

THE GHOST THAT SLAYED THE MANDATE  
*Kevin C. Walsh\**

**ABSTRACT:** *Virginia v. Sebelius* is a federal lawsuit in which Virginia seeks the invalidation of President Obama's signature legislative initiative of healthcare reform. Virginia seeks declaratory and injunctive relief to vindicate a state statute declaring that no Virginia resident shall be required to buy health insurance. To defend this state law from the preemptive effect of federal law, Virginia contends that the federal legislation's individual mandate to buy health insurance is unconstitutional. Virginia's lawsuit is one of the most closely followed and politically salient federal cases in recent times. Yet neither the federal government nor any other legal commentator has previously identified the way in which the very features of the case that contribute to its political salience also require that it be dismissed for lack of statutory subject-matter jurisdiction. The Supreme Court has placed limits on statutory subject-matter jurisdiction over declaratory judgment actions in which a state seeks a declaration that a state statute is not preempted by federal law—precisely the relief sought in *Virginia v. Sebelius*. These limits insulate federal courts from the strong political forces surrounding lawsuits that seek federal court validation of state nullification statutes. This Essay identifies these heretofore neglected limits, shows why they demand dismissal of *Virginia v. Sebelius*, and explains why it is appropriate for federal courts to be closed to this type of suit.

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# THE GHOST THAT SLAYED THE MANDATE

*Kevin C. Walsh\**

“The situation presented by a State’s suit for a declaration of the validity of state law is . . . not within the original jurisdiction of the United States district courts.”<sup>1</sup>

“It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay.”<sup>2</sup>

The leading constitutional challenges to the recent healthcare reform legislation involve a volatile mixture of powerful political forces pressing for federal court validation. In these suits, elected state officials aim to obtain accelerated, abstract review of the legislation’s constitutionality. Mere minutes after President Obama signed the Patient Protection and Affordable Care Act into law, Virginia filed the first lawsuit, *Virginia v. Sebelius*, challenging the constitutionality of one of the Act’s key provisions.<sup>3</sup> The first district court decision holding this provision unconstitutional came in *Virginia v. Sebelius* less than nine months later.<sup>4</sup> That decision prompted calls by some—though not heeded—to “fast-track” the case for immediate Supreme Court review.<sup>5</sup>

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<sup>1</sup> *Franchise Tax Bd. v. Construction Laborers Vacation Trust for So. Cal.*, 463 U.S. 1, 21-22 (1983).

<sup>2</sup> Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1008 (1924).

<sup>3</sup> See Kevin Sack, *Judge Voids Key Element of Obama Health Care Law*, N.Y. TIMES, December 1, 2010, at A1, available at <http://www.nytimes.com/2010/12/14/health/policy/14health.html> (“Mr. Cuccinelli filed the lawsuit minutes after President Obama signed the law on March 23 and has been discussing the case on cable television ever since.”); see also Ken Cuccinelli for Attorney General, *Will You Join Me?*, available at <http://www.cuccinelli.com/stopthemandate> and <http://vimeo.com/15842322> (“I’m Ken Cuccinelli. Minutes after President Obama signed healthcare reform law, my office filed suit to overturn the individual mandate, and the liberal media hasn’t stopped attacking.”).

<sup>4</sup> *Virginia v. Sebelius*, \_\_\_ F.Supp. 2d \_\_\_, 2010 WL 5059718 (E.D. Va. Dec. 13, 2010).

<sup>5</sup> See Jennifer Haberkorn & Sarah Kliff, *Health law ruling only the*

Virginia's lawsuit presents on its face a prominent and critically important question of federalism: Did Congress exceed the limits of its enumerated legislative powers and thereby trench on a domain reserved by the Constitution to state power? But the lawsuit also presents a less recognized but equally important question of separation of powers: Is it within the federal judicial power to determine *in this lawsuit* whether Congress exceeded its legislative powers?

The core claim of this Essay is that federal court adjudication of Virginia's lawsuit to enforce limits on federal *legislative* power exceeds the limits of federal *judicial* power. Due to limitations that the Supreme Court has placed on federal jurisdiction under the Declaratory Judgment Act in *Franchise Tax Board*<sup>6</sup> and *Skelly Oil*,<sup>7</sup> there is no statutory subject-matter jurisdiction over Virginia's claim. Although the holdings of these two cases have not yet been applied in *Virginia v. Sebelius*, they should be. In mandating dismissal of Virginia's lawsuit, these cases stop a slide into accelerated, abstract review that is inconsistent with traditional limitations on federal judicial power.

The claim that there is no statutory subject-matter jurisdiction in *Virginia v. Sebelius* is new; it has not previously been identified by the parties, the district court, or any other legal commentator. The claim may seem incredible at first, given that Virginia's complaint seeks relief from a federal law administered by federal officials, on the ground that the federal law violates the federal Constitution. That may be why nobody has thought to address it until now. But the claim's soundness becomes apparent once the nature of Virginia's lawsuit is brought into proper focus: what Virginia actually seeks is a declaration that its state law is not preempted. The Supreme Court has held, however, that "[t]he situation presented by a State's suit for a declaration of the validity of state law is . . . not within the original jurisdiction of the United States

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*beginning*, POLITICO, December 14, 2010, at <http://www.politico.com/news/stories/1210/46344.html> ("Within hours of the ruling, Cuccinelli called for the judicial process to be 'fast-tracked,' essentially bypassing the 4th Circuit Court of Appeals and moving directly to the U.S. Supreme Court. Two top Virginia Republicans, Gov. Bob McDonnell and House Minority Whip Eric Cantor, joined in the request."). Although joined by others in the call for expedited review after the ruling, Attorney General Cuccinelli's office had floated the idea of a "fast-track" to the Supreme Court more than a week prior to the ruling. See Jim Nolan, *Virginia may seek expedited health-care legislation ruling*, RICHMOND TIMES-DISPATCH, December 5, 2010, available at <http://www2.timesdispatch.com/news/2010/dec/05/cucc05-ar-695473/>.

<sup>6</sup> 463 U.S. 1 (1983).

<sup>7</sup> 339 U.S. 667 (1950).

district courts.”<sup>8</sup>

The jurisdictional issues surrounding *Virginia v. Sebelius* are but the most recent flashpoint of a recurrent phenomenon in American political life—the challenge of legislation in court almost immediately after enactment and before it has a chance to take deep root. The legal system’s handling of these challenges over time, in turn, has influenced the shape of jurisdictional doctrine, as succeeding generations invoke legal processes and respond to their opponents’ perceived abuses of these processes. Thus, while *Virginia v. Sebelius* is just one case, the implications of the jurisdictional arguments at issue extend far beyond it.

