BOOTSTRAPPING

STUART MINOR BENJAMIN*

I
INTRODUCTION

Law often develops through accretion. The common law and precedent involve courts building on what came before as they reach new decisions. The earlier decisions lay the groundwork for later ones. Slippery slopes are a particular kind of accretion: a conclusion that might seem unreasonable if taken in one fell swoop becomes reasonable because of the many small steps that precede it. In both situations, a decision depends on earlier ones—or, to put the point differently, earlier decisions enable the later one. This is of course a familiar story, and the accretive process of precedent is largely taken for granted in the United States.

Accretion often involves many different actors and many different steps. Consider a more directed, and direct, process: an actor undertakes action *Y* that enables that actor's action *Z*. As with the development of precedent, the later action depends on the earlier one, but in this case a given actor is creating the conditions for its later actions. The actor is engaged in bootstrapping—using its own volitional actions to empower it to take other actions.

Every action a person can take depends on the circumstances created by prior actions. One can walk into a building because someone built that building, one can own money because a monetary system was created, etc. Some of those conditions precedent are created by the actor herself. For example, walking into a given building depends on earlier decisions to be in that city and to go to that building. A person routinely enables her own action *Z* by first undertaking action *Y* without which *Z* would be impossible. Government institutions operate similarly: they rely on the earlier acts of others, for instance those who founded the nation or those who created the businesses they regulate. And government institutions rely in part on the acts of their predecessors. A Supreme Court holding on any issue depends on a series of decisions that its predecessors made.

This article focuses on bootstrapping based not on the physical enablement of *Z* but instead on its legal enablement—situations in which action *Y* transforms *Z* from legally problematic, if not clearly impermissible, to legally

---

This article is also available at http://lcp.law.duke.edu/.

* Douglas B. Maggs Professor of Law, Duke Law School. I would like to thank Matt Adler, Randy Barnett, Mitch Berman, Joseph Blocher, Jamie Boyle, Curt Bradley, Josh Chafetz, Guy Charles, Bob Cooter, Fred Kameny, Arti Rai, Stephen Sachs, Fred Schauer, Neil Siegel, Ilya Somin, and Ernie Young for useful comments and conversations, and Abby Liebeskind for research assistance. All errors are mine, of course.

permissible. That is, an actor undertakes permissible action *Y* and thereby renders its action *Z* legally permissible, as the actor's undertaking of *Z* absent *Y* would raise serious legal problems. For example, the Supreme Court's ruling in *Bolling v. Sharpe*[1] would have been difficult to defend absent *Brown v. Board of Education.*[2] *Brown* in turn relied on *Sweatt v. Painter*[3] and other earlier cases that had chipped away at the "separate but equal" doctrine, and later cases that would have seemed barely conceivable absent *Brown* relied on *Brown* for legitimacy.

The idea behind bootstrapping is that by undertaking *Y*, an actor creates the conditions that enable that actor to undertake some further action *Z*. This is different from estoppel, in which others' failure to object to earlier *Y*s is treated as preventing them from objecting to a new iteration of *Y*. In that situation, the earlier *Y*s have played an important role for the actor, but that role is to consolidate its ability to undertake similar actions.[4] Bootstrapping is different in that the actor is undertaking a further action that is beyond its precedents, and it does not rely on others' failure to object. The point of estoppel is that the actor says, in effect, "I am doing the exact same thing that I did in the past, and your lack of concern about those earlier actions prevents you from objecting now." Bootstrapping, on the other hand, involves a new action that goes beyond what was done in the past.

Bootstrapping is also different from estoppel in that estoppel may rely on *Y*s undertaken by others, but in bootstrapping the same actor undertakes *Y* and *Z*. The same point applies in distinguishing bootstrapping from path dependence or a slippery slope.[5] Neither path dependence nor a slippery slope necessarily involves a given actor building on its own prior actions. A key element of bootstrapping is an actor using two or more steps to achieve an outcome it could not achieve with a single step. The actor does not merely build on conditions precedent that have arisen, but instead creates those conditions precedent. A less important difference for my purposes between bootstrapping and path dependence or a slippery slope is that path dependence often, and a slippery slope by definition, entails many small steps that over time produce a given result. Slippery slopes in particular involve an accretion of small measures that results in a significant change. Bootstrapping, by contrast, often entails a simple step function rather than a slope. Bootstrapping can involve a series of

1. 347 U.S. 497 (1954).

2. 347 U.S. 483 (1954).

3. 339 U.S. 629 (1950).

4. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 531 (2008) ("[I]f pervasive enough, a history of congressional acquiescence can be treated as a 'gloss on "Executive Power" vested in the President by § 1 of Art. II.'") (quoting Dames & Moore v. Regan, 453 U.S. 654, 686 (1981)). For a discussion of the significance of acquiescence in creating a form of estoppel, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. (forthcoming 2012).

5. For a discussion on path dependence, see Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643–62 (1996). For a discussion on slippery slopes, see generally Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003) and Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

small changes that build up over time—and insofar as it does so, it overlaps with a slippery slope created by a single actor—but it need not do so.

Bootstrapping has particular current salience in the context of the Patient Protection and Affordable Care Act (ACA) of 2010.[6] The main response to the argument that the ACA exceeds Congress's commerce power relies on two apparent bootstraps. First, in the Emergency Medical Treatment and Active Labor Act (EMTALA), Congress required emergency rooms to treat patients whether they could pay or not, which means that individuals can receive health care paid by others.[7] Congress could then say that forgoing insurance affected interstate commerce, because the guarantee of emergency room service meant that the non-purchase of insurance shifted costs from some individuals onto others. Second, in the ACA, Congress prohibited insurance companies from disallowing coverage based on preexisting conditions and from charging higher premiums because of a person's medical condition or history.[8] As many commentators have noted, these prohibitions effectively necessitate an individual mandate or something like it (or else many people would forgo insurance in good health and sign insurance forms on their way to the hospital).[9]

What is wrong with bootstrapping? It seems to hit a constitutional nerve, as it were, when government institutions engage in it. An entity takes action *Y* that empowers it to take action *Z* that might further empower it. The institution is able to ratchet up its power by itself, creating an upward spiral of its power based on its own actions. The obvious concern is that an institution is able to create and control the conditions that empower it. Giving government actors the ability to determine their own limits—or lack thereof—allows for aggrandizement. The key is that an entity is empowering itself, rather than being part of a process involving many different entities. This raises fears about an actor concentrating its own power, contrary to foundational principles articulated in *The Federalist*[10] and embodied in constitutional provisions creating a government of limited, separated powers. Some bootstraps by nongovernment actors may trouble us (to tweak the definition of *chutzpah*, imagine that a person who kills her parents thereby becomes automatically eligible for benefits as an orphan). But this article's focus is on governmental

6. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

7. 42 U.S.C.A. § 1395dd (West 2010).

8. *Id.* § 300gg-3a ("A group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage."); *id.* § 300gg(a)(1) (prohibiting insurers from charging higher premiums except on the basis of age, rating area, tobacco use, and whether the policy covers individuals or families). The ban on exclusions based on preexisting conditions is sometimes called "guaranteed issue" (because it guarantees the issuance of insurance to those with preexisting conditions). The limitation on the bases for charging higher premiums is usually called "community rating" (because everyone in a given community is treated similarly, even though some people would be expected to have higher health care costs).

9. *See infra* notes 17–18 and accompanying text.

10. *See* THE FEDERALIST NO. 51 (James Madison).

institutions, because a key element of bootstrapping is self-empowerment, and that practice raises fears of government aggrandizement that have a particular historical and constitutional pedigree.

One can and probably should distinguish among aggrandizing outcomes. The Supreme Court, for example, has treated aggrandizing actions that invade another branch's authority (as opposed to aggrandizement that does not so invade) as particularly troubling.[11] This is a relevant axis, but it is orthogonal to the issues this article addresses. The possible illegitimacy of an outcome does not automatically condemn the process that produced it. Any process can produce a bad outcome. The question on which this article focuses is the legitimacy of the bootstrapping process. The unconstitutionality or illegitimacy of action *Z* is an independent reason to reject *Z*, but not a reason to reject the process by which all *Z*s are created.

Many courts and commentators have addressed the sufficiency of a connection between conditions precedent and what they allegedly enable, particularly in the Commerce Clause context. For example, should the Supreme Court find a sufficient connection to interstate commerce if Congress had a rational basis for finding a substantial connection between gun-related school violence and interstate commerce?[12] And, once a test is chosen, is it satisfied—is there a sufficient connection between the allegedly enabling condition and what it enables? Even a rational basis test likely would not be satisfied if Congress tried to regulate backyard cookouts based on its past declarations of a commemorative National Ice Cream Day. The connection between the two is just too tenuous.[13]

The issue addressed in this article is different: Are there categories of situations in which there is a sufficient empirical connection between the enabling condition and what it enables, but the bootstrap itself is illegitimate? So my focus is not on the test for sufficiency or its application, but instead on whether there are forms of bootstrapping that should be rejected even though *Y* in fact enables *Z* (and any reasonable decisionmaker would so conclude). More specifically, my question is whether there are situations in which a particular category of bootstrap is particularly troubling even though *Y* is permissible and justifies *Z*, and *Z* does not violate an independent constitutional right. If *Z* is unconstitutional or otherwise illegitimate whether or not *Y* exists, then *Y* is not

11. *See* Buckley v. Valeo, 424 U.S. 1, 122 (1976) (emphasizing the importance of "encroachment or aggrandizement of one branch at the expense of the other"); N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83 (1982) ("The constitutional system of checks and balances is designed to guard against 'encroachment or aggrandizement' by Congress at the expense of the other branches of government.") (quoting *Buckley*, 424 U.S. at 122); Bowsher v. Synar, 478 U.S. 714, 727 (1986) (emphasizing "[t]he dangers of congressional usurpation of Executive Branch functions").

