
**COMMON-LAW CONSTITUTIONALISM, THE
CONSTITUTIONAL COMMON LAW, AND THE VALIDITY
OF THE INDIVIDUAL MANDATE**

ABIGAIL R. MONCRIEFF*

INTRODUCTION	1245
I. THE CONSTITUTIONAL COMMON LAW	1247
II. THE INDIVIDUAL MANDATE	1250
A. <i>Common-Law Constitutionalism</i>	1251
B. <i>The Constitutional Common Law</i>	1253
III. THE DEMOCRATIC LIVING CONSTITUTION	1256
CONCLUSION.....	1257

INTRODUCTION

Originalism’s proponents (and here I refer to those “skyscraper originalists” who consider themselves bound by “original expected application”¹) articulate three important virtues of their chosen interpretive method: (1) originalism provides legitimacy to judicial review that would otherwise be lacking;² (2) originalism constrains judges’ discretion in choosing among possible interpretations of the Constitution’s text;³ and (3) originalism provides stability to the Constitution’s meaning.⁴ In *The Living Constitution*, David Strauss’s central thesis seems to be that the institution of judicial review itself – particularly the path dependency of the common-law tradition – provides all of those virtues even when judges are not bound by the Framers’ understandings.⁵ Indeed, Professor Strauss makes the stronger claim that “common law

* Peter Paul Career Development Professor and Associate Professor of Law, Boston University School of Law.

¹ JACK BALKIN, *LIVING ORIGINALISM* 32 (2011).

² Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (“The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality.”).

³ *See id.* at 863-64 (asserting that “the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law” and that originalism helps to avoid that danger by “establish[ing] a historical criterion that is conceptually quite separate from the preferences of the judge himself”).

⁴ *See id.* at 855.

⁵ *See* DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 3 (2010).

constitutionalism” better captures the virtues of legitimacy, constraint, and stability when it is *not* bound to original meaning than when it is.⁶

In making his case, however, Professor Strauss paints too simplistic a picture of modern judicial review, eliding a second and crucially important common-law-like feature of judicially constructed constitutional rules: their frequent susceptibility to legislative override.⁷ Today’s judiciary does not announce a constitutional rule and then enforce it dictatorially at all times and in all cases, nor does it announce a constitutional rule and then enforce it monolithically until compelled to make revisions through trial-and-error elaboration. Instead, today’s judges announce broad constitutional norms and then craft specific rules for enforcement of those norms – rules that Henry Monaghan long ago termed the “constitutional common law.”⁸ Importantly, most of these enforcement rules either allow for legislative overrides or are themselves subject to such override.

The presence and operation of the constitutional common law is important to Professor Strauss’s theory, especially to his claim that common-law constitutionalism can beat originalism at its own game – that it can better capture the virtues of legitimacy, constraint, and stability that originalists seek. The problem is that the legitimacy, constraint, and stability of common-law constitutionalism do not come from Burkean notions of tradition and precedent; they come from the constitutional common law and its openness to political suasion. But when it comes to judicial review, political suasion is a source of virtue that originalists want to reject. The disagreement between Professor Strauss and originalists, then, ought to be fought at square one: whether changing social norms and political preferences are a justifiable reason to change constitutional operations (absent a formal constitutional amendment). In my view, Professor Strauss cannot win on the originalists’ turf; he ought to attack the originalists’ foundational view that courts are institutionally antidemocratic and therefore ought not to do politics.

The paper proceeds as follows. Part I describes the constitutional common law and its interactions with common-law constitutionalism. Part II uses the fight over the constitutionality of the Patient Protection and Affordable Care Act (ACA) and its so-called “individual mandate” as a case study to flesh out the core differences between common-law constitutionalism and constitutional common law. Part III argues that a viable justification for a living constitution needs to embrace and defend the courts’ essentially political nature,

⁶ *Id.* at 44-46.

⁷ *See id.* at 46 (“A decision about the meaning of the Constitution, by contrast [to ordinary common-law fields like torts], cannot be reversed by Congress or a state legislature; it can only be undone if the courts change course, or if the Constitution is formally amended, an exceptionally difficult process.”).