The case squarely presents the question of whether federal jurisdiction can be premised solely on a state nullification statute—notwithstanding the established precedents of *Franchise Tax Board* and *Skelly Oil*, and the longstanding ban on advisory opinions. To allow federal jurisdiction on this basis would cross an important line and would result in a greater intermixture of politics and law than already exists in constitutional adjudication involving divisive political issues. I argue that this line should not be crossed. But my initial contribution is to demonstrate that this line—heretofore unnoticed by the parties and the many legal commentators who have weighed in on *Virginia v. Sebelius*—actually exists.

## I. VIRGINIA’S PURSUIT OF HEALTH CARE FREEDOM IN FEDERAL COURT

Christmas 2010 arrived twelve days early for Virginia Attorney General Ken Cuccinelli and the top lawyers in his office. Around noon on December 13, Judge Henry Hudson of the United States District Court for the Eastern District of Virginia ruled for Virginia in its case against the mammoth healthcare reform legislation that President Obama had signed into law a little less than nine months earlier. Judge Hudson held that Congress exceeded the limits of its legislative powers in enacting the Patient Protection and Affordable Care Act (the “Act”). This decision was the first to hold the Act unconstitutional.

*Virginia v. Sebelius* is a spare, go-it-alone affair in which Virginia is the sole plaintiff.<sup>9</sup> The single count in the complaint is that one statutory provision—the individual mandate, or minimum essential

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<sup>8</sup> *Franchise Tax Board*, 463 U.S. at 21-22.

<sup>9</sup> See Complaint, available at [http://www.oag.state.va.us/PRESS\\_RELEASES/Cuccinelli/Comm%20v.%20Sebelius%20-%20Complaint%20filed%20with%20Court%20\\_323\\_10.pdf](http://www.oag.state.va.us/PRESS_RELEASES/Cuccinelli/Comm%20v.%20Sebelius%20-%20Complaint%20filed%20with%20Court%20_323_10.pdf) (“Compl.”).

coverage provision—is unconstitutional.<sup>10</sup> Although Virginia’s claim appears narrow, its object is more ambitious: to take down the entire Act. The instrument for accomplishing this objective is inseverability. This potent doctrine provides that the entire Act must fall if a part of it (like the individual mandate) is unconstitutional, and the remainder is incapable of functioning independently, or Congress would not have enacted the remainder of the Act without that unconstitutional part.<sup>11</sup>

Virginia’s lawsuit aims to vindicate Virginia’s Health Care Freedom Act, a mandate-exemption statute that provides that no individual can be required by law to buy health insurance.<sup>12</sup> Directly responding to the pending federal individual mandate, both houses of the Virginia legislature passed the Health Care Freedom Act just weeks before President Obama signed the Patient Protection and Affordable Care Act into law.<sup>13</sup> Answering the criticism that its enactment was just a political stunt (given that state law must give way to federal under the Supremacy Clause), Attorney General Cuccinelli stated in the press that the statute could support Virginia’s standing to sue in federal court.<sup>14</sup> And when Virginia filed its lawsuit just minutes after the Act

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<sup>10</sup> Compl. ¶¶ 17-20.

<sup>11</sup> See *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3161-62 (2010) (explaining that the challenged statute could remain fully operative as law without unconstitutional restrictions on removal and that the Court therefore “must sustain its remaining provisions ‘[u]nless it is evident that the Legislature would not have enacted these provisions . . . independently of that which is [invalid].’”) (quoting *INS v. Chadha*, 462 U.S. 919, 932 (1983)); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (“Unless it is evident that the Legislature would not have enacted these provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.”) (internal citations and quotation marks omitted); see also Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 743-44 (2010) (discussing the requirements of severability doctrine).

<sup>12</sup> See Va. Code § 38.2-3430.1:1 (Mar. 2010). The statute contains certain exceptions not relevant here.

<sup>13</sup> See *General Assembly Briefs for March 11, Health Insurance Mandates Rejected*, RICHMOND TIMES-DISPATCH, March 11, 2010 (“The General Assembly told President Barack Obama and Congress yesterday that they cannot make Virginians buy health insurance. Gov. Bob McDonnell said he will sign the legislation. The Associated Press said Virginia is the first state to vote to reject federal mandates.”).

<sup>14</sup> See Andrew Cain, *Cuccinelli ready to defy federal health-insurance mandate*, RICHMOND TIMES-DISPATCH, February 4, 2010, available at [http://www2.timesdispatch.com/news/2010/feb/04/cucc04\\_20100203-232802-ar-11799/](http://www2.timesdispatch.com/news/2010/feb/04/cucc04_20100203-232802-ar-11799/) (“We’d have a conflict of laws and then the attorney general—me—would be in a position of defending the Virginia law and also attacking the

became law, the complaint premised its claim on the Health Care Freedom Act.

Virginia seeks a declaratory judgment that its state law remains valid notwithstanding the individual mandate in the federal law, along with injunctive relief prohibiting enforcement of the entire healthcare reform Act.<sup>15</sup> Although state law that conflicts with federal law is preempted, an unconstitutional federal statute cannot preempt a valid state statute. In *Virginia v. Sebelius*, then, Virginia contends that its state statute is valid because the conflicting federal statute is unconstitutional.<sup>16</sup>

Although Virginia's Health Care Freedom Act has thus far seemed to provide the Commonwealth with a quick ticket on a solo trip to invalidate the individual mandate, a closer look leads to the opposite conclusion. Virginia should be shown the exit from federal court *precisely because* its sole reason for entering is to vindicate its state statute in a declaratory judgment action. A straightforward application of established (albeit overlooked) doctrine requires dismissal.

## II. NO, VIRGINIA, THERE IS NO FEDERAL JURISDICTION

This section first sets forth the basic arguments from *Franchise Tax Board* and *Skelly Oil*. It then explains why the most persuasive potential response to these arguments is unsuccessful in avoiding dismissal.

### A. No Subject-Matter Jurisdiction

The starting point for analysis of federal jurisdiction over Virginia's lawsuit is that Virginia must sue either on its own behalf or not at all.

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constitutional problems with the proposed health-care bill as it stands.”).

<sup>15</sup> See Complaint, available at

[http://www.oag.state.va.us/PRESS\\_RELEASES/Cuccinelli/Comm%20v.%20Sebelius%20-%20Complaint%20filed%20with%20Court%20\\_323\\_10.pdf](http://www.oag.state.va.us/PRESS_RELEASES/Cuccinelli/Comm%20v.%20Sebelius%20-%20Complaint%20filed%20with%20Court%20_323_10.pdf)

<sup>16</sup> In the hours and days that followed Virginia's filing, many others also filed suit, including a collection of several states led by Florida, along with a smattering of private individuals and organizations. See Amy Goldstein, *Status of legal challenges to Obama health care overhaul*, WASH. POST, January 2, 2011, available at <http://www.washingtonpost.com/wp-srv/special/health-care-overhaul-lawsuits/> (describing twenty-four lawsuits challenging the constitutionality of the Patient Protection and Affordable Care Act). As these suits have developed, the most prominent have been the two filed by states: *Virginia v. Sebelius* and *Florida v. HHS*. And, of these two lawsuits, Virginia's has led the way because it has moved at a faster clip.

