

# ON THE DIFFICULTY OF SEPARATING LAW AND POLITICS: FEDERALISM AND THE AFFORDABLE CARE ACT

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## I INTRODUCTION

With *Popular Constitutionalism and the Underenforcement Problem*,<sup>1</sup> Professor Ernest Young enriches this symposium with his commentary on the legal, historical, and political underpinnings of constitutional federalism.<sup>2</sup> As I understand it, Professor Young makes three central claims in his article. First, he offers a descriptive claim, asserting that current constitutional doctrine underenforces federalism.<sup>3</sup> Second, he posits a causal claim, contending that the under or overenforcement of constitutional principles is in part shaped by history and politics.<sup>4</sup> And third, Professor Young issues a predictive claim that the Supreme Court may respond to libertarian popular constitutionalists<sup>5</sup> and

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1. Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 LAW & CONTEMP. PROBS. no. 3, 2012 at 157.

2. Young, *supra* note 1, at 191 (demonstrating his profound understanding of the federal constitutional structure in describing some of the ways in which popular constitutionalism might "shape the constraints within which constitutional interpreters must operate").

3. Young, *supra* note 1, at 158. Professor Young's article draws on Lawrence Sager's underenforcement thesis, which argues that, regardless of the "constricted reach" of judicial doctrine, non-judicial actors "are legally obligated to obey the full scope of constitutional norms." Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1264 (1978).

4. Young, *supra* note 1, at 159.

5. See, e.g., Ilya Somin, *The Tea Party and Popular Constitutionalism*, 105 NW. U. L. REV. 300, 300 (2011) (defining "popular constitutionalism" as "the involvement of public opinion and popular movements in influencing constitutional interpretation").

the litigation involving the Patient Protection and Affordable Care Act (ACA)<sup>6</sup> by crafting doctrine that more aggressively enforces federalism.<sup>7</sup>

Professor Young's article is an illuminating and enjoyable read; I commend it to you. In this response essay, I critically explore his engagement of the law-politics dilemma and the careful predictions he offers regarding the future of constitutional doctrine. First, as Part II explains, Professor Young's descriptive claim about federalism doctrine engages the law-politics dilemma in a way that might not fully account for the role of judicial discretion. Second, Part III questions whether Professor Young's causal claim draws a sustainable distinction between law and politics when it seems simultaneously to integrate and delimit those two realms. Finally, Part IV argues that, independent of Professor Young's accounts of the law-politics elision, there are reasons to doubt his predictive claim; because "much remains unknown regarding public opinion about federalism,"<sup>8</sup> it is not at all clear that the Court's doctrine will change in response to the constitutional politics<sup>9</sup> surrounding the ACA.

## II

### THE DESCRIPTIVE CLAIM: DOCTRINE, DISCRETION, AND THE LAW-POLITICS DILEMMA

Descriptively, Professor Young claims that current doctrine underenforces federalism.<sup>10</sup> I leave it to others to evaluate the veracity of Professor Young's descriptive claim, for such an endeavor is beyond the scope of this essay. Rather, my analysis of Professor Young's descriptive claim focuses on the relationship between law and politics implied in his account of constitutional doctrine.

Professor Young's article, as I interpret it, posits a two-part account of constitutional doctrine.<sup>11</sup> First, his causal claim, addressed in Part III, acknowledges doctrine's susceptibility to politics at the point of its formulation, or reformulation. His descriptive underenforcement claim, however, taken in its strongest form seems to suggest that, once formulated, doctrine determines legal outcomes to a substantial or complete extent. In short, the causal claim focuses on doctrine as a formative enterprise, while the descriptive claim pertains to doctrine as an applicative enterprise.

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6. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

7. See Young, *supra* note 1, at 200.

8. Megan Mullin, *Federalism*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 216 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008).

9. See, e.g., Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight Over Healthcare*, 27 J.L. & POL. 177, 181-95 (2011).

10. Young, *supra* note 1, at 200.

11. I understand Professor Young to be using the term "doctrine" to mean rules articulated in prior judicial decisions, rather than as a catch-all term enveloping the Court's exercise of prudence or discretion in addition to its precedential rules.

