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## Constitutionalizing the Dispute: Federalism in Hyper-Partisan Times

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**Constitutionalizing the Dispute:  
Federalism in Hyper-Partisan Times**

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**Abstract:**

This article describes how partisan actors during the Obama years have escalated polarization by transforming policy disputes into constitutional contests over the ground rules of the federal system – contests, moreover, in which one bloc of politically like-minded states opposes another. The article examines in particular how Republicans have supported strong claims of state sovereignty, and in some cases resurrected the antebellum doctrine of nullification, to deny to either Congress or the executive branch the authority to reform state health care markets or to limit states' emissions of greenhouse gases. Democrats have reinforced the partisan divide by declining to debate the constitutionality of their policies, instead invoking supposedly settled judicial precedent; and by enabling President Obama to create new federal policy through direct negotiation with like-minded states, thus circumventing congressional obstruction. Ironically both parties appear willing to shrink the power and authority of an already diminished Congress, a development with unsettling implications for the future.

## **Constitutionalizing the Dispute: Federalism in Hyper-Partisan Times**

During President Barack Obama's two terms as president, the United States has been characterized by intense party polarization and deep ideological division (Rose and Bowling 2015; Barber and McCarty 2015). The two major parties have moved toward opposite poles, though Republicans have shifted significantly further to the right than Democrats have shifted to the left (Abramowitz 2010; Mann and Ornstein 2013). One result of growing polarization in an era of divided federal government<sup>1</sup> has been a sharp reduction in the capacity of Congress effectively to address important national challenges. As a result, political power and policy initiative have increasingly migrated to other institutions (Rose and Bowling 2015), including the executive branch, the federal judiciary, and state and local governments.

In theory, to shift the locus of policymaking from a deeply divided federal government to the broad landscape of fifty states should moderate the effects of polarization. In Federalist 10 James Madison argued that, under a well-designed federal constitution, factional rage "will be less apt to pervade the whole body of the Union than a particular member of it." Adapting Madison's argument to the present, we should expect to find hyper-partisanship in a few states, but not in every state or across the entire federal landscape. If Congress and President are persistently at one another's throats, we should expect to find the states intervening to mitigate the damage.

There is no question that in practice state governments have partly offset the effects of our current polarization. The impact of the 2013 federal government shutdown on the daily lives of Americans, for example, would have been far greater if all fifty state governments had not

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<sup>1</sup> A Republican president (Bush) faced a Democratic House and Senate from 2007 to 2009. From 2011 through 2016 a Republican House (and since 2015 a Republican Senate) has faced a Democratic president (Obama).

continued to operate. Moreover in a number of policy areas including health care, environmental protection, education, and immigration, President Obama has circumvented congressional opposition by collaborating directly with state and local governments whose policy aims converge with his own, by selectively enforcing federal regulations, responding to state concerns, and tailoring federal policy to the conditions and practices of each individual state. (See Bulman-Pozen and Metzger, Konisky and Woods, and Conlan and Posner, all in this volume).

Yet shifting political initiative from paralyzed national institutions to state and local governments has not diminished polarization but instead has channeled it in new directions. Some state legislatures are even more polarized than Congress, some less so, but in the aggregate “the states appear to follow the national pattern of high and growing polarization” (Shor and McCarty 2011, 549-550). President Obama’s collaboration with like-minded states to sidestep an obstructive Congress does not remedy polarization, and might heighten it, because on highly contested questions such initiatives confront the determined opposition of a rival bloc of states. Thus in contrast to Madison’s prediction, our contemporary factional divisions tend to “pervade the whole body of the Union” as well as each “particular member of it.”

Political polarization is typically measured by the distance, on a scale from most consistently liberal to most consistently conservative across a range of specific policy stances, between the positions occupied by the median member of each party (Pew Research Center 2014). But another important marker of polarization, though one less readily quantified, is the extent to which Americans’ understandings of their shared Constitution likewise fracture along partisan lines.

We find highly polarized popular understandings on a number of constitutional questions, including interpretations of the Second Amendment and of the Constitution's implicit right of privacy. My focus in this article, however, is increasingly polarized understandings of the federal structures established by the Constitution. Polarization of constitutional understandings in this domain is arguably more consequential for the future character of American politics than polarization on policy questions. Constitutional arguments – even if in the first instance they are deployed opportunistically -- carry wider effects that endure beyond the specific policy aim for which they were enlisted. Political leaders do not only engage in ideological disputes *within* a federal constitutional order, but also in disputes *about* this federal constitutional order, and – especially in an era of hyper-partisanship -- these deserve as much attention as contests over the substance of policy. Escalating constitutional disputes about the extent of federal authority over states and local governments are potentially more destabilizing than spirited disputes about individual rights. An unresolved dispute over federal authority to restrict slavery in the territories was the trigger for secession and civil war in 1861.

In this article I describe how partisan actors in recent years have intensified the consequences of polarization by transforming policy disputes within Congress, or between Congress and president, into constitutional disputes over the ground rules of the federal system itself – disputes, moreover, that pit one politically like-minded bloc of states against another. During Barack Obama's eight years as president a number of policy disagreements have in this way broadened into constitutional-federal disputes. Here I examine two: the federal politics of the Affordable Care Act (a.k.a "Obamacare") and regulation of greenhouse gases under the Clean Air Act. The policies themselves are described in more detail elsewhere in this volume (see for instance Noh and Krane on the Affordable Care Act and Konisky and Woods on

environmental policy). My emphasis here is on the types of constitutional arguments these policy disputes have generated.

I show that, at least in the two featured cases, Republican and Democratic elected leaders have advanced sharply different constitutional arguments about federal structure. I also argue that this constitutional polarization has been asymmetric. Republicans have resorted to strong claims of state sovereignty that consciously break with longstanding precedent, and in some cases have revived antebellum doctrines of nullification. Republicans have also been readier than Democrats to turn policy disputes into public constitutional debates. At the same time Republicans appear internally divided on how far to press states' rights doctrine at the expense of congressional authority.

Democrats in contrast, at least in the two featured cases, were less likely to engage in constitutional debate at all. Instead they grounded their position on longstanding, apparently settled judicial precedent, on reinterpretation of existing statutes, and on rights-based arguments (e.g. a "right to health care") advanced without much effort at constitutional justification.

Thus polarization on questions of federal structure has not meant that partisans on each side voice substantially new constitutional doctrine pointing in opposite directions. Democrats have not, for instance, formulated fresh constitutional arguments to legitimate the federal powers their policies require but rely instead on what they claim is settled constitutional law. Republicans in contrast (and actors on the right generally) have advanced sharply new -- or newly resurrected -- states' rights doctrine, while Democrats (and actors on the left generally) have declined to respond at length on constitutional questions. Democrats' approach here might be viewed as a healthy way of preventing needless escalation. Alternatively, their constitutional non-response may reveal even deeper political fractures than would an open constitutional

debate. For hyperpolarization does not mean only that rival partisans hold sharply opposed political views, but more fatefully that they live in sharply disjunctive intellectual worlds.

A note on method: in the case studies below I feature constitutional arguments made by elected leaders who speak or act from some specific location in the American federal structure – e.g., as members of Congress, state legislators, governors, or state attorneys general. In that sense this essay is an excursion into what has been variously called “popular constitutionalism,” (Kramer 2005), “democratic constitutionalism” (Zietlow 2011), or “constitutional construction” (Whittington 2001).<sup>2</sup> Even if the federal judiciary is accepted as the final arbiter of constitutional disputes, it possesses no monopoly on constitutional interpretation and argument. Partisan actors play an enormous role in setting the judiciary’s agenda (as in the Republican-led constitutional challenge to the Affordable Care Act), furnishing its judges with arguments, implementing (or ignoring) its precedents and arguments, and of course appointing its members. The constitutional arguments of political actors who do not disguise their substantive aims often reveal more about the workings of American federalism than does the hyper-refined language of judges.

