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# Back to the Future of Originalism

Josh Blackman \*

## INTRODUCTION

In the blink of the jurisprudential eye, the Affordable Care Act (“ACA”) went to the brink of unconstitutionality and back. Along that rapid journey, lawyers and scholars from across the philosophical spectrum who were focused on developing, refining, and advancing constitutional arguments at breakneck speeds, were often unable to pause and appreciate the monumental importance of what was happening. This essay, as part of a symposium issue for the *Chapman Law Review*, takes a step back, and reflects on the legal challenge’s impact on originalism and constitutional law.<sup>1</sup>

In *NFIB v. Sebelius*,<sup>2</sup> originalists, who for decades have sought to restore the original meaning of the Constitution, shied away from that task, and advanced a strategy that would excise the individual mandate alone without disturbing any New Deal-era precedents. Rather than asserting an originalist challenge, the challengers turned to appeals to popular constitutionalism and led a concerted effort to create, and then draw attention to, the law’s unpopularity and unconstitutionality. This was a concerted effort to move the argument from “off-the-wall” to “on-the-wall.” These two moves—the decision not to assert the originalist case for the unconstitutionality of the individual mandate and to appeal to popular constitutionalism—have gone largely unrecognized and unappreciated. Both of these choices speak to the potential limitations of originalism in a world bound by entrenched precedents and the potential strength of fostering social movements intent on restoring the “lost Constitution.”

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\* Assistant Professor, South Texas College of Law. I would like to thank David Bernstein, Jack Balkin, Randy Barnett, Andy Koppelman, Mike Ramsey, John McGinnis, Mike Rappaport, Tim Sandefur, Ilya Shapiro, Lawrence Solum, Ilya Somin, Lee Strang, and Rebecca Zietlow for their insights into this case, the litigation strategy, and what lessons we should draw. Further, I would like to thank participants at the Georgetown University Law Center Advanced Constitutional Law Colloquium, South Texas College of Law Faculty Lecture Series, the Western Michigan University Medical Humanities Conference, the Mid-Atlantic Law & Society Association Conference, the Federalist Society Faculty Conference, and the Loyola Law School Constitutional Law Colloquium for their helpful feedback during presentations of this paper. I also benefited greatly from interviews with many of the attorneys, think-tankers, government officials, and pundits who guided this case from the beginning until the end.

<sup>1</sup> See also JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (forthcoming 2013) (discussing *NFIB v. Sebelius*).

<sup>2</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

Through such social movements, advanced by groups like the Tea Party, society witnessed a rededication, however convenient, to the Constitution. Although the Affordable Care Act was ultimately upheld, one of the greatest takeaways from the case was its contribution towards our collective constitutional culture. This challenge has contributed to the growing sentiment that the powers of the federal government are in fact constrained, and that the New Deal cases may not have definitively resolved the scope of federal power. Larry Solum has referred to this shift in thinking as our now-unsettled “constitutional gestalt.”<sup>3</sup>

What does this unsettled gestalt portend for originalism? In *NFIB*, the challengers made a conscious decision not to advance the originalist argument. This choice may have costs. Namely, any immediate gains that could have been obtained by striking down the mandate may in the long run undermine originalist jurisprudence. This decision may risk harming originalism, and open up originalist scholars to criticisms of being “faint-hearted.” Perhaps *NFIB* represents a short-term victory for the ends, but a long-term loss for the means.<sup>4</sup>

Yet, the litigation strategy in *NFIB* has shown that it is possible to advance originalism without using originalism. Even when originalism is not at the forefront, this jurisprudence exudes a *gravitational pull* that tugs at the Constitution, and prevents it from drifting too far away its original meaning. It is this pull that brought the Rehnquist Court’s “New Federalism” back into the orbit of the original understanding, even if cases such as *Lopez*,<sup>5</sup> *Morrison*,<sup>6</sup> and *Printz*<sup>7</sup> were not by themselves originalist challenges.

The challenge to the ACA was successful in unsettling our constitutional gestalt because it seamlessly blended a theory of constitutional law and the social movements that backed the theories. Both of these avenues gravitated around the original understanding of the Constitution. First, the theories were grounded in the Constitution’s structural protections of individual liberty, and second, the movements sought to restore what they viewed as the original Constitution. This strategy provides a how-to manual for constitutional litigation. Learning how to replicate this dual-focused phenomenon of *popular originalism* may be the most enduring lesson for future constitutional challenges.

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<sup>3</sup> Lawrence B. Solum, *The Legal Effects of NFIB v. Sebelius and The Constitutional Gestalt, passim* (Georgetown Pub. Law Research Paper No. 12-152, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2152653](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152653).

<sup>4</sup> Such a calculus may have also influenced Chief Justice Roberts’ decision-making process, though, he likely feared a short-term gain for federalism, paired with a long-term loss for the Court’s institutional credibility. See Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBSNEWS.COM (July 1, 2012 1:29 PM), [http://www.cbsnews.com/8301-3460\\_162-57464549/roberts-switched-views-to-uphold-health-care-law/](http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/).

<sup>5</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>6</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>7</sup> *Printz v. United States*, 521 U.S. 898 (1997).

## I. THE ORIGINALIST CONSTITUTION

This Part explores how the originalist constitution evolved in the challenge to the Affordable Care Act. First, I consider the significance of the non-originalist challenge to the ACA. Second, I look at how originalists were instrumental from moving the challenge to the ACA from “off-the-wall” to “on-the-wall.” Third, I query what this challenge means for the originalist goal of restoring the lost Constitution.<sup>8</sup>

## A. The Non-Originalist Challenge to the Affordable Care Act

## 1. Originally Originalist

Unlike earlier conservative or libertarian constitutional arguments, the challenge to the ACA did not mobilize around the text and the history of the Constitution. While the two-decades-long path to *District of Columbia v. Heller*<sup>9</sup> was paved with deep probing into the original understanding of the Second Amendment,<sup>10</sup> the challenge to the ACA, 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 was unprecedented.<sup>11</sup> Originalism and textualism served only as secondary, backup arguments; however, Justices both in the majority and in the dissent made numerous originalist arguments.<sup>12</sup> The genius of the strategy was to conform the

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<sup>8</sup> In this section, I focus quite heavily on the views of Randy Barnett as representative of broader originalist and libertarian sentiments. Barnett, whom the *New York Times* dubbed the “intellectual godfather” of the legal challenge of the mandate, was the leading legal voice in this challenge from this outset, was responsible for, and should receive credit for many of the key strategic and jurisprudential decisions in this case. See Kate Zernike, *Proposed Amendment Would Enable States to Repeal Federal Law*, N.Y. TIMES, (Dec. 19, 2010), [http://www.nytimes.com/2010/12/20/us/politics/20states.html?\\_r=0](http://www.nytimes.com/2010/12/20/us/politics/20states.html?_r=0) (dubbing Barnett the “intellectual godfather”). Barnett has written a number of noted works, including: RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); RANDY E. BARNETT, *CONSTITUTIONAL LAW: CASES IN CONTEXT* (2008); RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998).

<sup>9</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>10</sup> See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 924, 926 (2009) (discussing the Court’s focus on the idea that the Constitution should be interpreted based on its “original meaning”); see also Josh Blackman, *Originalism for Dummies*, (Dec. 19, 2008), <http://ssrn.com/abstract=1318387>.

<sup>11</sup> See, e.g., *Precedents cited in health care battle*, USA TODAY (Mar. 20, 2012, 9:12 PM), <http://usatoday30.usatoday.com/news/washington/judicial/story/2012-03-20/precedents-supreme-court/53674608/1> (listing the four cases most likely to be cited by both sides of the debate); Randy Barnett, Nathaniel Stewart & Todd F. Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, THE HERITAGE FOUND. (Dec. 9, 2009), <http://www.heritage.org/research/reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprecedented-and-unconstitutional> (arguing that the mandate is unprecedented); David Orentlicher, *Precedents for Upholding Health Care Law*, CNN (March 27, 2012, 8:25 AM), <http://www.cnn.com/2012/03/27/opinion/orentlicher-health-care/index.html> (arguing there is ample precedent to support the mandate).

