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INTRODUCTION

ECONOMIC ASPECTS OF HEALTH LAW

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Healthcare policy traverses the American political, social, and legal landscape. It raises obvious and important public-health issues such as access to quality medical care and individual autonomy over one's own treatment. It also implicates broader constitutional questions regarding the scope of congressional power and federalism, as federal and state governments seek to address public-health issues through various government programs and initiatives. A common thread throughout healthcare law and policy, however, is the economics of it all. On the one hand, government involvement in the provision of medical care and services is extraordinarily expensive and thus controversial, particularly in the current challenging economic environment. On the other, private actors encounter economic incentives and consequences that can influence them to act in ways that have a significant impact on public health.

Recent high-profile legal and political events demonstrate the pervasiveness of economics in our healthcare law and policy. In 2010, President Obama signed into law the controversial Patient Protection and Affordable Care Act (ACA).[1] The ACA is a complex and diverse piece of legislation but was designed at least in part to address the economics of healthcare. Indeed, much of the public debate and controversy surrounding the ACA pertained to its

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

ultimate cost to taxpayers and the economic sustainability of its inclusion of millions of new patients in publicly funded healthcare programs. Proponents of the ACA touted its ability to reduce the federal deficit as well as individual healthcare costs,[2] while opponents described it as instituting a heavy new burden on taxpayers and reducing consumer choice.[3]

The ACA ultimately became the subject of one of the most anticipated Supreme Court decisions in recent memory. In *National Federation of Independent Business v. Sebelius*,[4] the Court addressed the constitutionality of two of the most controversial provisions of the ACA, the "individual mandate"—the requirement that certain uninsured individuals purchase health insurance or pay the IRS for their failure to do so[5]—and the Act's financial incentives to states to participate in a significant expansion of the Medicaid program.[6] Much of the Court's rationale focused on economic questions and consequences. The individual mandate was ultimately upheld on the ground that it was a permissible federal tax within the meaning of Article I of the Constitution.[7] The spending provisions designed to encourage states to expand their Medicaid coverage were received less favorably by the Court, in part because of the sheer amount of federal money (both as an absolute value and as a percentage of state budgets) that the ACA threatened to withhold from states if they

2. Christina D. Romer, *Only the First Step in Containing Health Costs*, N.Y. Times, http://www.nytimes.com/2012/07/22/business/health-care-law-and-cost-containment-economic-view.html (July 21, 2012) (explaining that the ACA "is a great step forward. It is expected to expand health insurance coverage to more than [thirty] million uninsured Americans without increasing the deficit, and it makes an important start on reining in the rapid growth of healthcare costs").

3. Chris Conover, *How the Affordable Care Act Reduces Our Liberty*, Forbes.com, http://www.forbes.com/sites/chrisconover/2012/08/10/how-the-affordable-care-act-reduces-our-liberty/ (Aug. 10, 2012) (establishing that "more than one half trillion in new federal taxes" are associated with the ACA); *see id.* (stating that "[t]he contrast between the extraordinary freedom of choice we allow for food and the greatly restricted choices ACA will impose in medical care could not be more stark").

4. 132 S. Ct. 2566 (2012).

5. *See* 26 U.S.C. § 5000(A) (2006) (requiring individuals to maintain minimum essential coverage).

6. *See* 42 U.S.C. § 1396(c) (2006) (describing the operations of state plans).

7. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2598 (explaining that "[o]ur precedent demonstrates that Congress had the power to impose the exaction in [Section] 5000A under the taxing power, and that [Section] 5000A need not be read to do more than impose a tax. That is sufficient to sustain it").

failed to adopt the proposed Medicaid expansion.[8] Although this account of the Court's decision in *National Federation of Independent Business* is a gross oversimplification of the Court's reasoning and conclusions regarding the ACA's constitutionality, it nevertheless suffices to demonstrate the relevance of economic concerns to healthcare law and policy.

The power of the relationship between economics and healthcare has been confirmed yet again in the ongoing and heated political debate over how to avoid the impending "fiscal cliff."[9] Although the debate is far broader than healthcare, a recurring theme has been the balance between increasing government revenues through additional taxation and the reduction of federal spending.[10] The proposed spending cuts almost always focus on so-called entitlement programs, among the largest and most discussed of which are healthcare programs such as Medicare and Medicaid.[11] Quite apart from the effectiveness of those programs in meeting the country's healthcare needs, they are invoked as primary forces in an economic debate about the size, role, and efficacy of government. In short, economics and healthcare appear to be permanently intertwined as prominent features of the American legal and political landscape.

Hence the timeliness and import of this issue of the *Stetson Law Review*. The topic of the issue encompasses the entire range of healthcare law and policy issues, and the four primary submissions appear to take full advantage of that latitude, approaching the topic from what appears to be very different perspectives. That does not mean, however, that the articles are entirely unrelated from one another. Indeed, I would suggest that the articles

8. *See id.* at 2605 (noting that "[t]he threatened loss of over [ten] percent of a [s]tate's overall budget [via application of Section 1396c] . . . is economic dragooning that leaves the [s]tates with no real option but to acquiesce in the Medicaid expansion").