12. *See* United States v. Lopez, 514 U.S. 549, 618 (1995) (Breyer, J., dissenting) ("[W]e must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce.").

13. *Cf. id.* at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

legally enabling *Z* and there is no bootstrap, because *Z* is illegitimate anyway. Put differently, this article addresses the circumstances under which the act of bootstrapping is a problem and thus delegitimizes the enabled decision.

Governmental bootstrapping is not limited to the Commerce Clause context, or even to congressional enactments. Examples abound of government institutions relying on their decisions to legitimate other decisions they undertake. Precedent can serve this function—allowing a court (or the President) to do in a few steps what it could not do in one.

My inquiry is not limited to whether particular categories of bootstrapping violate the Constitution, much less whether the Supreme Court would find those categories unconstitutional. I want to ask a broader question: Are there categories of bootstrapping that we as lawyers and citizens should treat as particularly troubling forms of aggrandizement, even if they would not run afoul of a specific constitutional prohibition?[14] What is troubling will differ from person to person, of course, but what I mean to ask is whether the aggrandizement concerns that motivate fears about governmental bootstrapping are sufficiently greater in some contexts that we can distinguish them from other forms of bootstrapping. As I will discuss below, bootstrapping is pervasive. My question is whether we can identify differences among bootstraps that should lead lawyers and citizens to reject bootstraps of particular types.

Part II sets up the analysis by focusing on the most prominent recent examples of bootstrapping, arising out of the ACA's mandate that individuals purchase health insurance. The arguments against bootstrapping are consequentialist ones, grounded in fears about the results of bootstrapping. Part III discusses some key features of bootstraps, including their ubiquity, and thus the undesirability of disallowing all of them. Part IV turns to the question of distinguishing problematic bootstraps from other bootstraps, based either on substantive distinctions or on the purposes of the bootstrapper. I find that there are no useful substantive distinctions, and that purpose also does not give rise to useful distinctions, with one possible exception. That possible exception is a distinction based on the certainty of the bootstrap. A focus on certainty gives rise to a possible distinction between simultaneous and nonsimultaneous bootstraps, as *Y*'s enablement of *Z* will be clear when they are simultaneous, but the promulgation of *Z* will not be certain when they are separated in time. I find that this distinction would impose no meaningful hurdles to the President's ability to bootstrap but would impose very significant costs on Congress, and that those costs outweigh its benefits. The cure is worse than the disease.

14. So violating a constitutional norm (like the limits imposed by the Interstate Commerce and Necessary and Proper Clauses) is sufficient but not necessary.

II
BOOTSTRAPPING AND THE INDIVIDUAL MANDATE

My launching point is the argument that the individual mandate[15] in the ACA exceeds Congress's power under the Commerce Clause. Many arguments have been put forward against the individual mandate, some focusing on particular cases, some focusing on the Commerce Clause versus the Necessary and Proper Clause, etc. I am interested in one particular species of argument against the individual mandate—that focused on bootstrapping.

One justification for the individual mandate that operates as a bootstrap is the set of ACA provisions that forbid exclusions based on preexisting conditions and that sharply limit the bases upon which insurers can charge higher premiums.[16] The individual mandate is designed to counteract the incentives created by these provisions.[17] This is particularly clear with respect to preexisting conditions: Without a coverage mandate to accompany the ban on exclusions for preexisting conditions, "many people would simply wait to purchase insurance until they needed care. This 'adverse selection' would force the price of insurance higher for sick people who want to maintain continuous coverage."[18] As Randy Barnett has stated, "Congress exercises its commerce power to impose mandates on insurance companies and then claims these

15. 26 U.S.C.A. § 5000A(a) (West 2010) ("An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.").

16. *See supra* note 8 and accompanying text.

17. *See* 42 U.S.C.A. § 18091(a)(2)(I) (West 2010) ("[I]f there were no [individual mandate], many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection . . . . The [individual mandate] is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.").

18. Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1841 (2011); *see also* Anthony T. Lo Sasso, *Community Rating and Guaranteed Issue in the Individual Health Insurance Market*, NIHCM Foundation, Jan. 2011, *available at* http://nihcm.org/pdf/EV-LoSassoFINAL.pdf ("The primary concern with community rating and guaranteed issue is that these regulations can lead to adverse selection, destabilizing the insurance market and potentially causing total market collapse. This scenario is commonly termed an adverse selection death spiral. Aware of these concerns, policymakers included a provision in the ACA mandating all individuals to have health insurance."); *Making Health Care Work for American Families: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce*, 111th Cong. 11 (2009) (statement of Uwe Reinhardt, Professor of Economics and Pub. Affairs, Princeton Univ.) ("[C]ommunity-rating and guaranteed issue, coupled with voluntary insurance, tends to lead to a death spiral of individual insurance."); Brief for Petitioners, Dep't of Health & Human Servs., No. 11-398 (U.S. Jan. 6, 2012), 2012 WL 37168, at *18 ("[G]uaranteed-issue and community-rating enacted in isolation create a spiral of higher costs and reduced coverage because individuals can wait to enroll until they are sick."); Adele M. Kirk, *Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky, and Massachusetts*, 25 J. HEALTH POL. POL'Y & L. 133, 152 (2000) (stating that all but one private insurer left Kentucky after the state limited exclusions based on preexisting conditions); Mark A. Hall, *An Evaluation of New York's Reform Law*, 25 J. HEALTH POL. POL'Y & L. 71, 91–92 (2000) (after New York enacted legislation containing guaranteed issue and community rating for health insurance without an individual mandate, "[t]here was a dramatic exodus of indemnity insurers from New York's individual market").

insurance mandates will not have their desired effects unless it can impose mandates on the people, which would be unconstitutional if imposed on their own."[19]

A second bootstrap involves EMTALA.[20] That statute prohibits hospitals from refusing to stabilize emergency patients on the basis of their ability to pay or insurance status, thereby effectively turning every person into a potential cost that is shifted from the individual to hospitals.[21] The individual mandate forces individuals to internalize that cost. As Randy Barnett further explains,

> it is claimed that because everyone will one day need health care and may not be able to afford it when that day arrives, and because emergency rooms are obligated by law to provide care regardless of ability to pay, it is necessary to require that all persons purchase health insurance today to avoid shifting costs to others.[22]

So, once EMTALA was passed, an individual mandate could fairly be characterized as simply shifting economic impacts from providers to consumers. Without EMTALA, the ACA's individual mandate would be harder to justify as a cost-shifting mechanism because hospitals would not be legally required to provide uncompensated emergency care, and thus there would be no legal burden of costs to shift. Again, opponents have decried this bootstrap. As the Revere America Foundation wrote in an amicus brief about EMTALA and the resulting free riders as a justification for the individual mandate, "*that* problem is of Congress' own creation, and Congress cannot bootstrap itself into powers not enumerated by the Constitution simply because it deems the exercise of those powers expedient in light of other regulations that it has previously

---

19. Randy E. Barnett, *Turning Citizens into Subjects: Why the Health Insurance Mandate Is Unconstitutional*, 62 MERCER L. REV. 608, 614 (2011); *see also* Opening/Response Brief of Appellee/Cross-Appellant States, Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021, 11-11067), 2011 WL 1944107, at *39–40 ("The government also contends that the individual mandate is incidental to 'the requirement that insurers extend coverage and set premiums without regard to pre-existing medical conditions.' The government insists that this requirement 'would not work without' the individual mandate because the requirement will encourage consumers to refrain from buying insurance until they are injured or sick. . . . The Constitution does not permit this type of blatant bootstrapping—create a problem and then assert that it is necessary and proper to fix the problem by asserting an authority the Constitution otherwise denies the federal government.") (internal citation omitted).

20. 42 U.S.C. § 1395dd (2006).

21. 42 U.S.C.A. § 1395dd(h) (West 2010) ("A participating hospital may not delay provision of an appropriate medical screening examination . . . or further medical examination and treatment . . . in order to inquire about the individual's method of payment or insurance status."). Before the passage of EMTALA, some hospitals provided emergency care regardless of ability to pay and others did not. *See* Tiana Mayere Lee, *An EMTALA Primer: The Impact of Changes in the Emergency Medicine Landscape on EMTALA Compliance and Enforcement*, 13 ANNALS HEALTH L. 145, 146–47 (2004). EMTALA created a uniform requirement of basic coverage.

22. Barnett, *supra* note 19, at 614; *see also* Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1295 n.101 (11th Cir. 2011), *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 U.S. 603 (Nov. 14, 2011) (No. 11-393); Dep't of Health & Human Servs. v. Florida, 132 U.S. 604 (Nov. 14, 2011) (No. 11-398); Florida v. Dep't of Health & Human Servs., 132 U.S. 604 (Nov. 14, 2011) (No. 11-400) (noting the government's reliance on EMTALA and stating "the plaintiffs point out that the government's contention amounts to a bootstrapping argument. Under the government's theory, Congress can enlarge its own powers under the Commerce Clause by legislating a market externality into existence, and then claiming an extra-constitutional fix is required").

enacted."[23]

Those who attack this form of bootstrapping contend that the relevant bootstrap is illegitimate because it goes too far. Critics fear that allowing this bootstrapping would give Congress the power to compel economic activity, which it can then regulate under the Commerce Clause.[24]

It is worth unpacking these bootstrapping arguments a bit. The argument against bootstrapping is not that the individual mandate violates some independent constitutional right (e.g., the substantive component of the Due Process Clause).[25] The opponents of bootstrapping are not arguing that the enabling provision (e.g., EMTALA) is illegitimate. They are not denying that there is a sufficient empirical connection between the enabler (e.g., EMTALA) and what it enables (a requirement that people who can impose costs on emergency rooms bear those costs themselves through insurance).[26] Instead, they are focusing on the illegitimacy of relying on *Y* to justify *Z* because of the implications of accepting such reasoning. The problem seems to be one of consequences: Allowing *Y* to enable *Z* allows for aggrandizement, possibly unending aggrandizement.[27] If we allow this bootstrapping, what is the limit?

