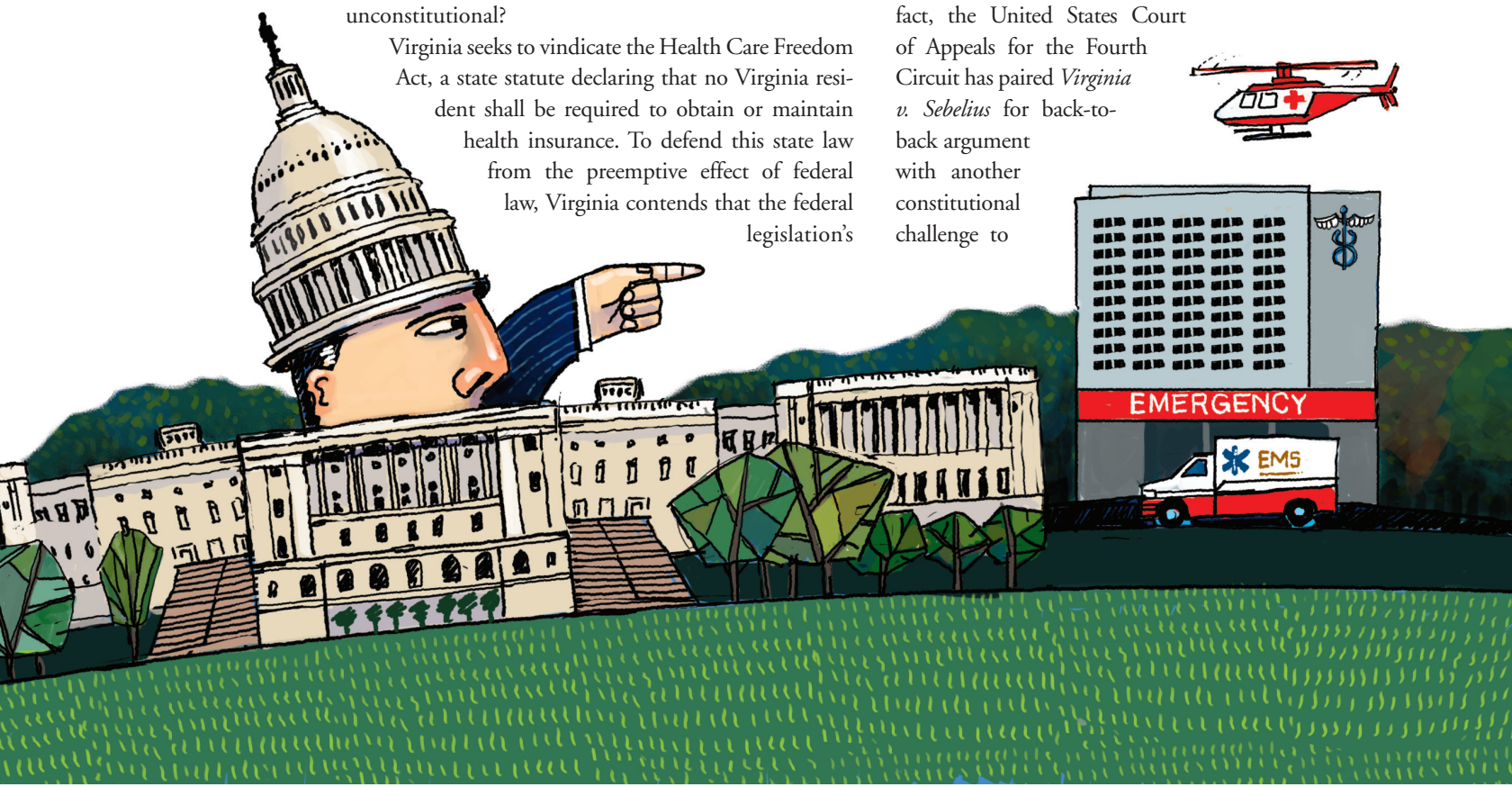
One of the most prominent is *Virginia v. Sebelius*. The lawsuit presents on its face a prominent and critically important question of federalism: Did Congress exceed the limits of its enumerated legislative powers by enacting the individual mandate, which requires individuals to have insurance or pay a penalty for failing to have it? But the lawsuit also presents a less recognized but equally important question of separation of powers: Is the federal judiciary authorized to rule on Virginia's claim that the individual mandate is unconstitutional?

