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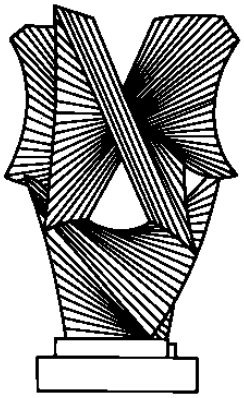

TIERS OF SCRUTINY IN ENUMERATED POWERS JURISPRUDENCE

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THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

2013

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Tiers of Scrutiny in Enumerated Powers Jurisprudence

Aziz Z. Huq†

This Article identifies and analyzes the recent emergence of a "tiers of scrutiny" system in Supreme Court jurisprudence respecting the boundaries of Congress's enumerated powers. The inquiry is motivated by the Court's recent ruling on the federal healthcare law, which demonstrated that the national legislature's election among its diverse textual sources of authority in Article I can have large, outcome-determinative consequences in constitutional challenges to federal laws. This is so because the Court not only delineates each power's substantive boundaries differently but also applies distinct standards of review to the various legislative powers enumerated in Article I and elsewhere in the Constitution. Variation in the standard of review generates both synchronic and diachronic oscillation in the quantum of empirical justification and means-end rationality demanded of Congress. This observed heterogeneity in the judicial demand for legislative rationality and empirical evidence is quite distinct from questions of how broadly or narrowly the substance of each enumerated power is defined.

This Article's threshold contribution is a comprehensive documentation of variation in doctrinal formulae concerning the standard of review in enumerated powers cases. Having demonstrated the existence of tiers of scrutiny for enumerated powers, it then evaluates their use in enumerated powers jurisprudence. Drawing on political science scholarship, social choice theory, and public choice theory, it demonstrates that the Court's use of tiers of scrutiny has deleterious effects on judicial and legislative incentives and behavior. This Article then identifies six potential justifications for the Court's emergent practice of calibrating judicial review differentially by enumerated power. Closely examining each of those six justifications for stratified review, it finds all of them wanting. At the same time as it creates negative externalities, therefore, the practice of tiered review for enumerated powers lacks any compelling normative justification. By abandoning the emerging tiers of scrutiny and instead employing a lockstep approach to the review of enumerated powers, this Article suggests, federal courts would reduce opportunities for strategic behavior by judges and elected officials. The proposed doctrinal reformulation would also introduce clarity into a currently opaque, yet abidingly important, domain of public law.

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INTRODUCTION

More than two centuries after the Constitution's ratification, questions persist about how federal courts should superintend Congress's diverse and heterogeneous enumerated powers.[1] In the October Term 2011 alone, the Supreme Court issued divided opinions about the Commerce Clause, the Taxing Power, and the Spending Power (all in one landmark judgment concerning

[1] For an example of Congress's diverse enumerated powers, see US Const Art I, § 8 (enumerating regulatory powers, including the Taxing Power and the power to regulate interstate and foreign commerce); US Const Art IV, §§ 1, 3–4 (granting authority to regulate interstate relations, territories, and to protect states against invasion and domestic violence); US Const Amends XIII § 2, XIV § 5, XV § 2 (granting Congress authority to enact legislation with respect to three post–Civil War Amendments); US Const Amend XVI (granting power to levy and collect taxes); US Const Amends XIX, XXIII § 2, XXIV § 2, XXVI § 2 (granting power to enforce various voting rights).

the 2010 federal healthcare law),[2] about § 5 of the Fourteenth Amendment,[3] and about the Copyright Clause.[4] In each case, the Court divided not only on how to draw *substantive* boundaries on federal power but also on the *methodological* question of the appropriate standard of review. The Justices, that is, disagreed not only about outcomes but also about the scope and nature of the deference owed to Congress's empirical and policy judgments.

Out of these methodological fractures has emerged a system of de facto "tiers of scrutiny" for the enumerated powers. Federal legislators' election among their distinct sources of constitutional authority enumerated in Article I and elsewhere in the Constitution consequently yields divergent species of judicial scrutiny characterized by more or less intense attention to the factual foundations and means-ends rationality of a federal legislative enactment.[5]

Judicial recourse to a tiered system for constitutional review is, of course, familiar to legal scholars from the fundamental rights and equal protection contexts. In those jurisprudential domains, the Court's taxonomies of constitutional challenges—each typically organized around either two or three tiers of review—facilitate adjudication by providing off-the-rack decision rules.[6] By establishing stable and predictable definitions of litigants' burdens of persuasion and production, judicial employment of tiers of scrutiny lowers decision costs and expedites litigation.

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[2] See generally *National Federation of Independent Business v Sebelius*, 132 S Ct 2566 (2012) ("The Healthcare Cases").

[3] See *Coleman v Court of Appeals of Maryland*, 132 S Ct 1327, 1333–35 (2012).

[4] See *Golan v Holder*, 132 S Ct 873, 878 (2012). Another important enumerated power, which happened not to be considered in October Term 2011, derives from the Naturalization Clause. Congressional power respecting not just naturalization but immigration more generally has been characterized in sweeping terms. See, for example, *Galvan v Press*, 347 US 522, 530–32 (1954); *Harisiades v Shaughnessy*, 342 US 580, 587, 591 (1952).

[5] Consider Robert C. Post, *Congress & the Court: The Scope of National Legislative Power*, 137 Daedalus 81, 81–82 (Fall 2008) ("The Court [has] struck down national legislation on the ground that Congress had failed to compile a sufficiently detailed and convincing record to justify encroachment on the sphere of state sovereignty.").

[6] The literature on tiers of scrutiny is too extensive to catalogue. For an excellent (and skeptical) discussion in the equal protection context, see generally Suzanne B. Goldberg, *Equality without Tiers*, 77 S Cal L Rev 481 (2004). See also Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich L Rev 213, 214–19 (1991) (charting the history of standards of scrutiny). For a similar discussion in the First Amendment context, see Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U Ill L Rev 783, 787 (illustrating "the adoption of the formal standards of review developed in the equal protection arena . . . into the edifice of First Amendment law").

But even fleeting familiarity with that jurisprudence reveals how important the Court's election of a tier of review can be. Indeed, it is practically a truism that the justices' threshold decisions about how to allocate constitutional rights disputes *among* tiers can have and do have a large, perhaps outcome-dispositive, significance in many strands of individual rights adjudication.[7]

Similarly, the Court's choice among tiers can determine the fate of a federal law in the enumerated powers context. Some Justices have already noted that the Court's election of a standard of review has been outcome dispositive in recent Commerce Clause[8] and Fourteenth Amendment litigation.[9] Commentators have made a parallel observation respecting litigation pursuant to the Spending Power.[10] Tiers of scrutiny for the enumerated powers, like their kindred in the fundamental rights and equal protection jurisprudence, may be refractory doctrinal minutiae. But they can also be intricacies of grave national consequence.

Despite its importance, the Court's recent deployment of tiers of scrutiny as a tool in evaluating Congress's deployment of enumerated powers has elicited little scholarly comment or

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[7] Even if higher tiers of scrutiny are not always "fatal in fact," they exercise a powerful influence in speech and equality cases. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court; A Model for a Newer Equal Protection*, 86 Harv L Rev 1, 8 (1972); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand L Rev 793, 796–97 (2006) (finding that nearly one-in-three laws survive strict scrutiny challenges, but that survival rates vary according to the right at issue).

[8] Compare *United States v Lopez*, 514 US 549, 567 (1995) (Rehnquist) (refusing to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"), with id at 603 (Souter dissenting) ("In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce 'if there is any rational basis for such a finding.'").

[9] Compare *Board of Trustees of the University of Alabama v Garrett*, 531 US 356, 370 (2001) (Rehnquist) (finding that "Congress assembled only such minimal evidence of unconstitutional state discrimination" that it failed to establish the evidentiary predicate for constitutional action), with id at 376 (Breyer dissenting) (criticizing the majority for "[r]eviewing the congressional record as if it were an administrative agency record"). See also Post, 137 Daedalus at 81–82 (cited in note 5).

[10] See Lynn A. Baker and Mitchell N. Berman, *Getting off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 Ind L J 459, 460 (2003) ("[M]any commentators . . . have proposed that Congress should respond to the Rehnquist Court's states' rights decisions by using the spending power to circumvent those limitations on congressional power."). See also Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 Cornell L Rev 1, 32–33 (2003); Lynn A. Baker, *Conditional Federal Spending after* Lopez, 95 Colum L Rev 1911, 1916, 1962–66 (1995); Thomas R. McCoy and Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 S Ct Rev 85, 125–26.

analysis. Most studies of congressional power linger rather on "high" theory matters of interpretive methodology, asking what hermeneutic tools—text, original semantic meaning, consequences, post–enactment practice—should be invoked when interpreting a given enumerated power.[11] Questions of "law declaration," that is, the judicial elaboration of "legal rules, standards, and principles . . . that [ ] yield[] a proposition that is *general* in character,"[12] dominate this debate, casting into shadow technical but highly consequential matters about how factual questions are evaluated, what kind of means-ends rationality is demanded, and how legal standards are applied to legislative records. No doubt deep questions of constitutional first principles matter. But scaling the commanding heights avails little if one fails to grasp the tactical dynamics of the litigation quagmire.

To remedy that gap in the legal scholarship, this Article analyzes and evaluates the emergent tiers of scrutiny system in enumerated powers doctrine. My first ambition is simple and descriptive. I aim to show how standards of review have varied both diachronically across time and synchronically among different grants of congressional authority. Invocation of some enumerated powers now triggers scrutiny that, if not "strict," then approaches that lofty rank.[13] By contrast, other enumerated powers elicit milder, less exigent forms of judicial attention.[14] This analysis casts light on one important modality of legal change: by recalibrating the standard of review—and thereby altering Congress's evidentiary burden of production—the Court can either enlarge or diminish the scope of legislative discretion without changing the verbal formulation of a power's substantive scope.

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[11] In 1982, Professor Philip Bobbitt developed a typology of constitutional arguments that remains useful today. See Philip Bobbitt, *Constitutional Fate* 7–23, 93–94 (Oxford 1982). For examples of fine recent scholarship that engages in this kind of interpretive exercise respecting particular clauses, see generally Jeanne C. Fromer, *The Intellectual Property Clause's External Limitations*, 61 Duke L J 1329 (2012); Jack M. Balkin, *Commerce*, 109 Mich L Rev 1 (2011).

[12] Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum L Rev 229, 234–35 (1985).

[13] Strict scrutiny, despite its reputed rigor, is more internally variegated, and on occasion amounts to "little more than weighted balancing, with the scales tipped slightly to favor the protected right." Richard H. Fallon Jr, *Strict Judicial Scrutiny*, 54 UCLA L Rev 1267, 1271 (2007). Construed in that fashion, it is not so different from the treatment of some enumerated powers.

[14] Compare *South Dakota v Dole*, 483 US 203, 207 (1987) (deferring substantially to Congress's judgment when reviewing a regulation governed by the Spending Power and upholding the law as constitutional), with *Lopez*, 514 US at 559, 567–68.

My second goal is to evaluate the new tiers of scrutiny for enumerated powers as a device for attaining constitutional goals.[15] Despite compelling arguments against viewing constitutional provisions "in splendid isolation,"[16] there is to date no synoptic analysis of whether the standard of review used by federal courts should vary by enumerated power. In the late 1990s, to be sure, some scholars developed critiques of the Court's treatment of legislative facts pursuant to § 5 of the Fourteenth Amendment.[17] While illuminating, these treatments were pitched narrowly: They were largely condemnations of the Rehnquist Court's federalism swerve. As the Court continues to flesh out the tiers of scrutiny for enumerated powers, the time is ripe for a more comprehensive and dispassionate analysis of the discontinuous forms of judicial scrutiny used to temper Congress's powers.

To that end, I consider whether there is a compelling justification for tiered review based on the constitutional text, original meaning, individual rights, federalism, or political process pathologies. In pursuing this inquiry, I assume that the aim of judicial doctrine is to promote a bundle of normatively desirable constitutional "goods." These goods might be taken to include, for example, social welfare, the promotion of democratic values, and the elimination of strategic or self-dealing behavior by political or

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[15] Several useful pieces have been written on the more general question of how the Court instantiates general constitutional norms in the context of specific cases. For the best example, see Richard H. Fallon Jr, *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv L Rev 54, 67–73 (1997) (cataloging eight species of doctrinal tests in constitutional law).

[16] Akhil Reed Amar, *Intratextualism*, 112 Harv L Rev 747, 788 (1999) (generally arguing against clause-bound methods of interpreting the Constitution).

[17] For the most important pieces in this largely critical literature that I draw upon in what follows, see generally Robert C. Post and Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 Ind L J 1 (2003); Robert C. Post and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L J 1943 (2003); Philip P. Frickey and Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L J 1707 (2002); William W. Buzbee and Robert A. Schapiro, *Legislative Record Review*, 54 Stan L Rev 87 (2001); A. Christopher Bryant and Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L Rev 328 (2001); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan L Rev 1127 (2001); Ruth Colker and James J. Brudney, *Dissing Congress*, 100 Mich L Rev 80 (2001); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 Duke L J 1169 (2001); Robert C. Post and Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L J 441 (2000).

judicial elites.[18] Based on that normative analysis, I conclude that there is no positive justification for currently observed variance in standards of review.

I instead find that varying the intensity of judicial review among enumerated powers has negative externalities in an important subset of cases. Instead of current arrangements, I suggest, judicial review should move in lockstep for all of Congress's enumerated powers. There ought, in other words, to be no tiers of scrutiny in enumerated powers jurisprudence.

My analysis and proposed reform are narrowly calibrated along two dimensions. First, I make no assumption about the appropriate general theory of judicial review or the correct institutional allocation of constitutional interpretive authority.[19] It is sufficient for my purposes to say that the Constitution seems to vest national political institutions with incentives that conduce to some delegation—but not complete abdication—of interpretive responsibility to the federal courts.[20] The result has been a network of "weak departmentalist" practices by which the authority to determine the constitutionality of statutes or executive actions is shared between courts and political actors.[21] My

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[18] I am cognizant of the fact that the quantum of democratic decision making in political systems with a written constitution is not self-evident. I also recognize that design margins sometimes associated with democracy, such as transparency, can have perverse effects. See Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* 183–215 (Oxford 2007). The argument developed here, however, touches upon neither of those important constraints on the instantiation of democratic values.

[19] It is no great simplification to say that the relevant literature here proceeds by either agreeing with or objecting to the deservedly canonical article by Professor James B. Thayer at the turn of the twentieth century that synoptically laid out the basis for judicial deference to the political branches. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129, 144 (1893) ("It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."). For divergent evaluations of Thayer's foundational thesis, compare Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum L Rev 1, 8 (1983) (labeling Professor Thayer's formula for judicial invalidation "too simplistic" for the elaborate body of modern constitutional doctrine), with F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 Notre Dame L Rev 1447, 1458–62 (2010) (rejecting arguments against Thayerian deference and suggesting that adopting a scheme of Thayerian deference is preferable).

[20] For a presentation of a similar view, see Mark Tushnet, *Why the Constitution Matters* 126–32 (Yale 2010) ("The Supreme Court's one of the institutions [national politicians] can pass the issues off to, at least if you can give the issue a constitutional spin."). See also Aziz Z. Huq, *Enforcing (but Not Defending) 'Unconstitutional' Laws*, 98 Va L Rev 1001, 1062 (2012).

[21] See Huq, 98 Va L Rev at 1010, 1034–37 (cited in note 20) (defining "weak departmentalism" as a situation where each of the three branches of federal government

aim here is to isolate and analyze one specific, yet consequential question—the appropriate standard of *judicial* review—within that complex network. I do not aim to elaborate here a full account of the entire system.

Second, I advance here a relatively narrow point about the doctrine: that judicial review of the enumerated powers should move in lockstep. But—and this is the important qualification—*I make no claim about whether constraints on federal legislative power can or should be strong or weak*. That is, I do not mean to resolve the question whether the federal government should be subject to across-the-board, exacting limitations to preserve federalism values and individual rights, or whether it should be given more leeway. The appropriate scope of federal power is a large, controversial question. Judges and commentators have weighed in on both sides from the dawn of the Republic onward, with results that fill libraries with distemper and hyperbole. No one new law review article can decide what boundaries are appropriately limned to circumscribe federal legislative power. It would be hubris to attempt as much, and I do not do so.

It also bears emphasis that the argument developed here takes doctrine as a meaningful unit of analysis. That is, I do not view doctrine as a wholly epiphenomenal consequence of exogenous political developments.[22] I further assume that judge and lawyer participants in American constitutional development accept the intellectual framework of legal doctrine with all its aporia and ambiguities. Role fidelity and the normative tug of legality as a public good, in my view, ensure that doctrine has some marginal effect beyond the brute force of political facts.[23] Consequently, I believe there is value in working toward integrity

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engages in independent constitutional interpretation on some matters but defers to the constitutional judgment of the other branches on others).

[22] I have elsewhere analyzed the development of judicial review from an external perspective attentive to political economy trends. See Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 Cal L Rev 579, 583 (2012). The relation between this external perspective and the "internal" perspective of doctrinal analysis is a complex matter since doctrine clearly accounts for facts exogenous to the law, but loses its integrity entirely if reduced entirely to such facts. My limited claim here is doctrine is an appropriate object of scholarly inquiry—and not that it is exhaustive of the determinants of judicial outcomes.

[23] Writing last year in these pages, I argued that "law and politics do not operate as *substitutes* in the regulation of executive authority" but "instead work as interlocking *complements*." Aziz Z. Huq, Book Review, *Binding the Executive (by Law or by Politics)*, 79 U Chi L Rev 777, 783 (2012). The same, I think, holds for judges. Indeed, it is likely that judges are even more sensitive to the formal demands of law than presidents. Unless one concludes that doctrine is purely a charade, in short, there remains value in doctrinal investigation.

and coherence in the doctrine quite apart from any analysis of the political economy of judicial review.

In brief then, my aim here is to strip away a layer of unnecessary complexity so as to render the current doctrinal framework pellucid and then critique the jurisprudential mechanisms used to make fundamental choices between weak and strong federal authority. If the Court were to adopt the reform proposed here, and switch to a unitary standard of review across enumerated powers, I believe that the Justices would no longer be able to obfuscate or occlude important first-order questions of how broadly federal authority should sweep. In lieu of decisions with greater symbolic than practical freight, the Court would have to take a clear position on the federal-state balance, as well as the limits of its own role in constitutional interpretation. To discard tiers of scrutiny in the fashion that I endorse here is, in other words, to eliminate a potent font of judicial evasion. It is further to move practical resolution of the quandary of federal-state relations into crisper focus in order to promote effectual public debate and dialogue.

The argument proceeds as follows. Part I catalogs the extensive heterogeneity in standards of review respecting the enumerated powers. In so doing, I err on the side of comprehensiveness. Part II then documents two deleterious consequences of tiers of scrutiny in enumerated powers jurisprudence. Those observations motivate a further inquiry into potential justifications for the application of a tiered structure of judicial review. Part III articulates and considers six potential justifications for tiers of scrutiny as a judicial tool for liquidating the metes and bounds of enumerated powers. It finds all of those justifications flawed. Together, Parts II and III make a case for an alternative lockstep approach to the judicial superintendence of federal legislative authority, wherein the standard of review does not vary by enumerated power.

I. STANDARDS OF REVIEW IN THE SUPREME COURT'S SUPERVISION OF ENUMERATED POWERS

This Part documents the central role standards of review play in enumerated powers jurisprudence. Because the Court does not always cogently distinguish first-order substantive rules from second-order rules allocating epistemic responsibility between courts and Congress, it is necessary to work power-by-power to

isolate the work done by the standard of review in respect to the judicial definition of an enumerated power.

I focus here on *endogenous* constraints on the enumerated powers—that is, I am not concerned with restraints that emerge from other parts of the Constitution, such as its individual rights provisions.[24] The former constraints, though, are often not ends in themselves but part of a strategy to maintain the equilibrium between federal and state governments.[25] Judicial review of the enumerated powers, as a result, is not merely a matter of glossing specific, narrow texts but often a site for the doctrinal elaboration of federalism values.[26]

I begin with a definition of my key term—the "standard of review"—and then engage in a systematic examination of how the Court has calibrated and recalibrated standards of review across enumerated powers.

A. Defining the "Standard of Review" Question

The assertion that the Court's "standard of review varies" across enumerated powers is not self-explanatory. To be clear from the start, I must identify precisely what I mean. By standard of review, I aim to single out two elements in judicial analysis that, in theory, can be distinguished from the task of declaring a generally applicable rule of law. These two elements are: (1) identification of relevant background "legislative facts" upon

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[24] The existence of rights-based constraints on federal power was not originally a given. We can imagine an alternative constitutional history, in which judges and lawyers took seriously Alexander Hamilton's argument in *The Federalist* that "bills of rights . . . are not only unnecessary . . . but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted." Federalist 84 (Hamilton), in *The Federalist* 575, 579 (Wesleyan 1961) (Jacob E. Cooke, ed). See also Gordon Wood, *The Creation of the American Republic, 1776–1787* 540 (North Carolina 1969) (quoting James Wilson to the effect that "[i]t would be very extraordinary to have a bill of rights, because the powers of Congress are expressly defined. . . . We retain all those rights which we have not given away to the general government") (second alteration in original). Relying on those statements, judges might have read the enumerated powers as limited by natural law and rights. Of course, that was a path not taken.

[25] See Jenna Bednar, *The Robust Federation: Principles of Design* 99–100 (Cambridge 2009).

[26] See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 Wm & Mary L Rev 1733, 1748–49 (2005) ("The open-textured nature of the Constitution's structural commitments calls for judicial implementation through doctrine: There is simply no way to administer our federal system without developing rules to flesh out the allocation and balance of authority.").

which the invocation of an enumerated power rests[27] and (2) "norm elaboration," through which a general rule is applied to the specific facts and details of a challenged statute.[28] For the purpose of this analysis, I treat both elements as distinct from "law declaration."[29] I lump both elements under the portmanteau term standard of review for the sake of expository parsimony.[30]

We can unpack further the idea of a standard of review by observing the Court in action in a hypothetical case. The Court's first task in approaching a controversy is to specify a substantive rule of decision.[31] Having done so, the justices must then assess the empirical evidence Congress has marshaled to demonstrate the existence of a problem that can be addressed by an enumerated power. They must often also consider the nexus between a tendered statutory solution and the relevant constitutional power—that is, its means-ends rationality. At this second stage, laws might not pass muster either because Congress fails to identify a pertinent problem or because the proffered legislative solution is inadequately tailored to constitutional specifications.[32] Delineating the standard of review, the Court decides

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[27] Legislative facts include "general facts about the state of the world that are not particularly within the knowledge of the parties with standing to appear before the court." Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 Duke L J 1, 10 (2011). See also David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U Pa L Rev 541, 552 (1991); Dean Alfange Jr, *The Relevance of Legislative Facts in Constitutional Law*, 114 U Pa L Rev 637, 640 (1966). The seminal account of the varieties of legislative fact was developed by Professor Kenneth Culp Davis. See Kenneth Culp Davis, *Facts in Lawmaking*, 80 Colum L Rev 931, 932–33 (1980). Consider Kenneth Culp Davis, *Judicial Notice*, 55 Colum L Rev 945, 952–59 (1955); Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv L Rev 364, 402–09 (1942).

