POPULAR CONSTITUTIONALISM AND THE UNDERENFORCEMENT PROBLEM: THE CASE OF THE NATIONAL HEALTHCARE LAW

ERNEST A. YOUNG*

I
INTRODUCTION

Contemporary constitutional theory draws an important conceptual distinction between the Constitution itself and the doctrinal rules that the courts employ to enforce it.[1] Constitutional doctrine implements constitutional principles—often by developing doctrinal "tests" that help courts determine when some other actor has acted in a constitutionally impermissible way. The "tiers of scrutiny" that dominate modern equal protection doctrine,[2] for example, do not appear in the text of the Fourteenth Amendment; rather, they are judicial constructs that help courts implement the Amendment's requirements in particular circumstances. Courts fashioning such doctrine must pay attention not only to the meaning of the underlying constitutional principle, but also to various institutional factors, including inherent institutional constraints on judicial decisionmaking that stem from the nature of judicial legitimacy, the institutional capacities of courts, and the relationship between courts and other actors.

The distinction between principle and doctrine often gives rise to a gap between meaning and enforcement.[3] Sometimes this results in *over*enforcement:

Copyright © 2012 by Ernest A. Young.

This article is also available at http://lcp.law.duke.edu/.

* Alston & Bird Professor, Duke Law School. This essay has been prepared for the Duke Law School Program in Public Law's conference on "Constitutional Challenges to the Affordable Care Act: Ideas from the Academy." I am grateful to the Program in Public Law for sponsoring the conference and inviting me to participate, to Jack Balkin, Guy Charles, David Hunter, Neil Siegel, and especially Bryan Leitch for thoughtful comments on the manuscript, and to Christine Paquin for valuable research assistance.

1. *See, e.g.*, RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION (2001); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–28 (2000).

2. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439–42 (1985).

3. *See* H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 234 (2011) ("There is . . . a gap between what the direct command of the Constitution literally requires . . . and what the Court deems appropriate or even essential in the enforcement of those requirements. It is the existence of this gap between constitutional command and judicial rule, in a sense, that defines constitutional doctrine."); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1741–48 (2005).

For prophylactic reasons, courts may enforce a constitutional principle more broadly than its strict meaning requires. The overbreadth doctrine in First Amendment law, for instance, allows courts to strike down laws even though the challenger's speech is unprotected, simply because the law might also be applied to protected speech.[4] The effect is to allow the constitutional prohibition to sweep more broadly than its conceptual scope—to protect, functionally speaking, unprotected as well as protected speech.[5] More often, courts *under*enforce constitutional norms: As Larry Sager has explained in a pathbreaking article, sometimes "the Court, because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries."[6] Courts do this for institutional reasons rather than for analytical ones; hence, when a constitutional norm is underenforced, its doctrinal application simply does not exhaust the conceptual meaning of the underlying constitutional principle.[7]

For a variety of reasons, the judge-made doctrine that enforces constitutional limits on national authority tends to underenforce those limits—sometimes radically so. That underenforcement problem is at center stage in the debate about the national healthcare law. In that debate, the "smart money" is confident that the Patient Protection and Affordable Care Act (ACA)[8] is constitutional—that it is, in fact, an easy case. Laurence Tribe, who practically *defines* the "smart money" in constitutional law, has said that "this law's constitutionality is open and shut."[9] Similarly, Erwin Chemerinsky's contribution to this conference insists that "the federal healthcare law is constitutional. It is not even a close question."[10]

---

4. *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1593 (2010) (Alito, J., dissenting) ("Because an overly broad law may deter constitutionally protected speech, the overbreadth doctrine allows a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others.").

5. One may also think of warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), in this way. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.").

6. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978); *see also* Powell, *supra* note 3, at 242–45.

7. Courts are not the only institutions that create a gap between the meaning of the Constitution and their enforcement of it. For instance, the War Powers Resolution purports to be an interpretation by Congress of the allocation of war powers between Congress and the President. But that statute arguably both overenforces some limits on the President's authority (for example, by applying to Presidential actions that do not amount to an act of war) and underenforces others (by allowing the President to initiate hostilities and continue them for sixty days without congressional approval). Presumably these gaps have their origins in certain institutional limitations of the Congress in dealing with crises that give rise to military action.

8. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

9. Laurence Tribe, *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 7, 2011, at A27. Much of the present author's knowledge of constitutional law, such as it is, consists in what he learned from Professor Tribe in law school.

10. Erwin Chemerinsky, *Political Ideology and Constitutional Decision-Making: The Coming Example of the Affordable Care Act*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 3.

These assessments, and others like them,[11] rest not so much on what the Constitution means conceptually but rather on what the Supreme Court has said about it—particularly since 1937. That, of course, is the date of the Court's famous "switch in time," in which the Court acquiesced in the development of the national welfare state by signaling that it would no longer vigorously enforce principles of economic liberty or limits on national power.[12] Dean Chemerinsky, for example, is careful to acknowledge that the ACA's constitutionality is easy "under existing doctrines."[13] He is probably correct: Current doctrine gives contemporary lawyers good reason to be confident that the Court will uphold the ACA because that doctrine is extremely deferential to Congress. Federalism is, in other words, underenforced in current law, and if that underenforcement continues, there is every reason to expect the ACA to survive current challenges to its constitutionality.

What I want to resist in this essay, however, is any supposition that the current underenforcement of federalism or economic liberty is somehow natural, inevitable, or necessarily correct. To see why, consider the state of constitutional law circa, say, 1920. At that time, Supreme Court doctrine enforced both federalism-based limitations on national authority and due process protections for freedom of contract much more aggressively than it does today.[14] At the same time, it is fair to say that extant doctrine underenforced the Equal Protection Clause's principle of racial equality,[15] the Establishment Clause's prohibition on public sponsorship of religious messages,[16] and the First Amendment's protection for speech critical of the government.[17] Today, of course, it would practically be unthinkable to defer to government action that trenched on these constitutional principles—but it would have been virtually

11. *See, e.g.*, Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1 (2011), http://yalelawjournal.org/2011/04/26/koppelman.html; Peter J. Smith, *Federalism*, Lochner, *and the Individual Mandate*, 91 B.U. L. REV. 1723 (2011).

12. *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392–400 (1937) (upholding state minimum wage legislation against a freedom of contract challenge); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34–46 (1937) (upholding provisions of the National Labor Relations Act against a Commerce Clause challenge); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1232 (1994) ("The post-New Deal conception of the national government has not changed one iota, nor even been a serious subject of discussion, since the Revolution of 1937.").

13. Chemerinsky, *supra* note 10, at 3.

14. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (striking down a New York law limiting the hours of bakers on freedom of contract grounds); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (striking down a Louisiana law regulating insurance on freedom of contract grounds); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (limiting Congress's Commerce Clause authority to matters that directly affected buying and selling across state lines).

15. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding a law providing for "separate but equal" accommodations for white and black persons on trains).

16. Engel v. Vitale, 370 U.S. 421 (1962), did not strike down the New York Regent's Prayer until 1962.

17. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (upholding Schenck's conviction under the Espionage Act of 1917 for criticizing the military draft, notwithstanding his First Amendment challenge).

unthinkable in 1920 to defer to the government on basic questions of federalism and economic liberty. My point, of course, is that which constitutional principles get underenforced changes over time.

The interesting question is why and how these changes occur. I argue here that such changes have a lot to do with the notion of "thinkability" mentioned in the last paragraph; in other words, the Court's perception of which institutional constraints warrant underenforcement of which constitutional principles has a lot to do with what is going on in the broader society. One obvious change between 1920 and today is that the public has come to accept and even expect an extensive role for government generally—and the national government in particular—in regulating the economy. Part of the story thus consists in the commonplace observation that changes in public attitudes about government tend to result in changes in constitutional doctrine.[18]

There is a second aspect to the story, however. That aspect focuses on public perceptions of the status and role of the courts—particularly the U.S. Supreme Court. Public opinion evolves not only with respect to matters of policy—for example, the appropriate level of government regulation and social provision—but also with respect to the role of judicial review itself. Because doctrinal underenforcement consists in the courts' willingness to defer constitutional judgments to other actors, broad trends in public opinion influence not only the weight that the courts give to other political institutions but also the confidence with which the courts approach their own tasks. Although the Supreme Court started out in a precarious institutional position with uncertain popular legitimacy, over time it has solidified its role and achieved an impressive level of "diffuse support"—that is, support that does not depend on public agreement with the merits of particular decisions.[19] To the extent that judicial review seems accepted, respected, even desired, we can expect the Court to defer less to Congress, the President, or state institutions on particular issues.

These observations shed some light, I hope, on the extent to which we can expect the current underenforcement of federalism-based limitations on national power (and perhaps even of economic liberties under the Due Process Clause) to change. Broad trends in public opinion—including but not limited to the Tea Party movement in current politics—have questioned the national regulatory state. At the same time, state governments, which were once identified with ineffectual efforts to ameliorate the Depression and the oppression of African Americans, now enjoy a resurgence in public confidence. And the Court itself has recovered its self-confidence and prestige since the nadir of court-packing and now enjoys a reputation not only as the primary

18. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 5–12 (2009) (documenting the shift during the New Deal period in public expectations of government); *id.* at 14 (concluding that "over time, as Americans have the opportunity to think through constitutional issues, Supreme Court decisions tend to converge with the considered judgment of the American people").

19. *See id.* at 12–16.

guardian of our liberties but as an important arbiter of government structure as well. It is not inconceivable—although perhaps not yet likely—that the confluence of these tendencies will cause the Court to reconsider the underenforcement of federalism.

Part II of this essay examines the constitutional case against the ACA, as well as the extent to which the weakness of that case may be attributed to the underenforcement of the relevant constitutional principles. Part III then considers the theory of doctrinal underenforcement and its historical contingency. Finally, Part IV examines the relationship between underenforcement and popular constitutionalism in the debate over the national healthcare law.

II
UNDERENFORCED CONSTITUTIONAL NORMS IN THE NATIONAL HEALTHCARE DEBATE

If the ACA survives constitutional challenge, it will not be because the law is clearly consistent with constitutional norms.[20] The Act's expansion of federal regulatory authority, its imposition of regulatory obligations upon state governments, and its intrusion on individual freedom of choice are all unprecedented, if not in principle then in scope or magnitude, in our history. In other eras—not just the Founding, but the early parts of the last century as well—those features would most likely have been seen as flatly inconsistent with the constitutional role of government in general and the limited role of the national government in particular. This is not to say that the ACA is clearly *un*constitutional either, but rather to say that the conceptual meaning of the relevant constitutional concepts is contested, and in fact has been so for much of our history. And what makes challenging the ACA an admittedly uphill battle today is that current constitutional *doctrine* underenforces all of the relevant concepts.

Legal controversy has centered primarily (although not exclusively) on the Act's "individual mandate," which requires virtually every American to purchase and maintain a minimum level of health insurance coverage.[21] It is not altogether clear whether this is because the individual mandate is the Act's most constitutionally vulnerable provision (it may not be), or because it is the provision most readily understood by non-health law experts and its intrusion on individual choice resonates most broadly with the body politic. As I will discuss later on, the lawsuits challenging the Act should be understood not simply as litigation seeking to achieve a particular legal result but also as

20. *Cf.* Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581, 583 (2010) ("There are three ways to analyze whether a law is constitutional or not. Does it conflict with what the Constitution says? Does it conflict with what the Supreme Court has said? Are there five votes for a particular result? Unless we are clear about which sense of 'unconstitutional' we are using, we are likely to talk past each other.").

21. 26 U.S.C. § 5000A(b)(1) (West 2011).

vehicles for articulating a particular—and perhaps divergent—conception of constitutional meaning. In any event, I will focus here on the individual mandate although I will have a bit to say about the Act's conditional spending provisions as well.

A. The Commerce Clause

The Commerce Clause restricts Congress's regulatory authority to "commerce . . . among the several states."[22] In *Gibbons v. Ogden*, John Marshall insisted that "[t]he enumeration [of federal powers] presupposes something not enumerated,"[23] and the Tenth Amendment makes this clear by providing that every power not granted to the national government is "reserved" to the States. Article I thus restricts Congress's authority along two dimensions: many activities do not involve "commerce,"[24] and not all commerce is "among the several states."[25] And in fact for the greater part of our history, constitutional doctrine distinguished sharply between "commerce" and other activities that do not involve buying and selling, such as "agriculture" or "manufacturing,"[26] and between interstate and intrastate commerce.[27] This model of federalism, which relied on the Court to define and police separate and exclusive spheres of state and national authority, was generally known as "dual federalism."[28]

The courts, however, found these distinctions much more indeterminate in practice than they might appear in theory. Economically speaking, activities like manufacturing or consumption of goods are closely tied to the buying and selling of them, and local markets had become closely integrated with national and international ones by at least the early twentieth century. As the size and responsibilities of the national government expanded in response to the Depression, the Court found itself under increasing pressure to recognize these realities. Although disagreement persists as to whether the Court ultimately changed course because of these conceptual difficulties or as the result of more overt political pressure in the form of FDR's "court-packing" plan,[29] what is

22. U.S. CONST. art. I, § 8.

23. 22 U.S. (9 Wheat.) 1, 195 (1824).

24. *See id.* at 204–06 (distinguishing Congress's power over commerce from the reserved power to enact quarantine and health laws).

25. *See id.* at 195 ("The completely internal commerce of a State . . . may be considered as reserved for the State itself.").

26. United States v. E.C. Knight, 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not a part of it.").

27. *See id.* at 15–16 (distinguishing between "direct" and "indirect" effects on interstate commerce).

28. *See, e.g.*, ALPHEUS THOMAS MASON, *The Role of the Court*, *in* FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE 8, 24–25 (Valerie A. Earle ed., 1968); *see also* ANTHONY J. BELLIA, JR., FEDERALISM 183 (2011) ("The *dual federalism* paradigm understands federal and state governments to operate in different spheres of authority.").

29. *Compare, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 175 (1960) (ascribing the switch in the Court's stance to a combination of FDR's sweeping 1936 electoral victory, the outbreak of a new wave of labor disputes, and the court-packing plan), *with* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 6

clear is that the Court ultimately abandoned this "dual federalism" regime.[30]

The modern doctrine abandons both of the potential limiting principles noted above.[31] It eschews any effort to confine "commerce" to buying and selling, notwithstanding strong evidence that this was the original understanding of the term at the Founding. Rather, commerce now includes all "economic activity."[32] Similarly, the modern cases assume the complete integration of the national market, having abandoned any distinction between "inter-" and "intra-"state economic activity. Congress may reach any economic activity that has a "substantial effect" on the national economy, and the criterion is evaluated by considering the aggregate effect of all similar activity.[33] Moreover, Congress's judgment on that question is subject only to rational basis review.[34] The result is not only an easy standard to meet, but deference to Congress as to whether it *has* been met.

