PARTISAN CONSTITUTIONALISM: RECONSIDERING THE ROLE OF POLITICAL PARTIES IN POPULAR CONSTITUTIONAL CHANGE

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Scholars have long understood that political parties play an important role in shaping constitutional culture over time. This occurs most obviously through judicial appointments but also by participating in the shaping of public opinion and passing legislation affecting the scope of our fundamental commitments. But recent legal challenges to the healthcare law highlight the ability of political parties to use courts to shift the scope and meaning of our policy and constitutional commitments also in the very short run, through their strategic support for high-stakes public litigation.

In both the *NFIB* and *King* challenges, some number of political opponents of the healthcare law recognized in the developing legal case an opportunity to extend a fight that had been waged in the political branches (at both the state and federal level), to a new and potentially more favorable battleground. This paper seeks to identify, for the first time, the mechanisms that allow political parties to play this role. I use the healthcare challenges to show that parties, acting under certain conditions, can increase both the success and also the speed at which politically-charged legal claims are dislodged from off-the-wall to being fair game for courts. In particular, I argue that this happens through four main mechanisms, each of which can be observed in two healthcare cases. Political parties have a unique ability, beyond what is available to private litigants or social movements, to initiate and support legal challenges by 1) providing the direct infrastructure for public litigation, 2) communicating salience of the challenge to courts, including by signaling the case's importance, 3) provide a common vocabulary of constitutional meaning that mediate between the litigants, the courts, and the public, and 4) framing relevant prudential considerations that might influence judicial decision making.

I describe how these four connected mechanisms were used by the party apparatus—through a process I term "partisan constitutionalism"—to advance the ACA challengers' legal claims. I show that these dynamics helped move the challengers' arguments from being widely considered unthinkable to being open and contested questions—thus providing cover for courts to depart from settled precedent to rule in favor of the challengers. This paper seeks to show the different ways that parties can support

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strategic constitutional litigation—while also acknowledging that various political and institutional considerations will often prevent them from playing this role.

I conclude that partisan constitutionalism has been made both more attractive and feasible by the background conditions of hyperpolarization and divided government. Rising polarization increases the incentives for political actors to "constitutionalize" political arguments and then for judicial actors to accommodate these attempts, while divided government increases the frequency of situations in which a party finds it advantageous to pursue its policy objectives through strategic litigation rather than orthodox lawmaking. These two features of our modern politics reinforce each other, helping to explain why the party-driven constitutional litigation observed in the healthcare cases is a relatively recent phenomenon—even as many of the mechanisms identified here have long been available to political parties. This dynamic threatens to fundamentally change the role of the judiciary, which increasingly will tend to function—and thus be treated by political actors—as a new institutional veto point for the political process.

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INTRODUCTION

Late on a December Friday in 2018, a federal district judge in Texas ruled[1] that the Affordable Care Act[2] is invalid, in its entirety, because of changes made to the individual mandate as part of President Trump's tax law.[3] Many observers and scholars—noting that the challengers' argument was laughable as a legal matter—immediately cautioned against overreaction, predicting that the decision would be overruled on appeal.[4] But others argued that these confident predictions had overlooked the most important lesson of previous ACA challenges: that a legal argument, no matter how unsound as a matter of law, is not "frivolous" in any practical sense "when it has the unified support of the political party whose appointees . . . [occupy] a majority" on the nation's highest court.[5]

Twice in the four years after the ACA was enacted in 2010, legal challenges to essential components of its architecture subjected the liberal achievement to a final veto point: the consent of an ideologically fractured Supreme Court. Famously, the legal claims underlying both *NFIB v. Sebelius*[6] and *King v. Burwell*[7] moved in remarkably short order from being considered by most observers to be essentially

1. *Texas v. United States*, 340 F. Supp. 3d 579, 619 (N.D. Tex. 2018).

2. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

3. Act of Dec. 22, 2017, Pub. L. No. 115–97, 131 Stat. 2054 (2017).

4. *See, e.g.*, Nicholas Bagley, *The Latest ACA Ruling is Raw Judicial Activism and Impossible to Defend*, WASH. POST (Dec. 15, 2018), https://www.washingtonpost.com/opinions/2018/12/15/latest-aca-ruling-is-raw-judicial-activism-impossible-defend/?noredirect=on&utm_term=.fc3a41614f47.

5. *See, e.g.*, Brian Highsmith, *Don't Be So Sure Obamacare Will Survive the Latest Lawsuit*, WASH. MONTHLY (Dec. 18, 2018), https://washingtonmonthly.com/2018/12/18/dont-be-so-sure-obamacare-will-survive-the-latest-lawsuit/ [https://perma.cc/LLB7-RJPQ]; Jack Balkin, Texas v. U.S*: Off the Wall and On the Wall in the Age of Trump*, BALKINIZATION (Dec. 15, 2018, 2:05 PM), https://balkin.blogspot.com/2018/12/texas-v-us-off-wall-and-on-wall-in-age.html [https://perma.cc/GRU7-FW67].

6. 567 U.S. 519 (2012).

7. 135 S. Ct. 2480 (2015).

frivolous under existing precedent to finding a receptive audience before successive lower federal courts. The challengers' claims ultimately came to be accepted in *NFIB* by each of the five conservative justices at the Supreme Court (even as the most dramatic result was avoided through the taxing power escape hatch)[8] and, in *King*, by enough to grant cert to a case presenting neither circuit split nor apparent emergency.[9]

How do high-profile legal challenges move so quickly, and so sharply, from being outside the mainstream to existing firmly "on-the-wall?" Existing accounts of constitutional change have focused variously on the role of social movements, public opinion, and judicial appointments.[10] I argue that these narratives fail to account for the ways

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8. *See* Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331, 1332 (2013) ("[A]lthough we did not succeed in invalidating the ACA, five Justices affirmed our view of the Commerce and Necessary and Proper Clauses."). *See also* JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 281 (2013) ("Who won the constitutional challenge to Obamacare? The answer is complicated."); Randy E. Barnett, *We Lost on Health Care. But the Constitution Won.*, WASH. POST (June 29, 2012), https://www.washingtonpost.com/opinions/randy-barnett-we-lost-on-health-care-but-the-constitution-won/2012/06/29/gJQAzJuJCW_story.html ("On the [C]ommerce [C]lause, Chief Justice John G. Roberts Jr. and four dissenting justices accepted all of our side's arguments about why the insurance mandate exceeded Congress's power."); Paul Clement, *Foreword* to A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE ix (Trevor Burrus, ed., 2013) ("Much of the focus in the immediate aftermath of the decision understandably emphasized . . . the practical reality that . . . the Court's majority did not invalidate the law in toto. But that should not obscure the reality that there are five votes to invalidate the mandate . . . and a remarkable seven votes holding that the Medicaid expansion exceeded Congress's spending power."); Ilya Shapiro, *We Won Everything but the Case*, SCOTUSBLOG (June 29, 2012, 9:38 AM), http://www.scotusblog.com/2012/06/we-won-everything-but-the-case/ [https://perma.cc/ZQ7Z-5RUT] ("Not only did the Court for the first time endorse the activity/inactivity and regulate/mandate distinctions that our opponents derided as appearing 'nowhere in the Constitution' but seven justices found the Medicaid expansion unconstitutionally coercive of state sovereignty.").

9. *E.g.*, Nicholas Bagley, *Symposium: The Court Will Hear King. That's Bad News for the ACA.*, SCOTUSBLOG (Nov. 7, 2014, 12:48 PM), https://www.scotusblog.com/2014/11/symposium-the-court-will-hear-king-thats-bad-news-for-the-aca/ [https://perma.cc/6DXY-W75P].

10. *See, e.g.*, Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK L. REV. 27, 29 (2005) ("[W]e know that social movements do influence constitutional interpretation, just as we know that the Supreme Court responds to . . . long-term changes in public opinion."); *see also* Jack M. Balkin & Stanford Levinson, *Understanding the Constitutional Revolution*, VA. L. REV. 1045, 1107 (2001) (indicating that judicial appointments effectively change the Constitution).

that party politics can support strategic constitutional litigation, in ways that can significantly affect both the reasoning and outcomes of contested decisions. I use these two cases as a study in how political parties can shape the development and outcomes of constitutional litigation, looking specifically at how parties can accelerate the process of dislodging legal claims from off-the-wall to being fair game for courts.

I describe how the Republican Party, after failing to prevent the passage of the Act by working through the political branches, helped provide an infrastructure for these legal challenges on the hope that the federal judiciary might be enlisted to serve as a final veto point for contested legislative change. This strategy relied on four identifiable mechanisms, which I describe in Part IV. Political actors, acting strategically through the organized collective of parties, can 1) initiate coordinated legal challenges or directly facilitate the efforts of private litigants, 2) communicate the political salience of a challenge to the courts, 3) provide a common vocabulary of constitutional meaning that mediate between the litigants, the courts, and the public, and 4) help shape the prudential considerations that may affect judicial actors' consideration of high-profile claims.

I describe how these four connected mechanisms were deployed by political actors organized by party affiliation—through a process I term "partisan constitutionalism"—to advance the ACA challengers' legal claims. First, I show how the parties leveraged institutional resources to provide an infrastructure for both legal challenges. This was done both through state attorneys general coordinating to file (just minutes after the Act was signed) the lawsuit that would become *NFIB*—as well as by Republican members of Congress holding hearings, registering objections into the congressional record, and filing amici curiae in support of both challenges. This unified party support operated as a direct signal to members of the judiciary of the case's importance to political actors—the second mechanism in this new framework. For ambitious lower court judges, this political salience likely increased the perceived career stakes of their rulings; for the Supreme Court justices, it raised the likelihood that the cases would be considered an important federal question worthy of certiorari. Additionally, party members also helped frame relevant prudential considerations that might have weighed on the justices, for example by writing op-eds assuring that GOP legislators would be ready to respond in the event that the Court were to strike down the disputed exchange subsidies. Finally, Republican politicians also helped bridge what Rosen and Schmidt have

termed popular constitutionalism's "translation problem."[11] Through compelling hypotheticals about broccoli mandates and unilaterally-imposed tax increases, political actors connected the challengers' legal arguments, which were based on novel and somewhat obscure theories about regulating inactivity and the meaning of the Act's Section 1321, to more salient liberty critiques that resonated with many among the broader public.

The strong form of partisan constitutionalism observed in *NFIB*—where an entire party unites behind and lends its infrastructure and reputation to a challenge—may occur only under a perfect storm of circumstances that until now has presented itself only rarely in our history. But the use of the mechanisms identified here exists on a spectrum. And even though the tools of partisan constitutionalism will be most effective where an entire party unites to deploy its resources in support of public litigation, one lesson from *King* is that even partial efforts—led by individual party actors in the absence of unified party support—can still significantly affect the trajectory of contested cases.[12] (Indeed, this dynamic characterizes the most recent ACA challenge, and thus can inform predictions about how it is likely to be resolved.)[13]

Importantly, these tools are not available to either private litigants or broad-based social movements, distinguishing the process and mechanisms that I describe here from the focus of previous scholarship. I argue that the challengers in both healthcare cases attempted to deploy a common playbook to advance their claims, but also identify important distinctions between the two that shed light on the nature of partisan constitutionalism. This framework thus attempts to identify both *how* parties can support constitutional litigation and *when* they are able and willing to commit fully to this role. This paper identifies the specific

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11. Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 113 (2013).

