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Foreword: Academic Influence on the Court

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FOREWORD: ACADEMIC INFLUENCE ON THE COURT

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THE months leading up to the Supreme Court's blockbuster decision on the Affordable Care Act (ACA) were characterized by a prodigious amount of media coverage that purported to analyze how the legal challenge to Obamacare went mainstream. The nation's major newspapers each had a prominent story describing how conservative academics, led by Professor Randy Barnett, had a long-term strategy to make the case appear credible.¹ In the first weeks after the ACA's passage, the storyline went, the lawsuit's prospects of success were thought to be virtually nil. Professor (and former Solicitor General) Charles Fried stated that he would "eat a

* Paul & Patricia Saunders Professor, Georgetown University. Professor Katyal served as Acting Solicitor General of the United States and was lead counsel in several cases that are discussed in this Foreword, including *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Florida ex rel. Attorney General v. U.S. Department of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011); *Liberty University, Inc. v. Geithner*, 671 F.3d 391 (4th Cir. 2011); and *Thomas More Law Center v. Obama*, 651 F.3d 529 (6th Cir. 2011). The views expressed herein are his alone.

¹ See, e.g., Michael Kinsley, On Healthcare, Time for Some Judicial Restraint, L.A. Times, Mar. 27, 2012, <http://articles.latimes.com/2012/mar/27/opinion/la-oe-kinsley-health-care-mandate-supreme-court-20120327>; James B. Stewart, How Broccoli Landed on Supreme Court Menu, N.Y. Times, June 14, 2012, at A1; Sheryl Gay Stolberg & Charlie Savage, Vindication for Challenger of Health Care Law, N.Y. Times, Mar. 27, 2012, at A1; Ezra Klein, Obamacare's Most Influential Legal Critic on Tuesday's Oral Arguments, Ezra Klein's Wonkblog, Mar. 27, 2012, 4:52 PM, http://www.washingtonpost.com/blogs/ezra-klein/post/obamacares-most-influential-legal-critic-on-tuesdays-oral-arguments/2011/08/25/gIQAq2NpeS_blog.html.

hat . . . made of Kangaroo skin” if the challenge were successful.² But, as the case went through the system, the predictions evolved to the point where many believed that the ACA would be struck down.³ A (rapidly diminishing) group of observers maintained their prediction that the ACA would be upheld, but even then, most of those individuals focused exclusively on Commerce Clause grounds.⁴

In the midst of this speculation came an important article by Robert Cooter and Neil Siegel arguing that the ACA should be upheld as a valid exercise of the tax power.⁵ They argued—in a draft placed online two months before the oral argument in the case—that there was a key distinction between penalties and taxes. Applying that framework, they argued that the ACA was not a penalty because penalties have the effect of preventing conduct (thereby producing little revenue) and the ACA’s minimum coverage provision, by contrast, was projected to raise oodles of revenue. It is fair to say that this article had little to no impact on the media predictions that were being bandied about as the case wound its way through the Supreme Court. The Commerce Clause remained everyone’s focus.

One person, however, turned out to be looking in a different direction: the Chief Justice of the United States. There has been a good deal of commentary about whether the Chief Justice was influenced by the Cooter/Siegel article.⁶ To be sure, there are many

² Igor Volksy, Reagan’s Solicitor General Promises to ‘Eat a Hat Made of Kangaroo Skin’ if Courts Repeal Health Care Law, ThinkProgress, Apr. 15, 2010, 4:40 PM, <http://thinkprogress.org/health/2010/04/15/171390/fried-unconstitutional/>.

³ See Bob Drummond, Obama Health Law Seen Valid, Scholars Expect Rejection, Bloomberg, June 22, 2012, 12:15 PM, <http://www.bloomberg.com/news/2012-06-22/law-experts-say-health-measure-legal-as-some-doubt-court-agrees.html>.

⁴ See, e.g., Lawrence Lessig, Why Scalia Could Uphold Obamacare, The Atlantic, Apr. 13, 2012, 11:38 AM, <http://www.theatlantic.com/national/archive/2012/04/why-scalia-could-uphold-obamacare/255791/>.

⁵ Robert D. Cooter & Neil S. Siegel, Not the Power to Destroy: An Effects Theory of the Tax Power, 98 Va. L. Rev. 1195 (2012) (first posted Jan. 23, 2012 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989537).

