Unprecedented

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The legal challenge to the Affordable Care Act, whether successful or not, represents an unexpectedly-effective social movement. The challengers advanced a very simple constitutional idea—that a mandate forcing people to engage in commerce is unprecedented. In a very short time, a movement mobilized around this new way of looking at the Constitution, from the halls of the ivory tower, to the halls of Congress, and ultimately to the halls of the federal courts, taking this idea from "off-the-wall" to "on-the-wall."[1]

This article analyzes the movement through the lens of popular constitutionalism, from its conception, to its growth, to its strengthening counter-movement, and finally to its (inevitable) conclusion at the Supreme Court of the United States.[2]

In Part I**,** this article considers the birth of a simple idea. Through a series of influential Op-Eds and blog posts, conservative and libertarian lawyers and professors advanced a simple reason why the ACA is unconstitutional—it is *unprecedented* for Congress to force a person to engage in commerce.[3] Epitomized by the now-infamous image of broccoli, the challengers asked whether Congress could compel people to eat that flowery green.

However, unlike earlier conservative or libertarian constitutional arguments, this movement did not mobilize around the text and the history of the Constitution. While the two-decade-long path to *District of Columbia v. Heller* was paved with deep probing into the original understanding of the Second Amendment, the challenge to the Affordable Care Act, blazed in record-time, was grounded purely in terms of whether the mandate could be squared with existing precedents of the Court, or whether it is unprecedented. Originalism and textualism have only served as secondary, backup arguments. The genius of the strategy was to conform the argument within the Court's existing precedents—to strike down the mandate would not require overturning a single precedent.

In Part II, this article traces the movement's pivot from the professoriate to the populace. This social movement "unfold[ed] outside the formal auspices and institutional apparatus of governance, as well as within it."[4] Indeed, the original battle to stop the ACA failed in Congress—though by fairly-close margins. Through what Reva Siegel has referred to as "constitutional culture," this movement mobilized from the academics in the halls of the ivory tower, to the the people in the fields of the Tea Party rally, to the politicians in the halls of Congress, and ultimately to the courts. As Jack Balkin has noted, "Successful social and political mobilization changes political culture, which changes constitutional culture, which in turn

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[1] Jack M. Balkin, Living Originalism __ (2011).

[2] Whether the Supreme Court strikes down or upholds the Affordable Care Act (in part or in its entirety), this article will provide a timely analysis of the popular constitutionalist movement that advanced an idea from obscurity to the forefront of American legal thought in a very short period of time.

[3] This article takes no position on whether the ACA is constitutional, or whether the ACA constitutes good public policy (however defined). Rather, this article focuses on the evolution of the social movement, and how it progressed from a idea, all the way to the marble steps of the Supreme Court.

[4] Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 Cal. L. Rev. 1323 (2006).

changes constitutional practices outside of the courts and constitutional doctrine within them."[5] Sustained conflicts, set against the backdrop of the 2010 midterm elections, inside and outside of Washington, helped to develop a new alternative understanding of the Constitution.[6] Through this movement, the people were able to persuade others, and (perhaps) ultimately, the Court, to adopt this view about constitutional meaning.[7]

In Part III, this article explores the counter-movement that emerged to the challengers, which at first got off to a rolling start. Initially, the challenge to the ACA, for the most part, was met with a blend of dumbfoundedness, incredulity, and derision.[8] Speaker Nancy Pelosi famously retorted "Are you serious?" to a question about the constitutionality of the mandate. Erwin Chermerinsky stated that the challenge does not have the "slightest merit from a constitutional perspective." Akhil Amar said none of the arguments "hold[] water." Orin Kerr predicted that the "realistic possibility of [the Court striking down the mandate] is less than 1%." Jack Balkin took pleasure in ridiculing the challenge, beaming that he "hadn't had this much fun since Con Law 1." Though scattered at first, the counter-mobilization organized, and grew steadily in response to the increasing acceptance of the challenger's arguments. The challengers and the supporters, who sought to defend the "existing constitutional order," clashed in a constitutional conflict.[9]

In Part IV (which is a work-in-progress) the article considers how the burgeoning social movement transitioned from a simple idea to a constitutional argument. This part will consider how the legal arguments evolved and transformed at each level of litigation—from Op-Eds and blog posts, to the district court, to the courts of appeals, and to the Supreme Court. Each side's increasing vigor resulted in the refinement and evolution of the constitutional arguments on the other side—specifically, with respect to arguments about the taxing power, standing, and

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[5] Jack M. Balkin, Living Originalism __ (2011) ("Only a few have significantly changed how Americans look at the Constitution. Successful social and political movements must persuade other citizens that their views are correct, or, at the very least, they must convince people to compromise and modify their views. If movements are successful, they change the minds of the general public, politicians, and courts. This influence eventually gets reflected in new laws, in new constitutional doctrines, and in new constitutional constructions."

[6] Constitutional Culture, *supra* note _ at 1324-25 ("Such interactions include but are not limited to lawmaking and adjudication; confirmation hearings, ordinary legislation, failed amendments, campaigns for elective office, and protest marches all may provide occasion for citizen deliberation and mobilization and for official action in response to constitutional claims. The Lecture employs the term "constitutional culture" to refer to the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution's meaning. ").

