

AMERICAN EXCEPTIONALISM AND THE HEALTHCARE REFORM DEBATE

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Two generations ago, discussion of “American exceptionalism”—at least among social scientists—came down to one great question: Why no socialism in America?¹ By the 1980s, however, even self-described socialists in Western Europe had embraced the benefits of markets and privatization.² Soon after, the Soviet empire collapsed and full-scale socialism was largely discredited.³ America no longer looked particularly unusual in its broader economic patterns. So the “exceptionalism” question dwindled down to: Why no national healthcare in America?⁴

The Obama administration tried to give an answer: Yes, we can!⁵ Then we did—enact the Patient Protection and Affordable

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1. *See, e.g.*, WERNER SOMBART, WHY IS THERE NO SOCIALISM IN THE UNITED STATES? 15–20 (C.T. Husbands ed., Patricia M. Hocking & C.T. Husbands trans., Macmillan Press Ltd. 1976) (1906); *see also* TONY JUDD, ILL FARES THE LAND 30–33 (2010) (acknowledging the widespread attention Sombart’s question has received and detailing some of the answers that have emerged in the century since he posed it).

2. *See, e.g.*, MICHAEL P. MCLINDON, PRIVATIZATION AND CAPITAL MARKET DEVELOPMENT: STRATEGIES TO PROMOTE ECONOMIC GROWTH 26 (1996).

3. *See, e.g.*, ROBERT STRAYER, WHY DID THE SOVIET UNION COLLAPSE?: UNDERSTANDING HISTORICAL CHANGE 4–7 (1998). On the significance of the USSR’s collapse, one commentator has observed:

[I]t was widely acknowledged that, in addition to its oppressive authoritarianism, Soviet socialism was brought down by the manifest failure of an economic system in which the means of production . . . had been totally under “social” (i.e. state) ownership and control. Even socialists unsympathetic to Soviet socialism had continued to hold that a genuinely socialist society required the social ownership or control of the means of production, and so the discrediting of this left many socialists at sea.

NIGEL TAYLOR, URBAN PLANNING THEORY SINCE 1945, at 133 (1998).

4. *See, e.g.*, JILL QUADAGNO, ONE NATION UNINSURED: WHY THE U.S. HAS NO NATIONAL HEALTH INSURANCE 201–07 (2005) (surveying past failures to nationalize healthcare in the United States, investigating the causes of those failures, and arguing for a universal healthcare system).

5. “Yes, we can!” was one of the prominent slogans of the Obama presidential campaign, with then-candidate Obama making frequent reference to the phrase in

Care Act of 2010 (ACA).⁶ The public reaction was: Maybe not. Public opinion polls have shown that a persistent majority of Americans do not favor ACA.⁷ So the question about American exceptionalism can now be rephrased: Why is national health insurance still so controversial in America? I want to offer an answer in three parts, looking successively at background political culture, constitutional architecture, and constitutional culture.

One way to capture the distinctiveness of American political culture is to look at survey responses. The Pew Global Attitudes Project has tracked differences in outlook among peoples in various countries.⁸ A few years ago, they asked respondents in a survey whether “success in life is pretty much determined by forces outside our control.”⁹ In every major country in Western Europe where they asked this question, the answer was (often by more than two to one): yes, success is determined by forces outside our control.¹⁰ In the United States, people rejected that answer by nearly two to one.¹¹ The United States is one of the great outliers. It is one of the only two Western countries where an overwhelming majority insists that individual success in life mostly depends on the personal effort of the individual.¹²

his speeches. *E.g.*, Senator Barack Obama, South Carolina Democratic Primary Victory Speech (Jan. 26, 2008), available at http://articles.cnn.com/2008-01-26/politics/obama.transcript_1_change-time-iowa?_s=PM:POLITICS (“Yes, we can. Yes, we can change. Yes, we can. Yes, we can heal this nation. Yes, we can seize our future And where we are met with cynicism and doubt and fear and those who tell us that we can’t, we will respond with that timeless creed that sums up the spirit of the American people in three simple words—yes, we can.”).

6. *See, e.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) [hereinafter ACA].

7. *Health Care Law: 55% Favor Repeal of Health Care Law*, RASMUSSEN REPS. (Aug. 22, 2011), http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/health_care_law (finding that a majority of Americans have favored the repeal of ACA in every weekly poll since its passage except for one); *Obama and Democrats’ Health Care Plan*, REALCLEARPOLITICS, http://www.realclearpolitics.com/epolls/other/obama_and_democrats_health_care_plan-1130.html (last visited Nov. 1, 2011) (collecting over 250 polls from various organizations over a span of more than two years, exhibiting consistent opposition to ACA).

8. *See About the Project*, PEW GLOBAL ATTITUDES PROJECT, <http://pewglobal.org/about/> (last visited Nov. 1, 2011).

9. PEW GLOBAL ATTITUDES PROJECT, VIEWS OF A CHANGING WORLD 107 (2003).

10. *See id.* at 108.

11. *See id.* at 107–08.