⁸ Henry P. Monaghan, *The Supreme Court, 1974 Term – Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

confronting head-on the (skyscraper) originalists' sense that courts should never do politics.

I. THE CONSTITUTIONAL COMMON LAW

In *The Living Constitution*, Professor Strauss portrays constitutional elaboration in the courts as a cloistered, voyeuristic, and slow process: A court announces a constitutional rule in the course of deciding a case, sees how that rule works in the world beyond its doors, and then makes adjustments slowly and carefully through case-by-case elaboration and with due respect for precedent. This picture of judicial review is incomplete and in some respects inaccurate. Modern judicial review is not in the least bit cloistered, and it is not always all that slow. Instead, it is interactive with the political branches, frequently in ways that allow for immediate political revision to the constitutional limits that the courts have announced.

The courts do not achieve this interactivity by allowing Congress to alter constitutional meaning directly. Once the Supreme Court decides that flag burning counts as protected expression under the First Amendment,⁹ for example, a federal statute to the contrary will not change the Constitution's meaning or the judicial enforcement thereof.¹⁰ But, first, the decision that flag burning counts as protected expression does not preclude all regulation of flag burning; all such pronouncements of constitutional meaning are enforced through balancing tests that leave room for political override when asserted "state interests" convince the court to set aside the constitutional limit. Second and more importantly, the courts frequently go out of their way to avoid making these kinds of unalterable pronouncements of constitutional meaning, choosing instead to enforce broad constitutional norms through rules that make intrusions on those norms politically harder without ever deeming intrusions "unconstitutional."

To elaborate the first point, that courts enforce their pronouncements of constitutional meaning through rules that allow for political pushback: The balancing tests for substantive constitutional limits are important because they create dynamism between the judiciary and the legislatures (both state and federal) even with respect to the most "activist" judicial decisions. For example, the Court in *Roe v. Wade*¹¹ did not announce that abortion can never be regulated; it announced that women have a constitutional liberty interest in bodily integrity that renders abortion regulations constitutionally suspicious – but ultimately acceptable if the regulations pursue sufficiently important state

⁹ See *Texas v. Johnson*, 491 U.S. 397, 399, 420 (1989) (invalidating a Texas prohibition on flag desecration on the ground that flag desecration constitutes protected expression).

¹⁰ See *United States v. Eichman*, 496 U.S. 310, 312, 318-19 (1990) (invalidating Congress's 1989 Flag Protection Act, which was passed in response to *Texas v. Johnson*, on First Amendment grounds).

¹¹ 410 U.S. 113 (1973).

interests.¹² Legislatures could and did react to that decision by establishing permissive but still intrusive regulatory regimes for the abortion procedure, and those regimes grew increasingly intrusive as social opposition to abortion intensified. In response, the Supreme Court slackened its review of abortion regulations under the constitutional balancing test, but it did so without abandoning or even openly revising the *Roe* precedent.¹³ Perhaps Professor Strauss would argue that this story is a core example of common-law elaboration. On one vision of the abortion right's evolution, the courts merely fleshed out and refined the scope of the substantive limitation through case-by-case consideration of various legislative approaches and with cognizance of increasing social resistance to a robust constitutional limitation. But the courts' incorporation of legislative preferences *into the substantive limitation itself*, by allowing for state interest overrides in the strict scrutiny formulation, makes the story much less Burkean than Professor Strauss acknowledges. The courts were not merely learning from political reactions and using them to refine the Constitution's meaning; the political reactions were, from the beginning, *part of* the constitutional meaning itself.

What about the second and more important interactive feature of modern judicial review – the judicial habit of enforcing broad constitutional norms through rules that make intrusions politically harder without ever deeming them “unconstitutional”? This is the feature of modern constitutionalism that Henry Monaghan famously identified more than thirty years ago, terming the rules that emerge from it “the constitutional common law.”¹⁴ So, for example, Professor Monaghan noted that the Warren Court's dormant Commerce Clause cases did not announce immutable constitutional limits on state power but merely set presumptive limits that Congress could override through simple legislation authorizing state regulation.¹⁵

Since Professor Monaghan wrote, this basic judicial strategy has evolved into a pervasive mode of constitutional enforcement.¹⁶ The courts have

¹² *Id.* at 154.