*Massachusetts v. Mellon* prevents Virginia from suing on behalf of its own citizens to enjoin the Secretary of Health and Human Services from enforcing the federal individual mandate against those citizens.<sup>17</sup> The Supreme Court held there that “it is no part of [the state’s] duty or power to enforce [its citizens’] rights in respect of their relations with the federal government.”<sup>18</sup> The Court reasoned that the citizens of a state are also citizens of the United States. To invoke “such protective measures as flow from that status,”<sup>19</sup> individuals should look to the federal government directly rather than rely on their states as intermediaries.

Because of *Massachusetts v. Mellon*, Virginia may not proceed against the federal government on behalf of its citizens as *parens patriae*.<sup>20</sup> Indeed, this bar is so well-established that Virginia appropriately conceded the point in its briefing.<sup>21</sup>

Eschewing an unsound *parens patriae* theory, Virginia has relied on sovereign-interest standing. The premise of Virginia’s claim of standing to *attack* the individual mandate in federal court was the asserted need to *defend* the Virginia Health Care Freedom Act. As mentioned above, Virginia’s Attorney General identified an anticipated standing-conferring function of the Virginia statute as one reason to pass it, and this position prevailed in the district court.<sup>22</sup>

Yet neither the parties nor the court examined whether Congress has vested the federal courts with *statutory subject-matter jurisdiction* to adjudicate a state’s claim of bare conflict between state and federal law in these circumstances. It has not. Virginia’s complaint asserts that

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<sup>17</sup> 262 U.S. 447 (1923). Massachusetts brought suit against the federal Secretary of the Treasury challenging a federal statute that appropriated funds to be spent on the improvement of maternal and infant health. *Id.* at 479. The challenged act also created a bureau to administer its provisions in cooperation with state agencies. *Id.* The Court understood Massachusetts’s claim to be that its “rights and powers as a sovereign state and the rights of its citizens have been invaded and usurped . . .” *Id.*

<sup>18</sup> *Id.* at 485.

<sup>19</sup> *Id.* at 486.

<sup>20</sup> This bar on *parens patriae* standing is probably not constitutionally compelled, but rather is a prudential limit that can be overcome by congressional action. See *Maryland People’s Counsel v. Fed. Energy Reg. Comm’n*, 760 F.2d 318 (D.C. Cir. 1985) (Scalia, J.) (holding that *Massachusetts v. Mellon* set forth a prudential standing requirement rather than a core component of constitutional standing doctrine).

<sup>21</sup> Va. Opp. to Mtn. to Dismiss at 12 (“Virginia recognizes that *Massachusetts v. Mellon* stands for the proposition that States cannot sue the federal government under *parens patriae* principles because their citizens are also citizens of the United States.”).

<sup>22</sup> See *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 606-07 (E.D. Va. 2010).

the court has jurisdiction over the case under the general grant of federal question jurisdiction, 28 U.S.C. § 1331, and the federal Declaratory Judgment Act, 28 U.S.C. § 2201.<sup>23</sup> The difficulty with direct reliance on § 1331 in a suit seeking declaratory relief is that the Supreme Court has interpreted § 2201 as placing limits on jurisdiction under § 1331.<sup>24</sup>

The limit most directly applicable to *Virginia v. Sebelius* is the one the Court imposed in *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*.<sup>25</sup> *Franchise Tax Board* was a declaratory judgment action filed by a state agency in state court seeking a declaration that its tax law was not pre-empted by ERISA. The Court had previously interpreted § 2201 to include certain limits on federal jurisdiction over declaratory judgment actions.<sup>26</sup> To avoid circumvention of those limits through state court declaratory judgment actions removed into federal court, the Court determined that the limitations it had previously found in § 2201 would apply whenever a litigant sought to bring a state declaratory judgment action into federal court.<sup>27</sup> Moreover, because removal jurisdiction is co-extensive with original jurisdiction, the holding of *Franchise Tax Board* regarding the reach of § 2201 applies not only to cases removed into federal court, but also those filed there originally.<sup>28</sup>

Most important for present purposes, however, the Court in *Franchise Tax Board* did more than simply extend prior limitations on federal declaratory judgments to state declaratory judgments. It imposed a *new* limitation on jurisdiction that applies when *states* seek declaratory relief under § 2201. The Court held that “[t]he situation presented by a State’s suit for a declaration of the validity of state law is . . . not within the original jurisdiction of the United States district

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<sup>23</sup> Compl. ¶ 9 (citing 28 U.S.C. § 1331 and 28 U.S.C. § 2001 [sic]).

<sup>24</sup> See *Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 18 (1983) (“Having interpreted the Declaratory Judgment Act of 1934 to include certain limitations on the jurisdiction of federal district courts to entertain declaratory judgment suits, we should be extremely hesitant to interpret the Judiciary Act of 1875 and its 1887 amendments [*i.e.*, the general grant of federal question jurisdiction] in a way that renders the limitations in the later statute nugatory.”).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 18.

<sup>27</sup> See *id.* at 18-19 (“[W]e hold that under the jurisdictional statutes as they now stand, federal courts do not have original jurisdiction, nor do they acquire jurisdiction on removal, when a federal question is presented by a complaint for a state declaratory judgment, but *Skelly Oil* would bar jurisdiction if the plaintiff had sought a federal declaratory judgment.”).

<sup>28</sup> See *id.*

courts.”<sup>29</sup>

This holding squarely forecloses federal jurisdiction in *Virginia v. Sebelius*, in which Virginia asks the court “to declare that § 1501 of PPACA is unconstitutional because the individual mandate exceeds the enumerated powers conferred upon Congress,” and also to “declare that [Virginia’s Health Care Freedom Act] is a valid exercise of state power.”<sup>30</sup> As the district court noted (in the course of analyzing a different point), the *raison d’être* of Virginia’s federal declaratory judgment lawsuit is to determine the validity of Virginia law<sup>31</sup>—which is why *Franchise Tax Board* requires dismissal.

To resist application of the *Franchise Tax Board* rule to Virginia’s lawsuit, one might argue that the rationale of the rule does not apply to Virginia’s suit because, unlike the claim at issue in *Franchise Tax Board*, there is no state court with authority to issue the relief Virginia seeks. In *Franchise Tax Board*, the states’ ability to litigate their non-preemption claims in state court was foremost among the “good reasons why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law.”<sup>32</sup> The Franchise Tax Board’s inability to be a declaratory judgment plaintiff in a federal forum left the Board with the ability to prosecute its action in a state court and to have the issue of preemption litigated there. By contrast, no such alternative forum is available to Virginia.