This generous standard is not all. In the rare instances in which a regulated activity is not "commercial" or "economic" in nature, Congress may nonetheless regulate if the regulation is "necessary and proper" to a broader scheme of commercial regulation. Hence, in *Gonzales v. Raich*, Justice Scalia said that even if consumption of homegrown marijuana for medicinal purposes did not amount to commercial activity, Congress could still regulate it because failure to do so would make Congress's broader effort to regulate the recreational marijuana market more difficult to enforce.[35] Necessity, moreover, has traditionally been evaluated under the deferential standard of *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[36] Again, the doctrine entails a broad

(1988) (arguing that the conventional account overlooks the critical role of doctrinal developments, internal to the law, that made the pre-1937 jurisprudence unsustainable).

30. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 17 (1950) (observing that, by 1950, the "entire system of constitutional interpretation" embodied in dual federalism lay "in ruins").

31. For a survey of alternate federalism models that remain viable after the demise of dual federalism, *see* Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, *in* NOMOS (James Fleming & Jacob Levy eds.) (forthcoming 2012).

32. *See* United States v. Morrison, 529 U.S. 598, 613 (2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

33. Wickard v. Filburn, 317 U.S. 111, 125–29 (1942).

34. United States v. Lopez, 514 U.S. 549, 557 (1995).

35. 545 U.S. 1, 34–42 (2005) (Scalia, J., concurring in the judgment).

36. 17 U.S. (4 Wheat.) 316, 421 (1819). The Court did suggest some willingness to tweak the *McCulloch* standard in its most recent "necessary and proper" case, *United States v. Comstock*, 130 S. Ct. 1949 (2010). That case upheld the federal civil commitment statute for mentally ill, sexually dangerous federal prisoners as necessary and proper to the enforcement of federal criminal laws enacted pursuant to Congress's various enumerated powers. The majority's careful consideration of the commitment provision's "necessity," however, was hardly the rubber stamp that we have come to expect under *McCulloch*. Moreover, Justice Kennedy—who might as well have a "5" tattooed on his forehead in federalism cases—wrote separately to insist that the *McCulloch* standard should not be

substantive rule, augmented by judicial deference to the political branches on the question whether the rule has been satisfied.[37]

It is hard to see how the plaintiffs can successfully challenge the ACA—or any other federal statute—under these rules. In *United States v. Lopez*[38] and *United States v. Morrison*,[39] the Rehnquist Court struck down two federal statutes on the ground that they exceeded Congress's commerce power. But in each case, it was plausible to say that if those statutes fell within Congress's commerce authority, no conceivable statute would fall outside it. The Court was unwilling, in other words, to read the Commerce Clause out of the Constitution entirely. But the Court has generally been reluctant to go further and strike important federal statutes so long as any conceivable limiting principle would remain.[40]

It is not clear that the ACA has this "last straw" quality that seems to have been so essential in *Lopez* and *Morrison*. For one thing, proponents of the ACA can always point to the Gun Free School Zones Act and the Violence Against Women Act as federal laws that would remain unconstitutional even if the ACA is upheld.[41] But it should also be clear that the contemporary doctrine underenforces the underlying constitutional principles at every turn. The Court defers to the political branches on whether activity is "commerce," whether it takes place "among the several states," and—in the rare case where these capacious definitions cannot be met—whether noncommercial regulation is nonetheless "necessary and proper." The reasons for this deference have to do not only with the indeterminacy of the underlying distinctions, but also with the Court's historical experience. The Court's failure to defer on these questions, after all, is precisely what brought about the painful confrontation with the political branches in the 1930s.[42] The result, however, is that very little scope

equated with the very lenient form of "rational basis" review applied in privacy cases not involving fundamental rights. *See id.* at 1966–68 (Kennedy, J., concurring in the judgment); *see also id.* at 1970 (Alito, J., concurring in the judgment) ("Although the term 'necessary' does not mean 'absolutely necessary' or indispensable, the term requires an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress. . . . And it is an obligation of this Court to enforce compliance with that limitation.") (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 415).

37. Although I have criticized aspects of this doctrine elsewhere, *see, e.g.*, Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after* Gonzales v Raich, 2005 SUP. CT. REV. 1, 21–37, I have generally praised the notion that the national and state governments exercise a largely concurrent jurisdiction, *see* Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001). The point is simply that current doctrine limits national power far less strictly than dual federalism did.

38. 514 U.S. 549 (1995).

39. 529 U.S. 598 (2000).

40. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding the Controlled Substances Act even as applied to medicinal use of homegrown marijuana).

41. *See, e.g.*, Robert D. Cooter & Neil Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 135 (2010) (suggesting that *Lopez* and *Morrison* were rightly decided but that the ACA is more defensible than the statutes struck down in those cases).

42. *See, e.g.*, *Lopez*, 514 U.S. at 604 (Souter, J., dissenting) ("The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive

remains for judicial enforcement of the underlying constitutional norms.

B. The Individual Rights Claim

At its heart, the constitutional objection to the individual mandate sounds in individual liberty. Senator John Kyl of Arizona, for example, describes the mandate as "a stunning assault on liberty."[43] Randy Barnett—the most prominent legal academic critic of the individual mandate—describes the ultimate problem with the provision as "commandeering the people."[44] "Unless they voluntarily choose to engage in activity that is within Congress's power to regulate or prohibit," he explains, "the American people retain their sovereign power to refrain from entering into contracts with private parties."[45]

A less lawyerly version of the argument lies behind the famous "broccoli question": "If Congress can order you to buy health insurance, why can't it order you to buy (and eat!) broccoli?"[46] The implication is surely not that making you eat broccoli would be OK as long as a *state* does it. Similarly, one suspects that the visceral reaction to being forced to purchase health insurance would be similar even if the mandate came from a state legislature rather than Congress.[47] The objection must therefore rest on an individual right secured

---

conception of judicial review in derogation of congressional commerce power.").

43. Jeffrey Young, *Kyl: Health bill a 'stunning assault on liberty'*, THE HILL, Sept. 22, 2009, http://thehill.com/blogs/blog-briefing-room/news/59761-kyl-health-bill-a-stunning-assault-on-liberty-.

44. Barnett, *supra* note 20, at 581.

45. *Id.* at 634. This point comes at the end of a lengthy and thoughtful exegesis of more traditional arguments under the Commerce and Taxing powers, but I think it is fair to say that this individually based argument best captures the intuitive heart of Professor Barnett's objection to the mandate. *See id.* at 587–620.

46. Daniel Fisher, *Obamacare Judges Must Answer The "Broccoli Question"*, FORBES, Nov. 18, 2011, http://www.forbes.com/sites/danielfisher/2011/11/18/obamacare-judges-must-answer-the-broccoli-question/. Your humble author was once nearly thrown out of a Federalist Society gathering for allowing that Commerce Clause doctrine might *not* prevent Congress from ordering all Americans to eat broccoli, suggesting instead that any constitutional challenge to such a law would better rely on substantive due process, and admitting that current doctrine might not support *that* challenge either. For a similar conclusion, from someone that no one would dare throw out of a Federalist Society gathering, see *The Constitutionality of the Affordable Care Act: Hearing Before the S. Com. on the Judiciary*, 112th Cong. (2011) (statement of Charles Fried, Professor of Law, Harvard Law School).

47. Consider, for example, a legislative proposal in South Dakota to mandate that individuals purchase a firearm. The proposal is meant to dramatize the illegitimacy of forcing individuals to purchase health insurance, and the proponents appear to see no critical difference in the fact that this proposal comes from a state government, not from Congress. *See South Dakota Lawmakers Propose Mandating Gun Ownership—To Make Point About Health Law*, FOX NEWS (Feb. 1, 2011), http://www.foxnews.com/politics/2011/02/01/sd-lawmakers-propose-mandating-gun-ownership-make-point-health-law/.

Not everyone shares this view, however. For example, one of the leading articulations of Tea Party objections to the individual mandate distinguishes sharply between the ACA's mandate and governmental mandates requiring individuals to buy auto insurance:

> But is mandatory car insurance really analogous to mandatory health insurance under Obamacare? No, for this simple reason: the sovereign mandating car insurance is the state, not federal, government. And . . . the principle of limited government is a principle that applies to the federal government, not the state.

ELIZABETH PRICE FOLEY, THE TEA PARTY: THREE PRINCIPLES, 37 (2012). Professor Foley goes on

against *all* governments.[48]

This ultimate grounding in individual rights explains the somewhat peculiar character of the Commerce Clause arguments in these challenges, which focus on a distinction between action and inaction.[49] While it is true that no previous case upholding federal legislation under the Commerce Clause has involved inaction, as opposed to action, it is also true that none of those opinions actually focused on the distinction. When Congress regulates action, however, it almost always leaves the individual the option to avoid participating in the federal obligation simply by refraining from engaging in the activity; a law requiring affirmative conduct thus *feels* like more of an imposition—however much we may pooh-pooh any action–inaction distinction as "formalistic."[50] This intuition comes through fairly clearly in the Eleventh Circuit's opinion striking down the ACA under the Commerce Clause. The gist of the opinion is that if the ACA is constitutional, then there is no meaningful limit on Congress's power, but the apparent reason that the ACA has this "last straw" quality is not so much the noneconomic nature of health insurance, but rather the fact that the ACA requires individuals to participate in an economic transaction against their will.[51]

The obvious constitutional home for this sort of objection is the old doctrine of "freedom of contract"—or, more precisely, freedom *not* to contract. In *Meyer v. Nebraska*, for example, the Court said that "liberty" in the Due Process Clause involves

---

to locate auto insurance mandates within the general police power, which she sees as one of the "numerous and indefinite" powers that Madison held to be reserved to the states. *See id*. From this point of view, there would be no obvious objection to *state* laws that required individuals to purchase health insurance, acquire firearms, or—heaven forbid—eat broccoli.

48. For an acknowledgement by one of the ACA's defenders that at *some* point government interference with individual health choices would run afoul of individual rights, *see* Michael Dorf, *The Federalism Objection to the Individual Mandate*, DORF ON LAW (Nov. 3, 2009), http://www.dorfonlaw.org/2009/11/federalism-objection-to-individual.html (recognizing that a "requirement to see a doctor would come close, in my view, to violating the common law right—assumed to be a constitutional right in the *Cruzan* case—to refuse medical treatment," and that "an order to exercise does appear to go too far"). The important point for my purposes is that these examples differ from the individual mandate in degree, but not in kind.

49. *See, e.g.*, Brief for Private Respondents at 32–33, Department of Health and Human Services v. State of Florida et. al. (No. 11-398) (U.S. Feb. 6, 2012); *see also* FOLEY, *supra* note 47 at 47–50; Barnett, *supra* note 20, at 604–05.

50. *See, e.g.*, Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Individual Mandate*, 75 LAW & CONTEMP. PROBS., no. 3, 2012, at 43 (criticizing the distinction between inactivity and activity as "formal" and "arbitrary"); *cf.* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting) (decrying "attempts to draw a sharp and rigid line between action and inaction" as "formalistic reasoning [that] has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment"); THE BHAGAVAD GITA AS IT IS, CHAPTER 4, TEXT 18, http://www.asitis.com/4/18.html (last visited Nov. 6, 2011) ("One who sees inaction in action, and action in inaction, is intelligent among men.").

51. *Compare, e.g.*, United States v. Morrison, 529 U.S. 598, 613 (2000) (holding that gender-motivated violence is not a commercial activity and therefore not regulable under the Commerce Clause), *with* Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1292–93 (11th Cir. 2011) ("Although any decision not to purchase a good or service entails commercial consequences, this does not warrant the facile conclusion that Congress may therefore regulate these decisions pursuant to the Commerce Clause.").

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[52]

The right to make one's own choices about how to guard against sickness and injury fits comfortably within this rubric.

Except, of course, that this doctrine is dead, dead, dead. The best cite for a doctrine of freedom not to contract would be *Lochner v. New York*,[53] and while *Lochner* still has its defenders,[54] the Justices of the United States Supreme Court are not among them. The Court has generally not actually disavowed the notion that the Constitution protects economic liberty, and the federal courts remain open to hear claims that those liberties have been infringed.[55] *Meyer* itself, moreover, is still good law, although it is generally now misread as having enforced a purely personal right.[56] Even the traditional "double standard" between economic and personal rights may well be breaking down.[57] But for now, current doctrine still reviews most economic liberty claims under a standard so deferential as to negate any hope of a successful challenge. Once again, contemporary doctrine at once affirms that a constitutional principle of economic liberty exists in the Constitution but defers to political actors the question whether that principle has been violated in any particular case. Freedom of contract, in other words, is so underenforced that the challengers of the ACA largely refrain from explicitly invoking it.[58]

C. The Spending Clause

The final avenue of challenge, which I consider only briefly in this essay, concerns the extensive provisions of the ACA that require implementation by state governments. States must establish "healthcare exchanges," for example,

---

52. 262 U.S. 390, 399 (1923).

53. 198 U.S. 45 (1905) (striking down a New York law regulating the hours of bakers on the ground that it unreasonably restricted the bakers' freedom to contract).

54. *See, e.g.*, DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

55. *See, e.g.*, Eastern Enters. v. Apfel, 524 U.S. 498 (1998) (debating whether economic substantive due process barred retroactive imposition of liability on employers for healthcare benefits to former employees).

56. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 77 (2000) (relying on *Meyer*, but for the narrow proposition that the Due Process Clause protects "a parent's interests in the nurture, upbringing, companionship, care, and custody of children"). As the quotation accompanying note 52, *supra*, indicates, *Meyer* located these interests within a much broader freedom of self-determination that included economic matters like choosing an occupation and making contracts.

57. *See, e.g.*, Sorrell v. IMS Health, Inc., 131 S. Ct. 2653 (2011) (applying strict scrutiny under the First Amendment to strike down an economic regulation of the sale of medical information in the healthcare industry).

58. The challenges in the Florida litigation, for example, did not appeal the district court's dismissal of their substantive due process claim. *See* Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1292 n.93 (11th Cir. 2011).

that meet a variety of federal requirements, and they must also implement a significantly expanded version of Medicaid.[59] The Act does not, however, simply *mandate* that States participate in this way; any such requirement would run afoul of the anti-commandeering doctrine, which holds that Congress may not require state legislatures or executive officials to implement a federal program.[60] Rather, it conditions significant grants of federal funds on the States' compliance with the ACA's requirements.