[28] Monaghan, 85 Colum L Rev at 235–36 (cited in note 12). Professor Henry P. Monaghan uses the terms "[f]act identification" and "[l]aw application" to capture these ideas. Id. He is focused, however, on the facts implicated in a given case rather than on the factual foundations of a given law. Id at 233 & n 25. Hence, my borrowing of his terms involves some deviation from his usage.

[29] For a similar decomposition of the judicial role in constitutional adjudication, see Hessick, 85 Notre Dame L Rev at 1448–49 (cited in note 19) (distinguishing between instances in which "federal courts defer on questions of fact to the legislature" and the question whether they "defer on questions of constitutional interpretation").

[30] For similar employment of the term, see Devins, 50 Duke L J at 1176 (cited in note 17) ("Where facts should come into play . . . is in the selection of standards of review.").

[31] For a discussion of the various rules of decision available to the Court, see Fallon, 111 Harv L Rev at 67–106 (cited in note 15) (discussing the problem of developing doctrinal rules of decisions).

[32] See, for example, *United States v Morrison*, 529 US 598, 612 (2000) (noting the question of how much attenuation to permit between an enumerated power and a statute).

whether to impose a demanding or a weak burden of empirical production on Congress on both counts. To forego any such burden, however, "would substantially take back the decision to limit the legislature with rules enforced in part through the courts."[33]

In decomposing constitutional adjudication into (in essence) questions of law and questions of law's application to fact, I intend to make no deep claim about the fact/law distinction. No doubt there are "value judgments implicit in labeling a matter one of 'fact,'"[34] such that reasonable people can differ on specific applications. No doubt any fact/law distinction may be seen as one of degree, not kind.[35] And no doubt the Court is not consistently diligent in employing my categories. Nevertheless, the fact/law distinction still reflects how judges typically understand and carve up constitutional adjudication.[36] In that mundane and practical sense, it remains a meaningful gesture in our contemporary constitutional culture to distinguish disagreements about law from disagreements about empirics in most (if not all) instances. So long as the distinction of "legal question[s]" from questions of fact remains "a centrally important ordering device for allocating and distributing regulative authority among the various actors in the legal system,"[37] it will be a useful tool for dissecting the work of the justices.

B. Varieties of Judicial Review for Enumerated Powers

The institution of judicial review predates the 1787 Philadelphia Convention.[38] It entered the constitutional culture only *sotto voce*. Accounts of the federal courts' early behavior underscore judges' belief that only "the concededly unconstitutional act"

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[33] John Harrison, Book Review, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U Chi L Rev 1101, 1109 (2011).

[34] Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding under the Post–Civil War Amendments*, 59 Notre Dame L Rev 337, 377 (1984).

[35] See Monaghan, 85 Colum L Rev at 234–36 (cited in note 12).

[36] Most famously, *Marbury v Madison*, 5 US (1 Cranch) 137 (1803), is "conventionally understood . . . as requiring independent judicial judgments on questions of law," but not questions of fact. Henry P. Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 Colum L Rev 665, 675 (2012).

[37] Monaghan, 83 Colum L Rev at 4 (cited in note 19).

[38] See Philip Hamburger, *Law and Judicial Duty* 407–61 (Harvard 2008) (collecting cases from New Hampshire, New Jersey, North Carolina, and Rhode Island). For another account that also traces judicial review back in time beyond the Revolution to "a longstanding English corporate practice under which a corporation's ordinances were reviewed for repugnancy to the laws of England," see Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 Yale L J 503, 504 (2006).

could be invalidated.[39] Notwithstanding that original understanding, other strands of Founding-era thinking can be invoked to warrant more aggressive judicial review. Principal among these is a concern with federalism.[40] From its inception, the Constitution was intended to produce "a multiplicity and interplay of interests" from which "the true interest of the entire body of the people may shine."[41] Judicial enforcement of constraints on federal power was one way to accomplish that goal.[42] Consistent with this conception of judicial power, the Supreme Court has been in the business of speaking to the scope of congressional regulatory authority at least since 1824.[43]

My aim in what follows is to taxonomize judicial treatment of the enumerated powers. I therefore begin with the most litigated of those authorities, the Commerce Clause, before turning to the Spending Power, the Taxing Power, the Reconstruction Amendments, and the Intellectual Property Clause. To render the taxonomy manageable, however, I omit such *rara avis* of federal court contestation as the federal Property Clause[44] and congressional regulation of interstate compacts.[45]

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[39] Sylvia Snowiss, *Judicial Review and the Law of the Constitution* 34–35 (Yale 1990). See also Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 Harv L Rev 4, 79 (2001) (claiming that judicial review was originally "a power to be employed cautiously, only where the unconstitutionality of a law was clear beyond doubt"); William Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 227 (South Carolina 1995) ("[T]he fundamental interpretive corollary of judicial review [was that] only legislation that was unconstitutional beyond doubt should be declared void."); David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* 55 (Chicago 1985) (suggesting that a "lasting principle[] of construction [was] established before 1801" that "doubtful cases were to be resolved in favor of constitutionality").

[40] See Richard H. Fallon Jr, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U Chi L Rev 429, 439 (2002) ("There is no agreed-upon definition of constitutional federalism.").

[41] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 32 (Duke 1993).

[42] See id at 10.

[43] See *Gibbons v Ogden*, 22 US (9 Wheat) 1, 239–40 (1824). *Gibbons* did not involve the invalidation of a federal law as ultra vires; rather the Court upheld the relevant federal regulation of navigation. Id.

[44] See US Const Art IV, § 3, cl 2 (vesting Congress with "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). For an example of the Court's unwillingness to regulate this power, see *Valley Forge Christian College v Americans United for Separation of Church and State, Inc*, 454 US 464, 466, 485–86 (1982).

[45] See US Const Art I, § 10, cl 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State.").

Before turning, however, to the Commerce Clause, it is useful to say a word about how the enumerated powers interact with an ancillary mechanism at work alongside textual enumeration—the Necessary and Proper Clause.[46] The latter has long been read to vest Congress with wide discretion in its choice of means to achieve constitutionally permissible ends[47] (although language in one 2012 decision might be read to contract that freedom[48]). For the purpose of this analysis, I take it as given that the Necessary and Proper Clause applies uniformly to all the enumerated powers following Chief Justice Marshall's dictum that the clause "does not enlarge" or "restrain" congressional power under any particular clause.[49] To the extent the Necessary and Proper Clause provides a *consistent* gloss on Congress's power, however, it cannot explain *variation* in the standard of review among enumerated powers. As a result, it is not useful for the purposes of this analysis to break out and separately consider a Necessary and Proper component in respect to each enumerated power. Instead, I shall discuss each enumerated power as it is applied in the trenches, that is, already accounting for the potentially resolving and augmenting effects of the Necessary and Proper Clause.

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[46] US Const Art I, § 8, cl 18 (authorizing Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States").

[47] See *M'Culloch v Maryland*, 17 US (4 Wheat) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and the spirit of the constitution, are constitutional."). The Court recently reaffirmed the reach of the Necessary and Proper Clause. See *United States v Comstock*, 130 S Ct 1949, 1956 (2010) ("We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."). See also *Sabri v United States*, 541 US 600, 605 (2004).

[48] Chief Justice John Roberts used language in his opinion in *The Healthcare Cases* to the effect that the individual mandate was not "proper." *The Healthcare Cases*, 132 S Ct 2566, 2592 (2012) (Roberts) ("Even if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means."). This application of the Necessary and Proper Clause seems to piggyback on Chief Justice Roberts's Commerce Clause analysis, which focused on the perceived breadth of the federal government's claim to regulatory authority. As such it is not clear that it provides a new, freestanding constraint on the Necessary and Proper Clause. Id at 2591–92.

[49] *M'Culloch*, 17 US at 420. See also Harrison, Book Review, 78 U Chi L Rev at 1122 (cited in note 33) (finding "good reason to believe that the clause was inserted out of caution . . . and confirms what would otherwise be true: a main power brings its incidents with it").

1. The Commerce Clause.

Congress's power "[t]o regulate commerce . . . among the several states"[50] has long been pivotal to federal regulation of national life. Even at the Founding, such power was perceived as central to a federal design wherein "multiple independent levels of government could legitimately exist within a single polity" with a division of authority based on "subject matter."[51] As such, disputes over the Commerce Clause have occasioned bitter, ongoing disputes about the scope of the "commerce" amenable to regulation.[52] Those disputes have not in the main seemed to hinge upon the standard of review.[53] But to study the historical struggle over the Commerce Clause is to perceive that the standard of review has been a vital gateway for legal change.

Near the beginning of the first era of intense debate over the Commerce Clause, the Supreme Court issued a limiting construction of the Sherman Act[54] barring the federal government from regulating "local" activities such as sugar production.[55] That era closed in 1942 with the Court's endorsement of federal regulation of domestic wheat production.[56] Intervening doctrine drew key distinctions "between production and commerce and between direct and indirect effects on commerce"[57]—distinctions

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[50] US Const Art I, § 8, cl 3 (authorizing Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[51] Alison L. LaCroix, *The Ideological Origins of American Federalism* 5–6, 66 (Harvard 2010).

[52] For a study in dueling "original" meanings, compare Balkin, 109 Mich L Rev at 5–6 (cited in note 11) (arguing that "'commerce' meant 'intercourse' and it had a strongly social connotation[]" and hence "was broader than economics narrowly conceived"), with Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U Chi L Rev 101, 146 (2001) (advocating a narrower original meaning).

[53] The first extended Supreme Court discussion of the Commerce Power does not address the standard of review question. See *Gibbons*, 22 US at 194–95. *Gibbons* was more notable as "the beginning of incessant litigation over the extent to which state legislation is precluded by the commerce clause." Currie, *The Constitution in the Supreme Court* at 173 (cited in note 39). For examples of pre-1900 cases relying on *Gibbons*, see *Pensacola Telegraph Co v Western Union Telegraph Co*, 96 US 1, 9–11 (1878) (upholding congressional power to authorize interstate telegrams); *The Trade-Mark Cases*, 100 US 82, 96–98 (1879) (invalidating federal regulation of trademarks as not limited to those in interstate or foreign commerce).

[54] Ch 647, 26 Stat 209 (1890), codified as amended at 15 USC §§ 1–7.

[55] *United States v E. C. Knight Co*, 156 US 1, 14–18 (1895).

[56] *Wickard v Filburn*, 317 US 111, 119–29 (1942).

[57] Barry Cushman, *The Great Depression and the New Deal*, in Michael Grossberg and Christopher Tomlines, eds, *Cambridge History of Law in America* 268, 294 (Cambridge 2008). In that era, the Court also upheld national regulation of local activities on the ground that they occurred in the "stream of commerce." See, for example, *Board of*

both conservative and liberal Justices accepted as late as 1935.[58] Despite routinely invoking a presumption of constitutionality,[59] the Court employed those distinctions to invalidate numerous federal laws.[60]

My aim here is not an extensive retelling of that well-worn story. Rather, my aim here is to flesh out one pivotal mechanism of doctrinal change in that period: When the scope of Commerce Clause power moved, it was not through rejection of any of the aforementioned substantive dichotomies—at least initially. Instead, congressional power enlarged when the Court started applying familiar legal rules with a more deferential standard of review.

The enabling function of the standard of review emerges most starkly in rulings on New Deal interventions into the economy. In an important 1936 dissent from the Court's opinion striking down the Bituminous Coal Conservation Act of 1935,[61] Justice Benjamin Cardozo accepted the direct/indirect effects line but also emphasized that such "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective" and that "considerations of degree" matter.[62] Justice Cardozo endorsed an approach to "interpret[ation] with suppleness of adaptation and flexibility of meaning" to enable a

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Trade of the City of Chicago v Olsen, 262 US 1, 42 (1923) (commodities exchanges); *Stafford v Wallace*, 258 US 495, 520 (1922) (public stockyards).

[58] See, for example, *A. L. A. Schechter Poultry Corp v United States*, 295 US 495, 546 (1935). It is often forgotten that there were no dissents in *Schechter Poultry*. Even liberal Justices endorsed its formalist categories as part of "a conscious strategy for circumscribing the boundaries of national and local competence in a principled fashion." Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U Chi L Rev 1089, 1099 (2000). Rather than sublimated endorsements of untrammeled free market ideology, Professor Howard Gillman has argued that these universally shared categories "had their roots in principles of political legitimacy that were forged at the time of the creation of the Constitution and were later elaborated by state court judges as they first addressed the nature and scope of legislative power in the era of Jacksonian democracy." Gillman, *Constitution Besieged* at 10, 22–60 (cited in note 41).

[59] For contemporary endorsements of the presumption of constitutionality, see *Borden's Farm Products Co v Baldwin*, 293 US 194, 209 (1934) (holding that "if any state of facts reasonably can be conceived that would sustain" the challenged legislation, then "there is a presumption of the existence of that state of facts"); Henry Wolf, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv L Rev 6, 21 (1924).

[60] Consider, for example, the cases cited in Cushman, 67 U Chi L Rev at 1097–1114 (cited in note 58).

[61] Pub L No 74-402, ch 824, 49 Stat 991, repealed by the Bituminous Coal Act of 1937 § 20(a), Pub L No 75-48, ch 127, 50 Stat 72, 90.

[62] *Carter v Carter Coal Co*, 298 US 238, 327–28 (1936) (Cardozo dissenting), quoting *Schechter Poultry*, 295 US at 554.

legislative "power . . . as broad as the need that evokes it."[63] In so doing, he did not challenge the canonical doctrinal categories, but rather suggested they should be applied with "flexibility"—that is, deference—to accommodate legislative judgments about "need."[64]

Within a year, this subtly different perception of doctrinal tools migrated into a majority opinion. In 1937, Chief Justice Charles Evan Hughes endorsed an expansive construction of the National Labor Relations Act[65] by explaining that even though the regulated "activities may be intrastate in character," they still had "such a *close and substantial* relation to interstate commerce that their control is essential *or appropriate* to protect that commerce from burdens and obstructions, Congress could not be denied the power to exercise that control."[66]

Without abandoning the direct/indirect line, Chief Justice Hughes had introduced the notion that congressional regulation of intrastate commerce could be permitted if not "essential" but merely "appropriate."[67] By such subtle inflections in the formulations of judicial deference, Chief Justice Hughes weakened the requisite nexus between Commerce Clause and statute so as to give Congress more play in the regulatory joints.[68]

The following year, Justice Harlan Fiske Stone exported Chief Justice Hughes's notion into the economic due process context, where it expanded. Upholding the federal Filled Milk Act of 1923,[69] Justice Stone declared that

> the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or

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63 *Carter Coal*, 298 US at 328 (Cardozo dissenting).

64 Id.

65 Pub L No 74-198, ch 372, 49 Stat 449 (1935), codified as amended at 29 USC §§ 151–69.

66 *NLRB v Jones & Laughlin Steel Corp*, 301 US 1, 37 (1937) (emphasis added). Tellingly, Chief Justice Hughes cited *Schechter Poultry* in support of this proposition, showing that *Jones & Laughlin* did not break from past legal categories. See id at 37, citing *Schechter Poultry*, 295 US at 547.

67 *Jones & Laughlin*, 301 US at 37.

68 Dissenting in *Lopez*, Justice David Souter explained that Chief Justice Hughes's opinion in "*Jones & Laughlin* did not reject the direct-indirect standard in so many words; it just said the relation of the regulated subject matter to commerce was direct enough. But we know what happened." *United States v Lopez*, 514 US 549, 615 (1995) (Souter dissenting) (citation omitted).

69 Pub L No 67-513, ch 262, 42 Stat 1486, codified at 21 USC §§ 61–63.

> generally assumed it is of such a character as to preclude the assumption that it rests upon such *rational basis* within the knowledge and experience of the legislators.[70]

Justice Stone's "rational basis" formulation took three years to filter back into Commerce Clause jurisprudence. The case, of course, was *Wickard v Filburn*,[71] a challenge to the Agricultural Adjustment Act of 1938.[72] Yet *Wickard* was almost a constitutional nonevent. In his first two drafts of an opinion for the Court, Justice Robert Jackson directed a remand to the trial court for further factual findings about the nexus between the Act and interstate commerce.[73] By directing a remand, Justice Jackson assumed "empirical verification was essential" for validation of the Act.[74] In the end, instead of remanding, the Court set the case for reargument without seeking fresh briefing—a move that "foretold the abandonment of a court-centered, empirical methodology in Commerce Clause jurisprudence."[75] The momentousness of the occasion did not escape the more perspicacious of the Justices. In a contemporaneous memo, Justice Jackson observed that "the introduction of economic determinism into constitutional law of interstate commerce marked the end of judicial control of the scope of federal activity."[76] Full-throated deference had finally displaced the formalist dualisms of the pre–New Deal era.

Through these cases, changes to the verbal formulations of the Commerce Clause's substantive metes and bounds played a surprisingly secondary role. Instead, the scope of congressional power changed first via recalibration of standards of review. The nexus between a regulated subject and "interstate" commerce became increasingly slack. Judges yielded more and more deference to Capitol Hill. Traditional categories ultimately deliquesced without direct assault.

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[70] *United States v Carolene Products Co*, 304 US 144, 152 (1938) (emphasis added). This is the sentence to which the famous Footnote Four was appended.

[71] 317 US 111 (1942). A year earlier, the Court held that "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction." *United States v Darby*, 312 US 100, 115 (1941). That the Court so eschewed invalidation of Commerce Clause enactments on the ground they were pretextual does not mean, however, the Court could not go on to exercise some sort of stringent review of Congress's empirical judgments instead.

[72] Pub L No 75-430, ch 30, 52 Stat 31, codified as amended at 7 USC § 1281 et seq.

[73] Cushman, 67 U Chi L Rev at 1137–39 (cited in note 58).

[74] Id at 1139.

[75] Id at 1140.

[76] Id at 1143.

Pivoting forward some forty-odd years, standards of review again play a motive role in the post-1995 revival of Commerce Clause scrutiny. Again, the nexus between a law and interstate commerce, as well as the allocation of epistemic labor between Congress and the Court, have been central areas of contestation. Indeed, it is striking that only one Justice has called for wholesale transformation of the *substantive* limits on Commerce Clause power.[77]

Today, the doctrinal structure for Commerce Clause disputes revolves around a familiar three-part test: "First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate [intrastate] activities that substantially affect interstate commerce."[78]

The first two elements of this test attract little judicial attention. By contrast, the Court has developed a reticulated structure for examining laws justified by a "substantial" effect on interstate commerce. This case law turns on the (hardly pellucid) distinction between "economic" and "noneconomic" activities.[79] Whereas substantial-economic-effects-based laws secure judicial deference, the Court has subtly shifted the standard of review for laws grounded on "noneconomic" substantial effects in ways that contract the scope of federal legislative authority.

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[77] *Lopez*, 514 US at 585–602 (Thomas concurring).

[78] *Gonzales v Raich*, 545 US 1, 16–17 (2005) (citations omitted), citing *Perez v United States*, 402 US 146, 150 (1971) and *Jones & Laughlin*, 301 US at 37. See also *Lopez*, 514 US at 561. I emphasize that this is only the core of the doctrinal test. *Lopez* also stated that intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." Id at 561. Depending on how one construes the holding of *The Healthcare Cases*, there might now also be an activity/inactivity distinction to be drawn respecting intrastate noneconomic activities. Compare *The Healthcare Cases*, 132 S Ct at 2589–90 (Roberts) (distinguishing between the regulation of pre-existing commerce and commerce yet to exist), with id at 2648–49 (Scalia, Kennedy, Thomas, and Alito dissenting) (endorsing a similar distinction). It is not clear how such a distinction fits with the balance of the doctrinal test: For example, does it apply to both economic and noneconomic activities? Does it limit in any way the first two *Lopez* prongs? I suspect the short-term impact of the innovation will be small since the federal government can often recast inaction as an action.

[79] *Lopez*, 514 US at 559–60 (underscoring power to regulate economic activity); id at 628–29 (Breyer dissenting) (criticizing the majority's "distinction between commercial and noncommercial activities"). As is oft remarked, the distinction between economic and noneconomic activities is not self-explanatory and may ultimately not be coherent. See *Morrison*, 529 US at 656–57 (Breyer dissenting).

Just as in the 1930s, the Court in the 1990s seized upon the standard of review as an effectual tool to change the scope of federal power. Considering federal regulation of guns near schools in *United States v Lopez*,[80] Chief Justice William Rehnquist conceded that "Congress *normally* is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."[81] He nonetheless cautioned that "congressional findings [ ] enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye."[82] Showing this warning to have teeth, the Court rejected the government's proposed nexus between school-related violence and interstate commerce because it impermissibly "pile[d] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[83] Stated otherwise, sufficient means-end rationality was wanting.

Five years later, *United States v Morrison*[84] confirmed the suggestion that the federal government had a greater burden of evidentiary production when it sought to regulate "noneconomic" matters.[85] *Morrison* rejected an effort to spin inferences from gender-based violence to interstate commerce as grounded on a "method of reasoning" that was "unworkable if we are to maintain the Constitution's enumeration of powers."[86] The Court was explicit that "[w]hether *particular* operations affect interstate commerce *sufficiently* to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question."[87] Rational basis review, in short, was no longer the regime of the day,[88] even when Congress had amassed what the dissent labeled a "mountain of data" in support of the law.[89] Rather, the Court would show "deference under

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80 514 US 549 (1995).

81 Id at 562 (emphasis added).

82 Id at 563.

83 Id at 567.

84 529 US 598 (2000).

85 Id at 613.

86 Id at 615.

87 Id at 614 (emphasis added), quoting *Lopez*, 514 US at 557 n 2.

88 *Morrison*, 529 US at 617–20.

89 Id at 628 (Souter dissenting) ("The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds our own."); id at 619–20 (majority).

the rationality rule [ ] subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation."[90]

The question of how to calibrate the standard of review arose again in the 2012 challenges by states and individuals to the individual mandate component of the Patient Protection and Affordable Care Act,[91] which were consolidated on certiorari review as *National Federation of Independent Business v Sebelius*[92] ("The Healthcare Cases"). Echoing *Lopez* and *Morrison*, Chief Justice Roberts's vote against the mandate's validity under the Commerce Clause hinged on a refusal to defer to Congress's empirical judgments. He opined that "[t]he proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking."[93] To bless federal action on so weak a *factual* predicate, he argued, would "undermine the structure of government established by the Constitution."[94] Chief Justice Roberts's analysis focused squarely on the quality of the evidentiary nexus between the challenged law and the Commerce Clause[95]—an irrelevancy if the Court is employing rational basis review.

To recap, the Commerce Clause's history is one characterized by persistent contestation over standards of review. It is a story in which subtle verbal reformulations in the standard of review yield resonant substantive transformations of federal legislative authority. To be clear, I do not mean to imply that the substantive boundaries of doctrinal rules are irrelevant. Rather, the study of such formal, first-order rules in isolation misses a

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90 *Lopez*, 514 US at 608 (Souter dissenting) ("Further glosses on rationality review, moreover, may be in the offing."). In a later case upholding federal legislation, the Court echoed *Morrison*'s dissent rather than its concurrence—and went on to uphold the challenged laws. See *Raich*, 545 US at 19 ("Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would [ ] affect price and market conditions."); id at 28–29 ("The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity.").