---

23. Brief of Revere America Foundation as Amicus Curiae in Support of Plaintiffs-Appellees/Cross Appellants, Florida *ex rel.* Att'y Gen., 648 F.3d 1235 (Nos. 11-11021, 11-11067), 2011 WL 2530512 at *10; *see also* Brief for the Am. Legislative Exch. Council as Amicus Curiae in Support of Plaintiffs-Appellees, Dep't of Health & Human Servs. v. Florida, No. 11-398 (U.S. filed Feb. 13, 2012), 2012 WL 504620 at *14–15 ("[T]he cost-shifting in this case is largely of Congress's own creation, stemming from the requirement in the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd, that hospitals provide emergency medical care regardless of ability to pay. Congress cannot bootstrap a radical expansion of its Commerce power simply by legislating cost-shifting measures."); Brief of Amici Curiae Docs4patientcare, the Benjamin Rush Society, and the Pacific Research Institute, Dep't of Health & Human Servs. v. Florida, 648 F.3d 1285 (11th Cir. 2011) (No. 11-11021), 2011 WL 2530507, at *22 (characterizing the argument that EMTALA justifies the individual mandate as "disingenuous bootstrapping" and adding: "The federal government cannot expand its own authority by manufacturing the circumstances of uncompensated care and claiming that such circumstances now affect interstate commerce."); Opening/Response Brief for Appellee, Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011) (Nos. 11-1057, 11-1058), 2011 WL 1115016 at *43–44 ("While it is true that Congress has directly regulated aspects of the health care system, principally by mandating emergency room treatment by hospitals receiving federal funds . . . the question in this case is whether Congress can command a citizen to purchase insurance solely for the convenience of the government in regulating market distortions caused, at least in part, by previous congressional regulation.").

24. *See* Brief of Revere America Foundation, *supra* note 23, at *24 ("Under the Government's theory, Congress can impress unwilling individuals into commerce and compel them to buy unwanted products whenever doing so is deemed by Congress to be essential to some larger regulatory plan."); *see also* Florida *ex rel.* Att'y Gen., 648 F.3d at 1351 n.14 (Marcus, J., concurring in part and dissenting in part) ("For reasons that remain inexplicable to me, the majority opinion seems to suggest that the individual mandate is a 'bridge too far'—in the words of the district court—not because it conscripts the inactive, but rather for some inchoate reason stated at the highest order of abstraction.").

25. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

26. Some bootstrapping opponents make some or all of these arguments in addition to their complaints about bootstrapping, but I am focusing on the bootstrapping arguments specifically.

27. *See* Reply Brief for Appellants, Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011) (No. 10-2388), 2011 WL 1653756 at *16 ("[I]f Congress can force a private citizen to engage in commercial or economic activity under penalty of federal law—whether exercising its authority under the Commerce Clause or the Necessary and Proper Clause—then it can regulate virtually anything, and the federal government is no longer one of limited and enumerated powers."); Robert A. Levy, *The*

This is a consequentialist argument, one that might resonate for many judges. The argument here is not that bootstrapping is illogical or immoral or unethical, but rather that it produces, or can produce, undesirable outcomes. The particular undesirable outcome, in the context of the individual mandate, is limitless congressional power: If we allow Congress to use EMTALA and the provisions on preexisting conditions and community rating to enable it to require an individual mandate, Congress can mandate anything the Constitution does not specifically prohibit.[28] More generally, a governmental

---

Case Against President Obama's Health Care Reform: A Primer for Nonlawyers, CATO INST., 6–7 (Apr. 25, 2011), http://www.cato.org/pubs/wtpapers/ObamaHealthCareReform-Levy.pdf ("Essentially, the insurance mandate is regulatory bootstrapping of the worst sort. Congress forces someone to engage in commerce, then proclaims that the activity may be regulated under the Commerce Clause. If Congress can do that, it can prescribe all manner of human conduct."); *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 7 (2011) (statement of Michael Carvin, Partner, Jones Day) ("[A]llowing Congress to impose an 'individual mandate' on Americans to offset the costs created by Congressional regulation would mean that the Necessary and Proper Clause eviscerates all limits on Congress's enumerated powers."); Memorandum of Amici Curiae, Former United States Attorneys General William Barr, Edwin Meese, and Dick Thornburgh, in Support of Plaintiff's Motion for Summary Judgment at 18, Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10cv001880), 2010 WL 4168827 ("If one does not apply the Necessary and Proper Clause according to its meaning, the government could claim virtually any power simply by citing one of the myriad federal laws that—*by being carried out*—affects the economy, and then claiming that it wishes to force individuals to participate in a certain fashion to adjust for the consequences of those laws."); Opening/Response Brief for Appellee, Virginia *ex rel.* Cuccinelli, 656 F.3d 253 (4th Cir. 2011) (Nos. 11-1057, 11-1058), 2011 WL 1115016 at *44–45 ("[T]he claim that citizens can be commanded to purchase goods or services from another citizen in order to increase the efficiency of the federal government's regulation of commercial actors goes beyond the negative outer limits of the Commerce Clause, even as aided by the Necessary and Proper Clause, because the claimed power would be unlimited and indistinguishable from a national police power."); Brief for the Am. Legislative Exch. Council, *supra* note 23, at *14 ("The Government's theory in this case reduces to the idea that an individual's failure to purchase health insurance has a negative effect on the interstate market for health insurance, as compared to when individuals uniformly purchase such insurance under Government compulsion. But this bootstrapping rationale is equally true—that is, *trivially* so—with respect to *nearly every* individual decision not to participate in commerce: Congress can always conceive of *some* activity which, if mandated, would substantially affect interstate commerce. . . . Such a conception of the Commerce Clause is indistinguishable from a plenary federal police power."); Reply Brief for Plaintiffs in Support of Motion for a Preliminary Injunction, Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (No. 2:10-cv-11156), 2010 WL 4784262 (arguing that the doctrine of enumerated powers would be eviscerated if Congress could expand its powers by issuing a finding of "essentiality" in a regulatory scheme); Brief of Members of the U.S. Senate and Speaker of the House of Representatives John Boehner as Amici Curiae in Support of Plaintiffs-Appellees, Florida *ex rel.* Att'y Gen., 648 F.3d 1235 (No. 11-11021), 2011 WL 2530520 at *31 ("The [Necessary and Proper] Clause is not a blanket grant of Congressional power to be invoked by Congress whenever its constitutionally-permissible provisions have bad real-world results that can only be mitigated by otherwise unconstitutional provisions."); *see also* Florida *ex rel.* Att'y Gen., 648 F.3d at 1351 (Marcus, J., concurring in part and dissenting in part) ("Perhaps at the heart of the plaintiffs' objection to the mandate—adopted by the majority opinion in conclusion, if not in reasoning—is the notion that allowing the individual mandate to stand will convert Congress' commerce power into a plenary police power, admitting of no limits and knowing of no bounds. The parade of horribles said to follow ineluctably from upholding the individual mandate includes the federal government's ability to compel us to purchase and consume broccoli, buy General Motors vehicles, and exercise three times a week.").

28. *See supra* note 27; Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1298 (N.D. Fla. 2011), *aff'd in part, rev'd in part sub nom.* Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom.* Nat'l Fed'n of

institution, finding itself with less power than it would like, and in particular the inability to implement *Z*, could make decision *X* and thereby empower itself to make decision *Y*, which would further empower it to undertake *Z*. The governmental institution could thus engage in repeated stepwise increases in power. Randy Barnett succinctly stated the possible result of allowing the bootstraps in the ACA: "By this reasoning, Congress would now have the general police power the Supreme Court has always denied it possessed."[29]

III
BOOTSTRAPS AS A CATEGORY

Given the fears of aggrandizement, one obvious response would be to disallow any actions that have this aggrandizing form. If we are worried about increases in power, why not prohibit all of them?

At the outset, note a basic textual problem for a prohibition on all congressional bootstrapping. The language of the Necessary and Proper Clause necessarily means that at least some bootstrapping is constitutionally authorized. The text of the clause gives Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution" the specifically enumerated powers.[30] To have meaning, this language must, like any

---

Indep. Bus. v. Sebelius, 132 S. Ct. 603 (Nov. 14, 2011) (No. 11-393); Dep't of Health & Human Servs. v. Florida, 132 S. C.t 604 (Nov. 14, 2011) (No. 11-398); Florida v. Dep't of Health & Human Servs., 132 S. Ct. 604 (Nov. 14, 2011) (No. 11-400) ("If Congress is allowed to define the scope of its power merely by arguing that a provision is 'necessary' to avoid the negative consequences that will potentially flow from its own statutory enactments, the Necessary and Proper Clause runs the risk of ceasing to be the 'perfectly harmless' part of the Constitution that Hamilton assured us it was, and moves that much closer to becoming the 'hideous monster [with] devouring jaws' that he assured us it was not.").

Indeed, some opponents have suggested that allowing the bootstrap will produce particularly pernicious forms of aggrandizement. House Republican Leader John Boehner argued in an amicus brief that this bootstrapping could create the wrong incentives for Congress. Brief of House Republican Leader John Boehner as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment at 6, Florida *ex rel.* Bondi, 780 F. Supp. 2d 1256 (No. 3:10-cv-91) ("If adopted by the court, this interpretation of the Necessary and Proper Clause would create incentives for Congress to pass ill-conceived or unrealistic statutes.").

In his opinion, Judge Vinson emphasized this possibility, writing,

> Such an application of the Necessary and Proper Clause would have the perverse effect of enabling Congress to pass ill-conceived, or economically disruptive statutes, secure in the knowledge that the more dysfunctional the results of the statute are, the more essential or "necessary" the statutory fix would be. Under such a rationale, the more harm the statute does, the more power Congress could assume for itself under the Necessary and Proper Clause.

