WHAT WE FRET ABOUT WHEN WE FRET ABOUT BOOTSTRAPPING

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I
INTRODUCTION

In his contribution to this symposium, Stuart Benjamin identifies, elaborates, and evaluates the intuition that there is something troubling about bootstrapping—the process by which an actor can, by doing *Y*, give itself the power to do *Z*.[1] That intuition animates much of the opposition to the Patient Protection and Affordable Care Act (ACA).[2] Benjamin argues convincingly that, however bootstrapping is defined, it is not the constitutional threat that some people have imagined it to be.[3] As Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit explained in the course of rejecting a different argument against the constitutionality of the ACA, "Sometimes an intuition is just an intuition."[4]

In this short response, I attempt to join the projects that Benjamin has set for himself: first, identifying what people mean when they talk about bootstrapping; second, elaborating what people find troubling about that concept; and, finally, evaluating whether those concerns are justified. Although I agree with Benjamin almost completely, I try here to offer a few different points of emphasis, including more of a focus on the distinction between bootstraps and preconditions, four types of concerns regarding bootstrapping (those relating to aggrandizement, formalism, institutionalism, and transparency), and the relevance of the bootstrapper's purpose.[5]

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1. Stuart Minor Benjamin, *Bootstrapping*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 115, 116.

2. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.). *See* Benjamin, *supra* note 1, at 120 n.18 & 121 n.19 (collecting sources arguing that the ACA represents an unconstitutional bootstrap).

3. Benjamin, *supra* note 1, at 143 (arguing that bootstrapping is pervasive, that "the consequences of freely allowing bootstrapping would be modest," and that "[t]he consequences of disfavoring bootstrapping would be massive").

4. Thomas More Law Ctr. v. Obama, 651 F.3d 529, 565 (6th Cir. 2011) (Sutton, J., concurring) (rejecting arguments premised on the distinction between action and inaction).

5. Like Benjamin, I focus here on *legal* bootstraps. And in keeping with his analysis and the focus of this symposium, I focus primarily on congressional bootstraps.

II
INTUITIONS ABOUT DEFINITIONS

Bootstrapping is a term whose frequency of use conceals a variety of shadowy and perhaps shifting meanings. The strength of people's intuitions about bootstrapping is not, unfortunately, indicative of any agreement about what actually constitutes a bootstrap. One of the most useful contributions of Benjamin's piece, therefore, is its effort to identify and explore those meanings.

The first and most basic meaning of bootstrapping is the one Benjamin describes at the beginning of his article, namely that "by undertaking *Y*, an actor creates the conditions that enable that actor to undertake some further action *Z*."[6] In other words, *Z* would be impossible or impermissible were it not for the existence of *Y*. The actor (*A*), by doing *Y*, creates the precondition for its also being able or allowed to do *Z*.

There are, of course, many instances in which an actor must do *Y* before doing *Z*, and not all of them are bootstraps. When a person obtains a concealed-carry license (*Y*), she is then legally permitted to carry a concealed firearm (*Z*). Yet few people would regard compliance with the licensing requirement as a bootstrap. If it is, then bootstraps are even more pervasive than Benjamin says, and the hard definitional project lies in separating the good bootstraps (like compliance with licensing requirements) from the bad.

Perhaps the difference between bootstrapping and satisfying a precondition is that, in the former case, the actor has control over both *Y* and *Z*—the "entity is empowering itself, rather than being part of a process involving many different entities."[7] Of course, the same is true of the concealed carrier. She has, by obtaining a license, empowered herself to carry a concealed firearm. Maybe the cases can be distinguished on the grounds that she has not truly empowered herself, for the requirement of *Y* was actually set by the legislature—a "different entit[y]." But that is not entirely satisfying either because nearly every imaginable bootstrap involves a *Y* required by another entity. The arguable Commerce Clause bootstrap in the context of the ACA, after all, involves Congress's attempt to satisfy a doctrinal test established by the courts.