12. *See* Robert Schlesinger, *How* King v. Burwell *Ended the Obamacare Wars*, U.S. NEWS (June 26, 2015), https://www.usnews.com/news/the-report/articles/2015/06/26/how-king-v-burwell-ended-the-obamacare-wars [https://perma.cc/9EZW-NGYT] (noting that while many Republicans feared a winning-ruling, the loss in *King* has become a source of political rally for members of the Party).

13. *See* Paul Demko, *Long-Shot Legal Challenge Could End Obamacare During the 2020 Campaign,* POLITICO (July 8, 2019, 4:53 PM), https://www.politico.com/story/2019/07/08/obamacare-lawsuit-2020-campaign-1572907 [https://perma.cc/DBN4-Z72X] (referencing a group of red states taking up the case against Obamacare in the wake of the Republican Party's recent Congressional failure to repeal the law).

mechanisms that allow political parties to play this role, as well as some of the considerations they face that help distinguish the kinds of claims they choose to support from those that they leave to aligned non-party groups.

Part V identifies several basic conditions that allow parties to play this function successfully—the presence or absence of which will help determine both whether they pursue their political goals through strategic public litigation as well as their likelihood of success in taking this route. In particular, there must exist both an alignment of perceived interests (both among various party actors as well as between the party and ideologically-aligned outside interest groups) around the immediate goal of the litigation and also a majority on the Court that, from the perspective of the challengers, may be receptive to the claims. I argue that the party unity condition was met in *NFIB* but not in *King*, and that this dynamic helps explain why the latter challenge was—by objective measures as well as the challengers' own assessments—notably less successful. This difference can be explained primarily by the intervening implementation of the ACA's coverage provisions, which severed the alignment that had previously existed between the strategic interests of the Republican Party and outside ideological groups. This suggests that where a party's "symbolic agenda" stands in tension with its electoral and other partisan imperatives, the strategic considerations will generally override even longstanding stated policy goals. That calculus is notably different from the one faced by traditional single-issue public interest litigants, who organize themselves precisely for the purpose of advancing their chosen set of ideological commitments.

The conditions that enable partisan constitutionalism do not occur at random: each political branch institution (at both the state and federal level) has unique and identifiable advantages in public litigation, and the parties' strategy for contesting fundamental questions will be influenced by their control of one or more of these branches. Moreover, the conditions that enable partisan constitutionalism do not occur at random. One advantage of this framework is that it gives us the initial tools to consider—for a given contested issue at a given moment in our history—whether such a challenge is likely to arise and be successful. Applying this framework, I conclude that partisan constitutionalism has been made both more attractive and feasible by the background conditions of hyperpolarization and divided government. Rising polarization makes it easier for parties to meet the party unity condition; it increases the incentives for political actors to "constitutionalize" political arguments and then for appointed judicial actors to accommodate these attempts. The state of persistently divided government—particularly where, as we see today, each party

experiences an enduring advantage at different given levels or institutions of government—increases the frequency of situations in which a party finds it advantageous to pursue its policy objectives through strategic litigation rather than orthodox lawmaking.

These two features of our modern politics reinforce each other, helping to explain why the party-driven constitutional litigation observed in the healthcare cases is a relatively recent phenomenon—even as the mechanisms identified here have long been available to political parties. Under these conditions, there will be a tendency for contested political issues to be constitutionalized in this manner—not just rhetorically but also in practice, through strategic judicial challenges that attempt to re-litigate political debates on a more favorable battleground. In this way, the dynamics explored here help explain why similar legal challenges were made (with varying degrees of party support) in response to nearly every one of President Obama's major initiatives, from Dodd-Frank to the Clean Power Plan to the immigration executive action—as well as more recent requests for departure from ordinary judicial procedure made by President Trump's Department of Justice.[14]

I conclude with a brief discussion of the implications of this type of party-led litigation. As party actors increasingly call upon the judiciary to function as a new institutional veto point for the legislative process, their perception of the role of courts is likely to shift in fundamental ways. We should expect this judicial veto—like the threat of filibuster or presidential veto—to exert a powerful background influence on political actors regardless of the frequency of its use in practice. Partisan constitutionalism thus helps explain why the stakes surrounding the vacancy created by Justice Scalia's death were perceived to be so high, and thus were evaluated by Republicans to be worth any political risks that might be associated with the refusal to hold hearings on President Obama's nomination.[15] As we are now

14. *See* Joshua Matz, *The Justice Department's New Tactic: Leapfrog Judicial Process and Go Straight to the Supreme Court*, WASH. POST (Nov. 12, 2018), https://www.washingtonpost.com/opinions/the-justice-departments-new-tactic-leapfrog-judicial-process-and-go-straight-to-the-supreme-court/2018/11/12/e7a61004-e38a-11e8-b759-3d88a5ce9e19_story.html?utm_term=.e15e102267ea ("The Justice Department has implemented a new strategy for defending President Trump's most controversial policies: Declare an urgent threat to the executive branch, bypass ordinary judicial procedure and rush straight to the Supreme Court. Over the past few weeks, it has made this move in cases involving climate change, immigration, the 2020 Census and Trump's ban on military service by transgender people.").

15. *See, e.g.*, Jeffrey Rosen, *What's at Stake in Selecting Justice Scalia's Replacement?*, THE ATLANTIC (Mar. 28, 2016),

seeing, parties will increasingly treat federal court appointments as a proxy battle for entrenched political control—jettisoning in the process prior norms that have informed our understanding of courts.[16]

The framework I describe documents a new type of public litigation that scholars have overlooked, the trajectory and outcomes of which will frequently surprise observers who fail to grasp the dynamics of partisan constitutionalism (as happened in both healthcare challenges). The implications of this new judicial function, both for litigation and appointments, call into question many currently predominant assumptions about the available pathways for policy change as well as the role of courts in our contemporary constitutional system.

I. OVERVIEW OF THE PARTY POLITICS BEHIND THE ACA CHALLENGES

More than any other major legislation in recent memory, the Affordable Care Act was born of political polarization.[17] The Act was

https://www.theatlantic.com/politics/archive/2016/03/confirmations-the-battle-over-the-constitution/475671/ [https://perma.cc/M77Z-GK4X] ("The constitutional stakes could hardly be higher. Scalia passed away not only in the middle of a heated election year, with the presidency and control of the Senate hanging in the balance, but during a particularly consequential term at the Supreme Court . . . ."); Russel Berman, *Senate Republicans Pledge to Ignore Obama's Pick for the Supreme Court*, THE ATLANTIC (Feb. 23, 2016), https://www.theatlantic.com/politics/archive/2016/02/senate-republicans-pledge-to-ignore-obamas-pick-for-the-supreme-court/470625/ [https://perma.cc/WV8B-4T26] (heeding the advice of conservative activists, Republican leaders decided to ignore President Obama's Supreme Court nominee).

16. *E.g.*, Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & POL'Y 521, 521 (2019) ("The politics of federal judicial appointments is as heated and as high-profile now as it has ever been in American history. For an important segment of both political parties, the federal courts have become a critical policymaking institution, and as a result both parties have been pushed to treat judicial appointments as an important political battleground.").

17. *See, e.g.*, Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 67 (2015) ("Although politics underlies almost every challenge to a major federal law, and although health policy has always been particularly contested, the politics of the ACA has been unusually raw."); Samantha Smith, *From The Very Start, Sharp Partisan Divisions Over Obamacare*, PEW RES. (June 25, 2015), http://www.pewresearch.org/fact-tank/2015/06/25/from-the-very-start-sharp-partisan-divisions-over-obamacare [https://perma.cc/4HAM-7YF5] ("One constant in the battle over the Affordable Care Act has been the depth of the partisan divide over the legislation. The partisan divisions over this issue are long-standing and deeply entrenched."). At the time the ACA was signed into law, it was by one measure the most politically divisive major legislation passed in over a century. *See* Michael Cembalest, *Eye on the Market*, J.P. MORGAN (Sept. 18, 2013),

debated and passed into law at a time in our history when the two parties had completely sorted ideologically and were "at loggerheads over the nature of the social contract."[18] The legislation received no Republican votes, despite the drafters' extensive efforts to make policy accommodations that might lend their accomplishment the imprimatur of bipartisan support.[19] As conservative writer Phillip Klein has observed, "[e]ver since President Obama signed his overhaul of the U.S. health care system into law . . . the elusive goal of repealing the legislation has been the driving force behind Republican politics."[20] The GOP-controlled House of Representatives has since voted to repeal or

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https://www.jpmorgan.com/jpmpdf/1320667550781.pdf [https://perma.cc/WGH9-R85M].

18. *See* Jack M. Balkin, *The Court Affirms Our Social Contract*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 13 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., Oxford University Press 2013) [hereinafter THE HEALTH CARE CASE]. This state of polarization stands in contrast to that which characterized previous instances of state building—in particular, the New Deal and Great Society programs—that were ultimately ratified by deferential courts. *See id.* ("By the time the ACA was passed . . . the nature of the party system had radically changed. The New Deal and the Great Society had support from liberal and moderate Republicans as well as Democrats. . . . The ACA was passed solely with Democratic votes, and the two parties were at loggerheads over the nature of the social contract.").

19. *See, e.g.*, Norm Ornstein, *The Real Story of Obamacare's Birth*, THE ATLANTIC (July 6, 2015), http://www.theatlantic.com/politics/archive/2015/07/the-real-story-of-obamacares-birth/397742/ [https://perma.cc/N52K-7T35] (describing the unsuccessful efforts of President Obama and congressional Democrats to secure Republican support for the legislation); Chris Frates & Carrie Budoff Brown, *Gang of Six Could Hold Obama's Fate*, POLITICO (Sept. 9, 2009, 3:25 PM), http://www.politico.com/story/2009/09/gang-of-six-could-hold-obamas-fate-026879 [https://perma.cc/DEE2-VM64]. *See also* David Frum, *Waterloo*, FRUM F., http://www.frumforum.com/waterloo/, *originally published* in Frum Forum (Mar. 21, 2010) ("At the beginning of this process we [Republicans] made a strategic decision: unlike, say, Democrats in 2001 when President Bush proposed his first tax cut, we would make no deal with the administration. No negotiations, no compromise, nothing. We were going for all the marbles.").