Virginia seeks to vindicate the Health Care Freedom Act, a state statute declaring that no Virginia resident shall be required to obtain or maintain health insurance. To defend this state law from the preemptive effect of federal law, Virginia contends that the federal legislation's

individual mandate to obtain and maintain health insurance is unconstitutional. The Supreme Court has held, however, that a state cannot go to federal court simply to seek a declaratory judgment that its state law is not preempted by federal law—precisely the relief sought in *Virginia v. Sebelius*. The upshot is that, in seeking to enforce limits on federal legislative powers, Virginia's lawsuit runs afoul of limits on the federal judicial power.

The federal government did not identify this particular jurisdictional flaw in its filings in the district court, although the federal government did move to dismiss on other jurisdictional grounds. The district court denied that motion to dismiss and ruled in Virginia's favor on the merits of its constitutional challenge. The jurisdictional and merits rulings are currently being reviewed on appeal.

Even if Virginia's case is jurisdictionally defective, the federal courts will be able to decide the constitutionality of the individual mandate in other cases. In fact, the United States Court of Appeals for the Fourth Circuit has paired *Virginia v. Sebelius* for back-to-back argument with another constitutional challenge to



the individual mandate that is not subject to the same jurisdictional objections as Virginia's. One might ask, then, why the federal courts should bother to spend time on jurisdictional technicalities in Virginia's case.

The reason is that form matters in constitutional adjudication. The United States does not have a system in which the federal courts function as a free-floating council of revision. Constitutional adjudication is—and ought to remain—incidental to the resolution of a justiciable case or controversy.

Alexis de Tocqueville, astute observer of American legal culture that he was, explained early in this nation's history why it is essential to adhere strictly to case-centered constitutional adjudication. "If the judge had been empowered to contest the law on the ground of theoretical generalities," Tocqueville wrote, "if he were able to take the initiative and to censure the legislator, he would play a prominent political part; and as the champion or antagonist of a party, he would have brought the hostile passions of the nation into the conflict." This peril of politicization is minimized by insisting on incidental adjudication of constitutional issues—that is, constitutional adjudication that takes place only as incidental to resolution of a case or controversy. This feature of federal jurisdiction, Tocqueville recognized, ensures that "the American judge is brought into the political arena independently of his own will. He judges the law only because he is obliged to judge a case."

Virginia v. Sebelius is not a case that the federal courts are authorized, let alone obliged, to decide. Virginia has conceded that it cannot sue the federal government as *parens patriae*, that is, in a

representative capacity to protect its citizens from federal law. Virginia also has conceded that, in the absence of the Health Care Freedom Act, its constitutional claim against the mandate would be too abstract to constitute a justiciable controversy in federal court.

Virginia argues that the Health Care Freedom Act makes all the difference; it transforms a dispute that would otherwise be abstract and non-justiciable into one that is concrete and ripe for resolution. But the conflict between state and federal law remains abstract. The single provision of federal law that Virginia asserts to be outside Congress's constitutional authority imposes no obligation on Virginia itself—only on its residents. And the rights of no particular individual are asserted to be at issue in Virginia's lawsuit.

If Virginia can generate a justiciable controversy where one would not otherwise exist, by first passing a law and then seeking a declaratory judgment about that law's validity, then so too can any other state. This jurisdictional two-step would provide entrée to a prominent platform for elected state officials to seek judicial validation of their constitutional visions apart from a concrete controversy, which would have significant political consequences. The practical effect would be to eliminate the insulation provided by the case-or-controversy requirement whenever a controversial issue mobilizes a state legislature to enact an anti-federal-law state law. Yet that is precisely when such insulation is most needed.