Maybe what makes bootstraps different from the satisfaction of preconditions is that the bootstrapping actor has done *Y* only because it really wants to do *Z*. That is, bootstraps occur when *A* undertakes *Y* solely because it enables *Z*, and not because *A* believes that *Y* has any independent value. But that is not totally satisfying either. A gun owner might seek a concealed-carry permit not because she believes that the licensing requirement is justifiable, but purely for the instrumental reason that it will allow her to carry a concealed firearm legally. We do not necessarily think of that as a bootstrap, notwithstanding the fact that it undoubtedly amounts to a situation in which, "by undertaking *Y*, an actor creates the conditions that enable that actor to

6. Benjamin, *supra* note 1, at 116.

7. *Id.* at 117; *see also id.* at 116 ("[I]n bootstrapping the same actor undertakes *Y* and *Z*.").

undertake some further action *Z*."[8] This is so even though, from *A*'s perspective, *Y* is simply a means of getting *Z* and is undertaken for that reason alone.

Of course, one major reason we do not consider this a bootstrap is because the license requirement is thought to give benefits to third parties. The gun owner might think that her action *Y* is pointless, but presumably some proportion of the public disagrees. Her satisfaction of the licensing requirement gives the public what it wants, and for that very reason is not a bootstrap.

Perhaps, then, the real question is whether *Y* has any value to anyone, not just to *A*. If it does not—if *Y* is simply an action undertaken for the sole purpose and with the sole effect of enabling *Z*—then a bootstrap has occurred. There is something appealing about this definition, for it highlights to some degree the intentions of the bootstrapping actor and the effects of her action on other actors, both of which seem relevant to our intuitions about bootstrapping. And yet this definition is as underinclusive as the earlier efforts were overinclusive. Rarely does an actor do *Y*—the satisfaction of a requirement or precondition, say—without any effect, positive or negative, on others. Requirements and preconditions, after all, are presumably put into place precisely because they are thought to be valuable.

Another way to separate bootstraps from the satisfaction of preconditions would be to say there is no bootstrapping problem when a person does *Y* in order to enable *Z* *if* the very purpose of requiring *Y* is to enable *Z*. This definition is different from the previous one because it focuses on the purpose of requiring *Y*—the linkage between *Y* and *Z*, that is—not the purpose of *A* in doing *Y*. The idea behind this definition is relatively simple: Sometimes the *Z*-enabling function of *Y* is desirable, perhaps even the very *raison d'être* of *Y*. For example, when *A* obtains a concealed-carry license (*Y*) so that she can legally carry a concealed weapon (*Z*), we do not consider that a bootstrap. By contrast, if *A* provokes or creates a dangerous situation (*Y*) and then argues that necessity or self-defense exceptions give her a right to an otherwise prohibited gun (*Z*), we might see things differently. The difference between the two scenarios lies in part with the fact that the very purpose of a license requirement is to serve as a precondition to carrying a concealed weapon, whereas the purpose of necessity and self-defense exceptions is not.

As these examples highlight, the idea of a bootstrap seems to incorporate some consideration of the *reason* that *Y* enables *Z* and of *A*'s intentions. Benjamin brackets the issue of congressional purpose, for familiar and understandable reasons, including the difficulty of identifying a single coherent congressional intent.[9] Although I certainly agree that "purpose" is a slippery

8. *Id.* at 116.

9. Benjamin generally brackets the question of "purpose," for good practical reasons. *See* Benjamin, *supra* note 1, at 130–34 (emphasizing, inter alia, the difficulty of identifying congressional "purpose"). These practical objections are weighty, but I still believe that *A*'s purpose is deeply relevant to our intuitions about bootstrapping.

concept, I also believe that it is central to people's intuitions about bootstrapping. What separates bootstrapping from the satisfaction of preconditions is, I suspect, largely dependent on *A*'s intention to aggrandize its own power. How such an intention could be identified is of course an extremely difficult question, but presumably no more so than the constitutionally mandated search for intent in equal protection cases.[10] Perhaps, as in other areas of law, the answer lies in looking to the "objective" purpose manifested in the statute, as opposed to the subjective intent of the legislators.[11] In any event, it is not a problem unique to bootstrapping.