20. PHILLIP KLEIN, OVERCOMING OBAMACARE: THREE APPROACHES TO REVERSING THE GOVERNMENT TAKEOVER OF HEALTH CARE (2015). *See also* Jack M. Balkin, *The Supreme Court Reaffirms the Social Contract: The ACA as a Framework Statute*, BALKINIZATION (June 25, 2015, 1:14 PM), http://balkin.blogspot.com/2015/06/the-supreme-court-reaffirms-social.html [https://perma.cc/Z5GZ-3TK2] ("The opponents of the Affordable Care Act were hardly ready to give up after [*NFIB*]. . . . Republican politicians and conservative media repeatedly denounced the Act and predicted its imminent demise. Opposition to the [ACA], on both policy and constitutional grounds, remained the more or less official position of the Republican Party.").

undermine the statute more than fifty times,[21] and in 2013, a refusal to approve funding for the statute's appropriated functions resulted in a prolonged government shutdown.[22] While nearly eight-in-ten Democrats approved of the law in 2015, it remained opposed by nearly nine-in-ten Republicans: a difference in perceptions that had only widened along party lines, six years after the legislation was signed into law.[23]

In both the *NFIB* and *King* challenges, some number of political opponents of the health care law recognized in the developing legal case an opportunity to extend a fight that had been waged in the political branches (at both the state and federal levels), to a new and potentially more favorable battleground. It has been widely observed that the *NFIB* challengers' argument that the individual mandate exceeded federal authority under the Commerce Clause had been initially considered "off the wall."[24] As told by legal scholars and participants in the litigation, the story of this historic legal challenge is one of a powerful social and political movement coordinating to transfer the primary site of its opposition from the legislative to the judicial branch, and doing so with sufficient strength to move a constitutional argument from "off- to on-the-wall in a matter of months."[25] As Mark Rosen and Christopher Schmidt have documented, "[i]n remarkably short order, a belief that the mandate violated the Constitution went from a fringe argument of libertarian ideologues to a Tea Party tenet to a consensus position in the Republican Party, with the party's presidential primary turning into a contest of one-upmanship in attacking the mandate."[26]

The repeated efforts to challenge this legislation through strategic litigation should thus be understood within the context of this hyperpolarized political landscape, where the fight over the ACA had

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21. Sam Baker & National Journal, *House Votes to Repeal Obamacare, Again*, THE ATLANTIC (Feb. 3, 2015), https://www.theatlantic.com/politics/archive/2015/02/house-votes-to-repeal-obamacare-again/440337/ [https://perma.cc/5EZS-CKTC].

22. *See* John Bresnahan, et al., *Anatomy of a Shutdown*, POLITICO (Oct. 18, 2013), http://www.politico.com/story/2013/10/anatomy-of-a-shutdown-98518.html#ixzz3fq26rlRs https://perma.cc/2DX3-QXWU.

23. *See* Smith, *supra* note 17.

24. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/ [https://perma.cc/K3S3-M32J].

25. *Id.*

26. Rosen & Schmidt, *supra* note 11, at 131 (noting that "[t]he Court considered the constitutional challenge to the mandate in this context").

come to represent the most contested and highest-stakes battleground.[27] In the words of Robert Weiner, who oversaw the administration's health care litigation at the Department of Justice: "Partisanship is in the DNA of the case, marking its birth, its progress through the lower courts, and its turn before the Supreme Court."[28] During the months that libertarian legal scholars, conservative activists, and state and local political actors began coordinating to develop what would become the *NFIB* challenge—at a time when the health reform legislation was still in the final stages of congressional debate—"the idea that the Act's mandate to purchase health insurance might be unconstitutional was, in the view of most legal professionals and academics, simply crazy."[29] Through a similar trajectory, the language of the Act's Section 36B was transformed in just a few years' time from an apparent statutory quirk, uncovered by a South Carolina employment benefits lawyer nearly a year after the ACA's enactment, to evidence presented before the Supreme Court of congressional intent to deny tens of billions in federal subsidies to the citizens of uncooperative states.[30] The magnitude of this shift—and speed with which it occurred in both cases—stunned legal observers at the time, and remains striking today.[31]

How did this happen? Although much of the legal commentary on these two cases has looked to doctrine for explanations, this focus has been criticized by observers who have emphasized extrajudicial considerations. Participants on both sides of the litigation and commenters from across the political spectrum have argued that that the Court's consideration of these claims was strongly shaped by their

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27. *See* BLACKMAN, *supra* note 8, at 55 ("Republicans, realizing that they had failed to kill the bill through the political process, turned to their last refuge—the Constitution.").

28. Robert N. Weiner, *Much Ado: The Potential Impact of the Supreme Court Decision Upholding The Affordable Care Act*, *in* THE HEALTH CARE CASE 71 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., Oxford University Press 2013) (noting various examples of political actors taking advantage of institutional resources).

29. Balkin, *supra* note 24. *See also* David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 U. ILL. L. REV. 805, 807 ("[V]irtually all law professors who opined on these issues agreed that *all* of the constitutional challenges to PPACA were meritless—and [that] the federal courts would make short work of the litigation").

30. Adam Liptak, *Lawyer Put Health Act in Peril by Pointing Out 4 Little Words*, N.Y. TIMES (Mar. 2, 2015), http://www.nytimes.com/2015/03/03/us/politics/in-four-word-phrase-challenger-spied-health-care-laws-vulnerability.html [https://perma.cc/DAY2-3ATH].

31. Josh Blackman, *Popular Constitutionalism and the Affordable Care Act*, 27 PUB. AFF. Q. 179, 185–87 (2013).

extrajudicial political valence. In particular, several scholars have placed these cases (and the *NFIB* challenge in particular) as examples of the process of "popular constitutionalism."[32] Although some have noted the role of the Tea Party as a social movement within the familiar framework, leading accounts have emphasized the role played by the Republican Party's support for the *NFIB* challenge—which Jack Balkin has described as "the single most important factor in making the mandate opponents' constitutional claims plausible" in *NFIB*.[33] Josh Blackman, a conservative academic who assisted with and wrote a book about the legal challenge to the individual mandate, has described the importance of the Republican Party's support in similar terms.[34] And Linda Greenhouse has observed that, "[a]side from *Bush v. Gore*, it is hard to think of any modern case that came before the Court with such a clear political valence."[35]

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32. *See, e.g.*, *id.* at 185 ("[T]hrough groups such as the Tea Party, the [*NFIB*] challengers appealed to norms of popular constitutionalism to give force to the arguments being advanced. This mode of constitutional interpretation was imperative in advancing the challenge to the Court."); Rosen & Schmidt, *supra* note 11, at 71 ("The story of broccoli, limiting principles, and *NFIB* provides new insights into dynamics of popular constitutionalism."); David Super, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, 66 STAN. L. REV. 873 (2014) (discussing the challenges to the ACA as a "constitutional moment" in which the Court participates but whose outcome ultimately is determined through broad popular engagement); Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367, 1368 (2010) (arguing that "the ACA itself was the product of popular constitutionalism, a victory for political advocates who argued that the right to health care was a fundamental human right that warranted protection by the federal government."). *Cf.* Randy Barnett, *Balkin "Flips,"* VOLOKH CONSPIRACY (July 20, 2010, 5:07 PM), http://volokh.com/2010/07/20/balkin-flips/ [https://perma.cc/JVR2-XM9V] ("[Jack Balkin argues t]hat I and others are trying to move what Jack calls an 'off the wall' theory to the status of 'on the wall.' . . . Unlike the misleading and inaccurate 'Constitution-in-Exile' trope promoted by Cass Sunstein and Jeff Rosen a few years ago . . . Jack is right about this. I and others are trying to do exactly this.").

33. Balkin, *supra* note 24. *See also* Neil S. Siegel, *None of the Laws but One*, 62 DRAKE L. REV. 1055, 1067 (2014) ("Republican politicians, including those in Congress, were primarily responsible for moving the constitutional objections to the minimum coverage provision from 'off the wall' to 'on the wall' in record time . . . .").

34. BLACKMAN, *supra* note 8, at 187 ("What must happen for the constitutional idea to shift from 'off the wall' to 'on the wall' is for the constitutional ideal to gain acceptance among powerful social movements. This is precisely what happened with the challenge to the ACA. The Republican Party rallied around this case at both the federal and state levels, uniting to oppose this law.").

35. Linda Greenhouse, *Is it the Roberts Court?*, *in* THE HEALTH CARE CASE 387 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013). *See also* Nathaniel Persily et al., *Introduction*, *in* THE HEALTH CARE CASE 2 ("As the

But despite these suggestions that party politics help explain the trajectory and ultimate outcome of the ACA challenges, scholars have not provided an explanation for *why* this support was so important—or even what precise form it took in these cases. That omission is notable, for this party-centered story fits uncomfortably in the existing popular constitutional literature—which has focused largely on the role played by broad-based social movements and confined the role of parties largely to the appointments process (through a process often described as "partisan entrenchment").[36] For example, Balkin previously had asserted that "social movements influence constitutional interpretation because they influence the two major political parties, which, in turn control the system of judicial appointments."[37] Similarly, he has argued that "[a]ppeals to national elite values try to change constitutional doctrine by changing the minds of sitting judges, while the strategy of partisan entrenchment tries to change the judges."[38]

Some of the popular commentary about the ACA cases has noted parties' ability to get behind constitutional claims that are advanced through litigation.[39] And John Ferejohn has similarly observed—in the context of describing courts' increasingly becoming sites of decision-making on major substantive policy questions—the ability of "[w]ell-organized parties [to] coordinate actions across institutions, at least in

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[*NFIB*] case reached the Supreme Court, the clear partisan divide over the ACA and the constitutional challenge to it was unmistakable. Republican officials at all levels of government lined up as amici urging the Court to strike the ACA down, while Democrats urged the Court to uphold it.").

36. Jack Balkin & Sanford Levinson, *The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 489–91 (2007).

37. Balkin, *supra* note 10, at 30–31 (noting that "[w]hen social movements become important to the major political parties, they influence the sort of people who are appointed to the judiciary, making it easier for the social movement's constitutional claims to be taken seriously."). *Cf.* Ernest A. Young, *Popular Constitutionalism and The Underforcement Problem: The Case of the National Healthcare Law*, 75 L. & CONTEMP. PROBS. 157, 189 (2012) ("In Professor Balkin's account, social movements influence existing political parties, who win elections and ultimately appoint judges that interpret the Constitution in ways congenial to the movement's agenda. The Supreme Court Justices that will ultimately decide the ACA cases represent the judicial legacy of successive waves of partisan activity . . . .").

38. Balkin, *supra* note 10, at 33.

39. Balkin, *supra* note 24 ("What really accelerates the movement of constitutional arguments from off the wall to on the wall is neither intellectuals nor social movements. It is the party system, which usually only gets involved after intellectuals and social movements have laid the groundwork.").

some circumstances."[40] But this role has been under-theorized: most of the academic literature describes judicial nominations as the primary vehicle through which political parties affect the meaning of our fundamental commitments, especially with respect to constitutional litigation.[41] And whereas existing descriptive accounts of popular constitutional change imagine these changes as happening only through long periods of struggle, the healthcare challenges were characterized by the nearly unprecedented speed at which their claims moved from unthinkable to (very nearly) providing the legal basis for undoing one of the most significant progressive policy achievements in all of modern politics.[42]

It is notable in this context that, across a number of important dimensions, the two healthcare challenges share an identifiable common architecture—a framework that has been adopted in other recent prominent challenges.[43] Conservative and libertarian legal intellectuals coordinated to advance a novel legal claim whose success would have the effect of dismantling a contested progressive achievement. The challengers then worked to move this claim into the realm of plausible through a concerted effort to enlist popular and, especially, political support—an effort that, in both cases, involved going outside the traditional channels to communicate preferred messages (and showings of support from political leaders) to potentially sympathetic members of the judiciary.[44] This is the template of partisan constitutionalism.