As the Court has made clear, the Spending Clause limits Congress's power to impose such requirements. If it did not, then the national government could use its vast resources and ability to preempt the states' revenue base to end-run virtually any constitutional protection for state sovereignty.[61] Contemporary doctrine thus holds that conditions on the states' receipt of federal funds must (1) promote the general welfare, (2) be clearly stated, (3) be "germane" to the purpose of the underlying federal funding, (4) not require the recipient to take action that would be unconstitutional for it to take, and (5) leave the states an actual choice as to whether or not to accept the funds—that is, not be *coercive*.[62] The Spending Clause challenge to the ACA relies primarily on this fifth and last prong of the *Dole* test—that is, it argues that the amounts of money at stake are so large that the states have no real alternative to participating in the national program.[63]

The problem, of course, is that this constraint is also an underenforced constitutional norm. The Supreme Court has found a federally-imposed condition unconstitutionally coercive exactly once: The federal Low-Level Radioactive Waste Policy Amendments Act of 1985 invited state governments to legislate in various ways to provide for disposal of radioactive wastes; if they did not, the ultimate sanction was that a State would have to "take title" to the wastes generated within its borders, thereby incurring any liability for the impacts of unsafe disposal.[64] The Court determined that the choice whether to legislate according to federal requirements or "take title" to all the radioactive waste was not a real choice at all; the condition, in other words, was coercive and therefore had to be treated as an outright requirement (which was

59. *See, e.g.*, FOLEY, *supra* note 47, at 70 ("The Florida Obamacare lawsuits assert that many provisions of health reform commandeer state officials. For example, states are required to collect data on the average risk of health insurance policies and assess a penalty (or reward) when insurers exceed (or undercut) the average."). Related arguments emphasize the spending obligations imposed by the Act. *See id.* ("[States] also argue that, because expanding Medicaid eligibility to 133 percent of the federal poverty level dramatically increases costs of running a Medicaid program, states are effectively forced to devote billions more dollars at a time when state budgets are stretched to capacity.").

60. *See* Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 178 (1992).

61. *See, e.g.*, Lynn A. Baker, *Conditional Spending after* Lopez, 95 COLUM. L. REV. 1911 (1995).

62. South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

63. *See, e.g.*, Amended Complaint, State of Florida, et al., v. U.S. Department of Health & Human Services, at 27 (May 14, 2010).

64. *New York*, 505 U.S. at 153–54.

unconstitutional because it "commandeered" the state legislature).[65] But the "take title" provision invalidated in *New York* is so unusual as to virtually prove the rule that more conventional spending conditions are unlikely to be found coercive. Even the Eleventh Circuit, which struck down the individual mandate, upheld the ACA's requirements on the states against the plaintiffs' Spending Clause challenge.[66] As Elizabeth Foley has acknowledged, "[c]oercion claims aren't getting any traction for the simple reason that the Supreme Court in *Dole* provided no guidance about how to know when federal strings cross the line from encouragement to coercion."[67] In the absence of a determinate standard, courts have chosen simply to back off.

D. Federalism and Economic Liberty

Before analyzing the underenforcement problem in more depth, I want to take a moment to discuss how the arguments just canvassed interact. Several of the ACA's defenders have noted that the heart of the constitutional objection to the individual mandate—and in particular its intuitive appeal to many laypeople—rests on conceptions of individual economic liberty, rather than federalism. Those defenders seem to think that this fact presents a major problem for the ACA's critics. As Peter Smith puts it, "if the problem with the individual mandate is that it violates a libertarian ideal, then federalism is an inappropriate constitutional framework in which to consider it."[68]

This objection overlooks something fundamental about the role of federalism in our constitutional system. As Ann Althouse has noted, "federalism . . . can protect constitutional rights better than the direct assertion of claims based on those rights."[69] It is easy to identify examples in which federalism-based limits have been asserted—sometimes successfully, sometimes not—for the purpose of protecting conceptions of individual liberty that would have been difficult to vindicate directly. Professor Althouse focuses on two instances involving the anti-commandeering doctrine. In *Printz v. United States*[70] itself, that doctrine absolved local law enforcement of the obligation to enforce federal gun control laws, thereby effectively protecting the right to bear arms well before *District of Columbia v. Heller*[71] made it respectable to assert Second Amendment claims directly. Likewise, several state and local governments forbade their officials to cooperate in the enforcement of the USA PATRIOT Act[72] because those governments believed various aspects of the Act to violate

65. *See id.* at 174–77 (discussing this provision).

66. *See* Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1262–68 (11th Cir. 2011).

67. FOLEY, *supra* note 47, at 73–74.

68. Smith, *supra* note 11, at 1726.

69. Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1274 (2004).

70. 521 U.S. 898 (1997).

71. 554 U.S. 570 (2008).

72. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

individual rights against unreasonable searches and seizures as well as antidiscrimination norms. Although such arguments faced dubious prospects if asserted in an actual legal challenge to the Act, the anti-commandeering doctrine gave functional shelter to those claims by preventing Congress from requiring state and local officials to implement the Act.[73]

The Commerce Clause can operate in similar fashion. In *Gonzales v. Raich*,[74] for example, terminal cancer patients asserted not only that Congress lacked authority to regulate medicinal use of homegrown marijuana, but also that they had an individual constitutional right—sounding in privacy under the Due Process Clause—to alleviate their suffering by using the drugs of their choice.[75] Had *Raich* gone the other way, it would have shielded this aspect of personal autonomy from federal intrusion; as it was, however, the *Raich* plaintiffs had to assert their Due Process rights directly on remand, whereupon the Ninth Circuit rejected that claim.[76] Likewise, at least one lower federal court has struck down national efforts to discourage same-sex marriage on enumerated powers grounds,[77] and concerns about the limits of Congress's commerce power may well have given pause to opponents of same-sex marriage who might otherwise have sought to legislate an outright national ban.

Professor Smith's objection, shared by many of the mandate's defenders, rests on a quite different conception of constitutional federalism. On this view, federalism has certain purposes—for example, to facilitate decentralized regulation on matters implicating unique local conditions—and federalism *doctrine* should generally be a direct function of those underlying purposes.[78] Professor Siegel's contribution to this symposium, for example, brings to bear his important recent work with Robert Cooter arguing that the Constitution confers power on Congress to act wherever national action is necessary to solve a collective action problem among the states.[79] Smith thus argues that it is "intellectually incoherent" to use federalism arguments to protect individual liberties that may have little to do with these structural purposes of federalism.[80]

There are three serious problems with this argument. The first is that, as I have already discussed, it ignores federalism's role in protecting individual liberty even when the liberty in question is not a fundamental right that would forbid governmental regulation in and of itself.[81] As the Court recognized just

73. Althouse, *supra* note 69, at 1253–61.

74. 545 U.S. 1 (2005).

75. *See generally* Note, *Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana*, 118 HARV. L. REV. 1985 (2005).

76. *See* Raich v. Gonzales, 500 F.3d 850, 866 (9th Cir. 2007).

77. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 391 (D. Mass. 2010).

78. *See* Smith, *supra* note 11, at 1743 ("[T]o be viable as a *federalism*-based limiting principle, the [libertarian objection] needs to bear some relationship to the very reasons why we divide authority between the federal government and the states in the first place.").

79. *See* Siegel, *supra* note 50; Cooter & Siegel, *supra* note 41.

80. Smith, *supra* note 11, at 1737–46.

81. *See* Althouse, *supra* note 69, at 1250; Abigail R. Moncrieff, *Cost-Benefit Federalism: Reconciling Collective Action Federalism and Libertarian Federalism in the Obamacare Litigation and*

last term, "[f]ederalism has more than one dynamic."[82] Not only does it "grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another," federalism also "'secures to citizens the liberties that derive from the diffusion of sovereign power.'"[83] Similarly, in *Federalist 51*, Madison described the vertical division of powers between national and state as part of the "double security" that the Constitution affords "to the rights of the people."[84] "Libertarian objections" couched in federalism terms are thus hardly "intellectually incoherent"—rather, they stand squarely at the center of federalist theory. It is not surprising that Tea Party opponents of the ACA describe federalism as "a concept critical for protecting individual liberty."[85]

The second problem is that Professor Smith's objection—which is, to be fair, widely shared among the ACA's defenders—assumes that federalism doctrine can, in fact, be constructed as a direct function of its underlying structural values. But the age-old debates between formalists and functionalists[86] and between rules and standards[87] cannot be resolved simply by assertion. This is, in fact, an important issue that transcends the debate on the ACA. For example, as important work by Professors Siegel and Cooter on "collective action federalism" becomes more influential,[88] there will be increasing efforts to reshape judicial federalism doctrine in terms of direct value-application. However, many scholars (including this one) have questioned whether courts are really institutionally competent to make the complex and policy-laden judgments that collective action analysis and other forms of direct value-application would entail.[89]

Beyond, 37 AM. J. L. & MED. (forthcoming 2012) ("The kind of liberty at issue here is a generalized freedom from governmental restraint. The question for Obamacare under this theory, then, is not whether the insurance mandate violates individual rights in a way that ought to receive scrutiny under the Fifth Amendment, but rather whether strongly-felt individual objections to the mandate ought to counsel in favor of state control.").

82. United States v. Bond, 131 S. Ct. 2355, 2364 (2011).

83. *Id.* (quoting New York v. United States, 505 U.S. 144, 181 (1992)).

84. THE FEDERALIST No. 51, at 351 (James Madison) (Jacob E. Cooke ed. 1961); *see also* Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1284–91 (2004) (discussing the ways in which federalism protects liberty).

85. FOLEY, *supra* note 47, at 23.

86. *See, e.g.*, Larry Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 196-97 ("Realist limits [that is, "attempts to track what federalism was *really* meant to protect"] can never effect effective judicial limits on governmental power . . . . If limits are to be found, they must be made. And if they are to be made, they will be made only with the tools of a sophisticated formalism.").

87. *See, e.g.*, Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (describing "rules" as captur[ing] the background principle or policy in a form that from then on operates independently" and "standards" as "tend[ing] to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation").

88. *See, e.g.*, Jack Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010) (using a similar analysis to that developed by Professors Cooter and Siegel).

89. *See, e.g.*, Moncrieff, *supra* note 81, at 14 ("Under the models for collective action federalism, the permissibility of congressional action depends on extremely difficult and extremely specific empirical evaluations of the costs, benefits, and externalities of each and every regulatory *question* (not

Finally, Professor Smith's discussion suggests that the libertarian objection to the ACA is inappropriately opportunistic: By making a federalism argument for libertarian purposes, he says, ACA opponents "can only deepen the suspicions of those who already view arguments about federalism as simply a guise for some other policy agenda."[90] I have argued elsewhere, however, that opportunistic federalism arguments are perfectly legitimate—more, they are precisely the sort of arguments that the Framers counted on to hold the constitutional structure together.[91] In *Federalist 51*, Madison wrote that "[t]he interest of the man must be connected with the constitutional rights of the place," and that the system would operate by a "policy of supplying by opposite and rival interests, the defect of better motives."[92] In this system, federalism—like every other structural value—is defended by those who have their own opportunistic reasons for preferring one decision-maker over another. Although some of us strive to be federalism purists, I do not expect to meet many who share that passion.[93]

* * *

This discussion hopefully demonstrates why a prudent legal academic ought not to bet the 401(k) on the Supreme Court striking down the ACA. This does not mean, however, that the challenges to that statute's constitutionality are frivolous or, as Professor Tribe has asserted, "a political objection in legal garb."[94] The plaintiffs' challenge is grounded in *bona fide* constitutional objections; they simply have the misfortune of relying on constitutional principles that are underenforced in current doctrine.[95] As discussed in the next

---

just each regulatory regime)."); Young, *supra* note 3, at 1844–48.

90. Smith, *supra* note 11, at 1746.

91. *See* Young, *Dark Side*, *supra* note 84, at 1308–11.

92. FEDERALIST NO. 51, *supra* note 84, at 349.

93. Professor Smith does give one more substantive reason for rejecting federalism arguments that seek to protect individual liberty: "[I]f the courts import this libertarian objection into federalism doctrine . . . the protection for individual liberty . . . will be *even greater* than it would be if the limitation were imposed as a matter of substantive due process." Smith, *supra* note 11, at 1746. That is because "[u]nder the latter doctrine, compelling government interests can sometimes justify an interference with individual liberty," but under a federalism argument, "Congress would be categorically precluded from compelling individuals to take actions that they would prefer not to take." *Id.* It is not immediately apparent how much difference this makes—strict scrutiny, after all, is nearly always fatal in fact—or that it is necessarily a bad thing to protect individual liberty categorically rather than pursuant to a balancing test. But in any event what *is* clear is that a federalism-based objection actually protects individual liberty in a far *less* categorical fashion than would a successful substantive due process claim. That is because the federalism-based objection does nothing to foreclose *state* regulation of the individual decisions in question.

94. Tribe, *supra* note 9.

95. It is also an interesting and nonobvious issue whether, as Professor Tribe suggests, a "nonpartisan majority of justices" would violate its "constitutional duty" by invalidating the ACA. *Id.* After all, a justice swears her oath to uphold the Constitution—not, I submit, the particular doctrines that the Court has developed to implement the Constitution. Those doctrines have the claim of *stare decisis*, of course, but a justice does not violate her oath when she determines that a prior decision meets the Court's criterion for overruling. *See* Planned Parenthood v. Casey, 505 U.S. 833, 854–55 (1992) (articulating those criteria); *see also, e.g.*, Agostini v. Felton, 521 U.S. 203, 235–36 (1997)

part, which doctrines are underenforced is a historically contingent matter. The interesting question in the litigation over the ACA is whether the Court might once again be prepared to change course.

III
THE CONTINGENT NATURE OF UNDERENFORCEMENT

The underenforcement of constitutional norms is a particular case of the Legal Process notion of "institutional settlement." That notion, which forms the heart of Legal Process theory, holds that a critical function of law is to "settle" the decision of some questions of law or fact in particular institutions, generally based on considerations of comparative institutional competence.[96] As Henry Hart and Al Sacks explained, institutional settlement "expresses the judgment that decisions which are the duly arrived-at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed."[97] Settlement need not be—and generally is not—complete; other institutions may review the initial determination through established procedures. But the notion of settlement requires that, to at least some degree, other institutions will defer to the initial determination even if the reviewing institution might have decided the question differently in the first place. The right to decide initially, in other words, is the right to get that decision "wrong" (from the perspective of other observers, at least) within certain bounds.[98] Hence, an appellate court has a right to review the trial court's decisions of both fact and law, but it will generally defer to the trial court's resolution of the factual issues on account of that court's superior institutional position (for example, it sees the witnesses firsthand) as long as that resolution meets some minimum threshold level of plausibility.[99]

When a court underenforces a constitutional norm, it does not purport to

---

(collecting cases and noting that *stare decisis* is "not an inexorable command" but "a policy judgment" that "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions"). Presumably, Tribe does not think that the Court that developed the current, highly deferential doctrines violated its constitutional duty by departing from the prior dual federalist regime in cases like *Wickard v. Filburn*, 317 U.S. 111 (1942). But unless we think that current doctrine is simply "true"—that it is congruent with the full conceptual meaning of the relevant constitutional principles rather than simply an instance of prudential underenforcement—a current justice would have the same option of recalibrating the appropriate level of doctrinal deference.