Bootstrapping also incorporates, as Benjamin emphasizes, some concern for the proximity in time of *Y* and *Z*. He concludes that "[t]he one distinction [among types of bootstraps] that has any traction—between simultaneous and nonsimultaneous bootstraps—still creates costs that greatly outweigh the benefits."[12] To the degree that the definition of bootstrapping incorporates some concern with intentionality—of an actor purposefully expanding its own power—then that definition may also be particularly concerned with *Y*s and *Z*s that are either simultaneous or proximate in time. One major reason for this is simply evidentiary. If Congress *A* does *Y*, and then fifty years later Congress *B* decides to do *Z*, which *Y* enables, then it is unlikely that Congress *A* undertook *Y* with the goal of enabling *Z*. Of course, Congress *B* undoubtedly took its action purposefully, but it is difficult to consider that a bootstrap. The existence of the fifty-year-old law is akin to a preexisting fact in the world, rather than a product or part of a bootstrap.[13] *Z* may be problematic, but not because it is a bootstrap.

In the end, there is no single shared intuition about what constitutes a bootstrap, just as other related buzzwords—including "slippery slope"—have no single, stable core meaning.[14] The characteristics described above are simply various faces of the issue.

III
INTUITIONS ABOUT PROBLEMS

The different faces of bootstraps raise different kinds of intuitive concerns. In this part, I attempt to review the most serious of those concerns and make the strongest possible case in favor of them. In Part IV, I revisit the question

10. *See generally, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (discussing the search for discriminatory intent).

11. *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 423–24 (2005). Many thanks to Neil Siegel for pointing this out to me.

12. Benjamin, *supra* note 1, at 143.

13. *Cf. id.* at 115 ("Every action a person can take depends on the circumstances created by prior actions.").

14. *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1033 (2003) ("Though the metaphor of the slippery slope suggests that there's one fundamental mechanism through which the slippage happens, there are actually many different ways that decision A can make decision B more likely.").

whether they are indeed legitimate.

Surely the first and most major form of the bootstrapping concern is the straightforward intuition that "[a]llowing *Y* to enable *Z* allows for aggrandizement, possibly unending aggrandizement."[15] Call this the aggrandizement concern. It is, as Benjamin notes, a consequentialist argument, one that suggests "not that bootstrapping is illogical or immoral or unethical, but rather that it produces, or can produce, undesirable outcomes."[16]

As Benjamin demonstrates, this particular concern seems to be animating much of the opposition to the ACA. Robert Levy of the Cato Institute writes, "Essentially, the insurance mandate is regulatory bootstrapping of the worst sort. Congress forces someone to engage in commerce, then proclaims that the activity may be regulated under the Commerce Clause. If Congress can do that, it can prescribe all manner of human conduct."[17] Similarly, Randy Barnett argues, "Congress exercises its commerce power to impose mandates on insurance companies and then claims these insurance mandates will not have their desired effects unless it can impose mandates on the people, which would be unconstitutional if imposed on their own."[18] Part IV will consider whether these arguments are justified, and whether they are bootstrapping arguments at all.

A related concern with bootstrapping is that it permits *A* to get *Z* by a means (*Y*) that follows the letter but not the spirit of the law. Call this the formalism concern. It flows from the fact that, although *Y* enables *Z* by definition, the linkage itself might be troubling nonetheless. This is in some sense the opposite of the "precondition" situations discussed above, in which the linkage between *Y* and *Z* is a product of design. In a bootstrap, the linkage exists (by definition), but is undesirable or unforeseen. It is the equivalent of exploiting a loophole, and bothersome for the same reason.[19]

The aggrandizement concern is essentially a problem of *what* amount of power Congress can give itself. The formalism concern is a question of *how* Congress gets to that result. But there is a slightly different way to view the issue—by focusing on *who* defines the limits of that power. Call this the

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15. Benjamin, *supra* note 1, at 122.

16. *Id.* at 123.

17. Robert A. Levy, *The Case Against President Obama's Health Care Reform: A Primer for Nonlawyers*, CATO INST. (Apr. 25, 2011), http://www.cato.org/pubs/wtpapers/ObamaHealthCareReform-Levy.pdf.