[7] Robert Post & Reva Siegel, The Constitution in 2020 at 27 (2009).

[8] Constitutional Culture, *supra* note __ at 1362 ("Countermobilization is likely to occur only as movement claims begin to elicit public response. Utopians and cranks can make all the claims on a constitutional tradition they want; but they are by definition marginal. On the other hand, when a movement advances transformative claims about constitutional meaning that are sufficiently persuasive that they are candidates for official ratification, movement advocacy often prompts the organization of a counter-movement dedicated to defending the status quo.").

[9] Constitutional Culture, *supra* note __ at 1329 ("This account presents the movement-countermovement dynamic as playing a crucial part in constitutional development. In so doing, it is in some tension with perspectives common in normative constitutional theory that emphasize the dangers of constitutional conflict.") *Id.* at 1363 ("For this reason, when a movement for constitutional change is gaining in credibility, it can prompt the organization of a counter-movement seeking to defend the longstanding understandings and arrangements that a constitutional insurgency is challenging.").

understandings of the Court's commerce and necessary-and-proper clause jurisprudence.[10]

In Part V, this article draws from the experience and success (or lack thereof) of the challengers's and supporters's respective social movements, and provides insight into how this clash may set the stage, and affect future constitutional challenges. Conservatives have long rallied around the cause of judicial restraint—however defined—and have grounded their jurisprudence in the text and history of the Constitution. However in the challenge to the ACA, many conservative have suddenly abandoned their dogma, and taken a page right out of the liberal-popular-constitutionalism playbook (as evidenced by the close fit between the challengers's strategy and the works of Balkin, Siegel, Post, and others). Conversely, many liberals—who have long championed an engaged and active judiciary—have conveniently rediscovered the importance of judicial restraint with respect to popular-constitutionalist movements.

Randy Barnett, the "intellectual godfather" of the challengers, recognized this asymmetry between the once-and-future positions of liberal and conservatives, when addressing the American Constitution Society's 2011 National Convention:

> But I do want to get back to the politics of [the Affordable Care Act] for a minute. I understand you had a very lively panel on original meaning [yesterday] . . . But I take it that the valence in this room is kind of not all that sympathetic with original meaning. Original meaning says the meaning of the Constitution must remain the same until it is properly changed. The opposite of originalism, or different position, is that the meaning of the constitution evolves over time to respond to changing conditions or to respond to political initiatives, or what my friend Jack Balkin calls social movements. That is what the alternative to original meaning is, the evolution of constitutional meaning according to social movements. *Well, look if you guys believe in that, you may be looking at a political movement in the face*.
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> Political movements sometimes go in your directions, sometimes political movements don't. If political movements don't go in your direction, it is difficult to rush in with a copy of the Constitution . . . and say no, no, no, it is the Constitution that stops you from doing this. Not if at the same time you think that political movements cause the Constitution to change through political appointments, and confirmed by politically appointed Senate. That is just the way business is done. That's the way business is done.
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> *Not only should you not be surprised. You should also not complain.* Except, if that day were to ever come, you were just on the losing end of a democratic process, then

[10] Constitutional Culture, *supra* note __ at 1363 ("The organization of counter-movement intent on defending understandings and practices that another movement is challenging dramatically changes the conditions of argument. A countermovement will endeavor to reinvigorate justifications for contested understandings and practices, and rebut new interpretive claims on the constitutional tradition To persuade the public, a movement advancing a new interpretation now must answer the countermovement's objections and allay the concerns its opponents raise. Countermobilization makes it more difficult for a movement making claims on a constitutional tradition to satisfy the consent and public value conditions.Who exactly is the audience for these arguments and counterarguments about the Constitution's meaning? The audience includes the legal officials who have the authority to recognize or refuse the movement's claims, as well as the public whose confidence is ultimately necessary to legitimate that exercise of authority. Winning the public's confidence is important even when argument unfolds in adjudicative rather than electoral arenas. The same elements of constitutional culture that authorize members of the polity to contest official pronouncements of constitutional meaning in turn teach constitutional disputants that they must persuade other citizens as well as officials who have the authority to recognize their claims.").

> you have judicial restraint to fall back on. You have judicial restraint to fall back on to protect the political process you lost. I want to suggest that maybe, just maybe the original constitution might have something to offer you if you are ever on the losing end of a political movement.[11]

In other words, what's good for the goose is now good for the gander.

The fight over the Affordable Care Act brings into focus the irrelevance of such banal bromides as "judicial activism" or "judicial restraint," which are nothing more than tools of convenience, depending on what issue is at play. In this case, conservatives adopted a popular constitutionalist argument, and did exactly what they have criticized liberals for doing. Likewise, liberals advocated a position of judicial moderation in tension with their decade-long view of how the courts should respond to popular-constitutionalist movements.

Not only is the individual mandate unprecedented, but the challenge to it is also unprecedented.

[11] See http://www.acslaw.org/news/video/national-power-to-address-the-nations-problems-the-constitutionality-of-the-affordable-ca starting at 1:31:30 (this is my rough transcription).