91 Pub L No 111-148, 124 Stat 119 (2010).

92 132 S Ct 2566 (2012)

93 Id at 2591 (Roberts).

94 Id at 2592.

95 Id at 2591. For an analysis of the substantive logic of *The Healthcare Cases* that emphasizes the role of evolving historical conceptions of the appropriate federal role in managing different species of risk, see generally Aziz Z. Huq, *Federalism, Liberty, and Risk in* NFIB v. Sebelius (University of Chicago Public Law and Legal Theory Working Paper No 425, Apr 2013), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255192 (visited April 29, 2013).

vital element of the Court's analytic labors, an element that seems especially salient to understanding legal change to federalism dynamics over time.

2. The Spending Power.

Article I of the Constitution endows Congress with the power to collect taxes and make expenditures for "the common Defense and the general Welfare."[96] Both Taxation and Spending Powers have long been viewed as complementary, alternative sources of regulatory authority. Congressional powers pursuant to those Clauses "have never been limited . . . to cases falling within the specific powers enumerated in the Constitution."[97] Although the Progressive-era Court gave but lip service to that view,[98] since the 1930s the Court has tended to refrain from importing formal limits on other enumerated powers into the context of Congress's fiscal powers.[99]

Instead, the Court tests the constitutionality of conditions attached to federal grants against four metrics.[100] They must be (1) "in pursuit of 'the general welfare,'" (2) "unambiguous[]," (3) related "to the federal interest in particular national projects or programs," and (4) not independently barred by another

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[96] US Const Art 1, § 8, cl 1.

[97] Joseph Story, 1 *Commentaries on the Constitution of the United States* § 991 at 727 (Little, Brown 5th ed 1891). James Madison, by contrast, took the minority view that Congress's fiscal powers were limited to otherwise enumerated powers. See David E. Engdahl, *The Spending Power*, 44 Duke L J 1, 27–28 (1994) (quoting Madison's comments from both the 1790s and the 1820s).

[98] Justice Owen Roberts rejected Madison's narrower view of the Spending Power in favor of the wider one proffered by Story and Hamilton. See *United States v Butler*, 297 US 1, 66 (1936). But the Court then went on to invalidate the challenged federal enactment on the ground that it went "beyond the powers delegated to the federal government." Id at 68.

[99] See *Oklahoma v United States Civil Service Commission*, 330 US 127, 143 (1947) (holding that Congress could condition an offer of federal funds to the states on the latters' curtailing of certain officials' partisan political activities even though "the United States is not concerned with, and has no power to regulate, local political activity as such of state officials").

[100] Again, I assume this doctrine describes the scope of the Spending Power as construed in light of the Necessary and Proper Clause. See Kate Stith, *Congress' Power of the Purse*, 97 Yale L J 1343, 1348 (1988) ("Congress' power to appropriate originates in article I, section 8. The concept of 'necessary and proper' legislation to carry out 'all . . . Powers vested by this Constitution in the Government of the United States' includes the power to spend public funds on authorized federal activities.") (alteration in original), quoting US Const Art I, § 8, cl 18.

constitutional provision.[101] Because the Court has explicitly deferred to Congress's judgment in respect to the general welfare,[102] and because the "independent bar" rule adds little new, one commentator has concluded that "[n]one of these *direct* limitations on the spending power has had any real bite."[103] *The Healthcare Cases* may have supplemented these rules by stipulating that conditions imposed pursuant to federal grants cannot be "coercive."[104] But the scope of the latter ruling is not clear, and it may fairly be doubted whether the notoriously slippery concept of "coercion" will prove analytically tractable in even the medium term.[105]

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[101] *South Dakota v Dole*, 483 US 203, 207–08 (1987), quoting *Helvering v Davis*, 301 US 619, 640–41 (1937), *Pennhurst State School and Hospital v Halderman*, 451 US 1, 17 (1981), and *Massachusetts v United States*, 435 US 444, 461 (1978) (Brennan) (plurality).

[102] See id at 207.

[103] Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 Duke L J 345, 351, 355 (2008) (emphasis added).

[104] See *The Healthcare Cases*, 132 S Ct at 2603–04 (Roberts) (distinguishing the expansion of Medicaid through the conditional Spending Power as distinct from the enactment at issue in *Dole* because it placed a "gun to the head" of the states).

[105] David Freeman Engstrom, *Drawing Lines between* Chevron *and* Pennhurst*: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 Tex L Rev 1197, 1200–01 (2004) ("[T]he 'coercion' concept touched upon in *Dole* and earlier cases is notoriously slippery both as a matter of political theory and of legal doctrine.").

Even apart from its reliance on the opaque concept of coercion, Chief Justice Roberts's logic on the Spending Power is puzzling in a number of other ways. *First*, in 2006, the Court had rejected unanimously a challenge to another conditional spending enactment, the Solomon Amendment, which directed that if any part of a higher educational institution denied military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds. *Rumsfeld v Forum for Academic and Institutional Rights, Inc*, 547 US 47, 51, 60 (2006) ("FAIR") (upholding the Solomon Amendment, National Defense Authorization Act for Fiscal Year 1996 § 541(a), Pub L No 104-106, 110 Stat 186, 315–16, codified as amended at 10 USC § 983). Although the latter opinion rested on the conclusion that recipients were being asked to alter unprotected conduct, and not protected speech, it is striking that the Court in 2006 did not entertain the possibility of a coercion analysis. It is not clear how the Solomon Amendment, which imposed penalties arguably as draconian as the Affordable Care Act, can be distinguished from the latter.

Second, Chief Justice Roberts's opinion in *The Healthcare Cases* focused on the distinction between "existing" and "new" Medicaid funds. See *The Healthcare Cases*, 132 S Ct at 2603–07 (Roberts). But it is not clear why this distinction has constitutional weight. Congress, after all, could have ended Medicaid—and so denied states any funds—and then simply reenacted a wholly new program with new conditions. Chief Justice Roberts's logic assumes that states have an ongoing entitlement to a stream of "existing" Medicaid funds. But it is wholly implausible to suggest that had Congress ended the entire Medicaid program, the states could have sued to continue it.

Finally, the notion of coercion is notoriously slippery and hard to operationalize, and Chief Justice Roberts gives no sense at all of how it might be applied to the Spending Power. To the contrary, by explicitly disavowing any effort to "fix a line," Chief Justice Roberts deliberately declined to give meaningful guidance to lower courts and also left

Although direct limits on the Spending Clause have proved exiguous, the Court has aggressively applied an indirect boundary on the Spending Power. In several cases, the Court has reasoned from the absence of specific language in a statute to the flat repudiation of purported conditions attached to a federal grant.[106] This "notice" requirement can be understood as either a rule of statutory construction or as a means of operationalizing a fundamentally empirical judgment parallel to the analyses elsewhere packaged into standards of review. That is, on the second formulation, the notice requirement reflects an effort by the Court to answer a fundamentally empirical question about the legislative process. It functions as a proxy in an inquiry meant to ascertain whether an entity that receives conditional federal funding (typically here, a state) has, *in fact*, identified and accounted for a potential condition to that funding. In this light, a rigorously enforced notice rule serves to ensure a close fit between the *actual* legislative process and policy outcomes generated through conditions on federal funding. Only when the nexus between process and outcome is sufficiently tight can federal regulation go forward.[107]

Congress in what may be a state of debilitating uncertainty. Id. Given that Chief Justice Roberts has railed against open-ended judicial standards in the past, he can fairly be criticized for inconsistency (for whatever that is worth). For an example of such criticism by Chief Justice Roberts, see *Caperton v A. T. Massey Coal Co*, 556 US 868, 893–99 (2009) (Roberts dissenting). In all, it remains to be seen whether the Spending Clause ruling will turn out to be anything more than a ticket good for one ride only. See generally Richard M. Re, *On "A Ticket Good for One Day Only,"* 16 Green Bag 2d 155 (2013).

[106] Spending Clause litigation largely conditions the metes and bounds of private enforcement of a regulatory regime imposed on the states. See, for example, *Sossamon v Texas*, 131 S Ct 1651, 1658 (2011) (concluding that absent an "unequivocal expression of state consent" the phrase "appropriate relief" in the 2000 Religious Land Use and Institutionalized Persons Act could not be construed to permit money damages); *Arlington Central School District Board of Education v Murphy*, 548 US 291, 295–300 (2006) (same for experts' fees); *Barnes v Gorman*, 536 US 181, 185–88 (2002) (same for punitive damages); *Pennhurst*, 451 US at 11, 17–27. See also *Gonzaga University v Doe*, 536 US 273, 276 (2002) (finding that Spending Clause legislation cannot be enforced pursuant to 42 USC § 1983); *Alexander v Sandoval*, 532 US 275, 280–81 (2001) (holding that agency regulations enforcing the antidiscrimination provisions of Title VI cannot be privately enforced). But see *Winkelman v Parma City School District*, 550 US 516, 526 (2007) (allowing parents to proceed on their own behalf to enforce claims under the Individuals with Educational Disabilities Act). One commentator has described the current regime as a form of "double immunity" that requires not only a general waiver of sovereign immunity but also a specific waiver of immunity from money damages. See generally Aaron Tang, *Double Immunity*, 65 Stan L Rev 279 (2013).

[107] This argument is distinct from, although related to, the argument that a clear statement rule is necessary to ensure that a provision infringing on states' rights is the product of a political process that appropriately safeguards federal values. See note 304 and accompanying text.

As first enforced by the Rehnquist Court, the notice rule imposed scant friction on federal legislative behavior.[108] Its current formulation, by contrast, evinces sharp mistrust of the federal government. Absent strong textual indications on the face of a statute that a grantee acceded to a condition, the Court now refuses to infer rules against federal grantees.

As currently practiced, judicial "matching" of the conditions on federal grants to appropriate kinds of legislative processes has an impact that is somewhat similar to the effect of raising the level of formal scrutiny.[109] Akin to an elevated standard of review, a stringent notice requirement allows the Court to limit Congress not merely by redrawing the formal scope of its substantive powers but also by imposing greater burdens of legislative effort. In effect, imposition of a strong notice requirement compels considerably more exertion by legislators in the enactment process, albeit of a different kind from that elicited by a higher tier of scrutiny. In the Commerce Clause context, Congress discharges its elevated burden by developing a more robust legislative record. By contrast, in the Spending Clause context it does so by hammering out a more precise statutory deal and by proving up the existence of that deal in federal court.[110] In both cases, the judicial demand for greater legislative effort is a means to ensure that the enumerated power at stake is not deployed to achieve unrelated policy effects.

In sum, while the Court (at least until the uncertain and opaque coercion ruling of *The Healthcare Cases*) has declined to enforce "direct" limits on the Spending Power,[111] it has used the notice rule to gerrymander indirectly congressional power. In this light, the path of legal change with respect to the Spending Power again turns on how evidentiary burdens of various sorts are allocated among branches rather than on a change to first-order doctrinal formulations.

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[108] See Baker and Berman, 78 Ind L J at 463 (cited in note 10).

[109] For analysis of other contexts in which the Court engages in analogous "matching" logic, see Aziz Z. Huq, *The Institution Matching Canon*, 106 Nw U L Rev 417, 435–52 (2012).

[110] All clear statement rules, though, impose frictional enactment costs. See Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 Yale L J 2, 41–42 (2008).

[111] See Bagenstos, 58 Duke L J at 355 (cited in note 103); Baker and Berman, 78 Ind L J at 463–69 (cited in note 10) (illustrating how each of the *Dole* restrictions has had little impact).

3. The Taxing Power.

Congress's authority to regulate through the imposition of tax penalties or tax expenditures arises from the same textual font as its spending authority.[112] It also raises many of the same issues.[113] Much like conditional spending authority, federal taxing authority might oust state regulatory authority. It may do so by displacing a state tax base[114] or by creating incentives for private action that undermine the practical force of state regulation.[115] Depending on the measure at issue, federal use of the Taxing Power might be more or less damaging to state authority than use of the Spending Power. It is hard to say in the abstract.[116] Yet the Taxing Power has occupied only a small share of the Court's attention. At the turn of the twentieth century, the Court invalidated some taxes as impermissibly regulatory, albeit without providing a lucid account of how permissible revenue-raising measures differed from impermissible, regulatory ones.[117] Subsequent cases appeared to abandon this distinction, expressly disclaiming power to inquire "into the hidden motives which

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[112] See US Const Art I, § 8, cl 1. For definitions of tax penalties and tax expenditures, see Ruth Mason, *Federalism and the Taxing Power*, 99 Cal L Rev 975, 984–92 (2011).

[113] The Supreme Court has recognized that a "tax exemption has much the same effect as a cash grant to [an] organization of the amount it would have to pay on its income," while cautioning that "we of course do not mean to assert that they are in all respects identical." *Regan v Taxation with Representation of Washington*, 461 US 540, 544 & n 5 (1983).

[114] This "crowding out" of state taxes is debated. Compare Mason, 99 Cal L Rev at 977 (cited in note 112) (arguing that "by crowding out state regulation, federal tax incentives may reduce opportunities for regulatory competition both among the states and between the states and the federal government") and McCoy and Friedman, 1988 S Ct Rev at 86 (cited in note 10) (asserting that crowding out occurs, without supplying any evidence), with Brian Galle, *A Republic of the Mind: Cognitive Biases, Fiscal Federalism, and Section 164 of the Tax Code*, 82 Ind L J 673, 702–09 (2007) (arguing that overlapping state and federal tax bases in fact cause crowd in of state tax rather than crowd out). An added complication here is that states tend to conform their income tax policies to piggyback on the federal system. See generally Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 Duke L J 1267 (2013).

[115] See, for example, James J. Fishman, *Stealth Preemption: The IRS's Nonprofit Corporate Governance Initiative*, 29 Va Tax Rev 545, 588–91 (2010) (developing this point in relation to charitable organizations).

[116] See Mason, 99 Cal L Rev at 1028 (cited in note 112) (tallying arguments on both sides).

[117] Even prior to the 1930s, the Court tacked back and forth on Taxing Power issues. Compare *Child Labor Tax Case*, 259 US 20, 37 (1922) (striking down the Child Labor Act given its "prohibitory and regulatory effect and purpose"), with *United States v Doremus*, 249 US 86, 95 (1919) (upholding the Narcotic Drug Act of 1914 as a Taxing Power enactment).

may move Congress."[118] By the mid-twentieth century, in the midst of a "dramatic expansion" in federal taxing and spending,[119] the project of judicially enforced limits on the Taxing Power seemed to have foundered.

The Healthcare Cases may presage a revival of Taxing Power jurisprudence. Writing the dispositive opinion, Chief Justice Roberts voted to uphold the individual mandate as a taxing measure. His constitutional analysis focused on the law's effect upon *individuals*, not states.[120] He identified three indices of the magnitude of the tax's burden on individuals[121] in order to ascertain whether the "exaction becomes so punitive that the taxing power does not authorize it."[122] While the individual mandate survived this test, the analysis hinted that other enactments might fail. The multifactor nature of Chief Justice Roberts's test, though, compromises any secure prediction of where the future boundary of the Taxing Power lies.[123]

Despite that precedential uncertainty, Chief Justice Roberts's analysis of the Taxing Power has methodological implications. It is plainly an exercise in "law declaration," one that implicates no substantial standard of review question. The line between taxes and penalties is a matter solely within the judiciary's evaluative bailiwick.[124] Should Taxing Power jurisprudence flourish along these lines, it will mark a break from the way that the Court defines other enumerated powers: It concerns first-order rules for Congress, not the standard of review. Further, it is trained on individual, not structural constitutional, interests.

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[118] See *Sonzinsky v United States*, 300 US 506, 513 (1937) ("Every tax is in some measure regulatory."). See also *United States v Sanchez*, 340 US 42, 44 (1950) (upholding federal tax on marijuana). As in the Spending Clause context, the Court has not imported limitations implicit in other enumerated powers to the Taxing Power context. See id.

[119] John Harrison, *The Fiscal Powers and the 1930s: Entrenchment*, 41 Wm & Mary L Rev 295, 296 (1999).

[120] *The Healthcare Cases*, 132 S Ct at 2595–97 (majority).

[121] Id (looking to (1) the magnitude of the burden created by the measure, (2) the scienter requirement, and (3) the nature of the enforcement mechanisms). This element of Chief Justice Roberts's opinion draws on earlier Supreme Court precedent, which employed a similar test for impermissibly coercive taxes. *United States v Constantine*, 296 US 287, 293–96 (1935).

[122] *The Healthcare Cases*, 132 S Ct at 2600–01 (majority).

[123] Id.

[124] Notice then that the doctrinal test with a stronger standard of review yielded success for the government in *The Healthcare Cases*, whereas the arguably weaker standard of review putatively employed in the Commerce Clause context yielded no analog result for the government. Standards of review, this shows, are not always the whole ball game.

At the same time, it is unclear whether the Court will be able to impose meaningful limits on congressional Taxing Power through an exercise in law declaration without recourse to changes in the standard of review. A doctrinal test that hinges on the "degree of [Congress's] control over individual behavior"[125] imposes no meaningful brake on the Taxing Power. For Congress almost always has at its disposal a plenary substitute for any given tax that is challenged. The most obvious substitute is a conditional benefit. In an earlier case, the Roberts Court rejected unanimously the argument that government threats to withdraw conditional grants imposed constitutionally impermissible burdens absent a collateral effect on constitutional rights.[126] This means that even if Congress cannot use tax *penalties* to influence individual behavior it can still use *conditional transfers* to the same effect (at least so long as no individual constitutional right is at issue, as was so in *The Healthcare Cases*).[127] Without close judicial regulation of all in-kind or cash transfers from the federal government to individuals, it is hard to see why the tax/penalty line drawn in *The Healthcare Cases* will have much effect.

There is an ancillary puzzle raised by *The Healthcare Cases*' treatment of the Taxing Power: It is hard to discern why Chief Justice Roberts's federalism-inspired concern about "the structure of government established by the Constitution,"[128] which was so prominent in his analysis of the Commerce Clause question posed in that case, does not apply with equal force for the Taxing Power. If federal imposition of an individual mandate to obtain insurance via the Commerce Clause is too large an innovation, why isn't the same measure of equal concern when imposed under the Taxing Power? The discontinuity in modalities

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[125] Id at 2600.

[126] See *FAIR*, 547 US at 51, 59–60. *FAIR* suggests the use of federal Spending Power to elicit behavior does not implicate constitutional concerns absent some effect upon the exercise of a protected constitutional right. See id at 59–60, 70. By contrast, *The Healthcare Cases* imply that the threat of higher taxes can violate the Constitution absent any effect on a constitutional right. See *The Healthcare Cases*, 132 S Ct at 2595–99 (majority).

[127] Conditional transfers might be justified on other grounds, such as efficiency. For example, the Earned Income Tax Credit, a transfer program for low-income workers administered via refundable tax credits, is arguably more efficient than close substitutes such as a federal minimum wage. See Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U Chi L Rev 405, 474–75 (1997).

[128] *The Healthcare Cases*, 132 S Ct at 2591–92 (Roberts).

of review by the same Justice in the same opinion has no obvious justification.

If a tax/penalty distinction is ultimately unavailing, it is likely the Court's novel effort to impose direct, doctrinal limits on federal taxing enactments will ultimately unravel. In that event, Taxing Power jurisprudence may resile to alternative, indirect limitations operationalized via the standard of review. Such indirectly imposed limitations are likely to prove echoes of those tactics and tools observed in other areas of enumerated powers jurisprudence.

4. The Reconstruction Amendments.

After the Civil War, Congress proposed and the nation ratified three constitutional Amendments repudiating aspects of the antebellum racial regime.[129] Each contained a provision specifically authorizing Congress to "enforce" by "appropriate legislation" newly created entitlements. The most consequential of these enforcement provisions has turned out to be § 5 of the Fourteenth Amendment, which is keyed to the equality and due process protections vested by the first provision of that amendment. This "§ 5 power" has been implicated in many important cases over the past decade.[130] One reason that the Reconstruction Amendments have been especially important is that in the past two decades the Supreme Court has interpreted them to enable federal ouster of state sovereign immunity against money damages actions, a remedy Article I cannot license.[131]

The jurisprudence of the Reconstruction Amendments has fluctuated over time. Observed variance does not turn principally on disagreements about substantive limitations on congressional power but on the standard of review—that is, how much evidence and how tight a means-end nexus Congress needs to

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[129] US Const Amends XIII § 2, XIV § 5, and XV § 2 (granting Congress authority to enact legislation in respect to the three post–Civil War Amendments).

[130] The exception concerns judicial challenges to sections of the Voting Rights Act of 1965, Pub L No 89-110, 79 Stat 473, codified as amended at 42 USC § 1973 et seq, which concern § 2 of the Fifteenth Amendment. See *Northwest Austin Municipal Utility District Number One v Holder*, 557 US 193, 197 (2009) (reviewing a challenge to the preclearance provision of the Voting Rights Act).

[131] Compare *Fitzpatrick v Bitzer*, 427 US 445, 455–56 (1976) (allowing ouster under the Fourteenth Amendment), with *Seminole Tribe of Florida v Florida*, 517 US 44, 54, 72–73 (1996) (refusing to allow ouster under Article I). See also *Alden v Maine*, 527 US 706, 712 (1999) (holding that Congress could not abrogate the states' immunity for suits in state court).

muster to animate its use of an enforcement power.[132] There are three distinct positions on the standard of review.[133] At least two—including the current rule—plainly diverge from the standard used for the Commerce Clause.

The most latitudinarian position is also the oldest, but not now good law. Early judicial opinions construed the Amendments' enforcement provisions to authorize "[w]hatever legislation is . . . adapted to carry out the objects the amendments have in view[;] whatever tends to enforce submission to the prohibitions they contain, . . . if not prohibited, is brought within the domain of congressional power."[134] Nearly a century later, the Court indicated it would not "require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment" because this "would depreciate both congressional resourcefulness and congressional responsibility."[135] Through the end of the 1960s, the Court remained committed to this weak form of rationality review.[136] As Archibald Cox summarized the law then, "The accepted principle upon constitutional review is that the Court should assume that there are facts which furnish a constitutional foundation for the [ ] legislation unless that conclusion is rationally impossible."[137]

A second position has emerged in the past two decades. Central to this reshaping has been closer judicial scrutiny of

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[132] It is important to recognize that what I characterize as a standard of review question, because it turns on the quality of congressional fact finding, bleeds into substantive redefinition of the relevant congressional powers.

[133] Commentators on the Reconstruction Amendments have identified the centrality of the standard of review question. See, for example, Jack M. Balkin, *The Reconstruction Power*, 85 NYU L Rev 1801, 1810 (2010).

[134] *Ex parte Virginia*, 100 US 339, 345–46 (1879). See also *Civil Rights Cases*, 109 US 3, 13–14, 20, 50–51 (1883) (purporting to read Congress's enforcement power in light of the deferential *M'Culloch* standard).

[135] *Katzenbach v Morgan*, 384 US 641, 648 (1966).

[136] See, for example, id at 651 (holding that the *M'Culloch* "standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment"); *South Carolina v Katzenbach*, 383 US 301, 326 (1966) ("The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States."). This language was used as late as 1980. See, for example, *City of Rome v United States*, 446 US 156, 177 (1980). It was also used to gloss enforcement authority under the Thirteenth and Eighteenth Amendments. See *Jones v Alfred H. Mayer Co*, 392 US 409, 443 (1968) (Thirteenth Amendment); *James Everard's Breweries v Day*, 265 US 545, 558–59 (1924) (Eighteenth Amendment).