9. The Financial Times defines the term "fiscal cliff" as "the simultaneous expiry of tax breaks with the introduction of tax increases and spending cuts at the end of 2012, the cumulation of which could push the [United States] back into recession." Financial Times Lexicon, http://lexicon.ft.com/Term?term=fiscal-cliff (accessed Feb. 26, 2013).

10. *See* Dana Bash & Tom Cohen, *Fiscal Cliff Talks Still Hung up on Taxes*, CNN.com, http://www.cnn.com/2012/12/12/politics/fiscal-cliff/index.html (Dec. 13, 2012) (describing that one critical obstacle to the legislative avoidance of the fiscal cliff is the lack of "a balance between increased tax revenue and spending cuts").

11. *See id.* (noting the dispute between Democrats and Republicans over whether proposals to avoid the fiscal cliff included "serious spending cuts and reforms to entitlement programs such as Medicare, Medicaid[,] and Social Security").

in this issue each offer powerful commentary on the way in which economics affects the interaction of both private and public entities with the healthcare system. In the first article, Professor Marshall Kapp offers a thought-provoking critique of the "general philosophical and operational approach to health reform embodied in the Affordable Care Act."[12] More specifically, Professor Kapp argues that the statute's "supply-side" regulatory approach—its tendency to regulate healthcare "providers, suppliers, and insurers"—creates both economic and ethical infirmities in the Act that are better addressed through a more "robust healthcare marketplace."[13] He employs economic principles to argue for the benefits of a demand-side, consumer-driven healthcare regime[14] and also offers specific examples of the increased costs associated with the ACA.[15] Beyond Professor Kapp's contentions regarding the ACA's specific shortcomings, his article highlights the "philosophical and operational" relationship between economics and healthcare.[16]

The next article also addresses the Affordable Care Act, but it takes a far more pointed view. Professor Jeffrey Hammond views the ACA through the lens of healthcare fraud, which has become "one of the largest 'expenditures' of the federal Medicare program."[17] By shifting perspective in this way, his article provides interesting insight into some of the economic benefits of the legislation. It offers a comprehensive breakdown of the various ways in which the ACA offers greater protection for federal healthcare programs from fraud and abuse, including restricting provider enrollment[18] and expanding the potential reach or effectiveness of traditional anti-fraud tools such as the False Claims Act,[19] the

12. Marshall B. Kapp, *Health Reform and the Affordable Care Act: Not Really Trusting the Consumer*, 42 Stetson L. Rev. 9, 9 (2012).

13. *Id.* at 9–10.

14. *Id.* at 25–32.

15. *Id.* at 11–17.

16. *Id.* at 9.

17. Jeffrey B. Hammond, *What Exactly Is Healthcare Fraud after the Affordable Care Act?* 42 Stetson L. Rev. 35, 39 (2012).

18. *Id.* at 44–50.

19. *See* 31 U.S.C. §§ 3729–3733 (2006) (imposing liability on individuals and companies who defraud federal government programs); Hammond, *supra* n. 17, at 51–54 (explaining that the False Claims Act is the federal government's "fraud-combating weapon of choice").

Stark law,[20] and the Anti-Kickback Statute.[21] This in-depth view of the ACA's approaches to combatting fraud enables us to normatively evaluate those approaches and to think more critically about future strategies for limiting waste, fraud, and abuse in government healthcare programs. Although Professor Hammond expresses some misgivings about the wisdom of some of the ACA's specific reforms,[22] he lauds Congress for "showing the seriousness with which it combats fraud and the massive drain that [healthcare fraud] wreaks on the federal fisc by adroitly focusing its attention on enforcement."[23] Professor Hammond's article is an important look at a potentially underappreciated feature of the ACA, and one that directly addresses the economics of healthcare.

The third and fourth articles in the symposium look at constitutional issues that impact healthcare law and policy beyond the Affordable Care Act. In doing so, however, they preserve the focus on the interaction of economics and public health that permeates this issue of the *Law Review*. In Professor Hilary Buttrick's article on the constitutionality of requiring graphic warning labels on cigarette packaging, she highlights the challenging legal issues around a powerful economic tool in the promotion of public health—the regulation of commercial speech.[24] On June 22, 2011, the FDA enacted its Final Rule requiring the inclusion of certain graphic warning labels on all cigarette packaging.[25] The purpose of the labels is to "'depict[ ] the negative health consequences of smoking,'"[26] which "'kills an estimated 443,000 Americans each year.'"[27] Despite the pressing public-health concerns caused by cigarette smoking, the warning-label requirement raises difficult free speech issues, including the standard by which courts should

20. *See* 42 U.S.C. § 1395(nn) (2006) (placing limitations on specific physical referrals); Hammond, *supra* n. 17, at 54–60 (detailing the changes that Congress made to the Stark Law).