¹³ See *Gonzales v. Carhart*, 550 U.S. 124, 156, 168 (2007) (interpreting the abortion cases to permit a federal ban on so-called “partial birth” or “late-term” abortions).

¹⁴ Monaghan, *supra* note 8, at 3-4.

¹⁵ *Id.* at 15.

¹⁶ For previous identifications and discussions of this trend, see Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1582 (2001); Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1282-83 (2002) [hereinafter Coenen, *Semisubstantive Constitutional Review*]; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596-97 (1992); Richard H. Fallon, Jr., *The Supreme Court 1996 Term – Forward: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997); Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 FORDHAM L. REV. 769, 769-70 (2006) (arguing that federalism is a good way to deal with deep and intense disagreements over individual liberty);

significantly expanded the set of rules that might be deemed “constitutional common law,” so that it now includes statutory interpretation doctrines (such as the canon of constitutional avoidance and the presumptions against preemption, retroactivity, and delegation), procedural rules (such as requirements for legislative findings, general requirements for consideration or deliberation, and prohibitions on animus-based justifications for legislative enactment), and structural norms (such as the presumption that agencies may not intrude on constitutionally sensitive areas without explicit congressional permission).¹⁷ All of these doctrines have the same nature and effect as the rules that Professor Monaghan discussed. They are judge-made rules that implement constitutional norms while allowing for simple legislative overrides. Under all such rules, the legislatures are left free to reenact the same substantive statutes as long as they comply with the courts’ procedural and structural demands. All of these rules openly involve the political branches in the elaboration of substantive constitutional norms.

So, for example, in *NLRB v. Catholic Bishop of Chicago*,¹⁸ the Court was concerned that protecting the collective bargaining rights of lay teachers in church-owned schools would violate the First Amendment by entangling the National Labor Relations Board (NLRB) in the schools’ religious exercises.¹⁹ Rather than holding that the National Labor Relations Act (NLRA) was unconstitutional as applied to church-owned schools, however, the Court simply read the NLRA as though it did not protect the relevant teachers, holding that Congress needed to speak more clearly if it wanted to raise the First Amendment issue.²⁰ This holding has two features that are centrally important to the theory of common-law constitutionalism. First, it falls short of creating a precedent on the scope of the First Amendment and the meaning of religious freedom; the Court avoided its Burkean obligation to contribute to the wisdom of generations. Second, the holding not only allowed but

Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 888-89 (2006) (making the case for state elaboration of substantive rights, at least as a way of evolving national consensus prior to federal judicial enforcement); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 199 (1976); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010); Monaghan, *supra* note 8, at 2-4; Matthew C. Stephenson, *The Prices of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 2 (2008); Laurence A. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 269 (1975); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1550-51 (2000).

¹⁷ For a comprehensive catalogue of these rules in the Rehnquist Court, see Coenen, *Semisubstantive Constitutional Review*, *supra* note 16, at 1285-86. For a comprehensive examination of a subset of these kinds of rules – the so-called “clear statement rules” of statutory construction, see Manning, *supra* note 16, at 408.

¹⁸ 440 U.S. 490 (1979).

¹⁹ *Id.* at 501-04.

²⁰ *Id.* at 504-07.

essentially *instructed* Congress to amend the NLRA (through simple legislation) so that it clearly and explicitly applied to church-operated schools' lay teachers. The Court's "clear statement rule" essentially dared Congress to gather the political will to make such an explicit decision. Furthermore, there was a real possibility that the Court would have upheld the more-explicit statute against a second constitutional challenge.²¹ In an important respect, then, the Court left the definition of the First Amendment's scope to Congress and to the political tides that turn it. The holding allowed Congress to choose between leaving the statute as it was or enacting a simple amendment to extend the NLRB's jurisdiction to church-operated schools, depending on Congress's and the electorate's sense of the constitutional limits.