12. *Id.* at 108. In the United States, 65% of respondents disagreed with the proposition that success is determined by outside forces. *Id.* In Germany, on the other hand 68% agreed that “success is determined by forces outside our control” (31% dis-

That poll does not seem to be an anomaly. It tracks with a number of other findings. Even Europeans in these surveys acknowledge that Americans seem to work harder than people in other countries.¹³ Americans believe this about themselves.¹⁴ It is what you would expect of people who think their success depends on their own efforts.

Americans also are inclined to express a good deal of pride in their country—certainly far more than Europeans and, by some surveys, even more than people in developing countries.¹⁵ Whereas sociologists often interpret “nationalism” as a response to feelings of insecurity,¹⁶ that observation does not seem to be the pattern in the United States.

Perhaps this result, too, fits with the larger pattern of American self-confidence. Americans think they can succeed through their own efforts—and they think the country that assures them the freedom to succeed on their own is a fine country. People in other countries, who place more reliance on state bureaucracies to care for them, usually are disappointed with the results. Then they are more likely to think their government or their whole society is to blame.

Add it up and you might infer that Americans want a health-care system that helps them make their own choices. The Obama administration seemed to recognize this in its initial

agreed); in Italy, 66% agreed (31% disagreed); in Poland 63% agreed (29% disagreed); in France 54% agreed (44% disagreed); in Great Britain 48% agreed (48% disagreed). *Id.* Only in Canada were results close to those of the United States: only 35% agreed (63% disagreed). *Id.* The same survey finds Americans “alone among the populations of wealthy nations” in saying “freedom to pursue individual goals” is more important (according to 58% of U.S. respondents) than providing “government assurances of an economic safety net” (only 34% said the latter was more important); majorities in Germany (57%), France (62%), Britain (62%), Italy (71%), and even Canada (52%) say government guarantees are more important. *Id.* at 105.

13. See PEW GLOBAL ATTITUDES PROJECT, AMERICAN CHARACTER GETS MIXED REVIEWS: U.S. IMAGE UP SLIGHTLY, BUT STILL NEGATIVE 21 (2005).

14. See *id.*

15. See Tom W. Smith & Seokho Kim, *National Pride in Comparative Perspective: 1995/96 and 2003/04*, 18 INT’L J. PUB. OPINION RES. 127, 129 tbl.1 (2006) (reporting that in surveys of national pride, the U.S. is tied for first in surveys of thirty-three countries, while only two countries in Europe (Austria and Denmark) rank in the top third).

16. See, e.g., Catarina Kinnvall, *Globalization and Religious Nationalism: Self, Identity, and the Search for Ontological Security*, 25 POL. PSYCHOL. 741, 742 (2004) (asserting that nationalism is a response to insecurity). This general rule does not suffice to explain the high level of national pride in the United States, as Americans seem uniquely confident and secure with their emphasis on self-determination and work ethic.

characterization of proposed reforms: If you like the private insurance you now have, President Obama promised, “you’ll be able to keep [it].”¹⁷ Some part of the resistance to the huge and hugely complicated package of “reforms” Congress enacted seems to reflect the realization that this promise has not been honored: Whatever else it does, the new healthcare law constrains the choices of individuals.¹⁸

But such broad background attitudes are only one part of the story. Another part of the explanation for our current debates is the actual constitutional architecture of our government, federalism in particular. Here I particularly want to mention federalism. Quite a few other countries also have federal systems—or systems they call federal. But the American system is unusual, even among nominally federal countries. You might say the United States is, in some ways, exceptionally federal.

To start with, the United States has fifty states. Canada has only ten provinces.¹⁹ Australia has six states.²⁰ Germany has sixteen subdivisions (*laender*).²¹ With fifty states, America has many more coordination problems.²² But our system does not really rely on coordination. In Germany, for example, the parliamentary chamber that represents the *laender* (the Bundesrat) really does represent the state governments; each *land* government designates its own representatives in the Bundesrat and then can replace them whenever it chooses to do so.²³ Since the adoption of the Seventeenth Amendment in 1913, voters (rather than state government) elect U.S. senators and the Constitution

17. President Barack Obama, Remarks by the President at the Annual Conference of the American Medical Association (June 15, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-the-Annual-Conference-of-the-American-Medical-Association/.

18. See 26 U.S.C. § 5000A(a) (2010) (requiring all non-exempt individuals to purchase and maintain health insurance).

19. CIA, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/fields/2051.html> (last visited Nov. 1, 2011).

20. *Id.*

21. *Id.*

22. See Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 6–20 (2011) (arguing that as the number of states increases in a federation, collective action problems in foreign affairs and trade increase as well).

23. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], MAY 23, 1949, BGBl. I, arts. 50–51 (Ger.).

always has assured the senators a six-year term, regardless of what their home state legislature or governor might prefer.²⁴

In Germany, state officials handle almost all enforcement of federal laws.²⁵ In the United States, the federal government is equipped to implement its own laws.²⁶ The Supreme Court insists there are limits on how far the federal government can go in forcing states to contribute state officials and state legislation to the implementation of federal schemes.²⁷

Among the most telling differences with other versions of federalism is that, in the United States, state governments maintain their own sources of revenue. States have their own sales taxes, income taxes, inheritance taxes, and so on.²⁸ States also compete with each other in providing different levels of taxation and different levels of services.²⁹ In most federal systems, federal authorities collect the bulk of taxes and then dispense federal funds to state authorities to implement federal schemes.³⁰

There is some of this revenue sharing in the United States too, of course. To take the most familiar example, federal gasoline taxes financed much of the Interstate Highway System, but state governments supervised the actual construction and

24. See U.S. CONST. amend. XVII; U.S. CONST. art. I, § 3.

25. See *Germany*, INTERPOL, <http://www.interpol.int/Public/Region/Europe/pjsystems/Germany.asp> (last visited Aug. 9, 2011) (“The police are for the most part under the jurisdiction of the States.”).

26. See, e.g., U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”); see also U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”).

27. See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (“We held in *New York v. United States*, 505 U.S. 144, that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States’ officers directly.”).

28. For a comparison of state income tax rates, see FED’N OF TAX ADMINISTRATORS, STATE INDIVIDUAL INCOME TAXES, (Feb. 2011), http://www.taxadmin.org/fta/rate/ind_inc.pdf. For a comparison of state sales taxes, see TAX FOUND. STATE SALES, GASOLINE, CIGARETTE, AND ALCOHOL TAX RATES BY STATE, 2000–2010, (Apr. 1, 2010), <http://www.taxfoundation.org/taxdata/show/245.html>. For a comparison of state inheritance tax regimes, see MCGUIREWOODS LLP, 2011 STATE DEATH TAX CHART, http://www.mcguirewoods.com/news-resources/publications/taxation/state_death_tax_chart.pdf (Jul. 7, 2011).

29. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“This federalist structure of joint sovereigns . . . makes government more responsive by putting the States in competition for a mobile citizenry.”).

30. See JONATHAN A. RODDEN, HAMILTON’S PARADOX: THE PROMISE AND PERIL OF FISCAL FEDERALISM 250–51 (2006).

maintenance of the System (to federal specifications).³¹ But states still have to operate, for the most part, on their own resources. In times of economic stringency, states are less keen to cooperate in federal undertakings, even when the federal government provides part of the funding. For example, Governor Chris Christie of New Jersey recently shocked federal officials when he halted work on a long-planned project for a new tunnel under the Hudson River.³² Even with substantial federal subsidies, he judged the additional financial burdens on his state to be too much for New Jersey taxpayers to carry.³³

In like manner, we now have states resisting the federal health insurance reform law—not just some states, but a majority of states: Twenty-eight states have launched or joined lawsuits asserting that ACA is in violation of the Federal Constitution.³⁴ Some of the state officials involved might be suspected of partisan motivation. But they are not all Republicans.³⁵ Regardless of political affiliation, these lawsuits demonstrate a

31. See Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 *FORDHAM URB. L.J.* 69, 83 (1998).

32. Patrick McGeehan, *Christie Stops Train Tunnel, Citing Its Cost*, *N.Y. TIMES*, Oct. 8, 2010, at A1.

33. See *id.* Florida Governor Rick Scott similarly rejected state funding for a proposed railway system. Yonah Freemark, *Florida Governor Rick Scott Rejects Funding for Tampa-Orlando Intercity Rail Project*, *TRANSPORT POLITIC* (Feb. 16, 2011), <http://www.thetransportpolitic.com/2011/02/16/florida-governor-rick-scott-rejects-funding-for-tampa-orlando-intercity-rail-project/>.

34. Florida sued, joined by twenty-five other states. *Florida ex rel. Bondi v. HHS*, 2011 WL 285683, at *1 (N.D. Fla. Jan. 31, 2011), *aff'd in part, rev'd in part* 2011 WL 3519178 (11th Cir. Aug. 12, 2011). Virginia and Oklahoma also have filed separate suits. See *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010); Complaint for Declaratory and Injunctive Relief, *Oklahoma ex rel. Pruitt v. Sebelius*, No. 06:11-cv-00030 (E.D. Okla. Jan. 21, 2011), available at [http://www.oag.ok.gov/oagweb.nsf/0/1c615ebde5d839eb8625781f007ae332/\\$FILE/Health%20Care%20Act%20Lawsuit.pdf](http://www.oag.ok.gov/oagweb.nsf/0/1c615ebde5d839eb8625781f007ae332/$FILE/Health%20Care%20Act%20Lawsuit.pdf).

35. Democratic Attorneys General Buddy Caldwell of Louisiana and Chris Koster of Missouri have opposed the legislation—Caldwell by joining the Florida suit, and Koster by filing an amicus brief in the Eleventh Circuit—though, to be sure, opposition to ACA has been a predominantly Republican effort. Bill Barrow, *Attorney General Buddy Caldwell explains his decision to join federal health care lawsuit*, *TIMES-PICAYUNE* (New Orleans, La.), Mar. 26, 2010, http://www.nola.com/politics/index.ssf/2010/03/attorney_general_buddy_caldwel.html; A.G. Sulzberger & Kevin Sack, *Democrat in Missouri Breaks Ranks to Oppose Law's Insurance Mandate*, *N.Y. TIMES*, Apr. 12, 2011, at A12. Caldwell, however, subsequently changed party affiliations. *Attorney General Buddy Caldwell switches to Republican*, *TIMES-PICAYUNE* (New Orleans, La.), Feb. 2, 2011, http://www.nola.com/politics/index.ssf/2011/02/attorney_general_buddy_caldwel_3.html.

fact about American federalism: We have a system in which state governments respond to their own political incentives. If they feel voters in their states will support them, they can try to use state authority to fight against a federal program.