In the conclusion I raise some normative questions about our current tendency to transform policy disagreements into constitutional contests over federal structure. I suggest that what matters for the future of American federalism is not only *whether* a policy dispute is turned into a constitutional debate, but also *how* this is done.

### **Congressional Constitutional Debate on the Affordable Care Act**

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<sup>2</sup> The meanings attached to these terms are broadly similar in referring to constitutional arguments and decisions made by non-judicial actors, but they are not strictly identical. Zietlow, for example (2011, 1371-1375) describes “democratic constitutionalism” as an important subset of “popular constitutionalism.”

The 2008 presidential candidates of both major parties declared that the U.S. health care system was in crisis. Both Barack Obama and John McCain proposed reforms designed to expand federal authority over state insurance markets, though in different ways. McCain's proposal did not require all adults to carry health insurance (the so-called individual mandate) which as a component of the Affordable Care Act later became a central point of constitutional controversy.<sup>3</sup> Nor did McCain characterize health care as a right, as Obama did, or promise to achieve universal coverage. But McCain did propose substantially to modify state regulations and state insurance markets by opening them up to interstate competition, to use federal authority to restrict state malpractice awards, and to federally subsidize coverage for low-income individuals or those whose medical conditions made them expensive to insure (McCain 2008; Commonwealth Fund 2008). McCain criticized Obama's proposal on policy grounds but did not characterize it as unconstitutional (*New York Times* 2008).

By March 2010, when the Affordable Care Act was signed into law despite the opposition of every Republican member of both chambers, the political ground had shifted fundamentally, in part because the Tea Party movement had now become a powerful constituency within the Republican Party (Skocpol and Williamson 2012). By late 2009 some Republican members of Congress had already begun urging legislators in their states to prepare constitutional challenges to the ACA in the event of its passage (Dinan and Pickerill 2013, 17-20). During the December 2009 U.S. Senate debate over the ACA (*Congressional Record* December 22, S13714 - S13744) the basic pattern of the constitutional confrontation had already been set: Republican senators, in addition to challenging the legislation on policy grounds, denounced it at length as unconstitutional (Kay Bailey Hutchison, R-TX, John Ensign, R-NV,

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<sup>3</sup> As a presidential candidate in 2008, Barack Obama supported requiring coverage for children but had not yet endorsed the full individual mandate later written into the Affordable Care Act.

Orin Hatch, R-UT); Democratic senators defended the ACA on policy grounds and mostly ignored Republicans' constitutional criticisms. The only Democratic Senator to take up the constitutional question (Max Baucus, D-MT) introduced it almost as an afterthought ("Seeing nobody who wishes to speak, I wish to address the question of the constitutionality of the individual mandate"). Baucus did not voice any constitutional argument himself but instead read into the record the opinion of legal scholar Mark Hall who argued that, based on relevant precedents, the U.S. Supreme Court was unlikely to strike down the individual mandate.

This pattern -- Republicans raising constitutional objections that Democrats largely ignored -- continued during the March 21, 2010 final House debate on the Affordable Care Act (at this point less a debate than a public reiteration of entrenched positions). The first Republican speaker, Rep. Nathan Deal of Georgia, denounced both "the unconstitutional individual mandate" and "the unconstitutional mandate to expand our Medicaid rolls." Deal announced that his state would join thirty-eight others "in suing to challenge the constitutionality of this statute" (*Congressional Record* H1856). Other Republican members echoed the claim: the ACA was "un-American and unconstitutional" (Rep. John Shadegg, R-GA, *Congressional Record* H1859); Democrats "carry the heart of our Constitution, bought in blood, and sacrifice it on the altar of political expediency" (Rep. Geoff Davis, R-KY, *Congressional Record* H1869); the bill was unconstitutional because it "moves far beyond regulating economic activity into the realm of regulating inactivity" (Rep. Scott Garrett, R-NJ, *Congressional Record* H1876).

For the most part Democrats during the House debate did not respond to Republicans' constitutional objections. They accused Republicans of hypocrisy for posing as defenders of Medicare, which Republicans had denounced as "brazen socialism" when a Democratic Congress enacted it in 1965 (Rep. Steny Hoyer, D-MD, *Congressional Record* H1855). Six

months earlier, House Speaker Nancy Pelosi had issued a public statement dismissing “the nonsensical claim that the federal government has no constitutionally valid role in reforming our health care system.” Democratic reform efforts, Pelosi argued, rested on the same constitutional basis as Medicare and Medicaid, and were likewise grounded in Congress’s “broad power to regulate activities that have an effect on interstate commerce”; because “virtually every aspect of the health care system has an effect on interstate commerce, the power of Congress to regulate health care is essentially unlimited” (Office of Nancy Pelosi 2009). During the March 21, 2010 House debate, Rep. George Miller (D- CA), one of the principal authors of the ACA, provided a similar but less sweeping constitutional defense. The constitutionality of the individual mandate, Miller argued, “is grounded in Congress’s taxing power but is also necessary and proper -- indeed, a critical linchpin – to the overall effort to reform the health care market and bring associated costs under control throughout interstate commerce” and to eliminate the moral hazards occasioned by requiring insurance companies to cover individuals with pre-existing conditions (*Congressional Record*, H1882). In general, Democrats treated the legislation’s constitutionality as firmly grounded in settled Commerce Clause precedent, and many followed Pelosi’s lead in dismissing Republican constitutional objections as frivolous.

That it fell within Congress’s broad power to regulate commerce was not, of course, the Democrats’ principal justification for the Affordable Care Act. Their central moral and political argument, both in the March 2010 congressional debate and in communications to the wider public, was that health care was “a right and not a privilege” (Rep. John Lewis, D-GA, *Congressional Record*, March 21, 2010, H1864; see also Rep. Carolyn Maloney, D-NY, H1871; Rep. Sheila Jackson Lee, D-TX, H1877). A right to health care, however, is not guaranteed under the U.S. Constitution like freedom of speech and religion. In that sense it is comparable to

basic education, which is likewise not guaranteed by the federal Constitution. (Many U.S. state constitutions do include provisions for social and economic rights, in some cases including health care, though most such guarantees appear intended as policy guidance for legislators rather than court-enforceable claims; see Dinan 2009, 204-212.) Barring a constitutional amendment, under the U.S. Constitution any “right to health care” would have to be legislatively-created rather than constitutionally guaranteed (Zietlow 2011). Its legitimacy would depend on its being constitutionally *permissible*, not on its being constitutionally required. In passing a law designed to ensure that health care was “a right and not a privilege,” congressional Democrats implicitly engaged in legislative rights-creation within the bounds of what they judged to be the discretionary powers of Congress. But they did not explain its constitutional legitimacy to the public this way, relying instead almost entirely on the moral claim that health care was a right.

The premise that the Constitution permits Congress to ensure affordable health care to all Americans grounds in turn the argument that an individual mandate is constitutionally legitimate. Here Oregon’s Democratic Attorney General John Kroger connected the moral argument for a right to health care with a corresponding constitutional argument much more clearly than most congressional Democrats did. In publicly defending the Affordable Care Act’s constitutionality Kroger wrote, “There is no constitutional right to force other people to pay for your health care when you decline to take responsibility for yourself” (Kroger 2011). It would follow, conversely, that if individuals have a right to *refuse* to be insured, then medical providers would have no moral, legal, or constitutional obligation to treat sick or injured individuals who were financially capable of purchasing insurance but chose not to do so.