18. Randy E. Barnett, *Turning Citizens into Subjects: Why the Health Insurance Mandate is Unconstitutional*, 62 MERCER L. REV. 608, 614 (2011); *see also John Eastman in the Sacramento Bee: Health care reform challenge? It's the law*, JOHN EASTMAN FOR ATTORNEY GENERAL (Apr. 6, 2010), http://www.eastmanforag.com/news/john-eastman-in-the-sacramento-bee-health-care-reform-challenge-its-the-law ("[T]he Supreme Court has never before allowed Congress to bootstrap its way into Commerce Clause authority by relying on the impact of its own regulation.").

19. *See* Leo Katz, *A Theory of Loopholes*, 39 J. LEGAL STUD. 1, 2 (2010) ("[W]hen I speak of loopholes I mean pretty much what everybody else means—seeming glitches in the formulation of a law (it could be either statutory or case law) that allow clever lawyers to help their clients do things that appear to subvert its purpose.").

institutional concern. Benjamin gestures at it when he writes that "[t]he key" to bootstrapping "is that an entity is empowering itself, rather than being part of a process involving many different entities."[20] This separates bootstrapping from, for example, slippery slopes.[21] The problem with bootstraps, on this slightly different account, is not simply that Congress is aggrandizing its own power. Rather, the root of the problem is that by bootstrapping, Congress effectively gets to control how much power it has. This raises a circularity concern: Congress's power is permissible so long as Congress says it is.

That difference is subtle, but important. The aggrandizement concern focuses on accumulation of power, whatever its source; the institutional concern focuses on the ability to set the boundaries of that power. The two are not identical. Congress might be empowered by forces beyond its control—the existence of an emergency sufficient to suspend habeas corpus, for example. That could raise a problem of aggrandizement. Or Congress might purposefully create or allow such an emergency, and then use it as the basis for further assertions of power. That would implicate the institutional concern because it would involve Congress increasing its own power. This suggests that when Congress enables itself to do *Z* by first doing *Y*, *Z* is not necessarily the problem, or at least not the only one. Rather, what is troubling is the fact that Congress has effectively redefined the limits of its own power. This may be what separates bootstraps from other forms of power-grabbing—a bootstrap allows Congress to unbind itself.

There is at least one more version of the argument against bootstrapping, which is that it permits—indeed, incentivizes—Congress to do *Y* when its "true" motive is *Z*. Call this the transparency concern. Just as the institutional concern focuses on the ability of other branches to check congressional aggrandizement of power, the transparency concern raises the issue of whether and how voters can do so.[22] For so long as voters cannot see Congress's endgame (*Z*), they will be more likely to approve *Y* (and thereby *Z*) without considering what it might mean for congressional authority in the future. One need not believe in widespread voter ignorance to think that voters will often be unable to determine whether *Y* can or is likely to lead to *Z*.[23] When Congress passed the

20. Benjamin, *supra* note 1, at 117.

21. *See id.* at 116 ("Neither path dependence nor a slippery slope necessarily involves a given actor building on its own prior actions."). *See generally* Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Case a Slippery Slope?*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 75.

22. If Congress does act intentionally with regard to its bootstraps, then the linkage between *Y* and *Z*—specifically, the fact that *Y* enables *Z*—actually sets another kind of perverse incentive, which is to pass *Y only* for the purpose of achieving *Z*. This raises the possibility that the true problem lies in *Y*—a pointless law that exists only to enable another. *Cf.* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1297 (N.D. Fla. 2011) ("Such an application of the Necessary and Proper Clause would have the perverse effect of enabling Congress to pass ill-conceived, or economically disruptive statutes, secure in the knowledge that the more dysfunctional the results of the statute are, the more essential or 'necessary' the statutory fix would be.").

23. *See generally* Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, CATO INST. (Sept. 22, 2004), http://www.cato.org/pubs/pas/pa525.pdf.