<sup>12</sup> See, e.g., Michael Ramsey, *Originalism in the Health Care Case: What is a Direct Tax?*, THE ORIGINALISM BLOG (July 8, 2012, 7:00 AM), <http://originalismblog.typepad.com/the-originalism-blog/2012/07/originalism-in-the-health-care-case-what-is-a-direct-tax-michael-ramsey.html> (discussing direct taxes); Michael Ramsey, *Originalism in the Health Care Decision: The Federal Government’s “Problem-Solving Powers,”* THE ORIGINALISM BLOG (July 6, 2012, 7:00 AM),

argument within the Court's existing precedents: to strike down the mandate would not require overturning a single precedent. Indeed, five Justices accepted this position, entirely consistent with the Court's jurisprudence from *M'Culloch v. Maryland*<sup>13</sup> to *Wickard v. Filburn*<sup>14</sup> to *Gonzales v. Raich*.<sup>15</sup> However, the originalist dog that did not bark speaks volumes about the potency of originalism in significant constitutional challenges such as this.

In late 2009, even before the enactment of the ACA, most prominent constitutional theorists who focused on originalist scholarship readily conceded that the individual mandate was not consistent with the original understanding of the Constitution—namely the Commerce Clause and the Necessary and Proper Clause.<sup>16</sup> On September 18, 2009, six months before the law's enactment, Randy Barnett, in noting that “the Supreme Court has certainly not limited either the enumerated commerce power or the implied spending power to the original meaning of the text,”<sup>17</sup> wondered aloud whether the Court could strike down Obamacare based on original meaning: “[s]tranger things have happened. After all, without any precedent standing in their way, a majority of the Supreme Court decided to follow the original meaning of the text of the Second Amendment in *District of Columbia v. Heller*.”<sup>18</sup>

Barnett, along with Todd Gaziano and Nathaniel Stewart, authored a seminal report for The Heritage Foundation laying out the case against the mandate.<sup>19</sup> In addition to developing the activity/inactivity distinction—an argument entirely consistent with modern Supreme Court precedent—the report also asserted that an originalist challenge to the law was a possible route.

[T]he 2008 case of *District of Columbia v. Heller* shows that a majority of the current Court takes the text and original public meaning of the Constitution quite

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<http://originalismblog.typepad.com/the-originalism-blog/2012/07/originalism-in-the-health-care-decision-the-federal-governments-problem-solving-powersmichael-ramsey.html> (highlighting exchange between Justice Ginsburg and the joint dissent).

<sup>13</sup> *M'Culloch v. Maryland*, 17 U.S. 316, 359–60 (1819) (holding Congress has the power to incorporate a bank even when such is not a power enumerated within the Constitution).

<sup>14</sup> *Wickard v. Filburn*, 317 U.S. 111, 123–24 (1942) (holding that even a wheat farmer's trivial contribution to the market, when combined with the contributions of other similarly situated farmers, was subject to federal regulation under the Commerce Clause because the commerce power “extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce” (citation omitted)).

<sup>15</sup> *Gonzales v. Raich*, 545 U.S. 1, 24 (2005) (holding Congress “had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in [Congress's Application of Controlled Substance Act (CSA)].”).

<sup>16</sup> Barnett et al., *supra* note 11.

<sup>17</sup> Randy Barnett, *Healthcare: Is “mandatory insurance” unconstitutional?*, POLITICO (Sept. 18, 2009), [http://www.politico.com/arena/perm/Randy\\_Barnett\\_8256A4EF-01E6-4207-B4E8-C761F2FDB5BF.html](http://www.politico.com/arena/perm/Randy_Barnett_8256A4EF-01E6-4207-B4E8-C761F2FDB5BF.html).

<sup>18</sup> *Id.* (italics added).

<sup>19</sup> Barnett et al., *supra* note 11.

seriously, especially when considering issues not controlled by existing precedent. A constitutional challenge to an individual health care mandate would be considered an opportunity by the Justices who made up the *Heller* majority to further vindicate their commitment to text and history in evaluating claims of federal power.<sup>20</sup>

## 2. The Move Away from Originalism

Ultimately the challengers to the Affordable Care Act decided not to ground their arguments in originalism, and did not seek the reversal of precedents concerning the scope of federal power stretching from *Wickard v. Filburn*<sup>21</sup> to *Gonzales v. Raich*.<sup>22</sup> Randy Barnett explained this decision in some detail. First, Barnett acknowledged that, based on his understanding of the original meaning of the Constitution, the individual mandate is clearly unconstitutional.<sup>23</sup> In his 2010 article, *Commandeering the People*, Barnett wrote, “[U]nder the original meaning of the Commerce Clause, as affirmed by the Court, Congress lacks any power over the health insurance business. The insurance business, like the businesses of manufacturing or agriculture, is to be regulated exclusively by the states.”<sup>24</sup> Or, more clearly stated in a footnote, “As suggested in Part I, both the regulations imposed on insurance companies, and the insurance mandate imposed on individuals, most likely exceed the original scope of the enumerated powers of Congress.”<sup>25</sup>

Second, Barnett concedes that a key non-originalist precedent stands in the way of restoring the original understanding of commerce with respect to insurance contracts—a matter that should be left for the states. In *United States v. South-Eastern Underwriters Association*<sup>26</sup>—a decidedly unoriginalist opinion—Justice Black reversed *Paul v. Virginia*,<sup>27</sup> which had held that “[i]ssuing a policy of insurance is not a transaction of commerce.”<sup>28</sup> In September of 2012—three months after *NFIB v. Sebelius*—Barnett made similar points during his address at the Cato Institute’s Constitution Day Symposium: “Doctrines certainly constrained us in our challenges to the Affordable Care Act. We might like to have contested the insurance company regulations as outside the bounds of the original meaning of the Commerce Clause but we were definitively foreclosed by such an argument by the 1944 case of *U.S. v. South-Eastern*

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<sup>20</sup> *Id.*

<sup>21</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>22</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>23</sup> Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 586–87 (2010).

<sup>24</sup> *Id.* at 585.

<sup>25</sup> *Id.* at 624 n.154.

<sup>26</sup> *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944).

<sup>27</sup> *Paul v. Virginia*, 75 U.S. 168 (1869), overruled by *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 543–50 (1944).

<sup>28</sup> *Id.* at 183.

*Underwriters*.<sup>29</sup> Or, stated more precisely, “Under the original meaning of the Constitution, for example, Congress would have no power to regulate the health insurance business since insurance contracts—like the practice of medicine—are not ‘commerce,’ which is why both activities have traditionally been regulated by the states.”<sup>30</sup>

Third, without acknowledging that these non-originalist precedents are correct, Barnett still contends that under current Supreme Court law, the individual mandate is unconstitutional.<sup>31</sup> “Existing doctrine reveals the individual mandate is unconstitutional even if we assume that Congress has the power to regulate the insurance business that the New Deal Supreme Court gave it in *South-Eastern Underwriters*.”<sup>32</sup> Rather, solely for the purposes of this case, the challengers were willing to forego this originalist argument and focus on how the Supreme Court—for better, but mostly for worse—has developed the doctrine.<sup>33</sup> Barnett wrote quite clearly that he has not “rested [his] claim that the individual insurance mandate was unconstitutional on the original meaning of the Constitution, and neither did the parties to the lawsuit.”<sup>34</sup>

“This entire case was pursued under *existing* post-New Deal Commerce Clause and Necessary & Proper Clause doctrine.”<sup>35</sup> “[M]y claim is that the mandate is unconstitutional in the second sense: based on what the Supreme Court has said in its Commerce and Necessary and Proper Clause decisions . . . and also in its tax power decisions . . .”<sup>36</sup> Because the mandate was unprecedented, in that it went beyond anything Congress had attempted before or anything the Supreme Court had considered, its constitutionality was not settled.

Importantly, this “second” sense must be distinguished from what Barnett has described as the first and third senses of constitutionality. The first sense focuses on “what the Constitution says and means,” while the third sense asks “whether there are five votes on the Supreme Court to uphold or invalidate the action.”<sup>37</sup>

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29 Randy Barnett, Address at the Cato Institute’s Constitution Day Symposium: The Supreme Court: Past and Prologue: A Look at the October 2011 and 2012 Terms, Panel I: Obamacare and Enumerated Powers (Sept. 18, 2012), available at <http://www.cato.org/events/ccs2012/index.html>.

30 *Id.*; see also Josh Blackman, *Originalism and Obamacare*, JOSH BLACKMAN’S BLOG (Oct. 11, 2012), <http://joshblackman.com/blog/2012/10/11/originalism-and-obamacare/> (quoting Randy Barnett on his opposition to the Affordable Care Act) (transcribing the quoted text).

31 Barnett, *supra* note 23.

32 *Id.* at 587.

33 *Id.* at 586.