Today's institution of judicial review, then, is even more common-law-like than Professor Strauss acknowledges. The story of constitutional evolution is not merely one of slow and steady elaboration through case-by-case adjudication, with judges learning through the generations. It is also one of continual interaction between the judiciary and the political branches as judges resist without prohibiting political intrusions into constitutionally sensitive domains, leaving significant room for the political process to shape constitutional meaning.

II. THE INDIVIDUAL MANDATE

Maybe more so than any other recent constitutional debate, the litigation challenging the Patient Protection and Affordable Care Act (ACA)²² has highlighted the differences between pure common-law constitutionalism on the one hand and common-law constitutionalism infused with a constitutional common law on the other. Although the ACA's so-called "individual mandate"²³ – the provision that will, starting in 2014, penalize individuals who fail to carry health insurance – is clearly constitutional on a straightforward application of precedent,²⁴ several judges in the lower federal courts have deemed the mandate constitutionally impermissible.²⁵ In oral arguments,

²¹ See, e.g., *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 294-95, 306 (1985) (upholding the application of the Fair Labor Standards Act to a religious foundation in a constitutional move that seemed at odds with the Court's hesitations in *Catholic Bishop*).

²² Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 [hereinafter ACA].

²³ ACA § 1501 (to be codified at 29 U.S.C. § 5000A).

²⁴ See Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, 37 J.L. MED. & ETHICS 40, 45 (2009); Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1731-32 (2011).

²⁵ *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1293 (11th Cir. 2011), *cert. granted*, 11-393, 2011 WL 5515162 (U.S. Nov. 14, 2011), and 11-398, 2011 WL 5515164 (U.S. Nov. 14, 2011), *cert. granted in part*, 11-400, 2011 WL

several of the Supreme Court Justices seemed inclined to agree, indicating that they might add a new constraint to the Commerce Clause that would prohibit Congress from mandating commercial transactions.²⁶ For present purposes, the interesting point is that the temptation to add this constraint seems to arise from a tradition of constitutional common law rather than a tradition of common-law constitutionalism. In this Part, I will briefly analyze the mandate under pure common-law constitutionalism and then under the constitutional common law, in order to flesh out the differences between the two.

A. *Common-Law Constitutionalism*

On Professor Strauss's vision of judicial review, a court reviewing the individual mandate for compliance with Commerce Clause limits would ask only one question: How similar is the mandate to other laws that have been upheld against a Commerce Clause challenge?²⁷ The reviewing court would then look to Supreme Court precedents on the limits of Congress's power to regulate interstate commerce and would draw analogies between those cases and the mandate. On that analysis, there is no doubt that the ACA ought to be constitutional.

With the mandate, Congress sought to eliminate a market for self-insured healthcare transactions by channeling patients into a near-perfect substitute market²⁸: the market for insured healthcare.²⁹ Importantly, both the market for self-insured care and the market for fully-insured care are markets that extend across state lines as the inputs (drugs, devices, and doctors) and the outputs (patients) can and do travel interstate. The targeted markets, therefore, clearly fall under congressional jurisdiction because they are interstate commercial markets. Furthermore, under longstanding precedent, both Congress's end of eliminating the market for self-insured care and its means of incentivizing

5515165 (U.S. Nov. 14, 2011); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 574 (6th Cir. 2011) (Graham, J., concurring in part and dissenting in part), *petition for cert. pending*, No. 11-117 (filed July 26, 2011); *Florida ex rel. Bondi v. U.S. Dep't of Health and Human Services*, 780 F. Supp. 2d 1256, 1291 (N.D. Fla. 2011), *aff'd in part, rev'd in part sub nom.*, *Florida ex rel. Att'y Gen.*, 648 F.3d 1235; *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 782 (E.D. Va. 2010).

²⁶ Transcript of Oral Argument at 27-28, *U.S. Dep't of Health and Human Servs. v. Florida* (2012) (No. 11-398), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf.

²⁷ See Strauss, *supra* note 5, at 40.