Florida *ex rel.* Bondi, 780 F. Supp. 2d at 1297; *see also* Levy, *supra* note 27, at 10 ("Once again, Judge Vinson saw through the sophistry: The mandate is artificially necessary—required only because Congress went down a particular path that left few if any alternatives.").

29. Barnett, *supra* note 19, at 614. Perhaps some might suggest that the claimed bootstraps are overstated, reasoning that EMTALA and the ban on preexisting condition exclusions do not change the legal landscape very much, so the individual mandate does not depend on them. If that is true, then the concerns created by bootstrapping are overstated as well. That is, the less work that is done by bootstrapping, and the less common they are, the less we need to be worried about their aggrandizing potential.

30. U.S. CONST. art. I, § 8, cl. 18.

grant of power, authorize Congress to enact legislation that Congress would not have the authority to enact in the absence of the language. Whatever the limits of its meaning, the Necessary and Proper Clause at its textual core means that laws passed within Congress's enumerated authority can authorize other laws (those "necessary and proper for carrying into execution" those enumerated powers) that would otherwise be outside of Congress's authority. In other words, legislation enacted pursuant to enumerated powers is the *Y* that enables the *Z* that the Necessary and Proper Clause covers at a minimum.[31]

The Necessary and Proper Clause empowers only Congress, and there is no similar empowerment of the President or the Supreme Court. There are broad grants of power.[32] But there is no provision with respect to the President or the Supreme Court that clearly authorizes bootstrapping. So the only entity that is textually guaranteed some ability to bootstrap is Congress.

The textual argument, however, is sufficient but not necessary. Regardless of the Necessary and Proper Clause, any suggestion of the illegitimacy of bootstrapping cuts much too broadly. No government entity could meaningfully function without bootstrapping. Congress provides the most obvious illustration. Every enactment depends in part on conditions precedent that previous Congresses helped to create. The multitude of federal regulations of interstate banks relies on the impact of earlier federal actions providing for interstate banks.[33] Regulation of activities on federal properties can exist because the federal government chose to have those properties in the first place. For that matter, Congress's ability to regulate any company depends on a series of earlier legislative decisions allowing the company to enter its line of business, not to mention earlier enactments that protected the United States from its enemies and allowed companies to exist. Simply stated, every piece of legislation is predicated in part on a state of affairs that previous Congresses helped to create.

Another point bears emphasizing. Bootstrapping involves the use of *Y* to legitimate *Z*—doing *Z* directly would be problematic because of some hurdle, and *Y* enables *Z* by overcoming that hurdle. This highlights the fact that bootstrapping depends on the existence of a hurdle in the first place. An actor with plenary power (say, an absolute monarch) has no need to bootstrap, because it can always undertake *Z*, whether or not it has undertaken *Y* first. Or, to use an example closer to home, in a world in which everyone agreed that the interstate commerce power authorized any regulation Congress deemed appropriate, there would be no role for bootstrapping in the Commerce Clause

31. *See* McCulloch v. Maryland, 17 U.S. 316 (1819); United States v. Comstock, 130 S. Ct. 1949 (2010); Gonzales v. Raich, 545 U.S. 1 (2006) (Scalia, J., concurring).

32. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

33. *See, e.g.*, National Currency Act, ch. 106, 13 Stat. 99 (1864); McFadden Act, ch. 191, 44 Stat. 1244 (1927).

context. Congress could simply enact any *Z* that it wanted, regardless of the presence or absence of any conditions precedent. By the same token, the hurdle must be superable. If there is no *Y* that could enable a particular *Z*—say, the goal of the President attaining absolute power—then bootstrapping is not an issue. An institution's ability to use *Y* to legitimate *Z* is a function of the relevant legal test.

The centrality of the relevant test relates to another point: For many tests, inaction is as important as action. This puts enormous weight on the decisions of an actor's predecessors—either to act or not to act. For instance, in *Reno v. ACLU*,[34] the Supreme Court ruled that the modest First Amendment protections for broadcast television were inapplicable to the Internet.[35] A central distinction for the Court was the long history of broadcast regulation, as contrasted with the absence of such a history with respect to the Internet.[36] Regulation of the broadcast spectrum helped to enable later broadcast regulation, but the failure to regulate the Internet helped to doom later Internet regulation. Public forum doctrine is another example. If the government places limits on the use of a forum when it creates the forum, courts will treat those limits as demarcating its openness.[37] "Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set."[38] Deciding exactly what if any limits to impose at the outset thus has major implications for later regulation. Beyond that, the Supreme Court sometimes relies on the existence, or nonexistence, of early congressional enactments in determining the constitutionality of a recent enactment. *Printz v. United States*,[39] for example, in invalidating a 1993 statute's imposition of responsibilities on states without their consent, placed great emphasis on the absence of early congressional enactments imposing similar responsibilities.[40] The failure of earlier Congresses to enact such statutes undermined its successors' ability to do so.[41]

Bootstrapping's emphasis on conditions precedent—the existence or

34. 521 U.S. 844 (1997).

35. *Id.* at 867.

36. *Id.* (distinguishing *Fed. Commc'n Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978), because "the order in *Pacifica* [was] issued by an agency that had been regulating radio stations for decades"); *id.* at 868 (noting that the Court "relied on the history of extensive Government regulation of the broadcast medium" in its broadcasting jurisprudence); *id.* at 868–69 ("Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.").

37. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

38. *Id.*

39. 521 U.S. 898 (1997).

40. *Id.* at 907–08.

41. The emphasis on history is particularly notable in the jurisprudence of Justice Scalia, who has emphasized the importance of "universal and long-established American legislative practice" as a relevant consideration in interpreting the First Amendment. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375–77 (Scalia, J., dissenting).

nonexistence of a given set of prior actions—means not only that a previous undertaking of those actions will enable further action, but also that the failure to undertake those earlier actions will make it harder to take further action. In this way, and importantly, allowing (or disallowing) bootstrapping will often have no clear valence. And bootstrapping can occur with individual rights as well as congressional power, as the path to *Brown v. Board of Education* reveals.[42] Sometimes bootstrapping aggrandizes congressional power and sometimes it doesn't.

Bootstrapping involving Congress's commerce power is about congressional power and does have a clear valence, given the tests that the Supreme Court uses to determine the limits of that power. Congress's failure to enact EMTALA in year *A* in no way made it harder for Congress to pass EMTALA in year *A+B*, and therefore had no impact on the ability of Congress to enact an individual mandate in year *A+B+C*. But many tests will place weight not only on action but also on inaction, as the example of broadcasting and the Internet reveals.[43]

IV
DISTINGUISHING AMONG BOOTSTRAPS

Can't one separate problematic from unproblematic bootstrapping? The fact that bootstrapping is pervasive doesn't mean there are no clear distinctions among forms of bootstrapping that allow us to identify the troubling versions.

A. Substantive Distinctions

Perhaps some forms of *Y* are substantively different from others in some dispositive way. But if *Y* is illegitimate, it should be rejected: It cannot legitimately enable anything. If, say, the Supreme Court ruled first that it had plenary jurisdiction to decide the outcome of any election and then chose the winner of a bitterly contested election, the allegedly enabling decision would be illegitimate and should be rejected in its own right. There would be no need to consider the legitimacy or implications of the choice of a winner, because the entire foundation was infirm.

And if *Y* is permissible, distinguishing among more and less appropriate *Y*s is a fool's errand. On what basis would we place congressional enactments or Supreme Court holdings on this continuum? By how many times they have been favorably cited? By how central they seem to have become in our lives? By how much controversy they have created? There is no answer to these questions.[44] Wisely, those concerned about bootstraps do not ask us to consider them. The stated concern is not with the legitimacy of *Y*. Concerns about

42. 347 U.S. 483 (1954); *see supra* notes 1–3.

43. *See supra* notes 34–36 and accompanying text.

44. We could try to create different categories of *Y*s based on how generative they have been of *Z*s, but that assumes the conclusion that the *Z*s are permissible and are a useful measuring stick.

Congress bootstrapping EMTALA into an individual mandate do not depend on the propriety of EMTALA. The point is that EMTALA may be totally appropriate and legitimate, but using EMTALA to justify an individual mandate is illegitimate. Why? Apparently, because there is no stopping point: once one allows EMTALA to be used in this way, Congress can claim whatever powers it wants.[45]

Some might object that this rejection of distinctions among categories of *Y*s is too hasty. Aren't there meaningful distinctions we can draw among them? Each of us can of course identify enactments and opinions we prefer (e.g., ones that we think are more public-regarding, or ones with better provenance),[46] but that is possible for all legal decisions. If we accept such grounds, then we can apply our criteria directly to *Z*s and dispense with any focus on bootstraps. One possible distinction is between bootstraps in which the entity relies on the impact of its own action and those in which it does not.[47] But, as the discussion so far indicates, in every bootstrap an actor is relying on the impact of its first action to enable a later action, usually directly.

A more nuanced variation on this argument is that we might try to distinguish *Y*s arising on their own from those that Congress creates. The idea is that with *Y*s that have arisen on their own via private conduct, there is only one jump (between *Y* and *Z*), but with congressionally created *Y*s, there are two jumps (to *Y*, and then between *Y* and *Z*). But this distinction depends on a false dichotomy between *Y*s that arise on their own and those mandated by the government. No *Y* arises entirely on its own. Every private activity relies on a backdrop created in part by prior government actions. Some *Y*s might seem to have arisen more naturally than others, but the *Y*s will be on a continuum in this regard. And even statutory *Y*s designed to codify an existing practice police outliers and circumscribe future conduct, and thus change the playing field.[48]

---

45. *See supra* notes 25–29.

46. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 402 (1819) (emphasizing that "[t]he bill for incorporating the Bank of the United States . . . [was] supported by arguments which convinced minds as pure and as intelligent as this country can boast"); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 755 (1999) ("[Marshall] opens his opinion by reminding us that the 1791 bill creating the first bank was supported by 'minds as pure and as intelligent as this country can boast.' The reference here is to the sainted Washington, who added his name to the bill and thus made it law only after satisfying himself of its constitutionality.") (internal citation omitted).

47. John Eastman made a more specific argument analogous to this, focusing on the Supreme Court and the Commerce Clause. *John Eastman in the Sacramento Bee: Health Care Reform Challenge? It's the Law*, JOHN EASTMAN FOR ATTORNEY GENERAL (Apr. 6, 2010), http://www.eastmanforag.com/news/john-eastman-in-the-sacramento-bee-health-care-reform-challenge-its-the-law ("[T]he Supreme Court has never before allowed Congress to bootstrap its way into Commerce Clause authority by relying on the impact of its own regulation.").

48. Consider EMTALA in this regard. Before EMTALA, some emergency rooms voluntarily treated patients who could not pay, and some federally funded emergency rooms had some treatment obligations. *See* Maria O'Brien Hylton, *The Economics and Politics of Emergency Health Care for the Poor: The Patient Dumping Dilemma*, 1992 BYU L. REV. 971, 980 (1992) (discussing 1946 legislation known as the Hill-Burton Act that required hospitals "receiv[ing] federal funds for construction and capital improvements to furnish a 'reasonable' amount of free or reduced-cost care to indigent patients," and the "widespread agreement that this program has been a complete failure with respect to

The degree of naturally occurring activities underpinning *Y* may lead us to conclude that a given *Y* is undesirable or unwise. But that is not an argument about bootstrapping; it is an argument about the underlying attractiveness of *Y*.

This brings us to the most prominent of the arguments against the individual mandate—that it is regulating inaction instead of action. I will assume, for purposes of this discussion, that the opponents are correct in asserting that the individual mandate involves a different form of regulation than Congress has attempted before. That may affect some aspects of the argument about the constitutionality of the individual mandate, but it has no logical relationship to arguments about the legitimacy of this bootstrap. Bootstraps do not work differently when they enable regulation of action rather than inaction, any more than they do when they enable government actions that enhance rather than constrict civil liberties. This particular bootstrap may produce consequences we do not like (here, by hypothesis, allowing regulation of inaction), but the mechanism of the bootstrap is the same—one regulation has enabled another.[49]

Suppose the Supreme Court relied on its statement that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"[50] to hold that the First Amendment has a positive component that empowers Congress to regulate speech (rather than merely prohibiting government abridgements of speech). Some might consider this conclusion to be wrongheaded and a misreading of the First Amendment, but the mechanism of building upon previous opinions would be the same as it has been in hundreds of other cases. The earlier cases would enable the "wrong" conclusion, but the mechanism of that enablement would be the same one that courts routinely use.

One last substantive distinction bears discussion: One might want to distinguish the Supreme Court from other actors, on the grounds that the Court holds *Y* and then *Z* because the issue was presented to it and it felt compelled to reach that result. Congress and the President, on the other hand, freely

---

increasing the supply of indigent care"); W. Adam Malizio, Note, Moses v. Providence Hospital*: The Sixth Circuit Dumps the Federal Regulations of the Patient Anti-Dumping Statute*, 27 J. CONTEMP. HEALTH L. & POL'Y 213, 215 (2010) (recounting the failure of the Hill-Burton Act to ensure care and adding that "[i]n an effort to address the problem of patient dumping on a broad scale, Congress passed [EMTALA]"); Jennifer M. Smith, *Screen, Stabilize, and Ship: EMTALA, U.S. Hospitals, and Undocumented Immigrants (International Patient Dumping)*, 10 HOUS. J. HEALTH L. & POL'Y 309, 321 (2010) (recounting the "ineffective[ness]" of the Hill-Burton Act and stating that "Congress' enactment of EMTALA was the direct response to the American public's outcry over the inhumane treatment of the poor"). But whatever percentage of emergency rooms already provided uncompensated care, EMTALA changed the legal landscape by compelling free care.

49. One can draw a distinction between bootstraps enabling regulation of action and bootstraps enabling regulation of inaction, but that would be an ad hoc judgment reflecting a desire not to allow this bootstrap (or maybe to stop the continued growth of bootstrapping). That is, the distinction would reflect a distaste for *Z*, but it would not reflect anything different about the bootstrapping process.

50. Associated Press v. United States, 326 U.S. 1, 20 (1945); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663–64 (1994) (quoting some of this language from *Associated Press*); Leathers v. Medlock, 499 U.S. 439, 459 (1991) (same).

choose what topics to act on and how to act on them. In this way, the Court arguably is not bootstrapping in the same way as Congress and the President, because its holdings do not represent the same sort of volition.

This of course implicates one of the fundamental debates in law about the nature of judging, one that I will not attempt to resolve here. A few points bear noting, however. First, as to what matters are addressed, the Supreme Court has a great deal of control over which cases it hears. The Court cannot choose to decide an issue if no petition presents it, but it can choose among the issues presented to it. Second, as to the decisions it reaches, few if any people believe that Justices are completely without volition. The only question is how much volition Justices exercise in reaching their conclusions. And the relevant question for my purposes is whether the divergence in volition between Justices on the one hand and members of Congress and the President on the other distinguishes the bootstrapping of the former from that of the latter in some relevant way. After all, once they have some ability to shape their agenda and some ability to exercise volition in reaching their conclusions, actors have the ability to aggrandize their power through bootstrapping. The degree of that ability differs for Justices versus members of Congress and the President, but it is far from clear that this difference in degree translates into a dispositive difference in the approach one should take to their bootstrapping. For my purposes, relatively little turns on the answer to that question. In the remainder of this article, I consider the Supreme Court's bootstrapping alongside that of Congress and the President. But the key contentions in this article stand even if one rejects the applicability of bootstrapping to the Supreme Court.

B. Purpose

I can imagine forms of bootstrapping that virtually everyone would condemn—for example, a President who, after a terrorist attack, issues an executive order that declares, "In this order I make a finding of a national emergency so that I have a justification for arrogating to myself near-dictatorial authority to respond to terrorism." And we might extend the category beyond such brazen situations to any in which a political actor makes decision *Y* solely, or at least centrally, to allow it to make a decision *Z* that would be legally problematic absent *Y*. If, for instance, Congress's sole purpose in enacting legislative provision *Y* is to pave the way for a legislative provision *Z* that would be impermissible but for *Y*, then let us assume that Congress has acted illegitimately.

This implicates longstanding debates about the circumstances under which it is useful to attempt to determine a lawmaker's subjective motivation or apparent purpose in making a particular decision.[51] One element of these

51. I am referring here to a distinction made by many commentators between the decisionmaker's subjective motivation and its objective purposes. *See, e.g.*, Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 793–94 (2001) (distinguishing legislators' subjective motives from objective legislative purpose); Ira M. Heyman, *The Chief Justice, Racial Segregation and the Friendly*

debates involves the difficulty of an observer's determining the lawmaker's actual purpose. Assuming that a lawmaker has a purpose, an observer (notably, a court) may not be able to reliably determine that purpose. A second, antecedent element is the usefulness of the notion of a purpose, particularly in a multimember context. Kenneth Shepsle noted twenty years ago that Congress is a "they," not an "it," and contended that "[i]ndividuals have intentions and purpose and motives; collections of individuals do not. To pretend otherwise is fanciful."[52]

I do not take a position on these broad questions about the ontological significance and epistemic value of lawmakers' purpose, because it is not necessary for my purposes.[53] Whatever one's answers to these questions, aggrandizement is a bad candidate for a focus on purpose. There may be some goals of such importance to both constituents and representatives that they are central to the legislators who vote for legislation that achieves those goals. If, for example, a majority of a given set of constituents and legislators desired the subordination of one or more racial groups, we might feel confident in identifying racism as the purpose of legislation that clearly harmed the disfavored race(s). Aggrandizement is different in two ways. First, there is little basis for concluding that aggrandizement is of central importance to legislators.[54] Congress has had ample opportunities to aggrandize its power in

Critics, 49 CAL L. REV. 104, 115–16 (1961) (same). Others reject the distinction. *See, e.g.*, John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217–21 (1970); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 426 n.40 (1996); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1143 (1986). As my arguments make clear, I do not think anything turns on a distinction between subjective motivation and objective purpose in the bootstrapping context, so those who reject this distinction can ignore this footnote and erase it from their memories (if it is possible to do so, *see* The Eternal Sunshine of the Spotless Mind (2004)).

52. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992); *see also* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("The least reflection makes clear that the law maker . . . does not exist, and only worse confusion follows when in his place there are substituted the members of the legislature as a body. A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs."); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes.").

The Supreme Court is smaller, but the same concern arises about divining its purposes. *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 94 (2004). The President, as a single person, avoids the multiperson difficulty. The problem of identifying a sole, or even central, purpose remains for presidential decisions, but at least the President is a single decisionmaker. *See infra* notes 75–79 and accompanying text.

Others disagree, of course, and contend that inquiries into purpose, including the purpose of multimember bodies, is useful and appropriate. *E.g.*, Regan, *supra* note 51, at 1143 ("[T]here is no good general objection to motive review."); Ely, *supra* note 51, at 1220–21; Kagan, *supra* note 51, at 439–41.