⁶ E.g., Brian Leiter, Cooter & Siegel: The Real Originators of the Tax Power Theory for Upholding the ACA, Brian Leiter’s Law School Reports, July 10, 2012, 8:47 AM, <http://leiterlawschool.typepad.com/leiter/2012/07/cooter-siegel-the-real-originators-of-the-tax-power-theory-for-upholding-the-aca.html>; Jeffrey Rosen, Welcome to the Roberts Court: How the Chief Justice Used Obamacare to Reveal His True Identity, The

similarities (most prominently the Chief Justice's emphasis on the size and effect of the exaction as being crucial components of determining whether something is a constitutionally permissible tax, and his view that taxes generally raise revenue while dampening but not ceasing the conduct).⁷ That question can only be resolved through shadowy investigative journalism, or perhaps via release of the Justices' papers at some point in the future. We simply cannot know right now. But the inquiry being waged around the Cooter/Siegel article (an article that is important in its own right) sets up the question of whether and how constitutional theory impacts the Court.

It is commonly thought that law review articles today have little impact on "the real world." The Chief Justice has famously remarked:

Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.⁸

Citation counts bear this out as well, with citations to law reviews in Supreme Court opinions over the last decade dropping significantly.⁹

The plaintiffs' strategy to attack the ACA, however, was not an attempt by an academic to influence the Court solely through law review articles. Rather, they employed a massive PR blanket—including think tank presentations, congressional testimony, media outreach, and blogging. In that sense, the strategy was very similar

New Republic, June 29, 2012, 9:40 AM, <http://www.tnr.com/blog/plank/104493/welcome-the-roberts-court-who-the-chief-justice-was-all-along>.

⁷ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2595–2600 (2012).

⁸ Debra Cassens Weiss, Law Prof Responds After Chief Justice Roberts Disses Legal Scholarship, ABA Journal, Jul. 7, 2011, 5:29 AM, http://www.abajournal.com/news/article/law_prof_responds_after_chief_justice_roberts_disses_legal_scholarship/.

⁹ Brent Newton, Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis, 4 Drexel L. Rev. 399, 415 (2012). Newton found that "[t]he current justices have cited law review articles less frequently than their predecessors did in the three decades before, which suggests that the current Justices may view current law review scholarship as less useful than the members of the Court did a generation ago." *Id.* at 416.

to the strategy I used in “litigating” *Hamdan v. Rumsfeld*.¹⁰ Yes, there was a deep and crucial legal component to my argument—months of hard research and mastery of the materials of international and domestic law—that manifested themselves first in law review articles.¹¹ But in *Hamdan*, as I think with *National Federation of Independent Business v. Sebelius*, there was a recognition by the challengers that a law review article was not going to turn the legal landscape against the President’s strong view of the matter. On something that massive, it was reasonable to expect that the Justices would view the case through several different lenses. In *Hamdan*, one of those lenses was the way the rest of the world viewed the case (leading to an international strategy),¹² and one was the way American citizens viewed it (leading to a domestic strategy).¹³

Barnett and his colleagues pursued a similar path—with academic writing being only one aspect of the strategy to bring credibility to the constitutional challenge. And ultimately, the strategy was successful with respect to the Commerce Clause. Despite the fact that the Court had not drawn an activity/inactivity distinction (and despite the fact that cases such as *Wickard v. Filburn* somewhat undermined it),¹⁴ the challengers were able to garner the sup-

¹⁰ See 548 U.S. 557 (2006).

¹¹ Neal K. Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002).

¹² E.g., Brief for 422 Current and Former Members of the United Kingdom and European Union Parliaments as Amici Curiae Supporting Petitioners, *Hamdan*, 548 U.S. 557 (No. 05-184), 2006 WL 42097 (arguing that military commissions violate international law).

¹³ E.g., Brief for Certain Former Federal Judges as Amici Curiae in Support of Petitioner, *Hamdan*, 548 U.S. 557 (No. 05-184), 2006 WL 53990 (same); Brief for General David Brahms and General James Cullen as Amici Curiae in Support of Petitioner, *Hamdan*, 548 U.S. 557 (No. 05-184), 2006 WL 42060 (arguing that the Authorization to Use Military Force Resolution does not authorize military commissions); Brief for Richard A. Epstein et al. as Amici Curiae Supporting Petitioners, *Hamdan*, 548 U.S. 557 (No. 05-184), 2006 WL 42067 (same).