[137] Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv L Rev 91, 106 (1966).

congressional fact finding.[138] Beginning in 1997 with *City of Boerne v Flores*,[139] the Court began asking whether a federal law was "congruen[t] and proportional[]" to the constitutional problem being addressed rather than querying whether it was rationally related to a permitted goal.[140] *City of Boerne* "tailor[ing]" entails a comparison between "the evil or wrong that Congress intended to remedy and the means Congress adopted to address that evil."[141]

Invalidating laws under this test, the Court highlights the absence of any "wrong"—for example, in two early cases, the absence of religious discrimination or patent infringements by the several states[142]—or alternatively the heavy regulatory burden on the several states.[143] In practice, the Court has found inadequate tailoring in every single case that does not implicate a fundamental right or suspect class (for example, race or gender).[144]

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[138] This focus was anticipated in Justice John Marshall Harlan II's dissent in a case in which the Court upheld the application of a 1970 amendment to the Voting Rights Act lowering the voting age in federal elections but struck down its application to state elections. See *Oregon v Mitchell*, 400 US 112, 117–18 (1970) (Black); id at 152–219 (Harlan concurring in part and dissenting in part). Resisting the plurality opinion's call for deference to congressional fact finding, Justice Harlan argued that whether or not the core question at stake was "factual," it was "a matter as to which men of good will can and do reasonably differ." Id at 206–07 (Harlan concurring in part and dissenting in part), citing id at 242–48 (Brennan dissenting).

[139] 521 US 507 (1997).

[140] Id at 520. For subsequent applications of this test, see *Coleman v Court of Appeals of Maryland*, 132 S Ct 1327, 1335 (2012); *Board of Trustees of the University of Alabama v Garrett*, 531 US 356, 365 (2001); *Kimel v Florida Board of Regents*, 528 US 62, 82–91 (2000); *Florida Prepaid Postsecondary Education Expense Board v College Savings Bank*, 527 US 627, 647 (1999).

[141] *Coleman*, 132 S Ct at 1333 (quotation marks and citation omitted), quoting *Florida Prepaid*, 527 US at 639 and citing *City of Boerne*, 521 US at 520.

[142] See *City of Boerne*, 521 US at 531; *Florida Prepaid*, 527 US at 640–41.

[143] See, for example, *Kimel*, 528 US at 82–83 ("[T]he substantive requirements the [Age Discrimination in Employment Act of 1976] imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."). *Kimel* focuses on burdens on both state and local governments. By contrast, in *Garrett*, the Court held that evidence of unconstitutional actions by local units in "no sense" counted in evaluating the scope of the wrong. *Garrett*, 531 US at 369–71. That is, the Court's doctrinal test expressly compares state wrongs to burdens on state and local or municipal actors.

[144] I include gender-based discrimination in this class. See *Nevada Department of Human Resources v Hibbs*, 538 US 721, 737 (2003) (permitting money damages actions under the family-care provision of the Family and Medical Leave Act). For a seeming outlier, which authorized legislative solicitude for the disabled based on the presence of other fundamental rights, see *Tennessee v Lane*, 541 US 509, 532–33 (2004) (upholding applications of Title II of the Americans with Disabilities Act that implicated fundamental rights, such as the right of access to courts). The *Lane* opinion has been criticized for changing the relevant unit of analysis from a whole provision or statutory title to a

Notionally accommodating of "preventive rules" as "remedial measures,"[145] the Court in practice tends to distinguish instances in which *judicial* protection of a right is greatest (Congress can act) from instances in which judicial protection is slight (Congress is disabled).[146] Legislative protection thus closely follows grooves cut by prior judicial diktat.

City of Boerne's congruence and proportionality test diverges from the quondam legal regime in two significant ways. First, the Court previously disavowed any need to anchor its analysis in the prior judicial specification of a right.[147] Now, by contrast, the "first step" in the Court's analysis "is to identify with some precision the scope of the constitutional right at issue" by looking to its "prior decisions."[148] Doctrinal tethering of legislation to judicial opinions (and indeed Supreme Court opinions alone[149]) constitutes a shift in the substantive law, not the standard of review. As many have noted, the shift is in tension with the Court's justifications for using rational basis review when a fundamental right or suspect class is not at issue.[150] In the latter contexts, the Court had emphasized its limited institutional competence and invoked a principle of judicial restraint[151] to justify the

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smaller set of applications, and the Court has not employed the same analytic move since. See David J. Langeland, Casenote, *Misapplication of Precedent: The United States Supreme Court Ignores the Overbreadth of the ADA by Abrogating State Sovereignty in* Tennessee v. Lane, 38 Creighton L Rev 1065, 1106 (2005).

[145] *City of Boerne*, 521 US at 530–32.

[146] One piece of evidence that it is the degree of judicial protection that motivates the Court's tailoring requirement derives from *Hibbs*'s treatment of gender discrimination as addressed by the Family and Medical Leave Act of 1993 (FMLA), Pub L No 103-3, 107 Stat 6, codified as amended at 29 USC § 2601 et seq. Rather than analyzing closely states' records in this context, Chief Justice Rehnquist's opinion for the Court engaged in a light review of some state laws and the "history of discrimination." *Hibbs*, 538 US at 729–30. *Hibbs* did not demand much by way of an empirical foundation for a law targeting gender discrimination (which receives a form of heightened protection under the Equal Protection Clause) in a way that diverged dramatically from its treatment of age and disability discrimination. See id at 754; *Craig v Boren*, 429 US 190, 197–99 (1976).

[147] *Morgan*, 384 US at 648.

[148] *Garrett*, 531 US at 365–67. See also *Coleman*, 132 S Ct at 1334.

[149] Without discernible irony, the Court has thus placed Congress in a position similar to that of the state prisoner seeking federal habeas relief, who must show "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 USC § 2254(d)(1) (emphasis added). Both the state prisoner and the Congress, of course, are set to their labors as a means to preserve federalism values—so perhaps the rough parallel is not so peculiar.

[150] See, for example, Post and Siegel, 112 Yale L J at 1966–71 (cited in note 17).

[151] *City of Cleburne, Texas v Cleburne Living Center, Inc*, 473 US 432, 441–42 (1985). See also *Garrett*, 531 US at 384–85 (Breyer dissenting) (making this point and

"underenforcement" of constitutional norms, on the apparent assumption that the political branches would pick up the slack.[152]

Second, the Court has also shifted the standard of review by amplifying Congress's burden of production and narrowing the class of cognizable legislative evidence. As initially formulated, the congruence and proportionality rule did not turn on the quality of the actual record assembled by Congress.[153] Over time, however, the Court has narrowed its analytic lens. Now, it looks solely at the record in fact before the enacting Congress; it also distinguishes among different sorts of record evidence.[154] By 2000, in reviewing Title I of the Americans with Disabilities Act of 1990[155] (ADA), the Court was distinguishing between evidence submitted to Congress and evidence submitted to a congressional "Task Force on the Rights and Empowerment of Americans with Disabilities"[156] that "held hearings in every State, attended by more than 30,000 people, including thousands who had experienced discrimination first hand."[157] Moreover, Congress must memorialize its evidence in specific forms. The Court, in *Board of Trustees of the University of Alabama v Garrett*,[158] complained that Congress had made no express finding of "a pattern of unconstitutional behavior by the States" in the Act's legislative findings.[159] By distinguishing between different species of evidence

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criticizing the Court for forcing Congress "to adopt rules or presumptions that reflect a court's institutional limitations").

[152] Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv L Rev 1212, 1213 (1978).

[153] Hence, in *City of Boerne*, the Court identified a "lack of support in the legislative record" but also emphasized it was

> not [the Religious Freedom Restoration Act's] most serious shortcoming. Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but "on due regard for the decision of the body constitutionally appointed to decide." As a general matter, it is for Congress to determine the method by which it will reach a decision.

City of Boerne, 521 US at 531–32 (citation omitted), quoting *Mitchell*, 400 US at 207 (Harlan concurring in part and dissenting in part). See also *Kimel*, 528 US at 91 (suggesting that a "lack of support" in the legislative record "is not determinative"). The quoted statement in *Kimel* is hard to square with what the Court does in that case.

[154] See, for example, *Garrett*, 531 US at 370 ("Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled."); *Kimel*, 528 US at 89 (dismissing the legislative record as comprised "almost entirely of isolated sentences clipped from floor debates and legislative reports").

[155] Americans with Disabilities Act of 1990 (ADA) §§ 101–08, Pub L No 101-336, 104 Stat 327, 330–37, codified as amended at 42 USC §§ 12111–17.

[156] *Garrett*, 531 US at 370–71.

[157] Id at 377 (Breyer dissenting).

[158] 531 US 356 (2001).

[159] Id at 371.

that might emerge from the legislative process, and simultaneously declining to consider later-generated evidence, the *Garrett* Court imposed a standard of review arguably more onerous than that employed in some First Amendment cases.[160] By "focus[ing] on legislative findings, rather than on the evidence that could support the legislation," and then requiring specific forms of legislative evidence, the Court made "a sharp break with the rhetoric, if not the reality, of the Court's precedents"[161] and thus opened a gap with Commerce Clause practice.[162]

The shift in standard of review catalyzed by *City of Boerne* is underwritten by the Justices' concern to preserve the independent meaning of the Constitution, as determined by the Court itself, against legislative manipulation. Absent a congruence and proportionality check, the Court frets, "Congress could define its own powers by altering the Fourteenth Amendment's meaning," a power that would rob the Constitution of its status as "superior paramount law, unchangeable by ordinary means."[163] Rather than a "necessary partner"[164] in elaborating constitutional norms, Congress is here perceived as a potential interloper upon the judicial monopoly of constitutional settlement.[165]

Imposition of congruence and proportionality review, in short, meaningfully retrenches federal authority under the Reconstruction Amendments. Yet it may not be the Court's last word on the matter—for there is a third position the Court might still adopt on the standard of review for § 5 cases. In recent opinions, Justice Antonin Scalia has calumniated congruence and proportionality as too "flabby" and "a standing invitation

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[160] For example, in applying intermediate scrutiny, the Court has not only allowed consideration of "predictive or historical evidence upon which Congress relied" but also directed a remand to the district court for "the introduction of some additional evidence." *Turner Broadcasting System, Inc v FCC*, 512 US 622, 667 (1994).

[161] Buzbee and Schapiro, 54 Stan L Rev at 118 (cited in note 17).

[162] See Post and Siegel, 78 Ind L J at 15–16 (cited in note 17) (arguing that "the Court would not require Congress in the exercise of its commerce power to adopt such juricentric rules of evidence" as used in the § 5 context). Section 5 review seems to me more onerous than even the most exiguous form of Commerce Clause review.

[163] *City of Boerne*, 521 US at 529. See also *Garrett*, 531 US at 374 (distinguishing Congress's "final authority" on matters of "desirable public policy" from its power to "rewrite the Fourteenth Amendment law laid down by this Court").

[164] Caminker, 53 Stan L Rev at 1172 (cited in note 17). See also Post and Siegel, 110 Yale L J at 515 (cited in note 17).

[165] So understood, *City of Boerne* has provoked considerable criticism on the grounds that the Court is (a) applying a model of legislative fact finding that ill fits the realities of congressional action and (b) illicitly claiming an inappropriate interpretative monopoly over the determination of constitutional meaning. See note 17.

to judicial arbitrariness and policy-driven decisionmaking."[166] Invoking the federal courts' limited ability to "scour the legislative record in search of evidence that supports the congressional action," Justice Scalia would cabin Congress to regulating conduct "that *itself* violates the Fourteenth Amendment."[167] To the extent a majority of the Justices already look askance at prophylactic measures benefiting nonfundamental rights or nonsuspect classes, Justice Scalia may be pushing on an unlocked door: the Court already seems to require a form of close tailoring under *City of Boerne*, and little precludes it from gradually raising the bar higher still.

5. The Intellectual Property Clause.

In closing, I turn to a power not usually addressed in the same breath as the Commerce Clause or the Spending Power to demonstrate the pervasiveness of standard of review questions: the so-called Intellectual Property Clause of Article I, which endows Congress with authority to legislate on patents and copyrights.[168] Two recent challenges to congressional expansions of this Clause's reach have spurred the Court to clarify the applicable standard of review.[169] In so doing, the Court has evinced a capacious deference to Congress's empirical judgments that is at odds with its resurgent closer scrutiny of other enumerated powers.

In *Eldred v Ashcroft*,[170] the Court upheld provisions of the Sonny Bono Copyright Term Extension Act[171] that enlarged the term of works under copyright at the time of the statute's enactment.[172] Justice Ruth Bader Ginsburg's majority opinion in

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[166] *Coleman*, 132 S Ct at 1338 (Scalia concurring), quoting *Lane*, 541 US at 557–58 (Scalia dissenting).

[167] *Coleman*, 132 S Ct at 1338 (Scalia concurring). In Justice Scalia's one-way ratchet, a court that invokes *its* institutional limitations to curtail its own recognition of rights would then invoke those very same institutional limitations to block Congress from doing so.

[168] US Const Art I, § 8, cl 8 (vesting Congress with power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). Consider Fromer, 61 Duke L J at 1331 n 1 (cited in note 11) (noting that the Clause, although commonly called the Intellectual Property Clause, does not reach trademark).

[169] See *Golan v Holder*, 132 S Ct 873, 878 (2012); *Eldred v Ashcroft*, 537 US 186, 193 (2003).

[170] 537 US 186 (2003).

[171] Pub L No 105-298, 112 Stat 2827 (1998).

[172] *Eldred*, 537 US at 192–94 (noting the scope of challenge), citing Sonny Bono Copyright Term Extension Act § 102(b), (d), 112 Stat at 2827–28, codified as amended at 17 USC §§ 302, 304.

Eldred is noteworthy in two respects. First, it held that the Intellectual Property Clause "empowers Congress to determine the intellectual property regimes that, overall, *in that body's judgment*, will serve the ends of the Clause."[173] Judicial supervision, on the *Eldred* Court's view, was confined to the identification of "a rational exercise" of congressional authority.[174] Second, and correlatively, the *Eldred* Court rejected an effort to impose the congruence and proportionality limits from § 5 jurisprudence onto the Intellectual Property Clause on the ground that the latter, unlike § 5, endowed the legislature to define, and not merely enforce, rights.[175]

The 2012 judgment in *Golan v Holder*[176] eliminated doubt about the amplitudinous breadth of judicial deference in the Intellectual Property Clause context. *Golan* concerned § 514 of the Uruguay Round Agreements Act,[177] which grants copyright protection to certain preexisting works that have been protected in their country of origin but lack protection in the United States.[178] Writing again for the Court, Justice Ginsburg quoted her own "pathmarking" *Eldred* opinion and reiterated the generous scope of judicial deference to congressional judgments under the Intellectual Property Clause.[179]

The methodology of *Eldred* and *Golan* diverges from the scrutiny used in respect to the Commerce Clause, Reconstruction Amendments, and Spending and Taxing Powers. Whether or not this surprises depends on which Justice one focuses upon.

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[173] *Eldred*, 537 US at 222 (emphasis added).

[174] Id at 204–06 & n 10 (rejecting the dissent's argument for application of "a heightened, three-part test for the constitutionality of copyright enactments"). For a pre-*Eldred* argument for robust judicial review, see Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 Berkeley Tech L J 535, 558–75 (2000).

[175] *Eldred*, 537 US at 218 ("Section 5 authorizes Congress to *enforce* commands contained in and incorporated into the Fourteenth Amendment. The Copyright Clause, in contrast, empowers Congress to *define* the scope of the substantive right.") (citation omitted). In his dissent, Justice Stephen Breyer also resisted the importation of § 5 standards, although he would have imposed a greater evidentiary burden on Congress. Id at 244–45 (Breyer dissenting). Some commentators argue that Justice Ginsburg invoked rational basis review "without explaining why she did so." See, for example, Paul M. Schwartz and William Michael Treanor, Eldred *and* Lochner*: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 Yale L J 2331, 2357 (2003).

[176] 132 S Ct 873 (2012).

[177] Pub L No 103-465, 108 Stat 4809, 4976–81 (1994), codified as amended at 17 USC §§ 104A, 109(a).

[178] *Golan*, 132 S Ct at 881–83, quoting Uruguay Round Agreements Act § 514, 108 Stat at 4976–81, codified as amended at 17 USC §§ 104A, 109(a).

[179] *Golan*, 132 S Ct at 888–89, quoting *Eldred*, 537 US at 222.

That Justice Ginsburg—never the Court's foremost maven of close judicial scrutiny of the enumerated powers—should cast so latitudinous a net is no surprise. What should raise an eyebrow is that the other signatories of the *Eldred* opinion, "Justices Kennedy, O'Connor, Rehnquist, Scalia, and Thomas[,] did not deem it necessary to police congressional exercise of the enumerated power and did not write to distinguish this case from previous decisions that did find this obligation."[180]

C. The Tiers of Scrutiny in the Judicial Review of Enumerated Powers: A Capsule Summary

The account developed so far in this Part has highlighted how pivotal the standard of review is in practice for the judicial review of Congress's enumerated powers. It also demonstrates that there are synchronic as well as diachronic discontinuities in the standards of review employed with respect to different enumerated powers.[181] That is, we have a de facto system of "tiers of scrutiny" for the enumerated powers, albeit one that is poorly articulated and almost wholly undertheorized.

Stepping back then, what does this tiers-of-review system look like in broad outline? Consider, as a rough approximation of current practice, the following: In essence, the Court employs a bifurcated approach in the judicial review of enumerated powers. Economic regulation under the Commerce Clause, like economic enactments based on Taxing, Spending, and Intellectual Property–related Powers trigger light scrutiny. By contrast, when Congress is likely engaged in noneconomic social policy making—whether by attempting to reach noneconomic "substantial effects" on interstate commerce or by invoking the Reconstruction Amendments—the Court peers at a law more scrupulously. The economic/noneconomic distinction in the third prong of Commerce Clause jurisprudence, on this view, assumes

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[180] Schwartz and Treanor, 112 Yale L J at 2360 (cited in note 175). Judicial deference to legislative delineations of intellectual property interests also contrasts with the same Justices' close scrutiny of congressional efforts to address intellectual property infringements by the states. See *Florida Prepaid*, 527 US at 640–44.

[181] This is not the same as saying that the Court is using standards rather than rules—another distinction often raised in the legal literature. See, for example, Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L J 557, 559 (1992). Rather, my point is that there is a set of related legal questions that might logically be analyzed in the same way but in fact have spawned a diversity of legal tests, including both more rule-like and more standard-like tests.

a wider resonance and greater explanatory force across different enumerated powers.

This first cut is surely imperfect. Arguably, the close judicial scrutiny of notice to federal grantees in the Spending Power context does not seem to fit this pattern neatly.[182] But consider the following gloss on the latter line of doctrine: Let us posit that states are more zealous about the control of social policy than economic policy (which is not, perhaps, a wholly unreasonable assumption about contemporary politics). Perhaps the notice rule for Spending Power enactments works in practice as a means of ensuring state control of those social issues, and thereby ends up reinforcing an economic/noneconomic distinction. Constitutionally mandated clarity in the textual specification of conditions upon federal funding enables states to object to extraneous or novel conditions on those funds. This in effect preserves states' control of policy domains about which they care enough to litigate—especially social policy questions. In practice, it may be the case that the notice rule often inhibits the federal government from exploiting its convergent interest in funding a particular state regulatory activity (say, education or incarceration) to further a social policy (say, the regulation of adolescent sexuality or the provision of religious accommodations).[183] If the notice rule does in fact tend to operate against federal efforts to control social policy in this way, it might plausibly be understood as yet another means of limiting congressional control of 'noneconomic' matters. To be sure, when Congress acts with sufficient clarity—that is, when it pays a sufficiently high enactment tax[184]—then it can cast its regulatory net into such domains. But often Congress will not able to pay the necessary enactment tax, leaving states with discretion over noneconomic social policy matters.

A second payoff from this synoptic review is the light it casts on historical mechanisms of diachronic legal change. The precedential trajectories tracked here show how the Court often adjusts congressional power by changing standards of review rather than redrawing first-order limits on congressional power.

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[182] See Part I.B.2.

[183] To be clear, I am merely explaining a potential line of argument here and do not mean to imply endorsement of one side or another of that dispute. I also do not mean to imply that there is a "proper" domain of state regulation—a claim that is contested, controversial, and orthogonal to the argument here.

[184] See Stephenson, 118 Yale L J at 41–42 (cited in note 110) (noting the possibility of judicial imposition of frictional enactment costs).

During the New Deal period, for example, the Court progressively loosened the evidentiary requirements of judicial review and eased the necessary nexus between statutes and their anchoring enumerated powers. These changes had the effect of enlarging federal power. In the 1990s, the Rehnquist Court initiated a selective increase in the intensity of judicial review of federal regulation of noneconomic activities.[185] With the Reconstruction Amendments, the standard of review remained stable through the 1970s, only to shift dramatically in the late 1990s via reformulation of the standard of review.[186] In the spending context, moreover, I have argued that the recent ratcheting up of the notice requirement can also be glossed as a form of heightened scrutiny.[187] These historical narratives suggest that recalibration of the standard of review is as potent a tool, or even more potent a tool, for effecting change to the substantive scope of congressional power as tinkering with the substantive doctrinal boundaries on such authority.

At a minimum, these two generalizations point toward the tiers of scrutiny in enumerated powers cases as important independent objects of study. What they do not illuminate, and what the next two Parts address, is whether the creation of tiered review has positive or undesirable collateral effects.

II. THE CONSEQUENCES OF DIVERGENT STANDARDS OF REVIEW FOR DIFFERENT ENUMERATED POWERS

So what effects does a tiers-of-scrutiny arrangement have? This Part identifies two undesirable collateral consequences of the Court's novel employment of tiers of scrutiny in enumerated powers jurisprudence. First, tiered review creates unjustifiable gaps between different enumerated powers that legislators can arbitrage for their own ends. Second, the tiers of scrutiny provide a subsidy for what pejoratively is called judicial activism. In both these ways, putative agents of the public—acting pursuant to supposedly cabining legal authority—are empowered to behave strategically to pursue their own interests. This freewheeling discretion, which is a form of agency slack, is generally

[185] See text accompanying notes 78–79 (discussing the Court's recalibration of the standard of review in order to change the scope of federal power).

[186] Part I.B.4.

[187] Part I.B.2.

thought undesirable.[188] Agency slack makes it more likely that democratic preferences will not translate into policy change—although not for any principled or normatively defensible reason. Although the identified effects arise only in some, but not all, instances of judicial review, together they furnish a reason to investigate closely whether tiers of scrutiny have robust normative justifications.

A. The Possibility of Legislative Arbitrage

In the enumerated powers context—unlike in the fundamental rights or equal protection domains—the tiers of scrutiny allow legislators to engage in what might be called doctrinal arbitrage. That is, because the reach of different enumerated powers overlaps substantially, members of Congress are able to exploit the fact that a statute would be valid under one enumerated power but invalid under a different one. Strategic behavior by official actors is not per se harmful or undesirable. But it has arguably undesirable consequences here.