### **Individual Rights, State Sovereignty, Nullification, and ACA Opponents**

When the constitutionality of the Affordable Care Act's individual mandate was argued in federal court, the debate centered on where to draw the line between federal and state authority: who had legitimate power to require individuals to carry insurance – both federal government and states, or only the latter? Did an insurance mandate fall within the enumerated powers of Congress, or exclusively within the police powers of a state? In the U.S. Supreme Court's *NFIB v. Sebelius* decision, 132 S.Ct. 2566 (2012) a five-four majority agreed that it fell within the enumerated powers of Congress and thus did not unconstitutionally invade the domain of the states (see the article by Somin in this volume).

Yet the political controversy over the Affordable Care Act's individual mandate was by no means limited to clashing views about where to draw the line between federal and state authority, though it took this form in federal court challenges and in many state attempts directly to block implementation of the law. Instead much popular opposition to the Affordable Care Act was motivated by the notion that *any* insurance mandate -- no matter who imposed it, whether Congress in 2010 or Massachusetts in 2006 -- violated some inherent (if unwritten) individual constitutional right. This view was especially prominent among the Republican Party's politically important Tea Party constituency.<sup>4</sup> The wider political-constitutional contest over the ACA was simultaneously an argument over federal versus state authority, and a dispute between two clashing *individual* rights claims: 1) that *all Americans had a right to affordable health care* (the congressional Democrats' position) and 2) that *all Americans had a right either to purchase or refuse to purchase health care* (the position of some of the Affordable Care Act's most active

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<sup>4</sup> The notion that any individual mandate violated individual rights led many Tea Party-affiliated Republicans to oppose Mitt Romney for the 2012 Republican presidential nomination, because Romney had signed into law the Massachusetts health care reform that included an individual mandate (Minnesota Public Radio 2011).

opponents). In practice the states' rights and individual rights arguments against the ACA were often advanced simultaneously, but they can be clearly distinguished in principle, and sometimes also in the documentary record.

In this respect the case of Virginia, the first of many Republican-controlled states to pass a "Health Care Freedom Act" in opposition to the Affordable Care Act, is instructive. HB 10 was introduced in January 13, 2010 and signed into law by Virginia Governor Bob McDonnell on March 24, the day after President Obama signed the ACA. As originally introduced, HB 10 held that "No law shall restrict a person's *natural right* [emphasis added]...to decline or to contract for health care coverage..." The natural rights language was replaced in the final text of the law by a clause stipulating that "No resident of this Commonwealth...shall be required to obtain or maintain a policy of individual insurance coverage..." (Virginia 2010). The final language is thus equivocal on whether declining to purchase health insurance is a natural right, or a right created by positive action of Virginia in its capacity as a sovereign state. Several "Health Care Freedom Acts" introduced in other states likewise maintained that individuals had a *natural right* to refuse to purchase health insurance, and the claim was a common one on Tea-Party affiliated websites.<sup>5</sup>

But leading opponents of the Affordable Care Act instead settled on a constitutional strategy that highlighted *state* rights rather than *natural* rights, even if a sense of violated individual rights furnished the opposition with much of its political energy. Natural rights claims were unlikely to be effective in federal court. Moreover, even if refusal to purchase insurance were framed as a Fifth or Fourteenth Amendment individual right, that argument could apply

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<sup>5</sup> For example Iowa's HF 111 (2011), which passed the Iowa House but not the Senate, likewise spoke of "a person's natural right...to decline or to contract for health care coverage..." For one of many possible examples of Tea Party affiliates' claim that an individual mandate violates natural rights, see Constitution Mythbuster 2011.

only to the individual mandate, not the ACA's expansion of Medicaid (leveraged by withholding existing Medicaid funds from nonparticipating states), its revenue-generating surtaxes, or its wider net of insurance regulations, which the law's opponents also sought to block.

The passage of the Affordable Care Act in 2010 coincided chronologically with the contemporary resurrection of the antebellum doctrine of nullification in a number of state legislatures (Read and Allen 2012; Raynor 2015, 631-634). The Affordable Care Act was by no means the only target of nullification bills, which covered a wide range of political and constitutional disagreements between the federal government and states including firearms law (the field where aggressively nullificationist legislation has been most successful),<sup>6</sup> land use, commercial and environmental regulations, and Fourteenth Amendment birthright citizenship. Conversely nullification, in the strict sense of the word, was by no means the only channel by which states served as vehicles for opposition to the ACA. But backlash against the ACA on the political right furnished essential political support to the nullification revival.

However, the term nullification (often used interchangeably with "interposition") can have both strict and loose meanings, which generates confusion. In the strict sense, modeled after South Carolina's 1832 nullification of the federal tariff, nullification means the theory that each individual state is fully "sovereign" and as such the final judge of its own constitutional rights and obligations; that consequently it may legitimately rule that any federal act – law, regulation, judicial decision, executive action, or treaty – is unconstitutional; and, most

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<sup>6</sup> See for example Kansas's S.B. 102 (2013) which passed both chambers of the legislature and was signed into law by Governor Sam Brownback. S.B. 103 declares "null, void, and unenforceable in the state of Kansas" any federal regulation of a firearm "manufactured commercially or privately and owned in the state of Kansas and that remains within the borders of Kansas." Any federal official attempting to enforce federal regulation with respect to such firearms would be charged with "a severity level 10 nonperson felony." S.B. 102, adopting the state sovereignty language included in firearm nullification bills in many other states (see Read and Allen 2012), holds that the U.S. Constitution shall mean what was it was understood to mean in 1861, when the state of Kansas entered the Union. (The irony of choosing the year 1861 to speak about a supposed consensus on constitutional meaning appears to have escaped the framers of the legislation.)

importantly, that it may act on this judgment by forcibly blocking the implementation of that federal act within the state's boundaries (Read 2009; Read and Allen 2012). But states can also challenge federal law in ways that incorporate some but not all of the above elements, and which we could describe as quasi-nullification. For instance, a state that declares a federal law unconstitutional and enacts legislation prohibiting state agencies from cooperating with federal enforcement may achieve the same goals as nullification without actively obstructing federal officials (for a useful taxonomy of the spectrum see Raynor 2015). Alternatively a state may enact legislation that conflicts with a federal law or regulation for the purpose of granting the state standing to challenge the law or regulation in federal court, without claiming any right to defy an adverse court decision. In contrast, nullification in the full sense would equally apply to federal court decisions, which were the principal target in the 1950s resurrection of nullification occasioned by the U.S. Supreme Court's 1954 *Brown v. Board of Education* decision (Read and Allen 2012, 283-287).

With respect to state opposition to the Affordable Care Act, the picture can be summarized as follows: 1) Most of the legislation enacted by states in opposition to the ACA does not meet the strict definition of nullification; 2) Much anti-ACA state legislation rests on an implicit constitutional theory that would widen the scope of state sovereignty and significantly narrow congressional power to legislate under the Commerce Clause; and 3) ACA opponents do not agree among themselves on how far the claims of state sovereignty should be pressed.