This section analyzes the strongest implications of Professor Young's applicative account of doctrine and the formalist view of the law it seems to trade on. That is, Professor Young's claim that current doctrine underenforces federalism<sup>12</sup> tends to depict law as an autonomous set of rules that "bind the judges as well as the judged."<sup>13</sup> This aspect of Professor Young's argument theorizes a crisp distinction between law and politics; law, in the form of doctrine, commands the outcome of legal disputes regardless of the political or historical context in which those disputes arise.

On this interpretation, Professor Young's account of doctrine is vulnerable to the criticism that it does not capture fully the interpretive practices that enable constitutional adjudication.<sup>14</sup> To be sure, Professor Young is correct that doctrine can constrain judges—particularly in lower courts.<sup>15</sup> But to the extent he identifies doctrine as the but-for cause of decisions he finds objectionable,<sup>16</sup> his argument (somewhat) assumes away the role of judicial discretion in those cases.<sup>17</sup> Professor Young's descriptive claims about doctrine, in other words, may not fully comport with the legal order they seek to describe. As a result, it is unclear whether his argument has drawn a sustainable distinction between law and politics.

To frame my analysis in the context of this symposium, I am not sure how Professor Young's applicative account can make sense of the split of authority on the ACA's constitutionality. In reaching their decisions, both the Sixth and Eleventh Circuits interpreted and applied precisely the same federalism doctrine.<sup>18</sup> Yet the Eleventh Circuit held the minimum coverage provision unconstitutional as a violation of federalism,<sup>19</sup> while the Sixth Circuit concluded

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12. See Young, *supra* note 1, at 200.

13. ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 69 (1987).

14. A similar criticism could be leveled at defenders of the ACA who argue that it is an "easy case" under current doctrine. The strongest implication of that claim seems to rely as well on the notion that judicial discretion, choice, and creativity are somehow absent when applying, rather than formulating, doctrine.

15. For a recent example of this phenomenon, see Leitch, *supra* note 9, at 212–23, 226–30, describing some of the ways doctrine constrained and disciplined the adjudication of economic due process challenges to the ACA.

16. See Young, *supra* note 1, at 201 (arguing that "current *doctrine* underenforces constitutional norms of federalism," rather than courts or judges underenforcing federalism principles (emphasis added)).

17. Accord ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158–59 (1990) (observing that the choice of whether to construe cases broadly or narrowly engages "the prudence of a court" and mandates a prediction of likely effects).

18. Compare *Florida ex rel. Att'y Gen. v. U.S. Dep't Health & Human Servs.*, 648 F.3d 1235, 1269 (11th Cir. 2011) (invalidating the mandate based on the Supreme Court's "principal Commerce Clause precedents," including *Wickard*, *Heart of Atlanta*, *Lopez*, *Morrison*, and *Raich*), *cert. granted*, 132 S. Ct. 604, with *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 541–49 (6th Cir. 2011) (upholding the minimum coverage provision, in large part, because it met the Court's doctrinal "rational basis" test as derived from *Wickard*, *Lopez*, *Morrison*, and *Raich*).

19. *Florida ex rel. Att'y Gen.*, 648 F.3d at 1286.

that the same provision fell within Congress's constitutional authority.<sup>20</sup> Similarly, members of other courts have engaged the same decisional materials and arrived at markedly different judgments about the law's permissibility under federalism principles.<sup>21</sup>

These judicial decisions, and the argumentative practices they reflect, seem to belie Professor Young's suggestion that doctrine is responsible for what he perceives as the underenforcement of federalism.<sup>22</sup> Instead, these rulings seem to show that doctrine cannot always be separated from the legal, political, and ethical choices that inform its interpretation and enforcement.<sup>23</sup> Even when courts are merely applying existing doctrine, recourse must be had to "the human faculty of judgment," in which "[j]ustification flows . . . from the principled application of pertinent considerations," not simply the "logical compulsion" of doctrinal rules.<sup>24</sup>

This means that judicial decisions construing and applying constitutional doctrine are not solely doctrine-governed.<sup>25</sup> Rather, they must rely on, among other things, normative appraisals of history, text, consequences, and national identity.<sup>26</sup> Thus, the Constitution as "hard law" and the Constitution as

20. *Thomas More Law Ctr.*, 651 F.3d at 541–49; *see also id.* at 557–58 (Sutton, J., concurring in part) (concluding that "the minimum-essential-coverage provision passes" the "conventional commerce clause benchmarks" of *Lopez* and *Morrison*).