96. *See* HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 2001) (1953); *see also* Richard H. Fallon, Jr., *Reflections on the Hart & Wechsler Paradigm*, 47 VAND. L. REV. 953, 971–75 (1994) (discussing the place of this principle in Legal Process thought).

97. HART & SACKS, *supra* note 96, at 4.

98. *See* Fallon, *supra* note 96, at 962 ("[A]uthority to decide must at least sometimes include authority to decide wrongly.").

99. *See, e.g.*, Penncro Assocs., Inc. v. Sprint Spectrum, L.P., 499 F.3d 1151, 1163 (10th Cir. 2007) (holding that appellants face a difficult burden in establishing "clear error" because "in a bench trial, . . . the district court . . . enjoys the benefit of live testimony and has the opportunity firsthand to weigh credibility and evidence").

limit the force of that norm; it simply defers the initial determination of how that norm should apply in particular circumstances to some other actor. For instance, when *McCulloch v. Maryland* established a deferential standard for reviewing whether an unenumerated means (creating a national bank) was "necessary and proper" to accomplish some enumerated end under Article I (collecting taxes, creating a currency, raising armies, et cetera),[100] the Court was not saying that necessity is a trivial requirement. Rather, the deferential standard of judicial review signifies that the initial determination of necessity is "settled" in Congress and the President, and courts should not disturb that determination unless it falls outside broad bounds of reasonableness.[101] Similarly, Justice Souter has described "[t]he practice of deferring to rationally based legislative judgments [as] 'a paradigm of judicial restraint.'"[102] "In judicial review under the Commerce Clause," he explains, this practice "reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices."[103]

Some doctrinal rules that settle institutional authority in this way, like the *McCulloch* standard, last a long time. But others change significantly over the course of a few decades. The constitutional norms that were underenforced in 1920, for example, were quite different than the norms that were underenforced in 1965. This part seeks to identify some factors influencing decisions to underenforce particular constitutional principles and illustrates how those factors may change over time. Before turning to that discussion, however, I deal with a potential objection.

A. How Do We Know that Federalism is Underenforced?

The notion that a constitutional principle may be "under-" or "overenforced" seems to imply that there must also be some optimal point at which that principle would simply be, well, *enforced*. And one might also assume that before we can sensibly speak of over- or underenforcement, we must identify what that true or best meaning of the constitutional principle *is*. We cannot, in other words, know whether courts are erring, and in which direction, unless we know where we would actually like to be. If this view is correct, then my discussion so far suffers from a rather large omission: I have

100. 17 U.S. 316, 352–60 (1819).

101. For this reason, President Andrew Jackson's subsequent veto of the Bank on constitutional grounds did not necessarily represent a "disagreement" with *McCulloch*, but rather was an exercise of the authority that the Court had left with the political branches. *McCulloch* held, in other words, that the political branches get to decide whether a Bank is "necessary"—not that the Bank *is* necessary. President Jackson, speaking for the Executive Branch, was willing to say that it was not. *See* ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 88–92 (1945).

102. United States v. Lopez, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993)).

103. *Lopez*, 514 U.S. at 604.

not made any effort to define the "true" conceptual meaning of constitutional federalism or, for that matter, of economic liberty.

The objection requires inquiry into two distinct questions: First, do constitutional principles actually *have* a fixed, "true" meaning that is distinct from the doctrines that courts use to enforce them? Second, to what extent do we need to identify that meaning in order to talk intelligently about whether doctrine under- or overenforces the principle in question? The answer to the first question, in my view, is clause-specific. Some constitutional principles *do* have a single determinate meaning; As Fred Schauer has pointed out, the difficulty of interpreting some portions of the Constitution should not blind us to the fact that there are also "easy cases."[104] The President, for example, must be at least thirty-five years old.[105] Unfortunately, these provisions with clear and determinate meanings generally require little judicial enforcement, and thus little doctrine. In these situations where it would be easy to tell if a provision were being over or underenforced, the problem generally does not arise.

Other constitutional principles, however, are considerably less determinate as a matter of text, and these typically are the principles that require judges to develop doctrinal rules that implement them in particular situations. The potential for a gap between conceptual and doctrinal meaning—the predicate for over- and underenforcement—thus arises in precisely those situations where we are least likely to reach consensus on the meaning of the underlying concepts. Even if your humble author were allowed the space to develop a complete parent concept of federalism, it is unclear what good that would do; other academics, not to mention judges and politicians, would no doubt frame the concept differently. If we must agree about a single true concept of "due process" or "federalism" before we can discuss whether those principles are under- or overenforced in current doctrine, then the latter discussion is unlikely ever to get off the ground.

It should be possible, however, to reach widespread agreement on a relatively thin version of at least some constitutional principles.[106] This may be especially true on the structural side of constitutional law, where the central principles of federalism and separation of powers may usefully be framed in terms of a balance among competing institutions. One need not agree on precisely where the balance should be struck to think that some meaningful balance is required. A thin conception of federalism might take its cues from Chief Justice Marshall's opinion in *Gibbons v. Ogden*:[107] The enumeration of national powers presupposes something not enumerated; each level of government should retain important competences; and a (relatively) neutral

104. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 399–408 (1985).

105. *See* U.S. CONST. art. II, § 1, cl. 5 (stating that "neither shall any person be eligible to that office who shall not have attained to the age of thirty five years").

106. *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1733–42 (1985).

107. 22 U.S. (9 Wheat.) 1, 187–239 (1824). I am using *Gibbons*, of course, precisely because it is so frequently cited by nationalists to justify a broad vision of national legislative authority.

judicial arbiter should referee the jurisdictional disputes that arise between the nation and the states. It is not hard to find support for each of these propositions even from people and decisions that otherwise embrace widely varying views of national power vis-à-vis the states.[108] Much room for disagreement remains as to where to draw the relevant lines. But sometimes the doctrine adopted by courts will fall outside this zone of reasonable conceptual meanings. In those cases, it makes sense to say that the the underlying concept is over- or underenforced.

The second question, then, is whether this thin conception of federalism is sufficient to ground a meaningful discussion of whether a constitutional norm is underenforced. I submit that it is. Consider the first aspect of *Gibbons* noted above—Chief Justice Marshall's notion that the principle of enumerated powers

---

108. On the first proposition, enumerated powers, *see*, *e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State."); *see also* United States v. Lopez, 514 U.S. 549, (1995) (Breyer, J., dissenting) (insisting that "[t]o hold this statute constitutional is not to 'obliterate' the 'distinction between what is national and what is local'" and suggesting that the Federal Government would lack power "to regulate 'marriage, divorce, and child custody,' or to regulate any and all aspects of education") (quoting *id.* at 564, 567 (majority opinion)); Matthew Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS 158, 161 (2001) ("[D]oes our Constitution limit the powers of the national government and reserve regulatory powers to the states? The answer—and it is hard to see how there could even be reasonable disagreement on this score—is yes. . . . In short, there are at least some types of legislation (such as laws regulating wholly intrastate activities) that the Constitution permits states to enact but disempowers the national government from enacting.").

On the second proposition, preservation of meaningful competences for both state and federal governments, *see* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 170–80 (1996) (recounting how nationalist efforts at the Philadelphia Convention truly to subordinate the States were defeated, and the ultimate compromises protected a meaningful role for state governments); THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("[A]s the plan of the convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States."); Koen Lenaerts, *Federalism: Essential Concepts in Evolution-The Case of the European Union*, 21 FORDHAM INT'L L. J. 746, 748 (1998) ("[F]ederalism searches for the balance between the desire to create and/or to retain an efficient central authority . . . and the concern of the component entities to keep or gain their autonomy so that they can defend their own interests.").

On the third proposition, judicial review, *see*, *e.g.*, *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring) ("[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2224 n.197 (1998) ("[T]o declare federalism limits unenforceable is destabilizing and that the possibility of judicial enforcement is conducive to more responsible governance consistent with constitutional traditions and judicial competencies."); Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 263 (1990) ("Federalism is present whenever a divided sovereign is guaranteed by a national or supranational constitution *and umpired by the supreme court of the common legal order*.") (emphasis added); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954) (emphasizing non-judicial checks on national authority, but acknowledging that "[t]his is not to say that the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation; the supremacy clause governs there as well").

"presupposes something not enumerated." As Gary Lawson has remarked, "in this day and age, discussing the doctrine of enumerated powers is like discussing the redemption of Imperial Chinese bonds. There is now virtually no significant aspect of life that is not in some way regulated by the federal government."[109] Professor Lawson made that observation a year before *United States v. Lopez*[110] shocked the legal community by actually striking down an Act of Congress on the ground that it exceeded the commerce power, but does anyone really think that *Lopez* and *Morrison* fundamentally restored the enumerated powers doctrine? Those cases were important for any number of reasons—most importantly, because they signaled to the political branches, as well as to state politicians and citizens generally, that enumerated powers remains an important constitutional principle.[111] But there is precious little that those decisions actually prevented Congress from doing.[112]

One might insist that it is simply impossible to talk about underenforcement of federalism (or any other constitutional norm) without defining the norm's true conceptual meaining and showing that judicial doctrine falls, not just short, but significantly short of enforcing it. This is not how the underenforcement literature proceeds, however. Dean Sager's important article, for example, identified any number of underenforced constitutional norms without stopping to develop a thick and complete account of their conceptual meaning.[113] Likewise, we would not need to develop a thick account of the theoretical limits of free speech to say that decisions like *Schenck v. United States*[114] underenforced that principle. A requirement of precise definition would ultimately be self-defeating, because underenforcement typically arises in

109. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994).

110. 514 U.S. 549 (1995).

111. *See, e.g.*, Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 34 (2001) ("Underenforced, but symbolic, laws against drug use, like underenforced, but symbolic, federalism cases, serve important social purposes. They teach the public about the proper hierarchy of norms and values, and in legislative bodies they help to set the agenda for policymaking debates."). Hence, I have long agreed with Mr. Leitch that such decisions are often part of a "dialectic" occurring between the Court and the public. *See* Bryan Leitch, *On the Difficulty of Separating Law and Politics: Federalism and the Affordable Care Act*, 75 Law & Contemp. Probs., no. 3, 2012, at 207; Young, *supra* note 37, at 165 (suggesting that decisions like *Lopez* serve a "cueing function for Congress" and also "may encourage Congress and the states to negotiate more rational allocations of authority within the broad confines prescribed by the Court").

112. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005) (defining Congress's power extremely broadly, notwithstanding *Lopez* and *Morrison*); *see also* Baker, *supra* note 61, at 1911 (noting that holdings like *Lopez* can easily be circumvented through spending conditions).

113. Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214 (1978).

114. 249 U.S. 47 (1919) (upholding convictions under the Espionage Act for distributing leaflets opposing the military draft). If one prefers to think of cases like *Schenck* as simply mistakes, rather than as instances of underenforcement, then consider *Washington v. Davis*, 426 U.S. 229 (1976), which required proof of discriminatory purpose rather than mere disparate impact to make out an Equal Protection claim. Although reasonable people may disagree about whether *Davis* underenforces the Equal Protection Clause, one need not have a fully developed conception of equal protection in order to discuss the issue.

precisely those areas where the underlying norms are most difficult to define with precision.

It is unlikely that the Constitution specifies a single, precise meaning for balancing norms like federalism and separation of powers—but this hardly requires advocates of greater restraints on national power to pack up our tents and go home. As I have discussed at greater length elsewhere,[115] the difficulty of identifying a precise point of "true" constitutional equilibrium does not make it impossible to observe, in the present age, that the system is out of balance in favor of national power.[116] Indeed, the best reply to skeptics that federalism is underenforced may simply be to say, "Look around you!" One can argue that underenforcement is *good* because national power is better than state power, or that it is the only way to prevent the more serious evil of judicial activism. But I have a hard time seeing how one could deny that "underenforcement" accurately describes the present state of the law on federalism.

B. Why Do Courts Underenforce?

A variety of considerations influence the appropriate allocation of authority between institutions in our legal system. Some of these are relatively hard-wired: Trial courts will always be closer to the facts than appellate courts, for example; likewise, administrative agencies have no comparative expertise advantage over reviewing courts on questions of constitutional law. Some may even be constitutionally mandated: The Court's recent decision in *Stern v. Marshall*, for example, seems to mean that the Constitution limits the degree of deference that Article III courts may accord to decisions on private rights rendered by non-Article III bankruptcy courts.[117] One would expect the influence of these sorts of factors to be relatively stable over time.

One factor that has played a significant role in the federalism decisions is the Court's ability to develop determinate doctrinal rules to implement a particular constitutional principle. Larry Lessig has called this factor the "Frankfurter Constraint," after then-Professor Felix Frankfurter's analysis of the Supreme Court's nineteenth century decisions construing the boundaries of dual federalism under the Commerce Clause.[118] Frankfurter's account emphasized the Court's need and desire to avoid the appearance of "judicial policy-making"[119]—in Alexander Hamilton's terms, to be seen as exercising "judgment," not "will."[120] Professor Lessig contends that this requirement is

115. *See* Young, *supra* note 3, 1803–11.

116. *See, e.g.*, Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental "States' Rights"*, 46 WM. & MARY L. REV. 213, 215 (2004) ("Federal power and supremacy long ago eclipsed state power, no matter what barometer one consults.").

117. 131 S. Ct. 2591, 2595–99 (2011).

118. *See* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE (1937); Larry Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 174.

119. *See* FRANKFURTER, *supra* note 118, at 54.

120. THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (J.E. Cooke ed., 1961).

fundamental to judicial legitimacy.[121] "[A] rule is an inferior rule," he writes, "if, in its application, it appears to be political, in the sense of appearing to allow extra-legal factors to control its application."[122] And when the Court perceives that it is incurring costs to its legitimacy by pursuing a doctrinal rule perceived to be political, we can expect the Court to abandon that rule and try something else.[123]

The ultimate expression of the Frankfurter Constraint is the aspect of the political question doctrine that holds some constitutional claims nonjusticiable if they are not subject to resolution by "judicially manageable standards."[124] But instances of outright nonjusticiability are rare; generally, the courts will be willing to decide a class of claims, but because of concerns about the indeterminacy of the operative constitutional principles they will adopt a deferential doctrinal rule. The courts remain willing to adjudicate claims predicated on economic substantive due process, for instance, but because of the indeterminacy of the underlying principle they have chosen an extremely deferential standard.[125] Likewise, the Supreme Court has repeatedly rejected Jesse Choper's invitation to declare all federalism claims nonjusticiable,[126] but it has adopted a set of doctrines under the Commerce Clause that effectively settles in Congress the primary judgment as to whether a given statute falls within national power.[127]

There is little doubt that the extreme line-drawing problems associated with defining separate and exclusive spheres of federal and state authority contributed significantly to the collapse of the dual federalism regime during the 1930s and early 1940s.[128] The same can be—and has been—said of the New Deal Court's retreat from enforcing economic liberty under the Due Process Clause, which required increasingly indeterminate judgments about whether

121. *See* Lessig, *supra* note 118, at 174 ("To the extent that results of a particular rule appear consistent, it is easier for the legal culture to view this rule as properly judicial, and its results as properly judicial . . . . To the extent, however, that the results appear inconsistent, this pedigree gets questioned; it becomes easier for observers to view these results as determined, or influenced, by factors external to the rule—in particular, factors considered political.").