34 Randy Barnett, *Elhauge Replies to Hamburger*, VOLOKH CONSPIRACY (Apr. 22, 2012, 11:52 AM), <http://www.volokh.com/2012/04/22/elhauge-replies-to-hamburger/>.

35 *Id.*

36 Barnett, *supra* note 23, at 586.

37 Randy Barnett, *In What Sense is the Personal Health Insurance Mandate “Unconstitutional”?*, VOLOKH CONSPIRACY (Apr. 16, 2010, 11:27 AM), <http://www.volokh.com/2010/04/16/in-what-sense-is-the-personal-health-insurance-mandate-unconstitutional/>.



To argue that the Court should roll back unoriginalist precedents would be a nonstarter. As Larry Solum put it, “[y]ou cannot argue to a District Court that it should overrule a recent decision of the United States Supreme Court—the move is ‘off the wall,’ ‘out of bounds,’ and ‘beyond the pale [sic].’”<sup>38</sup> There were not enough votes to accomplish this position—this is the “third” sense of Barnett’s understanding of constitutionality.<sup>39</sup> As Justice Brennan was fond of saying, “Five votes can do anything around here.”<sup>40</sup> In order to advance this argument, the challengers had to move the argument from off-the-wall to on-the-wall.

#### B. Moving the Argument from Off-The-Wall to On-The-Wall

How the arguments went from being taken seriously by a small cadre of libertarian scholars to garnering five votes on the Supreme Court is a fascinating story of constitutional persuasion on related fronts: legal and populist. This narrative is well encapsulated in a series of back-and-forths between Barnett and Yale Law Professor Jack Balkin (who are in fact excellent friends).

##### 1. Of Theories and Movements

To Balkin, Barnett’s strategy was two-fold: on the one hand, Barnett was advancing a theory about constitutional law that was largely deemed frivolous; yet, at the same time, Barnett was also trying, through his own gravitas as a noted constitutional scholar, to convince people that his argument is not frivolous.

Randy Barnett wants you to know that his argument was not frivolous. But he is not simply reporting a fact about the world. He is engaged in a performative utterance. He is trying to make this statement true by the fact that he, a prominent constitutional theorist and litigator, is saying it. And he is trying to get enough people to agree with him so that what he says is true will actually become true.<sup>41</sup>

There is something of a chicken-and-the-egg dynamic at play in Balkin’s view. A constitutional theory only becomes non-frivolous when people accept it. But, before people accept a constitutional theory, it must be non-frivolous. “If Randy and his allies are successful in changing public and professional opinion, then they will move these ideas from off the wall to on the wall. They will make arguments that were once considered frivolous serious arguments, and possibly even winning arguments.”<sup>42</sup> Barnett was indeed successful about moving the idea from off-the-wall to on-the-wall. Although Barnett was not successful in winning the ultimate

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<sup>38</sup> Solum, *supra* note 3, at 16.

<sup>39</sup> See Barnett, *supra* note 37.

<sup>40</sup> H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 16 (2008). See generally Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

<sup>41</sup> Jack Balkin, *Randy Barnett Wants Us to Know that His Commerce Clause Argument is not Frivolous*, BALKINIZATION (July 19, 2010, 1:48 PM), <http://balkin.blogspot.com/2010/07/randy-barnett-wants-us-to-know-that-his.html>.

<sup>42</sup> *Id.*



case, his success in moving the argument onto the wall “would work a significant change in existing law”: to Balkin he “changed the practical meaning of the Constitution, and changed it a great deal.”<sup>43</sup> This change, in effect, is the change that Larry Solum has referred to as the “constitutional gestalt.”<sup>44</sup>

According to Barnett, when Balkin calls his constitutional arguments “off-the-wall” and associates them with libertarian attempts to restore an originalist vision of constitutional law, Balkin “is trying to marginalize the challenge to the individual mandate by connecting the argument about its constitutionality to [Barnett’s] and others [sic] ‘off-the-wall’ departures from conventional constitutional argument.”<sup>45</sup> Implicitly, Barnett concedes that popular libertarian constitutional goals are still “off-the-wall,” and are not ready to be accepted.

I can tell you what an ‘off-the-wall’—but in my view constitutionally sound—challenge to ObamaCare would look like: it would contest whether Congress has the power to regulate insurance companies under the Commerce Clause, given that the original meaning of ‘commerce’ did not extend to insurance contracts, which is why for 100 years the insurance business was regulated state by state.<sup>46</sup>

The notion of “off-the-wall” is descriptive of the current acceptance of an argument by the Supreme Court, not its soundness or its normative appeal. Barnett would maintain that this originalist challenge is accurate, but not the argument to make. “Contending that the Court enforce the original meaning of the Commerce Clause and refuse Congress the power to regulate health insurance would be an accurate reading of the Constitution in my view, but it would also be ‘off-the-wall’ at this point.”<sup>47</sup> Thus, while maintaining that “off-the-wall” notions of originalism are still sound and normatively appealing, libertarians can still advance a non-originalist argument that has the potential of moving to on-the-wall.

Barnett and other libertarians did not make the “off-the-wall” originalist argument. “But here is the thing. No one is making this argument. Not me, not ‘the large group of conservative and libertarian lawyers, politicians, and activists who want [sic] to change the public’s mind about the powers of the federal government,’ and certainly not the Attorneys General of 21 states.”<sup>48</sup> Rather, they look solely “at the law as it currently exists and [observe] that the Supreme Court has never upheld the use of the commerce power to mandate that everyone engage in economic activity.”<sup>49</sup> Because all that the Court “has ever done is [to] regulate or

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<sup>43</sup> *Id.*

<sup>44</sup> Solum, *supra* note 3, at 3.

<sup>45</sup> Randy Barnett, *Balkin “Flips,”* VOLOKH CONSPIRACY (July 20, 2010, 5:07 PM), <http://www.volokh.com/2010/07/20/balkin-flips/>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

prohibit those who choose to engage in economic activity. . . . [T]here is no existing authority for extending the Commerce Clause this far.”<sup>50</sup>

## 2. Popular Constitutionalism

To move this argument “onto the wall,” and to change the constitutional gestalt, the challengers employed tools of popular constitutionalism. The legal challenge to the Affordable Care Act, although short of total success, represents an unexpectedly effective social movement. Through a series of influential Op-Eds, speeches, and blog posts, conservative and libertarian lawyers and professors advanced a simple reason why the ACA is unconstitutional—namely, it is *unprecedented* for Congress to force a person to engage in commerce.<sup>51</sup> Epitomized by the now-infamous image of broccoli, the challengers asked whether Congress could compel people to buy that flowery green.<sup>52</sup>

The challengers advanced a very simple constitutional idea: a mandate forcing people to engage in commerce is unprecedented.<sup>53</sup> 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.”<sup>54</sup> Almost lost amidst the Court’s opinion in *NFIB v. Sebelius*, which upheld the Affordable Care Act under Congress’s taxing power, was the fact that a majority of the Court unexpectedly accepted the challenger’s primary argument.<sup>55</sup> This way, paved by decades of conservative and libertarian scholarship,<sup>56</sup> fortified by the New Federalism precedents of the Rehnquist Court,<sup>57</sup> and advanced by the then-burgeoning Tea Party, “[a] constitutional gestalt shift [snuck] up on the community of constitutional actors.”<sup>58</sup>

At first, most constitutional scholars ridiculed the challenge to the ACA.<sup>59</sup> Balkin and a select few others took it more seriously, very much

<sup>50</sup> *Id.*

<sup>51</sup> Blackman, *supra* note 1.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*; see generally JACK M. BALKIN, *LIVING ORIGINALISM* 17–18 (2011) (defining “off-the-wall”). For my review of Balkin’s book, see Josh Blackman, *Originalism at the Right Time?*, 90 TEX. L. REV. 269 (2012).

<sup>55</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593 (2012); see also *id.* at 2649–50 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). Arguably, Justices Scalia, Kennedy, Thomas, and Alito did not join Chief Justice Roberts’s opinion, but Roberts did by reference agree with the four joint-dissenters. Thus, broadly stated, there were five votes for this position.

<sup>56</sup> Solum, *supra* note 3, at 22 (“The constitutional challenge to *Sebelius* began its journey to the Supreme Court in an intellectual environment shaped by a constitutional gestalt that structured the field of constitutional argument.”).

<sup>57</sup> *Id.* at 23 (“The New Federalism cases decided by the Rehnquist Court posed a challenge to the constitutional gestalt that read the New Deal Settlement as creating plenary and unlimited national legislative power.”).

<sup>58</sup> *Id.* at 19.