This distinction is a real one. Upon analysis, however, it provides even more of a reason to apply the rule of *Franchise Tax Board* and dismiss *Virginia v. Sebelius*. There is no alternative state-court forum

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<sup>29</sup> *Franchise Tax Board*, 463 U.S. at 21-22.

<sup>30</sup> Compl. at 6. Virginia also asks for “such further and additional relief as the ends of justice may require including an injunction against the enforcement of § 1501 in particular and PPACA as a whole.” *Id.* As this wording reveals, however, the request for an injunction is ancillary to the request for declaratory relief. Furthermore, as explained in more detail below, the federal court lacks jurisdiction to issue the requested injunction.

<sup>31</sup> *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 605 (E.D. Va. 2010) (explaining that the “primary articulated objective” of the lawsuit is “to defend the Virginia Health Care Freedom Act from the conflicting effect of an allegedly unconstitutional federal law”).

<sup>32</sup> *Franchise Tax Board*, 463 U.S. at 21. The Court determined that “[s]tates are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation.” *Id.* The reason for this lack of significant prejudice is that states “have a variety of means by which they can enforce their own laws in their own courts, and they do not suffer if the preemption questions such enforcement may raise are tested there.” *Id.*

available to Virginia because there is no state-court enforcement action that Virginia could bring under the Health Care Freedom Act. The tax law at issue in *Franchise Tax Board* imposed obligations on individuals whom the state could then pursue in a state-court collection action or at least name as proper defendants in a state-court declaratory judgment action. By contrast, Virginia's Health Care Freedom Act imposes no obligations on anybody. In the words of the district court, Virginia's law is of a "declaratory nature."<sup>33</sup> To ask a Virginia court to opine on its validity in the absence of a proper defendant would be to request a forbidden advisory opinion.<sup>34</sup> But moving the same claim into federal court and adding the Secretary as a nominal defendant does not render the resulting opinion any less advisory.<sup>35</sup>

These considerations point to a further flaw with Virginia's lawsuit. Even if one were to distinguish *Franchise Tax Board* as embodying nothing more than some sort of abstention principle (notwithstanding the Court's broader formulation of its holding), Virginia's suit would still need to satisfy the test of *Skelly Oil*.

It cannot. In *Skelly Oil Co. v. Phillips Petroleum Co.*, Justice Frankfurter wrote in his opinion for the Court that the Declaratory Judgment Act "enlarged the range of *remedies* available in the federal courts but did not extend their *jurisdiction*."<sup>36</sup> A declaratory judgment could provide non-coercive relief, but only in cases in which the underlying dispute would have been within federal jurisdiction. As

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<sup>33</sup> *Virginia v. Sebelius*, 702 F. Supp. 2d, at 605.

<sup>34</sup> See, e.g., *Franklin v. Peers*, 95 Va. 602, 29 S.E. 321 (Va. 1898) ("It is not the office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend and where no relief can be afforded. Only real controversies and existing rights are entitled to invoke the exercise of their powers.").

<sup>35</sup> This line of analysis also explains why *Franchise Tax Board* provides no support for Virginia even if it is interpreted as a decision that involves an element of deference to state forum preferences. Whatever such deference *Franchise Tax Board* might be thought to embody, Virginia cannot get around the ultimately advisory nature of its claims.

Moreover, if the district court is wrong about the "declaratory nature" of the state law, and there existed some way in which it could be enforced against a person who sought to impose an obligation on a Virginia citizen to purchase insurance, this would still not aid Virginia's attempt to distinguish *Franchise Tax Board*. In such a case, Virginia would be acting to protect a particular individual using a *parens patriae* theory, which has already been shown to be unavailable for a suit against the United States.

<sup>36</sup> 339 U.S. 667, 671 (1950); see also *id.* at 671-72 ("The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction . . . were not impliedly repealed or modified.").

applied in later cases, the *Skelly Oil* approach to § 2201 allows for federal jurisdiction over only those declaratory judgment actions in which either the declaratory judgment plaintiff or the declaratory judgment defendant could have brought a coercive action against the other party.<sup>37</sup> As matters now stand, then, federal jurisdiction over a declaratory judgment action brought under § 2201 “depends on the answer to a hypothetical question: had the Declaratory Judgment Act not been enacted, would there have been a nondeclaratory action (i) concerning the same issue, (ii) between the same parties, (iii) that itself would have been within the federal courts’ subject matter jurisdiction?”<sup>38</sup>

Virginia cannot satisfy the *Skelly Oil* test because it possesses no right to coercive relief against the Secretary’s enforcement of the individual mandate.<sup>39</sup> Virginia may not seek an injunction prohibiting the Secretary’s enforcement of the individual mandate against its citizens; that would be a *parens patriae* action forbidden by *Massachusetts v. Mellon*. Nor may Virginia seek an injunction prohibiting the Secretary’s enforcement of the individual mandate against Virginia; the individual mandate, by its terms, is not enforceable against Virginia—only against individuals.<sup>40</sup>

Injunctions do not run against statutes, but against actors. “If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute

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<sup>37</sup> RICHARD H. FALLON, JR., ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 805 (6th ed. 2009).

<sup>38</sup> *Id.* at 804.

<sup>39</sup> The discussion that follows addresses injunctive relief only, not damages. Virginia would not be entitled to seek damages unless one fancifully imagines that it would be appropriate for the Supreme Court to create some sort of a *Bivens* claim based on the Tenth Amendment.

<sup>40</sup> See Pub. L. No. 111-148, § 1501 (imposing minimum insurance coverage requirement on “applicable individuals”); Pls.’ Mem. in Support of MTD at 1 (“the only provision Virginia challenges in this litigation – Section 1501 of the Patient Protection and Affordable Care Act (“ACA”), which requires individuals either to obtain a minimum level of health insurance or to pay a penalty if they do not – will impose no obligations on the Commonwealth, even after the law takes effect some four years from now. The provision applies only to individuals, not the state government.”); *id.* at 12 (stating that the individual mandate provision “does not impose any obligations whatsoever on Virginia as a state”); Mem. in Opp. to MTD at 18-19 (“As Secretary Sebelius concedes, Virginia will not be required to pay the penalty for failure to meet the Individual Mandate. . . . Virginia will incur no direct financial liability under the challenged penalty provision.”); DCt Op. at 11 (stating that Virginia is “a sovereign entity not required to purchase insurance under the Patient Protection and Affordable Care Act”).

notwithstanding.”<sup>41</sup> As the wording of its complaint reveals, Virginia accepts this basic principle.<sup>42</sup> But once this principle is applied to the individual mandate, Virginia’s inability to seek injunctive relief against the Secretary’s enforcement of that law against Virginia is clear. The reason is simple: If the Secretary can take no action against Virginia pursuant to the individual mandate, there is no basis for a federal court to enjoin “the acts of the official, the statute notwithstanding.”<sup>43</sup> And, as already mentioned, the individual mandate does not apply to Virginia—just to individuals.