122. *Id*.

123. *Id.* at 174–75.

124. *See* Nixon v. United States, 506 U.S. 224, 228 (1993); Baker v. Carr, 369 U.S. 186, 226 (1962); *see generally* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

125. *See, e.g.*, Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

126. *Compare* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 171–259 (1980), *with* United States v. Morrison, 529 U.S. 598, 610–19 (2000) (rejecting the dissent's argument that the Constitution "remits [Commerce Clause issues] to politics").

127. This approach is probably more faithful than Dean Choper's to the "original meaning" of Herbert Wechsler's discussion of the "political safeguards of federalism." *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 71 (2004).

128. *See, e.g.*, CUSHMAN, *supra* note 29, at 47–84; Young, *supra* note 31.

particular industries were "affected with a public interest."[129] At the same time, it seems unlikely that the present underenforcement of federalism and economic liberty can be attributed wholly to the indeterminacy of the underlying constitutional principles. After all, there are a variety of areas in which both the underlying principles and the doctrines that the Court has devised to implement them are highly indeterminate, and yet the Court continues to enforce these rules.

Consider, for example, the basic principle of personal privacy in *Griswold v. Connecticut*[130]—a decision so widely supported that Robert Bork's questioning of it made him radioactive as a nominee to the high court.[131] Controversy rages over particular extensions of *Griswold*'s principle (particularly to abortion), but the Court's role in protecting privacy rights seems well-established, and the Court continues to extend *Griswold* with considerable confidence.[132] Or consider the Court's revival of economic substantive due process itself in *BMW v. Gore*, which claimed a role for the Court reviewing punitive damages awards under the Due Process Clause.[133] Aside from a few annoying cranks (including this one) who thought *BMW* amounted to a return to the *Lochner* era, no one seems that upset about *BMW*, and the Court appears to see relatively little need to defer to other institutions in enforcing the relevant principles. This is true notwithstanding the almost total lack, under both *Griswold* and *BMW*, of determinate standards for defining and applying the doctrine.

Other examples abound. The Court's well established "standard"—if one can even call it that—for personal jurisdiction under the Due Process Clause is whether the defendant has "minimum contacts" with the forum state.[134] It applies a general rule of "reasonableness" to searches under the Fourth Amendment.[135] An aggressive recent line of cases has limited state imposition of capital punishment as "cruel and unusual" under the Eighth Amendment based on the Court's own moral intuitions, a highly tendentious approach to counting the positions of state jurisdictions, and occasional references to foreign law.[136] My point is not that these cases are wrong; I approve of several of them and can live with many of the others. What is interesting, however, is that despite

129. *See* CUSHMAN, *supra* note 29, at 104–05, 154–55.

130. 381 U.S. 479, 484–86 (1965).

131. For Judge Bork's critique, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1 (1971). *See also* FRIEDMAN, *supra* note 18, at 317 (citing Bork's opposition to *Griswold* as one of the "main issues" triggering opposition to his nomination).

132. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 564–79 (2003) (recognizing a right to engage in gay sex under the Due Process clause).

133. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 563–74 (1996).

134. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

135. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 222 (1960) ("[W]hat the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.").

136. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that capital punishment for child rape violates the Eighth Amendment); Roper v. Simmons, 543 U.S. 551 (2005) (striking down the juvenile death penalty under the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally disabled violates the Eighth Amendment).

significant Frankfurter Constraint problems in each of these areas, the Court has not felt the need to develop doctrines that underenforce the relevant constitutional principles.

Something more than indeterminacy must be going on with underenforcement. I submit that that "something more" has much to do with the social and political context in which the Court formulates doctrine. Both popular constitutionalism and the responses of other political actors influence when the Court will take the lead on implementing particular constitutional principles, and when it will settle primary authority to implement those principles in other actors by developing doctrines that underenforce the relevant norms. This dynamic reflects the Court's need not only to be faithful to legal principle but to make sure the law "accounts for the conditions of its own legitimation"—to practice, in my friend Neil Siegel's terms, "the virtue of judicial statesmanship."[137]

The influence of popular constitutionalism is, of course, notoriously hard to pin down. It may be useful to think of that influence as having both a substantive and an institutional component. That is, the Court pays heed not only to popular attitudes on particular constitutional issues, but also to more general public views on the legitimacy and appropriate scope of judicial review itself. The Court may well be more willing to enforce constitutional principles, despite the indeterminacy of the available doctrinal formulae, when it believes that the underlying principles have strong public support and when it believes the public's general approval of judicial review to be strong. This view would account for the Rehnquist and Roberts Courts' willingness to intervene, in a fairly aggressive way, on a number of issues despite the absence of determinate doctrinal rules. On gay rights, for example, *Lawrence* eschewed traditional doctrinal tests in favor of a highly amorphous concept of "liberty," but the Court was moving in line with broader social trends on the issue in question and also enjoyed high levels of diffuse support.[138] Similarly, one can hardly explain the Court's willingness to decide difficult cases about affirmative action and race-based preferences by pointing to highly determinate rules that the Court has developed for such cases; rather, the Court's relatively non-deferential stance in this area seems better grounded in the fact that "an equivocating Court matched a confused public somewhere in the middle on the issue."[139] If this is right, then we can expect underenforcement to occur primarily in particular areas where the Court is unsure of public support for its results, or at times when more diffuse support for judicial review generally is in question.

Current doctrine on federalism and economic liberty reflects a profound change since the 1930s in public expectations of the general role of government

137. Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 963 (2008).

138. *See* FRIEDMAN, *supra* note 18, at 359–60 (noting a "remarkable" "transformation in public debate and opinion" on the issue); *id.* at 15 (noting high levels of diffuse support in the Rehnquist Court era).

139. *Id.* at 361.

in society and of the role of the national government in particular. But it also reflects a change in public expectations of the role of the Court over the same period. The next section sketches how both sets of expectations evolved in ways that encouraged the Court to underenforce constitutional norms of federalism and economic liberty. Part IV then suggests ways in which those expectations might be changing again.

C. Underenforcement Over Time

As a thought experiment, consider the constitutional world of 1920. Beginning in the late nineteenth century, the Supreme Court increasingly saw its role as protecting individual economic liberties and the free market against increasing incursions by both state and national government.[140] It did this primarily through the doctrine of freedom of contract expressed in cases like *Allgeyer v. Louisiana*[141] and *Lochner v. New York*,[142] although it is important to understand that the Court viewed freedom of contract as just one manifestation of a broader right of individual self-determination that also included less overtly economic liberties such as freedom of worship and the right to rear one's children without undue interference from the State.[143] Although the Court upheld as many statutes as it struck down during this period,[144] the Court's "reasonableness" test for incursions on economic liberty was relatively undeferential to political actors.[145] Economic liberty was not, in other words, underenforced.

Neither was the Commerce Clause. Although the Court sometimes allowed national regulation of intrastate activity when such regulation was necessary to implement a viable regime governing interstate commerce,[146] the Court retained confidence in its ability to draw principled lines between "commerce" and antecedent activities like manufacturing,[147] between goods that were "in the stream of [interstate] commerce" and those that were not,[148] and between "direct" and "indirect" effects on interstate commerce.[149] The Court drew these

140. *See generally* MCCLOSKEY, *supra* note 29, at 96–117.

141. 165 U.S. 578, 590–92 (1897).

142. 198 U.S. 45, 64 (1905).

143. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

144. *See* CUSHMAN, *supra* note 29; Tony A. Freyer, Book Review, *Brandeis and the Progressive Constitution: Erie, The Judicial Power, and the Politics of the Federal Courts in Twentieth Century America by Edward A. Purcell, Jr.*, 18 CONST. COMMENT. 267, 270 n.8 (2001) ("The objective fact that the Lochner era had a low rate of invalidation has been noted by historians and lawyers for some time.").

145. *See, e.g.*, *Lochner*, 198 U.S. at 59 ("There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities?").

146. *See, e.g.*, Shreveport Rate Cases, 234 U.S. 342, 350–55 (1914).

147. United States v. E.C. Knight Co., 156 U.S. 1, 13–18 (1895).

148. Stafford v. Wallace, 258 U.S. 495, 518–28 (1922).

149. *E.C. Knight*, 156 U.S. at 11–18.

lines, moreover, notwithstanding its recognition that they raised significant indeterminacy problems.[150]

Many constitutional norms, however, *were* underenforced in 1920. *Plessy v. Ferguson*'s refusal to challenge Jim Crow segregation under the Equal Protection Clause, for example, was grounded not only in racist attitudes on the merits (reflecting attitudes in the broader society) but also in institutional pessimism concerning the capacity of the federal courts to effect social change.[151] Justice Holmes's seminal dissents in the World War I free speech cases remained just that—dissents—as the Court upheld restrictions on antiwar speech in cases like *Schenck*[152] and *Abrams*.[153] These cases naturally reflected the unpopularity of dissent as well as institutional deference to the political branches on questions of national security. Finally, the First Amendment's Religion Clauses had been ineffectual in stopping the Mormon persecutions in the late nineteenth century,[154] and the federal courts had taken no steps to limit daily Bible reading and prayer in the public schools.[155]

One could identify many other examples, but these should suffice to make the basic point. Nowadays, we would consider underenforcement of the Equal Protection, Free Speech, and Religion Clauses virtually unthinkable.[156] The Court's primacy in these areas is well-established, and the contemporary doctrinal rules that implement these provisions are generally rigorous and non-

150. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) (acknowledging that "[t]here is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce," but insisting that "[t]he law is not indifferent to considerations of degree"). The Court also plainly recognized the relation between federalism-based limitations on government action and individual economic liberties. Enforcing limits on the Commerce Clause, after all, prevented national interference with the free market at the same time that the Court's rigorous enforcement of the dormant Commerce Clause worked alongside the Due Process cases to prevent state interference. *See generally* Stephen A. Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997).

151. 163 U.S. 537, 551–52 (1896) (observing that social equality of the races "'can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community . . . .' If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane") (quoting People v. Gallagher, 93 N.Y. 438, 448 (1883)).

152. Schenck v. United States, 249 U.S. 47, 53 (1919).

153. Abrams v. United States, 250 U.S. 616, 624 (1919).

154. *See, e.g.*, Davis v. Beason, 133 U.S. 333 (1890) (upholding a federal statute requiring Mormons to disavow the teachings of the church); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (upholding a federal statute dissolving the Mormon Church and seizing its property); Reynolds v. United States, 98 U.S. 145 (1878) (upholding convictions for polygamy against a Free Exercise challenge).

155. *See* MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 483 (2d ed. 2006). Of course, the Establishment Clause was not even incorporated against the States until 1947, in *Everson v. Board of Education*, 330 U.S. 1 (1947). But the refusal to interpret the Fourteenth Amendment as applying particular Bill of Rights protections to the States is not that different from underenforcement—after all, the effect of nonincorporation was to defer issues of religious liberty to state institutions.

156. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 373 (1976) (establishing a presumption of irreparable injury in free speech cases where the plaintiff seeks injunctive relief, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

deferential toward other actors. Indeed, while modern courts deciding federalism and economic liberty cases eschew the right to sit as a "superlegislature,"[157] courts plainly *do* perform this function in the broad range of cases in which they have adopted implementing doctrines of "strict scrutiny." In such cases, courts second-guess the factual determinations of legislatures, insist on the least restrictive possible means of pursuing state interests, and rule out many state interests as simply insufficiently weighty to warrant imposition on fundamental rights.[158] This approach may well be appropriate in many instances, but we should be clear on the fact that courts do frequently sit as "superlegislatures," and the decisions about when and where they do so are drawn not from the underlying constitutional principles, but from contingent institutional judgments that change over time.

The relevant changes are familiar history. The Depression seriously damaged not only *laissez faire* faith in the free market but also confidence in state governments as the primary actors responsible for addressing domestic social ills. In the wake of the New Deal, the public came to expect and rely upon a significant role for government in regulating the economy and guaranteeing basic social welfare.[159] And the Supreme Court, which had fought these changes during the 1930s, emerged weak and chastened.[160] It is not entirely easy to summarize the areas of underenforcement under the "double standard" of judicial review that emerged in the 1940s and 1950s,[161] but one explanation that works as well as any is that the Court stopped doing what it had been doing when it got in trouble. Federalism and economic liberty would be underenforced, and the Court would try to carve out a new niche for itself in areas of civil liberties that it had previously neglected.[162]

---

157. *See, e.g.*, Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1328–65 (11th Cir. 2011) (Marcus, J., dissenting).

158. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738–42 (2011) (striking down California's attempt to regulate violent videogames under a First Amendment strict scrutiny standard).

159. *See, e.g.*, DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945, 379 (1999) ("Above all, the New Deal gave to countless Americans who had never had much of it a sense of security, and with it a sense of having a stake in their country.").

160. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 862 (1992) (discussing the *Lochner* Court's failure to adapt constitutional doctrine to changing economic circumstances and concluding that "the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss").

161. *See generally* Lynn Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 80–85 (2001) (trying and failing).

162. Some of the ACA's defenders have asserted that the Act's broad assertion of national power is faithful not only to the post-New Deal settlement but also to the Framers' original intent. *See, e.g.*, Simon Lazarus, *The Health Care Lawsuits: Unraveling a Century of Constitutional Law and the Fabric of Modern American Government*, AM. CONST. SOC'Y 4 (Feb. 2011), http://www.acslaw.org/sites/default/ files/lazarus_-_health_reform_lawsuits_0.pdf ("[I]t would be more accurate to view what libertarian critics call the New Deal Supreme Court's 'revolution of 1937' as a restoration of the vision of the original Framers, who sought to supplant the feckless Articles of Confederation with a charter for effective and responsive national governance."). This assertion relies on broad language in Marshall Court decisions like *McCulloch* and *Gibbons*, *see id.*, but of course those decisions upheld quite modest

This it did with considerable success. But the story I have told should make clear the highly contingent nature of underenforcement. Underenforcement is not, in at least most cases, a natural or inevitable quality of particular constitutional norms. Rather, the patterns of under- and overenforcement change over time in response to events, conditions, and public attitudes. And what can change once can change again.