Emergency Medical Treatment and Active Labor Act[24] (EMTALA) in 1986, requiring hospitals to provide emergency care, surely few voters were clairvoyant enough to perceive that it would later be used as a justification for the constitutionality of the ACA.[25]

The transparency concern comes in many forms. Its strong version—that Congress purposefully tricks ignorant voters into approving *Y*, thereby giving Congress the power to do *Z*, which is what it really wanted all along—is almost certainly unrealistic. After all, it seems unlikely that many elected officials saw EMTALA as a constitutional predicate to the individual mandate. Moreover, such long-term bootstraps are not particularly attractive from Congress's point of view. After all, Congress *A* might not have sufficient incentive to aggrandize the power of Congress *B*; the personal and party interests of individual representatives probably outweigh their interests in expanding the power of the institution itself.[26]

But lack of transparency can be a problem even if it does not mask purposeful expansions of congressional power. So long as the consequences of *Y* with regard to *Z* are hidden or unknowable, inadvertent bootstraps are likely to occur, and their effects may be precisely the same as purposeful ones. For example, voters and Congress *A* might have nothing at all in mind when passing law *Y* other than the specific goals associated with *Y*. That means that they cannot accurately "price" its results, and could therefore inadvertently pre-approve a future Congress's assertion of sweeping authority. Intentionally or not, Congress *A* has given itself (or future Congress *B*) the power to do *Z* as well. For example, as Benjamin notes, congressional authority over interstate commerce is greatly enhanced by the existence and extent of federal regulations of interstate banks.[27] Yet it is unlikely that many supporters of these bank regulations at the time intended, or perhaps even wanted, to expand Congress's Commerce Clause power.

These are, of course, only a few of the arguments against bootstrapping; Benjamin's article explores others. Undoubtedly, our intuitions about bootstrapping implicate all four of these arguments in various ways. And they seem to be among the strongest. So if bootstrapping is problematic, then we should expect these arguments to carry significant weight.

IV
WHY WE NEED NOT FRET (AT LEAST NOT MUCH)

Professor Benjamin's article concludes on a reassuring note. He claims that

24. 42 U.S.C. § 1395dd (2010).

25. *Cf.* Benjamin, *supra* note 1, at 128 n.48 (recounting reasons for EMTALA's passage, none of which involve laying foundations for the ACA).

26. *See generally, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006) (describing how two-party political competition has altered the conception of separation of powers).

27. Benjamin, *supra* note 1, at 125.

"boostrapping is pervasive" and yet "the sky has not fallen."[28] Bootstrapping, therefore, cannot be the unmitigated constitutional problem that Part III might suggest. I generally agree, though I think intuitions about why bootstrapping is problematic are not completely unfounded.

The first major objection discussed above is the aggrandizement concern, which has much in common with slippery slope arguments. And as with slippery slopes, the main problem from the aggrandizement perspective is the possibility that the bootstrapping actor will increase its power beyond proper limits, whatever those limits might be. But standing alone, that is not an objection to bootstrapping *per se*, but rather to the results of doing so—to the aggrandizement itself. Benjamin distinguishes the concern on precisely these grounds.[29] By definition, a bootstrap makes *Z* permissible. The problem with the bootstrap, then, cannot simply be the fact that it enables *Z*.

That answer, however, is unlikely to satisfy those concerned with aggrandizement. For even if the bootstrap renders *Z* permissible, it still—again by definition—changes the status quo in doing so, perhaps for the worse. By following a particular process, Congress has substantively altered its own powers. And even if a process cannot be damned based solely on the fact that it occasionally leads to bad results,[30] the fact that it does so is not a mark in its favor. One (if not *the*) point of process design, after all, is to generate and encourage desirable substance. Thus, if bootstrapping is a process that leads to undesirable outcomes like aggrandizement, then perhaps it should be prohibited or limited, notwithstanding its internal coherence.

Just how *much* we should be worried about aggrandizement is a more difficult question, one that—in the particular context of the ACA—requires understanding Congress's incentives to foster its own power. Scholars have cast some doubt on whether members of Congress have incentive to further empower the institution as opposed to, say, themselves or their parties.[31] In the current political climate, for example, with congressional approval ratings hovering at around fifteen percent,[32] aggrandizement of congressional power is unlikely to be a primary goal of voters or elected officials.[33]

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28. *Id.* at 143.