21. *Compare* *Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915, at \*1 (4th Cir. Sept. 8, 2011) (relying on Supreme Court doctrine to define the minimum coverage provision as a "tax," which no other court had done up to that point, and applying the Anti-Injunction Act to dismiss the plaintiffs' challenge on jurisdictional grounds), *and id.* at \*23, \*37–\*49 (Davis, J., dissenting) (concluding that the "the challenged provisions of the Act are a proper exercise of Congress's authority under the Commerce Clause"), *with* *Seven-Sky v. Holder*, 661 F.3d 1, 14–21 (D.C. Cir. 2011) (disagreeing with the Fourth Circuit's conclusion that the minimum coverage provision was a "tax," but concluding that it is nonetheless a valid exercise of the commerce power under Supreme Court doctrine), *and id.* at 22 (Kavanaugh, J., concurring) (characterizing the minimum coverage provision as "a tax for purposes of the IRS's assessment authority," and concluding that the Anti-Injunction Act deprived the court of jurisdiction).

22. I acknowledge but do not endorse a contrasting interpretation of these cases as proving Professor Young's underenforcement claim. That is, one could reasonably argue that the Eleventh Circuit's decision is the "exception that proves the rule." Doctrine, the argument might go, so egregiously underenforces federalism that it categorically prohibits judges from exercising reasoned discretion in accordance with their ethical or political commitments to limited national power. I disagree with this reading of the cases, however, for the reasons stated above.

23. *Cf.* PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 166–67 (1982) (stressing that judges often "find a particular doctrinal argument persuasive precisely because they are being pulled by the unacknowledged force of constitutional, ethical argument").

24. Robert Post, *Theories of Constitutional Interpretation*, in *LAW AND THE ORDER OF CULTURE* 35 (Robert Post ed., 1991).

25. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 56 (1991) (explaining that the doctrinal approach often "measure[s] its standards—neutrality and generality—against arguments generated by the other forms," like ethical, structural, or textual argument); *see also* H. Jefferson Powell, *Constitutional Investigations*, 72 *TEX. L. REV.* 1731, 1743 (1993) (arguing that when doctrine supports equally plausible but conflicting outcomes, "the decisionmaker has no choice but to choose the outcome that seems just" according to his constitutional sensibilities).

26. *See* Post, *Theories of Constitutional Interpretation*, *supra* note 24, at 35.

instantiated in political ethos are often mutually dependent.<sup>27</sup> In sum, law can never, and should never,<sup>28</sup> be wholly separated from politics in the application of existing doctrine.

### III

#### THE CAUSAL CLAIM: CONSTITUTIONAL MEANING AND THE VALUES– DIALECTIC

Professor Young’s causal claim submits that politics and history partly determine the patterns of under or overenforcement in constitutional doctrine.<sup>29</sup> Taking the “switch in time”<sup>30</sup> of 1937 as an example, Professor Young contends that public expectations, like those following the Great Depression, can prompt the Court to alter its doctrinal enforcement of a constitutional norm.<sup>31</sup> Professor Young reasons that there is a causal relationship between “broad trends in public opinion” and both “the weight that the courts give to other political institutions” as well as “the confidence with which the courts approach their own tasks.”<sup>32</sup> Although this claim is by many accounts incontestable, it nevertheless raises potential issues.

#### A. Standards of Review, Constitutional Meaning, and the Law–Politics Dilemma.

Professor Young’s causal claim posits that, when sustained social–political movements register strongly enough, the Court may underenforce certain norms by lowering its level of scrutiny and deferring to other branches.<sup>33</sup> That is, public attitudes may influence the Constitution’s enforcement by changing the juridical devices implemented in constitutional doctrine. By formulating his causal claim this way, Professor Young integrates law and politics while maintaining the integrity of a distinction between those domains.