<sup>59</sup> Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went*

cognizant of how a social movement could advance after it got “onto the wall.” Balkin was uniquely positioned to augur the potential outcome of this case, for he “observed . . . that politics and political parties played an important role, perhaps the crucial role, in combination with intellectuals and social movements.”<sup>60</sup> Balkin asserted, “Randy and his allies are trying to change people’s minds through op-eds, speeches, protests, and litigation. They are trying to move things from ‘off the wall’ to ‘on the wall.’ And this is not the first time people have tried to do this.”<sup>61</sup> This process of constitutional contestation had the effect of causing “a constitutional gestalt shift . . . . Arguments may occur in the public sphere, in the legal academy, in legislative and executive forums within both state and national political institutions—and in the courts of law.”<sup>62</sup>

Barnett reflected on the social movement that enabled the challenge to *NFIB v. Sebelius*, noting that “[t]here is for the first time a popular political movement on behalf of the written Constitution, especially its power-constraining clauses. This ‘constitutional conservative’ movement is famously associated with the Tea Party, but extends well beyond.”<sup>63</sup> If the same legal argument had been presented without the groundswell of support, it would not have made it before. Rather, this popular constitutional support nearly pushed the argument over the broccoli finish line.

Randy Barnett further commented on the nature of the political movements behind the challenge, when he addressed the American Constitution Society’s 2011 National Convention:

[I] do want to get back to . . . the politics of [the Affordable Care Act] for a minute because I understand you had a very lively panel yesterday on original meaning . . . . But I take it that the valence in this room is kind of not all that sympathetic with original meaning. Original meaning, as far as I understand it, says the meaning of the Constitution must remain the same until it’s properly changed . . . but the opposite of [originalism], or the different position of that, is that the meaning of the Constitution evolves over time to respond to changing conditions and also to respond to political initiatives, or what my friend Jack Balkin calls social movements. That is what the alternative to original meaning is, which is the evolution of constitutional meaning according to political

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*Mainstream*, THE ATLANTIC (June 2012), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.

<sup>60</sup> Solum, *supra* note 3, at 22; see also Balkin, *supra* note 59. For further discussion of Balkin’s views on popular constitutionalism, see Josh Blackman, *The Affordable Care Act and Popular Constitutionalism*, 26 Public Affairs Quarterly \_\_\_\_ (forthcoming 2013).

<sup>61</sup> Balkin, *supra* note 41.

<sup>62</sup> Solum, *supra* note 3, at 19.

<sup>63</sup> Randy Barnett, *The Mirage of Progressive Originalism: A New Legal Theory Attempts—and fails—to Unite Leftist Politics with Constitutional Fidelity*, WALL ST. J. (Sept. 7, 2012), <http://online.wsj.com/article/SB10000872396390444914904577619763983330558.html> (reviewing AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* (2012)).

movements. *Well, look if you guys believe in that, then obviously you may be looking at a political movement in the face.*

Political movements sometimes will go in your direction, and political movements will sometimes not go in your direction. If political movements don't go in your direction, it is difficult to rush in with that copy of the Constitution . . . and say no, no, no, it's the Constitution . . . that stops you guys from doing it. Not if you at the same time think it's political movements that causes [sic] the meaning of the Constitution to change . . . through judicial appointments . . . confirmed or not confirmed by a politically representative Senate. That is just the way business is done.

*Not only should you not be surprised. You should also not complain. Except . . . if that day were ever to come . . . you are simply on the losing end of a democratic process, and then we have judicial restraint to fall back on. You guys have judicial restraint to fall back on in protecting the outcome of this . . . political debate that you may have lost. I just want to suggest that maybe, just maybe, the original Constitution might have something to offer you guys if and when you are ever on the losing end of a political movement.*<sup>64</sup>

In other words, what's good for the goose is now good for the gander. This case turned the tables on much more than just our Commerce Clause jurisprudence. More recently, Randy Barnett has described the realist nature of this reversal more bluntly:

We also have the realist fact that five Justices embraced the entirety of our Commerce Clause and Necessary and Proper Clause arguments. Critics like Charles Fried can dismiss this as emanating from the leaderless Tea Party . . . but it is now embraced by what is called the 'Rule of Five.' Even if the Tea Party played a role, we have long been told that this is how the living Constitution—by which is meant constitutional doctrine—evolves in response to social movements. *So unless it is a living constitutionalism for me, but not for thee, if the outcome of this case was indeed impelled by popular constitutionalism, that would make it more, not less legitimate on living constitutionalist grounds.*<sup>65</sup>

Balkin was more cynical of the nature of this change.<sup>66</sup>

All social and political movements that seek to change the Constitution in practice do something like this, although the exact strategies and methods may differ. Attempting this is part of the process of constitutional change. It is an aspect of living constitutionalism. (This is one of the greatest ironies of modern conservative originalism—it is a perfect example of how living constitutionalism actually works in practice).<sup>67</sup>

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<sup>64</sup> See *National Power to Address the Nation's Problems: The Constitutionality of the Affordable Care Act*, AMERICAN CONSTITUTION SOCIETY (June 18, 2011), <http://www.acslaw.org/news/video/national-power-to-address-the-nations-problems-the-constitutionality-of-the-affordable-ca> (beginning at 1:31:30). Please note, the above is the author's rough translation and emphasis has been added.

<sup>65</sup> *Cato Institute Reviews Supreme Court's Recent Term*, C-SPAN (Sept. 18, 2012), <http://www.c-span.org/Events/Cato-Institute-Reviews-Supreme-Courts-Recent-Term/10737434182/> (beginning at 18:50) (emphasis added).

<sup>66</sup> Balkin, *supra* note 41.

<sup>67</sup> *Id.*

This sentiment is indeed quite ironic, especially in light of how critical conservatives have been for decades about the Justices reacting to political and social movements instead of focusing solely on the Constitution.

#### A. Restoring the Lost Constitution?

Although Barnett publicly distanced himself from bringing an originalist challenge to the Affordable Care Act, detractors and critics—buoyed by Barnett’s decade-long originalist scholarship trail—assailed Barnett, claiming that *NFIB* was in fact an attempt to restore the Lost Constitution, or more pejoratively, to bring back the Constitution in Exile.<sup>68</sup> Professor Jeffrey Rosen, far more cynical of Barnett’s motives than Balkin, said, “[l]et’s not pretend that this is just a modest case of applying existing precedents,” and asked, largely rhetorically, “[t]he question is: [a]re you going to reverse decades of judicial deference in economic matters?”<sup>69</sup> In response, Barnett insists “[n]othing about existing Supreme Court doctrine needs to change for us to prevail in this case.”<sup>70</sup> In fact, Barnett argues that he and the plaintiffs in *Gonzales v. Raich*<sup>71</sup> did not seek to overturn *Wickard v. Filburn*<sup>72</sup> outright, but instead sought to distinguish that “wheaty” case.<sup>73</sup> “While devoting pages to this argument,” Barnett recalled, “in a single sentence we did ask that *Wickard* be reconsidered ‘if the Court were to conclude that *Wickard* is controlling’ (i.e. if it rejected our distinctions), but this is an obligatory request never mentioned in oral argument.”<sup>74</sup>

In a response to a similar point made by Ian Millhiser at ThinkProgress,<sup>75</sup> Barnett commented, “[A] decision to invalidate the individual insurance mandate would not require the Supreme Court to overturn ANY of these precedents you like. If it did, we would not have so good a chance to prevail as we do.”<sup>76</sup> Barnett asserted that the fact that

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<sup>68</sup> Randy Barnett, *Academic Reaction to Oral Argument on the ACA Challenge*, VOLOKH CONSPIRACY (April 30, 2012, 10:55 AM) <http://www.volokh.com/2012/04/30/academic-reaction-to-oral-argument-on-the-aca-challenge/>.

<sup>69</sup> Nina Totenberg, *Health Care Decision Hinges On A Crucial Clause*, NPR (June 11, 2012, 4:34 AM), <http://www.npr.org/2012/06/11/154583824/health-care-decision-hinges-on-a-crucial-clause> (internal quotation marks omitted).

<sup>70</sup> *Id.* (internal quotation marks omitted).

<sup>71</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>72</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>73</sup> Randy Barnett, *Jeff Rosen Responds to Critics*, VOLOKH CONSPIRACY (May 29, 2012, 12:01 PM), <http://www.volokh.com/2012/05/29/jeff-rosen-responds-to-critics/>.