29. *Id.* at 118–19 ("If *Z* is unconstitutional or otherwise illegitimate whether or not *Y* exists, then *Y* is not legally enabling *Z* and there is no bootstrap, because Z is illegitimate anyway.").

30. *Id.* at 118 ("The possible illegitimacy of an outcome does not automatically condemn the process that produced it. Any process can produce a bad outcome.").

31. *See id.* at 137 ("Congress has less ability to engage in a long-term process of aggrandizement than the other branches do.").

32. Paul Kane & Scott Clement, *Poll Sees a New Low in American's Approval of Congress*, WASH. POST (Oct. 5, 2011), http://www.washingtonpost.com/politics/poll-sees-a-new-low-in-americans-approval-of-congress/2011/10/04/gIQAc0yQML_story.html. For frame of reference, President Nixon's approval rating the week before he resigned was twenty-four percent. *See Presidential Approval Ratings—Gallup Historical Statistics and Trends*, GALLUP, http://www.gallup.com/poll/116677/presidential-approval-ratings-gallup-historical-statistics-trends.aspx (last visited Jan. 11, 2012).

33. This is not to say, of course, that candidates will or should avoid calling for particular actions that would have the *effect* of increasing congressional power. My point is simply that the power itself is

This assumes, of course, that the political process can check bootstraps, which once again raises the transparency concern discussed above. Even if voters have incentive to prevent bootstraps, they will be unable to do so effectively if they cannot see bootstraps as they happen. For the reasons discussed above, this blindness is almost certainly endemic, at least with regard to those situations where the link between *Y* and *Z* is only clear in retrospect. A savvy (or diabolical) Congress could even bootstrap through *in*action[34]—for example, by intentionally failing to prevent an avoidable crisis and then using that crisis as a justification for asserting broad powers. Indeed, from the perspective of Congress, that may be precisely what makes bootstrapping so effective: Voters approve expansions of congressional power without fully understanding that they have done so.

Here again, the passage of time between *Y* and *Z*—the simultaneity issue Benjamin discusses[35]—becomes highly relevant. It remains unclear, however, which way the issue cuts in terms of addressing the concerns laid out in Part III. On the one hand, requiring Congress to do *Y* and *Z* at separate points in time could help address the transparency concern by illuminating the intentionality problem discussed above. If Congress does *Y*, and then does *Z* at some later point—perhaps much later—then the chronology itself tends to suggest that *Y* was undertaken for its own sake. This is important inasmuch as it suggests both that Congress did not set out to bootstrap its own power and, relatedly, that *Y* has independent value, rather than simply being a necessary (and perhaps otherwise pointless, or even harmful) step towards *Z*. For example, the fact that Congress has extensively regulated interstate banks does not mean the creation of the interstate banking regulations was the first step of a bootstrap.[36] The nonsimultaneity of *Y* and *Z*, among other things, reassures us on that score.

Moreover, separating *Y* and *Z* can address the transparency issue by giving voters an opportunity to stop the bootstrap. If they do not want Congress to do or have *Z*, they can vote out the Congress that did *Y*. Some version of this idea lies behind the Twenty-Seventh Amendment, which prevents congressional salary changes from taking effect until after an intervening election.[37] The idea is to give voters a chance to ratify or disapprove the action. Of course, whether this check will be effective depends on the ignorance problem discussed above; if voters cannot see *Z* on the horizon, they will not respond to it when evaluating *Y*.

Despite the potential benefits, requiring nonsimultaneity would also carry significant costs. Benjamin discusses many of these,[38] and I will not revisit them in depth. One obvious obstacle would be the straightforward political one. If *Y*

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probably not a stated goal.

34. Benjamin, *supra* note 1, at 126 (describing possibility of bootstrapping through inaction).

35. *Id.* at 134–43.

36. *Cf. id.* at 125 (discussing bank regulation example).

37. U.S. CONST. amend. XXVII.

38. *See* Benjamin, *supra* note 1, at 134–43.

is only useful to the degree that it enables *Z*, it might never be done on its own, meaning that *Z* cannot be done either.[39] This is potentially a problem, at least if the combination of *Y* and *Z* is better than neither *Y* nor *Z*.