The most frequently-enacted and politically consequential form of anti-ACA state legislation follows the model recommended by the American Legislative Exchange Council (ALEC), an influential and well-funded organization that promotes a conservative political agenda on the state level. As of March 2012 ALEC claimed that legislation modeled on its

proposed “Freedom of Choice in Health Care Act” had been introduced in at least forty-four states and enacted into law in twelve (ALEC 2012; 2014a). Virginia’s HB 10 (discussed above) in enacted form resembles the ALEC model. The distinctive feature of HB 10 is that it aims to block the Affordable Care Act’s individual mandate without directly claiming to nullify federal law -- indeed HB 10 nowhere expressly refers to any federal law -- though the bill tacitly presumes that state authority overrides federal law on the matter at hand. The apparent strategy behind the law was to establish the state’s standing to challenge the ACA in federal court (Raynor 2015, 639). The text of the law stays clear of nullification claims that the federal judiciary would reject, and that might also produce division within the ranks of the ACA’s opponents. Legislation of this kind unquestionably demonstrated its effectiveness in enabling states to challenge the ACA in federal court.

On the other hand, such an approach may have appeared too limited to those who sought to push federal practice in a markedly state sovereign direction. Some anti-ACA legislation enacted or seriously considered in other states made explicit the kind of sovereignty claims on which Virginia’s HB 10 remained silent. Utah’s HB 67 (2010), which was signed into law on March 22, 2010, took several steps beyond Virginia’s HB 10. The Utah law aimed to block the implementation of “any provision of the federal health care reform,” not only the individual mandate or the expansion of Medicaid. Among its purposes was to ensure that the state of Utah enjoyed full control over regulations affecting the health insurance market within the state; in this respect it implicitly denied that federal power over interstate commerce extended to the health insurance market. The law did not propose actively to block federal implementation of the ACA, but instead prohibited any “state agency or department” from participating in any federal health care reform, unless and until the state legislature specifically authorized it. In this respect

the law made a strong and wide-ranging claim of state sovereignty, while stopping short of nullification in the strict sense. Utah’s Office of Legislative Research and General Counsel noted that HB 67 “might violate the Supremacy Clause (Art. VI) of the U.S. Constitution” and added that “the federal government has legislated in this field for well over fifty years, since Medicare and Medicaid were enacted in the mid-1960s.”<sup>7</sup> Thus in passing HB 67, Utah’s legislature and governor were consciously challenging five decades of precedent.

Idaho’s HB 117 (2011) did attempt nullification in the strict sense. Echoing Thomas Jefferson’s 1798 Kentucky Resolutions draft, HB 117 declared the Affordable Care Act “void and of no effect” within the state of Idaho. The bill invoked the “Sovereign Power” of Idaho to “interpose between said citizens and the federal government, when it has exceeded its constitutional authority.” It denied to the federal government any regulatory authority whatsoever over health care markets in the state, which possessed “sovereign power to provide regulatory oversight of insurance content, coverage, benefits and beneficiaries within the state of Idaho.” No provision of the Affordable Care Act could be enforced or administered by any “departments, political subdivisions, courts, public officers or employees” of the state. Though HB 117 stopped short of imposing criminal penalties on federal officials, it empowered Idaho citizens to seek injunctive relief in Idaho courts against anyone implementing the law.

HB 117 passed the Idaho House 49-20, but failed in the Idaho Senate, which like the House had a Republican majority. Republican Senate President Pro Tempore Brent Hill said he “agreed the health care overhaul passed by Congress last year was unconstitutional” but “couldn’t support a bill he thought also violated the U.S. Constitution” (quoted in Miller 2011).

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<sup>7</sup> See the Legislative Review Note that follows the bill text at Utah 2010.

Thus Idaho's HB 117 highlighted divisions of constitutional doctrine among ACA opponents in a way that Virginia's HB 10 did not.

Congressional Republicans continued their effort to overturn the ACA even as the battle widened to state legislatures and federal courts. Much state-level opposition to the ACA denied that Congress had constitutional power to intervene *at all* in state health insurance markets. In contrast, House Minority Leader (later Speaker from 2011 to 2015) John Boehner sought to uphold congressional regulatory powers even as he asserted that key components of the ACA were unconstitutional. This balancing act is evident in his November 16, 2010 amicus brief in *State of Florida v. United States Department of Health and Human Services*, one of the U.S. District Court cases that paved the way for the Supreme Court's ruling on the ACA's constitutionality in 2012.

Boehner begins the brief by observing that "members of Congress have an independent responsibility...to ensure that the Legislative Branch stays within the bounds of the powers afforded it by the Constitution." He concedes that the Affordable Care Act's "reforms of the insurance market" – including the elimination of lifetime benefit limits, ban on pre-existing condition exclusions, mandatory coverage of preventive services, extension of parental coverage to adult children under twenty-six, and cost control measures – "do fall within Congress's power, pursuant to the Commerce Clause, to regulate the interstate health insurance market." He argues, however, that "Congress's power to regulate interstate commerce does not allow it to *compel* passive individuals to engage in economic activity." In response to the argument that the ACA's insurance reforms could not function effectively without the individual mandate, Boehner replies that, if true, this merely underscores the "ill-conceived" and "unrealistic" character of those reforms (*Florida v. U.S. Department of Health and Human Services, Amicus Curiae* Brief by

John A. Boehner 2010). The individual mandate, in short, was a constitutionally-improper means of propping up otherwise constitutional but ill-advised reforms of the insurance market. Thus Boehner's brief mounts a broad *political* challenge to the ACA, in all its elements, while keeping the *constitutional* component of the attack as narrow as possible. Boehner's concession that most of the ACA's insurance reforms were constitutional did not represent the views of all congressional Republicans, some of whom – in tandem with legislative efforts in a number of states -- were determined sharply to restrict Congress's power to legislate under the Commerce Clause (Lee 2015).

#### **Constitutional Engagement and Complacency and ACA Supporters**

In comparison to the law's opponents, who had a well-organized and well-funded strategy to enlist states against the Affordable Care Act even before its passage, ACA supporters were slower to draw upon state legislators, governors, and attorneys general in the law's favor. The earliest state publicly to defend the ACA's constitutionality was Oregon under the leadership of state attorney general John Kroger, who was one of the law's most effective state-level constitutional advocates (*Portland Tribune* 2011; Kroger 2011). Oregon, however, was an exception. In the months immediately following the ACA's passage, states denouncing the ACA's constitutionality were more active, numerous, and eager to engage in constitutional argument than the states endorsing its constitutionality. For example, *State of Florida et. al. v. United States Department of Health and Human Services* was filed in the U.S. Northern District of Florida immediately after the law's passage and eventually enlisted twenty-six states as plaintiffs, in comparison to four states that submitted an amicus brief in support of the law

*(Florida v. U.S. Department of Health and Human Services, Amicus Brief on behalf of the Governors of Washington, Colorado, Michigan, and Pennsylvania 2010).*

As a rule the state governments that supported the ACA put less effort into publicly defending the law's constitutionality than the law's opponents put into challenging it. In February 2011 eight state attorneys general (representing California, Connecticut, Iowa, Maryland, New York, Delaware, Vermont, and Hawaii) issued a brief public statement endorsing the constitutionality of the Affordable Care Act. The public statement, however, makes no constitutional argument whatsoever, but merely recommends the law on policy grounds and expresses confidence that the U.S. Supreme Court will uphold it (California Office of the Attorney General 2011). In this respect many of the states that supported the Affordable Care Act followed the lead of congressional Democrats in resting its constitutionality principally upon a brief reference to apparently settled precedent.