<sup>74</sup> *Id.*

<sup>75</sup> See Ian Millhiser, *Architect of Anti-Health Care Lawsuit Admits To His Broader Agenda — No National Child Labor Laws, No Minimum Wage*, THINKPROGRESS (June 12, 2012, 5:00 PM), [http://thinkprogress.org/justice/2012/06/12/498288/andys-fake-constitution/?fb\\_comment\\_id=fbc\\_10150862594781078\\_22609833\\_10150864646626078#f3b8e0dd74](http://thinkprogress.org/justice/2012/06/12/498288/andys-fake-constitution/?fb_comment_id=fbc_10150862594781078_22609833_10150864646626078#f3b8e0dd74) (discussing Barnett’s alleged views).

<sup>76</sup> Randy Barnett, Comment to *Architect of Anti-Health Care Lawsuit Admits To His Broader Agenda—No National Child Labor Laws, No Minimum Wage*, THINKPROGRESS (June 13, 2012, 3:08 PM), [http://thinkprogress.org/justice/2012/06/12/498288/andys-fake-constitution/?fb\\_comment\\_id=fbc\\_10150862594781078\\_22609833\\_10150864646626078#f3b8e0dd74](http://thinkprogress.org/justice/2012/06/12/498288/andys-fake-constitution/?fb_comment_id=fbc_10150862594781078_22609833_10150864646626078#f3b8e0dd74).

originalists are not making originalist arguments is not important: “That I hold *other* views, such as a commitment to originalism, that [sic] are not being put forward in this challenge is irrelevant to the merits of the arguments we *are* making in court (as they were in *Raich*).”<sup>77</sup>

However, Rosen may be somewhat correct, albeit indirectly. The aim of the strategy was not to reverse decades of precedents, but rather to jolt a rethinking of those precedents going forward. It is not necessary to overturn precedents in order to change the law. The underlying victory, I think, is what Larry Solum has referred to as the “constitutional gestalt.”<sup>78</sup>

## II. THE SHIFTED “CONSTITUTIONAL GESTALT”

Though the Affordable Care Act survived, in the words of Justice Ginsburg, “largely unscathed,”<sup>79</sup> the impact of *NFIB v. Sebelius* extends far beyond the constitutionality of the individual mandate. In a path-breaking article about the state of constitutional law following *NFIB*, Professor Larry Solum identifies a change in our constitutional landscape—what he calls the *constitutional gestalt*.<sup>80</sup> The social movement against the ACA had the effect of unsettling many constitutional assumptions that have existed since the New Deal, and it created grounds for contestations of the scope of federal power.<sup>81</sup> This—and not the Chief Justice’s curious vote—may be the important contribution for the future of constitutional law and our Constitution. Yet, this change in the gestalt, independent of originalism, also speaks to the importance of originalism as a tool in these future contests. I conclude by speculating about possible end games of libertarian constitutional thought.

### A. *NFIB*’s Unsettling of Our Constitutional Gestalt

The state of our constitutional law does not merely consist of rules and precedents. Professor Larry Solum has written that “[at] the very highest level of abstract, our constitutional theories and narratives reflect and contain what might be called the constitutional gestalt—a holistic picture that organizes the constitutional materials (the text, cases, and practices) and the norms of constitutional argument.”<sup>82</sup> As Solum observed, “In *NFIB*, five Justices of the Supreme Court endorsed a view of the commerce clause [sic] that is inconsistent with the constitutional gestalt associated with the New Deal Settlement. A fissure has opened in constitutional

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<sup>77</sup> See Barnett, *supra* note 73 (emphasis added).

<sup>78</sup> See *infra* Part V; see also Solum, *supra* note 3, at 2.

<sup>79</sup> See Adam Liptak, *Justices, By 5–4, Uphold Health Care Law; Roberts in Majority; Victory For Obama*, N.Y. TIMES, June 29, 2012, at A1, available at <http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html?pagewanted=all>.

<sup>80</sup> Solum, *supra* note 3, at 26.

<sup>81</sup> See *id.* at 2.

<sup>82</sup> See *id.* at 16 (describing a constitutional gestalt as “an overall picture of the constitutional landscape”) (quote from original article, on file with author).



politics, creating space for an alternative constitutional gestalt.”<sup>83</sup> Now, what were once “[u]ndisputed norms” about the scope of federal power can now be questioned, and arguments which “once were ‘off the wall’ are now seen as ‘on the wall.’”<sup>84</sup> The notion of the unsettled gestalt accurately captures how our system of law changed after *NFIB*—even though the ACA survived.

In a July 2010 blog post, two years before the Supreme Court’s decision, Jack Balkin honed in on the challenger’s efforts to change our constitutional landscape:

Randy is part of a large group of conservative and libertarian lawyers, politicians, and activists who want to change the public’s mind about the powers of the federal government. They want the public and the courts to rethink the assumptions of the activist state that came with the New Deal. They want to restrain the growth of the federal government and push it back, because they believe that this is more faithful to the Constitution as they understand it.<sup>85</sup>

Solum recognized that “[a] shift in the gestalt can only occur with support developments in constitutional politics off and on the Court.”<sup>86</sup>

Barnett was correct in refuting Balkin’s claim that the challenge *directly* sought to return to pre-New Deal era precedents. But Balkin’s prescient claim was much broader. The challenge, whether successful or unsuccessful in killing the ACA, had the much deeper objective of affecting how people think about the Constitution, the federal government, and individual liberty. Or, as Solum stated it, “[t]he most important *indirect* effect of *NFIB* is that it enables constitutional contestation over the content of the gestalt and the meaning of the New Deal Settlement.”<sup>87</sup>

After *NFIB v. Sebelius*, our society has gone through just such a rethinking. Putting aside the issue of whether there was a five-vote block to strike down the mandate as a violation of the Commerce Clause,<sup>88</sup> or if the Chief’s discussion of the Commerce Clause was holding or dictum,<sup>89</sup> the long-term victory of this case was changing how the Constitution is viewed by the people—and this is likely what concerned Balkin far more than the

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<sup>83</sup> *Id.* at 2–3.

<sup>84</sup> *Id.* at 20.

<sup>85</sup> Balkin, *supra* note 41.

<sup>86</sup> Solum, *supra* note 3, at 27.

<sup>87</sup> *Id.* at 3 (emphasis added).

<sup>88</sup> See *id.* at 3 (“The technical analysis leads to the conclusion that on the Commerce-Clause issues, *NFIB* is unlikely to produce *stare decisis* effects that are clear and uncontested—one way or the other.”).

<sup>89</sup> Ilya Somin, *A Simple Solution to the Holding vs. Dictum Mess*, VOLOKH CONSPIRACY (July 2, 2012, 3:47 PM), <http://www.volokh.com/2012/07/02/a-simple-solution-to-the-holding-vs-dictum-mess/>; see also Randy Barnett, *Quin Hillyer: “John Roberts’ Travesty, Point by Point”*, VOLOKH CONSPIRACY (July 9, 2012, 2:23 PM), <http://www.volokh.com/2012/07/09/quin-hillyer-john-roberts-travesty-point-by-point/>; Randy Barnett, *Quote of the Week*, VOLOKH CONSPIRACY (July 1, 2012, 12:41 PM), <http://www.volokh.com/2012/07/01/quote-of-the-week/>.



Affordable Care Act's fate. And with this sea change of thought, a new tide has arrived, drawn in by the currents of "constitutional contestation."<sup>90</sup>

The long-term effects of *NFIB* are uncertain. However, we know that "grounds of constitutional contestation will have been changed—the dominant constitutional gestalt has become open to challenge through formal legal argument in ordinary litigation."<sup>91</sup> Future challenges to the scope of federal power will no longer be scoffed at as ridiculous—consider the drastic change in reactions to the challenge in 2009 and 2012. Scholars will be able to put forth ideas about laws that may be suspect after *NFIB*.<sup>92</sup> Movements will continue to advance understandings of constitutional norms consistent with a federal government of enumerated powers. Politicians will incorporate constitutionalist ideals in legislative debates over the scope of federal power. And, perhaps most importantly, judges at all levels will now have a precedent upon which to act based on these cases.

#### B. *NFIB*'s Implications for Originalism

Barnett's concession that an originalist challenge to the ACA would be "off-the-wall"<sup>93</sup> speaks volumes about the limits of originalism when unmoored from a popular constitutional backing. When confronted with perhaps the largest and most significant constitutional law challenge of a generation, rather than advancing an "off-the-wall" argument that is consistent with originalism—the predominant jurisprudence of modern-day libertarians—the challengers turned to something else, and it was not just an argument about the extent of the Court's precedents. Rather, as Balkin acknowledges, the challengers aimed to change public opinion, and bring the unprecedented argument into the realm of plausibility.<sup>94</sup> Once the argument crossed that threshold, it was off to the races—and it only partially crossed the finish line when Chief Justice Roberts seized defeat from the jaws of victory.