The causal claim integrates law and politics by acknowledging that social–political opposition to the status quo may cause the Court to reformulate its

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27. *Id.*

28. See Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX L. REV. 959, 960 (2008) (“The rule of law depends for its practical realization on political trust between the government and the governed. In circumstances in which trust is strained, the virtue of statesmanship is especially valuable and produces leadership.”).

29. Young, *supra* note 1, at 190.

30. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 225–26 (2009).

31. Young, *supra* note 1, at 184 (noting that the Supreme Court “emerged weak and chastened” following the Great Depression’s tumult, and thus, for want of a better description, it “stopped doing what it had been doing when it got in trouble”).

32. *Id.* at 160.

33. See *id.* at 173–74 (observing that the deferential standard of judicial review employed in Necessary and Proper Clause cases “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”).

doctrine.<sup>34</sup> But Professor Young keeps law and politics separate by cabining politics' influence primarily to the issue of judicial deference—or, put differently, the Court's level of scrutiny. I interpret this as a separation of law and politics because levels of scrutiny, though they may be outcome determinative, are not necessarily substantive principles of constitutional law.<sup>35</sup> Rather, they are generally regarded as shorthand labels that determine the extent to which courts defer to the judgments of coordinate branches. At bottom, then, Professor Young's causal narrative seems to be that politics may affect *who* enforces a constitutional norm.<sup>36</sup> But because politics does not necessarily affect *what* that norm's scope is or should be, Professor Young achieves an elegant division between law and politics.

There are, however, reasons to question this causal account of law and politics. Certainly, no one can seriously dispute Professor Young's observation that the Court's federalism doctrine and the applicable standards of review have changed over time.<sup>37</sup> But in canvassing the broader corpus of federalism jurisprudence, there could be more going on than his causal claim might suggest.<sup>38</sup> To take a specific example, the Court's Commerce Clause jurisprudence seems to evidence more than changing standards of review or the abandonment of dual federalism's bright-line rules.<sup>39</sup> For instance, the federalism principles animating the *Carter Coal* case<sup>40</sup> appear incompatible with

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34. See *id.* at 181 (reasoning that “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”).

35. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 219 (2004) (“[R]ational basis scrutiny . . . was a rule of judicial restraint, not substantive constitutional law.”).

36. Young, *supra* note 1, at 173 (“When a court underenforces a constitutional norm, it does not purport to 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.”).

37. See, e.g., Randy E. Barnett, *Three Federalisms*, 39 *LOY. U. CHI. L.J.* 285, 285 (2008) (describing three major federalism epochs: “Enumerated Powers Federalism,” “Fundamental Rights Federalism,” and “Affirmative State Sovereignty Federalism”).

38. Young, *supra* note 1, at 179 (contending that the Court “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”).

39. Compare *The Daniel Ball*, 77 U.S. (9 Wall.) 557, 564–65 (1870) (holding unanimously that Congress could regulate ships traveling within only one state because (1) the Commerce Clause “authorizes all appropriate legislation for the protection or advancement of . . . interstate . . . commerce”; and (2) because the ship at issue was transporting goods originating in, and destined for, other states it “was engaged in commerce between the States” regardless of how “limited that commerce may have been”), with *Hammer v. Dagenhart*, 247 U.S. 251, 273–77 (1918) (striking down a federal child labor law, which only regulated goods in interstate commerce, because the Commerce Clause enabled Congress only to “regulate [interstate] commerce,” and did “not to give it authority to control the States in their exercise of the police power over local trade and manufacture”).