The relationship between *Y* and *Z* is also central to the formalism concern—the idea that using *Y* to get *Z* is within the letter of the law but contrary to its spirit. This is not an easy concern to answer in the abstract. For those who believe that rules can and should be applied without reference to underlying values, it will simply have no appeal; the linkage between *Y* and *Z* is sufficient on its own terms. But those who are bothered by such situations—and related concepts like loopholes—are likely to want more. The answers must lie in the same kinds of analyses used to address loopholes and technicalities, analyses that are beyond my ability to address in any detail here.[40]

This leaves the institutional concern, which focuses less on the substantive results of bootstrapping and more on the fact that bootstraps effectively transfer interpretive authority from one institution (the courts, for example) to the institution that is acting (Congress, for example). As explained above, this problem is subtly but significantly different from the aggrandizement concern, as it looks not to the amount of power *A* has claimed for itself, but to the fact that by doing so *A* has disabled other branches from their normal roles in identifying the proper limits of *A*'s authority.

These types of self-defining bootstraps are common. Yet, here again, the problem may not be quite so dramatic as it seems, or at least not so unique. There are many, many instances of federal government officials interpreting the limits of their own interpretive authority. Professor Benjamin rightly points to *Marbury v. Madison*[41] as one example.[42] The basic principle that courts have jurisdiction to determine their own jurisdiction is another.[43] Sometimes such bootstraps are partially bounded. State secrets doctrine, for example, effectively permits the executive to, within limits, define its own power.[44] The same is true of Congress's power under the Necessary and Proper Clause.[45] As Neil Siegel points out, "If American constitutional law were otherwise, *Comstock* would have come out the other way, for the federal statute under review addressed a collective action caused in part by Congress when it authorized long periods of incarceration in remote federal prisons."[46]

Moreover, one might argue against the institutional concern that bootstraps

39. *Id.* at 138.

40. *See supra* note 19.

41. 5 U.S. 137 (1 Cranch) (1803).

42. Benjamin, *supra* note 1, at 141.

43. United States v. United Mine Workers, 330 U.S. 258, 291, 359 (1947).

44. For a recent and thoughtful exploration of various forms of state secrets, see generally David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

45. Benjamin, *supra* note 1, at 124.

46. Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 29, 72 (citing United States v. Comstock, 130 S. Ct. 1949 (2010)).

do not remove interpretive authority; they simply change the question that the interpreter must ask. Even if one considers the ACA to be a bootstrap based on EMTALA, nothing in that bootstrap deprives courts of jurisdiction to consider challenges to the ACA's constitutionality.[47] What it does change is the *merits*. By doing *Y*, Congress has made *Z* permissible. Congress has played by the rules, whether or not the result of its having done so is desirable.

V
CONCLUSION

Stuart Benjamin identifies an important but ill-defined objection to the ACA, gives the objection its best possible articulation, and then shows that even in its strongest form it does not cast doubt on the law's constitutionality. Whatever limits on congressional power are relevant to the ACA must be found elsewhere. In that respect, his article delivers precisely what this symposium calls for: a scholarly treatment of a particularly important aspect of the debate over the ACA.

But the article, like many other contributions to this symposium, also has general implications for other areas of law. As noted above, the same underlying concerns that animate the bootstrapping argument in the ACA context—fears of slippery slopes, institutions defining their own powers, and loss of transparency—are also relevant to questions of jurisdictional rules, executive action, and Commerce Clause jurisprudence as a whole. The debate over the ACA's constitutionality provides a particularly salient context in which to investigate the issues. But the issues, and therefore Benjamin's article, are broader than that.

47. There are, of course, significant jurisdictional concerns, but they do not derive from the bootstrap itself. *See, e.g.*, Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 270–72 (4th Cir. 2011) (holding that Virginia lacks Article III standing to challenge the ACA); Kevin Walsh, *The Ghost that Slayed the Mandate*, 64 STAN. L. REV. 55 (2012) (arguing that federal courts lack statutory subject matter jurisdiction over *Virginia v. Sebelius*).