*B. Inseverability As an End-Run?*

One response to this line of analysis might be to broaden the scope of the case in search of a hypothetical coercive action between Virginia and the federal government under the Act. There are parts of the Act that do apply to the states as states, and that consequently could form the basis of a coercive action by Virginia against the federal government. Virginia might argue that it can employ inseverability reasoning to obtain an injunction based on the unconstitutionality of the mandate and its inseverability from the remainder of the Act. The argument would take the following form: (1) other provisions of the law purport to impose legal obligations on Virginia; (2) the individual mandate is unconstitutional; (3) the unconstitutional individual mandate is inseverable from the remainder of the law; (4) the remainder of the law is therefore unenforceable; (5) there is an actual controversy between Virginia and the Secretary because the Secretary maintains that these other provisions do impose legal obligations on Virginia, while Virginia maintains that they do not; consequently, (6) Virginia is entitled to seek an injunction against enforcement of the law in its entirety.

This would amount to an impermissible end-run around *Skelly Oil*. The Supreme Court has allowed parties to advance an inseverability argument in seeking the invalidation of provisions beyond those directly applicable to them.<sup>44</sup> But the Court appears to have always limited its consideration to the potential inseverability of those statutory provisions applicable to the challenging party. A simple

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<sup>41</sup> *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

<sup>42</sup> Compl. at 7 (requesting “an injunction *against the enforcement* of § 1501 in particular and PPACA as a whole”) (emphasis added).

<sup>43</sup> *Mellon*, 262 U.S. at 488.

<sup>44</sup> See, e.g., *Pollock v. Farmers’ Loan and Trust Co.*, 158 U.S. 601, 635-37 (1895) (invalidating as inseparable all income tax provisions of federal tax statute after determining that the provisions taxing income derived from real and personal property were unconstitutional).

example illustrates the point. Consider, for instance, a statute (XY) that is composed of two provisions (X and Y). Suppose, further, that X imposes enforceable obligations on P, but Y does not. P can use inseverability to seek the invalidation of XY on the ground that *X is unconstitutional* and it is inseverable from Y. But P may not use inseverability to seek the invalidation of XY on the ground that *Y is unconstitutional* and it is inseverable from X.<sup>45</sup>

The important New Deal-era case of *Electric Bond & Share Co. v. Securities and Exchange Commission* is illustrative.<sup>46</sup> This case involved the Public Utility Holding Company Act of 1935 (“PUHCA”). PUHCA’s section 5 required certain holding companies to register with the SEC. PUHCA’s section 4(a) prohibited companies that were required to register but failed to do so from using the instrumentalities of interstate commerce.<sup>47</sup> The SEC brought suit to enforce sections 4(a) and 5 after several companies failed to register.<sup>48</sup> The companies defended on the ground that the provisions to be enforced were unconstitutional and inseverable from additional unconstitutional provisions. Further, they sought by cross-bill in equity a declaratory judgment that the PUHCA was invalid in its entirety.<sup>49</sup> The district court upheld sections 4(a) and 5 and dismissed the cross-bill “for want of equity and for lack of any actual controversy within the meaning of the Federal Declaratory Judgment Act of 1934.”<sup>50</sup> The Court of Appeals affirmed and the Supreme Court granted certiorari.<sup>51</sup>

The Supreme Court affirmed in an opinion written by Chief Justice Hughes. The Court first held that the holding companies were engaged in activities within the reach of congressional power.<sup>52</sup> The Court then turned to the claim that the PUHCA was entirely invalid, and that sections 4(a) and 5 could not “be separated from the other provisions of the act and thus be separately sustained and enforced.”<sup>53</sup> Addressing this contention on its merits, the Court concluded that “the provisions of sections 4(a) and 5 are not so interwoven with the other provisions of

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<sup>45</sup> The Court appears never to have explicitly observed that inseverability is not reciprocal. The results that should flow from this recognition therefore remain undeveloped doctrinally. The theoretical issues worthy of further exploration in this area range beyond the scope of this Essay, but I hope to address them in future work.

<sup>46</sup> 303 U.S. 419 (1938).

<sup>47</sup> *Id.* at 426-27.

<sup>48</sup> *Id.* at 427.

<sup>49</sup> *Id.* at 427.

<sup>50</sup> *Id.* at 427.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 431-33.

<sup>53</sup> *Id.* at 433.

the act that there is any inherent or practical difficulty in the separation and independent enforcement of the former while reserving all questions as to the validity of the latter.”<sup>54</sup> After upholding the constitutionality of sections 4(a) and 5 considered on their own, the Court finally turned to the cross-bill alleging total unconstitutionality. The Court rejected the companies’ attempt to obtain a judgment of total invalidity, holding that “[d]efendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts.”<sup>55</sup> The Court reasoned that it would not “enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived.”<sup>56</sup>

In sum, the only way that the Court considered allowing the defendants to contest the statutory provisions not being enforced in that suit was through an argument that *the provisions actually being enforced in that suit* were inseverable.<sup>57</sup> To return to the hypothetical above, then, Sections 4(a) and 5 correspond to X, and all the other statutory provisions correspond to Y. The Court considered the potential inseverability of XY using X as a starting point, but refused to do so with respect to Y. Based in part on its determinations about X, the Court concluded that the challengers sought an advisory opinion on a hypothetical state of facts with respect to Y.

This openness to entertaining an inseverability argument arising out of only those statutory provisions applicable to the parties raising the constitutional challenge makes good sense. Given the breadth of much legislation, allowing an assertion of inseverability to get claims into federal court that would otherwise be kept out would allow for widespread circumvention of justiciability requirements.

Virginia has not, to date, advanced an argument of this sort in addressing the question of federal jurisdiction.<sup>58</sup> By contrast, the

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<sup>54</sup> *Id.* at 434-35.

<sup>55</sup> *Id.* at 443.

<sup>56</sup> *Id.*

<sup>57</sup> This reading of *Electric Bond & Share Co.* I have offered is consistent with the Court’s decision but not compelled by its reasoning. It rests on recognizing the non-reciprocity of severability or inseverability, a matter which the Court did not directly address in its decision. If the Court (mistakenly) believed that severability was reciprocal, then its earlier holding that Sections 4(a) and 5 were severable may have been important to its holding regarding the availability of declaratory relief.