40. *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936) (holding that federal power does not “extend[] to purposes affecting the Nation as a whole with which the states severally cannot deal or cannot adequately deal”).

those underlying *Gibbons v. Ogden*.<sup>41</sup> Likewise, the vision of federalism articulated in *Katzenbach v. McClung*<sup>42</sup> seems different in kind and degree from that evident in *United States v. Morrison*.<sup>43</sup> Similar examples are abundant.<sup>44</sup>

To be sure, the distinctions between these cases may simply be rhetorical rather than substantive. Those cases in which the Court upheld federal laws might simply reflect dutiful agreement with a certain vision of federalism in order to both defer to and legitimate Congress's interpretive judgments. Nevertheless, it seems equally plausible that these cases evince differently constituted Courts expressing fundamentally different conceptions of federalism. If that latter take is correct, then the causal story is less about changes in standards of review and potentially more about changes in the principles underlying federalism—principles that envelop more than differing institutional judgments or changes from a rules- to a standards-based approach.<sup>45</sup> Although this may be a distinction without a difference as a historical matter, it does challenge the integrity of Professor Young's implicit distinction between law and politics. If social-political movements influence doctrine in the sense that they alter substantive constitutional visions, then the

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41. 22 U.S. (9 Wheat.) 1, 194 (1824) (holding that Congress may regulate navigation under the Commerce Clause because, in Chief Justice Marshall's view, "[t]he word 'among' means intermingled with," and "Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior").

42. 379 U.S. 294, 299, 304 (1964) (upholding the public accommodation provisions of the 1964 Civil Rights Act on the ground that, in the aggregate, racial discrimination impedes the "flow of interstate commerce" and "impose[s] commercial burdens of national magnitude," because such discrimination discourages minorities from participating in interstate business, travel, and employment).

43. 529 U.S. 598, 615 (2000) (holding that the commerce power cannot be exercised on the rationale that, because in the aggregate potential victims of domestic violence may be deterred from participating in interstate travel, business, and employment, "gender-motivated violence affects interstate commerce"); see also *id.* at 614 ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.") (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995)).

44. Compare *United States v. Darby*, 312 U.S. 100, 122 (1941) (accepting the government's contention that the Fair Labor Standards Act was constitutional because the commerce power authorized Congress to remedy national problems like "unfair methods of competition made effective through interstate commerce," which the States could not remedy acting alone) (citation omitted), with *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935) (rejecting the government's contention that, simply because Congress was faced with a "grave national crisis," the National Industrial Recovery Act was constitutional; the Court instead held that "[e]xtraordinary conditions do not create or enlarge constitutional power").

45. Compare *United States v. E.C. Knight*, 156 U.S. 1, 12 (1895) (dismissing the notion that Congress's commerce power extends to intrastate economic practices simply because those practices may "ultimately affect[]" "interstate or international commerce"), with *Gonzales v. Raich*, 545 U.S. 1, 17–19 (2005) (holding that the Commerce Clause empowers Congress to regulate intrastate non-economic activities, like medicinal marijuana, when those activities "substantially affect" interstate commerce). Cf. Paul J. Mishkin, *The Current Understanding of the Tenth Amendment*, in *FEDERALISM AND THE JUDICIAL MIND: ESSAYS ON AMERICAN CONSTITUTIONAL LAW AND POLITICS* 154–55 (Harry N. Scheiber ed., 1992) (contending that the Court's refusal to "draw lines" in federalism cases is not merely a judicial restraint issue—it instead amounts to a declaration that the federalism "issue, or the interests involved, are not important enough to warrant the effort in trying" to draw the lines).

distinction between law and politics cannot be drawn as neatly as Professor Young's causal claim might suggest.

#### B. The Values–Dialectic Between the Court and the Public.

Next, Professor Young's causal claim focuses on the Court as a values-registering<sup>46</sup> institution in a way that tends to undervalue the Court's role as a values-shaping institution.<sup>47</sup> Often, the prime benefit of the Supreme Court vigilantly protecting constitutional values is not simply the invalidation of an unconstitutional law.<sup>48</sup> As Paul Mishkin argued, the Court's protection of constitutional values also provides them “an authenticated vocabulary”—an “imprimatur of legitimacy”—which, in turn, shapes public understanding of those values.<sup>49</sup> In this way, broad societal trends not only shape constitutional law over the long run, but are also shaped, in part, by the Court's doctrine.<sup>50</sup>

Thus, although Professor Young briefly acknowledges this interaction,<sup>51</sup> there seems to be more of a dialogue occurring between the Court and the public than his causal claim suggests. And although I agree with his account of the ways in which social understandings can influence Supreme Court doctrine,<sup>52</sup> the Court's doctrine can animate and influence social understandings of its own.<sup>53</sup> This potential for a values–dialectic between the Court and the public further challenges Professor Young's compartmentalized theorization of law and politics. On this dialogic account, the Court is not merely ratcheting up or down its standards of review in response to political pressure. Nor is it simply reversing its considered judgments of the federal–state balance to appease public expectations. The Court instead has a meaningful role in shaping the public values that inform constitutional politics and the public expectations that in turn influence constitutional law.<sup>54</sup>

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46. See, e.g., Young, *supra* note 1, at 160 (“[B]road 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.”).