When the Court employs differentially geared standards of review, legislators can on occasion exploit those differences by enacting a law under one power that would lack sufficient evidentiary foundations pursuant to another. *Some* congressional arbitrage is intrinsic to a Constitution with multiple, overlapping enumerating powers, and hence unavoidable. Yet using tiers of scrutiny for enumerated powers expands the range of arbitrage possibilities, and so enlarges the scope for strategic legislative behavior at the margin. The effect may not be large, but there are still reasons to view such legislative conduct with at least puzzlement and even skepticism when it flows from the mere convenience of organizing enumerated powers into a tractable doctrinal framework for the purpose of judicial review.

For an example of how discontinuities in judicial review of enumerated powers can matter, we might look at Congress's success (and its failure) enacting anti-circumvention measures. These are measures designed not merely to confront a policy problem frontally but also to mitigate the risk of private circumvention of a direct prohibition. In the spending context, the

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[188] For a brief, helpful introduction to the problem of agency costs, see Eric A. Posner, *Agency Models in Law and Economics*, in Eric A. Posner, ed, *Chicago Lectures in Law and Economics* 225, 225–29 (Foundation 2000). For applications in the public law context, see Terry M. Moe, *The New Economics of Organization*, 28 Am J Polit Sci 739, 758 (1984).

Court has permitted Congress large freedom of regulatory maneuver in this regard, whereas under the Reconstruction Amendments it has resisted legislative efforts to address circumvention.

Take first *Pierce County, Washington v Guillen*,[189] a Spending Power case where the Court concluded that "Congress could reasonably believe that adopting a [challenged] measure eliminating an unforeseen side effect of [the measure's] information-gathering requirement [related to traffic accidents] would result in more diligent collection efforts" by the states to comply with federal commands.[190] On the basis of this "reasonabl[e]" assumption, the Court found the challenged federal statute lawful.[191]

By contrast, consider how anti-circumvention measures are treated in the § 5 context. In *Coleman v Court of Appeals of Maryland*,[192] the Court rejected the proposition that the Family and Medical Leave Act of 1993's[193] (FMLA) self-care provision was a "necessary adjunct"[194] to the FMLA's direct bar on pregnancy- and gender-based discrimination that was necessary to prevent employers from trying to circumvent the FMLA's core command by modulating hiring decisions.[195]

The gap between these cases' different outcomes turned on the burden of evidentiary production placed on Congress. In *Guillen*, the Court showed scant interest in testing Congress's empirical claim that prophylactic measures were necessary.[196] By contrast, in *Coleman*, it flyspecked Congress's determination to the same effect.[197] Yet it is hardly implausible to imagine Congress enacting the self-care provisions of the FMLA pursuant to the Spending Power rather than § 5. Taking *Guillen* and *Coleman* at face value suggests that such a hypothetical provision would be upheld under the Spending Power even though it had been invalidated under Congress's § 5 authority. The lesson of *Guillen* and *Coleman*, in short, is that Congress should, to the

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189 537 US 129 (2003).

190 Id at 147. See also *Sabri v United States*, 541 US 600, 605 (2004) ("Congress does not have to sit by and accept the risk [that federal policy goals will be thwarted by private circumventory action].").

191 *Guillen*, 537 US at 147 (using a reasonableness standard in evaluating the connection between the purpose statute and the powers granted to Congress).

192 132 S Ct 1327 (2012).

193 Pub L No 103-3, 107 Stat 6, codified as amended at 29 USC § 2601 et seq.

194 *Coleman*, 132 S Ct at 1335.

195 See id at 1334–35; id at 1339 (Ginsburg dissenting) (explaining the functions of the FMLA provisions).

196 *Guillen*, 537 US at 147.

197 *Coleman*, 132 S Ct at 1334–35.

extent it is feasible, enact regulations that are required as adjunct anti-circumvention measures using the Spending Clause, rather than the Reconstruction Amendments.

As noted, it is important to emphasize that the facial variation in the substantive reach of enumerated powers means that *some* congressional arbitrage is always possible. But that does not entail the further conclusion that some *additional* arbitrage opportunities enabled at the margin by a system of tiers of scrutiny are warranted. My focus is on that marginal supplement, which may be of uncertain magnitude but is certainly not a null set. Whatever its magnitude, there are three reasons for worrying about such marginal increases in arbitrage opportunities created by discontinuities in standards of review.

First, it is not obvious why Congress would be able to enact a federal statute using a given legislative evidentiary record with one power when it would be barred from doing so with another *solely because of the insufficiency of that record*. When enacting laws, Congress does not always identify which enumerated power it is relying upon.[198] The use of tiers of scrutiny in the enumerated powers context thus entails that a law can stand or fall on a ground that has no immediate normative relevance—whether the correct enumerated power has been picked out in light of the record that Congress has assembled. It is instead to make the outcome of judicial review a capricious function of what might be viewed as a superfluous detail of the legislative process. This may enable strategic legislative behavior or it might lead to arbitrary invalidations. Either way, it is hard to see the result as positive.

Second, and relatedly, it is not at all clear that using tiers of scrutiny will have any useful deterrent effect on legislative action. This is so not least because it may not be feasible for Congress to sequence its deliberation in a way that allows it first to identify an enumerated power and then to conduct appropriately tailored empirical inquiry. Timing constraints, complex procedural rules in each chamber, and exogenous crises can make sequenced deliberation of this kind impossible. In many instances,

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[198] For example, the legislative findings of the Affordable Care Act do not invoke a specific enumerated power, leaving courts with discretion on which to examine. Affordable Care Act §§ 1501(a), 10106(a), 124 Stat at 242–44, 907–09, codified at 42 USC § 18091(a)(1)–(3). See, for example, *Florida v United States Department of Health and Human Services*, 648 F3d 1235, 1314 (11th Cir 2011) (relying on "legislative history of the Act" to draw an inference about the use vel non of the Taxing Power).

local political exigencies mean that there is only a short window in which a law can be passed, or only a limited range of procedural vehicles for accomplishing that end.[199]

If Congress in these instances cannot always be expected to match the enumerated power to an appropriately developed record, penalizing its failure to do so will not pick out cases in which Congress has behaved in a troublesome manner or has acted upon illicit motives. Nor will it necessarily elicit better legislative behavior in the future. More likely, the prospect of invalidation based on parameters of the legislative process that are largely outside an enacting coalition's control merely has the effect of making congressional action across-the-board less likely. In a system of bicameralism and presentment already sharply criticized for its status quo–preserving effects,[200] it is not at all clear why further disempowerment of democratically credentialed officials, merely for the analytic convenience of federal judges, is desirable or even defensible.

Compounding this friction on legislative action is an intertemporal effect: When the Court has altered the standard of review in past cases, it has generally penalized an earlier Congress that was necessarily unaware of the new burden of production.[201] This is a penalty imposed *retroactively* for violation of a *procedural* rule imposed by the Court. But it is not clear why Congress should be sanctioned in this fashion for a rule with which it had no contemporaneous reason to comply. (Relatedly, it is also not clear why a failure of congressional process of *any* sort warrants invalidation of the ensuing statute. Not all procedural violations of the Article I framework undermine the validity of a law.[202] Given that the Court does not enforce all

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[199] See Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 NC L Rev 587, 609 (1983) (describing the timing limitations that Congress operates under and the negative effect it has on "thorough and accurate legislation").

[200] See Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* 35 (Chicago 1998) (explaining why the structure of federal lawmaking conduces to the underproduction of laws). See also William N. Eskridge Jr, *Vetogates,* Chevron*, Preemption*, 83 Notre Dame L Rev 1441, 1444–48 (2008) (describing opportunities for House or Senate members to derail proposed legislation at "vetogates," which are necessary stages in the legislative process where one group or another has the ability to derail a bill).

[201] Professors Ruth Colker and James Brudney thus criticize "the crystal ball nature of the Court's decision[s]" on standards of review. Colker and Brudney, 100 Mich L Rev at 111 (cited in note 17). See also Frickey and Smith, 111 Yale L J at 1723 (cited in note 17).

[202] See *Field v Clark*, 143 US 649, 672–73 (1892) (announcing the "enrolled bill" doctrine, which bars the Court from looking beyond the text of an enrolled bill to identify procedural failures). The enrolled bill doctrine has been applied to bar judicial review of assertions that bills were not enacted through the necessary steps of bicameralism and

rules of constitutionally mandated procedure, it is hardly obvious that Congress's failure to comply with a judicially imposed rule of legislative procedure should be fatal to a law's survival.[203])

Finally, the use of a tiers-of-review system imposes an epistemic tax on successful legislating with potentially troubling intracameral distributive consequences. In order to produce laws that survive judicial review, a legislator must know not only how to assemble a legislative coalition but also how to navigate downstream litigation peril that arises in what will appear to some as arbitrary ways. This tax is less burdensome for more experienced and better-staffed legislators, and most costly for novice or marginal legislators.[204] Indeed, the latter may be especially prone to discount or entirely overlook the low-salience, downstream peril of judicial invalidation on the seemingly technical matter of which enumerated power is at work. The net effect of the tax is to shift authority from newer to older, and more entrenched, legislators.[205] In this fashion, judicial employment of tiers of scrutiny may foster an "arbitrarily chosen threshold [ ] lead[ing] to systematic distributive inequalities,"[206] which is hard to justify even if it is not independently unconstitutional.[207]

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presentment. See *Public Citizen v United States District Court for the District of Columbia*, 486 F3d 1342, 1351 (DC Cir 2007) (noting that "the Courts of Appeals have consistently invoked *Marshall Field*" and applying the doctrine to bar a challenge to a law based on the claim that different versions of the law passed the two houses); *OneSimpleLoan v U.S. Secretary of Education*, 496 F3d 197, 203 (2d Cir 2007) (same).

[203] I assume here that legislators view invalidation of a law they supported as a penalty. This to me is a reasonable assumption, but I recognize that it should be subjected to empirical testing.

[204] In effect, the tax imposed by judicial employment of tiers of scrutiny is likely to fall hardest on those without extensive support from interest-group lobbies. Recent work has shown that lobbying operates "as a form of legislative subsidy—a matching grant of policy information, political intelligence, and labor to the enterprises of strategically selected legislators." Richard L. Hall and Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 Am Polit Sci Rev 69, 69 (2006) (emphasis omitted). Obviously, those legislators most likely to be lobbied will rarely be marginal or minority representatives.

[205] In other contexts, some Justices have treated incumbency effects as good reason to be suspicious of a law's constitutionality. See, for example, *McConnell v FEC*, 540 US 93, 306 (2003) (Kennedy dissenting) (describing campaign finance laws as "an incumbency protection plan"). I am not confident that the marginal effect of tiered scrutiny is anywhere near as large as that of campaign finance reform, but the general suspicion of incumbency protection is nonetheless relevant here.

[206] Melissa Schwartzberg, *The Arbitrariness of Supermajority Rules*, 49 Soc Sci Info 61, 69 (2010).

[207] It is important to note that the point here holds more generally in respect to doctrinal complexity. The more rebarbative the relevant rules with which Congress must comply to enact constitutionally valid laws, the greater the bias in favor of more tenured, more experienced legislators. To the extent this distributive effect is perceived as desirable, it is a ground for doctrinal parsimony.

In summary, a tiered system of judicial review for enumerated powers has the potential to lead to an aleatory or inequitable pattern of invalidations due to its effects on the legislative process. It may also enlarge the pool of opportunities for legislators to engage in strategic behavior. And to reward (or penalize) Congress by invalidating a law on grounds that are not within Congress's control or do not exist at the time of enactment imposes a serious friction on the realization of democratic preferences. All of these effects "produce or reify inequalities" between legislators or voters such that "those supporting [the use of tiered scrutiny] are under a special obligation to give reasons to those potentially disadvantaged."[208]

B. Tiers of Review and the Inflation of Judicial Discretion

The creation of arbitrage opportunities for Congress is not the sole way in which the tiered structure of enumerated powers review alters the scope and nature of official discretion. Building on Part II.A, I show in this Section how using tiers of scrutiny for enumerated powers also changes the operation of *judicial* discretion along four separate margins. None of these four mechanisms is obviously desirable. Their cumulative effect is to vest the federal bench with a measure of free-floating policy discretion that allows for the imposition of judges' own personal preferences regardless of democratic or constitutional warrants.

First, in those instances in which Congress fails to specify an enumerated power, the following troubling species of judicial discretion arises: A court can decide whether to uphold or invalidate a law once it has reviewed the legislative record, depending on whether it infers the use of one legislative power or another. When a law would be valid if enacted with one enumerated power, but not with another, the constitutionality of a law would turn on an unfettered and unguided exercise of discretion by a federal court respecting the constitutional basis of the enactment.

Although Congress might be expected to include a reference to the enumerated power used in most cases, this is far from universally so. In enacting a law as recent and as important as the 2010 Affordable Care Act, for example, Congress failed to specify which enumerated power was at stake. As the divergent views expressed by the Justices in *The Healthcare Cases* as to

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[208] Id at 71.

whether Congress had even invoked the Taxing Power show,[209] judges can read quite different meanings into the resulting silence. In effect, the constitutionality of so significant a law as the Affordable Care Act plausibly turned on how one (or more) Justices inferred a choice of enumerated powers from legislative silence.[210]

The Justices in *The Healthcare Cases* possessed such unfettered and outcome-determinative discretion solely by dint of the discontinuities between tiers of judicial review. Their discretion along this margin correlates in no meaningful way with an ability to promote either democratic or constitutional values. To the contrary, the discretion enabled by discontinuities in regard to judicial scrutiny appears to enlarge the ability of judges to displace democratic choice with personal preferences without any corresponding positive yield in constitutional norms.

Second, as my previous account of doctrinal change through history underscored, the Court has long resorted to the recalibration of the standard of review to facilitate substantive adjustments to the scope of federal regulatory authority.[211] This history suggests that federal judges, whether explicitly or inadvertently, use recalibration of the standard of review as an advantageous and preferred mechanism for altering the federal-state balance of power.

Why should this be so? One possibility is the lower salience of standards of review to the public and to elected officials. Changes to the standard of review are plausibly characterized as lower salience than changes to substantive legal rules because the latter "bring[] to the fore the element of judicial choice inherent in a decision to reject an old rule and establish a new one."[212] By contrast, using the standard of review to alter the bounds of federal legislative power increases the cost to an observer of the Court who is seeking to discern a decision's significance. Directing

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[209] Compare *The Healthcare Cases*, 132 S Ct at 2600 (majority) (holding that the Act's requirement that individuals without health insurance pay a penalty can be "characterized as a tax"), with id at 2655 (Scalia, Kennedy, Thomas, and Alito dissenting) ("[T]o say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it.").

[210] Note that, to the extent the Court supervises the constitutionality of laws enacted before the emergence of a tiered system of review of enumerated powers, we might predict that Congress will often have failed to be precise in this regard. In effect, the Court gains the most freewheeling discretion with respect to older enactments.

[211] See Part I.B.

[212] Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv L Rev 56, 66 (1965).

Congress to meet a "congruence and proportionality" standard is less dramatic, and has less obvious consequences, than saying plainly that Congress can only enforce rights previously recognized by the Court.

Lowering the salience of judicially instigated changes to the scope of federal power renders substantive alterations of the law less costly for the federal bench in those instances in which the Court anticipates political "backlash."[213] In consequence, reliance on the standard of review as a mechanism of legal change injects elasticity into what Professor Alexander Bickel labeled the "natural quantitative limit" that political resistance imposes on judicial elaboration of constitutional norms.[214] To be sure, not all judicially initiated legal changes will elicit public opposition. Sometimes a court even accrues public support by changing the metes and bounds of federal authority.[215] A judge who predicts that a legal change will secure public acclamation, however, can toggle back to the higher salience modality of doctrinal elaboration. Having the option of tweaking the standard of review thus enlarges discretionary judicial control over the delineation of federal power.[216] To the extent federal judges can deploy different standards of review strategically, the existence of tiered scrutiny enlarges their freedom to act in the teeth of public disapprobation.[217] It is, in effect, a subsidy for what some pejoratively term "judicial activism."[218]

Third, use of tiers of scrutiny expands judicial discretion by altering the unit of doctrinal change. In effect, a tiered system of

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[213] For a succinct account of the idea of backlash, see Cass R. Sunstein, *Backlash's Travels*, 42 Harv CR–CL L Rev 435, 435–36 (2007) ("[I]f the Court rules in a certain way in such cases, public outrage could significantly affect national politics and undermine the very cause that the advocates of the ruling are attempting to promote.").

[214] Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 94 (Yale 1978).

[215] For example, the impact of *The Healthcare Cases* on the Taxing Power. See text accompanying notes 120–26.

[216] For another account of how the Court might leverage the relative salience of issues to maintain public support, see David Fontana and Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 Colum L Rev 731, 781–84 (2012).

[217] Keith E. Whittington, Book Review, *Once More unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 L & Soc Inq 601, 611 (2000) (noting broad support for the proposition that justices act "strategically, in the sense of understanding and anticipating the likely responses of others to the judge's own actions") (emphasis omitted).

[218] Richard A. Posner, *How Judges Think* 287 (Harvard 2008) (defining the activism/restraint spectrum according to whether a decision "expands the Court's authority relative to that of the other branches of government"). I use the term "judicial activism" not as a pejorative label for decisions I happen to dislike, but rather to signal the possibility of agency slack on judges' part.

review increases the potential granularity of legal change and thereby enables the Court to engage in more subtle (and so more difficult and costly to observe) adjustments to the substantive law and, hence, to make doctrinal microadjustments in line with its policy preferences.

To see this point, consider a counterfactual world in which the standard of review for all enumerated powers moved in lockstep. A judicially initiated change under these counterfactual circumstances could hardly have a fine-grained character. The Supreme Court could not, for example, pick out the Commerce Clause and enlarge congressional power under that provision without doing the same for the Spending and Taxing Power. Equally, it could not single out and narrow rights-protecting enactments under the Reconstruction Amendments without also restricting Congress's power to address economic questions. Under these counterfactual conditions, there is a kind of "lumpiness" that acts as a friction on judicial innovation.

In contrast, a world (such as ours) in which standards of review vary among enumerated powers is one in which recalibrating scrutiny can be a far more "practical tool of judicial activism."[219] Discontinuous forms of scrutiny enable more subtle and targeted strategies of judicial transformation of the substantive law. Judges can thus engage in more granular amendments to the doctrinal landscape in ways that conform to their personal preferences about policy without triggering as large an adverse public response.

Finally, the fourth important effect of variable standards of review is that the latter may render outcomes less stable by increasing somewhat at the margin the risk of cycling between outcomes. This in turn can yield either instability over time or stable but arbitrary outcomes.

Cycling refers to the instability of collective choice within multimember bodies. Stated otherwise, any outcome from a decision protocol such as majority choice can (under certain conditions) be ousted by another round of the same deliberative mechanism under certain conditions.[220] For example, it can be

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[219] *Harper v Virginia Department of Taxation*, 509 US 86, 107–08 (1993) (Scalia concurring).

[220] See generally Kenneth J. Arrow, *Social Choice and Individual Values* (Yale 2d ed 1963) (providing general conditions under which the exercise of collective choices through majority-rule voting does not yield stable outcomes). See also Dennis C. Mueller, *Public Choice III* § 5.2 at 84–85 (Cambridge 2003) (providing a comprehensive technical account of cycling); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and*

demonstrated formally that sequential majority-rule votes over pairs of three or more potential outcomes do not yield a stable outcome because any given majority-vote winner can be unseated by an alternative. Cycling creates "circular preferences, path dependence, and other problems" that may render any outcome of a collective choice procedure normatively suspect.[221]

The possibility of cycling developed in a body of social choice theory initially formalized by economists such as Kenneth Arrow,[222] although the basic notion goes back to the late eighteenth-century work of Condorcet.[223] Although the pervasiveness of cycling in actual legislatures is highly contested,[224] the intuition that fairness in decision rules may need to be traded away to guard against the arbitrariness of results remains a potent source of critique. In the legal context, commentators have proposed that majority-rule decisions of multimember courts (such as the Supreme Court) may be characterized by cycling and have even identified potential cycles to prove their case.[225]

The existence of an Arrovian paradox in a decisional context nevertheless does not lead inexorably to chaos. Rather, the possibility of cycling may often not materialize because institutional designers have specified basic decisional protocols in ways that promote stability. They might do this, for instance, by designating an "agenda setter" with the power to lead a collective "to an outcome particularly pleasing to the agenda setter, and keep it there."[226] Any such decision protocol employed to solve an embedded cycling problem is, however, "rife with possibilities of strategic exploitation."[227] In the public law context, these possibilities

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the Voting Paradox, 75 Va L Rev 971, 984–88 (1989) (describing succinctly cycling and the underlying voting paradox).

[221] Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv L Rev 802, 824 (1982).

[222] See Arrow, *Social Choice* at 94–96 (cited in note 220); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L J 1219, 1224 (1994) (identifying Arrow's work on social choice as establishing the relevant field of inquiry).

[223] H.P. Young, *Condorcet's Theory of Voting*, 82 Am Polit Sci Rev 1231, 1232–34 (1988) (describing Condorcet's findings).

[224] See, for example, Gerry Mackie, *Democracy Defended* 17, 86–92 (Cambridge 2003) ("[T]he cycles that are alleged to make democracy meaningless are rare."); Donald P. Green and Ian Shapiro, *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science* 107–46 (Yale 1994) (reviewing empirical studies and expressing skepticism about their value).

[225] For the leading account, see Easterbrook, 95 Harv L Rev at 815–21 (cited in note 221).

[226] Mueller, *Public Choice III* § 5.13 at 115 (cited in note 220). See also Kenneth A. Shepsle and Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 Pub Choice 503, 507 (1981).

[227] Leo Katz, *Why the Law Is So Perverse* 101 (Chicago 2011).

often may redound to judges' benefit, effectively increasing their ability to insert policy preferences into the law.[228] Hence, a jurisprudence characterized by cycling is one in which judges can manipulate the sequence in which issues are raised and decided so as to maximize the attainment of their own extrinsic preferences.

Concerns about instability, cycling, and agenda manipulations arise only when a group's aggregated preferences over an issue are multidimensional. When a group's preferences over options are unidimensional and single peaked, by contrast, cycling does not arise.[229] All else being equal, it is less likely that an exercise of judicial review that comprises one decision upon the substantive rule of law will engender cycling problems.

The installation of tiers of scrutiny, however, has the effect of adding a new dimension to the judges' decisions. All things being equal, the addition of this new element to the judicial decision renders the possibility of instability more likely.[230] The more likely instability is, the more likely it is that a line of jurisprudence will be characterized by either unstable or unjustifiable outcomes.[231]

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[228] Consider Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 Mich L Rev 2297, 2332–33 (1999); Frickey and Smith, 111 Yale L J at 1751–52 (cited in note 17).

[229] See Tracey E. George and Robert J. Pushaw Jr, *How Is Constitutional Law Made?*, 100 Mich L Rev 1265, 1272 (2002) ("[C]ycling is inevitable on a theoretical level when groups make even the simplest decision among multidimensional options."). Professor Dennis Mueller identifies this effect by explaining, "If all issues were unidimensional, multipeaked preferences of the type [that induce a cycle] might be sufficiently unlikely so that cycling would not be much of a problem. In a multidimensional world, however, preferences [with multiple peaks] seem quite plausible." Mueller, *Public Choice III* § 5.4 at 87 (cited in note 220). See also John S. Dryzek and Christian List, *Social Choice Theory and Deliberative Democracy: A Reconciliation*, 33 Brit J Polit Sci 1, 12–13 (2008) (explaining that "single-peakedness[] is already a sufficient condition" for avoiding cycling) (emphasis omitted); Easterbrook, 95 Harv L Rev at 826 (cited in note 221) ("Multi-peakedness becomes more and more likely as the number of dimensions of choice increases.").