<sup>58</sup> Virginia has asserted (though unsuccessfully so far) that total invalidation based on inseverability is the appropriate remedy. See *Virginia v. Sebelius*, \_\_\_ F. Supp. 2d, 2010 WL 5059718 \*20 (E.D. Va. 2010) (“[T]he Secretary counsels severability, and the Commonwealth urges wholesale

plaintiff states in the other state challenge to the individual mandate, *Florida v. HHS*, have advanced an argument of this sort in attempting to establish their standing. Although the district court in that case did not address this argument,<sup>59</sup> the fact that over 20 states have advanced it is useful because those litigants have presumably presented the argument in its strongest form. An examination of that briefing reveals, however, that the argument does not succeed.

The principal authority that the states rely on to use inseverability to leverage the ability to challenge some parts of a statute (the parts that regulate their conduct) into an invitation to challenge other parts (the ones that do not) is *Alaska Airlines, Inc. v. Brock*.<sup>60</sup> The Supreme Court in *Alaska Airlines* addressed the severability of a legislative veto provision from a statute that governed the transition to de-regulated operation of airlines.<sup>61</sup> A group of airlines challenged regulations regarding the rehiring of employees who had been furloughed or otherwise terminated.<sup>62</sup> They contended that the statute authorizing the promulgation of those regulations contained an invalid legislative veto.<sup>63</sup>

The states in *Florida v. HHS* describe *Alaska Airlines* as a “suit to protest employee-protection provisions of federal legislation on the basis that a *different* provision (regarding a legislative veto) rendered the entire legislation ineffective.”<sup>64</sup> But this description is misleading. The legislative veto was one of the provisions setting forth the manner in which *the challenged regulations* were to be promulgated; Congress put it in the same section of the statute as the provision authorizing promulgation of the regulations that the airlines sought to invalidate.<sup>65</sup> That is far different from the circumstances facing the states that seek to challenge the individual mandate on the basis of statutory provisions dealing with different matters (such as the creation of health-benefits

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invalidation.”).

<sup>59</sup> Rather than make a determination whether the states had standing to challenge the individual mandate (based on an inseverability argument or otherwise), Judge Vinson in *Florida v. HHS* decided only that the private individuals in that case had standing to challenge the individual mandate, remaining silent on the issue of state standing to challenge this provision. *Florida v. HHS*, 716 F. Supp. 2d, at 1144-47.

<sup>60</sup> See *Florida v. HHS*, Mem. Opp. Mtn. to Dismiss at 6-8 (arguing for standing based on inseverability in reliance on *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-86 (1987)).

<sup>61</sup> *Alaska Airlines*, 480 U.S. at 680-81.

<sup>62</sup> *Id.* at 681-82.

<sup>63</sup> *Id.* at 682-83.

<sup>64</sup> *Florida v. HHS*, Mem. Opp. Mtn. to Dismiss at 7

<sup>65</sup> See Pub. L. No. 95-504, 92 Stat. 105 (1978).

exchanges). Unlike the states, the *Alaska Airlines* plaintiffs did not need to rely on inseverability to generate a right to challenge the legislative veto provision; their claim was that the regulations that governed them were invalid because the process for creating them allowed for an inseverable legislative veto whose unconstitutionality infected the regulations.

Were *Skelly Oil's* author alive today, he clearly would reject an attempt to use inseverability in the way described above to satisfy its requirement of a hypothetical coercive cause of action between the parties to the declaratory judgment action. Justice Frankfurter wrote the opinion for the Court in *Communist Party of United States v. Subversive Activities Control Board*, in which the Communist Party sought to challenge a number of restrictions that a statute placed on subversive organizations.<sup>66</sup> Like the PUHCA case discussed above, the underlying suit involved only a requirement that certain organizations register with the government.<sup>67</sup> The government brought suit when the Communist Party refused to register.<sup>68</sup> In defense, the Communist Party relied on the alleged unconstitutionality of all the various restrictions placed on organizations that register.<sup>69</sup> The Court refused to adjudicate the constitutionality of those restrictions, stating that “[e]ven where some provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality.”<sup>70</sup>

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<sup>66</sup> 367 U.S. 1, 70 (1961)

<sup>67</sup> *Id.* at 72-81.

<sup>68</sup> *Id.* at 72.

<sup>69</sup> *Id.* at 70.

<sup>70</sup> *Id.* at 71. Justice Frankfurter further explained:

Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case. No rule of practice of this Court is better settled than never to anticipate a question of constitutional law in advance of deciding it. In part, this principle is based upon the realization that, by the very nature of the judicial process, courts can most wisely determine issues precisely defined by the confining circumstances of particular situations. In part it represents a conception of the role of the judiciary in a government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet proceeded so far as to affect individual interests adversely. These considerations, crucial as they are to this Court's power

In the end, though, it is unnecessary for a court to address the use of inseverability as an end-run around *Skelly Oil* in *Virginia v. Sebelius*. As already discussed, *Massachusetts v. Mellon* and *Franchise Tax Board* require dismissal on their own. *Skelly Oil* comes into play only if there is reason not to apply the holding of *Franchise Tax Board* in *Virginia v. Sebelius*. It is nevertheless fitting to focus on *Skelly Oil* because the analysis it calls for helps to flush out the way in which Virginia's lawsuit, at bottom, seeks a forbidden advisory opinion. Although the availability of *Franchise Tax Board's* holding as a statutory ground for dismissal makes a judicial determination about the reach of Article III unnecessary, attending to the ultimately advisory nature of Virginia's claim focuses attention on why dismissal for lack of statutory subject-matter jurisdiction is not only doctrinally appropriate, but also normatively attractive, as the next Part discusses.

### III. THE INSULATION OF INCIDENTAL REVIEW

*Virginia v. Sebelius* was born in political warfare. The lawsuit exists because Virginia enacted the Health Care Freedom Act, a state law enacted to counter a conflicting federal law by providing a vehicle for attacking the federal law in federal court. As invoked in *Virginia v. Sebelius*, the function of this anti-mandate statute has been to move debate over the federal individual mandate from the political realm to the legal realm. If successful, this move would enable Virginia to obtain federal judicial validation of the constitutional vision animating political and legal opposition to the individual mandate.

Although the occasion for this particular nullification statute is the fight over health care reform, that is just one area in which the states are pushing back against the federal government. If Virginia's statute suffices on its own to establish federal jurisdiction, one can expect litigation-provoking nullification statutes like the Health Care Freedom Act to multiply.

To treat such statutes as tickets into federal court, however, would deprive the courts of an important buffer from political forces that federal justiciability doctrine currently provides. That doctrine requires that constitutional adjudication be incidental to resolution of a case or controversy, rather than that the case or controversy be incidental to resolution of a constitutional question.

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and obligation in constitutional cases, require that we delimit at the outset the issues which are properly before us in the present litigation.