47. Mishkin, *The Current Understanding of the Tenth Amendment*, *supra* note 45, at 156 (noting the Court's capacity to “set[] the terms of discourse” on the meaning of constitutional norms and thereby influence popular understanding and discussion of those norms).

48. *Id.*

49. *Id.*

50. See, e.g., Neil S. Siegel, *A Coase Theorem for Constitutional Theory*, 2010 MICH. ST. L. REV. 583, 584 (2010) (noting the “capacity of the justices to shape social values or otherwise to decide important matters with finality”).

51. Young, *supra* note 1, at 171.

52. See, e.g., Jack M. Balkin & Reva B. Siegel, *Introduction*, in *THE CONSTITUTION IN 2020 5* (Jack M. Balkin & Reva B. Siegel eds., 2009) (“The constitutional revolution of the New Deal followed a groundswell of popular sentiment for change, to which an older Court had been unresponsive.”).

53. Accord ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 31 (1962) (observing the Court's role in “concretiz[ing] . . . the Constitution” as “the symbol of nationhood, of continuity, of unity and common purpose”).

54. See Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 71 (1965) (theorizing that there is a



## IV

## THE PREDICTIVE CLAIM: FEDERALISM, HEALTHCARE, AND PUBLIC AMBIVALENCE

Finally, Professor Young makes a cautious, but controversial, predictive claim about the future of the Supreme Court's federalism doctrine. Specifically, he argues that (1) public opinion now indicates a broad, significant desire to "devolve significant governmental authority to the states"<sup>55</sup> concerning important regulatory matters; and (2) that the Supreme Court's federalism doctrine may respond to that perceived shift in social-political expectations.<sup>56</sup> But despite Professor Young's cautious presentation, this section offers some reasons to question his predictions.

As a threshold matter, although Professor Young's estimation of public opinion may be correct,<sup>57</sup> it is unclear<sup>58</sup> whether public opinion has shifted quite as far as he asserts.<sup>59</sup> Indeed, as acknowledged in the data upon which he relies, public attitudes about federalism are often "weakly held and inconsistent."<sup>60</sup> In one survey, for example, respondents indicated a preference for "reduced federal activity in broad terms" while "support[ing] a larger federal role when asked about specific government functions."<sup>61</sup> The evidence revealed, that is, a curious mix of support for "devolution in the abstract" with endorsement of "federal involvement in" specific regulatory functions.<sup>62</sup> Thus, contrary to Professor Young's claim, these studies seem to show a rather unstable "relationship between people's general beliefs and their specific attitudes about

"normative power" to "actual" law, because "that which is law tends by its very existence to generate a sense of being also that which ought to be the law").

55. Young, *supra* note 1, at 193.

56. *Id.* at 192.

57. See, e.g., Kaiser Health Tracking Poll, *Public Opinion on Health Care Issues*, KAISER.COM, Feb. 2011, at 1 ("Overall, 48 percent of Americans have an unfavorable opinion of the [ACA] and 43 percent hold favorable views."); cf. Frank Newport, *One Year Later, Americans Split on Healthcare Law*, GALLUP.COM, Mar. 21, 2011 (indicating that 46% of respondents said the ACA "was a good thing" and 44% said "it was a bad thing"), available at <http://www.gallup.com/poll/146729/One-Year-Later-Americans-Split-Healthcare-Law.aspx>.

58. E.g., Lawrence R. Jacobs, Ph.D., *1994 All Over Again? Public Opinion and Health Care*, 358 N. ENGL. J. MED. 1881, 1882 (2008) ("[P]ublic perceptions [regarding health reforms] appear fragile and susceptible to change.").