[230] Moreover, Professor Leo Katz argues, "[A]s long as the legal doctrines are multicriterial in character—which virtually all legal doctrines are—loopholes . . . are bound to arise." Katz, *Why the Law Is So Perverse* at 118 (cited in note 227). As I explain in the following paragraph in the text, there are reasons to believe that single questions of law declaration are not inevitably multicriterial. I accept Professor Katz's argument that because a substantive legal standard "synthesize[s] a variety of different criteria for evaluating a transaction" there is a de facto "guarantee" of "discontinuity." Id at 181.

[231] Indeed, there is an argument that the Court's federalism jurisprudence already manifests cycling over (1) substantive federal grounds and (2) preferences regarding statutory interpretation methods. See Frickey and Smith, 111 Yale L J at 1751–52 (cited in note 17).

It is important to emphasize here that even if a multimember court focuses on the single question how a substantive rule of constitutional law applies to a given statute, it is possible that the combined preferences of the judges can generate cycling. Even on the merits of a single, substantive legal question, judges might be tugged in diverse directions by concerns about fidelity to history, arguments by analogy, and even "economic, social, and political factors," such that their individual preferences will generate collectively multipeaked preferences.[232] Accordingly, compressing judicial review into a single question is no guarantee against instability.

Nevertheless, there are a number of reasons to think that cycling problems are less likely to arise when the Court only has to resolve a single point of law, and not specify in addition an applicable standard of review. First, it is quite plausible that in many cases judges' preferences on a single question will be ordered in such a way as not to produce cycling. Where five justices consistently value federalism more than national power, for example, no cycling arises. Indeed, questions about the scope of congressional power are especially liable to be collapsed into the single, simple question of the federal balance. Second, within the bounds of substantive law declaration, the Court has developed doctrinal devices such as standing and stare decisis that arguably quell cycling.[233] By ruling out of bounds certain considerations, these decisions tend to eliminate the multiplicity of options necessary to trigger a cycle.

To the extent it is desirable to avoid cycling problems, therefore, there is some reason to think that addition of the standard of review question to the doctrinal framework for enumerated powers will yield undesirable effects.

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This Part has suggested that discontinuities in the standards of review for various enumerated powers may well have troubling normative consequences for the expected incentives of legislatures and judges. It thus tees up the question whether there is a plausible normative justification for tiers of scrutiny in

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[232] Easterbrook, 95 Harv L Rev at 826 (cited in note 221).

[233] See Maxwell L. Stearns, *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making* 58, 170–77 (Michigan 2000).

enumerated powers jurisprudence warranting these costs—a question taken up in the following Part.

III. JUSTIFYING DIVERGENT STANDARDS OF REVIEW IN ENUMERATED POWERS JURISPRUDENCE

This Part analyzes potential justifications for tiers of scrutiny in enumerated powers jurisprudence. It assumes that the enumerated powers are not coterminous in their substantive reach and considers whether federal judges are warranted in adopting differentiated degrees of skepticism with respect to each distinct enumerated power. A positive answer would justify the status quo. In contrast, a negative response would provide a reason for reform and course correction.

To that end, this Part identifies and analyzes six potential explanations for modulating standards of review by enumerated power. To deflate any potential suspense, I should say here that each is ultimately found wanting. I conclude that not only does variegated judicial review of enumerated powers have undesirable consequences—as Part II demonstrated—but that further it lacks a redemptive justification. Together, the troubling consequences and the absence of countervailing benefits suggest that federal judges should not vary the standard of review according to the enumerated power under consideration. There should be no discontinuities in the judicial review of enumerated powers, but instead a lockstep standard of review.

This conclusion, I should stress at the outset, is not a *sub rosa* endorsement of either enlarged federal power or greater state autonomy. My argument is directed at the *procedures* that the Court employs to delineate bounds on federal regulatory authority. It is intended to be neutral in respect to the underlying question of federalism and reflects no implicit agenda in that respect.

A. Textualist and Originalist Justifications

I first consider the textualist and originalist justification for varying judicial review among the diverse enumerated powers. With one exception, I conclude, they are fragile—and the potential exception is in any event at odds with current practice.

The Constitution in general and Article III in particular are silent about judicial review, although there is a case for inferring

the practice from the text.[234] If, as with many consequential questions of constitutional structure, "the text doesn't give clear answers" to inquiries about the distribution of authority to liquidate constitutional uncertainties,"[235] then a fortiori, no powerful textual basis directly obtains for differentially calibrating review for different enumerated powers. To the extent we have a pre-Ratification practice upon which to draw for the elaboration of standards of review, it is one of Thayerian deference and even extreme unwillingness to invalidate federal legislation.[236] Variations in the intensity of judicial review, in consequence, cannot be derived from Article III's text or an account of judicial review's historical origins.

Turning to the Constitution's provisions on enumerated legislative powers, it is not clear how any modulation in the standard of judicial review between congressional authorities can be derived from those parts of the Constitution's text. Rather, the text strongly suggests that Congress's enumerated powers move in lockstep. In particular, this is the natural inference to be drawn from the Necessary and Proper Clause, which applies not only to the powers catalogued in Article I, § 8, but also to "all other Powers vested by this Constitution in the Government of the United States."[237] The Necessary and Proper Clause, as previously noted, provides a broad and *uniform* gloss across all Congress's legislative powers.[238] Finding variance among the enumerated powers would therefore contradict the principle that "absent a good reason for doing otherwise, similar constitutional commands should be treated similarly."[239] In short, the larger

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[234] I do not question that the legitimacy of judicial review can be justified casuistically (in the best sense of that word) from the constitutional text. See John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 Va L Rev 333, 363–69 (1998). My point is that it is not plain on the document's face.

[235] David A. Strauss, Book Review, *Not Unwritten, After All?*, 126 Harv L Rev 1532, 1535 (2013).

[236] See note 39. See also William Michael Treanor, *The* Case of the Prisoners *and the Origins of Judicial Review*, 143 U Pa L Rev 491, 527 (1994) (describing pre-Ratification proceedings in which participants believed a statute had to be "dramatically at odds with the constitution" for it to be unconstitutional).

[237] US Const Art I, § 8, cl 18. But see Engdahl, 44 Duke L J at 18–20 (cited in note 97) (arguing that the Spending Power is non-enumerated and therefore cannot be glossed with the Necessary and Proper Clause).

[238] Consider Harrison, Book Review, 78 U Chi L Rev at 1122 (cited in note 33) (suggesting the Necessary and Proper Clause implies that "a main power brings its incidents with it").

[239] Amar, 112 Harv L Rev at 790–91 (cited in note 16).

constitutional text strongly counsels against springing and shifting the strength of judicial review from one clause to another.[240]

This argument against discontinuities in the strength of judicial review can be extended to the later-enacted Reconstruction Amendments, which employ the term "appropriate" rather than the words "necessary and proper."[241] Despite the textual disanalogy, the framers of the Reconstruction Amendments "invoke[d] *McCulloch* in interpreting the reach of Section Five."[242] Early judicial constructions of the Reconstruction Amendments confirmed that understanding of the term "appropriate."[243] This enactment history, along with the semantic parallels between the Necessary and Proper Clause and later enforcement provisions—that is, the close relation between proper and appropriate—suggest that there should be no shift in deference as courts move from Article I to later amendments.

Herein, though, lies the exception: A historically contextualized reading of the Reconstruction Amendments might underwrite the use of *weaker* judicial review than that exercised in the supervision of earlier, vested congressional powers. On one reading, history reflects the Reconstruction-era framers' "desire not to vest the judiciary with exclusive or even primary jurisdiction

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[240] As an alternative to textual arguments, it might be contended that the tiers of scrutiny can be justified by attention to the "original meaning" of state sovereignty. Indeed, the Court has justified its protection of state interests in terms of "an older conception of the sovereign" derived from the colonial, monarchical period and the late-eighteenth-century law of nations. Judith Resnik and Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 Stan L Rev 1921, 1923 (2003). But see Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 Va L Rev 1, 6–7 (2003) (suggesting that the concept of state sovereignty should be given meaning by drawing on international law). Notions of sovereignty, at least as invoked by the Supreme Court, however, are insufficiently granular to provide a meaningful guide for distinguishing among different species of enumerated federal powers. If anything, an analysis founded in terms of sovereignty leads back to an analysis of the long-abandoned "dual federalism" model. See note 317.

[241] US Const Amends XIII § 2, XIV § 5, XV § 2.

[242] Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv L Rev 153, 178 n 153 (1997) (noting that the change from "necessary and proper" to "appropriate" in § 5 was met without protest); id at 188 ("[The term 'appropriate'] has its origins in the latitudinarian construction of congressional power in *McCulloch*."). See also Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 Harv J Legis 187, 200–03 (2005).

[243] See, for example, *Ex Parte Virginia*, 100 US 339, 345–46 (1879). See also *Civil Rights Cases*, 109 US 3, 13–14 (1883) (pointing to Congress's power to pass "corrective legislation . . . such as may be necessary and proper").

with respect to safeguarding Section 1 rights."[244] Suspicion of federal judges' sympathies for Southern states' resistance to the race-related elements of Reconstruction provided ample justification for shifting power away from the courts. A reading of the text that accounted not only for the federalism-related expectations of 1787, but also those of 1868, might plausibly find more leeway for legislative judgment in the Reconstruction Amendments than Article I.[245]

Of course, even if one rejected the argument from textual parallelism coupled to enactment history, and instead accepted this alternative reading, it would require current practice to be flipped on its head. As such, it supplies little justification for the currently observed tiers of scrutiny in enumerated powers jurisprudence.[246]

B. Judicial Supremacy and the Diverse Ends of Congressional Power

A second argument for changing the strength of judicial review among different enumerated powers might take inspiration from the *City of Boerne* Court's concern with distinguishing Congress's "final authority" on matters of "desirable public policy" from any power to "rewrite the Fourteenth Amendment law laid down by th[e] Court."[247] The argument would seek to distinguish cases in which judicial supremacy is most needful by looking at where the threat from Congress is gravest.

Accepting arguendo the "juricentric" assumption upon which this worry rests,[248] judicial employment of tiers of scrutiny might be explained and justified as follows: In some instances,

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[244] Caminker, 53 Stan L Rev at 1163–64 (cited in note 17). By contrast, the *City of Boerne* Court relied on the fact that the term "necessary and proper" was amended at one point to "appropriate," although it failed to supply compelling reasons why a restrictive inference would properly be drawn from an amendment that at least facially seemed to expand congressional power. *City of Boerne*, 521 US at 517, 529–30. Reviewing the "complex" historical record, one commentator described the Court's reading here as "facile." Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 Colum L Rev 1992, 2017 (2003).

[245] There is, accordingly, no little irony in the fact that it is the Court's most prominent originalist who counsels for stricter review of laws enacted pursuant to the Reconstruction Amendments. See *Coleman*, 132 S Ct at 1338 (2012) (Scalia concurring).

[246] More generally, the Court's insensitivity to Reconstruction-era history inflects its understanding of state sovereignty and federalism in ways that are hard to justify on a theory of original meaning that is not confined to 1787.

[247] *Garrett*, 531 US at 374. See also *City of Boerne*, 521 US at 529.

[248] But see Post and Siegel, 78 Ind L J at 17–30 (cited in note 17) (developing a criticism of the "juricentric Constitution").

the ends Congress can promote are defined by the Constitution itself. In others, these ends are defined by exogenously given social, economic, and political conditions. The enforcement provisions of the Reconstruction Amendments fall into the first category of intrinsically defined goals because the objects of congressional action are rights created in those Amendments' respective opening provisions. By contrast, the Commerce Clause, the Intellectual Property Clause, and the Spending and Taxing Powers plausibly fall into the second category of extrinsically defined ends pertaining to private rights. In the first category, where the end that Congress is empowered to promote is itself constitutionally defined, there is a risk—not present in other cases—of legislative trenching on constitutional meaning in ways that compromise the "supreme" nature of the Constitution.[249] Hence, in that first category alone, and not in the second category, judicial review should be more exacting.

Facially alluring, this line of argument ultimately rests on unstated, undefended, and perhaps indefensible epistemological foundations. At the threshold, we can begin by doubting that there is a clear distinction between (1) congressional powers defined in terms of endogenous constitutional norms and (2) congressional powers defined by reference to exogenous empirical facts. It requires more than an ipse dixit to explain why "commerce," but not "religious liberty," should be treated as a social fact and not a legal category.[250] Both preexist the Constitution. Both are altered, directly or indirectly, by the existence of federal institutions. Neither, therefore, has a preordained Platonic form that can be insulated from transformation under the tidal pressures of time and technological innovation. One might press this point yet further by venturing that the congressional power to define "commerce" poses in practice an even greater threat to judicial supremacy, and thus to the supremacy of the constitutional text, than any legislative power to define "equal protection" under the Fourteenth Amendment in light of the centrality of the Commerce Clause to federal regulatory power.

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[249] *City of Boerne*, 521 US at 529, quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

[250] See Devins, 50 Duke L J at 1178 (cited in note 17) (arguing that in some instances "the law-fact distinction may be a judicial conceit . . . used to prop up a conclusion about whether the Court or Congress should settle an issue"). One might indeed read Justice Clarence Thomas's separate concurrence in *Lopez* as making precisely such a claim about the legal nature of "commerce." *Lopez*, 514 US at 602 (Thomas concurring).

One might also reframe the Reconstruction Amendment cases in terms of *factual* judgments rather than legal conclusions no different from the policy judgments about economic development, invention, or immigration at stake in respect to Article I powers. On this view, the existence vel non of discrimination against the disabled and aged in *Garrett* and *Kimel v Florida Board of Regents*[251] respectively are "gauzy, unresolvable sociological disputes about what is happening in the real world of state government."[252] They are not questions about what the Constitution means. Accordingly, when Congress makes judgments about the extent of discriminatory behavior for the purposes of § 5 legislation, it is not making a judgment about the *Constitution* at all. It is rather making a judgment about the tangible world beyond the four corners of the law, one that is indistinguishable from policy judgments salient to the use of other enumerated powers.

Worse for this justification of tiered review, the alleged threat to judicial supremacy—and hence to the Constitution—from § 5 legislation in particular turns out to be rather finespun and evanescent. Consider in this regard *City of Boerne* and its progeny. *City of Boerne* invalidated a private right of action created by the Religious Freedom Restoration Act of 1993[253] (RFRA) against the states on the ground that RFRA created a shield against disparate religious impact. In the Court's view, this unconstitutionally displaced its 1990 ruling that individuals have a right only against disparate religious treatment.[254] A fair reading of *City of Boerne* would hence focus upon the legislative ouster of a disparate treatment rule for a disparate impact rule in religious liberty cases.

In later cases, however, the Court upheld almost the same disparate impact right of action first against the federal government (under what remained of RFRA)[255] and then against the states (under a later law enacted under the Spending Power).[256]

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[251] 528 US 62 (2000).

[252] Frickey and Smith, 111 Yale L J at 1749 (cited in note 17).

[253] Pub L No 103-141, 107 Stat 1488.

[254] See *City of Boerne*, 521 US at 529–36. The Court had earlier held the Free Exercise Clause entailed no disparate impact standard. See *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872, 882 (1990).

[255] See, for example, *Gonzales v O Centro Espírita Beneficente União do Vegetal*, 546 US 418, 423 (2006) (applying RFRA to grant an injunction allowing a religious group to use hallucinogenic tea that would otherwise violate the Controlled Substances Act).

[256] See *Cutter v Wilkinson*, 544 US 709, 714 (2005) (requiring accommodation of religion for prisoners under the Religious Land Use and Institutionalized Persons Act).

The Court has also shown no inclination to oust the disparate impact rule presently embodied in almost half the states through "mini-RFRAs."[257] As a consequence of these post–*City of Boerne* decisions and state enactments, a private right of action against state action with a disparate impact on believers is often available. Clearly then, not everything that has the practical effect of second-guessing the Court's judgment about constitutional liberty interests is problematic.

In any case, it is hardly clear that the Constitution's status as supreme law is threatened or compromised solely and mainly because the federal legislature uses an enumerated power that is defined in relation to a constitutional entitlement. The Court itself concedes that "preventive rules [as] remedial measures" are acceptable under the Reconstruction Amendments.[258] So it cannot be that the mere invocation of an enforcement power will necessarily instantiate a definitive act of constitutional interpretation.[259] When Congress expressly says it is enacting a prophylactic rule, judicial supremacy is not plainly impugned in any meaningful way.

Nevertheless, perhaps the justification for discontinuities in judicial scrutiny resides in the potential "expressive" effects of Congress's selection of one enumerated power over others. When, for example, it enacts a disparate impact rule for religious liberty cases using the § 5 power, perhaps this signals to the public Congress's disagreement with the Court's view of the Constitution.[260] But it is hard to see why this can justify tiered judicial review. In light of the Court's enunciated tolerance for prophylaxis under the Reconstruction Amendments and in light of the repeated government avowals of the prophylactic, rather than definitional, goals of a given law, it is hard to discern any reason to be concerned with expressive effects. No reasonable member of the public, under those circumstances, could believe that Congress has altered the meaning of the Constitution. As a

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[257] See Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv L Rev 155, 211–12 (2004).

[258] *City of Boerne*, 521 US at 530–32.

[259] Note that any exercise of the Commerce Clause also implies a view on the correct meaning of that Clause.

[260] See Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J Legal Stud 725, 726 (1998) (defining expressive effects as ones that "not only bring about certain immediate material consequences but also express . . . values and attitudes").

result, it is hard to see any reason why a rule enacted under § 5 would pose a constitutional concern on expressive grounds when the same rule enacted under the Spending Power would not.[261]

My argument here resonates with (but is somewhat orthogonal to) arguments developed in previous scholarship on the Court's § 5 jurisprudence. As several scholars have noted, constitutional rights created by the Fourteenth Amendment have been defined and defended by the Court and political branches in collaboration.[262] The Court may impose limits on its own remedial role out of comity-driven regard for its coequal branch collaborators, but it is a non sequitur to extend constraints imposed on the basis of limited *judicial* competence to the actions of the two democratically elected branches.[263] More fundamentally, other commentators have argued that "virtually any situation where Congress appears to be changing the meaning of a right" can be redescribed as "the addition or subtraction of a prophylactic remedy."[264] The permeability of the rights/remedy boundary means that any distinction between right and remedy is unlikely to generate coherent outcomes but will be vulnerable instead to the ad hoc exercise of judicial discretion.

In short, the logic of *City of Boerne* assumes that Congress's choice of one enumerated power over another is freighted—symbolically? semantically? institutionally?—such that it imperils the constitutional order in ways the same statute promulgated under a different enumerated power would not. This assumption underwrites a ratcheting up in the level of scrutiny for § 5 legislation. But the Court ultimately supplies no account of this mysterious threat to the supremacy of judicially created constitutional law. It may fairly be doubted that one exists.

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[261] I do not think it is plausible to say that the Reconstruction Amendments are categorically different in the magnitude of their normative and expressive effect from Article I, § 8. The latter, after all, was a radical transformation of national power—albeit one to which we are more than habituated. Alternatively, one might argue that a certain Reconstruction Amendment, that is, the Thirteenth Amendment, has a particularly important expressive dimension because it bears on private as well as state conduct. See, for example, *Jones v Alfred H. Mayer Co*, 392 US 409, 413 (1968). Again, it is especially hard to see why this underwrites *greater* suspicion of congressional action.

[262] See, for example, Caminker, 53 Stan L Rev at 1172–73 (cited in note 17); Post and Siegel, 110 Yale L J at 515–19 (cited in note 17). See also Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum L Rev 857, 875 (1999) (noting that even the "'true' principle of *Brown* only later began to come into focus . . . through the lens of remedy").

[263] See McConnell, 111 Harv L Rev at 156 (cited in note 242).

[264] Levinson, 99 Colum L Rev at 915–16 (cited in note 262).

C. Variations in the Political Safeguards of Federalism

If attention to the symbolic consequences of enumerated powers cannot explain tiers of scrutiny, can the latter be explained in terms of *federalism* concerns? There are two ways of reasoning from federalism values[265] to a tiered system of judicial review for enumerated powers. The first, more powerful and sophisticated line of argument focuses on whether and when federalism-related interests belonging to the states are protected in the national political process or alternatively are vulnerable to federal ouster inside the Beltway. This Section considers that argument; the following Section takes up a variant federalism-related argument.

The first federalism-based argument for varying judicial review by enumerated power focuses on the interaction between the judicial protection of federalism and its promotion through political safeguards. On this view, the central reason for limiting federal regulatory authority is the preservation of an autonomous domain of state regulation.[266] Variation in the standard of review flows from the waxing and waning of the need for judicial intervention.

The Constitution, on this view, provides serial, complementary methods of preserving the appropriate balance between the federal government and the several states against disequilibrating actions by the federal government.[267] In *The Federalist*, Madison identified state governments as "constituent and essential parts of the federal Government," with "each of the principal branches of the federal Government [owing] its existence more or less to the favor of the State Governments."[268] On Madison's view, involvement of the states in the "federalist political process might more effectively promote the very substantive values federalism is supposed to serve than any attempt to enforce

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[265] I do not mean to obscure the deep ambiguities of this term. Rather, Part III.D explores possible "federalism values." For the sake of the present argument, that internal variation can be ignored.

[266] Again, I should emphasize that, as explored in Part III.D, this is not the only potential "end" of federalism.

[267] For a careful definition of how "exploitation" by the federal government might be defined in welfarist terms, see Bednar, *The Robust Federation* at 66–73 (cited in note 25) (distinguishing federal encroachment from interstate burden shifting and state shirking).

[268] Federalist 45 (Madison), in *The Federalist* 308, 311 (cited in note 24). See also Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum L Rev 543, 552 (1954) ("Congress, from its composition and the mode of its selection, tends to reflect the 'local spirit' predicted by Madison.").

those values directly."[269] In 1985, the Supreme Court endorsed this view, opining that the "principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[270]

Madison's argument that the several states are represented in the federal legislative process has been criticized on the ground that "mechanisms that (possibly) give state and local interests a greater voice in national politics"—such as the protocols for selecting representatives and senators—"do not necessarily protect state and local *institutions*."[271] At the same time, the Madisonian account has also been supplemented by the claim that national political parties have stepped in as vehicles for fostering a healthy "political dependency of state and federal officials" and thereby serving as conduits for the articulation of state interests in the national political process.[272] On this updated

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[269] Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 S Ct Rev 341, 373–76.

[270] *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 550 (1985). Strictly speaking, *Garcia* is good law in the sense that its rejection of the "traditional government functions" test is still a valid rule of law. Id at 545; Kevin J. O'Brien, *Federal Regulation of State Employment under the Commerce Clause and "National Defense" Powers: Constitutional Issues Presented by the Public Safety Employer-Employee Cooperation Act*, 49 BC L Rev 1175, 1186–87 (2008). But see John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S Cal L Rev 1311, 1311–12, 1334–35 (1997). Obviously, as Part I demonstrated, the Court has assumed a larger role in policing federal power since 1985, albeit on different doctrinal grounds.