Such minimal constitutional engagement from states supporting the ACA is in some respects surprising, because the law envisaged a key role for states in setting up insurance exchanges and tailoring policy to each state's specific needs. The logic of constitutional politics would suggest that states were better positioned than the federal government to counter the charge that the ACA unconstitutionally intruded on state authority. As one amicus brief (representing seventy-eight legislators from twenty-seven states) argued, "Our Constitution creates a vibrant system of federalism that gives broad power to the federal government to act in circumstances in which a national solution is necessary or appropriate, while reserving a significant role for the States to craft innovative policy solutions that showcase the diversity of America's people, places, and ideas. Far from violating state sovereignty or the principles of federalism," the ACA "reflects the federal-state partnership at its best" (*Florida v. U.S.*

*Department of Health and Human Services, Brief of Amici Curiae State Legislators 2010*). But this constitutional argument came from individual legislators who were not officially speaking for their states. Most Democratic constitutional defenses of the ACA were limited to pro forma invocations of precedent.

In contrast, many of the ACA's opponents, as noted above, were open about aiming to break with longstanding precedent. Yet the eagerness of some Republicans to embrace highly restrictive readings of Congress's authority to legislate under the Commerce Clause -- and in some cases nullification or quasi-nullification -- even as other Republicans (as in John Boehner's amicus brief) seek to uphold the powers of Congress, suggests that there are sharper differences of constitutional philosophy on the political right than one finds on the left. The constitutional politics of the Affordable Care Act might be summarized as follows: the law's supporters are united but constitutionally complacent; its opponents are engaged but constitutionally divided.

### **Climate Change: Congressional Stalemate and State Activism**

Congress has not passed a major piece of environmental legislation since 1990, when President George H.W. Bush signed into law amendments to the Clean Air Act (1970) specifically addressing acid rain, urban air pollution, and airborne toxics. The 1990 amendments passed by large bipartisan majorities in both chambers. Since 1990 scientific evidence of anthropogenic contribution to climate change has steadily accumulated (Intergovernmental Panel on Climate Change 2014; U.S. National Academy of Sciences and U.K. Royal Society 2014). But efforts in Congress to update the Clean Air Act to regulate greenhouse gases have failed -- in part because of the complexity of regulating a pollutant (carbon dioxide) produced by a wide range of human activities, but also because elected officials, like the American public, are divided along party lines in their views on the reality of climate change (Pew Research Center

2015). In 2009 the American Clean Energy and Security Act (HR 2545), designed to reduce greenhouse gas emissions 17 percent by the year 2020, passed the U.S. House (then under Democratic control) 219-212 but failed to overcome a Republican-led filibuster in the Senate. In 2014 the Republican-controlled House passed (229-183) HR 3826, the Electricity Security and Affordability Act, which would have overturned the Environmental Protection Agency's decision, issued during Barack Obama's presidency, to regulate greenhouse gas emissions as pollutants under the existing Clean Air Act. That bill failed in the Democratic-led Senate. Thus in a Congress marked by deep partisan division, no significant action either to regulate greenhouse gases, or decisively to block such regulation, has been enacted, and the locus of decision has shifted to the executive branch, the courts, and the states. The states have in turn been divided in their greenhouse gas policies, and particularly in their response to federal regulations, in ways that mirror the divisions between Republicans and Democrats in Congress and between Republican and Democratic presidential administrations.

The first significant state challenge to federal greenhouse gas policy came from a pro-regulation direction. In 2002, California passed the first state legislation to regulate greenhouse gas emissions. (California had at the time a Democratic legislature and governor; the greenhouse gas initiative was later supported by Republican governor Arnold Schwarzenegger but opposed by Republicans in the California Assembly.) In 2005, during the presidency of George W. Bush, California requested a waiver from the Environmental Protection Agency under the Clean Air Act to permit the state to adopt regulations to reduce automobile emissions of greenhouse gases. One feature of the original 1970 Clean Air Act was that, for reasons originally related to smog rather than greenhouse gases, California was permitted to set stricter auto emissions standards than were required nationally. If California were granted a waiver from the EPA, then under the

Clean Air Act other states would also be permitted to adopt California's emissions standards (Congressional Research Service 2007). At the time of California's waiver request, the EPA had not yet classified greenhouse gases as pollutants within the meaning of the Clean Air Act, and in late 2007 the Bush administration denied California's waiver request. Even as its waiver request was pending, California joined eleven other states (Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington) and three cities (New York, Baltimore, and Washington, D.C.) as petitioners in the federal court case in which the petitioning states and cities argued that "a prodigious amount of scientific evidence indicates that [carbon dioxide and other greenhouse gases] are changing our climate" and that these gases should be regulated by the EPA under the Clean Air Act as "air pollutants [that] may reasonably be anticipated to endanger public health and welfare" (*Massachusetts v. EPA*, Brief for the Petitioners 2006). The states of Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah took the opposite side in the case, arguing in their brief that the Clean Air Act "does not authorize EPA to regulate greenhouse gas emissions for purposes of global climate change" (*Massachusetts v. EPA*, Brief in Opposition 2006). In a five-four decision the U.S. Supreme Court ultimately ruled – on statutory rather than constitutional grounds – that the EPA must either regulate greenhouse gases or "provide some reasoned explanation as to why it cannot or will not" do so (*Massachusetts v. EPA*, 549 U.S. 497 [2007]).

### **Clean Power Plan and State Opposition**

In June 2009, six months into Barack Obama's first term, the EPA reversed course and granted California's waiver request. In December 2009 the EPA issued a finding that "greenhouse gases constitute a threat to public health and welfare." A series of EPA greenhouse

gas regulatory initiatives followed over the next several years. In June 2014 the EPA proposed the Clean Power Plan, designed to cut carbon emissions from stationary power plants by 30 percent by the year 2030; the final version of the plan was released in August 2015 (U.S. EPA 2015). Under the plan states are given broad flexibility to decide how to meet carbon reduction goals, so that existing coal-fired plants can stay in operation longer if offsetting carbon reductions are achieved through conservation, renewables, emissions trading, or other methods.

In the meantime, as a result of Republicans' victory in the 2010 elections, the institutional stances within the federal government with respect to climate change reversed themselves from what they had been during the final two years of the George W. Bush presidency. Now it was the EPA that issued greenhouse gas regulations and the House that sought to overturn the EPA's action. Here, as with the Affordable Care Act, the ideological contests within Congress and between the legislative and executive branches were reproduced in the sphere of federal-state relations. The difference is that in this case, the contests centered not on freshly-passed legislation (as with the ACA) but on new regulations issued in the absence of new legislation. The roles of each state grouping (those supporting and those opposing carbon emissions regulations) in relation to the EPA also reversed themselves. In summer 2014, twelve states (Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, South Carolina, West Virginia, and Wyoming) filed suit in federal district court to block the EPA's proposed carbon-emissions rules for coal-fired power plants (Banerjee 2014). The roster of states suing the EPA later expanded to fifteen (Funk 2015). Thirteen states (California, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington – nearly all of whom earlier participated

as plaintiffs in *Massachusetts v. EPA*) and the District of Columbia joined the case in support of the EPA's carbon regulations.