53. Pardon the pun.

54. As Joseph Blocher notes in his response to this article, "Congress *A* might not have sufficient incentive to aggrandize the power of Congress *B*; the personal and party interests of individual

exactly the ways that opponents of the individual mandate fear, but its actions have been fairly modest.[55] Aggrandizement simply has not manifested itself as a clear and central goal of members of Congress. The second and more important difference flows from the fact that constituents will not deeply desire aggrandizement. The fear of aggrandizement is grounded in agency costs: Legislators will have an interest in aggrandizing their power despite their constituents' lack of interest in it, and will achieve aggrandizement by smuggling aggrandizement into legislation that constituents find acceptable for other reasons.[56] The key point is that there will be other reasons for constituents to support the legislation. Aggrandizement comes packaged in a substantive proposal, and some aspect of that substantive proposal is what makes it acceptable, if not desirable, for constituents. And many members of Congress may support the legislation for the same reason their constituents do (or in response to their constituents' support) and have no particular interest in aggrandizement. The aggrandizement will be part of an initiative with aspects attractive to those uninterested in aggrandizement. And the particular balance for the decisionmaking body, or for any member of it, may not be knowable or even identifiable.

Consider the following hypothetical: A powerful organization in a given congressional district visits the district's member of Congress and persuades her that change *Z* in the law will allow it to expand its beneficial activities in her district while doing no harm to any constituency the member of Congress cares about. *Z* has no obvious connection to commerce, but it can be packaged with another proposal *Y* that clearly affects commerce and might have modest benefits, and that neither the organization nor any significant constituency opposes. The member of Congress decides to introduce legislation that would achieve the organization's aims. The resulting legislation builds on the existing state of the world; adds to an existing regulatory regime; packages *Y* and *Z* together into a broad initiative; and has findings containing assertions that support treating the legislation as a permissible exercise of Congress's Commerce Clause authority. In other words, the legislation is filled with forms of bootstrapping.

Let us imagine that the member of Congress drafted the legislation herself and has a sufficiently deep background in constitutional law to understand the need for the bootstraps. By hypothesis, she understands that *Z* would be legally problematic absent *Y*, and she is aware that her inclusion of *Y* enables her inclusion of *Z*. So we might reasonably infer that she has an apparent purpose

representatives probably outweigh their interests in expanding the power of the institution itself." Joseph Blocher, *What We Fret About When We Fret About Bootstrapping*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 146, 151; *see generally* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (arguing that members of Congress are primarily loyal to their party, not to Congress).

55. *See infra* notes 85–88 and accompanying text.

56. Unless we believe that constituents want aggrandizement, in which case the push against aggrandizement is both antidemocratic and doomed to failure.

of bootstrapping by including *Y* in the legislation. But an apparent purpose to bootstrap does not necessarily entail a purpose to aggrandize. Here, the aggrandizement seems to be a byproduct of the legislator's desire to help the organization. And, of course, even if there were a purpose to aggrandize, that does not mean that this was the sole or central purpose for the drafter (much less for her colleagues who voted for it).[57]

One could respond that this is setting the bar too high: Even if aggrandizement is a byproduct, the member was aware of the aggrandizement and it is still fairly treated as an apparent purpose—and that is sufficient to render the bootstrapping problematic. In other words, instead of focusing on a sole or central purpose, one could say bootstrapping is illegitimate if the actor had an awareness of aggrandizement or an apparent purpose to aggrandize. But that cuts much too broadly. As I have noted, every piece of legislation relies on various forms of bootstrapping, and drafters are aware of the ways in which they rely on existing regulatory schemes and provisions in the legislation at issue—that is part of the drafters' job (and a reason why members of Congress do not draft on their own, but instead rely on their staff and the Office of the Legislative Counsel).

The paragraph above may seem to suggest that illegitimate bootstrapping can be distinguished by creating a threshold that is less than the predominant purpose but more than a purpose.[58] But in fact this discussion highlights an additional problem with attempting to consider any chosen threshold for

---

57. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 636–40 (1987) (Scalia, J., dissenting). Justice Scalia stated:

> [A] particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the majority leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly *un*motivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.

Id. at 637 (Scalia, J., dissenting) (emphasis in original).

58. This is akin to a distinction drawn in some Establishment Clause cases. *See, e.g.*, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates th[e] central Establishment Clause value of official religious neutrality."); *id.* at 901 (Scalia, J., dissenting) ("[T]he Court replaces *Lemon*'s requirement that the government have '*a* secular . . . purpose,' with the heightened requirement that the secular purpose 'predominate' over any purpose to advance religion.") (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)); *Edwards*, 482 U.S. at 599 (Powell, J., concurring) ("A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate.").

purpose in the bootstrapping context: With one possible exception discussed below, this approach will not usefully distinguish among bootstraps. There are myriad elements in any given piece of new legislation and in prior legislation that enable all the elements in that new legislation. No one believes that all such bootstraps are illegitimate (if so, every piece of legislation would be illegitimate). The question is whether one can distinguish some bootstraps from others, and the problem is that there is no reason to believe that the drafter(s), sponsor(s), or supporter(s) will have different purposes for different bootstraps that achieve the same goal. To return to the example above, insofar as one or more members of Congress have some set of purposes in pushing to enact *Z*, they will have the same purposes with respect to all the bootstraps necessary, because the bootstraps would serve the same instrumental goal. All the conditions precedent enable *Z*, and thus all have instrumental value to the proponents of a given initiative. Some of the conditions precedent might be more important to the drafter because they seem truly necessary for the initiative to pass muster, as opposed to other conditions precedent that might seem helpful but not absolutely necessary. But that is just another way of saying that to achieve one's purposes (whatever they may be), some building blocks are more essential than others. And this tells us nothing about those purposes. If *Y* is useful but not absolutely necessary to justify *Z* and some other aspect of the legislation is absolutely necessary, then the latter may be more important to the drafter and to the sponsors. This gives us no information about the degree to which their purpose was aggrandizement.

C. The Significance of Simultaneity

The one possible exception to the inability to distinguish among bootstraps based on purpose (or anything else) involves uncertainty. Some acts contain both *Y* and *Z*, meaning that *Y*'s enablement of *Z* is certain. At the other extreme, some acts contain what turns out to be a *Y* (that is, an enablement of some *Z*), but not only is the promulgation of *Z* unclear—even the status of *Y* as enabling that possible *Z* is unclear. In this second situation, the bootstrap would not merely be uncertain but in fact hard to foresee. Fears about a purpose to aggrandize would not be founded in this second situation, whereas they are at least plausible in cases of certain bootstraps.

Uncertain bootstraps arise most notably in situations in which *Y* and *Z* are not simultaneous. There is often a significant time lag between *Y* and *Z*, and often the significance of *Y* as enabling *Z* will not have been apparent at the time *Y* occurred. In effect, the bootstrapping is not only difficult to foresee but also retroactive. Indeed, many of the most prominent examples of congressional bootstrapping involve situations in which there was little incentive to bootstrap because at the time of action *Y* people did not believe that it was in fact necessary for action *Z*.

Reno v. ACLU provides one such example.[59] When Congress enacted the Radio Act of 1927[60] and then built on that legislation in the Communications Act of 1934,[61] there was no hint in the discussion in Congress or among commentators about the possible relevance of the regulations' breadth to any First Amendment challenges. The most widely held assumption was that the First Amendment had little, if any, impact on government regulation of broadcasters' speech. And early court cases embodied this view.[62] It is unlikely that members of Congress imagined that the breadth of the regulations they imposed on broadcasters would have any impact on the likelihood of courts invalidating their regulations on First Amendment grounds. The danger of invalidation would have seemed remote, and there was no particular reason to assume that the breadth of the other regulations would be relevant. Decades later, however, the Supreme Court made this distinction dispositive when it invalidated the Communications Decency Act (applicable to the Internet) in *Reno v. ACLU*, despite *Federal Communications Commission v. Pacifica Foundation*[63] (which had permitted indecency regulation of broadcasts).

Another instance of retroactive bootstrapping arose from a different line of Supreme Court cases. In *Glickman v. Wileman Brothers & Elliott, Inc.*,[64] the Supreme Court upheld a program that compelled California peach growers to contribute to a fund used to advertise California peaches. Four years later, in *United Foods v. United States*,[65] the Supreme Court invalidated a very similar program compelling mushroom growers to contribute to a fund to advertise mushrooms. The difference, according to the Court, lay in the fact that *Glickman* involved a wide-ranging regulatory program and *United Foods* did not.[66] The Court thus found the presence of comprehensive regulation dispositive. Indeed, here the significance of such regulation was quite great: The

59. 521 U.S. 844 (1997).

60. Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–620 (2006)).

61. Ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–620 (2006)).

62. *See, e.g.*, Trinity Methodist Church, S. v. Fed. Radio Comm'n, 62 F.2d 850, 851 (D.C. Cir. 1932) (stating that the First Amendment applies to prior restraints, and that refusing to renew a broadcaster based on his earlier broadcasts does not implicate the First Amendment).

63. 438 U.S. 726 (1978).

64. 521 U.S. 457 (1997).

65. 533 U.S. 405 (2001).

66. The programs at issue in the two cases were very similar. Both required growers to contribute to a program that would fund generic advertising of the product grown. Both programs were mandatory, once a majority of farmers voted to initiate it. But the Supreme Court found one program constitutional and the other unconstitutional. The difference, according to the Court in *United Foods*, was in the larger regulatory scheme surrounding the two advertising programs:

> The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

United Foods, 533 U.S. at 411–12. The Sixth Circuit had similarly distinguished the mushroom program. *See* United Foods v. United States, 197 F.3d 221, 222 (6th Cir. 1999).

Court in *Glickman* concluded that the challenged regulation did not have to survive any level of First Amendment scrutiny, because the advertising program was part of an economic regulation that was not subject to First Amendment scrutiny in the first place;[67] by contrast, the First Amendment did apply to (and invalidate) the program challenged in *United Foods*.[68]

At the time Congress created these programs, it was not obvious (to put it mildly) that the applicability of the First Amendment to each fund would turn on the comprehensiveness of the program. Indeed, it was not clear how, if at all, the First Amendment might apply to them. There is no reason to believe that members of Congress thought that anything, as a First Amendment matter, turned on how pervasive their scheme was. And seven of the Justices on the Supreme Court saw no significance to this distinction at the time these cases were decided. But the two other Justices drew a distinction based on comprehensiveness. As a result we now know that by the Supreme Court's lights, a comprehensive program will enable Congress to require food producers to contribute to a fund to advertise their product. The status of *Y* (the comprehensive program) as an enabler thus only became clear years after the programs were created.