There is nothing wrong with filing a lawsuit to enforce limits on federal legislative power. But such lawsuits must fit within the limited jurisdiction granted to the federal courts by Congress and the United States Constitution. Even if Virginia is correct that Congress has exceeded its limited authority, that provides no reason to invite a federal court to do the same. ■

Kevin C. Walsh is an assistant professor of law whose scholarship explores the doctrines that define—and delimit—the scope of federal judicial power. This essay was adapted from his forthcoming publication,

The Ghost that Slew the Mandate, 64 Stanford L. Rev. This issue went to print shortly before the Court of Appeals for the Fourth Circuit heard oral argument in Virginia v. Sebelius.

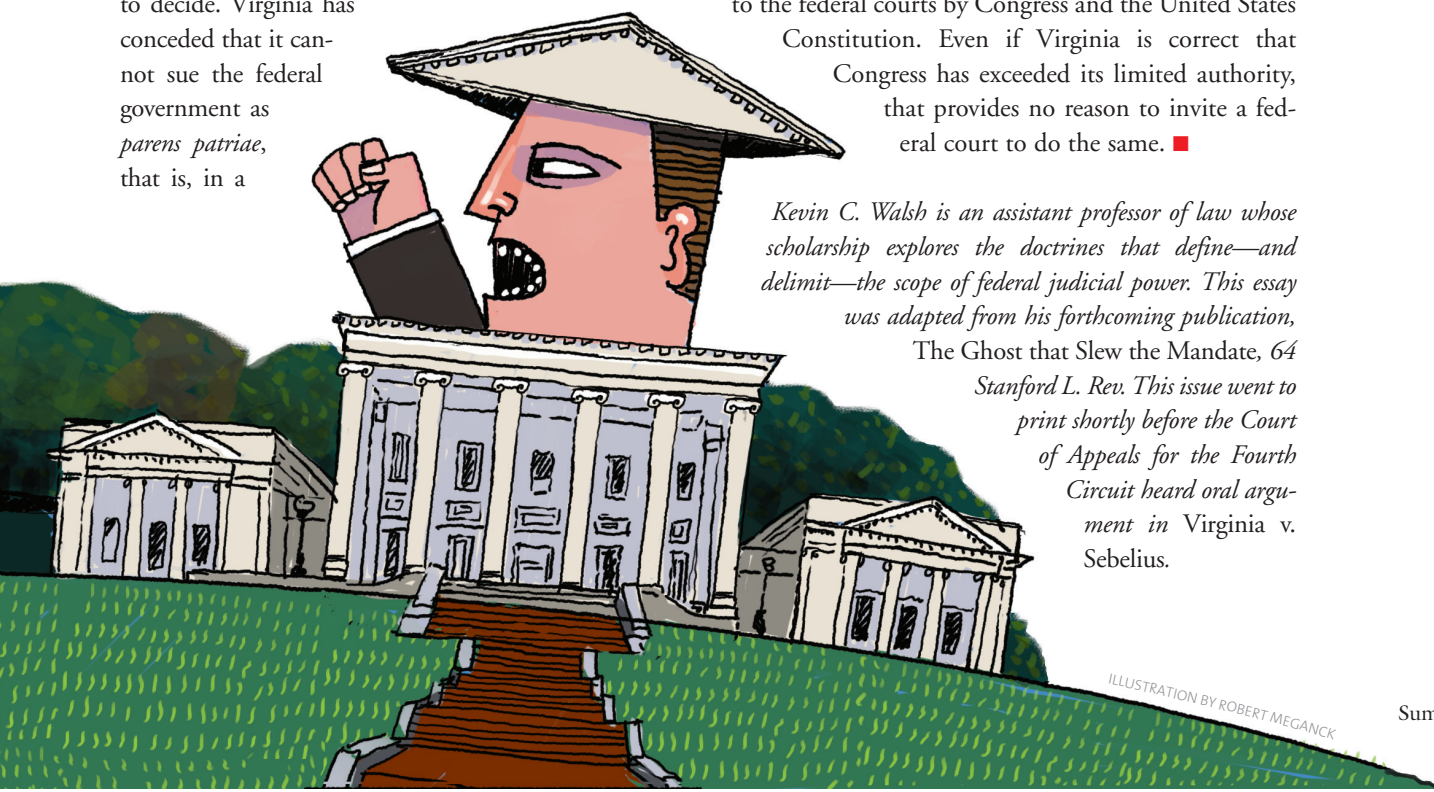


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