II. PARTIES SUPPORT STRATEGIC CONSTITUTIONAL LITIGATION THROUGH FOUR PRIMARY MECHANISMS

As the ACA challenges illustrate, political parties—acting at both the state and federal level—can alter the near-term trajectory of

40. John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41, 58 (2002).

41. *See, e.g.*, Balkin & Levinson, *supra* note 36, at 489, 493–95.

42. *See, e.g.*, Jack M. Balkin, *What is Living Constitutionalism*?, BALKINIZATION (Mar. 27, 2008), http://balkin.blogspot.com/2008/03/what-is-living-constitutionalism.html [https://perma.cc/EN4E-E6DZ] ("In general, living constitutionalism of the sort I've described allows social and political mobilizations, *working over long periods of time*, to shift the interpretation and application of abstract clauses and open ended features of the Constitution.") (emphasis added).

43. *See, e.g.*, Li Zhou, *The Latest Legal Challenge to the Affordable Care Act, Explained*, VOX (July 9, 2019, 11:37 AM), https://www.vox.com/policy-and-politics/2019/7/9/20686224/affordable-care-act-constitutional-lawsuit-fifth-circuit-court-texas-district-court [https://perma.cc/6A6Y-WRK4].

44. BLACKMAN, *supra* note 8, at 82–84.

constitutional challenges.[45] This happens, I suggest, through four specific mechanisms, each of which was used by one or both parties in the two healthcare challenges. In this section I document how these mechanisms shaped not only the politics *surrounding* the litigation, but also affected—and perhaps even determined in a dispositive manner—the outcomes of the cases themselves.

A. Parties can Leverage Institutional Resources to Provide an Infrastructure for a Legal Challenge

First, political parties can provide the direct infrastructure for a legal challenge, especially through suits brought by state attorneys general but also through support from federal actors through, for example, congressional hearings and filing amicus briefs.[46] Of note, this can take the form of political actors coordinating with—even effectively renting out—their institutional advantages to allied outside parties, providing support for the challenge that would otherwise be unavailable to nongovernmental advocates.[47] Perhaps the most effective version of this is litigation initiated by coordinating state attorneys general, as was done in *NFIB*—though state attorneys general also can provide indirect support, as through the amicus briefs that a number of them (on both sides) filed in *King*.[48] Party actors at the state and federal level can additionally support this sort of legal challenge through the traditional levers of legislative power and process.[49]

1. STATE ACTORS

From the beginning, the unified opposition to the ACA among federal Republicans extended in parallel down to political actors among the states: indeed, the role played by state attorneys general was a hallmark of the *NFIB* challenge.[50] As noted above, a dozen Republican

45. Zietlow, *supra* note 32, at 1367–68, 1370.

46. *See, e.g.*, Brief of Members of the United States Senate, et al. as Amici Curiae Supporting Petitioners, *Nat'l Fed. Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (No. 11-393).

47. BLACKMAN, *supra* note 8, at 90–91.

48. *See id.* at 60, 65. For an example of an amicus brief filed by multiple state attorneys general challenging the ACA, see Brief of the States of Oklahoma eta l. as Amici Curiae Supporting Petitioners, *King v. Burwell*, 135 S. Ct. 2840 (2015) (No. 14-114).

49. Zietlow, *supra* note 32, at 1368.

50. BLACKMAN, *supra* note 8, at 91.

attorneys general (as well as one Democrat who later would switch parties) filed suit on behalf of their states only minutes after the health reform law had been signed into law.[51] Although state attorneys general have long coordinated litigation, as on tobacco, their efforts to undermine the ACA through legal challenge have been distinguished by several factors, including partisan unity (as also highlighted in the partisan federalism literature); close coordination with outside actors, including conservative advocacy groups and business groups; and support from Republican legislators and party officials at both the state and federal level.[52]

In *NFIB*, two different state-led lawsuits directly challenged the new health law. In Virginia, State Attorney General Ken Cuccinelli, aiming to be the first state to file a legal challenge,[53] began preparing his state's challenge before the federal legislation had passed.[54] This effort was supported by Republican leaders in the state legislature, who prepared a bill that would give Cuccinelli the authority to sue the federal government asking for the law to be struck down.[55] The state's Republican Governor Bob McDonnell signed the law on March 24, 2010, one day after the ACA was passed.[56] The second state-initiated lawsuit to be brought challenging the ACA's constitutionality, which ultimately reached the Court in the form of *NFIB*, similarly was the product of coordination between state party officials and outside ideological allies.[57] The effort began with a letter—"ghostwritten" by conservative litigator David Rivkin[58]—sent to Speaker Nancy Pelosi from South Carolina's Republican attorney general, stating constitutional objections to provision of the law that was later removed.[59] The day prior, Florida's attorney general had circulated a

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51. Weiner, *supra* note 28, at 70.

52. BLACKMAN, *supra* note 8, at 65, 84, 90–91.

53. *Id.* at 53.

54. *See* KEN CUCCINELLI, THE LAST LINE OF DEFENSE: THE NEW FIGHT FOR AMERICAN LIBERTY 47–48 (2013) ("Once passage of the federal bill began to appear imminent in mid-March, [my staff] and I began to draft Virginia's formal complaint and to finalize our constitutional reasoning for challenging the new law.").

55. This law, the Virginia Health Care Freedom Act, anticipated this legal challenge by aiming to prevent Virginia citizens from being forced to purchase health insurance under a federal mandate. *See* BLACKMAN, *supra* note 8, at 52.

56. *Id.* at 85.

57. *Id.* at 53.

58. *Id.* at 60.

59. *Id.* This controversial provision, however, would reemerge in the litigation when Justice Scalia referenced the deal during *NFIB* oral arguments. *See* Alexander Bolton, *Dems Fume Over Justice Scalia's Comments During Healthcare*

letter to South Carolina asking that they "join . . . in launching a full review of the constitutionality of the individual mandate and potential legal options for States to pursue on behalf of their citizens should this mandate become law."[60] As the litigation moved forward, this group of state attorneys general coordinated with the conservative Heritage Foundation's legal team "for support and to 'get their ducks in order.'"[61]

Other key aspects of the challenge—from the selection of their legal arguments[62] to choice of filing venue[63]—likewise were cleared through this network of conservative and libertarian advocates,[64] as well as with to business groups that opposed the law.[65] Indeed, the decision to join *NFIB* as a party to the states' lawsuit—a move that ultimately "proved decisive" in establishing standing when the case came before the Court—was initiated at a Heritage conference that featured remarks from both Florida's attorney general and NFIB's executive director.[66] Additionally, the Virginia law that gave rise to Cuccinelli's suit was based on draft legislation prepared by the American Legislative Exchange Council (a corporate-backed conservative interest group) that was introduced in some form by legislators in at least thirty-seven other states.[67]

Case, THE HILL (Mar. 30, 2012, 9:15 AM) http://thehill.com/policy/healthcare/219171-dems-fume-over-justice-scalias-healthcare-comments [https://perma.cc/C32X-P2ZN] ("Scalia's use of the term 'Cornhusker Kickback,' coined by GOP political operatives during the healthcare reform debate, also raised concerns—especially since Scalia appeared unaware the provision was scrapped before Obama signed the law.").

60. BLACKMAN, *supra* note 8, at 60.

61. *Id.* at 65.

62. *Id.* at 292 ("The states initially threatened litigation to challenge the Medicaid expansion. However, once the unpopularity of the mandate became obvious, many of the Republican attorneys general saw political gold and shifted their focus.").

63. *Id.* at 82–83.

64. But not all aspects of the litigation reflected this sort of delegated partnership: Blackman describes frustration among "the think-tankers" at Cuccinelli's insistence on proceeding independently of the other states with what was, in their view, a comparatively weaker case—and also for his "stubborn refus[al]" to adopt their legal strategies, a decision that ultimately contributed to the defeat of Virginia's claims before the Fourth Circuit. *Id.* at 84–88.

65. *Id.* at 90–91.

66. *Id.*

67. Press Release, American Legislative Exchange Council, Virginia First State to Pass Health Care Freedom Act: 38 States Lining Up Against ObamaCare (Mar. 4, 2010), http://www.prnewswire.com/news-releases/virginia-first-state-to-pass-health-care-freedom-act-38-states-lining-up-against-obamacare-86418607.html [https://perma.cc/L4PX-888D]. *See also* Sarah McIntosh, *Virginia Passes Health*

These state efforts also were coordinated by the party at the federal level. Two weeks after the 2010 elections that saw major GOP gains (in large part ascribed to popular objections to the new healthcare law), Republican Governors Association Vice President Tim Pawlenty urged "[n]ewly elected Republican governors" to join the lawsuit.[68] In their first month of office, four more Republican attorneys general and one Republican governor responded to the call; in each instance, leadership of the state had switched from Democratic to Republican in the 2010 election.[69] In total, the twenty-seven states that went to court to have the law declared unconstitutional all had either Republican governors, Republican attorneys general, or both.[70]

By the time the case reached the Supreme Court, it was "possible for the first time in American history to count a clear majority of states in litigation with the federal government, each claiming that the federal government has exceeded its enumerated powers."[71] These efforts did not escape notice of the justices. During oral argument, Justice Scalia would quip: "I didn't take the time to figure this out, but . . . [i]s there any chance that all twenty-six states opposing it have Republican governors, and all of the states supporting it have Democratic governors? Is that possible?"[72] Additionally, the four conservative dissenters prominently noted in their joint opinion that "more than half

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Freedom Bill, Setting Up Legal Challenge to Individual Mandate, HEARTLAND (May 31, 2016) https://www.heartland.org/news-opinion/news/virginia-passes-health-freedom-bill-setting-up-legal-challenge-to-individual-mandate [https://perma.cc/MS56-HGKN] ("'With pro-big government types controlling Washington, freedom advocates realize that states can provide an important line of defense for their liberties,' [Clint Bolick, director of the Goldwater Institute's Center for Constitutional Litigation] said. 'In the face of policies threatening the medical autonomy of millions of people, the Health Care Freedom Act is a way to create a constitutional firewall.'"). In Missouri, for example, voters passed a referendum to deny the federal government the authority to penalize citizens for refusing to purchase private health insurance. BLACKMAN, *supra* note 8, at 108.

68. Julian Pecquet, *Lawmakers not on Sidelines as Health Law Repeal Gains Momentum in Courts*, THE HILL (Nov. 27, 2010, 2:19 PM), https://thehill.com/policy/healthcare/130771-healthcare-law-repeal-effort-gains-momentum-in-the-courts [https://perma.cc/8GVV-E8H8].