State attorneys general, among others, have made a variety of arguments in court filings. These arguments demonstrate a third general point: American constitutional culture supports, and even encourages, this sort of resistance—especially in these circumstances.

The first general argument is that the insurance mandate exceeds the power of Congress to regulate commerce. The Constitution gives Congress power “[t]o regulate Commerce . . . among the several States.”³⁶ But the healthcare reform law requires almost all individuals to purchase health insurance, whether or not they are directly engaged in interstate commerce.³⁷ Even people who are not employed are required to purchase insurance.³⁸ The mandate extends even to those who dissociate themselves from buying or selling in the regular economy.³⁹ If you are a survivalist in the mountains, living on what you can gather in the woods, you are still subject to this mandate. If Congress can force such people to buy insurance—in the name of regulating commerce—then there is no limit at all on the power to regulate “Commerce . . . among the several States.”

A similar argument involves the power of Congress to impose new mandates on the States. The legislation requires states to expand coverage under the existing federally-sponsored Medicaid program.⁴⁰ Medicaid currently offers fed-

36. U.S. CONST. art. I, § 8 (emphasis added).

37. 26 U.S.C. § 5000A(a) (2010) (“An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.”). There are very limited exemptions to the individual mandate. There are limited religious exemptions, and the mandate does not apply to illegal aliens or incarcerated persons. *See id.* § 5000A(d). The individual mandate also exempts persons for whom “minimum essential coverage” will cost more than 8% of their income, who make less than the poverty line, who are members of Indian tribes, or who have suffered a hardship as determined by the Secretary of Health and Human Services. *See id.* § 5000A(e). Apart from these narrow categories of exempted persons, the individual mandate applies to anyone residing in the United States. *See id.* § 5000A(a).

38. *See id.* § 5000A.

39. *See id.*

40. *See* Pub. L. No. 111-148, §§ 2001–07, 124 Stat. 119, 271–85 (2010).

eral subsidies to induce states to administer a program covering medical costs for low-income residents.⁴¹ The “inducement” to expand coverage under the new law is to threaten the withdrawal of federal assistance for Medicaid—upon which states have come to rely—unless states commit to wider coverage with vastly increased costs.⁴² Critics (and some state governments) insist this breaches the traditional line between offering financial inducement to states and imposing coercive conditions on states to participate in federal programs.⁴³ These critics argue that, if such coercion is permissible, there is no effective limit on congressional power to force States to cater to federal demands; the Tenth Amendment, reserving some powers to the States and the people, is a dead letter.⁴⁴

There is no need to belabor these arguments. Whether they ultimately persuade five Justices of the Supreme Court remains to be seen and is not essential to the analysis offered here. They show that the Constitution has force in American political life, apart from what the courts might say. To put the point a slightly different way, Americans do not view the Constitution as simply affirming transcendent values and leaving courts to

41. See 42 U.S.C. §§ 1396-1, 1396b.

42. ACA § 2201 amends the Social Security Act to add § 1943, which cuts off federal assistance as of January 1, 2014, unless the state has arranged for persons determined eligible by a § 1311 Exchange to enroll for coverage through the Exchange’s website. To give more political salience to this financial pressure, § 1401 of the ACA amends § 36B of the Internal Revenue Code to deny a federal tax credit (by reducing its amount to zero) for residents of any state which fails to establish a “voluntary” Exchange under § 1311. Constitutional objections to this particular provision—trying to coerce the states by penalizing citizens of non “volunteering” states—are urged in Brief for South Carolina Chamber of Commerce as Amicus Curiae Supporting Plaintiffs-Appellees/Cross-Appellants, *State of Florida v. HHS.*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021, 11-11067), 2011 WL 2530489, at *18–*29.

43. The classic formulation of the doctrine was set forth in *Steward Machine Co. v. Davis*, 301 U.S. 548, 585–91 (1937) (upholding inducements to states to participate in federal unemployment insurance program), reaffirmed in *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987) (upholding inducements to states to raise the drinking age to 21), and emphasized in *New York v. United States*, 505 U.S. 144, 174–75 (1992) (rejecting a coercive provision of a federal regulatory scheme that forced states to either regulate nuclear waste pursuant to a federal program or “take title” to, and assume all liability for, such waste).

44. For one version, see Richard A. Epstein & Mario Loyola, *ObamaCare’s Next Constitutional Challenge*, WALL ST. J., June 7, 2011, at A15. At more length, see Brief of the Texas Public Policy Foundation as Amicus Curiae on Behalf of Plaintiffs-Appellees/Cross-Appellants at 1–4, 13–20, *Florida v. HHS.*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021 and 11-11067).

implement those values in practice. Americans tend to believe the Constitution is what it actually seems to be—a set of authorizations, limitations, and procedures for government, which derives its ultimate authority from “We the People.”