As with the Affordable Care Act, the arena of state-federal contests over greenhouse gas policy has not been limited to the courtroom. As of June 30, 2015 seven states (most of them also parties to the EPA lawsuit) had enacted legislation designed to block or delay the EPA's Clean Power Plan (Oklahoma's governor issued an executive order to the same effect), and nine states passed resolutions urging the EPA to withdraw the Clean Power Plan (National Conference of State Legislatures 2015). Here too ALEC has provided model legislation and helped to coordinate state strategy (ALEC 2014b). In March 2015 the attorneys general of nineteen states (Louisiana, North Dakota, Nebraska, Ohio, West Virginia, Oklahoma, Alabama, South Carolina, Alaska, South Dakota, Arizona, Texas, Arkansas, Utah, Georgia, Wisconsin, Kansas, Wyoming, and Kentucky) signed a letter to the EPA asserting that the proposed rule for new fossil fuel power plants was unlawful (State of Louisiana et. al 2015). With the exception of Kentucky, a coal-producing state, and Nebraska, whose formally nonpartisan legislature has an ideologically conservative majority, the states challenging the legality or constitutionality of the EPA's carbon emission rules had Republican-controlled legislatures. In several Republican-led states legislation has been introduced, but has not passed, that would either nullify all EPA regulations or prohibit state agencies from assisting in any way in their enforcement, on grounds that the Commerce Clause does not authorize federal regulation of the environment.<sup>8</sup>

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<sup>8</sup> See for example Indiana's HB 1290 (2015); Oklahoma's SB 354 (2013) which declares that "the rulemaking authority of the Environmental Protection Agency to control commerce and interfere with free market economies is nowhere expressly granted by the United States Constitution" and is therefore "null and void and of no effect in this state"; and Idaho's HB 473 (2014) which likewise declares the authority of the EPA to be "null and void" within the state. All of these nullification bills failed, but they are nevertheless revealing for their denial that Congress's Commerce Clause legitimately extends to environmental regulation. The policy aim of the Oklahoma nullification bill was substantively accomplished by executive order of the state's governor.

Thus far the story of state opposition to the EPA's stance toward greenhouse gas emissions appears to support the hypothesis that partisan actors will use federalism in similar ways, even as they pursue opposite aims: Democratic-led states challenged the greenhouse gas policy of a Republican president, and Republican-led states challenged the greenhouse gas policy of a Democratic president. Jessica Bulman-Pozen, in arguing that both parties use state-opposition strategies in similar ways, lists the California-led challenge to the EPA during George W. Bush's presidency as an example (Bulman-Pozen 2014, 1101-1102). The Democratic and Republican state-led court challenges to EPA greenhouse gas policy (under Bush and Obama respectively) are also alike in that both contest the EPA's interpretation of sections 111(d) and 112 of the 1970 Clean Air Act.<sup>9</sup> Congress could resolve these contradictory statutory interpretations by amending the Clean Air Act itself, but this is prevented by the same ideological polarization that generated the legal disputes in the first place.

But there are important respects in which the strategic options and constitutional claims of those who support EPA greenhouse gas regulations differ from the strategic options and constitutional claims of those who oppose them; here the two sides' use of federalism is not symmetrical. First, those (predominantly Democratic) states that favor EPA greenhouse gas regulations implicitly endorse a broad enough reading of the Commerce Clause to legitimize regulation within state boundaries of a substance (atmospheric carbon dioxide) that is not

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<sup>9</sup> Section 111(d) of the Clean Air Act "requires EPA to develop regulations for categories of sources which cause or significantly contribute to air pollution which may endanger public health or welfare." <http://www.epa.gov/region07/air/rules/111d.htm> This was the section relied upon by Massachusetts et. al. in challenging the Bush-era EPA's refusal to issue greenhouse gas regulations. Section 112 of the Act, "Hazardous Air Pollutants," provides a specific list of pollutants that does not include carbon dioxide, and stipulates specific human health impact criteria for adding new pollutants to the list which arguably do not apply to carbon dioxide. <https://www.law.cornell.edu/uscode/text/42/7412> The states filing suit against the EPA's Clean Power Plan argue that if carbon dioxide is not covered under section 112, it cannot be regulated under section 111 (d). See E and E Publishing, "Legal Challenges – Overview and Documents," [http://www.eenews.net/interactive/clean\\_power\\_plan/fact\\_sheets/legal](http://www.eenews.net/interactive/clean_power_plan/fact_sheets/legal)

literally bought and sold,<sup>10</sup> and that consequently would remain outside congressional power under a narrow construction of that clause. The Clean Air Act of 1970, like many other landmark pieces of environmental legislation, was grounded constitutionally on the notion that air pollution was a “substantial effect” of interstate commerce and thus legitimately subject to national regulation. This broad construction of the Commerce Clause was apparently settled constitutional doctrine in 1970; in the last two decades Supreme Court rulings have narrowed congressional power in important ways, and today it is challenged to an even greater degree by legislators and legal theorists on the political right who seek to strengthen the claims of state sovereignty in a wide range of policy areas including environment, health care, and firearms.

California and the other states that pressed the EPA to issue greenhouse gas regulations during George W. Bush’s presidency were clearly *not* claiming that the constitutional authority to regulate atmospheric carbon remains exclusively with the states. Politically their aim was not merely to be permitted to regulate greenhouse gases within their own boundaries (for which a state sovereignty argument would be sufficient) but to change national policy – and indeed, by force of example, global practice. The states that have challenged the Obama-era EPA’s Clean Power Plan also seek to change national policy, though in the opposite direction. But in this case a strong state sovereignty argument, one that denies that the federal government has constitutional authority to regulate carbon emissions within state boundaries, is conducive to their national political aims. The states pressuring the Bush EPA to regulate greenhouse gases made a statutory rather than constitutional argument. The states resisting the Obama EPA’s Clean Power Plan make (as shown below) both statutory and constitutional arguments.

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<sup>10</sup> Carbon emissions *credits* are bought and sold under some voluntary interstate consortiums like the Western Climate Initiative, and under the federal cap and trade bill that passed the House in 2009 but stalled in the U.S. Senate. But what is bought and sold in cap and trade systems, an emissions credit, is a creation of the regulatory regime itself.

In this respect the two state-led challenges are not mirror images of one another. Those who today enlist the states in the effort to reverse the Obama-era EPA's greenhouse gas regulations draw from a wider range of strategic options than those who enlist states to support those regulations. For in the absence of new national legislation, advocates of greenhouse gas regulation must rely on the continued willingness of presidents and federal courts to read the 1970 Clean Air Act language broadly enough to cover carbon emissions. Opponents, in contrast, have additional strategies if they lose the argument over statutory language.

#### **Cooperative and Uncooperative Federalism in Greenhouse Gas Policy**

One strategy available to states that oppose greenhouse gas regulations is to refuse to cooperate with the EPA in implementing them. The Clean Air Act was designed as an exercise of cooperative federalism, which as Daniel J. Elazar explains, "rests upon the idea that within the American federal system more interests are shared than not," and that "cooperation is negotiated" among the levels of government responsible for implementing programs designed to achieve shared purposes (Elazar 1995, 41). In the case of the Clean Air Act, the federal government is charged with formulating air quality standards (which states must meet, and may in many cases exceed), providing scientific and technical expertise, and providing some though not all of the funding; while states and local governments are responsible for most of the day to day implementation of the law. The presumption is that federal, state, and local governments have shared interests in controlling air pollution, and therefore each level of government is willing to accept part of the administrative and financial responsibility for achieving that goal. Under the terms of the legislation, the federal government retains the authority directly to

enforce emissions standards without state and local participation, but the costs, both economic and political, of doing so on a wide scale would be enormous.

The Clean Power Plan was designed in accordance with the principles of cooperative federalism, and among those states that share the Obama Administration's view that climate change is an urgent threat, it has indeed functioned cooperatively. Rather than requiring that states reduce greenhouse gas emissions in a manner specified by the federal government, the Plan sets broad emissions targets and allows states to meet those targets in a wide range of ways, whether through state-imposed emissions controls, increased energy efficiency, shifting to nuclear or renewable power, or any combination of these approaches. The emissions targets established by the EPA for each state take into account that state's past record in reducing carbon emissions, as well as its political history: other factors being equal, states that have a history of opposing greenhouse gas regulations face less demanding emissions targets (see Konisky and Woods and Bulman-Pozen and Metzger in this volume).