*Id.* at 71-72.

Insistence on constitutional adjudication as incidental to the resolution of a case or controversy is one of the strengths of the American legal system. Alexis de Tocqueville discerned early on that this feature of the system provided the judiciary some insulation from the buffeting of political winds. The power given the judiciary in America, he observed, was not to censure legislation in the abstract, but only to “refuse to admit [unconstitutional legislation] as a rule” in deciding a case.<sup>71</sup> Tocqueville recognized that a less restricted power would subject the judge exercising it to enlistment in political controversy, “and as the champion or the antagonist of a party, he would have brought the hostile passions of the nation into the conflict.”<sup>72</sup> The absence of a power to censure unconstitutional legislation in the abstract may be problematic at times, such as when delay creates uncertainty, or when individuals are required to comply with a law later held to be unconstitutional. Tocqueville understood, however, that Americans “have left the remedy incomplete, lest they should give it an efficacy that might in some cases prove dangerous.”<sup>73</sup>

Tocqueville was right. Justiciability doctrine functions in various ways to insulate the federal judiciary—at least somewhat—from political forces. There are longstanding debates over the legitimacy of consciously shaping justiciability doctrine to achieve this end.<sup>74</sup> But if it were possible to invoke federal jurisdiction solely on the basis of a state statute opposing a particular rule of federal law, the insulation provided by that doctrine would be eliminated entirely in exactly the set of cases where insulation from political pressures would be needed most—those involving highly controversial issues that have mobilized a political constituency to push successfully for nullification legislation. This concern is not why the Supreme Court decided *Franchise Tax Board* and *Skelly Oil* as it did, but it is nonetheless a strong reason for courts to apply their holdings to foreclose suits like *Virginia v. Sebelius*.

If federal jurisdiction can be premised solely on a state nullification statute in this first case, it assuredly will not be the last. And as the

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<sup>71</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, BOOK I, CHAPTER VI.

<sup>72</sup> *Id.* Protection from this enlistment arises out of the fact that the American judge enters the political arena “independently of his own will. He judges the law only because he is obliged to judge a case. The political question that he is called upon to resolve is connected with the interests of the parties, and he cannot refuse to decide it without a denial of justice.” *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> For a classic debate over the relative weight to be accorded this consideration, compare ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962), with Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—a Comment on Principle and Expediency in Judicial Review*, 64 *COLUM. L. REV.* 1 (1964).

events surrounding the case have already borne out, the combination of political pressures and abstract adjudication in a case like *Virginia v. Sebelius* can generate strong currents. While the federal courts can withstand the pull of those currents in any one case, there is a real risk that a proliferation of such cases could generate currents too strong to withstand.

Consider the effects of this one case at the district court level alone. Immediately upon issuance of a judgment in Virginia's favor, legal and political figures across the nation hailed the decision as a game-changer that cemented the seriousness of the constitutional objections leveled against the individual mandate.<sup>75</sup> Others, it is true, sought to minimize the decision's importance.<sup>76</sup> But even these attempts at minimization are a testament to the consequential nature of the decision. For example, Attorney General Eric Holder and Secretary of Health and Human Services Kathleen Sebelius apparently thought the decision significant enough to publish a jointly authored op-ed in the next day's

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<sup>75</sup> See, e.g., Randy Barnett, *A Noxious Commandment*, N.Y. TIMES, Dec. 13, 2010, at \_\_\_ (“The days of calling the constitutional challenges to the Affordable Care Act ‘frivolous’ and ‘political’ are now officially over. Judge Hudson’s ruling that the individual insurance mandate is unconstitutional is a milestone in the legal process of deciding whether Congress has the power to command every person in the United States to enter into an economic relationship with a private company.”); Ashby Jones, *The Health Care Law Under the Judicial Knife: Some Early Reactions*, WSJ LAW BLOG, Dec. 13, 2010, (quoting Jordan Sekulow, Director of Policy at the American Center for Law & Justice: “This is a momentum-changer that will further tarnish the Obama administration as it faces serious legal challenges to the President’s most noteworthy legislative accomplish, which now faces a 112<sup>th</sup> Congress filled with Republicans who have pledged to repeal the unpopular health care reforms.”); Kevin Sack, *Years of Wrangling Lie Ahead for Health Care Law*, N.Y. TIMES, Dec. 13, 2010, at \_\_\_ (“[T]he challenges from dozens of states to the law’s constitutionality can no longer be dismissed as frivolous, as they were earlier this year by some scholars and Democratic partisans.”); Sheryl Stolberg, *Just One Ruling, But an Outsize One*, N.Y. TIMES, Dec. 14, 2010, at \_\_\_ (“By the numbers, President Obama is beating opponents of his signature health care bill two to one in federal court. Of the three district court judges who have ruled on the merits of constitutional challenges to the landmark Affordable Care Act, two have sided with Mr. Obama. But from a political standpoint, the only case that really matters is the one Mr. Obama lost on Monday.”).

<sup>76</sup> Jennifer Haberkorn & Scott Wong, *Health ruling is GOP rallying cry*, POLITICO, Dec. 13, 2010 (“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.”).

Washington Post.<sup>77</sup>

The decision's consequences have been felt most strongly in the political realm. *Virginia v. Sebelius* has been a rallying point for legislators opposed to the Act, and assertions about the Act's unconstitutionality have become a staple in arguments for its repeal. The decision has had a significant effect in the legal realm as well, although not as outsized as in the political realm. Legal commentators on both sides of the issue have gravitated to the district court's opinion as a focal point for analysis, even while these commentators (and the district court itself) have recognized that the decision is not binding on any other court and is not the final word on the matters it addresses.

The decision's many effects cannot, in truth, be neatly divided between the legal and political realms. Given the nature of the case, any effort to draw a clear boundary between the two realms and then to assign some features of the case to one or the other breaks down. To what realm, for instance, should one allocate the display advertisements by Attorney General Cuccinelli's political committee that ran both on the day that summary judgment was argued and also on the day that the summary judgment decision was handed down?<sup>78</sup> It might be tempting to dismiss these advertisements as purely political.

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<sup>77</sup> Eric H. Holder, Jr. & Kathleen Sebelius, *Health reform will survive its legal fight*, WASHINGTON POST, Dec. 14, 2010, at \_\_\_\_.