The character of the main constitutional objections here illustrates the point. Defenders of the healthcare reform law point out that Congress can impose very demanding obligations. Federal law requires eighteen-year-old males to register for the draft,⁴⁵ and, in the past, the law required most young men to submit to military service.⁴⁶ If Congress has the power to force young people into military service—just because they meet certain age and health standards—why can it not impose the much less onerous obligation of buying health insurance? The answer is that the power to “raise and support Armies” is one of the specific powers enumerated in the Constitution.⁴⁷ The health insurance imposition may be less onerous, but it does not rest in the same way on a specific grant of power in the Constitution.

If Congress can impose obligations on people minding their own business at home, we should expect to see quite a number of impositions of this kind in a federal code that now extends, after all, into a vast range of policy fields. The telling fact is that no one has yet identified a statute that imposes a new obligation on people without any reference to some activity they were already engaged in.⁴⁸ In *Wickard v. Filburn*,⁴⁹ the Supreme Court endorsed the application of federal agricultural regulations to a farmer harvesting wheat for his own private use.⁵⁰ That might have been a stretch as a regulation of “Commerce . . . among the several States,” but at least it was conditioned on a prior activity (the growing of wheat).⁵¹ Under ACA,

45. See 50 U.S.C. app. § 453 (2006).

46. See, e.g., Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604 (1948); Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885 (1940); Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 76 (1917); see also 50 U.S.C. app. § 462(a) (2006) (providing penalties for those who evade the draft).

47. U.S. CONST. art. I, § 8.

48. See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 558–59 (6th Cir. 2011) (Sutton, J., concurring) (explaining that the Supreme Court’s previous commerce decisions concerned laws that commanded affirmative acts only by reference to some activity people were already engaged in and concluding that Congress has “never crossed this line” before).

49. 317 U.S. 111 (1942).

50. *Id.* at 128–29.

51. See *id.*

federal controls apply to almost every person who continues to breathe.⁵² The power to regulate commerce is a power without limit if it can apply to the activity of breathing.⁵³

A similar rejoinder meets the argument that the mandate can be viewed as a tax, rather than a penalty for noncompliance.⁵⁴ Because the federal government has broad power to impose taxes, why can it not impose a “tax” on individuals who fail to purchase health insurance?⁵⁵ The distinction is that all other federal taxes are triggered by some transaction—receiving income, acquiring capital gains from the sale of an asset, or purchasing gasoline, distilled spirits, or some other taxed product.⁵⁶ With all other taxes, one can avoid the tax by avoiding the transaction. Under the healthcare reform law, however, simply breathing exposes one to the tax if one fails to follow the federally-imposed duty to purchase the mandated health insurance coverage.⁵⁷

52. See 26 U.S.C. § 5000A(a) (2010).

53. Judge Jeffrey Sutton, while joining to reject a facial challenge to the legislation, still acknowledged in his concurring opinion that there is no precedent for such a measure “[to] compel individuals to buy products they do not want To argue that Congress’s power to enlist individuals to defend the country’s borders proves that it may enlist individuals to improve the availability of medical care gives analogy a bad name. There is a difference between drafting a citizen to join the military and forcing him to respond to a price quote from Aetna.” *Thomas More Law Ctr.*, 651 F.3d at 558–59 (Sutton, J., concurring).

54. See, e.g., Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 YALE L.J. ONLINE 407, 408 (2011), <http://www.yalelawjournal.org/images/pdfs/971.pdf>.

55. See *id.* at 413–14.

56. See Steven J. Willis & Nakku Chung, *Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169, 183, 191 (2010) (explaining that the ACA penalty cannot be an excise or income tax because it lacks a proper trigger); see also Steven J. Willis & Nakku Chung, *Oy Yes, The Healthcare Penalty Is Unconstitutional*, 129 TAX NOTES 725, 729–30 (2010) (reiterating that the ACA penalty cannot be an income tax because it lacks a proper trigger—an “undeniable accession[] to wealth, clearly realized, over which the taxpayer has complete dominion”).

57. Professor Akhil Amar has argued:

The Obamacare tax does not apply to various individuals who make less than a certain amount of income, and the tax thus easily falls on the income-tax side of the line for those who attempt to sharply distinguish between “income” taxes and various “direct” taxes. Unlike a classic direct tax, the Obamacare tax is avoidable, either by refraining from earning a certain amount of taxable income, or, of course, by obtaining health insurance.