But if the Clean Power Plan has functioned as cooperative federalism among those (predominantly Democratic) states that support greenhouse gas reductions, it has encountered fierce opposition among those (predominantly Republican) states that do not – despite the fact that the Plan makes less ambitious demands on anti-regulation than on pro-regulation states. Cooperative federalism is typically double-edged: to depend on a state's cooperation means that the state can exercise power by refusing to cooperate. Heather Gerken and Jessica Bulman-Pozen point out that the structures of cooperative federalism create opportunities for states to engage in “uncooperative federalism” – using the “regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law.” The California-led effort to push the EPA to regulate greenhouse gases, they argue, illustrates how state dissent from within the

framework of cooperative federalism can leverage changes in national policy (Bulman-Pozen and Gerken 2009; 1259, 1276-1277). They acknowledge, however, that states have often successfully used “uncooperative federalism” to relax federal emission standards (1276 n. 64).

Those states opposed to national greenhouse gas regulations have indeed resorted to a strategy of uncooperative federalism, in a manner that continues and broadens the policy battles within Congress. In March 2015 U.S. Senate majority leader Mitch McConnell (R-KY) encouraged states to resist “the excessive and arbitrary mandates imposed by this regulation” [the Clean Power Plan] “under the guise of protecting the climate” by refusing to submit state compliance plans (McConnell 2015). Oklahoma Governor Mary Fallin, implementing the strategy recommended by McConnell, on April 28, 2015 issued an executive order barring the state’s Department of Environmental Quality from developing an implementation plan related to carbon emissions, on the grounds that the EPA’s Clean Power Plan was unauthorized by the Clean Air Act and threatened the rights and freedoms of the people of Oklahoma (Oklahoma 2015). The cooperative federalism built into the Clean Air Act, though it anticipated disputes over the terms of cooperation, presupposed that all levels of government agreed that air pollution was harmful and recognized a shared interest in regulating it. In the case of greenhouse gas emissions, what is disputed – increasingly along party lines – is precisely whether a problem exists at all. Cooperative federalism ceases to operate where there is no perception of shared interest between federal government and states.

Oklahoma’s challenge to the Obama-era EPA is more radically “uncooperative” than California’s Bush-era challenge. California and the other states that pressed the Bush-era EPA to regulate greenhouse gases under the Clean Air Act made their case entirely on statutory grounds; they could not plausibly claim that any federal agency was constitutionally obliged to regulate

carbon emissions. Opponents of the Obama-era EPA's greenhouse gas regulations make both statutory and constitutional arguments. The constitutional argument is that the EPA's greenhouse gas regulations, at least as framed under the Clean Power plan, represent unconstitutional "coercing" or "commandeering" of state administrative agencies. The reasoning is that the Clean Power Plan violates the Tenth Amendment because implementing it would require states thoroughly "to overhaul their energy market," "dramatically change their energy mix," and revise regulations for numerous activities ranging far beyond the fence lines of power plants. Regulation of this kind "forces the states to act to carry out federal policy" in a manner barred by the anti-coercion doctrine set forth in the U.S. Supreme Court's *Printz v. United States*, 521 U.S. 898 (1997) decision (Rivkin, Grossman, and DeLaquil 2015). Oklahoma Governor Mary Fallin's executive order echoes this argument: the Clean Power Plan is illegal because it seeks to "regulate all aspects of state energy systems" (Oklahoma 2015). Mitch McConnell likewise hints at the *Printz* anti-coercion argument in urging states not to permit the federal government to "lock you into federal enforcement" (McConnell 2015).

The anti-coercion argument against greenhouse gas regulations would classify as unconstitutional *any* federally-imposed steep reductions of carbon emissions, even if those reductions were authorized by new congressional legislation. In this sense the argument is not principally about executive branch usurpation of Congress's legislative authority. Its more radical and surprising aspect (given Republican congressional leaders' role in promoting the argument) is that it seeks to deny Congress, no less than the President, the constitutional authority to regulate carbon emissions. Under this constitutional view, Congress could indeed vote to *prohibit* federal greenhouse gas regulations binding on the states (as House Republicans did in 2014) but it could not constitutionally *enact* them. Moreover the specifics of the regulatory

rules would hardly matter, because it is difficult to imagine any federal policy designed significantly to reduce carbon emissions that would not entail fundamental changes in the energy policies of many states. What from one political perspective can be described as cooperative accommodation of state needs – the extremely wide range of methods by which states can choose to reduce carbon emissions under the Clean Power Plan – from another political perspective is denounced as wide-ranging federal coercion, because any aspect of state energy policy is potentially affected by the Plan. The same policy facts, viewed through differently polarized political lenses, produce radically opposed constitutional views.

Here as in other instances where political actors make constitutional arguments, whether the argument will ultimately succeed in federal court is not the only question.<sup>11</sup> Elected officials often make, and act upon, their own constitutional judgments long before (if ever) their actions are tested in court. Even if the federal judiciary ultimately upholds the constitutionality of the Obama administration’s Clean Power Plan, this would not prevent Oklahoma or other states from refusing to cooperate with the EPA in addressing an environmental problem many of those states’ elected leaders regard as imaginary. As long as beliefs about the reality of climate change continue to divide along party lines, judgments about the constitutionality of federal action to address climate change will be similarly polarized.

## Conclusion

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<sup>11</sup> On February 9, 2016, in *State of West Virginia, State of Texas et al. v. United States Environmental Protection Agency* the U.S. Supreme Court issued a five-four decision temporarily blocking the implementation of the Clean Power Plan. The ruling was issued on process grounds, to allow states opposed to the Plan additional time to make their case, rather than on the merits. Twenty-nine predominantly Republican-led states brought the case, while eighteen predominantly Democratic-led states weighed in to support the Clean Power Plan (Liptak and Davenport 2016).

During Barack Obama's presidency, policy disagreements have readily become constitutional disputes over federal versus state authority – disputes, moreover, in which one bloc of politically like-minded states confronts another. An equally important and closely connected development is the growing ineffectiveness of Congress to enact new policy -- as opposed to blocking policy, for which it retains considerable power -- and the consequent shift of initiative to the executive branch, the judiciary, and the states.

With respect to congressional paralysis, the Affordable Care Act is the exception that proves the rule, for it was enacted when Democrats held both the presidency and an uncharacteristically strong position in Congress. The greenhouse gas case is more typical of congressional deadlock in polarized times: a Democratic House passes a bill which dies in the Senate because of a Republican filibuster; a Democratic president issues new regulations that reinterpret decades-old legislation; a Republican House passes a bill to overturn those regulations, but it does not pass the Senate; Republicans then resort to state-initiated constitutional challenges and to more direct forms of state obstruction. Immigration policy, omitted here for reasons of space, has followed a broadly parallel course during the Obama years: a Congress unable or unwilling to enact new legislation, a President exercising substantial discretion in implementing existing law, and a constitutional challenge in which rival blocs of states line up on each side of the question.<sup>12</sup>

It is not surprising that congressional Republicans would challenge President Obama's broad discretion in greenhouse gas and immigration policy, just as congressional Democrats

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<sup>12</sup> See for example the pending case *United States v. Texas*, which the Supreme Court has recently agreed to hear. The case concerns states challenges to the Obama Administration's deferred action policy for certain categories of undocumented immigrants. Twenty-five states joined Texas as co-respondents in opposing the Obama policy (*U.S. v. Texas*, Brief in Opposition 2015). Sixteen states and the District of Columbia joined an amicus brief supporting the Obama policy and opposing that of Texas (*U.S. v. Texas*, Amicus Brief of the State of Washington et al. 2016).

challenged President George W. Bush's exercise of sweeping presidential powers after the September 11, 2001 attacks. (For discussion of war powers during the Bush and Obama administrations, see Fisher 2013, 201-265). Democrats tend to side with presidential power when a Democratic president faces a Republican Congress, and Republicans with presidential power when a Republican president faces a Democratic Congress. Such constitutional opportunism is not necessarily dysfunctional. For it ensures that someone has a partisan incentive to challenge excessive executive power, and someone else a partisan incentive to defend its proper use.