69. Pecquet, *supra* note 68.

70. Greenhouse, *supra* note 35.

71. Petition for a Writ of Certiorari Before Judgment at 13, *Virginia v. Sebilius*, 539 U.S. 969 (2011) (No. 10-1014).

72. Paul Clement replied, "There's a correlation, Justice Scalia." Transcript of Oral Argument at 22, *Florida v. Dep't of Health & Human Servs.*, 567 U.S. 519 (2012) (No. 11-400).

the states [have] brought this lawsuit"—citing this as evidence that the federal law had unlawfully burdened the states.[73]

Although the litigation challenges were the most consequential initial state-led challenge to the new law, resistance among the states took other forms. As Abbe Gluck has noted, "[t]he political resistance to the ACA [among the states] . . . was much deeper than anticipated [by the drafters], and, as a result, nearly three dozen states ultimately decided not to support the statute in any way, including by establishing exchanges."[74] In the first five years after the law was enacted, at least twenty-two state legislatures would follow Virginia's lead by enacting laws and measures either directly challenging or opting out of the law's mandatory provisions.[75] In this context, it is notable that the states played a much less prominent role in supporting the *King* litigation's challenge to Section 36B, despite the challengers' best efforts.[76] Healthcare reporter Sarah Kliff has recounted these attempts in detail:

> The search for a new Obamacare challenger initially went quite poorly. The individual mandate case had failed earlier that summer and, among conservatives, there was lawsuit

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73. *See* Greenhouse, *supra* note 35 ("Surely one of the most disingenuous questions ever posed in a Supreme Court opinion is this one, from the Scalia-Kennedy-Thomas-Alito dissent: '[W]hy have more than half the states brought this lawsuit . . . ?' The answer the dissenters gave to their own question was asserted coercion under the Spending Clause, but the real answer, as they had to know, was partisan politics.") (parenthesis omitted).

74. Gluck, *supra* note 17, at 69–70.

75. RICHARD CAUCHI, NAT. CONF. STATE LEG., STATE LAWS AND ACTIONS CHALLENGING CERTAIN HEALTH REFORMS (2018), http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx [https://perma.cc/2RYB-GB96]. As David Super has observed, "many states have been at the forefront of litigation and have expressed their constitutional reservations by refusing to plan for the implementation of insurance exchanges and threatening to reject the Medicaid expansion." Super*, supra* note 32, at 891. Indeed, he has argued that the role of the state attorneys general in advancing and participating in the legal challenges—and also as a result of the Court's decision to make the Medicaid expansion optional for states—"this constitutional moment will be fought out in both federal and state politics." *Id.* Noting that this stands in contrast to other constitutional moments like the New Deal consensus, which "was hammered out almost entirely on the national level," Super has analogized this central role for the states "to state ratification at the end of the Article V process." *Id.* at 890–91.

76. Sarah Kliff, *The Accidental Case Against Obamacare: How a Lawyer, a Law Professor, and a Libertarian Found the Affordable Care Act's Secret Weakness*, VOX (Mar. 2, 2015, 10:17 AM), http://www.vox.com/2015/3/2/8129539/king-burwell-history [https://perma.cc/K8DX-ERN5].

> fatigue. There was no appetite for a lawsuit that appeared to hinge on a drafting error. [Conservative advocate Michael] Cannon badgered a half-dozen governors and attorneys general to take the case, especially those who had worked on the individual mandate. . . . Now, Cannon had a way that he thought Republicans could in fact halt Obamacare, with a new lawsuit. The problem was, none of them believed him.[77]

The challengers eventually were able to convince one state Attorney General, Republican Scott Pruitt of Oklahoma, to challenge the legality of the exchange subsidies.[78] Pruitt publicized his lawsuit in a *Wall Street Journal* op-ed—highlighting its potential to cause "the structure of the ACA [to] crumble"[79]—and eventually filed an amicus brief with the Court, which was joined by Alabama, Georgia, Nebraska, South Carolina, and West Virginia.[80] (Indiana had followed Oklahoma in bringing its own challenge to the subsidies, and filed separately with the Court.) "Tellingly," observed legal scholar Timothy Jost, "the biggest Republican federal exchange states, such as Florida, Texas, Wisconsin, and Ohio did not join."[81]

This is not to say that other states were silent in this case: in fact, twenty-two states and the District of Columbia—including ten states with a federal exchange, and eight with Republican governors[82]—filed in support of the government respondent, arguing that longstanding principles of federalism prevented Congress from imposing the funding condition that would result from the challengers' reading of the law

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77. *Id.* ("'I couldn't interest Ken Cuccinelli or Pam Bondi,' Cannon says. 'I think I mentioned it to Paul LePage. I spoke with Rick Scott, and he said he was interested but never did anything. Phil Bryant seemed excited, but no follow through.'").

78. *Id.*

79. Scott Pruitt, *ObamaCare's Next Legal Challenge*, WALL STREET. J. (Dec. 1, 2013), https://www.wsj.com/articles/obamacare8217s-next-legal-challenge-1385941074 [https://perma.cc/4QPB-GSGZ].

80. Brief for the State of Oklahoma et al. as Amici Curiae Supporting Petitioners, *King v. Burwell*, 135 S. Ct. 475 (2015) (No. 14-114).

81. Timothy Jost, *The Amicus Briefs Supporting the Government's Position in* King v. Burwell, BALKINIZATION (Feb. 1, 2015), https://balkin.blogspot.com/2015/02/the-amicus-briefs-supporting.html [https://perma.cc/7K3D-JWRR].

82. Rob Weiner, *The Incredible Shrinking Lawsuit: The Decomposition of* King v. Burwell, BALKINIZATION (Feb. 17, 2015), https://balkin.blogspot.com/2015/02/the-incredible-shrinking-lawsuit.html [https://perma.cc/7CTY-HHQS]. *See also* Jost, *supra* note 81.

without first clearly putting the states on notice.[83] As Rob Weiner pointed out, "the mere fact of support for the Government from nearly half the States, compared to seven supporting the challengers . . . deflates the challengers' self-anointed status as champions of federalism."[84]

The most recent challenge also adopts this model: the lawsuit Judge O'Connor ruled on was brought by a group of eighteen Republican state attorneys general, as well as two Republican governors.[85] On the other side, seventeen Democratic attorneys general acted to intervene to defend the law, after the Trump Department of Justice declined to do so.[86]

2. FEDERAL ACTORS

The emerging literature on partisan federalism—which highlights the role of *state* attorneys general in initiating strategic litigation—helps tell one part of this new story.[87] But it does not explain the ways that the resources available to *federal* congressional actors can similarly be deployed to advance novel constitutional claims. Although states initiated the first legal challenge to Obamacare, these efforts drew critical support from Republican political officials acting at the federal level.[88] Through floor speeches and remarks at hearings, statements submitted to the *Congressional Record*, a constitutional point of order, and briefs filed before courts hearing the challenge, Republican officials in Congress embraced and provided official validation of legal advocates' novel legal claims.[89] The candidates vying for the 2012

83. Brief for the Commonwealth of Virginia et al. as Amici Curiae Supporting Affirmance at 3, 12, *King v. Burwell*, 135 S. Ct. 475 (2015) (No. 14-114).

84. Weiner, *supra* note 82.

85. Julie Rovner, *A Texas Lawsuit Being Heard This Week Could Mean Life or Death for the ACA*, KAISER HEALTH NEWS (Sept. 4, 2018), https://khn.org/news/democratic-gop-attorneys-general-square-off-in-texas-showdown-over-health-law/ [https://perma.cc/AV6W-CLAW].

86. Katie Keith, *Fifth Circuit Questions Standing of Parties Defending ACA in* Texas v. Azar, HEALTH AFF. (June 28, 2019), https://www.healthaffairs.org/do/10.1377/hblog20190326.572950/full/ [https://perma.cc/SBD5-GZB3].

87. *See generally* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014); *see also* Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 43 (2018) (noting the relationship between partisan polarization and public litigation at the state level).

88. *See* BLACKMAN, *supra* note 8, at 48–49, 64–65.

89. *See id.*

Republican presidential nomination also embraced these claims, helping to further unify the party behind the constitutional arguments underlying the state-led challenge.[90]

All these efforts were undertaken in close coordination with the same outside advocacy groups that had assisted the states. The process through which the challengers' activity-inactivity distinction transformed, in a matter of weeks, from an offhand remark (made between sessions at the Federalist Society's annual convention)[91] to the official position of a major political party is emblematic of this partnership. Three weeks after the meeting where this constitutional objection was originally conceived, Heritage released "what would become the seminal report asserting that the ACA was unconstitutional."[92] In drafting this report, Heritage legal director Todd Gaziano's self-described goal was to "'convince people to write' something to lay the foundation for future constitutional challenges and then to 'get it in the legislative record.'"[93]

The litigation advantages that could be gained from official party support were not lost on the challengers,[94] who invited Hatch to present the report at a public event in December, remarks that were paired with a speech he made the same day on the Senate floor.[95] Heritage hosted a lunch meeting about the report for congressional staff, where "[i]t was stressed how important it was to get this report into the *Congressional Record* and to persuade senators who opposed the Act on policy grounds to also oppose it on constitutional grounds."[96] Specifically, the staffers were instructed that this issue "was going to the Supreme Court and that the justices would want to know whether the issue had been argued in Congress."[97] Toward this end, Gaziano urged them to make a constitutional point of order, a parliamentary proceeding that would

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90. *See id.* at 79–80, 149.

91. *See id.* at 40–44.

92. *Id.* at 46. *See also* Randy Barnett, Nathaniel Stewart & Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, HERITAGE FOUND. (Dec. 9, 2009), https://www.heritage.org/health-care-reform/report/why-the-personal-mandate-buy-health-insurance-unprecedented-and [https://perma.cc/VU2Q-E982].

93. BLACKMAN, *supra* note 8, at 44.

94. *See id.* at 47 ("Gaziano knew that in order for this report to make an impact, it would have to be accepted by Republicans in Congress.").

95. *Id.* at 47–49.

96. *Id.* at 48.

97. *Id.*

force a vote on the constitutionality of the law;[98] although this measure was defeated, it had the effect of placing every voting Senate Republican on record as objecting to the legislation on constitutional grounds.[99] The Heritage report also was "cited, and read from, over again over again" during the final stretch of Senate debate.[100]

This effort to develop an official record documenting the constitutional complaints was complimented by legislators' statements on the floor and at various congressional hearings.[101] Senator Orrin Hatch questioned congressional witnesses about whether the mandate, in their opinion, complied with the Constitution.[102] One week later, Hatch again addressed the perceived constitutional defects of the mandate in remarks that "echo[ed] many of the points" that conservative advocates had been making in a series of op-eds.[103] Democrats attempted to respond to these late objections by quoting legal scholars who affirmed the (then mainstream consensus) position that the mandate raised no constitutional defects[104] and by answering the Republicans' objections with constitutional findings of their own.[105]

After Republicans retook the House in 2010, and as the individual mandate challenge was working its way through the lower courts, party

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98. *Id.* at 55 ("The purpose of this constitutional point of order was not really to defeat the bill. . . . [T]he sole goal was to place this evidence into the *Congressional Record* in order to give a court some ground on which it could strike down the mandate.").