²⁸ The two markets are not quite perfect substitutes because even comprehensive insurance does not cover all of the care that a person might want to consume. Elective surgeries and unindicated diagnostics, for example, are treatments that many patients demand but that insurance refuses to cover. For all medically necessary interventions, however, insured care is a perfect substitute for uninsured care.

²⁹ See Brief for Prescription Policy Choices as Amici Curiae Supporting Petitioners on the Minimum Coverage Provision, *Dep't of Health and Human Servs. v. Florida* (U.S. Nov. 14, 2011) (No. 11-398), 2012 WL 160229, at *17.

insurance purchases are constitutional under the Commerce Clause directly or, at a minimum, under the Necessary and Proper Clause in conjunction with the Commerce Clause.³⁰

First, under *Raich v. Gonzales*,³¹ the elimination of a national market is, as a matter of settled constitutional law, a legitimate end for Congress to pursue under its authority to regulate interstate commerce.³² *Raich* rejected any constitutional distinction between banning a market and regulating it. Second, under the majority holding of *Raich*, the longstanding precedent of *Wickard v. Filburn*,³³ and the rules stated in *United States v. Lopez*³⁴ and *United States v. Morrison*,³⁵ the Commerce Clause allows Congress to penalize “intrastate economic activity” that, when aggregated, “substantially affects” a regulated market.³⁶ Here, there is no doubt that the decision to self-insure – the failure to buy health insurance – is an economic decision (albeit an intrastate economic decision) that, when aggregated, sustains a market in self-insured healthcare transactions, thereby substantially affecting the market that Congress is attempting to eliminate. The only possible distinction between the ACA and the relevant precedents – and the distinction that the plaintiffs in the ACA litigation as well as most of the invalidating judges in the lower courts have emphasized – is that the decision *not* to buy health insurance arguably is not an economic *activity* because it is inactivity. This distinction seems a fragile hook for a constitutional argument and for standard common-law analysis, and it is therefore surprising that some of the invalidating judges and apparently some of the Supreme Court Justices have taken it seriously.

Even more surprising, though, is that the lower federal judges who have accepted the action/inaction distinction under the Commerce Clause test have not upheld the mandate under the Necessary and Proper Clause. All that the Necessary and Proper Clause demands is that Congress’s chosen means be rationally related to a legitimate end³⁷ and that the means not commandeering state governments in a way that intrudes on the states’ sovereignty.³⁸ Having established, then, that banning the national market for self-insured healthcare is a legitimate end, the only question ought to be whether the means chosen –

³⁰ *See id.* at *i.

³¹ 545 U.S. 1 (2005).

³² *Id.* at 20.

³³ 317 U.S. 111 (1942).

³⁴ 514 U.S. 548 (1995).

³⁵ 529 U.S. 598 (2000).

³⁶ *Raich*, 545 U.S. at 19.

³⁷ *See* *United States v. Comstock*, 130 S. Ct. 1949, 1956-57 (2010) (describing the “means-ends rationality” test of the Necessary and Proper Clause); *Raich*, 545 U.S. at 34-42 (Scalia, J., concurring) (arguing that the *Raich* holding should be based on Necessary and Proper Clause analysis rather than bare Commerce Clause analysis).

³⁸ *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 175 (1992).

namely, the requirement that individuals carry insurance coverage – is a rational way to accomplish that end. Given that the market for fully-insured healthcare is a near-perfect substitute for the market for self-insured healthcare, an incentive for individuals to buy insurance will cause those individuals to shift from the self-insured market to the fully-insured market. The means, thus, seem eminently reasonable and rational. And that should be the end of the matter for common-law constitutionalism. There is absolutely nothing in modern doctrine that permits a court to import general notions of liberty (or founding-era concepts of agency³⁹) into the question of whether Congress’s chosen means are “proper” under the Necessary and Proper Clause,⁴⁰ irrespective of any public outrage at the mandate’s perceived effect of forcing unwilling Americans “to enter the stream of commerce.”⁴¹