In other situations, decisionmakers may take action *Y* with no particular intention of its being treated as an enabling precedent but with some awareness that it could be so treated, and a later action *Z* in fact treats it as an enabling precedent. Arguably, some of the decisions of the First Congress were in that position. Most of those in the First Congress made at least some of their decisions without intending them to bind, or even greatly influence, later Congresses, but they were likely aware of the possibility that their decisions could be treated as dispositive precedents (and later decisionmakers did treat them as enabling some actions and disabling others).[69]

1. The Impact of a Simultaneity-Based Distinction on the Different Branches

This discussion highlights the way that bootstraps depend on factors made relevant by other actors, often acting much later. That is the nature of tests. But this discussion also suggests a possible distinction among bootstraps: that between simultaneous and nonsimultaneous bootstraps. If a government institution takes actions *Y* and *Z* at the same time, uncertainty is eliminated. The actor ensures that *Y* leads to *Z*. This answers any question of whether the

67. *Glickman*, 521 U.S. at 475.

68. *United Foods*, 533 U.S. at 415–16.

69. This point applies even to major constitutional debates in the first Congress, such as that on the President's ability to remove executive officers. In *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court placed great emphasis on this debate and heralded it as "the decision of 1789." But as Sai Prakash has noted about that debate, "[t]he vast majority of Representatives [in the first Congress] understood that Congress could express its views about the Constitution's meaning and that, while the Decision of 1789 would be deserving of some deference, it would not decide the removal question for all time." Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1075 (2006).

bootstrap was foreseeable. It also eliminates questions about whether *Z* will in fact occur, and whether it will be *Z* or some variant of *Z*, by simply creating *Z* at the time it creates *Y*. The governmental entity acts with a presumed awareness that it has engaged in bootstrapping, and this arguably gives rise to an appearance of a purpose to bootstrap. So, insofar as one thinks that purpose is relevant, maybe we should distinguish simultaneous bootstraps from nonsimultaneous ones.

A distinction between simultaneous and nonsimultaneous bootstraps could lead to an absolute bar to simultaneous bootstraps, a strong presumption against, a weak presumption against, etc. But this simply raises more questions, about not only the basis for a particular level of presumption but also what would overcome the presumption. And to answer that question we are back to the problems with drawing distinctions among bootstraps. One can distinguish simultaneous versus nonsimultaneous bootstraps, but that provides no basis for distinguishing among simultaneous bootstraps. And the difficulties discussed above with respect to possible distinctions among all bootstraps apply as well with respect to possible distinctions among simultaneous bootstraps.

Whatever the form of the distinction, increasing the cost of simultaneous bootstraps will have profound consequences. The implications for Congress would be greatest. At the outset, note that Congress would be disabled from responding quickly to an emergency with a single piece of legislation that contained a bootstrap (for example, legislation after September 11 creating a federal cadre of airport screeners and regulations governing their behavior). Do we really want to tell Congress that even if there seems to be a crying need for a particular *Z*, it must respond in two steps? We could create an exception for particularly important or urgent bootstraps. But how would we define those with any clarity? Would a horribly lethal pandemic qualify as such an emergency?[70] The collapse of Lehman Brothers? More importantly, once we are distinguishing among bootstraps based on their perceived importance or urgency, we are simply distinguishing among *Z*s. That is, we are back to distinguishing among bootstraps based on their outcome, not based on any element of the bootstrapping process. To put the point differently, there would be no difference in the way that *Y* enabled *Z*, or in the nature of the relationship between *Y* and *Z*; what would distinguish the permissible from the impermissible bootstrap would be the importance or urgency of *Z*. That is not an argument about bootstrapping. It is an argument about outcomes.

A further problem for Congress is less obvious, but no less real. Any presumption or bar against simultaneous bootstraps will pose particular barriers for Congress. This flows from the fact that Congress has less ability to engage in a long-term process of aggrandizement than the other branches do. As many commentators have noted, the hurdles to passage of a given piece of legislation

70. *See* Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1829 (2011) (noting relatedly that "authority under the commerce power to compel purchases or other actions could well be essential to combat a horrifically lethal pandemic").

are numerous and subject to change—support by the relevant committees and their chairs, support not only by a majority of the House but also by a majority of the majority party in the House, in many cases support by a filibuster-proof majority in the Senate, and support by the President.[71] Legislative coalitions change during each session of Congress, in response to the electoral calendar as well as public opinion, and of course the makeup of the House and Senate changes every two years. A second piece of legislation means a changed political environment, a new legislative coalition to bring together, and a new round of veto gates to overcome. No member of Congress can have any real confidence that the stars will align for a given future piece of legislation.

Indeed, a ban or strong presumption against simultaneous bootstrapping could completely disable Congress from crafting legislation on some issues, because often the only way legislation can pass is if multiple elements are combined into one act. Starting with constitutional constraints, the best example arises from strict scrutiny. For any legislation that would be subject to strict scrutiny, a key element of that scrutiny is whether Congress has regulated comprehensively. A court will invalidate the legislation if the claimed compelling interest implicates activities that the legislation does not cover (that is, if Congress regulates only some of the activities that implicate that interest).[72] So breaking up legislation into separate parts could prevent a legislative response to an important issue by preventing constitutionally required comprehensiveness.

Furthermore, both theory and practice indicate that successful legislation (especially on complex issues) often requires multiple related elements in order to satisfy the different groups needed to create a sufficiently large legislative coalition. Prominent among recent examples is the ACA.[73] The individual mandate relied on the ban on denying coverage to those with preexisting conditions as an empirical matter, but the provisions on preexisting conditions relied on the individual mandate as a political matter. Insurance companies and other major stakeholders believed that without an individual mandate, the provisions on preexisting conditions would lead the sickest people to pay for insurance and many of the healthy remainder to take their chances (until they

71. *See, e.g.*, William N. Eskridge, Jr., *Vetogates,* Chevron*, and Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008) (listing nine different vetogates that legislation must overcome); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720 (1992) (noting the many vetogates that can block legislative initiatives).

72. The Court has emphasized the importance of comprehensiveness in other contexts, notably including the Commerce Clause. See, for example, *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981), stating,

> A complex regulatory program such as established by the Act can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

73. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

were on the way to the emergency room, when they would sign up).[74] The ban on denying coverage based on preexisting conditions had been popular for many years, but Congress could never enact it because of this opposition. Insurance companies dropped their opposition, allowing the provisions on preexisting conditions to be enacted, only when these provisions were paired with the individual mandate. In other words, if Congress had been required to enact the provisions on preexisting conditions and the individual mandate in separate pieces of legislation, then likely neither would have been enacted. And because the provisions on preexisting conditions were key (and among the most popular) elements of the health care reform proposals, without the linkage between the provisions on preexisting conditions and the individual mandate it seems unlikely that any major health care reform would have been enacted.

Congress could have overcome this obstacle by establishing an unbreakable linkage between its (now separate) legislation on preexisting conditions and on the individual mandate. But an unbreakable linkage raises the same problems as are created by simultaneity in the first place—the members of Congress would know the result of their bootstrapping. By hypothesis, bootstraps with that level of certainty are different from other bootstraps and should be disfavored. So the way to avoid these seemingly problematic bootstraps is to eliminate that certainty. And once there is no certainty, complex legislation like health care reform becomes more difficult, if not impossible.

With respect to the President, disfavoring simultaneous bootstraps will have very little impact. The President needs no one else's vote in order to promulgate an executive order.[75] A President with any meaningful time left in his term knows that he can issue two or three executive orders almost as easily as he can issue one, and more generally can make multiple decisions that build on each other.[76] Indeed, this was precisely the fear that some commentators articulated during the George W. Bush Administration—that the Bush White House was pursuing a strategy of aggrandizing its power by playing the long game. Recall, for instance, the Bush Administration's unwillingness to release the names of people who met with Vice President Cheney about energy policy.[77] As was widely noted at the time, it seems unlikely that the Administration was worried about releasing that information per se, but rather that it was using the matter to set a precedent that it could later expand.[78] A more recent example

74. *See supra* notes 17–18 and accompanying text.

75. *See* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. & ECON. 132, 133 (1999) (discussing "the president's formal capacity for taking unilateral action and thus for making law on his own").

76. I say "almost as easily" because Presidents have always had an internal executive branch review process for executive orders, and so two orders entail two iterations of that process. But Presidents choose such review and thus can dispense with it, the review is not very onerous, and the President knows at the end of the day that the decisions on all aspects of a given executive order are his alone.

77. *See* Joseph Kahn, *Cheney Refuses to Release Energy Task Force Records*, N.Y. TIMES, Aug. 4, 2001, at A10.

78. *See* Michael Abramowitz & Steven Mufson, *Papers Detail Industry's Role in Cheney's Energy*

arises from the United States' role in Libya. President Obama concluded in June 2011 that our support for bombing in Libya did not constitute "hostilities," based in significant part on the absence of United States ground forces, active exchanges of fire, or a serious threat of United States casualties.[79] A President who wanted to gut the War Powers Act could build on that in future decisions to go much further, leading to the conclusion that he could use air power in any way he saw fit, even to the extent of making a long-term direct commitment of the United States Air Force, because the United States has total air superiority. This result would have seemed absurd pre-Libya. (Could the United States claim that a re-run of the World War II air attack on Dresden did not constitute "hostilities"?) But a President who sought to expand his power could begin with Libya and build on that precedent, ending up with a result that would have seemed absurd at the outset.

For courts, in particular the Supreme Court, the costs of disfavoring simultaneous bootstraps will be significant, though not nearly as high as for Congress. In some circumstances the Supreme Court Justices can reasonably assume that there will be a durable majority for a result and that there will be ready future opportunities to reach that result.[80] But that will often not be the

Report, WASH. POST, July 18, 2007, at A01.