Akhil Reed Amar, *The Lawfulness of Health-Care Reform*, 121 YALE L.J. ONLINE 14–15 (forthcoming 2011), available at <http://papers.ssrn.com/abstract=1856506>. But the low-income exemption from the tax does not make it an income tax, because the tax-penalty for failing to purchase health insurance is the same (for those earning more than the exempted class) regardless of income. One could as well say that a

The Constitution does, to be sure, contemplate a form of federal tax not contingent on some specific activity—the head tax or “Capitation.”⁵⁸ But Article I, Section 9 deliberately makes this tax quite cumbersome to implement by requiring that such a direct tax be apportioned among the States (that is, proportioned to the population of each state, rather than uniform for all individual taxpayers).⁵⁹ If the healthcare reform law is constitutional, this limitation is meaningless, and the power to tax is, like the power to regulate commerce, without any imaginable limit.⁶⁰

The argument about interference with state authority has a similar character. States could impose an insurance mandate, requiring all residents to buy health insurance, as Massachusetts already has done.⁶¹ What difference does it make if states impose such an obligation or the federal government arranges to have it done and then induces the States to cooperate in implementing the overall scheme? The difference matters to American citizens who care about whether they are governed in accordance with the Constitution. The Constitution contemplates a division of power between state and federal authority.⁶² If the federal government can impose any obligation on states, the Constitution no longer incorporates this limiting feature.

The point does not rest on metaphysical distinctions. It makes a real, practical difference whether such programs are imposed state by state or at once on the whole country.⁶³ People can move freely between states, relocating from states with more onerous healthcare regulatory schemes to those that leave

flat tax on all males or all those above age six is not a capitation because it does not apply to all heads, but such reasoning would make nonsense of the original constitutional requirement.

58. U.S. CONST. art. I, § 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”).

59. *See id.*

60. *See* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 613 (2010).

61. *See* MASS. GEN. LAWS ANN. ch. 111M, § 2 (West 2006).

62. *See* U.S. CONST. amend. X; *see also* *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.”).

63. *Cf. Gregory*, 501 U.S. at 458 (listing the advantages of our Constitution’s division of power between the federal government and the States).

more to individual choice.⁶⁴ Also, different schemes in different states can help analysts to determine what works better (or what works well enough) and what does not.⁶⁵

Behind all these arguments lurks a common impulse—to insist that the Constitution really is a law, that it really does mean what it says. Even where the text of the Constitution remains ambiguous, the same impulse insists that it must, at any rate, mean something. The background assumption is that when the text of the Constitution confers discrete powers on the federal government, those powers must have limits or we no longer have a constitution.⁶⁶ There are a variety of plausible arguments for a “living Constitution” that adapts to changing circumstances.⁶⁷ But the arguments that everything in modern societies is interdependent, that what happens in each state must affect all the other states, and that what each person does or fails to do can imperil everyone else throughout the nation prove too much.⁶⁸ In the end, they imply that we simply cannot insist on constitutional limits, because the demands of public policy are potentially limitless.⁶⁹

No one should be surprised that so many Americans resist this logic.⁷⁰ The ultimate issue is not whether we interpret the

64. *Cf. id.* (“This federalist structure . . . makes government more responsive by putting the States in competition for a mobile citizenry.”).

65. *Cf. id.* (“This federalist structure . . . allows for more innovation and experimentation in government . . .”).

66. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote: ‘The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.’”) (quoting *THE FEDERALIST* NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)).

67. See generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

68. See *Lopez*, 514 U.S. at 567 (refusing to “pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States”).

69. See *New York v. United States*, 505 U.S. 144, 187 (1992) (“But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”).

70. See *Many Say Government Now Operating Outside the Constitution*, RASMUSSEN REPS., (Nov. 23, 2010), http://www.rasmussenreports.com/public_content/politics/general_politics/november_2010/many_say_government_now_operating_outside_the_constitution (finding that only 39% of likely American voters believe the federal government is currently operating within the limits established by the Constitution of the United States); *TIME MAGAZINE / ABT SRBI POLL* (June 22, 2011), <http://www.srbi.com/TimePoll5380-Final%20Report-2011-06-22.pdf> (finding that 56%

Constitution in the exact way the Supreme Court Justices of earlier generations might have done or even as the Framers at Philadelphia might have expected. It is whether we have, in any meaningful sense, an actual constitution or not.⁷¹ The most compelling arguments against the healthcare law—at least, those that seem to have gained some traction in public debate—are those that appeal to this concern.⁷² If federal power can be extended to such extremes, are there any conceivable limits?⁷³ Or are we saying that the Constitution must be left behind, along with horse-drawn carriages—vehicles we now display for ceremonial purposes or ride now and then for amusement, but no longer expect to serve any serious purpose in a world where advanced technology dissolves all limits?

I still make no prediction about the outcome of current litigation in the Supreme Court. The one thing I feel safe in predicting is that the Supreme Court will not settle the debate, even if the Court does hold that the current federal healthcare reform law can be fitted into some very advanced, very creative interpretation of the Constitution. The prevailing American belief—that we do still have a Constitution, which still imposes some limits on government—also implies that the Constitution is not reducible to what five robed jurists happen to say it is at any one time.

Let me offer a few examples to drive home this point—that the Constitution has force in our political culture, apart from rulings of the Supreme Court. Look, for example, at our most recent constitutional amendment, the Twenty-seventh.⁷⁴ It was proposed by Congress in 1789, but not ratified by the requisite three-quarters of the states until more than 200 years later.⁷⁵ Was an unratified proposal still “alive” after lying in desuetude

of Americans think it is unconstitutional for the government to require most individuals to have healthcare insurance) [hereinafter TIME MAGAZINE POLL].