What is more surprising is that partisans in both camps appear willing to further sideline an already diminished Congress, even when their party enjoys a majority in one or both chambers, or expects to in the near future. On climate change congressional Republicans have sought not only to limit President Obama's authority to reinterpret old law, but also to strip Congress itself of the constitutional power to regulate carbon emissions. In the ACA contest many Republicans, in and out of Congress, advocated sharp new constraints on Congress's authority to legislate under the Commerce Clause. Democrats, for their part, have ritually invoked decades-old precedents supporting broad congressional power, but in practice have accepted the transfer of much of that power to the President. The parties' policies and constitutional understandings differ significantly. Yet they apparently agree that Congress, as a body, cannot be trusted to legislate responsibly.

There are good reasons for pessimism about Congress. The body's diminished effectiveness cannot be simply attributed to presidential encroachment on its prerogatives, for much of its paralysis is self-inflicted. Yet to respond to congressional dysfunction by sidestepping the body or sharply restricting its role, as both parties appear increasingly inclined to do, will almost certainly make its pathologies worse. Nor will shifting power and

responsibility to the states (or to states in negotiation with the President) substitute for a Congress paralyzed by partisan division, because the same ideological divisions are reproduced across the wider federal canvas. Deep divisions between rival blocs of states are potentially more dangerous and destabilizing than divisions within Congress, where both parties have political incentives to preserve national coalitions and voice national goals. Ideological blocs of states have less incentive to do this, and their mutual opposition may sharpen geographical, cultural, and racial fractures in ways that the national parties themselves are powerless to prevent.

How to remedy congressional pathologies lies outside the scope of this essay. The question I raise in closing is this: does turning policy disagreements into federal-constitutional debates inevitably worsen polarization? Or might the turn to constitutional debate sometimes have a moderating effect? Here the inquiry becomes normative as well as descriptive. For the question is not only *whether* a policy question is constitutionalized, but also *how* this is done.

In principle a shared constitution establishes procedures for peacefully and democratically deciding contested political questions. A shared constitution also symbolically reminds citizens that they are members of the same political community and have important common interests alongside their political conflicts. But a shared constitutional text and tradition, like a shared religious text and tradition, can divide as well as unite; the double-edged potential is always there. The most destructive religious wars are not fought against unbelievers but against those one regards as apostates or heretics.

Americans' shared constitutional text and tradition have at times stoked destructive conflicts. After the 1860 election the slave states of the lower South seceded from the Union before president-elect Abraham Lincoln could take office, not only to defend slavery – though that motive was unmistakable – but also because they regarded the Republican Party's

commitment to barring slavery from federal territories as a violation of the constitutional compact. Congress, slaveholders argued, was constitutionally prohibited from restricting slavery in any way. Indeed, they claimed, both Congress and President were constitutionally *obligated* to protect slaveholders' rights in every federal territory. By this reasoning (see for example Jefferson Davis's farewell speech to the U.S. Senate [Davis 2004, 190-194]) slave states had not only a right but a constitutional duty to secede from the Union upon Lincoln's election.

When the powers of Congress are interpreted this way – as defined almost entirely by what Congress *must* or *must not* do – then constitutionalizing a policy dispute will almost inevitably escalate it. In the contemporary cases described here, Republicans (and especially the Tea Party constituency) were most inclined to view the powers of Congress as exhausted by constitutional prohibitions and obligations: it was not within the power of Congress to pass an Affordable Care Act, or to restrict greenhouse gas emissions; instead members were constitutionally obligated to oppose such legislation, and to encourage states to resist it. Republican states followed by likewise denying Congress legitimate authority to regulate health care markets or carbon emissions within state boundaries. To constitutionalize a policy dispute in this way is almost certain to deepen partisan divisions, because Democrats, who might be willing to compromise on matters of policy, will not support a view of the Constitution according to which most of their legislative goals are rendered unconstitutional from the outset.

Contemporary Democrats, for their part, have also escalated constitutional disputes over federal structure, though not in the same way. At least in the two cases examined here, Democrats endorsed a Constitution of broad permissions, not principally of prohibitions and obligations. They did not claim that Congress was constitutionally obligated to guarantee a “right to health care,” only that this lay within the permissible discretion of Congress. But such a

position itself requires a thoughtful constitutional argument, not just a reference to “settled precedents” that have clearly become unsettled in recent decades. To decline to engage in constitutional argument also deepens political divides because it implies that one’s opponents’ arguments need not be taken seriously, and it allows extreme constitutional doctrines like nullification to go unchallenged, except insofar as they are challenged by other Republicans.

In closing I would suggest that we trust the democratic process enough to refrain from reducing every important constitutional question to strict prohibitions and obligations. There should be sufficient room for democratic discretion, for decisions constitutionally permissible even if not constitutionally required. We might democratically decide, for example, to decentralize power by shifting many decisions to the states. That is not the same as claiming that we *must* transfer these powers because Congress cannot constitutionally exercise them.

The constitutional approach outlined here aligns more closely with contemporary Democrats than contemporary Republicans, but it presupposes a greater commitment to public constitutional reasoning than most Democratic leaders have displayed during the Obama years. It was Abraham Lincoln, the founder of the Republican Party, who in his First Inaugural Address best expressed the constitutional approach I recommend here. Unlike the secessionists, Lincoln did not principally speak of constitutional obligations and prohibitions, nor did he treat the Constitution’s language as wholly determinate. He did not claim that anything in the Constitution *obligated* Congress to restrict slavery in the territories. Instead Lincoln highlighted the degree to which the Constitution was indeterminate on many key points related to slavery. He argued that in such cases Congress, as an elected body accountable to the people of the United States, ought to be *permitted* to legislate. “Any right plainly written into the Constitution” must be respected, Lincoln acknowledged, but he denied that the violations alleged by slaveholders fell in this

category. “*May* Congress prohibit slavery in the Territories? The Constitution does not expressly say. *Must* Congress protect slavery in the Territories? The Constitution does not expressly say” (Fehrenbacher 1989, 219-220). In contrast to those who aimed narrowly to confine the authority of Congress, Lincoln sought to expand the space for national democratic decision on matters like the expansion of slavery that affected all sections of the country. Moreover he sought to enhance democratic discretion not by muffling constitutional discourse but by inviting it.

Lincoln’s appeal to a common Constitution, which he saw as permitting Congress to act on slavery where the Constitution was indeterminate or silent, did not persuade the secessionists, who preferred to risk war rather than concede the legitimacy of Lincoln’s election. Our current political climate is not as polarized as American politics in 1860, but it may well be more polarized than it has ever been since. Our polarization will not disappear anytime soon. Both the practical operations of our federal system, and the constitutional understandings that undergird it, will likely remain unsettled long after Barack Obama has completed his two terms as president. Under the circumstances, we would be wise to heed Lincoln’s call to honor our Constitution by de-escalating our constitutional battles.

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