99. *See* Greg Hitt & Naftali Bendavid, *One Hurdle Remains in Senate*, WALL STREET J. (Dec. 23, 2009), http://www.wsj.com/articles/SB126148236683801411 [https://perma.cc/6KPS-C2EM]. Also in support of these efforts, Republican Senator Mike Johanns introduced an amendment (which ultimately was blocked) to provide for an expedited constitutional review of the individual mandate. *See* Brian Darling, *The Individual Mandate in Obamacare is Unconstitutional*, DAILY SIGNAL (Dec. 9, 2009), http://dailysignal.com/2009/12/09/the-individual-mandate-in-obamacare-is-unconstitutional/ [https://perma.cc/L98X-Z7LC].

100. BLACKMAN, *supra* note 8, at 49.

101. *See id.* at 52–57.

102. *Id.* at 38 ("Hatch opened up the question to anyone testifying that day . . . [and] was met with dead silence.").

103. *Id.* at 38–39.

104. In a floor speech during the final days before the Senate passed the Act, Senator Max Baucus quoted Erwin Chemerinsky's assessment that "[m]ost legal scholars who have considered the question . . . argue forcefully that the requirement is within Congress's power to regulate interstate commerce." *See id.* at 46 (internal quotations omitted).

105. The staff director of the Senate Health Committee contacted the executive director of the American Constitution Society, whose staff then "put together a series of 'constitutional findings' to insert into the bill to explain why the ACA was constitutional." *Id.* at 49.

leaders—who now controlled the committees and agenda of one of the two chambers of Congress—scheduled several hearings on the constitutionality of the ACA.[106] In addition to media appearances and public remarks, Republicans found additional opportunities to publicly highlight these objections.[107] At Elena Kagan's June 2010 confirmation hearings, for example, several senators asked her about the pending healthcare litigation—including in an extended back and forth with Senator Coburn about the broccoli hypothetical.[108]

In addition to the GOP-led states whose attorneys general supported the *NFIB* challengers, a total of forty-three Republican senators filed an amicus brief arguing that the mandate undermined the federal system and was unconstitutional—despite the fact that ten of those signatories previously had sponsored legislation containing such a mandate.[109] House Speaker John Boehner, the Republican Governor's Association, and five Republican former Justice Department officials also filed briefs advocating that the ACA be struck down as unconstitutional.[110] Finally, the law's contested constitutionality also was discussed at length in the presidential primary that coincided with this period,[111] with all the candidates in unison on the question even though several leading candidates, including Mitt Romney and Newt Gingrich, had previously supported such a provision.[112]

Two years later, the *King* challengers adopted—or at least attempted—a similar approach. In October 2012, Jonathan Adler and Michael Cannon, two strategists leading the legal challenge, organized

106. *See* Weiner, *supra* note 28. *See, e.g.*, *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011).

107. See BLACKMAN, *supra* note 8, at 103–05.

108. *Id.* An edited version of this exchange was later incorporated by Reason, a libertarian research organization, into a widely-shared internet video. *See* James B. Stewart, *How Broccoli Landed on Supreme Court Menu*, N.Y. TIMES (June 13, 2012), http://www.nytimes.com/2012/06/14/business/how-broccoli-became-a-symbol-in-the-health-care-debate.html [https://perma.cc/6PJL-VC4N].

109. Weiner, *supra* note 28, at 70–71.

110. *Id.*

111. Rosen & Schmidt, *supra* note 11, at 71, 131. *See also* Charles Fried, *The June Surprises: Balls, Strikes, and the Fog of War*, *in* THE HEALTH CARE CASE 51, 52 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., Oxford University Press 2013) ("[A]ll the major Republican candidates for the presidential nomination competed to outdo each other in condemning particularly the mandate.").

112. Romney had championed a plan in Massachusetts that similarly relied on an individual mandate—and even written an op-ed urging President Obama to follow this example and incorporate such an incentive in the federal law. *See* BLACKMAN, *supra* note 8, at 10–11.

a hearing for Hill staff members with Oklahoma's attorney general titled "Could Oklahoma's New Lawsuit Strike a Fatal Blow to Obamacare?"[113] Representative Darrell Issa prepared legislation to nullify the IRS rule authorizing the subsidies for all states, including those established by the federal government,[114] and also held a hearing on the subject at which the architects of the legal challenge were invited to testify.[115] Additionally, citing the legal challenge to the IRS rule, a group of Republican legislators wrote an open letter to the National Governor's Association, urging governors to forgo establishing their own exchanges in order to undermine ACA implementation and thus assist their efforts to repeal the health reform law.[116]

But these efforts were notably less successful than those that supported the *NFIB* litigation. While a number of congressional Republicans together filed an amicus brief with the Court on behalf of the *King* challengers, only six of the fifty-four Republican senators

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113. The event description highlighted the potential disruption to the health care law: "Supporters and opponents agree the PPACA's 'entire structure' depends on the IRS's interpretation of the state, and that this dispute 'could be a fatal blow to Obamacare.'" *See Capitol Hill Briefing: Could Oklahoma's New Lawsuit Strike a Fatal Blow to Obamacare?*, CATO INST. (Oct. 17, 2012), https://www.cato.org/events/could-oklahomas-new-lawsuit-strike-fatal-blow-obamacare [https://perma.cc/37L3-P3AA].

114. Alan K. Ota, *Darrell Issa Keeps Health Care Law in His Sights*, ROLL CALL (Nov. 1, 2012, 11:46 AM), http://www.rollcall.com/news/Darrell-Issa-Keeps-Health-Care-Law-in-His-Sights-218641-1.html [https://perma.cc/5ASK-9DTD]. With other members of his committee, Issa also wrote a letter to the IRS seeking justification for the rule. *Oversight Committee Asks IRS to Explain Recent Rule That Expands Obamacare's Reach in a Way Not Authorized in Law,* COMMITTEE ON OVERSIGHT AND REFORM (Aug. 22, 2012), https://republicans-oversight.house.gov/release/oversight-committee-asks-irs-to-explain-recent-rule-that-expands-obamacares-reach-in-a-way-not-authorized-in-law/ [https://perma.cc/YWL4-LS4B].

115. *See The Illegal IRS Rule to Increase Taxes & Spending under ObamaCare: Hearing Before the Comm. On Oversight and Reform*, 112th Cong. (2012).

116. *See* Jessica Zigmond, *GOP Tells Governors Not to Set Up Exchanges*, MOD. HEALTHCARE (July 2, 2012, 1:00 AM), http://www.modernhealthcare.com/article/20120702/NEWS/307029970/gop-tells-governors-not-to-set-up-exchanges [https://perma.cc/Y9NZ-ML4V]; *see also* Michael Tanner, *The States Resist Obamacare*, NAT. REV. (July 4, 2012, 4:00 AM), http://www.nationalreview.com/article/304729/states-resist-obamacare-michael-tanner [https://perma.cc/Z4FL-MDXR] (connecting this effort to the potential legal challenge that eventually would become *King v. Burwell*).

signed it[117]—a sharp contrast to the forty-three (of forty-five) Republican senators who had lent their names to the *NFIB* challenge.[118]

It remains to be seen (at the time of publication) the degree to which the Republican Party will unite behind the latest challenge. But for all of these reasons, it matters tremendously that the current President of the United States has argued—both in court, through his Department of Justice, and in the public sphere—that the lawsuit is not only serious but legally correct. Following Judge O'Connor's ruling, President Trump tweeted to affirm the decision: "As I predicted all along, Obamacare has been struck down as an UNCONSTITUTIONAL disaster!"[119] Other senior Republicans quickly followed his lead: Congressman Kevin Brady, who chairs the House Ways and Means Committee, told reporters that it is "not surprising" that a court had ruled the ACA unconstitutional.[120]

B. Party Support Operates as a Signal to the Judiciary of the Case's Significance

Where a political party has thrown its support behind a constitutional challenge, this demonstration of unity operates as a powerful signal to judges hearing the case. For ambitious lower-court judges, this signal raises the stakes of their decision on the case, increasing—in a salient way that is unlikely to escape their notice—both the costs of departing from the party line as well as the potential rewards for adopting the legal claim at issue.[121] This implication of the appointments process has been underappreciated as driver of judicial outcomes generally, but the dynamic likely takes on an outsized importance in legal challenges that enjoy some measure of *unified* party

117. Nine (of 247) Republican House members signed the brief. Brief for Senators John Cornyn et al. as Amici Curiae Supporting Petitioners, *King v. Burwell*, 135 S. Ct. 475 (2015) (No. 14-114).

118. *See* Jost, *supra* note 81 (contrasting the "extraordinary assemblage of states and state legislators, members of Congress" and others filing in opposition to the plaintiffs to the "far more limited" support assembled for the challengers).

119. Donald Trump (@realDonaldTrump), TWITTER (Dec. 14, 2018, 9:07 PM), https://twitter.com/realDonaldTrump/status/1073761497866747904 [https://perma.cc/DA5A-UCBC].

120. Sahil Kapur, *Judge Throws Political Bomb in Trump's Lap by Voiding Obamacare*, BLOOMBERG (Dec. 16, 2018, 11:41 AM), https://www.bloomberg.com/news/articles/2018-12-15/judge-throws-political-bomb-in-trump-s-lap-by-voiding-obamacare [https://perma.cc/WLE7-AUR5].

121. *See* Balkin & Levinson, *supra* note 36, at 503–04.

support.[122] Additionally, at the point by which the case is appealed to the Supreme Court, party support for a challenge may increase the likelihood that it receives the four votes required for a grant of certiorari. By operating as a signal to friendly judges, open party support can thus increase the likelihood of both receiving favorable hearings from lower court judges as well as receiving an audience before the Supreme Court.[123]

1. Lower Courts

One implication of the partisan entrenchment narrative is that constitutional change is shaped in part by the success of Presidents in their attempts to "appoint judges and Justices to the federal judiciary who are thought to share the broad political agenda of the political party led by the President."[124] The obvious way that this interacts with the type of party-supported litigation described here is that these judges may be, simply on the basis of their ideologies and political priors, more likely to give a favorable hearing to claims supported by the political party to whom they owe their appointments.

But beyond ideology, there is another source of motivation that may have influence on lower-court judges considering such a challenge on its way to the Supreme Court: their standing with and reputation among party members. In particular, for any judge harboring a desire to be appointed to a higher court, open party support for these challenges raises the stakes in terms of future career advancement and stature within the party and movement.[125] Hearing such a case offers the ambitious lower-court judge an opportunity to make herself an instant hero to the party—raising her profile, and likely also increasing her odds of being appointed to a higher court during the next friendly administration.[126] And at the same time, any lower-court judge who rejected these challenges would do so knowing that this decision may well kill her chances of winning support from the party for promotion. In short, the sort of political unity demonstrated through the mechanisms described above will have the effect of making it

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122. *See id.*
123. *See id.*
124. *See id.* at 490.
125. *See id.* at 503–04.
126. *See id.*

immediately apparent to any judge that her decision in the case may be career-defining.[127]

This dynamic helps explain the pattern of the early rulings on the health care challenges. Although the objective legal merit of both challenges was largely dismissed at the outset, each received critical early vindication from ideologically sympathetic judges in lower-court rulings—a trend that has continued in this most recent challenge.[128] In the cases challenging the individual mandate, district court judges that reached the merits divided precisely along the lines of party affiliation.[129] These decisions were "written in extravagant terms that seemed to be dictated by right-wing talk radio"[130]—and, as Andrew Koppelman has noted, predictably "transformed the debate, lending the objections judicial approval."[131] At this point, whatever the ultimate outcome of the litigation, the challengers' claims no longer could be dismissed as existing outside the realm of conceivability.