##### 1. The Means of Originalism and the Ends of Libertarianism

*NFIB* reveals that fidelity to originalism must take a back seat when more lofty goals can be obtained—goals that are unobtainable through

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<sup>90</sup> See Solum, *supra*, note 3, at 3.

<sup>91</sup> *Id.* at 26.

<sup>92</sup> See *id.* at 27 ("NFIB has opened the space for constitutional contestation—and that space is already being occupied, in the blogs, at academic conferences, in position papers, water cooler discussions, email exchanges, briefs, and judicial opinions. Competing doctrinal arguments, theories, and narratives are already in play.").

<sup>93</sup> See Barnett, *supra* note 45.

<sup>94</sup> See Barry Friedman & Dahlia Lithwick, *Justice by the Numbers: When it Comes to Deciding the Future of Obamacare, the Supreme Court Should Ignore Public Opinion*, SLATE (Apr. 24, 2012, 2:56 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/04/the\\_supreme\\_court\\_and\\_obamacare\\_the\\_justices\\_should\\_be\\_careful\\_not\\_to\\_let\\_public\\_opinion\\_guide\\_their\\_decisions\\_single.html#pagebreak\\_anchor\\_2](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/the_supreme_court_and_obamacare_the_justices_should_be_careful_not_to_let_public_opinion_guide_their_decisions_single.html#pagebreak_anchor_2) (suggesting that the Court should ignore public opinion).

originalism. The decision to not advance the originalist argument was grounded in the fact that the challengers wanted to win the case. As Solum has observed, “[m]any originalists believe that the New Deal cases expanded Congress’s Commerce Clause power beyond the limits of original meaning . . . . [Although] as a practical matter, it would be impracticable and costly to undo New Deal and Great Society or to amend the Constitution to authorize these programs.”<sup>95</sup>

But, this strategic decision may have costs. The short-term gains for freedom (striking down the mandate) may be in tension with undermining constitutionalism (a jurisprudence supporting a libertarian Constitution).<sup>96</sup> This constitutionalism is an important protection for freedom in the long term. By not advancing these ideas when it counts the most, the jurisprudence may be somewhat undermined. By refraining from advancing originalist arguments in support of originalist ends, the methodology may become divorced from, and in effect dilute the theory.

Perhaps *NFIB* represents a short-term victory for the ends, but a long-term loss for the means. Solum observes that this approach might “mitigate the damage done to original meaning by precedent and practice.”<sup>97</sup> However, if limited government can be achieved without primarily pursuing originalism (such as the ACA case), a cynic could argue that originalism is merely a front for what libertarians seek. In other words, when libertarianism becomes unmoored from originalism, the objective nature of the libertarian Constitution becomes weaker.<sup>98</sup>

By not advancing their signature methodology, libertarians risk undermining, and perhaps sacrificing, the normative appeal of originalism as an objective school of constitutional thought. Should libertarians simply try to achieve the goals of a freer society and limited government without concerns for how the arguments are made? Or should libertarians seek to achieve limited government through originalism?

## 2. Faint-Hearted Originalism?

In an article criticizing Justice Scalia’s “faint-hearted” originalism, Randy Barnett found objectionable Scalia’s “willing[ness] to avoid objectionable outcomes that would result from originalism by invoking the precedents established by the dead hand of nonoriginalist Justices.”<sup>99</sup> However, Barnett rejected the premise that “if so lion-hearted a jurist as [Scalia] shrinks in practice from the implications of a theory he so

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<sup>95</sup> Solum, *supra* note 3, at 25.

<sup>96</sup> I credit Ilya Somin for this formulation. *See generally* Somin, *supra* note 89.

<sup>97</sup> Solum, *supra* note 3, at 25.

<sup>98</sup> *See also* Josh Blackman, *Originalism at the Right Time?*, 90 TEX. L. REV. 269, 282 (2012) (“Such a theory unmoors originalism from things that are original by relying on occurrences that postdate the enactment of the law.”).

<sup>99</sup> Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13 (2006).

vociferously defends . . . [then] originalism itself ought to be rejected as unworkable and ultimately unwise,” in that “Justice Scalia is simply not an originalist.”<sup>100</sup>

The challengers to the ACA were afflicted with a related strain of faint-heartedness as advocates. Barnett concedes that “[c]onstitutional conservatives don’t yearn for a bygone age of Supreme Court rulings.”<sup>101</sup> In other words, they do not seek the wholesale repeal of six decades of precedents. It may just be that the end goal of enforcing the entire Constitution requires the concession—though not acquiescence—of a number of nonoriginalist precedents. This sounds, however, somewhat faint-hearted.

While professing a deeply-held belief in restoring the lost Constitution, the challengers were willing to rely on—but not acknowledge—nonoriginalist precedents, to achieve what is in effect an originalist goal.<sup>102</sup> By focusing on this one law, the challengers were able to move the constitutional goalposts somewhat, to effect a change on the legal landscape, without a wholesale reversal of many twentieth century precedents.

Maybe we can call this approach “incremental originalism”—moving the Constitution towards original meaning without even arguing that non-originalist precedents should be overturned. Solum refers to this concession as “‘originalist second best’: given the practical impossibility of the first-best originalist interpretation of the Commerce Clause, the originalist might argue for doctrines that limits departures from original meaning to those required by practical necessity.”<sup>103</sup> Incremental originalism may be a pragmatic theory to reconcile constitutional originalism with faint-hearted originalism.

### 3. Advancing Originalism without Originalism

Perhaps this utilitarian calculus may indeed indirectly benefit originalism. By using non-originalist arguments to move the law toward originalist ends, the challengers ultimately strengthened our fidelity to the original meaning of the Constitution in a roundabout way. By garnering five votes to cabin the power of Congress, originalists accomplished just this task. In fact, the opinions of Chief Justice Roberts, and those of the joint dissenters, were replete with citations to founding-era sources, such as the *Federalist* and the ratification debates—this demonstrates originalism’s *gravitational pull*.<sup>104</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> Barnett, *supra* note 63.

<sup>102</sup> See Solum, *supra* note 3.

<sup>103</sup> *Id.* at 25.

<sup>104</sup> I thank Randy Barnett for helping me develop this formulation. See <http://joshblackman.com/blog/2012/11/18/originalisms-gravitational-pull-towards-original-meaning/>. This topic will be discussed in Barnett’s Dunwoody Lecture at the University of Florida in March 2013.

### III. ORIGINALISM'S GRAVITATIONAL PULL

#### A. Three Views of Federalism

In order to understand how a non-originalist argument advances originalism, we must first consider the nature of existing precedents. Randy Barnett explained that there are three views of federalism (and, I would add, relatedly, federalism's structural protection of individual liberty).<sup>105</sup>

First, there is the pre-1937 view, where the Court, unbound by modern precedents, can rule in accordance with the original public meaning of the Constitution.<sup>106</sup> Second, there is the New Deal-era view of federalism, wherein Congress has a plenary police power to do whatever it deems necessary, and any law that fits within the New Deal's ambit will be upheld.<sup>107</sup> Third, there is the "New Federalism" of the Rehnquist and now Roberts Court.<sup>108</sup>

This third strand can be best characterized as "this far, but no farther."<sup>109</sup> In other words, the New Federalism did not repudiate the New Deal view of federalism, nor did it effect a return to the pre-1937 view of federalism. Rather, it asserted that if the federal government seeks to assert a power that goes beyond what had already been upheld, it must justify that extension for an unprecedented assertion of power. Even under the New Federalism, the Court does not adjudge the constitutionality of the new law purely based on originalism, but instead based on what Chief Justice Rehnquist referred to as "first principles."<sup>110</sup> It is noteworthy that Justice Thomas's originalist opinion in *Lopez* was *not* joined by Justice Scalia (same for *Morrison*).<sup>111</sup> This tripartite taxonomy helps to explain why originalism has, and has not been, used successfully in recent cases.

Perhaps the best examples in the first category are *District of Columbia v. Heller*<sup>112</sup> and *McDonald v. Chicago*.<sup>113</sup> In these cases, the

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See also STEPHEN GUEST, RONALD DWORKIN 89 (3d ed. 2013) (discussing how case precedents exert a degree of "gravitational force" of fairness that is considered when deciding later cases).