71. See *Lopez*, 514 U.S. at 557 (“[T]he scope of the interstate commerce power ‘must be considered in the light of our dual system of government and may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local and create a completely centralized government.’” (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))).

72. See *supra* notes 7 & 70 and accompanying text.

73. See *Lopez*, 514 U.S. at 556–57.

74. U.S. CONST. amend. XXVII (“No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”).

75. Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 498 (1992).

for more than a century? Scholars could think of serious objections, but a citizens' movement in the 1980s urged state legislatures to consider the plain words of the Constitution, which do not impose any time limit on ratification and seem to leave it to state legislatures to decide for themselves whether an old proposal is still worth considering.⁷⁶

Or consider the Second Amendment and our ongoing disputes about the right to "keep and bear Arms."⁷⁷ No Supreme Court ruling had clearly endorsed the notion that the Second Amendment guarantees an individual right to own firearms.⁷⁸ At least one decision indeed seems to indicate that the right was tied to state policies on militia training.⁷⁹ But the notion that the Second Amendment conferred an individual right to own guns has long been insisted upon by mass membership organizations like the National Rifle Association and embraced in party platforms and federal statutes.⁸⁰ When the Supreme Court finally ruled in *District of Columbia v. Heller*, that the Second Amendment does mean what it says—or what it seems to say, when it speaks of a "right . . . to keep and bear Arms"⁸¹—it was simply catching up with a well-established current of public opinion.⁸² It no doubt helped that the *Heller* appeal presented the Court with a limiting case. Whatever one might say about room for regulatory measures of one kind or another, the D.C. law at issue was a total ban

76. *Id.* at 536–42 (describing the resurrection of the amendment by a modest grassroots campaign that nearly escaped the attention of most scholarly commentators).

77. U.S. CONST. amend. II.

78. See *United States v. Miller*, 307 U.S. 174 (1939) (providing no clear answer on whether the Second Amendment safeguards an individual right); see also Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 654 (1989) (noting that "there is, basically, only one modern case that discusses [the question of Congress' power to regulate the keeping and bearing of arms], *United States v. Miller*"); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 250 (1983) ("*Miller* is the Supreme Court's first and last extended treatment of the second amendment.").

79. See *Miller*, 307 U.S. at 178–79.

80. See *District of Columbia v. Heller*, 554 U.S. 570, 615–16 (2008) (discussing how post-Civil War legislation sought to enforce the Second Amendment right of individuals to keep and bear arms).

81. The Court held that the Second Amendment safeguards an individual right. *Id.* at 592.

82. Jeffrey M. Jones, *Americans in Agreement with Supreme Court on Gun Rights*, GALLUP, (Jun. 26, 2008), <http://www.gallup.com/poll/108394/americans-agreement-supreme-court-gun-rights.aspx> (finding that 73% of Americans believe the Second Amendment guarantees the rights of Americans to own guns).

on all ownership of operable guns.⁸³ If that were permissible, the “right” at stake would seem to be entirely nugatory.

As a third example, many countries allow defendants to demand some form of a jury in criminal trials.⁸⁴ Not even countries with a parallel common law heritage, however, acknowledge a right to jury trials for complex civil litigation involving abstruse technical issues nearly to the extent that the United States does.⁸⁵ There are many good reasons why Canada and the United Kingdom, for example, eliminated jury trials for such cases.⁸⁶ It is not required by any international human rights convention.⁸⁷ But it happens to be guaranteed by the Seventh Amendment.⁸⁸ There are surprisingly few cases testing the limits of the guarantee because neither Congress nor state legislatures have dared to press the point. We have a guarantee in the Constitution. It is supposed to mean something. It cannot just be brushed away as the product

83. See *Heller*, 554 U.S. at 574–75.

84. See Neil Vidmar, *A Historical and Comparative Perspective On the Common Law Jury*, in *WORLD JURY SYSTEMS 3* (Neil Vidmar ed., 2000).

85. See *id.* (“[W]ith the exception of the United States and parts of Canada, the jury has been largely abandoned for civil cases . . .”); see also Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 *AM. J. COMP. L.* 277, 288 (2002) (“While the jury retains a lively role in criminal cases in most English-speaking nations (but not in the rest of the world), it is striking that in no other nation has the jury been retained in civil litigation to the degree it has in the United States.” (footnote omitted)).

86. See 1 *MARY ANN GLENDON ET. AL., COMPARATIVE LEGAL TRADITIONS* 613–27 (2d ed. 1994) (compiling sources and discussing the decline of the civil jury in the United Kingdom); see also Benjamin Kaplan & Kevin M. Clermont, *England and the United States*, in 16 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* 3, 29 n.265 (Mauro Cappelletti ed., 1984) (stating that in general juries are rarely used in civil cases in England, Canada, and Australia).