Following these initial judicial determinations, "[t]he decisions on the merits in the courts of appeals continued to reflect this partisan division" with three notable exceptions.[132] Republican-appointed Judge Jeffrey Sutton's ruling to uphold the law—which came less than one year after he had introduced the Virginia Attorney General at a Federalist Society meeting as having "[taken] the lead in the fight against Obamacare"[133]—drew a particularly swift and severe reaction from influential conservative legal intellectuals.[134] By contrast, after

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127. *See id.*

128. *See, e.g.*, Emma Platoff, *By Gutting Obamacare, Judge Reed O'Connor Handed Texas a Win. It Wasn't the First Time*, TEX. TRIB. (Dec. 19, 2018), https://www.texastribune.org/2018/12/19/reed-oconnor-federal-judge-texas-obamacare-forum-shopping-ken-paxton/ [https://perma.cc/5UBT-UTNV].

129. Weiner, *supra* note 28, at 71 ("Republican appointees in Florida, Virginia, and Pennsylvania invalidated the law. Democratic appointees in Michigan, Virginia, and the District of Columbia upheld it."). *See also* Clement, *supra* note 8, at viii ("[C]ommentators could not help but notice that the judges striking down the statute as unconstitutional were appointed by Republican presidents, while those upholding the law were appointed by Democratic presidents.").

130. Fried, *supra* note 111, at 52.

131. ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 92 (2013). *See also* Clement, *supra* note 8, at vii ("The official game changers were the decisions issued in rapid succession by Judges Henry Hudson of Virginia and Roger Vinson of Florida.").

132. Weiner, *supra* note 28, at 71.

133. BLACKMAN, *supra* note 8, at 110.

134. *See* Ilya Shapiro, *The Sixth Circuit Got It Wrong*, CATO AT LIBERTY (June 29, 2011), http://www.cato.org/blog/sixth-circuit-got-it-wrong [https://perma.cc/N49K-6GRN] (describing Sutton's opinion as "shocking" for "an

Judge Roger Vinson became the first to rule that the entire legislation should be struck down in full, his opinion was hailed by multiple Republican senators in speeches to the floor.[135]

Years later, the consequences of these decisions appear to linger for Sutton and the other judges who ruled on these challenges.[136] As a candidate, President Donald Trump released a list, compiled in consultation with the Federalist Society and Heritage Foundation, of intended Supreme Court nominees. Omitted from this list were several prominent GOP-appointed judges, including Sutton.[137] One article noted that "[i]f there's a litmus test . . . it appears to be that the proposed nominees not be on record blessing the legal legitimacy of Obama's most controversial programs. That may have been enough to scratch

avowed constitutionalist like Judge Sutton"). Michael Carvin has described Sutton as "not a Scalia type of a conservative [but rather] more of a Leweis Powell type of guy"—which, as Blackman noted, "[i]n right-wing circles" amounts to "fighting words." BLACKMAN, *supra* note 8, at 157. *Cf.* David Cole, *A States' Rights Advocate Upholds Obamacare*, NYR DAILY (July 5, 2011), http://www.nybooks.com/daily/2011/07/05/states-rights-advocate-upholds-obamacare/ [https://perma.cc/6BM2-53E5] ("The significance of Sutton's opinion cannot be underestimated. Until now, with one important exception—Harvard Law professor Charles Fried, former solicitor general under President Reagan . . . —reaction to the health care law has been divided along partisan lines, in Congress, the courts, and the public at large."); Linda Greenhouse, *Judge on the Spot*, N.Y. TIMES (Nov. 26, 2014), http://www.nytimes.com/2014/11/27/opinion/judge-on-the-spot.html [https://perma.cc/RD5L-R7KB] ("In the superheated atmosphere of the summer of 2011, this was a highly noteworthy opinion, placing Judge Sutton in a bright spotlight that I suspect was at once uncomfortable and thrilling.").

135. BLACKMAN, *supra* note 8, at 117. News of this decision, meanwhile, had been leaked to Fox News prior to its release to the Solicitor General's office, which learned of the ruling first when a Fox reporter called for a reaction. *Id.* at 115.

136. *See* Josh Gerstein, *Trump's List Snubs Top Legal Conservatives*, POLITICO (May 18, 2016, 8:04 PM), http://www.politico.com/story/2016/05/donald-trump-supreme-court-justices-223340#ixzz49aAm8Cg6 [https://perma.cc/2AF8-7GVT].

137. *See, e.g.*, Carmen Germaine, *If Republicans Could Pick a Scalia Successor, They'd Pick . . .*, LAW360 (Feb. 17, 2016), http://www.law360.com/articles/760043/if-republicans-could-pick-a-scalia-successor-they-d-pick [https://perma.cc/5BTK-XSUN]("Klepper acknowledged that conservatives are lukewarm on Judge Sutton, who authored the only federal appellate opinion upholding same-sex marriage bans but was the first Republican-nominated judge to rule in favor of the individual mandate of the [ACA]. . . . 'His vote in the Obamacare case is a strike against him . . .'"); Bill Mears, *Supreme Court Possibilities if Romney Wins Election*, CNN POL. (Oct. 2, 2012, 12:33 PM), http://www.cnn.com/2012/09/30/politics/court-romney-list/ [https://perma.cc/67QG-V68Z] ("[Sutton is c]onsidered a conservative intellectual force on the court. But Republicans may not forgive him when Sutton became the first Republican-appointed judge to back the health care reform law championed by President Barack Obama.").

[Brett] Kavanaugh and Sutton, who are respected conservatives but also voted to reject challenges to Obamacare."[138]

Although we have no way of knowing the extent to which this calculus influences *judges'* decisions (relative to all the other factors at play), there is thus ample evidence that *parties* give particular weight to prospective candidates' records in these contested cases when assessing nominees for judicial appointment.[139] Further, the degree to which a decision functions as a job application varies directly with the degree to which a party is united behind a challenge—meaning that this dynamic interacts with, and is reinforced by, the other mechanisms discussed here.[140] And even if this does not determine a judge's vote on a particular question—even if she does all that a judge might be expected to do in setting these considerations aside—it is quite likely that this reality at least is tacitly understood, and may color a judge's disposition towards a case even where this motivation is never openly acknowledged.

And although the lifetime appointment removes the career advancement considerations for Supreme Court justices already at the highest level of their profession, the healthcare cases show that a similar dynamic affects their standing and reputation within the party. Since providing key votes to uphold the ACA in both healthcare challenges, Chief Justice John Roberts has been the target of extensive criticism from conservatives and Republican officials, despite an objectively conservative voting record outside these cases.[141]

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138. Gerstein, *supra* note 136. Of course, Judge Kavanaugh's name was later added to the list and he nevertheless received President Trump's nomination for the second Supreme Court vacancy of his presidency.

139. *See* Germaine, *supra* note 137; Mears, *supra* note 137; Gerstein, *supra* note 136.

140. *See* Gerstein, *supra* note 136.

141. *See* Adam Liptak, *Chief Justice John Roberts Amasses a Conservative Record, and Wrath from the Right*, N.Y. TIMES (Sept. 28, 2015), http://www.nytimes.com/2015/09/29/us/politics/chief-justice-john-roberts-amasses-conservative-record-and-the-rights-ire.html [https://perma.cc/7548-JKB5]; *see also* Josh Gerstein, *Conservatives Steamed at Chief Justice Roberts' Betrayal*, POLITICO (June 25, 2015, 2:05 PM), http://www.politico.com/story/2015/06/gop-conservatives-angry-supreme-court-chief-john-roberts-obamacare-119431 [https://perma.cc/YY9T-RQ2K] ("Roberts' decision to side with the Obama administration for a second time on the high-profile health care law threw a huge splash of fuel onto a long-simmering debate about whether Republicans misjudged the chief justice when he was nominated a decade ago or whether he has grown more moderate in his years on the court . . . ."); David Weigel & Katie Zezima, *Once a John Roberts Booster, Ted Cruz Continues to Turn Against Him*, WASH. POST (Sept. 12, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/09/12/once-a-john-

2. COURT'S CONSIDERATION OF CERTIORARI PETITIONS

Party support functions as an important signal also by affecting the consideration of whether or not to grant certiorari to a case upon appeal from one of the lower courts.[142] A case brought by a group of coordinating state attorneys general—and one that has received significant rhetorical and other support from party officials at the federal level—is likely to be seen by the justices as raising an important federal question, certainly as compared to a similar challenge brought by outside actors acting without a party's support.[143] Indeed, the cert petition filed by Virginia specifically referenced these political dynamics, noting the number of states that were taking steps to oppose the law and that "[t]he party that unanimously opposed the PPACA in the House of Representatives has just seen its largest electoral gains in over seventy years."[144]

By the time the Court granted certiorari in *NFIB*, the decision to hear the case came as no surprise: the lower courts were split, over half of the states were joined as parties to the challenge, and the challenge was widely recognized as having been "on track for the Supreme Court from the day it was filed."[145] By contrast, the Court's decision to hear the *King* appeal surprised many observers, as it represented a notable departure from its typical practice (since the one-time circuit split had been resolved after the full D.C. Circuit vacated its earlier judgment)[146]—and raised immediate concerns among the ACA's

roberts-booster-ted-cruz-continues-to-turn-against-him/; Christopher Snyder, *Trump Slams Chief Justice Roberts' Record*, FOXNEWS.COM (Dec. 12, 2015) ("[Trump] explained[,] 'I will tell you this: Justice Roberts really let us down. He really let us down.'").

142. *See* Benjamin Johnson, *The Supreme Court's Political Docket: How Ideology and the Chief Justice Control the Court's Agenda and Shape Law*, 50 CONN. L. REV. 581, 586 (2018) ("[W]hether a Justice finds a petition to be worthy of certiorari is a function of how important the substance of the case is and whether the case is likely to advance the Justice's ideological interests.").

143. *See* Balkin, *supra* note 24.

144. Petition for Writ of Certiorari Before Judgment, at 13, *Commonwealth of Virginia v. Sebelius*, 656 F.3d 253 (4th Cir. 2011), (No. 101014), 2011 WL 465746 at 13 (asserting that "PPACA has roiled America").

145. Sam Baker & National Journal, *Obamacare's Road Back to the Supreme Court*, ATLANTIC (July 22, 2014), http://www.theatlantic.com/politics/archive/2014/07/obamacares-road-back-to-the-supreme-court/440949 [https://perma.cc/X6VX-E8KR].