21. *See* 42 U.S.C. § 1320(a)–(7)(b) (2006) (excluding certain individuals and entities from participating in healthcare programs); Hammond, *supra* n. 17, at 60–69 (explaining the Anti-Kickback Statute is a criminal statute that combats fraud).

22. Hammond, *supra* n. 17, at 55–69.

23. *Id.* at 69.

24. Hilary G. Buttrick, *"You've Come a Long Way, Baby": Cigarettes, Graphic Warning Labels, and Balancing Consumer Protection and Commercial Free Speech*, 42 Stetson L. Rev. 71 (2012).

25. *Id.* at 74 (citing 76 Fed. Reg. 36628, 36628 (June 22, 2011)).

26. *Id.* at 73 (quoting 123 Stat. 1776, 1845 (June 22, 2009)).

27. *Id.* at 76 (quoting 76 Fed. Reg. at 36629).

review government action that requires private parties to engage in speech in a strictly commercial context.

Professor Buttrick's analysis highlights the current confusion over the appropriate standard of review to apply to government interference with product advertising and packaging.[28] It provides a helpful and insightful parsing of the relevant caselaw and identifies important distinctions that could lead to a more transparent and consistent standard. More specifically, Professor Buttrick examines the existing circuit split over graphic warning labels[29] and contends that courts should "examine . . . the extent to which the government's purpose is relevant to the level of scrutiny," namely to determine whether graphic warning labels are designed to "prevent[ ] consumer deception" or for other, more persuasive purposes such as discouraging smoking.[30] She goes on to argue that truth seeking in the form of labels that reduce consumer confusion or deception deserves more latitude under the First Amendment than mandated speech designed to convey a governmental preference. In addition to bringing some clarity to an important individual rights issue under the First Amendment, Professor Buttrick's article reminds us that economic influences such as the regulation of commercial packaging can become important features in the pursuit of healthcare policy outcomes.

The fourth article in this issue addresses the economics of healthcare through the constitutional right to a jury trial. R. Jason Richards' article outlines the question of how statutory damages limits on medical malpractice claims impact the right to trial by jury.[31] Florida's statutory limit was enacted to combat a perceived economic problem with the provision of quality healthcare—a "dramatic increase in the cost of medical malpractice insurance."[32] Mr. Richards' analysis focuses on the constitutional ramifications of that economic decision in Florida, but it has direct implications for each of the forty-seven states that recognize a constitutional right to jury trial. It begins by addressing the difficult interpretive question of the scope of the

28. *Id.* at 78–89.
29. *Id.* at 89–103.
30. *Id.* at 109–110.
31. R. Jason Richards, *Capping Non-Economic Medical Malpractice Damages: How the Florida Supreme Court Should Decide the Issue*, 42 Stetson L. Rev. 113 (2012).
32. *Id.* at 116.

right to trial by jury in Florida, concluding that the constitutional right applies, much like the right articulated by the Seventh Amendment to the United States Constitution,[33] "to those proceedings where the right existed when the State's Constitution was adopted."[34] Mr. Richards then argues that the right to jury trial is fundamental and that medical negligence claims not only fit within the class of claims that are guaranteed that fundamental right in Florida,[35] but also that damages limits on those claims cannot satisfy the strict scrutiny reserved for alleged violations of such a right.[36] In the process of making the case against Florida's damages limits, however, Mr. Richards draws analogies to other jurisdictions that help demonstrate the broader national significance of the issue, as well as yet another means by which economic considerations impact healthcare law and policy.[37]

The sheer magnitude of the American healthcare system and the associated government programs preordains that healthcare issues will span all manner of public policy concerns. Healthcare is a prominent feature of the social, political, and legal fabric of the nation, and its influence in these areas shows no signs of abating. For that reason alone, healthcare is always a worthy subject of scholarly discussion as our society seeks new and better ways to provide its members with quality, affordable, and ethical medical services. This symposium issue of *Stetson Law Review* represents another step forward in that quest. All of the articles in this issue tackle highly relevant and controversial questions of healthcare law and policy with admirable zeal and scholarly rigor. They also share the common cause of examining various aspects of healthcare with an eye toward its economic influences and ramifications. As the country pursues healthcare reform in the context of a weakened economy, these questions become of para-

33. U.S. Const. amend. VII (stating that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law").

34. Richards, *supra* n. 31, at 122.

35. *Id.* at 120–124.

36. *Id.* at 131–136.

37. *See id.* at 126–131 (discussing cases from the highest courts in Oregon, Washington, Georgia, and Missouri addressing the question of whether damages limits violate the constitutional right to jury trial in those states).

mount importance to the future direction and health of our democracy.