87. Various international human rights conventions speak of a right to a fair trial, but none specifically guarantees a right to a jury trial. See, e.g., *International Covenant on Civil and Political Rights* art. 14, Dec. 19, 1966, 999 U.N.T.S. 171; *Convention for the Protection of Human Rights and Fundamental Freedoms* art. 6, Nov. 4, 1950, 213 U.N.T.S. 221; *Universal Declaration of Human Rights* art. 10, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

88. See U.S. CONST. amend. VII.

of a simpler age.⁸⁹ Most Americans do not believe that the complexities of our era make the Constitution superfluous.⁹⁰

Let me conclude with a caution about the reach of my argument. I am not at all suggesting that our healthcare policy was in fine condition before the enactment of the 2010 legislation. I am not saying that there were no serious constitutional issues in healthcare policy before this legislation was enacted. I am not even saying that all would be well if we simply left everything to the States.

One of the central problems in the previous arrangements was that the market for health insurance was subject to a number of arbitrary limitations. For example, many states prohibit the purchase of health insurance from out-of-state insurers.⁹¹ In the late nineteenth century, the Supreme Court held that a state law prohibiting the purchase of insurance from out-of-state providers was a deprivation of liberty, so arbitrary that it amounted to a denial of liberty without due process, violating the guarantee in the Fourteenth Amendment.⁹² In 1944, when the Court already had abandoned past efforts to protect commercial freedom under the due process guarantees, the Court held that Congress could regulate insurance companies under its commerce power.⁹³ Congress responded with a statute that authorized the states to prohibit the purchase of out-of-state insurance without dormant Commerce Clause limitations.⁹⁴ The Supreme Court promptly upheld that statute (the McCarran-Ferguson Act).⁹⁵

89. See, e.g., Jennifer F. Miller, *Should Juries Hear Complex Patent Cases?*, 2004 DUKE L. & TECH. REV. 4, ¶ 1 (acknowledging that a “complexity exception” to Seventh Amendment claims would have to be applied cautiously so as not to become a “blanket exception for patent infringement cases” even when they turn on highly technical issues).

90. TIME MAGAZINE POLL, *supra* note 70 (finding that 64% of Americans think the Constitution has held up well as the basis for our government and laws and is in little need of change).

91. See CATO INST., CATO HANDBOOK FOR POLICYMAKERS 175–76 (7th ed. 2009).

92. See *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897).

93. See *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 553 (1944).

94. See McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945), codified at 15 U.S.C. §§ 1011–1015 (2006); see also *W. & S. Life Ins. Co. v. State Bd. Of Equalization*, 451 U.S. 648, 653 (1981) (“Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act . . .”).

95. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 439–40 (1946).

It remains a serious question whether the congressional power to “regulate Commerce . . . among the several States” actually encompasses the power to authorize the States to break up the country into fifty separate trade zones, where state governments can blockade their own citizens against insurance offerings in other states. In 1913, when Congress tried to authorize states to block all imports of “intoxicating liquors” from out of state, President Taft vetoed the measure as a violation of the proper constitutional scheme.⁹⁶ We subsequently adopted an amendment to the Constitution—the Eighteenth—to clarify that states could stop “intoxicating liquors” from crossing their borders.⁹⁷ But even with a subsequent amendment—the Twenty-first, repealing Prohibition while acknowledging residual state authority to regulate in this area⁹⁸—the Supreme Court has recently insisted that states cannot impose arbitrary limits on imports of wine from out of state.⁹⁹ It is strange to think that what a constitutional amendment cannot authorize for traffic in wine and liquor, a mere statute can authorize for traffic in insurance contracts. If Congress can authorize each state to embargo out-of-state insurance, can it authorize each state to embargo imports from foreign countries, so we get fifty separate policies on international trade?¹⁰⁰

I do not predict that the Supreme Court will soon return to traditional understandings of the Commerce Clause when it comes to authorizing state obstacles to trade any more than when it comes to imposing federal standards. The general point I want to make remains the same. The Constitution is plainly designed to structure what policies can be made, by which governing authorities, and at what level.¹⁰¹ Reasonable people may

96. See 49 CONG. REC. 4291 (daily ed. Feb. 28, 1913) (Interstate Shipment of Liquors—Veto Message).

97. U.S. CONST. amend. XVIII.

98. See U.S. CONST. amend. XXI.

99. See *Granholm v. Heald*, 544 U.S. 460, 466 (2005).

100. The Constitution grants parallel congressional authority to regulate foreign commerce along with interstate commerce. See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

101. As the Supreme Court stated in *Saenz v. Roe*:

“Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system

disagree about the exact scope of the particular powers conferred. But to make the Constitution into an open-ended charter of coercion—so that the federal government can do anything at all that policymakers happen to favor at the moment—is to deny us the benefits of constitutional government.

I do not believe the current generation of Americans is ready to accept that result.¹⁰² So I think we will continue to see lots of debate about how the federal government imposes its will on private decisions regarding healthcare and health insurance. If that still makes America an exceptional country, most Americans will be quite ready to remain exceptional.¹⁰³ We have, at many times in the past, set a good example for the world, even when most of the world was not yet prepared to follow it. We may be exceptionally well situated to make our own choices and, if necessary, to go our own way. That is part of the point in having our own Constitution.

unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.” 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

102. See sources cited *supra* notes 7 & 70 and accompanying text.

103. See sources cited *supra* notes 9–16 and accompanying text.