IV
POPULAR CONSTITUTIONALISM AND THE HEALTHCARE DEBATE

Michael Dorf has recognized that "the meaning of the Constitution is never finally settled. Even long-lasting resolutions of particular controversies can be re-opened when the People are moved to action."[163] If this is true of constitutional meaning, it is doubly true of the doctrinal constructs that courts develop to implement that meaning. This last part considers the prospect that aspects of popular constitutionalism may prompt the Court to revisit its doctrines that presently underenforce principles of federalism and economic liberty. I do not wish to be read as endorsing popular constitutionalism as a normatively legitimate form of constitutional change; indeed, it has always seemed to me that a primary purpose of constitutionalism is precisely to entrench certain principles and structures against change, particular change driven by popular pressure.[164] Nor do I want to embrace any particular theory as to how popular constitutionalism operates. As a descriptive matter, however, it is hard to deny that changes in public attitudes have their impact on constitutional interpretation. This last part addresses how those forces may play out in with respect to the debate over the ACA.

The suits challenging the ACA take place in the context of a broader popular debate concerning the role of government in general and the national government in particular. Although the plaintiffs naturally insist that the courts can strike down the ACA without departing from present doctrine, it is plain

---

federal programs and nothing approaching the magnitude of the ACA's regulatory scheme appeared until the middle third of the Twentieth Century. Despite attempts to develop an originalist pedigree for the ACA and other components of contemporary progressives' constitutional vision, *see, e.g.*, Balkin, *supra* note 88, at 15–47, the more persuasive strand of progressive scholarship acknowledges the need to ground the New Deal in either novel theories of constitutional amendment, *see, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: VOLUME 2: TRANSFORMATIONS (2000), or notions of "living constitutionalism," *see, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 222, 204, 222–24 (1980).

163. Michael C. Dorf, *Nullification, Secession, and Guns Show Constitutional Meaning is Never Settled*, FINDLAW'S WRIT, Feb. 24, 2010, http://writ.news.findlaw.com/dorf/20100224.html.

164. *See* FRIEDMAN, *supra* note 18, at 372–74 (identifying, as the crucial question, whether the Supreme Court is sufficiently independent of popular opinion to enforce constitutional principle in the face of majority disapproval); Ernest A. Young, *The Constitution Outside the Constitution*, 177 YALE L.J. 408 (2007) (identifying entrenchment as a key purpose of constitutions). Many instances of popular constitutionalism, moreover, are spectacularly unattractive. *See, e.g.*, Lucas A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 866–70 (2005) (identifying the South's "massive resistance" to *Brown v. Board of Education* as an instance of popular constitutionalism).

that the lawsuits are also part of a broader effort to articulate a more libertarian vision of the government's authority over the individual and a more federalist vision of the reach of national power.[165] The disdainful rhetoric with which the ACA's defenders have greeted the lawsuits should also be viewed as part of this essential process of constitutional contestation. Constitutional law trades on broad societal intuitions about what is "normal"—in individual conduct,[166] in the scope of government authority,[167] and in the role of the courts.[168] Thus, when defenders of the present equilibrium say the case is "easy" and depict those who disagree as unsophisticated and in need of a good Constitutional Law I class,[169] they are seeking to defend and preserve the currently prevailing view of constitutional normalcy. But this view reflects the current state of doctrine, with its areas of significant underenforcement, rather than some absolute truth of the underlying principles themselves. Should the defenders of the status quo lose their argument in the ACA cases, something quite different may seem "normal" or even inevitable a half century hence.

In assessing the current debate, moreover, it is important to recognize how dramatically the "New Deal settlement" in constitutional law has already changed in the intervening years. That settlement saw a Court in retreat, eschewing challenges to the political branches virtually across the board. By the next decade, however, the Court had taken up the cause of noneconomic rights—first racial equality,[170] then criminal procedure,[171] equal voting,[172] and

165. *See, e.g.*, Kenneth T. Cuccinelli, II, E. Duncan Getchell, Jr., & Wesley G. Russell, Jr., *Why the Debate Over the Constitutionality of the Federal Health Care Law is About Much More than Health Care*, 15 TEX. REV. L. & POL. 293, 334–38 (2011) (essay, by the Virginia Attorney General and senior staff, grounding Virginia's suit challenging the ACA in a broader vision of limited government); *but see id.* at 295 ("No existing doctrine needs to be curtailed or expanded for Virginia to prevail on the merits.").

166. *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 950–51 (2012) (relying on social conventions to define the meaning of a "search" under the Fourth Amendment); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856 (1991) (relying on broad social understandings of the relationship between reproductive liberty and women's roles in considering the *stare decisis* force of *Roe v. Wade*).

167. *See, e.g.*, Cuomo v. Clearing House Ass'n, L.L.C., 129 S. Ct. 2710, 2718–19 (2009) (interpreting the scope of preemption under the National Bank Act by reference to settled understandings that state agencies have authority to enforce state laws against state banks); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. (forthcoming 2012–2013) (exploring the degree to which settled practice defines the constitutional separation of powers).

168. *See, e.g.*, Dukes v. Wal-Mart, Inc., 131 S. Ct. 2541 (2011) (noting, in holding that the trial court improperly certified a class action under Federal Rule of Civil Procedure 23, that "[w]e are presented with on of the most expansive class actions ever"); Morrison v. Olsen, 487 U.S. 654, 681 (1988) (resolving whether Congress may vest certain powers concerning independent counsel in the courts by determining that those powers were analogous to other powers the courts had long exercised).

169. *See, e.g.*, Tribe, *supra* note 9; Chemerinsky, *supra* note 10, at 3. Indeed, Dean Chemerinsky's essay for this symposium undertakes to preemptively "spin" a possible Supreme Court decision striking down the ACA as the next *Bush v. Gore*. *See id.* at 2; *see also* Koppelman, *supra* note 11, at 1 (making a similar attempt to spin an adverse Supreme Court ruling on the ACA as nothing more than partisan politics).

170. Brown v. Bd. of Educ, 347 U.S. 483 (1954).

171. *See, e.g.*, Mapp v. Ohio, 347 U.S. 643 (1961).

172. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

ultimately privacy.[173] With the privacy cases, moreover, the Court had reversed its rejection of substantive due process review during the New Deal.[174] For a similar set of transformations, consider the Court's national security jurisprudence. The New Deal Court was prepared largely to rubber-stamp the Executive's judgments on national security, as it did in the Japanese Internment case.[175] During a lesser conflict in the 1950s, the Court was more willing to challenge the Executive in the Steel Seizure case,[176] but the Warren Court remained extremely hesitant to block national security measures.[177] But by the time of the Rehnquist and Roberts Courts, these supposedly more conservative courts were nonetheless willing to block key executive and legislative measures for dealing with suspected terrorists.[178]

In all these areas, norms that were previously underenforced as part of the New Deal settlement became rigorously enforced over time. The obvious question, of course, is whether there is reason to believe that the same thing might happen with respect to federalism or economic liberty. I make no confident predictions here. My fundamental point is simply that the current doctrines that make the ACA's defenders so confident of their positions are themselves historically contingent and not set in stone. The only thing we can say with relative certainty is that as popular opinion shifts concerning the appropriate role of government and the legitimacy of programs like the ACA, those shifts will have an impact—at some point, in some form—on constitutional doctrine.

A. Institutional Mechanisms

Almost no one seems to believe anymore that political culture, and social movements do not influence the courts or the development of constitutional law. The tricky part is identifying the institutional mechanisms by which this occurs. This essay is not the place to develop a full-blown institutional theory of popular constitutionalism, and my central claim can remain agnostic on that issue. That claim asserts simply that the constitutional issues raised in the ACA suits are "easy" only within current doctrine, that that doctrine underenforces the relevant constitutional norms, and that such underenforcement is historically contingent and vulnerable to shifts in the zeitgeist. It may be helpful, however, to offer a few observations on the institutional mechanisms by which popular constitutionalism may influence doctrinal change.

Jack Balkin has helpfully identified two institutional paths by which popular

173. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); *see generally* FRIEDMAN, *supra* note 18 at 300 (narrating the transformation of the Court's role).

174. *Cf., e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

175. Korematsu v. United States, 323 U.S. 214 (1944); *see also* Ex parte Quirin, 317 U.S. 1 (1942).

176. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

177. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 75–103 (2000) (describing the Warren Court's national security cases).

178. *See* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); *see* FRIEDMAN, *supra* note 18, at 341 (discussing the Court's assertiveness in the terrorism cases).

constitutionalism influence the development of constitutional law. One path runs through political parties: "social movements . . . influence the two major political parties, which, in turn control the system of judicial appointments."[179] The point is not that judges self-consciously accede to the wishes of parties or movements in interpreting the Constitution; rather, social activism "leads to the appointment of judges who sincerely believe that the best interpretation of the Constitution is one that happens to be sympathetic with social movement claims."[180] Professor Balkin and Sanford Levinson have labeled this mechanism "partisan entrenchment," reflecting the fact that the judges appointed by political partisans may well outlast the political force of the social movement that brought them to the bench.[181]

Professor Balkin's second path involves "appeals to the values of national elites."[182] "Social movement politics," he argues, "play a crucial role in getting both popular and elite opinion to view the world differently and to acknowledge changes as salient and important."[183] Again, judges are unlikely to see themselves as bending the Constitution to suit contemporary mores; rather, political change influences how judges see the world, and constitutional doctrine may look different in light of such changed circumstances. The key distinction between these two paths is that "[a]ppeals to national elite values try to change constitutional doctrine by changing the minds of sitting judges," which tend to reflect elite opinion, "while the strategy of partisan entrenchment tries to change the judges."[184]

The next two sections examine how both these mechanisms may influence the way that courts formulate and apply constitutional doctrine in the ACA litigation. Section B considers the operation of public opinion and social movements through the political branches. I focus on the "Tea Party," which actually originated in opposition to the Wall Street bailouts but quickly came to focus on healthcare reform as a core mobilizing issue,[185] but I also consider popular constitutionalist claims by the ACA's proponents. Although Professor Balkin emphasizes the political branches' role in appointing judges, who in turn shape doctrine, I consider some additional ways in which political branch actions may influence judicial decisionmaking. Section C turns to the "the people themselves"[186] and the broader influence of public opinion on judges

179. Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 30 (2005).

180. *Id.* at 32.

181. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067 (2001).

182. Balkin, *supra* note 179, at 32.

183. *Id.* at 34.

184. *Id.* at 32–33.

185. *See generally* FOLEY, *supra* note 47, at 1–19 (describing the Tea Party's origins and general principles); Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. 300 (2011) (situating the Tea Party within broader theoretical discussions of popular constitutionalism and social movements).

186. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM

interpreting the Constitution. Survey data shows profound shifts in public views on government since the New Deal; in particular, a public that placed most of its faith in national institutions after the Depression now reposes considerably more trust in state and local governments. Likewise, large majorities of the American people believe the ACA to be unconstitutional. While such views will not control the outcome of Supreme Court litigation in any crude way, the Court is unlikely to be indifferent to them.

Finally, Section D considers an additional institutional mechanism that most theories of popular constitutionalism discount—that is, the role of state governments. Twenty-eight states have signed onto various suits challenging the ACA.[187] Nor is state action confined to litigation: state legislatures have enacted laws purporting to constrain ACA implementation, and state executive officials have pushed back against particular aspects of the ACA through administrative channels.[188] I want to suggest that state governmental action may be a particularly promising mode of popular constitutionalism because it incorporates elite as well as mass opinion and features well-developed mechanisms of accountability. These advantages are all on display in broad controversies over the ACA.

B. Social Movements and Political Branch Action

Much of the scholarship on popular constitutionalism has focused on the role of social movements in shaping constitutional meaning. In Professor Balkin's account, social movements influence existing political parties, who win elections and ultimately appoint judges that interpret the Constitution in ways congenial to the movement's agenda.[189] The Supreme Court Justices that will ultimately decide the ACA cases represent the judicial legacy of successive waves of partisan activity, motivated by contrasting impulses to recover something of a constitutional vision giving greater weight to federalism and economic liberties, on the Republican side,[190] and to legitimate a more progressive vision of activist government, on the Democratic side. It is harder to assess the impact of *current* social movements on constitutional doctrine. Defenders of the ACA have suggested that the new healthcare law itself "was the product of popular constitutionalism, a victory for political advocates who argued that the right to health care was a fundamental human right that

---

AND JUDICIAL REVIEW (2004).

187. For an overview of state litigation challenging the ACA, *see* Richard Cauchi, *State Legislation and Actions Challenging Certain Health Reforms*, *2011-2012*, NCSL, (Feb. 20, 2012), http://www.ncsl.org/issues-research/health/state-laws-and-actions-challenging-aca.aspx#AG.

188. *See infra* notes 244–245 and accompanying text.

189. *See supra* note 179.

190. *See, e.g.*, Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Constitutional Power*, 78 IND. L.J. 363, 367 (2003) ("Since 1995, the Rehnquist Court has begun adopting theories of congressional power and federalism strikingly similar to those developed in the reports of the Reagan Justice Department. One of those reports was devoted to the critical role of judicial appointments in shaping the development of the law.").

warranted protection by the federal government."[191] The ACA's opponents—particularly the Tea Party—also claim the popular constitutionalist mantel.[192] These sorts of conflicting claims highlight both the vibrancy of the "constitution outside the courts" in contemporary culture and the danger that "popular constitutionalism" can mean just about anything.

According to one leading account, "there's no Tea *Party*, but there is a Tea Party movement."[193] That movement seems to have originated in the spring of 2009 in a series of protests growing out of the national government's handling of the economic crisis, but it quickly took up the ACA as a focal point for its critique of big government.[194] The group has "no central leader, organization, or even organizing committee," but rather relies on "small chapters scattered throughout the country, with rough coordination via social media, the Internet, and local activist groups."[195] Ilya Somin has pointed out that, although there are many commonalities between the Tea Party and other movements that have changed our constitutional landscape, "the Tea Party . . . is the first such movement in many years to focus its efforts primarily on limiting the power of the federal government."[196]

As Professor Somin notes, "[i]t is too early to say whether the Tea Party will have any major lasting impact."[197] There is little doubt, however, that the movement has sparked a rare emphasis on constitutional law—and even constitutional *theory*—in public debate.[198] Professor Balkin's model emphasizes the interaction of social movements and political parties, and in fact the Tea Party has pursued a deliberate strategy of "opportunistically inflitrat[ing] existing political parties (mostly the Republican Party), pressuring them to embrace principles of importance to the movement."[199] The movement has had considerable success at the congressional level, supporting numerous successful candidates in the 2010 elections and establishing a Tea Party caucus in Congress.[200] With all due respect to the crazy unpredictability of this year's race

191. Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367, 1367 (2011).

192. It is not just the Tea Party—whatever we make of them—that is increasingly discontented with federal authority. Once we move beyond the particular issue of healthcare, much of the discontent comes from the political Left as well as the Right. At various times in the past decade, progressive proponents of environmental protection and gay rights, as well as opponents of the War on Terror, have all pressed reform at the state level during periods when federal policy was contrary to their goals. *See generally* Young, *Dark Side*, *supra* note 84.