59. *Id.* at 199 (citing empirical research showing "significant alterations in relative trust for states and national institutions since the New Deal" to support his conclusion that even progressives may be revising their post-New Deal assumption that meaningful reform must come from Washington).

60. Mullin, *supra* note 8, at 215; see also 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?* 150-51 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001) (stressing that if contemporary confidence in state governments "is based on something other than the demonstrated abilities of those governments to address problems, that satisfaction may dry up quickly in the face of even minor indications of state incapacity").

61. Mullin, *supra* note 8, at 215.

62. *Id.*

federal power and responsibilities.”<sup>63</sup>

What is more, as it relates to federal health reform, research reveals a conflicted set of public attitudes about the role government should play—if any.<sup>64</sup> According to one study, “Americans support an expanded role for government in health care that provides more choices and makes insurance more affordable,” but they “do not want to see the government assume a more prominent role as a dictator of individual decisions.”<sup>65</sup> Concurrently, other studies suggest robust public support for certain aspects of the ACA that unequivocally limit individual decisions. In particular, one study reports that nearly eighty percent of Americans favor the law’s underwriting scheme, which includes guaranteed issue requirements that prohibit the denial of coverage based on preexisting conditions.<sup>66</sup> By any account, those features of the ACA constitute direct government interference with private choice: forbidding private insurance companies from practicing their preferred method of cost control.<sup>67</sup> Yet the underwriting scheme continues to enjoy near unimpeachable favor among the public.

This data seems to depict an uneasy wedding of public faith in market-driven solutions<sup>68</sup> and public skepticism about the extent to which markets or states can solve systemic failures in American healthcare.<sup>69</sup> Americans seem broadly to agree that the system needs reform<sup>70</sup> and in some cases favor a

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63. *Id.*

64. Compare Kaiser Poll, *supra* note 57, at 3 (stating that “[t]he one provision that the public remains happy to repeal” is the individual mandate, “which 67 percent would be happy to strip from the law”), with David Grande, Sarah E. Gollust & David A. Asch, *Polling Analysis: Public Support For Health Reform Was Broader Than Reported and Depended on How Proposals Were Framed*, 30 HEALTH AFFAIRS 1242, 1246 (2011) (indicating that in the lead up to the ACA’s enactment, “overall average level of public support for the individual mandate was 53.0 percent”).

65. Grande et al., *supra* note 64, at 1247.

66. See, e.g., Kaiser Poll, *supra* note 57, at 3.

67. See, e.g., *id.*

68. See Grande et al., *supra* note 64, at 1247 (noting that public “support declined” “when questions suggested that a government insurance program would compete in an adversarial way with private insurance”).

69. See, e.g., Jacobs, *supra* note 58, at 1881 (noting that in “nine Gallup polls conducted since 2000, the majority (59 to 69%) of respondents have favored the idea of the federal government taking responsibility for ensuring that all Americans have health care coverage” and in ten out of eleven “surveys conducted between 1980 and 2000 by the *New York Times* and CBS News,” majorities (“50 to 66%”) favored “national health insurance, financed by tax money, that would pay for most health care services”); see also Kaiser Poll, *supra* note 57, at 3 (showing that “if they could pick and choose” nearly eighty percent of Americans would keep, among other things, the ACA’s underwriting provisions that “prohibit insurance companies from denying coverage based on pre-existing conditions”); Grande et al., *supra* note 64, at 1247 (“The idea that the federal government should directly sponsor insurance—a major expansion of the government’s role—received strong support.”).

70. Jacobs, *supra* note 58, at 1881 (noting the “unusually broad agreement among Americans . . . that health care arrangements needed reform—a negative consensus that still holds today”); see also *id.* (“Between 1991 and the summer of 2007, about 90% of Americans were fairly consistent in agreeing that the U.S. health care system should be completely rebuilt or required fundamental changes . . . . About 70% of Americans consistently believed that the system was in a state of crisis or had major problems . . . , and the proportion dissatisfied with it had increased to 81% by November 2007.”).

substantial degree of government involvement in those reforms.<sup>71</sup> But despite such consensus, “there is no convergence on proposals for reform,” and public opinion is instead “characterized by ambivalence or divergence regarding future directions.”<sup>72</sup> Public reform advocates may sometimes be uncomfortable with the unintended consequences of government intervention,<sup>73</sup> and private-ordering types may possess less than full confidence in the efficacy of state or consumer choice reform.<sup>74</sup> Hence, it may be more difficult to specify the public’s view of “the national regulatory state”<sup>75</sup> than Professor Young’s article recognizes.