¹⁴ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2619 (2012) (Ginsburg, J., concurring in part and dissenting in part) (“[C]ontrary to the Chief Justice’s contention, our precedent does indeed support ‘[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity.’ In *Wickard*, the Court upheld a penalty the Federal Government imposed on a farmer who grew more wheat than he was permitted to grow” (second alteration in original) (citation omitted)).

port of both the Chief Justice¹⁵ and four of his colleagues.¹⁶ It was a remarkable achievement—for the first time in many decades, the Court had said that landmark legislation could not be pursued under the Commerce Clause. (The Court had, of course, invalidated statutes in *United States v. Lopez* and *United States v. Morrison*, but the statutes at issue in those cases are not comparable in their gravity.)¹⁷

However, even with five votes, the Commerce Clause reasoning turned out not to matter. The Chief Justice, joined by his four other colleagues, upheld the Act as a valid exercise of the tax power. To the extent the Cooter/Siegel model influenced the Court and contributed to this result, it worked through a different path than Barnett's. It harkened back to the older model of academics influencing the Court by dint of their writing. Perhaps the best known recent example is Charles Reich's *The New Property*, which led to *Goldberg v. Kelly*.¹⁸ Henry Hart's Dialogue¹⁹ and Paul Bator's *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*²⁰ are others. (One may, of course, go back even further, to the Joseph Story era.)²¹ In this (traditional) model, the solitary scholar writes something of influence and distinction, thereby providing a new way for a Justice to conceptualize a problem.

¹⁵ Id. at 2587 (opinion of Roberts, C.J.) (“The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.”).

¹⁶ Id. at 2644–50 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

¹⁷ See *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁸ *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (citing Charles Reich, *The New Property*, 73 *Yale L.J.* 733 (1964)).

¹⁹ See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362 (1953). The Supreme Court cited Hart's Dialogue eleven times between 1968 and 2001. See, e.g., *Jean v. Nelson*, 472 U.S. 846, 876 (1985) (Marshall, J., dissenting).

²⁰ 76 *Harv. L. Rev.* 441 (1963). The Supreme Court cited Bator twenty-two times between 1963 and 2009. See, e.g., *Danforth v. Minnesota*, 128 S. Ct. 1029, 1036 (2008); *Bush v. Gore*, 531 U.S. 98, 137 (2000) (Ginsburg, J., dissenting); *McCleskey v. Zant*, 499 U.S. 467, 478 (1991).

²¹ Joseph Story, *Commentaries on the Constitution of the United States* (Boston, Little, Brown & Co. 1858) (1831).

For the last two decades, the legal academy has been embroiled in an overwrought debate concerning whether the turn to theory has been detrimental.²² The critics of theoretical scholarship sometimes miss the ways in which theory can influence solutions to legal problems.²³ And the supporters sometimes overstate their case, neglecting the cost of a legal professoriate that is increasingly unable to talk to judges (or even to their own graduates). But that debate is only one aspect of a larger set of questions about what, in fact, influences judges. What creates the constitutional atmospherics necessary to give an argument credibility? Is it great litigators (and great oral arguments)? Is it simple and elegant arguments? Or do judges have their minds made up already? And if they do, what made these judges make their minds up? Their upbringing? Their economic circumstances? Their race, gender, orientation, or religion? Their experience as a lawyer before they ascended to the bench? How does what they watch on television matter—think MSNBC or Fox News? How about what they read—from the *New York Times* to the *Virginia Law Review*? These questions are as hard to answer at a general level as the specific question of whether Cooter and Siegel influenced the *Sebelius* opinion. And yet everyone seems to have an opinion about it. In one sense, it is no surprise that many litigators tend to think lawyering matters a lot, and academics do not; each has a vested interest in seeing themselves as creating value.

Yet litigators trudge on, day after day, polishing their briefs and rehearsing their oral arguments. They do this despite the doubts that maybe their efforts will not matter. And it is here that Cooter and Siegel teach us a similar lesson: despite the doubts about scholarship altering litigation outcomes, the efforts are worth it, because sometimes they very well may alter those outcomes. Cooter and Siegel, following in the footsteps of Charlie Reich, Henry Hart, and others, remind us that, at its best, legal scholarship can be deeply relevant to the real-world practice of law.

²² See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *Mich. L. Rev.* 34, 34 (1992).

²³ Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 *Harv. L. Rev.* 65, 67 (2006).