193. FOLEY, *supra* note 47 , at xiii.

194. *See id.*; Rebecca M. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory* 5–6 (U. Toledo Legal Stud., Research Paper No. 2011-09, 2011).

195. FOLEY, *supra* note 47, at xiii.

196. Somin, *supra* note 185, at 309.

197. *Id.* at 304.

198. *See, e.g.*, Adam Liptak, *Tea-ing Up the Constitution*, N.Y. TIMES, Mar. 13, 2010, at WK1.

199. FOLEY, *supra* note 47, at viii; *see also* Barnett, *Tea Party*, *supra* note 20 ("The Tea Party . . . has resisted any interest in forming a third party, seeking instead to take over the Republican Party by organizing at the local level and backing challengers to incumbents in primaries.").

200. Richard Albert, *The Constitutional Politics of the Tea Party Movement*, 105 NW. U. L. REV.

for the Republican nomination, however, it seems unlikely that the Tea Party will ultimately succeed in nominating one of their preferred candidates for President. If a moderate Republican wins the White House in 2012, the Tea Party will likely have an impact on legislative initiatives in Congress and, perhaps, judicial selection. And even if President Obama wins reelection, his legislative initiatives and judicial nominees will confront a congressional opposition profoundly influenced by Tea Party principles.

Professor Balkin's partisan entrenchment model hardly captures all the ways in which political change influences constitutional law, however. Another involves the enactment of ordinary legislation in response to social movements. I have argued elsewhere that ordinary legislation often has constitutional significance, in the sense that statutes, regulations, and government practices "constitute" our governmental structure in ways that supplement the bare-bones edifice of the canonical Constitution.[201] The ACA is certainly "constitutional" in this sense—it restructures the relationship between federal and state regulators, as well as the rights and obligations of individual citizens, in profound ways. My point in this essay is slightly different, however: Ordinary enactments, particularly to the extent that they create lasting institutions like government agencies and endow important interest groups with new or enhanced interests that they will fight to protect, acquire significant institutional weight that judges ultimately must take into account in constitutional interpretation. As Ronald Dworkin's classic discussion recognized, constitutional theories and doctrines developed by judges must "fit" the greater part of our existing institutional arrangements.[202] By changing those arrangements—that is, the vast majority of our law that is *not* constitutionally entrenched—political movements also shape the constraints within which constitutional interpreters must operate.

Similarly, political movements elect or at least influence Presidents. In Professor Balkin's account, the primary role of the Executive is to appoint judges. But Presidents shape constitutional law in other ways as well. They interpret the Constitution for themselves in innumerable ways: They may veto laws on constitutional grounds even though the courts would uphold them, as Andrew Jackson did with the Bank;[203] they may be the primary constitutional interpreter in areas, such as foreign and military policy, where the courts are unlikely to intrude;[204] they may tailor the interpretation and implementation of federal statutes by executive agencies to constitutional concerns whether or not those concerns are shared by the courts.[205] Likewise, the President influences the courts in ways other than appointments: As a litigant, the Executive often

---

COLLOQUY 267, 267–68 (2011).

201. *See generally* Young, *supra* note 164.

202. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058–62 (1975).

203. *See supra* note 101 and accompanying text.

204. *See* Bradley & Morrison, *supra* note 167.

205. *See, e.g.*, Johnsen, *supra* note 190, at 385–86 (discussing Reagan administration directives instructing federal executive branch officials how to interpret the limits of national power).

can affect the timing and posture of judicial interpretation by seeking or opposing *certiorari*;[206] its views both of constitutional meaning and of the governmental interests that figure in most doctrinal tests carry significant weight with the courts;[207] and in extreme cases the Executive may undermine legislation it views as unconstitutional by refusing to defend it when it is challenged.[208]

It is not hard to imagine how these dynamics might bear on the future development of constitutional doctrine relevant to healthcare. The enactment of the ACA, the concomitant creation and expansion of federal and state bureaucracies to implement it, and the establishment of key individual entitlements such as the right to coverage without regard to preexisting conditions all create established institutions and settled expectations that will exercise increasing gravitational force on constitutional interpretation as the years go on. The weight of these institutions will vary as future Congresses and state governments either implement the ACA's mandates or chip away at it through underfunding, partial repeals, or bureaucratic resistance. Likewise, the coming presidential election will likely function as a sort of referendum on the ACA. In the event that the legislation's constitutionality is not conclusively resolved prior to the election,[209] the outcome of the election will either cement or undermine the ACA's standing. And the posture of the next presidential administration—that is, a hostile Romney administration or a friendly second Obama administration—may matter a great deal. If a Romney administration were to refuse to defend the Act on federalism grounds, for instance, that would likely have an important impact on the ACA's prospects in the courts.

To say that social movements in favor of healthcare rights and against an overactive national government will "have an important impact" on constitutional adjudication, however, leaves us still a long way from pinning down precisely what that impact will be or how it will weigh against other factors. None of the extant theories of popular constitutionalism can provide anything close to a definitive answer to those questions. And that problem becomes even more daunting as we move from concrete institutional mechanisms, such as the influence of social movements on political parties and the national political branches, to the more diffuse influence of public opinion

206. David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 276–77 (2009) (discussing the influence of the Solicitor General on the Supreme Court's decisions to grant or deny certiorari).

207. *See, e.g.*, Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 772–74 (2000) (collecting studies on the influence of *amicus* briefs filed by the Solicitor General).

208. *See generally* Daniel J. Meltzer, *Lecture: Executive Defense of Congressional Acts*, 61 DUKE L. J. 1183 (2012).

209. Final decision on the constitutional issues could be postponed, for example, if the Court decides that the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a) (2006), precludes pre-enforcement review of the individual mandate. *See* Seven-Sky v. Holder, 661 F.3d 1, 21–23 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

at large.

C. Public Opinion and the Court

Social movements and other forms of popular constitutionalism influence broader public opinion—both that of legal elites and the public at large.[210] Over time, as Barry Friedman has shown, shifts in those opinions seem to influence the course of constitutional interpretation.[211] This section surveys changes in public opinion and speculates a bit as to how those changes may affect the constitutional environment in which the ACA cases will be decided. At least three sets of views are potentially relevant: public attitudes about the general distribution of authority between the national government and the states; attitudes about the Supreme Court and the role of judicial review; and specific public views about the constitutionality and desirability of the ACA itself. This paper makes no strong predictions about how the Court will respond to these shifts in public opinion. The point is simply to cast suggest that contemporary opinion may offer the Court an opening to change its doctrine if it is inclined to do so.

Survey data on popular trust in government reflects significant alterations in relative trust for states and national institutions since the New Deal. Megan Mullin reports that "[a]lthough trust in the federal government has declined since the 1960s, attitudes toward subnational governments have held steady or even improved. State and local governments historically inspired little public confidence, but surveys conducted in recent decades reveal rising public support relative to feelings toward Washington."[212] The result is that "[g]iven a choice among levels of government, survey respondents are increasingly likely to express faith and confidence in states and localities and to perceive them as being closer to the people and giving more for the public's money."[213] Summarizing the available data, Cindy Kam and Robert Mikos conclude that

> [c]itizens on average evaluate the performance of the federal government as significantly lower than that of the state and local governments, report less faith in the federal government to "do the right thing," have significantly lower confidence in the ability of the federal government to solve problems effectively, see the federal government as significantly less responsive than lower levels of government, and nearly 60 percent see the federal government as the most corrupt level of government.[214]

As Professors Kam and Mikos point out, "[t]rust in government is politically

210. *See* Balkin, *supra* note 179, at 32.

211. *See* FRIEDMAN, *supra* note 18, at 14.

212. Megan Mullin, *Federalism*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 209, 214 (Nathaniel Persily, Jack Citrin, & Patrick J. Egan eds., 2008).

213. *Id.*; *see also* FRIEDMAN, *supra* note 18, at 357 (citing survey data that since the 1960s, public trust in federal institutions has sharply declined relative to trust in state and local institutions).

214. Cindy D. Kam & Robert A. Mikos, *Do Citizens Care about Federalism? An Experimental Test*, 4 J. EMPIRICAL LEGAL STUD. 589, 598 (2007) (reporting results from the 2000 Attitudes Toward Government Study, but concluding that "[t]hese findings are consistent with those reported by other scholars, using other nationally representative surveys").

consequential: it affects public opinion and voting decisions."[215] Most obviously, support for state institutions may translate into political opposition to measures that would increase federal power vis-à-vis the states. In *Federalist 17*, Alexander Hamilton suggested that state governments "will generally possess the confidence and good will of the people; and with so important a support will be able effectually to oppose all incroachments of the national government."[216] Robert Mikos has dubbed this phenomenon the "populist safeguards of federalism."[217] While it is difficult to establish the influence of such safeguards directly, some scholars have suggested that they were powerful enough to impel movements in the 1980s and 1990s to devolve significant governmental authority to the states.[218]

The impact of such shifts in public opinion may not be confined to the political branches of government. Barry Friedman's account of the Rehnquist Court's "federalist revival" in the mid-1990s, for example, suggests that "[e]ven if some of the specific federalism decisions were hard to follow and others barely registered, the American public was by all accounts well behind the idea of devolving power to the states."[219] When the Court decided *United States v. Lopez* in 1995, for example, "[p]olls . . . not only showed huge support for states running things like education, crime fighting, and job training but also showed the public's ability to distinguish functions that were better suited to the federal government, such as the environment, civil rights, and the economy."[220] The Court may thus feel more confident limiting Congress's power when public opinion seems to want that power to be more limited.

We have also seen, and continue to see, important shifts in public perceptions of the Court's role, and these shifts have arguably supported the Court's gradual expansion of its authority in the years since its New Deal retreat. As previously described, the Court did not stay in retreat for long; rather, it shifted its ground to noneconomic liberties. Although many of its decisions in the 1950s and 1960s were controversial at the time, over the long term the Court seems to have established itself in a popular role as the primary guarantor of civil liberties.[221] And as such, it has been confident enough to move from underenforcement of those norms to rigorous enforcement today.

Moreover, the Court seems to have succeeded not only in finding a new role of enforcing noneconomic liberties, but also in translating that success into expansion into other areas. Recent empirical work has concluded that the liberal support that the Court generated with its decisions in favor of civil rights

215. *Id.* at 599.

216. THE FEDERALIST NO. 17, at 109 (Alexander Hamilton) (J.E. Cooke ed., 1961).

217. Robert Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1729 (2007).

218. *See* March J. Hetherington & John D. Nugent, *Explaining Public Support for Devolution: The Role of Political Trust*, *in* WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? 134, 134–35 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001).

219. FRIEDMAN, *supra* note 18, at 357.

220. *Id.*

221. *See* POWE, *supra* note 177, at 875; MCCLOSKEY, *supra* note 29.

is at least somewhat "portable"—that is, the Court has managed to hold that support even as it has become more conservative and shifted its attention away from civil rights enforcement.[222] Even the Court's award of the presidency to the Republican candidate in 2000 seems to have had merely transitory effects not only on public support for the Court generally, but even on support among liberals.[223] In any event, the Court has been sufficiently confident to expand relatively aggressive constitutional review into many areas of separation of powers,[224] even at the risk of direct conflict with the national political branches.

To the extent that underenforcement of constitutional principle reflects the Court's lack of confidence vis-à-vis the political branches, these trends suggest that the post-1937 "double standard" may not last forever. That standard reflected an effort by the Court to develop new areas of judicial review while respecting the national political branches' primacy with respect to the old preoccupations of federalism and economic liberty. But as the Court has recovered its standing, that double standard has begun to erode. Most obviously, the Rehnquist Court's "federalist revival" began—albeit extremely cautiously—a reentry into the field of federalism-based restraints on national authority. And, as I have noted, the Court has even made some forays back into the sensitive territory of economic rights.[225] More recent cases undermine the very existence of a double standard between economic and "personal" rights—in *Sorrell v. IMS Health, Inc.*, for example, the Roberts Court aggressively applied free speech principles (typically seen as "personal") to invalidate state healthcare legislation,[226] and that decision has already spurred similar speech-based challenges to federal regulation of the prescription drug industry.[227]

---

222. *See* Manoj Mate & Matthew Wright, *The 2000 Presidential Election Controversy*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 333, 349 (Nathaniel Persily, Jack Citrin, & Patrick J. Egan eds., 2008). During the Warren years, the Court defined itself as a guardian and arbiter of individual rights and civil liberties. Although the Rehnquist Court was on balance a more conservative Court, in some areas it followed the Warren Court in continuing to uphold and protect core individual rights and civil liberties. Many liberals continue to support that vision even as the Court has become more conservative in recent years.

223. *See id.* at 348. At least outside the law schools, of course.

224. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417 (1998); Clinton v. Jones, 520 U.S. 681 (1997); INS v. Chadha, 462 U.S. 919 (1983); United States v. Nixon, 418 U.S. 683 (1974).

225. *See, e.g.*, Eastern Enters. v. Apfel, 524 U.S. 498 (1998) (striking down a federal statutory provision imposing retroactive costs on companies that had been in the coal business on a combination of Takings Clause and Due Process theories); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (striking down a state court punitive damages award as excessive on a substantive due process theory); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (holding that a South Carolina restriction on development of beachfront property amounted to a regulatory taking).

226. 131 S. Ct. 2653, 2659 (2011); *see also* Ernest A. Young, Sorrell v. IMS Health *and the End of the Constitutional Double Standard*, 36 VT. L. REV. (forthcoming 2012) (discussing broader implications of *Sorrell*).

227. *See generally* Kate Greenwood, *The Ban on Off-Label Promotion after* Sorrell v. IMS Health, HEALTH REFORM WATCH (Aug. 3, 2011), http://www.healthreformwatch.com/2011/08/03/the-ban-on-off-label-promotion-after-sorrell-v-ims-health/; Lisa Blatt, Jeffrey Handwerker, John Nassikas & Kirk Ogrosky, *Does* Sorrell v. IMS Health *Mark the End of Off-Label Promotion Prosecution?*, 9 PHARMACEUTICAL L. & INDUS. REPORT 909 (2011), http://www.arnoldporter.com/resources/documents/ArnoldPorterLLP_BNAPharmaceuticalLawIndustryReport_7152011.pdf.

The post-New Deal settlement prescribing broad judicial deference to the political branches on matters of federalism and economic rights is a product of a wounded Supreme Court, humbled by its confrontation with the political branches during the Depression. The Court initially recovered its confidence by expanding judicial review in areas that did not implicate the old sore points. But now the Court has established itself as the critical champion of liberty in cases like *Brown*, *Brandenburg*, and *Mapp*, and it has successfully extended that role into policing the national separation of powers[228] and the democratic process itself.[229] Why should we assume that a Court with a reconstructed sense of legitimacy, staffed by justices with no direct memory of the New Deal crisis, would continue to view principles of federalism and economic liberty as requiring unusual degrees of doctrinal caution? It seems likely that the Court's expanded confidence will ultimately tell across the board.