[271] Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum L Rev 215, 223–27 (2000) (emphasis added). See also William H. Riker, *The Senate and American Federalism*, 49 Am Polit Sci Rev 452, 456 (1955) (finding little evidence that the Senate protected states' interests). The normative payoff of this criticism of Madison's structural arguments is less clear than Professor Larry Kramer assumes. On the one hand, fidelity to the Constitution may require that current generations respect whatever design decisions were made in the original document—including ones that no longer function in the way the Founding generation either expected or intended—or it might require fidelity to some more abstract, atextual goal called "federalism." But see Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 Harv L Rev F 98, 101 (2009) ("[I]nclusion of broad and ambiguous provisions makes it unlikely that the founders intended to preclude all reference to general federalism purposes and norms."). To claim that a failure in the Framers' structural devices for preserving federalism imposes a demand on current generations to find substitutes is to place a great deal of normative weight on the second, nontextual federalism norm.

[272] Kramer, 100 Colum L Rev at 282 (cited in note 271); Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U Kan L Rev 1113, 1120–27 (1997) (describing the relevant mechanisms). See also Bednar, *The Robust Federation* at 113–16 (cited in note 25) (describing a theory of political safeguards and noting its weakness—because the "motivation of the part[ies] is to win elections," their actions will not always converge with what is required to defend federalism-related goods). See also John D. Nugent, *Safeguarding Federalism: How*

view of Madison's conception—which, inevitably, has garnered its own challengers[273]—the values of federalism are promoted through subconstitutional, political channels as well as through the formal lineaments of constitutional design.

Yet acceptance of a political-branch mechanism for the promotion of federalism values need not oust the courts of a federalism-related role. Even if the primary safeguard of the appropriate federal-state balance is institutional and political in nature, auxiliary protections in the form of judicial promotion of federalism might still be warranted for those instances in which the political safeguards fail.[274] Judicial promotion of federalism, from this perspective, operates as a failsafe or "backup."[275] Federal judges should accordingly vary the intensity of their scrutiny depending upon whether they believe the federal lawmaking process under a given enumerated power is likely to account properly for state interests. They should apply a more searching form of review in those domains where state interests are most likely to be ignored.

This process-based justification for intermittently more amplitudinous judicial review echoes Professor John Hart Ely's celebrated account of a jurisprudence of individual rights based on predictions of political process failure.[276] Drawing inspiration from Professor Ely's argument for the judicial defense of individual rights, one might posit that a jurisprudence of federalism could be specified by asking when in expectation the national political process is most likely to break down at cost to the several states' constitutional interests. In those latter instances, judicial invalidation should have a softer trigger. Such a theory of federalism-related political "process failure"[277] would provide a foundation for organizing the enumerated powers into a system of tiers

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States Protect Their Interests in National Policymaking 215 (Oklahoma 2009) (concluding, on the basis of several case studies, that "state officials have numerous means at their disposal for resisting perceived federal encroachments on their interests").

[273] Among the most insightful is Professors Paul Frymer and Albert Yoon's argument that parties, as "instruments of political combat and assertion," cannot play the role that Professor Kramer ascribes to them. Paul Frymer and Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 Nw U L Rev 977, 982 (2002).

[274] See Bednar, *The Robust Federation* at 132 (cited in note 25) ("[Judicial and political s]afeguards also bolster one another's performance and stand in where others are weak.").

[275] Saikrishna B. Prakash and John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 Tex L Rev 1459, 1479 (2001) ("[T]he federal courts must play backup to Congress, to ensure that any unconstitutional legislation that emerges from the political process . . . will not survive.").

[276] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 73–74 (Harvard 1980).

[277] Rapaczynski, 1985 S Ct Rev at 391 (cited in note 269).

that tracked the relative degree of peril to federalism values from various enumerated powers.[278]

There are two possible accounts of political process failure that might underwrite pro-federalism judicial interventions. Neither, however, provides a firm foundation for using tiers of scrutiny in enumerated powers jurisprudence. *First*, it is possible to argue that courts should engage in more fulsome scrutiny of federal action when there is a substantial risk that Congress has failed to internalize the costs of its policy making and instead shifted them onto the states. This can be styled as a problem of "unfunded mandates," or "hidden taxation," on states "by poorly monitored, opportunistic legislators."[279] Even if individual legislators are alert to states' interests, this line of argument suggests, their incentives may nonetheless conduce to a tragedy of the commons problem, where the commons being plundered is the states' reserved domain of fiscal and regulatory domain.[280] Accordingly, federal courts should strive to identify those enumerated powers that conduce to a heightened congressional temptation to engage in cost externalization to the several states.

A threshold problem with this line of argument is that it is not at all clear that the probability of constitutionally problematic cost shifting[281] rises or falls in any predictable way as Congress

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[278] This parallels the contribution of political process theory in the individual rights context. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va L Rev 747, 783 (1991) ("The most political process theory can hope to achieve is identification, in a value-neutral manner, of particular *subject matter areas* in which legislative decisionmaking suffers from systemic biases.").

[279] Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 Vand L Rev 1355, 1356, 1389 (1993). See also Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulations*, 93 Nw U L Rev 351, 351–52 (1999) (noting the possibility that "unfettered decisionmakers underestimate the costs they impose, issue commands that are selfish, engage in inefficient and unfair redistributions, or are simply driven too much by the political benefits their directives generate").

[280] Consider Garrett, 45 U Kan L Rev at 1118 (cited in note 272) (arguing that "collective action problems undermine responsible decisionmaking" and induce deleterious cost shifting by Congress). But see Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 Stan L Rev (forthcoming 2013) (questioning Professor Garrett's argument).

[281] Any conception of constitutionally troubling levels of cost shifting implicitly depends on a benchmark to gauge the permissible quantum of cost sharing the Constitution clearly permits. It is not plausible, after all, to say the federal government can impose no costs on the states. Article I's vesting of federal Taxing Power alone suffices to oust that possibility. Once this baseline question is recognized, it seems fair to wonder whether there is any meaningful way for courts to distinguish between "good" and "bad" cost sharing on either doctrinal or welfarist grounds. Moreover, this baseline problem

toggles between enumerated powers. There is no obvious correlation, that is, between the use of a specific enumerated power and the likelihood of cost shifting (and certainly, the Court has identified no such linkage). Just as it is possible for a § 5 enactment to impose compliance costs on the state,[282] so too can a Commerce Clause enactment directly regulate the states,[283] oust the states from revenue-raising possibilities,[284] or displace state regulatory schemes.[285] Equally, a Taxing Power enactment might crowd out state revenues in ways that impose marginal costs of a magnitude similar to that associated with direct regulation. Even a federal expenditure directed toward the states with conditions attached might either free up state funds or alternatively tie them down by entangling the state in regulatory enterprises that would otherwise be foregone. Indeed, the size of any relevant externalities would seem to turn not so much on the specific enumerated power at issue, but rather on the particular design of a given regulatory intervention.

Further, any correlation between the federal legislative choice of enumerated power and the magnitude of cost shifting to the states may be drowned out or complicated by other fiscal distortions inherent in the national legislative process. For example, the relatively greater representation of small states as opposed to large states in the Senate may systematically yield transfers from the latter to the former.[286] Given this potentially

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means that there is no obvious or simple litmus test for discerning when a measure imposes impermissible externalities on the states, as opposed to being justified by the creation of countervailing public goods at the federal level.

[282] See, for example, *Kimel*, 528 US at 82–83 (emphasizing the Age Discrimination in Employment Act of 1976's regulatory burdens on states and local governments).

[283] See, for example, *Garcia*, 469 US at 533 (allowing application of the Fair Labor Standards Act to the states).

[284] See Brian Galle, *The Politics of Federalism: Self-Interest or Safeguards? Evidence from Congressional Control of State Taxation* *12 (Boston College Law School Legal Studies Research Paper No 220, Aug 20, 2011), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1759510 (visited Nov 29, 2012) (finding that congressional action tends to reduce state taxing authority and that "this effect is more pronounced where there is tax-base competition and where public choice theory predicts"). Professor Brian Galle's empirical findings also suggest that commandeering and Commerce Clause regulation can be equally effective in shifting costs to the states.

[285] A shift in regulatory authority can in principle "be beneficial . . . . [w]hen initiated by public demand, authority migration demonstrates government responsiveness." Jenna Bednar, *Authority Migration in Federations: A Framework for Analysis*, 37 PS: Polit Sci & Polit 403, 403 (2004).

[286] See Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 Nw U L Rev 495, 535–36 (2009) (assembling empirical evidence to that effect); Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism,*

substantial background fiscal distortion, which flows from the malapportionment of national representation rather than from any kind of collective action problem, the choice of enumerated power may be inconsequential. Malapportionment at the national level may also make it difficult to ascertain ex ante whether a judicial intervention will bring cost sharing closer to or further away from a desirable baseline, such as one defined in per capita terms. Any judicial intervention may be either dampening or exacerbating distortions created by the Senate's apportionment rule.[287] In short, there is no reason to think Congress's choice of an enumerated power conveys any information about the risk of cost shifting.

More generally, federalism arguments from cost shifting rest on a nirvana fallacy.[288] Such claims implicitly assume that states and localities are the only constituencies to which costs can be shifted.[289] They ignore the possibility that states may be advantaged in the political process in comparison to other interest groups, and hence secure cost shifting via federal legislation onto those interest groups. For example, consider the possibility that weak federal environmental regulation is in effect a transfer of costs from the several states (which lose revenues from polluting businesses) to future generations (unrepresented in Congress).[290] Or the possibility that weak federal antidiscrimination

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and the Perils of Subconstitutional Change, 100 Georgetown L J 173, 189–90 (2011) (documenting the Senate's deviation from per capita representation).

[287] Lynn A. Baker, *Federalism: The Argument from Article V*, 13 Ga St U L Rev 923, 943–45 (1997) (arguing that because the Court in several cases, including *Dole*, has been unwilling to enforce constitutional provisions meant to give power to the states, it has implicitly endorsed the "systematic redistribution from large population states to small ones" effected by the national structure of representation).

[288] See Maxwell L. Stearns and Todd J. Zywicki, *Public Choice Concepts and Applications in Law* 112 (West 2009) ("Scholars commit the nirvana fallacy when they identify a defect in a given institution and then, based upon the perceived defect, propose fixing the problem by shifting decisional responsibility somewhere else.").

[289] See Roin, 93 Nw U L Rev at 376 (cited in note 279) ("The case against unfunded mandates relies either on the presence of unsophisticated voters or on a systematic pattern of weaker interest groups at the local cost-bearing level than at the federal benefit-enjoying level."). This parallels the problem in the individual rights context of figuring out "how we are supposed to distinguish [ ] 'prejudice' from principled, if 'wrong,' disapproval. Which groups are to count as 'discrete and insular minorities'? Which are instead to be deemed appropriate losers . . . ?" Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L J 1063, 1073 (1980).

[290] For evidence that at least some environmental regulations can transfer costs between populations, see David Satterthwaite, *The Links between Poverty and the Environment in Urban Areas of Africa, Asia, and Latin America*, 590 Annals Am Acad Polit & Soc Sci 73, 90 (2003); Daniel A. Farber, *From Here to Eternity: Environmental Law and Future Generations*, 2003 U Ill L Rev 289, 290.

legislation (at least in the absence of a state-law complement) enables uncompensated transfers between states and a diffuse group of employees who are poorly represented in the political process.[291] That is, a claim that an unfunded mandate is normatively troubling requires a comparison of states' influence in Congress with the influence of whatever other group stands to gain from the states' loss (or vice versa).

Once other interest groups are introduced into the analysis in this fashion, it becomes difficult to predict whether or when an enumerated power engenders an unacceptable risk of cost shifting to the states. The resulting analysis of congressional cost shifting must therefore proceed on a retail, not a wholesale, basis, since there is no longer a simple correlation between Congress's choice of enumerated power and the states' exposure to unfunded mandates.[292]

Second, an alternative account of political process failure that might justify tiers of scrutiny for enumerated powers would draw upon public choice theory. This application of economic modeling to legislative bargaining models the production of statutes as a market in which interest groups bid for congressional attention.[293] Comparative advantage accrues to groups with relatively low collective action costs, for example, because they are not geographically dispersed or have homogenous interests.[294] Legislation will, on this view, reflect "the (politically

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[291] Consider, for example, the case of those with disabilities. It would be expected that the disability lobby be weak because it is diffuse and because many potential members do not know they are members until they are disabled (that is, after the moment for lobbying has come and gone). As such, there is a timing problem in effective collective action. See John J. Donohue III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U Pa L Rev 523, 524–28 (1987).

[292] A further wrinkle is that arguments from cost shifting must account for mechanisms such as the Unfunded Mandates Reform Act of 1995 (UMRA), Pub L No 104-4, 109 Stat 48, codified at amended at 2 USC § 602 et seq. UMRA's "very passage indicates the influence retained by state and local governments over the federal legislature." Roin, 93 Nw U L Rev at 379 n 109 (cited in note 279). Because UMRA's coverage is not perceived as comprehensive, any baseline to test when a particular instance of cost shifting should raise constitutional flags must account for the Act's strengths and weaknesses. See Garrett, 45 U Kan L Rev at 1168–69 (cited in note 272).

[293] See Stearns and Zywicki, *Public Choice* at 49–53 (cited in note 288) (summarizing the economic theory of regulation).

[294] See James Q. Wilson, *Political Organizations* 332–37 (Basic Books 1973) (identifying distributions of costs and benefits as key determinants of interest-group mobilization). See also Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 33–36 (Harvard 1965) (explaining why an analysis of political influence should focus on collective action costs). James Wilson and Mancur Olson likely underestimate the ability of diffuse beneficiaries to elicit legislative action through politicians' rational

responsive) interests located within [a given] district."[295] Drawing on public choice theory, it might be argued that the enumerated powers should be organized into tiers of scrutiny depending on the risk that states will be outmatched in the federal legislative process by better-placed interest groups.[296]

The objection to this argument roughly parallels the counter developed above to the cost-shifting argument. Once more, there is no obvious correlation between Congress's choice of enumerated power and the putative vulnerability of states in the federal legislative process. The degree of states' influence on a law's drafting is not in any simple way a function of which enumerated power is in play. Rather, it is an empirical question how much weight states' views have, one with an answer that likely will vary on a bill-by-bill basis. Some exemplary case studies, though, throw light on the question.

Consider first the 2010 healthcare legislation, which was the object of intense private lobbying. Notwithstanding the powerful interest groups at work, and despite the federalism anxieties that have come to wreathe the law, studies of the statute's enactment process have found that state officials in fact "did wield influence during the congressional process in several notable respects" and secured meaningful changes to the law.[297] This influence did not appear to turn, however, on the unresolved question whether Congress was relying on its Commerce Clause or Spending Power authority. It turned on factors entirely extraneous to the Constitution.

Much the same can be said of the civil damages provision of the Violence Against Women Act of 1994,[298] which was invalidated on federalism-inspired grounds in 2000.[299] That measure, which was enacted pursuant to both the Commerce Clause and

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expectation of "future opinion" and consequent electoral punishment. R. Douglas Arnold, *The Logic of Congressional Action* 9–10 (Yale 1990).

[295] Barry R. Weingast and William J. Marshall, *The Industrial Organization of Congress; Or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J Polit Econ 132, 136 (1988).

[296] See, for example, Devins, 50 Duke L J at 1194–1200 (cited in note 17) (doubting whether the political economy of the federal legislative process conduces to serious consideration of state concerns). See also Roderick M. Hills Jr, *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 NYU L Rev 1, 33–34 (2007) (analyzing the interest-group competition in Congress relevant to federalism outcomes).

[297] John Dinan, *Shaping Health Reform: State Government Influence in the Patient Protection and Affordable Care Act*, 41 Publius 395, 407 (2011).

[298] Violent Crime Control and Law Enforcement Act of 1994, title IV, Pub L No 103-322, 108 Stat 1796, 1902–55.

[299] *Morrison*, 529 US at 625–27.

the Reconstruction Amendments, had the support of thirty-eight states' attorneys general—hardly evidence of a federalism crisis.[300] Those states sided with the people for whose benefit the Reconstruction Amendments were first enacted, rather than with any abstract idea of states' rights.

At the same time, it is also easy to conjure instances in which states—as the objects of regulation—oppose enactments pursuant to the Reconstruction Amendments.[301] States, in other words, can both oppose and support measures that seemingly narrow their federalism-related interests under § 5. There is no clear connection between patterns of state mobilization in support of or against federal laws on the one hand and the choice of enumerated power on the other. But if there is no clear correlation between Congress's choice of enumerated power and the public choice dynamics of a law's enactment, it is hard to see how those dynamics can underwrite tiers of scrutiny for enumerated powers.[302]

An alternative version of the public choice objection might be invoked to animate the clear statement rule employed in the Spending Power context.[303] That rule might be justified by the hypothesis that the constitutionally mandated process of bicameralism and presentment is more likely to yield laws that respect states' interests than extratextual, penumbral glosses placed on those enactments by executive agencies or federal judges.[304]

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[300] See Frickey and Smith, 111 Yale L J at 1729 (cited in note 17).

[301] For an obvious example of a statute that has garnered consistent opposition from states, see Voting Rights Act of 1965, 79 Stat at 4437; Voting Rights Act Amendments of 1970, Pub L No 91-285, 84 Stat 314; Voting Rights Act of 1965 Amendments of 1975, Pub L No 94-73, 89 Stat 400; Voting Rights Act Amendments of 1982, Pub L No 97-295, 96 Stat 131; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub L No 109-246, 120 Stat 577, codified at 42 USC §§ 1973–1973aa-6. For an account of state opposition, see Chandler Davidson, *The Voting Rights Act: A Brief History*, in Bernard Grofman and Chandler Davidson, eds, *Controversies in Minority Voting: The Voting Rights Act in Perspective* 7, 19, 39 (Brookings 1992).

[302] Moreover, state officials influence the federal legislative agenda prior to the selection of an enumerated power. Nugent, *Safeguarding Federalism* at 63–64 table 4 (cited in note 272) (listing examples of agenda-setting influence). Hence, states influence federal lawmaking before anyone has decided which enumerated power is in play.

[303] See, for example, *Sossamon v Texas*, 131 S Ct 1651, 1661 (2011).

[304] See *Virginia Department of Education v Riley*, 106 F3d 559, 567 (4th Cir 1997) (en banc) ("[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.") (alteration in original), quoting *Gregory v Ashcroft*, 501 US 452, 464 (1991), quoting Laurence Tribe, 1 *American Constitutional Law* § 6-25 at 480 (Foundation 2d ed 1988). For academic development of this idea, see Bradford R. Clark, *Separation*

Even this more limited defense of the use of a clear statement rule, however, is vulnerable. A number of scholars have recently developed arguments for the empirical claim that federal agencies tend to be more solicitous of state interests than legislators in the course of the Article I, § 7 legislative process.[305] These scholars assert that the presumption on which an anti-preemption clear statement rule rests—that the Congress is a better venue for the vindication of states' interests than the administrative process—is flawed.[306] If they are correct, the Court's clear statement rule in the Spending Power context shifts decisional authority from an entity likely to strike effectively a balance between competing policy and constitutional interests to a legislative process that is systematically prone to producing ambiguity and even conflicting instructions.[307] On that view, a clear statement rule in respect to conditional spending enactments is unwarranted, and even perverse, in the absence of a more robust empirical defense of Congress's institutional competence on federalism values.

Beyond these objections, any justification for variegated judicial review of enumerated powers based on public choice grounds must account for the relative influence of interest groups not only within the legislative process but also in the judicial process.[308]

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of Powers as a Safeguard of Federalism, 79 Tex L Rev 1321, 1325 (2001) (arguing that "strict adherence to federal lawmaking procedures" protects federalism values better than judicial enforcement). For a critique of Professor Bradford Clark's position, see Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 Colum L Rev 731, 780–81 (2010).

[305] See, for example, Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 Duke L J 2125, 2150–52 (2009) (documenting how agencies were more responsive to state regulatory concerns around the REAL ID Act of 2005 than Congress). See also Brian Galle and Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 Duke L J 1933, 1939, 1948–83 (2008) (arguing that "for the most part, agencies outperform" other federal branches as allocators of policy setting power); Nina A. Mendelson, Chevron *and Preemption*, 102 Mich L Rev 737, 741 (2004).

[306] See, for example, Mendelson, 102 Mich L Rev at 741 (cited in note 305).

[307] For an account of why congressional delegation to agencies will be pervasive, see David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Approach to Policy Making under Separate Powers* 196–97 (Cambridge 1999) (modeling causes of statutory delegations). See also Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L Rev 1, 55–60 (1982) (arguing that Congress engages in responsibility-shifting delegations so as to avoid blame for bad outcomes while claiming credit for good outcomes).

[308] See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L J 31, 66–68 (1991) ("Interest group theory can justify more intrusive judicial review only if it shows that the litigation process has some *comparative advantage* over the political process.").

The use of heightened scrutiny in some domains of federal regulatory power but not others assumes that (1) courts can identify those instances in which states are especially vulnerable to competing interest groups and (2) the litigation process will respond to such legislative pathologies without itself being distorted by the same or even additional lobbying effects. Yet it is hardly clear why we should assume that federal courts, but not Congress, are free of interest-group influence. Selective judicial scrutiny in some policy domains may reflect the success of some interest groups' efforts at attaining a deregulatory agenda through the promotion of certain judicial appointments.[309] Alternatively, an interest group that prevails against the states in the federal legislative process is also likely to be influential in the states' own governmental processes.[310] If that is so, it would be reasonable to expect states *not* to pursue litigation precisely in those instances in which public choice theory would suggest that it is most valuable. In either case, it is hard to see why judicial review can be mechanically promoted as a panacea for public choice dysfunctions in the federal legislative process.

One final point is worth making. If indeed relevant to an assessment of the appropriate scope of post hoc intervention by federal judges, the public choice analysis of interest-group dynamics arguably cuts against any robust judicial review on federalism grounds. States, after all, have an "intergovernmental lobby" that influences federal legislation even beyond big-ticket items such as the healthcare law.[311] They suffer from few of the deliberative and epistemic shortfalls that bedevil other interest groups.[312] And they have become increasingly coordinated and

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[309] See, for example, id at 81–83. Consider Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J L & Polit 645, 654 (1999) (noting that an interest group with a policy agenda such as deregulation could contribute to the campaigns of judges who are responsive to their political view).

[310] See, for example, Tyler Welti, Massachusetts v. EPA*'s Regulatory Interest Theory: A Victory for the Climate, Not Public Law Plaintiffs*, 94 Va L Rev 1751, 1782 (2008) (noting that state attorneys general are at risk of being captured by special interest groups).

[311] See Nugent, *Safeguarding Federalism* at 31, 118–20 (cited in note 272).

[312] For an argument that it is irrational for individual voters to gather information to enable informed voting, see Bryan Caplan, *Rational Irrationality and the Microfoundations of Political Failure*, 107 Pub Choice 311, 311–20 (2001). For an argument that states are better equipped than interest groups to gather information relevant to the federal legislative process, see Note, *The Lesson of* Lopez*: The Political Dynamics of Federalism's Political Safeguards*, 119 Harv L Rev 609, 621–22 (2005).

effective participants in the federal litigation process, in particular at the Supreme Court.[313]

All this suggests the Court's tendency to view noneconomic legislation with a more skeptical eye than economic legislation is a mistake. If the states comprise, in general, an effective lobby, then we would expect them to prevail except in the cases in which they face a more powerful foe—such as the well-organized business community. (As is well known, empirical studies of Congress find a skew toward business groups and against those representing the less advantaged.[314]) This suggests that the states will prevail in Congress in noneconomic matters, but remain vulnerable on economic matters.