<sup>78</sup> On October 18, 2010, targeted display advertisements for Ken Cuccinelli's political website appeared on news and commentary sites. While Virginia's Solicitor General was in Judge Hudson's courtroom for arguments over summary judgments. The advertisements contained a headshot of Virginia's Attorney General, with the message that "liberty is under attack, and I am attacked for defending it." See [http://www.cuccinelli.com/petition/landing/support\\_petition.html](http://www.cuccinelli.com/petition/landing/support_petition.html) (last visited Jan. 3, 2011). The link took visitors to a page headlined "STOP THE MANDATE," with the message: "Hi, I'm Ken Cuccinelli, and 15 minutes after President Obama signed the health care law my office filed suit to overturn the individual mandate. Will you join me?" *Id.* The page invited visitors to sign a petition and linked to a donation page. *Id.*

As on the day summary judgment was argued in *Virginia v. Sebelius*, so too on the day that summary judgment was granted: Virginia Attorney General Ken Cuccinelli's political committee sponsored display advertisements trolling for supporters and donations, this time touting victory and basking in the validation provided by the ruling. See Ben Smith, *Cuccinelli fundraising off health care win*, POLITICO, December 13, 2010, at [http://www.politico.com/blogs/bensmith/1210/Cuccinelli\\_fundraising\\_off\\_health\\_care\\_win.htm](http://www.politico.com/blogs/bensmith/1210/Cuccinelli_fundraising_off_health_care_win.htm) ("That didn't take long: Virginia Attorney General Ken Cuccinelli is *already* capitalizing on today's health care victory with a big online fundraising push, with this image on top of the Drudge Report and on Google Ads across the political web. The ad takes supporters to a petition which harvests their emails and then, naturally, to a 'Donate' button.").

But that quick characterization would neglect the extent to which the legal skirmishing in *Virginia v. Sebelius* is just one front in a larger battle of ideas about the Constitution—one in which the line between legal and political has never been neatly drawn.<sup>79</sup>

Moreover, even if one were to view the lawsuit as largely political, it would be mistaken to characterize it as an activist Attorney General's one-man crusade. The Health Care Freedom Act passed through Virginia's General Assembly on a bipartisan basis.<sup>80</sup> And the popular sensibility addressed by the Virginia legislature was not peculiarly Virginian. A nationwide poll in August 2010 revealed that 70% of Americans had an unfavorable view of the individual mandate, including 52% of Americans who characterized their view as strongly unfavorable.<sup>81</sup> Legal measures opposing various aspects of healthcare reform were introduced in over 40 state legislatures in 2009 and 2010, and Virginia was just one of seven states to enact opposition to an individual mandate into state law in 2010.<sup>82</sup>

Because Virginia is not the only State to have enacted opposition to the federal individual mandate into state law, and because health care is just one issue on which the states are pushing back against the federal government, the correct approach to federal jurisdiction in a case like *Virginia v. Sebelius* has broad significance. This Essay has explained why current doctrine requires dismissal, and has further

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<sup>79</sup> Indeed, this is how Attorney General Cuccinelli and his political director have explained the advertisements. See Rosalind S. Helderman, *Va. Attorney General Cuccinelli's strategy looks good in light of ruling*, WASH. POST, Dec. 14, 2010, at \_\_\_ (“‘There’s a battle of ideas going on here,’ [Attorney General Cuccinelli] said. ‘The formal battle is going on in court. There’s also a battle for hearts and minds [of] the citizenry. I’m trying to educate folks about why we’re doing this.’”); *id.* (describing political director Noah Wall’s explanation that the goal of the advertisements was not raise money but to encourage supporters to sign a petition expressing their support).

<sup>80</sup> See *General Assembly Briefs for March 11, Health Insurance Mandates Rejected*, RICHMOND TIMES-DISPATCH, March 11, 2010 (noting that a majority of 39 House Democrats voted with Republicans in passing the Health Care Freedom Act); Olympia Meola & Tyler Whitley, *Response to health overhaul practical, ideological*, RICHMOND TIMES-DISPATCH, Sept. 26, 2010 (stating that four Senate Democrats voted with Republicans in passing the Health Care Freedom Act).

<sup>81</sup> Kaiser Family Foundation, Kaiser Health Tracking Poll August 2010, at 7-8.

<sup>82</sup> See Richard Cauchi, *State Legislation and Actions Challenging Certain Health Reforms, 2010-11*, National Conference of State Legislatures (last updated January 19, 2011), at <http://www.ncsl.org/?tabid=18906>. The other states enacting a mandate-exemption statute in 2010 were Arizona, Georgia, Idaho, Louisiana, Missouri, and Utah. *Id.*

suggested why that is desirable from the point of view of the federal courts.

The arguments in this Essay do not reduce to an argument for a rule of federal jurisdiction that would authorize federal court refusal to entertain claims because state officials may be using the forum to further their own political ambitions. Such a rule would be impossible to apply, given the inevitable intermixture of political and legal considerations in actions brought by elected public officials. And, after all, elected public officials *should* be eager to enforce the will of the people as expressed in their laws. Moreover, even if such a rule could be applied, it would be a bad idea to have it. The use of federal courts as vehicles of political ambition is an important source of the courts' power to maintain some control over determinations of constitutional meaning.<sup>83</sup>

Nor do the arguments in this Essay stem from angst about messy public debates over constitutional meaning. The worry, instead, is about what might flow from the immediate thrusting of all such debates into federal courts without regard to established jurisdictional doctrine. The aim is to preserve the rules of federal jurisdiction that enable the federal judiciary to stand firm against the political and cultural waves that continually cast questions of constitutional meaning out of the swirling tides of political processes onto the hard land of the judicial domain. The law should not prevent these questions from ever coming ashore, but should instead ensure that they arrive there in a way that does not threaten erosion of the shore into the sea.

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This Essay is, in essence, a brief for the status quo; its object is to avoid acceptance of an innovative entrée into federal court. But if even if one disagrees with its conclusion, one should acknowledge the existence of the limitations on federal judicial power that have yet to be applied in *Virginia v. Sebelius*. These limitations do exist, and they should not be neglected. Regardless of whether one thinks the decisions imposing these limitations were rightly decided, they should not be bypassed just because nobody has noticed them.

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<sup>83</sup> See generally KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).

CONCLUSION

Curbing the overt politicization of abstract review in federal court was not the intended function of the Court's rulings in *Skelly Oil* and *Franchise Tax Board*. But that may nevertheless be the most beneficial function of straightforwardly applying to *Virginia v. Sebelius* the Supreme Court's pronouncement that "[t]he situation presented by a State's suit for a declaration of the validity of state law is . . . not within the original jurisdiction of the United States district courts."<sup>84</sup>

The early success of Virginia's challenge in *Virginia v. Sebelius* serves as a fresh reminder that some declaratory judgments are not merely declaratory judgments; "[t]hey are ghosts that slay."<sup>85</sup> Before it is too late, this ghost should be exorcised.<sup>86</sup>

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<sup>84</sup> *Franchise Tax Bd. v. Construction Laborers Vacation Trust for So. Cal.*, 463 U.S. 1, 21-22 (1983).

<sup>85</sup> See Frankfurter, *supra* note \_\_\_, at 1008.

<sup>86</sup> See Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").