In the end, then, the pure “common law constitutionalism” version of the mandate challenge would have characteristics of legitimacy, constraint, and stability. The courts would not interfere with the political decision to require insurance coverage, maintaining democratic legitimacy by leaving democratic decisions alone. The adherence to precedent would constrain the courts’ ability to second-guess political and economic decisions, notwithstanding their own political preferences. And the meaning of the Commerce Clause and Necessary and Proper Clause would remain unchanged, maintaining stability in the constitutional law. If common-law constitutionalism operated perfectly in this form, I would agree with Professor Strauss that the common-law tradition provides the legitimacy, constraint, and stability that originalists seek absent any reference to the Founding-era definition of interstate commerce.⁴²

B. *The Constitutional Common Law*

But, of course, the lower federal courts have not adhered to precedent in this way, and some Supreme Court Justices (including proclaimed originalist Justice Scalia) indicated during argument that they would adopt an unprecedented limitation on federal power.⁴³ Several lower federal judges

³⁹ See Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267, 268 (2011).

⁴⁰ See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIB. 581, 637 (2010) (arguing that the anti-commandeering doctrine announced in *New York* and *Printz* ought to extend not only to states but also to individuals); see also Transcript of Oral Argument, *supra* note 26, at 27.

⁴¹ *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1235, 1291-92 (11th Cir. 2011) (“Individuals subjected to this economic mandate have not made a voluntary choice to enter the stream of commerce, but instead are having that choice imposed upon them by the federal government.”).

⁴² See Strauss, *supra* note 5, at 43-44.

⁴³ Transcript of Oral Argument, *supra* note 26, at 27-28.

have deemed the individual mandate constitutionally invalid, notwithstanding their recognition that self-insured healthcare transactions have harmful commercial effects.⁴⁴ What, then, is motivating these lower federal judges and Supreme Court Justices to deviate from straightforward common-law constitutionalism? The answer seems to be that the judges are worried about the individual liberty implications of a national requirement for individual purchases of private products, and they therefore want to resist the mandate.⁴⁵ Because there is no individual right or other liberty-based doctrine for invalidating the mandate, however, the judges want to resist the statutory approach without fully prohibiting it. These judges seem to be using the Commerce Clause as a constitutional-common-law enforcement mechanism for individual rights that the judges are unwilling to enforce directly.⁴⁶

The plaintiffs have made general arguments that they should be free not to buy commodities that they don't want to buy, as well as more specific arguments that the freedom of contract and the freedom of health protect their right not to enter into health insurance contracts.⁴⁷ Of course, none of those asserted liberty interests is strong enough under current doctrine to invalidate (or even seriously to challenge) the mandate on direct substantive review. But the arguments have been enough, particularly in light of the Tea Party

⁴⁴ See e.g., *Florida ex rel. Bondi v. U.S. Dep't of Health and Human Servs.*, 780 F. Supp. 2d 1256, 1291 (N.D. Fla. 2011).

⁴⁵ See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 572 (6th Cir. 2011) (Graham, J., dissenting) ("In the absence of the mandate, individuals have the right to decide how to finance medical expenses. The mandate extinguishes that right. Congress may of course provide incentives . . . to steer behavior, and it may impose certain requirements or prohibitions once an individual decides to engage in commercial activity. It is a different matter entirely to force an individual to engage in commercial activity that he would not otherwise undertake of his own volition."); *Florida ex rel. Att'y Gen.*, 648 F.3d at 1292 ("Although this distinction [between regulations that leave individuals with multiple compliance opportunities (like those at issue in *Wickard*) and mandates that require unique action for compliance] appears, at first blush, to implicate liberty concerns not at issue on appeal, in truth it strikes at the heart of whether Congress has acted within its enumerated power. Individuals subjected to this economic mandate have not made a voluntary choice to enter the stream of commerce, but instead are having that choice imposed upon them by the federal government. This suggests that they are removed from the traditional subjects of Congress's commerce authority . . ."); *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1287 (reasoning, in a now infamous allusion to the tax on tea that spurred the American Revolution, that the Founders would not have "create[d] a government with the power to force people to buy tea in the first place"); *Virginia ex rel. Cuccinelli*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010) ("At its core, this dispute is not simply about regulating the business of insurance – or crafting a scheme of universal health insurance coverage – it's about an individual's right to choose to participate.").