Hence, when the Court assumes there is a "'disability lobby' . . . [that] rolled over the defenseless states as employers" during enactment of the ADA,[315] it is taking a view of the political process that is quite likely false. In that case, the Court's heightened skepticism of social legislation may operate paradoxically to deepen extant political and social inequalities by privileging states as against the least well-organized and most vulnerable interest groups, while leaving them undefended against powerful private interests. It is hard to see why this is desirable.

There is, in short, no good way of reasoning from a political process account of federalism to a system of tiered review. To the extent studies of the political process teach anything, they counsel against the presently observed system of tiered judicial review of Congress's enumerated powers.

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[313] For empirical evidence, see Paul M. Collins Jr, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* 73–74 table 3.6 (Oxford 2008) (documenting the increase in states' amicus briefs filed between 1950 and 1995); Eric N. Waltenburg and Bill Swinford, *Litigating Federalism: The States before the U.S. Supreme Court* 60–61 table 5.1 (Greenwood 1999).

[314] See Kay Lehman Schlozman, Sidney Verba, and Henry E. Brady, *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* 19–20, 265–446 (Princeton 2012) (documenting comprehensively the power of wealth and business lobbies); Kay Lehman Schlozman and John T. Tierney, *Organized Interests and American Democracy* 65–73 (Harper & Row 1986). See also Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* 285 (Russell Sage 2008) ("[A]ffluent people have considerable clout [in the federal legislative process], while the preferences of people in the bottom third of the income distribution have *no* apparent impact on the behavior of their elected officials."); Jacob S. Hacker and Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class* 41–72 (Simon & Schuster 2010). This effect is likely exacerbated by recent changes to First Amendment rules pertaining to campaign finance law. See *Citizens United v FEC*, 130 S Ct 876, 917 (2010).

[315] Frickey and Smith, 111 Yale L J at 1729 (cited in note 17).

D. Variations in the "Goods" of Federalism

The next argument to consider is a variant on the federalism-based argument for tiers of scrutiny in enumerated powers jurisprudence: Even if there is no predictable pattern of political process failure, there are still differences in the underlying *goods* or *values* that our system of federalism promotes. Because each enumerated power implicates a different bundle of those goods, there may be a need for differently calibrated review between various powers. Again, this argument on close inspection turns out to be frangible. And again, the core problem is the absence of any obvious correlation among enumerated powers and the potential for harm to federalism values. Case-by-case analysis is instead necessary to gauge how much of a concern any given federal enactment likely raises.

Federalism comprises plural strands.[316] Even within the Court's jurisprudence, we can identify distinct concerns about preserving separate spheres of state regulatory autonomy,[317] ensuring states' financial robustness,[318] and respecting the independent operation of state political institutions.[319] The incidence

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[316] See Fallon, 69 U Chi L Rev at 439–40 (cited in note 40). See also Heather K. Gerken, *Our Federalism(s),* 53 Wm & Mary L Rev 1549, 1552 (2012) ("Federalism theory has long exhibited a healthy pluralism with regard to the *ends* federalism promotes."). As Professor Alison LaCroix's incisive account of the "ideological origins" of federalism demonstrates, "the specific consequences of federal thought shifted over the decades between the 1760s and the 1800s," in part as the Framers turned from problems of legislative authority to jurisdiction. LaCroix, *Ideological Origins* at 7–9, 217–19 (cited in note 51).

[317] See LaCroix, *Ideological Origins* at 7 (cited in note 51) (noting the Founding-era "belief that the division of authority among levels of government should be determined according to the subject matter at issue"). See also Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 Duke L J 1513, 1527 (2002) ("For generations the Court had conceived the constitutional values of federalism as served by the maintenance of separate and incompatible spheres of state and federal authority."). A concern with separate spheres has long been eulogized as outdated. See Roderick M. Hills Jr, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich L Rev 813, 815 (1998); Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va L Rev 1, 19 (1950). But it continues to reemerge in the case law. See, for example, *Lopez*, 514 US at 577 (Kennedy concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.").

[318] See Fallon, 69 U Chi L Rev at 445 (cited in note 40) (noting the role of fiscal concerns in the Court's federalism jurisprudence).

[319] See Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 Harv L Rev 2180, 2218 (1998) (arguing for "the value of states as alternative locations of independently derived government power"). Alternatively, it is possible to explain federalism in terms of the expected welfare benefits from plural sovereigns

of these distinct goods is unlikely to be perfectly correlated. It may also be that different enumerated powers impinge on these regulatory, fiscal, and political goods in different and distinct ways, such that the Court is right to apply a discontinuous form of constitutional scrutiny.

The Court, however, has never explained why it is that some enumerated powers pose more of a risk to the aforementioned federalism values than others. And—echoing a point developed earlier—it is not at all clear that there is a strong correlation between the choice of enumerated power and the threat to regulatory, fiscal, or political federalism values. Worse, the interaction between a given enumerated power and any one of these values may be so entangled, subtle, and unpredictable that federal judges will be prone to miss them.

Consider an example of the Court's failure to grasp how federal laws can threaten the federalism-related value of state political autonomy—*Steward Machine Co v Davis*,[320] which upheld unemployment compensation portions of the Social Security Act[321] (SSA) under the Taxing Power.[322] The SSA imposed a tax on employers but granted those same employers a credit for payments to state unemployment insurance schemes.[323] The Court rejected the argument that the SSA was "void as involving the coercion of the states."[324] In so doing, it missed the SSA's effect on the states' democratic processes. The law's intended and actual effect was to alter the expressed preferences of a key constituency in state elections (large business owners) that would otherwise oppose state politicians who proposed unemployment schemes.[325] Rather than directly changing the state's regulatory policy, that is, the SSA indirectly influenced it by tinkering with the states' democratic political processes.[326] Such sidelong manipulation of states' political processes might be thought to raise

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with some degree of autonomy. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U Chi L Rev 1484, 1493–1511 (1987) (focusing on the positive goods generated through maintenance of a federal system, rather than cataloguing the design predicates of federalism).

[320] 301 US 548 (1937).

[321] Pub L No 74-271, ch 531, 49 Stat 620 (1935), codified as amended at 42 USC § 301 et seq.

[322] *Steward Machine*, 301 US at 582 (upholding the SSA).

[323] Id at 575.

[324] Id at 585, 590.

[325] See John Brueggemann, *Racial Considerations and Social Policy in the 1930s: Economic Change and Political Opportunities*, 26 Soc Sci Hist 139, 163–66 (2002).

[326] See id.

federalism flags—and yet it did not even register in the Court's analysis.[327]

In addition to showing how courts can miss the subtle and complex relationships between Congress's choice of enumerated powers and federalism's diverse goods, *Steward Machine* demonstrates that even the otherwise innocuous Taxing Power can be used to undermine the autonomous operation of state political processes. Again, the larger point is that the magnitude of any correlation between the invocation of a particular enumerated power and threats to federalism goods is hard to predict ex ante.

Accounts of federalism's underlying values are, accordingly, insufficiently theorized to warrant reliable predictions about which enumerated powers should provoke concern. As a result, any recalibration of the strength of judicial review on federalism grounds should proceed on a case-by-case basis. Acting in such a granular basis, courts benefit from the briefing offered by parties and any error is of limited consequence.

E. The Distinctive Judicial Concern with Individual Rights

Another reason to attend to the distinctive ends that Congress can pursue with its enumerated powers might conduce to the creation and utility of tiers of scrutiny turns not on internal variation in federalism ends, but on a distinction between rights and structure. That is, we might posit that courts should engage in closer judicial scrutiny in respect to rights-related congressional powers than in respect to structural principles such as federalism. This distinction would trade on language in judicial opinions as early as *Marbury v Madison*[328] to the effect that "[t]he province of the courts is, solely, to decide on the rights of individuals,"[329] since "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[330] It follows that federal courts have a special obligation "to protect the constitutional

[327] Indeed, the SSA arguably raised especially substantial federalism concerns because the subtlety of its operative mechanism arguably made it more difficult for voters to allocate responsibility accurately between different levels of government. The Court has styled this as a concern about "accountability." *Printz v United States*, 521 US 898, 929–30 (1997); *New York v United States*, 505 US 144, 168 (1992).

[328] 5 US (1 Cranch) 137 (1803).

[329] Id at 170.

[330] Id at 163. See also *Baker v Carr*, 369 US 186, 208 (1962).

rights of individuals from legislative destruction."[331] Hence, they must attend with special care to how Congress employs its rights-related powers, such as the Reconstruction Amendments and (perhaps) the Intellectual Property Clause.

Yet a rights/structure distinction—even assuming it is analytically coherent[332]—supplies no plausible basis for sorting enumerated powers into different tiers of judicial review. To begin with, the distinction does not explain why the Court currently employs greater scrutiny when examining rights-protective legislation enacted under § 5 than when examining Commerce Clause enactments. To the contrary, the Court's present approach seems precisely backward. Moreover, the distinction does not explain why the Court dons the actuary's green eyeshade when Congress seeks to legislate prophylactically and yet remains silent when Congress fails to protect a right, say by failing to invoke Commerce Clause authority to enact a precautionary rule.[333]

More generally, there is no particular reason to believe that Congress's election of a particular enumerated power supplies a reliable guide as to whether an ensuing statute either promotes or undermines liberty interests. History suggests, to the contrary, that each enumerated power is equally capable of promoting or debilitating one or another species of liberty. On the one hand, a Commerce Clause enactment, as much as a Spending Power enactment, might imperil a liberty interest against excessive governmental regulation.[334] On the other hand, Congress has historically employed the Commerce Clause power to promote

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[331] *Wesberry v Sanders*, 376 US 1, 6–7 (1964).

[332] The analytical coherence of a rights/structure distinction is hardly obvious. The Framers believed rights and structure had overlapping goals. See, for example, Federalist 47 (Madison), in *The Federalist* 323, 323–25 (cited in note 24) (exploring the relationship between "the structure of the federal government" and "liberty"); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1132–33, 1153–54 (1991) (arguing the individual entitlements in the Bill of Rights are "tightly interconnected" with the structural design of the Constitution). In my view, this is not a sufficient response to the distinction proposed here. Rights and structure may have convergent goals, but they promote such goals through quite different methods. See Huq, 98 Va L Rev at 1067–69 (cited in note 20). It may well be that rights- and structure-based strategies for preserving liberties would benefit in divergent ways from differentially geared judicial review.

[333] See Levinson, 99 Colum L Rev at 919 (cited in note 262) ("[M]erely limiting Congress to remedies will not prevent it from eviscerating rights.").

[334] Consider in this regard the fierce contestation about the relationship between the Affordable Care Act's individual mandate and individual liberty. See, for example, Noa Ben-Asher, *Obligatory Health*, 15 Yale Hum Rts & Dev L J 1, 7–8 (2012) (identifying the individual mandate as an "impingement on individual liberty").

civil rights just as effectively as it has wielded the Reconstruction Amendment.[335] These examples suggest that the Constitution is plausibly understood to promote plural forms of liberty (here, economic freedom and freedom from discrimination), and that conflicts between those different species of liberty are possible. Further, both the Commerce Clause and the Spending Power can be employed to tip the scales in favor of either one or the other kind of liberty, or, instead, to enact federal laws that trench on both.

In short, even if the Court wished to hew to *Marbury*'s hortatory peroration to individual rights, this would not justify placing the enumerated powers on different tiers of scrutiny for purposes of judicial review. Rather, it would point the Court toward a sorting of laws on a case-by-case basis depending upon the threat they in fact present to some especially valued liberty.[336]

F. Standards of Review as Complements to Substantive Doctrinal Change

The final argument in favor of varying standards of review focuses on the interaction between substantive law on the one hand and standards of review on the other. Its gist is that standards of review should vary in ways that mirror, and thus compensate for, changes in the ease or difficulty of engaging in judicial review of a particular substantive standard.[337] Rather than complementing the political safeguards of federalism as previously suggested, shifting standards of review would compensate for variation in the ease or difficulty of law declaration.

There are (roughly speaking) two ways in which a court can expand federal legislative authority. It can either ratchet up the deference to Congress's *legal* judgment about the scope of a given enumerated power or evince greater deference to Congress's

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[335] Hence, Congress enacted the Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241, under the Commerce Clause. See *Heart of Atlanta Motel, Inc v United States*, 379 US 241, 245 (1964).

[336] I develop further the argument that structural constitutional choices have only a weak correlation to trends in individual liberty elsewhere, extending it to federalism claims more generally and also to the separation of powers. See generally Aziz Z. Huq, *Standing for the Structural Constitution*, 99 Va L Rev (forthcoming 2013).

[337] My argument here is distinct from Professor Heather Gerken's point that "it is possible for many forms of federalism to coexist" as "complements and not just substitutes." Gerken, 53 Wm & Mary L Rev at 1564 (cited in note 316). The argument here relies on a notion of *equilibrated* enforcement, whereas Professor Gerken's is a free-form celebration of diverse technologies of federalism without any attempt to establish a baseline of desirable enforcement levels.

empirical judgments about the nexus between a law and an enumerated power. Either strategy can yield to Congress more breathing room for regulation. In consequence, both species of deference are rough substitutes for each other. The ensuing plurality of doctrinal tools might be valuable to a Court that wishes to ensure Congress is subject to a constant level of judicial scrutiny and constraint, but finds it difficult to impose the same degree of constraint on Congress through the delineation of substantive rules.

The goal of equal constraint across the enumerated powers might be warranted on the ground that while legislators typically operate within constitutional bounds, they are consistently tempted to stray outside those bounds.[338] If incentives to act ultra vires are distributed evenly across the enumerated powers, then the Court must apply a constant quantum of resistance against legislative overreaching. Judges' ability to draw precise legal boundaries, however, might vary between the enumerated powers. For example, it might simply be easier to limn tractable doctrinal boundaries for the Commerce Clause than to write down a workable test for coercion under the Taxing Power. Or the fashioning of § 5 doctrine might be easier than the delineation of an across-the-board rule for conditional spending enactments.

To buffer its intermittent inability to reel in Congress through tightening substantive boundaries of an enumerated power, the Court might turn to the standard of review and ratchet up its scrutiny of the legislature's empirical judgment. By toggling between deference to legislative judgments of law and of fact, legislators' feet would be held to the fire equally regardless of the enumerated power they chose to invoke. In that way, the Court might maintain what Justice Anthony Kennedy calls "the federal balance"[339] uniformly across the diverse enumerated powers.

At present, however, it is not the case that the Court treats deference to Congress's legal and factual judgments as substitutes. As a result of this want of fungibility, the aggregate level of judicial scrutiny of Congress's legal and factual judgments

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[338] For an argument that legislators are consistently tempted to stray outside constitutional bounds, see Lynn A. Baker and Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L J 75, 115–18 (2001) (criticizing the possibility of political promotion of federalism values).

[339] *Lopez*, 514 US at 578 (Kennedy concurring). I bracket here the ample reasons for skepticism of the "balance" metaphor in a context implicating incommensurate values, bundled governmental goods, and fluid exogenous pressures.

varies widely across enumerated powers. On intellectual property questions, for example, Congress appears to secure large deference on both counts. On questions arising under the Reconstruction Amendments, the federal legislature obtains no benefit of the doubt on either score.[340]

More generally, there is simply not enough variation in the scope of judicial deference to Congress's legal judgments to explain modulation in judicial supervision of factual judgments. With the exception of the Intellectual Property Clause, the Court has "largely refused to defer on questions of constitutional interpretation."[341] This means there is simply not enough variation in deference to congressional legal interpretations to justify differential gearing in the standards of factual review.

Further, the complementarity of law definition and standards of review is not as clear as might first appear. Consider, for example, the Commerce Clause, where the Court has furnished a reasonably precise tripartite doctrinal definition of legislative authority.[342] Yet at least with respect to the first two elements of the doctrinal test, legal clarity coexists with considerable legislative discretion. Law declaration, that is, may or may not yield constraints on Congress depending on how tightly the doctrinal lines are drawn. In consequence, arguments for tiered judicial review based on a balancing of legal and factual deference with the aim of securing a constant level of judicial deference must fail.

G. Abandoning Tiers of Scrutiny for Enumerated Powers

This Part has evaluated six possible justifications for the use of differential tiers of scrutiny in enumerated powers jurisprudence. In each case, I have argued that the potential justification fails to explain or justify the differentiation of judicial review by enumerated power. Of course, I cannot demonstrate that there is not a seventh potential justification that will succeed. But I believe that it is fair to venture that the foregoing analysis has covered most of the likely grounds on which the tiers of scrutiny might be justified. At minimum, I hope to have shifted the burden of persuasion onto those who approve of the Court's current approach to enumerated powers jurisprudence, and who would retain tiers of scrutiny.

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[340] Compare *City of Boerne*, 521 US at 520–30, with *Eldred*, 537 US at 218–22.

[341] Hessick, 85 Notre Dame L Rev at 1449 (cited in note 29).

[342] *Gonzales v Raich*, 545 US 1, 16–17 (2005). See also text accompanying note 78.

The more ambitious—but still, I hope, plausible—inference to be drawn from this analysis is that there is simply no sound justification for tiered review in enumerated powers jurisprudence. There is hence no reason to distinguish Reconstruction Amendment enactments from Commerce Clause enactments, no reason to separate those Commerce Clause enactments that concern "noneconomic" interstate activities from those concerning "economic" interstate activities, and no reason to hive off spending and taxing from the general regime of judicial supervision.

Moreover, recall that I endeavored to demonstrate in Part II that using tiers of scrutiny in enumerated powers jurisprudence is not simply unjustified but also leads to ample unwelcome consequences. Tiered review creates pockets of discretion for undesirable strategic behavior by judges and legislators. In consequence, the outcomes of judicial review are less likely to be the products of principled reasoning and more likely to reflect specific individual judges' policy preferences.[343] Stratified judicial review of Congress's enumerated powers is not only unwarranted but also positively undesirable.

If that more ambitious version of my thesis is persuasive—as I will assume for the balance of this Part—it points toward a need for reform of the existing doctrine. But what would that reform look like? My proposed reform involves a move to lockstep judicial review. This move would largely eliminate opportunities for strategic behavior by diminishing the space for judicially initiated changes to the scope of federal legislative authority and by forestalling the possibility of doctrinal arbitrage (either by Congress or the courts) across the enumerated powers.[344] The result would be a more temporally stable, democratically responsive, and principled jurisprudence. My aim in what follows is to flesh out that proposal.

To reiterate first a caveat lodged initially in the Introduction, the reform proposed here would hardly end debate about the scope of federal power. To the contrary, my proposed abolition of tiers of scrutiny for enumerated powers is not intended to resolve *in any way* the underlying question of how broadly federal authority should sweep. That question is too complex, too fraught, and too entrenched to be resolved simply through so subtle a shift in the mechanics of judicial review. In consequence, a

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[343] See text accompanying note 219.

[344] See David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv L Rev 731, 737 (1987) (arguing that transparent decision making constrains the exercise of judicial power).

court employing lockstep review can still side with either the federal government or the several states.

The main difference from the status quo to follow from my proposal is methodological. The judiciary, on my view, should resolve the scope of congressional power with different tools than those presently employed. The proposed shift in working method would generate more transparency and reduce the risk of strategic action by judicial and political elites. The Court's position on the federal-state balance would be more unequivocal and less prone to unprincipled caveats, hesitations, or exceptions. The winners from my proposed reform, I submit, would not necessarily be the several states or the federal government, but the democratic polity at large.[345]

Eliminating tiers of scrutiny for enumerated powers would force the Court to confront directly and frankly that question and render the stakes of ensuing decisions more pellucid. In lieu of our current world of recondite doctrinal formations, hollow symbolic gestures, and "lawyers' revolution[s],"[346] the move to lockstep judicial review of the enumerated powers would push the Court to take seriously the enduring project of sculpting boundaries to Congress's fulsome enumerated authorities.[347] In this way, the proposed reform would render the political and policy stakes of such judicial review more transparent in ways that enable more meaningful public discussion.

The lumpiness of judicial review would also mean that the Court could not single out specific, disfavored enumerated powers—consider in this regard its treatment of the Reconstruction Amendments. Hence, the proposed reform would tend to preclude the Court from drawing lines between favored and disfavored legislation on grounds that have scant basis in the Constitution. The ad hoc distinction between economic and noneconomic matters that haunts enumerated powers jurisprudence, for example, could consequently be happily retired.[348]

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[345] There is no question that under certain circumstances, opacity is a desirable characteristic in governmental institutions. One might not want, for example, a Central Intelligence Agency or a Federal Reserve whose every move was subject to external scrutiny or political lobbying. But I see no reason to demur to the goal of maximal transparency in respect to the articulation of constitutional norms, which is the task at hand here.

[346] Fallon, 69 U Chi L Rev at 494 (cited in note 40).

[347] This is not to say that the task of law declaration excludes the possibility of symbolic yet functionally nugatory judicial interventions. The activity/inactivity distinction in *The Healthcare Cases* might be one such ineffectual and symbolic gesture. See note 78.

[348] See note 79 and accompanying text.

New avenues of judicial activism motivated by the policy peccadillos of the justices would also go undiscovered.

Under the proposed regime of lockstep judicial review, the Court, if it wished to reduce federal power, could certainly do so. But it would have to do so plainly, openly, and across-the-board. If indeed there is a new balance to be struck between the federal government and the states, the justices would have to announce it frankly, publicly, and without occluding subterfuge or camouflage. Eliminating discontinuous scrutiny in enumerated powers jurisprudence would hence yield gains denominated in judicial candor. Whether it would also diminish judicial power is harder to say. Certainly, it would diminish the space for certain less candid species of judicial action while leaving open other, more transparent modalities of intervention.

All this is a long way from a solution to the problem of what substantive lines should circumscribe federal regulatory power. But at the very least it provides the groundwork for a more frank and openly democratic debate by "protecting the integrity of the public process by which legal justifications are developed, challenged, and modified over time."[349]

CONCLUSION

Lawyers and law students laboring through the complex warren of federalism precedent often yearn for a purifying simplicity to descend and burn away the doctrine's rococo excrescences. As this Article has aimed to show, they are right to see the technical details of the jurisprudence, which I have lumped together as standard-of-review questions, as consequential. At the same time, they are also correct to muster animadversions against the case law based on the absence of cogent normative justifications for much of the observed doctrinal intricacy. The tiers-of-scrutiny system that has emerged in enumerated powers jurisprudence hence rests on fragile, even facile, ground.

In the absence of tenable foundations for its enumerated powers jurisprudence, I have argued, the Court should jettison its use of discontinuous tiers of scrutiny and instead deploy a unitary standard of review for all of Congress's enumerated powers. Doing so would remove the source of potentially corrosive arbitrariness and strategic behavior from the current jurisprudence. It would force the Court to confront directly the

[349] Micah Schwartzman, *Judicial Sincerity*, 94 Va L Rev 987, 991 (2008).

question of how to calibrate the federal-state balance. No less importantly, it would require the justices to make clear their own responsibility for setting this balance—or, alternatively, their acquiescence in whatever equilibrium is set by the political process. Abandoning the tiers of scrutiny, in short, provides no easy answer to the core problem of American federalism. But it would inject a healthy transparency into judicial action and thereby open a more candid conversation about the role that the Court properly plays in crafting boundaries on federal regulatory power in the twenty-first century.

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