We have few reliable tools, unfortunately, for gauging prospectively how changing public attitudes are likely to affect the Court's exercise of judicial review. It is particularly hard to know what it would take to prompt the Court to reconsider its general deference toward the political branches on basic questions like the scope of the Commerce Clause. One can imagine, however, more limited shifts in particular areas. For example, consider a hypothetical scenario involving the Court's state sovereign immunity jurisprudence. Previous periods of judicial activism in this area have always coincided with serious state debt crises. The Eleventh Amendment itself was ratified in response to *Chisholm v. Georgia*, which decided that the States could be held accountable in federal court for their Revolutionary War debts.[230] Likewise, the expansion of state sovereign immunity to cover federal question cases, as part of a new wave of Eleventh Amendment decisions, responded to another massive debt crisis involving the States' Reconstruction-era bonds.[231] Arguably, the Rehnquist Court's aggressive foray into state sovereign immunity law in the 1990s[232] came 15 years too early, before there was a policy need to support the Court's aggressive protection of the states' public fiscs. Congress responded by pushing back hard, repeatedly seeking to rewrite federal statutes to get around state sovereign immunity.[233] And the Court backed down, at least to some extent, moderating its jurisprudence on abrogation of state sovereign immunity

228. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008); Clinton v. City of New York, 524 U.S. 417 (1998).

229. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876 (2010); Bush v. Gore, 531 U.S. 98 (2000); Cal. Democratic Party v. Jones, 530 U.S. 567 (2000); *see generally* Richard A. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29 (2003) (discussing the Supreme Court's increasing intervention in the democratic process).

230. 2 U.S. (2 Dall.) 419 (1793).

231. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

232. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe v. Florida, 517 U.S. 44 (1996).

233. *See, e.g.*, Mitchell N. Berman, R. Anthony Reese, & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights*: *How to "Fix"* Florida Prepaid *(And How Not To)*, 79 TEX. L. REV. 1037, 1048 (2001) (discussing Congress's attempt to abbrograte state sovereign immunity in the intellectual property area in response to prior court decisions).

substantially in the Rehnquist Court's last years.[234]

With the States now financially on the ropes, however, the need to protect them from private damages liability makes somewhat more sense. Moreover, the public may well perceive the States as more financially responsible than the national government in light of recent brinksmanship over the federal debt ceiling. To the extent that people react in this way, the public might support greater financial protections for states if the Court should seek to further extend its sovereign immunity caselaw.[235] Or they might not, of course. It is much easier to say that the Court is not indifferent to shifts in public opinion than it is to say what the Court will do in response.

The public has views not only on general matters of federalism and judicial review, but also on particular constitutional issues—like the constitutionality of the ACA itself. A recent USA Today/Gallup poll found that "Americans overwhelmingly believe the 'individual mandate' . . . is unconstitutional, by a margin of 72% to 20%. Even a majority of Democrats, and a majority of those who think the healthcare law is a good thing, believe that provision is unconstitutional."[236] Similarly, a poll conducted last year by the Associated Press and the National Constitution Center asked respondents whether "the Federal Government should have the power to require all Americans to buy health insurance, and to pay a fine if they don't." Only 16 percent of respondents said that the Federal Government *should* have that power, and 82 percent said that it should not.[237]

These are pretty striking numbers, but the ACA's defenders tend to dismiss such attitudes as some kind of false consciousness. Andrew Koppelman, for instance, asserts that "[t]he unconstitutionality of health care reform is another of those [urban] legends [propagated by the Republican Party], legitimated in American culture by frequent repetition."[238] Contemporary scholarship on popular constitutionalism, however, has taught us that constitutional scholars indulge in this sort of condescension toward our fellow citizens at our peril. In any given case, the Court may surprise or even defy the popular will, and that

234. *See, e.g.*, Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006); Tennessee v. Lane, 541 U.S. 509 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

235. *Cf.* Coleman v. Court of Appeals of Maryland, 2012 U.S. Lexis 2315 (Mar. 20, 2012) (distinguishing *Hibbs* and holding that state sovereign immunity barred suits under the self-care provision of the Family and Medical Leave Act).

236. Jeffrey M. Jones, *Americans Divided on Repeal of 2010 Healthcare Law*, GALLUP POLITICS (Feb. 27, 2012), http://www.gallup.com/poll/152969/Americans-Divided-Repeal-2010-Healthcare-Law.aspx.

237. THE AP-NATIONAL CONSTITUTION CENTER POLL (Aug. 2011), http://surveys.ap.org/data/GfK/AP-GfK%20Poll%20Aug%202011%20FINAL%20Topline_NCC_1st%20story.pdf. Two percent were unsure. *Id.* When the same question was asked a year earlier, 17% said the federal government should have that power, and 83% said that it should not. *Id.* The AP's question was, of course, normative, while the Gallup poll solicited a legal judgment. It seems unlikely, however, that the laypeople responding to the two polls would have differentiated too sharply between them. The AP question was, after all, directed to the question of federal power, not to whether the individual mandate was a good idea overall.

238. Koppelman, *supra* note 11, at 23.

may well happen with the ACA cases. But over time, "Supreme Court decisions tend to converge with the considered judgment of the American people."[239] Certainly it is not obvious that the Court needs to continue to defer to broad assertions of national power when broad majorities of the American people distrust national institutions and already believe the ACA to be unconstitutional.

D. The States

One important and frequently overlooked aspect of the healthcare debate as an episode of popular constitutionalism is the role of state governments. State opposition to the ACA has taken a number of forms. Most obviously, states are the primary parties challenging the ACA's constitutionality in court. Wholly apart from their prospects of success on the merits, these suits serve as a vehicle for articulating an alternative view of constitutional meaning from that embodied in the ACA. In this sense, the States' role in the ACA litigation parallels Virginia's and Kentucky's challenge to the Alien and Sedition Acts in the early Republic, which articulated a more libertarian conception of free speech and a more limited view of national authority.[240] More recent parallels would include the many state and local resolutions condemning aspects of the USA PATRIOT Act as unduly infringing civil liberties,[241] as well as state efforts to enforce or exempt themselves from federal immigration policies by either enforcing federal law more vigorously than the federal executive has been willing to do, opting out of federal immigration programs like the "Secure Cities" initiative that the states consider unfair, or providing sanctuaries for certain types of aliens in circumstances where federal law makes no exception.[242]

States have also pursued a variety of bureaucratic strategies that we might group under the label of "uncooperative federalism."[243] At least twenty states, for example, have declined to participate in the portion of the ACA that enlists them to create a high-risk insurance pool, thereby requiring federal authorities undertake that task.[244] To the extent that the success of the federal healthcare regime depends on state cooperation and implementation, this sort of "pushback" is likely to be a highly effective means for reshaping federal policy, especially at the level of institutional detail. And while much of the state bureaucratic resistance is likely to focus on pragmatic objections to particular aspects of the national program, such resistance can also be a vehicle for

239. FRIEDMAN, *supra* note 18, at 14.

240. *See, e.g.*, Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENT. 315, 319–41 (1994).

241. *See generally* Althouse, *supra* note 69, at 1233.

242. *See generally* Christina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

243. *See generally* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

244. *See* Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 110, 116–17 (2010).

limiting national control on federalism grounds or enlarging the scope of individual liberty allowed under the Act.

States may be a particularly salutary institutional vehicle for popular constitutionalism, especially in comparison with social movements, nongovernmental organizations, and political parties. Social movements are typically dominated by organizations and individuals that may or may not have robust internal mechanisms of accountability. Even political parties have traditionally figured in our law as private associations; possess constitutional rights but are not easily regulated to ensure accountability to their members.[245] States, by contrast, are themselves democratic governments subject both to popular accountability and constitutional norms. The recent re-election campaign of Texas Attorney General Greg Abbott, for example, featured a public debate concerning whether Texas's participation in various lawsuits resisting national encroachments—including the ACA litigation—actually reflected Texans' views and was a good use of the State's resources.[246] If states do have important advantages as vehicles for constitutional contestation, then efforts to construe standing doctrine broadly to exclude state parties from litigation like the ACA challenges[247] are dangerously misguided.

States also facilitate popular constitutionalism in a broader sense. When constitutional or political constraints preclude homogenizing legislation at the national level, national inaction leaves the individual states as sites for political and constitutional contestation. We still see, for example, considerable diversity on healthcare policy among the states notwithstanding the ACA. Ohio has just voted to repudiate the individual mandate,[248] while Vermont has resolved to move beyond the ACA to a single-payer state healthcare system.[249] Fledgling social movements may find it easier to influence one or two states than the national government, and the opportunity to test out their vision in one or two jurisdictions may in turn enhance the persuasiveness of their message.[250] In this important sense, federalism enhances the opportunities for, and diversity of, a national conversation regarding constitutional meaning.

---

245. *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).

246. Chuck Lindell, *Texas Attorney General Greg Abbott opposes federal government on many fronts*, AUSTIN AMERICAN-STATESMAN, Aug. 7, 2010, http://www.statesman.com/news/texas-politics/texas-attorney-general-greg-abbott-opposes-federal-government-847623.html?printArticle=y.

247. Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 267–72 (4th Cir. 2011).

248. *See* Aaron Marshall, *Ohio Voters Say No to Health Insurance Mandates, Older Judges*, CLEVELAND PLAIN DEALER, Nov. 9, 2011, http://www.cleveland.com/politics/index.ssf/2011/11/ohio_voters_say_no_to_health_i.html.

249. *See* Zach Howard, *Vermont Single-Payer Health Care Law Signed by the Governor*, REUTERS, May 26, 2011, *available at* http://www.huffingtonpost.com/2011/05/26/vermont-health-care-reform-law-single-payer_n_867573.html.

250. *See* Heather K. Gerken, *Dissenting by Deciding*, 56 STAN. L. REV. 1745 (2005).

V
CONCLUSION

Justice Ginsburg has observed that judges "do not alone shape legal doctrine but . . . they participate in a dialogue with other organs of government, and with the people as well."[251] Although legal theory has become intensely interested in the phenomenon of popular constitutionalism over the past decade or two, we are a long way from any sort of rigorous understanding of how social movements like the Tea Party, public opinion at large, and judicial decisionmaking interact. We simply know that these interactions matter. What I have tried to do in this essay is to link popular constitutionalism to the phenomenon of underenforcement of constitutional norms through judicial doctrine. My basic point is a simple one: Underenforcement reflects the Court's views of its own institutional capacity to define and enforce constitutional principles vis-à-vis other branches of the government and the People at large. As such, underenforcement is historically contingent; even though constitutional principle endures, different principles may be over- and underenforced at different times, depending on historical circumstances. And as political circumstances and attitudes change, constitutional doctrine is likely to change with them.

We should keep the historically contingent nature of underenforcement in mind as we think about the Affordable Care Act. The constitutional debate over the individual mandate has—regrettably—gotten a little chippy. In a popular online essay, Andrew Koppelman has pronounced that "[t]he constitutional objections [to the ACA] are silly," and that any adverse ruling on the ACA by the Court could only be an illegitimately political effort by "the conservative majority on the Court . . . to crush the most important progressive legislation in decades."[252] Similarly, Peter Smith has asserted that "[s]muggling a libertarian-based limitation into constitutional law by concealing it in the garb of federalism . . . can only deepen the suspicions of those who already view arguments about federalism as simply a guise for some other policy agenda."[253] Professor Smith then proceeds to recycle the old canard purporting to link contemporary advocates of federalism to Southern segregationist policies of the last century.[254] The implication seems to be that the constitutionality of the

251. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1187 (1992).

252. Koppelman, *supra* note 11, at 2.

253. Smith, *supra* note 11, at 1746.

254. *See id.* at 1746–47 (finding in arguments against the ACA by Virginia and other parties "an eerie echo" of a segregationist brief filed by the Commonwealth in *Heart of Atlanta Motel v. United States*); *see also id.* at 1746 (citing, as support for the suggestion that ACA opponents have "some other policy agenda," a statement by Barry Friedman likening proponents of state autonomy to "foaming segregationists cursing civil rights marchers") (quoting Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 384 (1997)); FOLEY, *supra* note 47 , at 30–32 (collecting examples of statements suggesting that opposition to the ACA is motivated by "thinly veiled racism"). It really is surprising that this canard persists, seventeen years into a vibrant intellectual debate about federalism engendered by the Supreme Court's revival of the Commerce Clause in *Lopez*. *See, e.g.*, David J. Barron, *Reclaiming Federalism*, Dissent, Spring 2005, *available at* http://dissentmagazine.org/article/?article=249 (last visited

ACA is *so clear* that only stupid people—or bad ones—could disagree.

But the ACA's critics are *not* stupid, much less segregationist. Neither are the American people, three-quarters of whom believe the ACA to be unconstitutional.[255] Confident predictions about the outcome of the ACA litigation rest on judicial doctrine, not the uncontested meaning of the Constitution itself. The Supreme Court's current doctrine underenforces constitutional norms of federalism and economic liberty, and if that doctrine remains intact, then it is hard to see how the ACA will not ultimately survive the current challenges to its constitutionality. I have tried to show, however, that underenforcement is a historically contingent phenomenon, and doctrine that has shifted once can shift again. If the Court does shift ground, it will likely be in response to various aspects of popular constitutionalism—that is, public attitudes on federalism, economic liberty, and the role of the Court itself. In each of these areas, there is reason to believe that public opinion has moved away from key aspects of the New Deal settlement.

We would do well to remember that doctrine is historically contingent in a way that the Constitution itself is not. And the movement of history is unpredictable. The last decade and a half has witnessed a presidential impeachment, a presidential election tie broken by the Supreme Court, a massive terrorist attack on American soil, the worst financial meltdown since the Great Depression, the embrace of gay rights by large majorities of Americans, and the election of an African American President. We live in an age of catastrophes and miracles, none of which many people saw coming. The changing needs and views of the People will have their own impact on future doctrinal shifts, and that impact is not easy to predict. To the extent that the lawsuits challenging the ACA amount to a vehicle for articulating a different view of constitutional meaning, they may well find a more receptive public audience than they would have a decade or two ago. And if that happens, one should not expect the current underenforced status of federalism, or possibly even of economic liberty, to persist forever.

Mar. 27, 2012) (articulating a liberal case for state and local autonomy); Baker & Young, *supra* note 161, at 143–57 (explaining why it is wrong to assume that state autonomy is somehow inherently tied to racism). Our culture rightly treats any asserted tie to racism as a serious accusation; it follows that such accusations should be made sparingly.

255. *See supra* notes 236–237 and accompanying text.