⁴⁶ See Abigail R. Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Indirect Protection to Non-Fundamental Liberties*, 64 FLA. L. REV. 639, 672 (2012).

⁴⁷ See *Bondi*, 780 F. Supp. 2d. at 1265.

movement's populist backing, to convince several judges to bend the Commerce Clause precedents in order to invalidate the mandate on structural grounds. In so doing, those judges have set a rule that compulsory insurance provisions are constitutionally acceptable only if enacted by states, making the incursion on liberty harder (due to coordination costs among the states) but not impossible.⁴⁸ They have also incidentally set a rule that Congress may punish engagements in disfavored markets but may not punish failures to engage in preferred markets. That rule, too, permits the liberty incursion by allowing Congress to channel people from one market to another, but it makes the incursion harder. The invalidating judges' Commerce Clause holdings, thus, seem to be attempts – very much in the tradition of the constitutional common law – to resist without prohibiting a problematic intrusion on a substantive constitutional constraint.

This strategy has three interesting features for the present discussion. First, by way of a concession to Professor Strauss, the judges' strategy demonstrates that common-law constitutionalism works some disciplining force on judges' constitutional holdings. The invalidating judges have taken economic liberties surprisingly seriously in their reviews of the individual mandate, but they have not resurrected the freedom of contract in its erstwhile substantive due process form, despite invitations from the plaintiffs to do exactly that.⁴⁹ The Supreme Court, too, is so unlikely to resurrect the freedom of contract that the plaintiffs have not bothered to seek *certiorari* on any of their substantive due process claims. Precedent, thus, certainly binds modern courts, and in Burkean fashion, the courts are loath to make dramatic changes to core constitutional meaning, such as by suddenly reverting the scope of substantive due process.

Second, however, the invalidating judges' strategy demonstrates that even the clearest precedents are not enough to stop some judges from responding quickly to emerging political movements. Absent a populist groundswell against the individual mandate and widespread state legislative resistance to the law, the Commerce Clause challenge would have been an extraordinarily easy case, and the freedom of contract arguments would have been entirely irrelevant. Because of that groundswell, however, five federal judges have gone out of their way to incorporate the Tea Party's sense of economic liberty into their structural analyses. They have found and exploited the only arguable leeway in the Supreme Court's precedents: the references to "economic activities" as the regulable class.

Third and most importantly, the invalidating judges' responsiveness has taken an interactive rather than a purely judicial form. The judges have not written that Congress may never penalize individuals for failing to buy health insurance; indeed, several have implied that a tax penalty would be permissible

⁴⁸ See *id.* at 1264.

⁴⁹ See *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1161-62 (N.D. Fla. 2010) (rejecting a handful of substantive due process arguments that the plaintiffs raised, including a freedom of health argument).

if Congress openly identified it as a tax.⁵⁰ Furthermore, the judges' logic has left room for Congress to recreate the precise substantive incentive of the individual mandate – through simple legislation – by penalizing individuals for consuming self-insured care rather than penalizing individuals for failing to carry health insurance. And, of course, they have left room for the states to pass compulsory insurance provisions of identical substance and form. Imagining, then, that the Supreme Court adopts the logic of the invalidating judges and does so because it is concerned about the substantive validity of compelling individual insurance coverage, the holding will leave room for the political branches to reenact the mandate through simple legislation and thereby to participate directly in defining the constitutional importance of economic liberty. The substantive constitutional constraint will be subject to simple legislative override.

With the constitutional common law, then, the virtues of constraint and stability are weaker than Professor Strauss seems to argue. In the ACA litigation, the invalidating judges are responding to changing political tides much faster than pure common-law constitutionalism would allow, and they are doing so through tools that allow political branch responsiveness to potential changes in constitutional limits, undermining the stability and legitimacy of constitutional meaning. In this case, constitutional meaning seems subject to transient political whim. Furthermore, the legitimacy of judicial review itself looks very different from Professor Strauss's portrayal. To the extent that these lower federal judges have legitimacy at all, it comes from their willingness to respond quickly to political change, without immediately and monolithically altering core constitutional meaning by, for example, resurrecting the freedom of contract. That is, the constitutional common law imports democratic legitimacy into the project of constitutional interpretation.