All of this is to say that if public attitudes about federalism and healthcare are indeed mercurial or under-determined,<sup>76</sup> it is not clear that Supreme Court doctrine will respond as Professor Young predicts.<sup>77</sup> On the other hand, Professor Young’s predictions may eventually bear out, for even if most Americans supported ACA-like reforms that would hardly settle the matter. A determined minority with sufficiently intense disagreements could challenge a Supreme Court decision upholding the Act, and force the rest of the country “to reexamine its position and to recede from it.”<sup>78</sup> As Professor Young rightly observes in his article, changes in constitutional law can occur when a critical segment of the public understands the Court’s decisions to be incompatible with “the felt necessities of the time.”<sup>79</sup>

## V

### CONCLUSION

Professor Young’s contribution to this symposium is an important, provocative comment on the legal and political implications of the ACA litigation. It is also an enjoyable read. This essay’s analysis of his article sought to highlight two key ideas. First, Professor Young’s theorizations of the law–politics dilemma, and the integrity of the distinctions they draw between law

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71. *E.g., id.* at 1882.

72. *Id.* at 1881.

73. *Id.* at 1882 (observing that even majority support for public health insurance programs declined when “respondents were told that such a program could mean reduced access to some medical treatments” or “limits on the choice of doctors”).

74. *Id.* at 1882–83 (noting that many questioned John McCain’s consumer choice plan for health reform because of fear that it “may actually increase the visibility and burdens of costs that fall on individuals” like “paying for health insurance premiums, deductibles, and other charges”).

75. Young, *supra* note 1, at 160.

76. Mullin, *supra* note 8, at 216 (stressing that “much remains unknown regarding public opinion about federalism”).

77. Young, *supra* note 1, at 160. (positing that a confluence of factors, including Tea Party objections to “the national regulatory state” and a “resurgence [of] public confidence” in the ability of state governments to repair economic conditions, may “cause the Court to reconsider the underenforcement of federalism”).

78. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 102 (1975).

79. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lessons of Lochner*, 76 N.Y.U. L. REV. 1383, 1453, 1455 (2001).

and politics, are worth questioning. Certain features of both the descriptive and causal claims seem to depend on law's autonomy relative to politics and other cognate methods of value contestation. But as Parts II and III argued, those claims might not fully register the discretionary judgments involved in applying existing doctrine or the complex values–dialectic occurring between the Court and the public.

Second, Part IV questioned Professor Young's predictive claim and his reading of public attitudes on federalism. I think he is right that many non-trivial objections to federal power are currently resonating in the public zeitgeist. But I question whether those resonations are here to stay. Federalism, for most citizens, seems to elicit provisional and somewhat inconsistent responses. Empirics suggest that, in the abstract, the cultural significance of state sovereignty remains as strong as ever. But at the granular level, sensibilities tend to go the other way. That is, when asked about specific issues, Americans still seem to expect federal power to solve problems that are perceived to be federal in nature. And as it relates to healthcare reform, public attitudes are deeply ambivalent; there is little consensus about what should be done or by whom. If all that is true, it may suggest that we are unlikely to see any change to current judicial enforcement of federalism, however that enforcement may be characterized.

Of course, I am in no better position than Professor Young to offer confident predictions on this matter—and, in fact, I am probably in a much worse position. My point in this essay, however, was not to contend that Professor Young is wrong, but rather to highlight some additional considerations that may complicate his narrative. Particularly as concerns law and politics, it seems that both make claims on one another and do so in unpredictable ways. When looking at the historical arc of federalism doctrine and the ACA litigation specifically, both law and politics seem to take an active role in shaping public attitudes, doctrinal mechanics, and the meaning constitutional law attaches to the Constitution.