<sup>105</sup> Josh Blackman, *Recording: Video and Recap: Randy Barnett, Neil Katyal, & Paul Clement on Federalist Society Panel on Obamacare* #FedSoc2012, JOSH BLACKMAN'S BLOG (Nov. 17, 2012), <http://joshblackman.com/blog/2012/11/17/video-and-recap-randy-barnett-neil-katyal-paul-clement-on-federalist-society-panel-on-obamacare-fedsoc2012/>; see also *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (holding that "individual liberty secured by federalism is not simply derivative of the rights of the States").

<sup>106</sup> See *Carter v. Carter Coal*, 298 U.S. 238 (1936); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>107</sup> See *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>108</sup> See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>109</sup> See John Valauri, *Baffled by Inactivity: The Individual Mandate and the Commerce Power*, 10 GEO. J.L. & PUB. POL'Y 51, 63 (2012) (describing the "thus far method and justification of constitutional line drawing").

<sup>110</sup> *Lopez*, 514 U.S. at 552.

<sup>111</sup> *Id.* at 584.

<sup>112</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>113</sup> *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020 (2010).

Court was largely writing on a blank slate—precedential *open fields*, as opposed to deep in the *thicket*.<sup>114</sup> The Court was in no way bound by any sort of New Deal compromise, as the precedential slate was clear. Thus, the Court was free to receive, and did apply originalist arguments. In fact, both the majority and dissent in *Heller* and *McDonald* advanced originalist arguments.<sup>115</sup>

For decades, until *Lopez* and *Morrison* and other Rehnquist-era precedents, the Supreme Court was steadfastly locked in the second zone of the New Deal vision of Federalism. To paraphrase Larry Solum, that gestalt had crystallized. However, originalism's gravitational pull would crack that chrysalis.

#### B. Tugging Originalism, Wobbling Constitution

With my most sincere apologies to Judge Wilkinson, this *cosmic constitutional theory*<sup>116</sup> (quite literally) is instructive. In our solar system, eight planets orbit around the Sun. The gravitational pull of our nearest star keeps the planets in orbit. But (to grossly oversimplify), gravity pulls both ways.<sup>117</sup> Our planet exerts a pull, however small, on our star. To the extent that the planet exerts a pull on the star, the star will wobble a bit *towards* the planet.<sup>118</sup> This principle of physics has enabled astronomers to locate planets outside of our solar system (extrasolar planets).<sup>119</sup> Astronomers are only able to detect extrasolar planets—which are too small to be visible even with advanced telescopes—by measuring shifts in the movement of stars. If a star “wobbles,” that is a sign that a planet's gravitational forces is pulling on it.

In our jurisprudential solar system, think of our star as our Constitution. Various planets that orbit the star represent different constitutional theories. The strength of the theory can be viewed as a

<sup>114</sup> See Josh Blackman, *Originalism in Open Fields and In The Thickets*, JOSH BLACKMAN'S BLOG (Jan. 25, 2013), <http://joshblackman.com/blog/2013/01/25/originalism-in-open-fields-and-in-the-thickets/>.

<sup>115</sup> Josh Blackman, Alan Gura & Ilya Shapiro, *The Tell-Tale Privileges or Immunities Clause*, 2010 CATO SUP. CT. REV. 163 (2010); Josh Blackman, *Originalism for Dummies* 2–17 (Working Paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1318387](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1318387).

<sup>116</sup> J. HARVIE WILKINSON, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* (2012). My review of Judge Wilkinson's book, titled *A Brief History of Judging: From the Big Bang to Cosmic Constitutional Theory*, is available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2179073](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179073) and <http://www.concurringopinions.com/archives/2013/01/book-review-a-brief-history-of-judging-from-the-big-bang-to-cosmic-constitutional-theory.html>.

<sup>117</sup> Newton and Planetary Motion, UNIV. OF LA.-LINCOLN, [http://astro.unl.edu/naap/pos/pos\\_background2.html](http://astro.unl.edu/naap/pos/pos_background2.html) (last visited Feb. 3, 2013).

<sup>118</sup> Phil Plait, *A tiny wobble reveals a massive planet*, DISCOVER (May 29, 2009, 7:00 AM), <http://blogs.discovermagazine.com/badastronomy/2009/05/29/a-tiny-wobble-reveals-a-massive-planet/>.

<sup>119</sup> *NASA's Hubble Reveals a New Class of Extrasolar Planet*, HUBBLESITE (Feb. 21, 2012, 9:00 AM), <http://hubblesite.org/newscenter/archive/releases/2012/13/full/>; CAL. INST. OF TECHNOLOGY, *PlanetQuest: The Search for Another Earth*, NASA Jet Propulsion Laboratory, <http://planetquest.jpl.nasa.gov/> (last visited Feb. 3, 2013).

function of the gravitational pull the planet places on the star. If a theory has some pull on the star, even if the theory is not that close to the star itself, it still has some influence.

The tug of originalism, ever so slight, has been the force that has helped to break federalism free from its New Deal-imposed chrysalis.

Originalist scholarship began to emerge in the 1970s and 1980s that showed that the Court had departed from the original understanding of the Constitution in the New Deal cases, particularly with respect to federalism and structural protections of individual liberty. This scholarship exerted a pull on the Court's jurisprudence, ever so subtle at first, but soon enough the law, like a star being attracted to a planet, began to wobble.

Progressives observed this wobble, worried, and hoped that the Constitution would remain in the sole-orbit of the New Deal. Cases like *New York v. United States*,<sup>120</sup> *United States v. Lopez*,<sup>121</sup> *Printz v. United States*,<sup>122</sup> *United States v. Morrison*,<sup>123</sup> *Seminole Tribe v. Florida*<sup>124</sup> and others collectively dubbed part of the "New Federalism," have proven otherwise.

Importantly, none of these cases were argued in terms of restoring the original meaning of the Constitution. The advocates did not need to. It was sufficient for the Justices to know that errors were made, those errors would not be fixed—in Justice Scalia's words, they were "water over the dam."<sup>125</sup> However, with this understanding, the Court should *go no further* from the Constitution's original meaning without a sufficient justification from the government. In each case, the government failed to meet that burden, and the Court would go *this far, but no further*.

Consider *Gonzales v. Raich*,<sup>126</sup> where Randy Barnett—one of the most prominent originalists—did not advance an originalist argument. He did not ask the Court to overturn *Wickard* (other than in a perfunctory sentence in the brief).<sup>127</sup> Barnett's arguments accepted the legitimacy of *Wickard*, but asked the Court to go no further. But Barnett did not need to advance an originalist argument in *Raich*. I think it was not satisfactory to simply say that advancing an originalist argument would be a losing argument. The constitutional force of originalist scholarship documenting how the

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<sup>120</sup> *New York v. United States*, 505 U.S. 144 (1992).

<sup>121</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>122</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>123</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>124</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>125</sup> Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U.L. REV. 169, 191 (2012).

<sup>126</sup> *Gonzalez v. Raich*, 545 U.S. 1 (2005).

<sup>127</sup> Josh Blackman, *Randy Barnett's Changed Tune on Precedents and Unprecedentedness?*, JOSH BLACKMAN'S BLOG (MAY 29, 2012), <http://joshblackman.com/blog/2012/05/29/randy-barnetts-changed-tune-on-precedents-and-unprecedentedness/>.



New Deal Court got the Commerce Clause wrong exerted the necessary pull on the Court.

*Raich*, ultimately, did not turn out in Barnett's favor as the Justices saw that it did not go further than *Wickard*, so no further justification was necessary.<sup>128</sup> In other words, while *Lopez* and *Morrison* went too far, *Raich* was still in the New Deal settlement's inner-orbit. Perhaps one of the most misunderstood lessons after *Raich* was whether this case presented a repudiation of the New Federalism.<sup>129</sup> Viewed in terms of the "this far, but no farther" lens, the answer is no. The "New Federalism" did not go up in smoke with *Raich*.<sup>130</sup>

### C. "New Federalism" and *NFIB*

*NFIB v. Sebelius* continues the movement of the "New Federalism." Though the law ultimately survived, I would caution you not to get too hung up on counting the votes (the challengers got fourteen out of the necessary fifteen votes in the words of Paul Clement<sup>131</sup>), which very well may have changed. Rather than considering how it was ultimately decided, instead we should look at how the case was litigated over the course of two years from the district court all the way to the Supreme Court. Was this a case where the government was able to easily argue that the ACA was covered by the New Deal precedents like *Wickard*? Well they tried, but failed, as most judges, even those that ruled in favor of the government, acknowledged that this case was different, in at least one or more respects.<sup>132</sup> Academics who stated that this was an open-and-shut case soon had to change their tune and refine their arguments when its failings were highlighted.