III. THE DEMOCRATIC LIVING CONSTITUTION

Given the presence and operation of the constitutional common law, the virtues of living constitutionalism seem harder to align with originalist theory than Professor Strauss implies. From the perspective of a “skyscraper originalist,” the benefit of originalism is that it keeps constitutional meaning stable in the face of changing social and political circumstances and constrains judges in their ability to import their own political preferences into their constitutional holdings.⁵¹ Furthermore, originalism gives judicial review a legitimacy that it would otherwise lack. In the abstract, giving Article III judges the power to undo political decisions seems hard to defend because the judges themselves are insulated from political accountability. But if judges are bound to the Constitution's original meaning, the argument goes, then they can justify their role as the enforcers of a founding bargain – the enforcers of the

⁵⁰ See, e.g., *Thomas More Law Ctr.*, 651 F.3d at 550.

⁵¹ See *supra* text accompanying notes 2-4.

country's core social contract. The judicial role, on this view, is a standard *judicial* one: enforcing a contract against a party in breach when the political branches violate the Constitution's terms. Originalists' claim to superior legitimacy, constraint, and stability, then, centers entirely on a view that courts are not and should not be political actors.

As noted above, Professor Strauss addresses this fundamental critique of the living constitution by arguing that common-law constitutionalism is, much like contract enforcement, a standard judicial role that does not depend on political responsiveness or democratic legitimacy. In his view, the courts are not doing politics when they engage in constitutional updating; they are engaging in a kind of conservative, Burkean evolution that courts have engaged in from time immemorial.⁵² But, of course, the courts do not function entirely the way that Professor Strauss imagines, and the deviations from his vision of judicial review all speak to the heart of the originalists' objections to living constitutionalism. The deviations of the constitutional common law – modern judges' frequent allowance for legislative overrides – create greater judicial involvement in political considerations. It seems to me, then, that a defense of living constitutionalism must not attempt to beat the originalists at their own game, attempting to provide a different mechanism by which courts can gain legitimacy as apolitical institutions. Instead, a good defense of living constitutionalism ought to confront the essentially political nature of constitutional updating and justify the courts' role in that project.

The good news, though, is that the constitutional common law provides the solution as well as the problem. Yes, the courts are engaging in an essentially political project, and yes, they are doing so from a position of life tenure and undiminished salary. Yes, they are even doing so in apparent violation of an exclusive and deeply political amendment process specified in Article V of the Constitution. But they are involving the political branches directly in the project! Most of the courts' pronouncements of constitutional meaning simply do not require formal constitutional amendment to change, and many of them do not even require judicial overruling of precedent. The vast majority of the courts' constitutional holdings either incorporate legislative overrides or are themselves subject to legislative override. Originalists, then, do not need to worry that judges are making lasting decisions of constitutional meaning without regard to political preferences or without involvement of interested stakeholders. In hard cases and in marginal cases, the courts use structural and process-based rules to make constitutionally problematic decisions harder without making those decisions impossible, giving the political branches easy options for resisting the courts' sense of constitutional limits.

CONCLUSION

Ultimately, I agree with the vast majority of Professor Strauss's theory. The living constitution is the reality of the American constitutional system;

⁵² See Strauss, *supra* note 5, at 100.

“skyscraper” originalism, as an interpretive theory, is fraught with difficulties that undermine many of its core claims to supremacy; and judges evolve constitutional meaning through processes that are reminiscent of standard common-law traditions. I do not agree, however, with Professor Strauss’s more ambitious claim that common-law constitutionalism provides sufficient protections against judicial policymaking to legitimize an apolitical judicial institution of constitutional interpretation. In my view, that claim does a disservice to the reality of common-law constitutional interpretation, which is a deeply political institution that is nevertheless legitimate, constrained, and stable. It is legitimized, constrained, and stabilized by its interactions with the polity, not by its isolation from it.