79. *See* White House, United States Activities in Libya, at 25 (June 15, 2011), *available at* http://www.foreignpolicy.com/files/fp_uploaded_documents/110615_United_States_Activities_in_Libya_--_6_15_11.pdf ("U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof."); Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 15, 2011, at A16 ("Jack L. Goldsmith, who led the Justice Department's Office of Legal Counsel during the Bush administration, said the Obama theory would set a precedent expanding future presidents' unauthorized war-making powers, especially given the rise of remote-controlled combat technology. 'The administration's theory implies that the president can wage war with drones and all manner of offshore missiles without having to bother with the War Powers Resolution's time limits,' Mr. Goldsmith said.").

80. Consider *Nw. Austin Mun. Util. Dist. No. One v. Holder* (*NAMUDNO*), 557 U.S. 193 (2009). I think it is plausible to imagine that at least one of the five Justices most likely to invalidate the Voting Rights Act thought there would be unacceptable costs to the Court if it invalidated it in *NAMUDNO*, but wanted ultimately to invalidate it. In such circumstances, what might such a Justice do? One possible answer is to bootstrap—to write the *NAMUDNO* opinion in a way that enables the future invalidation of the Voting Rights Act without the high costs to the Court. If our hypothetical Justice believed both that the majority of which he was a part was durable and that a future Voting Rights Act challenge would be brought, then the risks of this strategy would be fairly low and the benefits significant.

Whether or not this was in fact any Justice's intention, I believe that the Court's opinion in *NAMUDNO* has that effect. It sounds warnings about the Voting Rights Act and urges Congress to revise the act to save the Court from the need to do so. No one expects Congress to revise the Voting Rights Act—given the differing views in Congress and the many barriers to any legislation, it would be a minor miracle if the revisions the Court seeks were enacted. But the lack of a response to the Court's call makes it easy for the Court in the future, when facing a constitutional challenge to the Voting Rights Act, to say that because Congress failed to revise the Act, the Court will invalidate the Act. What would seem illegitimate in one step will seem much less objectionable when done in two. This is a bootstrap that relies on congressional inaction, but it is a safe bet. Meanwhile, the Justices most likely to invalidate the Voting Rights Act knew, at the time *NAMUDNO* was decided, that their majority was likely to persist for at least five to ten years, either because none of them would retire (the most likely outcome) or because any Justice who did retire would be replaced by someone like-minded (since

case; and in any event disfavoring simultaneous bootstraps will impose significant costs. In a single opinion, the Supreme Court often has a significant holding and another significant holding that builds on the first. That is, the process of bootstrapping via precedent sometimes occurs in a single opinion: the Court thus undertakes *Y* and *Z* simultaneously. In *Marbury v. Madison*,[81] for instance, the Court's significant holding on the scope of Article III's original-jurisdiction provision enabled the Court to both consider the constitutionality of the Judiciary Act and assert the Court's power of judicial review. The Court could have decided each of those issues separately, but that would have produced piecemeal opinions and piecemeal processes.

Judges could try to minimize the inefficiencies by deciding all the issues at the same time and then simply splitting the resolution into different opinions. In effect, that is what happened in *Brown v. Board of Education*[82] and *Bolling v. Sharpe*,[83] decided on the same day. But that raises the same problems as simultaneity, namely the certainty of *Z* at the time that *Y* is decided. If judges decide all the issues at the same time, they have engaged in simultaneous bootstrapping. To avoid simultaneity, judges must decide the various steps separately, and that imposes significant costs on judges and lawyers (not to mention the parties involved in the cases).

2. The Benefits of Such a Distinction

Insofar as the fear of bootstrapping is a fear of aggrandizement, a focus on simultaneous bootstraps is a poor fit. A bar to or strong presumption against simultaneous bootstraps would impose enormous costs on Congress and significant costs on the Supreme Court, but it would impose no meaningful limit on the President. The President's ability to aggrandize would be unaffected. Insofar as the fear of bootstrapping is focused more directly on congressional aggrandizement (which, of course, is the focus of the challenges to the individual mandate), it is not obvious why presidential aggrandizement should be exempted from this fear, and the costs imposed on courts are difficult to defend. And a fear of congressional and judicial but not presidential aggrandizement seems entirely arbitrary.[84]

Justices can time their retirements). It was a high-probability bet, at the time *NAMUDNO* was decided, that if a majority was ready to invalidate the Voting Rights Act in 2009 but for the seeming inappropriateness of acting precipitously, a majority would be just as ready to invalidate it in 2014 or 2019, at which point the Court could point to years of congressional inaction as a justification. And *NAMUDNO* was a sufficiently clear hint to litigants that the Justices could reasonably expect future challenges that would provide vehicles for considering the constitutionality of the Voting Rights Act.

81. 5 U.S. 137 (1 Cranch) (1803).

82. 347 U.S. 483 (1954).

83. 347 U.S. 497 (1954).

84. It may be that some critics of simultaneous bootstrapping are actually motivated by a desire to make complex legislation more difficult to enact (and perhaps complex Supreme Court opinions more difficult to create), perhaps on the theory that simultaneous bootstraps are likely not only to be complex but also to contain policy elements that they generally will not favor, or perhaps because they think that states should have more power relative to the federal government. If so, bootstrapping is a proxy for policy results they do not like. In any event, if that is their concern then critics should so state,

More fundamentally, this seems to be a situation in which the cure is worse than the disease. The argument against bootstrapping is based on its consequences. Here, the costs avoided (or benefits created) by disfavoring simultaneous bootstraps are outweighed by the costs of disfavoring them.

Daryl Levinson has persuasively argued against the notion that our governing institutions, and in particular Congress, have great incentives to aggrandize their power.[85] As Levinson notes, "neither the policy interests of constituents nor the self-serving goals of officials are likely to correlate in any systematic way with the power or wealth of government institutions."[86] This is not a matter of mere theorizing. In the years between *Wickard v. Filburn*[87] and *United States v. Lopez*,[88] the widespread assumption was that the Commerce Clause posed no meaningful hurdle for congressional legislation, but Congress left many areas subject only to state regulation. Congress did of course enact many regulations, but I do not think anyone could fairly argue that Congress inexorably increased its power, much less ran amok. Indeed, Congress increased its role in some areas but reduced its role in others.

Note in this regard that bootstrapping is costly for the bootstrapper, because undertaking *Y* is by definition a significant step in its own right. (If it is not a significant step, then there is no bootstrap.) An actor that wants to achieve *Z* has to incur the cost of *Y* to do so, and that cost will usually be substantial. Consider pervasive regulation. It is true that if Congress's goal is to regulate farmers' collective speech about their products, it now knows what to do: Create a pervasive regulatory scheme and embed speech regulations as part of it.[89] So a Congress that wants to regulate farmers' collective speech can do so, but only if it is willing to incur the costs associated with creating the much larger regime in which to embed it. To use another example, even if Congress had designed EMTALA to pave the way for an individual mandate (quite unlikely, but let's indulge the assumption), we still have the fact that it *did* pass EMTALA, and enacting any regulation entails nontrivial costs for Congress.

Indeed, simultaneous bootstraps have a significant advantage over nonsimultaneous bootstraps. One fear about bootstraps is that an actor will move in degrees (as in a slippery slope) and thus make its destination difficult to determine. We the citizens will be boiled like a frog in slowly heating water.[90] Simultaneous bootstraps avoid such an accretive process by containing *Y* and *Z*

so that we can then assess that argument on its merits.

85. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

86. *Id.* at 916.

87. 317 U.S. 111 (1942).

88. 514 U.S. 549 (1995).

89. *See* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997); United Foods v. United States, 533 U.S. 405 (2001); *supra* text accompanying notes 64–68.

90. Apparently, this is not actually true of frogs, but the metaphor has taken root nonetheless. *See, e.g.*, *Next Time, What Say We Boil a Consultant*, FAST COMPANY (Oct. 31, 1995), http://www.fastcompany.com/magazine/01/frog.html (quoting numerous experts who said that a frog would, in fact, jump out of the water).

in a single act. They thus have the significant advantage of transparency. Whatever other complaints citizens may have about the ACA, they cannot complain that Congress enacted a popular ban on preexisting conditions while hiding its intention of enacting a less popular individual mandate. Congress revealed both steps at the same, a benefit that would be lost if simultaneous bootstraps were disallowed.

Interestingly, focusing on simultaneous bootstraps would divert attention and energy from a greater danger of aggrandizement. As Levinson acknowledges, the constraints on aggrandizement have less force with respect to the President.[91] And the President's ability to engage in aggrandizement via bootstrapping would be only marginally affected by a limit on simultaneous bootstrapping. So not only would a limit on simultaneity have modest benefits, but it would also ignore the potentially greater aggrandizer.

The point here is that the benefits of disfavoring simultaneous bootstraps will be much smaller than its costs. The incentives to engage in bootstrapping are not very great, and the costs of disfavoring bootstraps are substantial.

V

CONCLUSION

Concerns about bootstrapping do not arise from any provision in the Constitution. They arise from a fear about the consequences of bootstrapping. The problem, as this article has demonstrated, is that bootstrapping is pervasive. The consequences of freely allowing bootstrapping are modest. It is the world that we inhabit, and the sky has not fallen. The consequences of disfavoring bootstrapping would be massive. The one distinction that has any traction—between simultaneous and nonsimultaneous bootstraps—still creates costs that greatly outweigh the benefits.

Whether or not those who have raised concerns about bootstrapping in the ACA have put forward persuasive arguments against the legitimacy of the individual mandate, the problem is not the legitimacy of bootstrapping. If the final destination is impermissible, so be it. But that does not mean that the pathway should be abandoned as well.

91. *See* Levinson, *supra* note 85, at 956.