Instead, the government tried to justify why this law was constitutional, beyond simply citing *Wickard* and *Raich*. They did this by focusing on the importance of regulating the costs of the health care market, and stressing how Congress had the power to address this national problem.<sup>133</sup> In other words, the government's behavior acknowledged that this law was going beyond what Congress had done before, and the United States was attempting to justify this departure.

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<sup>128</sup> *Id.*

<sup>129</sup> Indeed, there was a "generational" divide within the Solicitor General's office as to how to treat *Raich*, and whether it represented a repudiation of *Lopez* and *Morrison*. This divide is evident in the brief Acting Solicitor General Neal Katyal submitted to the 4th, 6th, and 11th Circuit Courts of Appeals, and the briefs Solicitor Donald Verrilli submitted to the D.C. Circuit Court of Appeals and the United States Supreme Court. The former position stressed that *Lopez* and *Morrison* were the outer bounds of the government's power, while the latter eschewed those limiting principles. For further discussions of the government's evolving view of the scope of the "New Federalism," see BLACKMAN, *supra* note 1.

<sup>130</sup> See CHEECH AND CHONG'S UP IN SMOKE (Paramount Pictures 1978).

<sup>131</sup> Blackman, *supra* note 105.

<sup>132</sup> See generally Nat. Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

<sup>133</sup> See *id.* at 2584–85.



This is the *modus operandi* for governmental litigation under the New Federalism: this far, but no farther, without a sufficient justification. As much as the government would hate to admit it, this case was not an open-and-shut case of simply applying existing precedents. The United States' unwillingness to identify a limiting principle in terms of *Lopez*, *Morrison*, and *Raich* is evidence of that fact. The government's decision not to rely on existing precedents was due to a fear that *Lopez* and *Morrison* proved "too capacious," and "wouldn't seem robust enough of a limiting principle under these circumstances." In other words, the Court's precedents did not resolve this matter, and the government assumed the burden of going further.<sup>134</sup> *NFIB* fits squarely (roundly?) within the third ring of federalism.

#### D. Originalism's Righting of Our Constitutional Lodestar

Because we are dealing with the "New Federalism," where unlike *Heller* or *McDonald*, it is infeasible to advance originalist arguments in the absence of countervailing precedents, in *NFIB*, originalism was only needed to have an indirect effect. It was clear that the ACA was not supported under the original understanding of the Commerce Clause. Barnett and others conceded this at the outset, but argued not in terms of originalism. Rather they argued why this case went further than the New Deal precedents (this is really what "unprecedented" means), and how the government failed to meet its burden of justification. But, the years of originalist scholarship demonstrating how the Commerce Clause was originally understood imposed the burden on the government to demonstrate this further departure from 1787.

In other words, the originalist scholarship placed a mild pull on the star, and created the sense that perhaps it should not be pulled in the other direction. The Chief Justice's vote was not the only thing wobbling in *NFIB*.

The potency of originalism cannot be measured simply by assessing whether originalist arguments are advanced, and ultimately accepted in any given case. Originalism's strength can be seen as a factor of what view of federalism and liberty the Court is laboring under. Originalism lays the intellectual groundwork for understanding how a particular law deviates from what has come before. Sensing how that theory pulls and tugs on our constitutional lodestar provides enough of an indication that an act of Congress has gone too far, and there needs to be an adequate justification.

So, in this sense, with the "New Federalism," originalism's gravitational pull tugs the Constitution towards original meaning, even if originalism is not directly advanced in a case. Originalism is the hidden force that causes other things to shift, even if we do not directly see why.

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<sup>134</sup> BLACKMAN, *supra* note 1.

This is why “this far and no further” works, even when originalist arguments need not be made.

#### IV. POPULAR ORIGINALISM?

The unsettling of our constitutional gestalt between 2009 and 2012 may be attributed to two important, and interrelated factors inherent in the challenge to the Affordable Care Act: legal theories and the social movements supporting them. I do not assert that the popular support for the challenge solely determined the constitutionality of the mandate. Nor do I claim that the theories of the Commerce and Necessary and Proper Clauses were adequate to render the mandate unconstitutional.

Neither approach was by itself enough. Here, the whole was greater than the sum of its parts. The popular constitutionalist movement, along with the theoretical arguments were both necessary, but not sufficient conditions to advance the challenge. However both fronts, when engaged in tandem proved quite potent—particularly because the original understanding of the Constitution animated both avenues.

Originalism’s tug was felt in both aspects of this challenge. The legal arguments, though grounded in terms of the Court’s modern jurisprudence—acquiescing to many nonoriginalist precedents—gravitated towards an originalist understanding of enumerated powers, federalism, and individual liberty. Likewise, the social movement opposed to the law, embodied most prominently in the Tea Party, was organized *loosely* around an originalist vision of the Constitution and founding of the United States.<sup>135</sup> In this sense, the two-pronged approach of popular constitutionalism and legalism were in the orbit of originalism, even if originalism was not at the fore of the challenge. This approach is similar to what Rebecca Zietlow has referred to as *popular originalism*.<sup>136</sup>

Indeed, some of the most successful constitutional movements in our nation harkened back to our foundational charter. The Abolitionist Movement, led prominently by Lysander Spooner, cited the Declaration of

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<sup>135</sup> See Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. COLLOQUY 288, 298 (2011) (“The Tea Party movement is a surprising hybrid of these two positions, a sort of popular originalism, a popular movement that purports to advance originalist interpretations.”).

<sup>136</sup> See Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 487 (2012) (“Finally, and perhaps most importantly, originalism and popular constitutionalism can lead in very different directions when determining the relationship between democratic participation and constitutional development. The popular originalism of the Tea Party raises the issue of whether it is possible to be faithful to the original meaning of the Constitution while engaging in democratic politics. If not, popular originalism could paradoxically lead to a reduction of the role of democracy in constitutional interpretation.”); see also Lee Strang, *Originalism as Popular Constitutionalism?*, 87 NOTRE DAME L. REV. 253, 254 (“[T]here is no necessary analytical connection or disjunction between” originalism and popular constitutionalism); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 672 (2009); see generally Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism: Theoretical Possibilities and Practical Differences*, 53 ARIZ. L. REV. 827 (2011).

Independence's promise of equality, and the Constitution's omission of any reference to slavery to support the legal argument that slavery was unconstitutional.<sup>137</sup> Susan B. Anthony, leader of the Suffrage Movement, broadly read the 14th Amendment to guarantee equality to "all persons."<sup>138</sup>

In many respects, *District of Columbia v. Heller* could be understood as a product of popular originalism.<sup>139</sup> The legal theories that supported the individual right to keep and bear arms were supported by originalism. Likewise, the social movement buttressing firearm ownership—led most prominently by the National Rifle Association (NRA)—waxed nostalgic for the liberties of the revolutionary-era minutemen (though the NRA tried repeatedly to sabotage the case).<sup>140</sup>

What made the evolution of *NFIB v. Sebelius* so *unprecedented*, at least as far as constitutional litigation goes, is the seamless union of the theories and the movement at all levels of government and the populace. The political and social climate in which this challenge came of age created a veritable perfect storm for this popular originalist case. Learning how to replicate this dual-focused phenomenon may be the most enduring lesson for future constitutional challenges.

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<sup>137</sup> Helen J. Knowles, *Seeing the Light: Lysander Spooner's Increasingly Popular Constitutionalism*, available at <http://hknowles.typepad.com/files/knowles---ls-and-popular-constitutionalism---law-and-history-review-final-draft-1.pdf>.

<sup>138</sup> Jose Felipe Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 34, 36 n.159 (2008).

<sup>139</sup> For a related, but different take on *Heller's* popular constitutionalism, see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192–93 (2008) ("*Heller's* originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism. It situates originalism's claim to ground judicial decision making outside of politics in the constitutional politics of the late twentieth century, and demonstrates how *Heller* respects claims and compromises forged in social movement conflict over the right to bear arms in the decades after *Brown v. Board of Education*.").

<sup>140</sup> See generally ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (2011); Josh Blackman, *Book Reviews: The Supreme Court's New Battlefield*, 90 TEX. L. REV. 1207 (2012) (reviewing Winkler's work).