146. As one observer noted shortly before cert was granted: "People following these challenges will no doubt be waiting for the Court's decision with bated breath, but there shouldn't be much suspense. If the Court follows its usual practices and

supporters that at least four justices, and perhaps a majority, might be inclined to look favorably on the challengers' case.[147]

Although we cannot know how consideration of challengers' cert petitions would have differed if these cases had not reached the Court in such a politically charged manner. But it is worth noting that in granting the *King* challengers' petition for certiorari, the justices overlooked potentially fatal vehicle flaws—including plaintiffs' possible lack of Article III standing—that under different circumstances might have drawn additional scrutiny.[148] Indeed, there was some speculation ahead of oral arguments that the case might be dismissed altogether, as improvidently granted—without any decision on the merits.[149]

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procedures, it won't grant review in *King*." Brianne Gorod, *Not a Difficult Decision: Why the Court Shouldn't Grant Cert. in* King v. Burwell, BALKINIZATION (Oct. 27, 2014), https://balkin.blogspot.com/2014/10/not-difficult-decision-why-court.html [https://perma.cc/X8CY-FSUH].

147. *See* Bagley, *supra* note 9 ("The challengers urged the Court to intervene now in order to resolve 'uncertainty' about the availability of federal tax credits. In the absence of a split, however, the only source of uncertainty is how the Supreme Court might eventually rule. . . . That's why the justices' votes on whether to grant the case are decent proxies for how they'll decide the case.").

148. Or perhaps not. The government had not challenged the plaintiffs' standing at trial or on initial appeal; the possible vehicle flaws went unnoticed until media investigated the claims that the plaintiffs had sworn to as proof of their injuries. *See* Louise Radnofsky & Brent Kendall, *New Questions Swirl on an Affordable Care Act Challenger; Plaintiff Listed Motel as Her Address, Which Was Basis for Her Legal Grounds*, WALL STREET J. (Feb. 9, 2015, 7:17 PM), http://www.wsj.com/articles/new-questions-swirl-on-an-affordable-care-act-challenger-1423527427 [https://perma.cc/MW4F-BDQ6]; *see also* Rob Weiner, King v. Burwell: *Standing Pat or Standing Corrected*, BALKINIZATION (Feb. 18, 2015), https://balkin.blogspot.com/2015/02/king-v-burwell-standing-pat-or-standing.html [https://perma.cc/7BX4-7BCB] ("The recent news stories on standing are thus troubling, even aside from the inference that the wispiness of the asserted injuries raises regarding the political rather than remedial nature of the lawsuit.").

149. *See* Weiner, *supra* note 82 ("The challenges . . . hit their own high water mark when the Supreme Court granted review in *King v. Burwell*. Since then, the challengers' claims, which were insubstantial to start with, have evaporated, laying bare both the absence of any coherent legal basis for the claims and the political nature of the litigation."); Brian Beutler, *The Conservative Obamacare Challenge Has Become an Absurdist Comedy*, NEW REPUBLIC (Feb. 11, 2015) http://www.newrepublic.com/article/121037/king-burwell-obamacare-challengers-hate-obama-may-lack-standing [https://perma.cc/QT8B-VTC9].

C. Parties Help Coordinate and then Amplify Novel Constitutional Claims

In addition to providing the infrastructure for a claim and contextualizing its political salience, parties can also play a critical role in coordinating and then amplifying a message—a function that takes on outsize importance where the legal claims do not straightforwardly follow from existing precedent.[150] This happens through two mechanisms. Party support provides a challenge with an instant legitimacy and can focus public attention on its claims, including by taking advantage of journalistic objectivity conventions that may result in both greater and more favorable media attention for the challengers.[151] Additionally, parties can help channel the influence and attention of powerful social movements to the legal challenge, in part by helping to overcome what scholars have termed popular constitutionalism's "translation problem."[152] Both of these dynamics help move arguments from off-the-wall to being open and contested questions—thus providing cover for courts to depart from settled precedent to rule in favor of the challenger.

1. Expanding the Universe of Accepted Legal Claims by Drawing Attention to the Challenge

Over nearly the entire period of congressional debate, conservative criticisms of the law were stated as policy rather than constitutional objections.[153] Until the eleventh hour, "[n]o constitutional hearings

150. *See* Neal Devins, *Party Polarization and Judicial Review: Lessons from the Affordable Care Act*, 106 NW. L. REV. 1821, 1826 (2012).

151. *See* Clement, *supra* note 8, at ix.

152. *See* Blackman, *supra* note 31, at 187; Rosen & Schmidt, *supra* note 11, at 113.

153. Devins, *supra* note 150, at 1844 ("Republican lawmakers launched only a half-hearted attempt to cast doubt on the ACA's constitutionality; they focused, instead, on the policy issues that seemed politically salient at the time."); *see also* Andrew Koppelman, *Did the Law Professors Blow it in the Healthcare Case?*, 2014 U. ILL. L. REV. 1273, 1275 ("At the time that the ACA was written, the constitutional objections had never been thought of by anyone. The action/inaction distinction, on which so much eventually turned, was invented in July 2009, and even then was so underdeveloped that it could not be taken seriously as a legal argument."); Clement, *supra* note 8, at vii ("While the health care legislation was actively debated in Congress, it was a political and policy debate, not a constitutional one. Legislators hotly contested the wisdom of the individual mandate, but constitutional concerns about the mandate were not raised until the very end of deliberations and were neither central to the debate nor taken particularly seriously."); BLACKMAN, *supra* note 8, at 36

were held, committee reports did not discuss the Act's constitutionality, and legislative debates largely ignored constitutional objections to the Act."[154] In both *NFIB* and *King*, the challengers' relatively late adaptation of their constitutional objection—combined with the fact that their legal theories had not been formulated prior to the point at which they were applied to the end of undoing Obamacare—help explain why their claims initially were considered implausible by mainstream legal observers.[155]

As described above, one of the key functions of party support was to highlight these claims.[156] But Republicans' success in *NFIB* cannot be attributed simply to their having called some notable roll call vote, or having made strategic submissions to the *Congressional Record*.[157] These might have provided the challengers' helpful citations to include in their official briefings before the courts—but party actors' less tangible, though far more numerous, showings of support may ultimately have been more important in the process of shifting the "thinkability" of their legal challenge.[158] And towards this end, it was important that Republican politicians were publicly willing to get fully behind, and then repeatedly highlight, their constitutional objections—in media interviews and public speeches, at political rallies, and the like.[159] After the conservative lawyers and advocates behind the *NFIB* challenge had developed and laid out their constitutional claims, this framing was adopted wholesale by Republican politicians.[160]

Legal scholars have long understood the ability of social movements to affect constitutional meaning through executing exactly

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(describing constitutional criticisms of the law as "mere blips in the national dialogue" up until the very end). *Cf.* BLACKMAN, *supra* note 8, at 43 ("[Todd] Gaziano asked [Randy] Barnett, 'Hey, Randy, do you have any thoughts about the constitutionality of the health care law?' Randy replied, 'You know, I really haven't give[n] it much thought.'").

154. Devins, *supra* note 150, at 1822.

155. *See* BLACKMAN, *supra* note 8, at xxii ("At the time, most scholars laughed at the idea of any legal challenge to Obamacare. Yet a handful of constitutional scholars and attorneys, led by Georgetown law professor Randy Barnett, was undeterred.").

156. *See supra* notes 121–23 and accompanying text.

157. *See* Blackman, *supra* note 31, at 179.

158. *See* Clement, *supra* note 8, at ix.

159. *See id.* at viii–ix.

160. *See* Blackman, *supra* note 31, at 186 ("The movement grew from the halls of the ivory tower . . . to the chambers of Congress, and ultimately to the benches of the federal courts . . . In a very short time, a movement mobilized around this new way of looking at the Constitution.").

this sort of shift in popular perceptions.[161] But scholars have failed to appreciate the unique advantages that political actors, coordinated through our system of parties, bring to this effort.[162] One distinct advantage enjoyed by political actors is that their claims—by simple virtue of their having been made *by those actors*—are considered newsworthy, and thus will be nearly guaranteed wide attention.[163] As Paul Clement has noted, one of the "distinguishing aspect[s] of the health care case was the intensity and duration of the media focus."[164] Media attention increases both the salience of the challenge as well as the likelihood that the merits of the contested claim will be presented favorably; indeed, journalistic objectivity standards may also discourage suggestions that one side's argument lacks merit.[165]

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161. *See id.* at 179, 185.

162. In a recent article, Michael Dorf noted this dynamic, which he termed "agenda setting," in the context of several new constitutional issues placed on the national agenda via the candidacy of Donald Trump. Trump's "provocative" constitutional claims attracted wide attention from media and legal scholars and thus "did more [to advance these constitutional arguments] than the serious scholars" who had written on the issues prior to their directly entering the political sphere. Dorf described this as an "additional mechanism[] by which contentious politics can affect constitutional law outside of the appointments process . . . ." Michael C. Dorf, *Donald Trump and Other Agents of Constitutional Change*, 83 U. CHI. L. REV. 72, 78–79 (2016).

163. *See* BLACKMAN, *supra* note 8, at 57–58 ("Most importantly, because the debates were broadcasted on C-SPAN and covered by the press, the issue of the mandate's constitutionality was then picked up by conservative talk radio and cable news and given wide play."). In this respect, the Republican Party was able to play exactly the role that Balkin first described over a decade ago. Jack M. Balkin, *"Wrong the Day it Was Decided":* Lochner *and Constitutional Historicism,* 85 B.U. L. REV. 677, 718 (2005) ("The characterization of positions along the spectrum of plausibility is also affected by social movement activism and by the willingness of certain members of the bar, or *certain important political figures*, to support a particular position and put their credibility or authority behind it. By making and supporting constitutional arguments repeatedly, people can disturb settled understandings and create new ones.") (emphasis added). This dynamic relates directly to the mechanisms described above—which had, for example, placed every Republican senator on record as objecting to the mandate's constitutionality. As Randy Barnett has written, "the general acceptance of our claim that the individual insurance mandate was 'unprecedented' was . . . crucial to the unexpected legal success we enjoyed." Barnett, *supra* note 8, at 1349.

164. Clement, *supra* note 8, at viii.

165. For example, Blackman notes that some legal observers were frustrated by a lengthy *New York Times* profile of Randy Barnett that ran just ahead of oral arguments, which in their view gave unduly generous treatment to "what they deemed to be a frivolous argument . . ." Josh Blackman, *Obamacare & Man at Yale*, 2014 U. ILL. L. REV. 1241, 1248. *See also* BLACKMAN, *supra* note 8, at 185–86 (recounting that participants in a panel on press coverage of the *NFIB* challenge "asserted that . . . the *Times*, by giving the challengers so much attention, [had] created a 'false equivalency'"

In addition to helping legitimate their own legal claims, party actors also took steps to undermine those of their opponents. After Solicitor General Don Verrilli stumbled over his opening remarks in one of the *NFIB* oral arguments, the Republican National Committee produced—within hours of the audio's release—a controversial video attacking his performance, which featured doctored audio of his choking at the podium over a picture of the Supreme Court and the headline "ObamaCare: It's a Tough Sell."[166]

The cumulative effect of these efforts surely contributed to public perceptions of the legal challenge playing out in federal courtrooms across the country. As Clement has noted, "[w]hether because of the saturation coverage, the political dynamic, the practical impact, or something else, many people who had never paid significant attention to a constitutional case were riveted by this one."[167] And as the public focused on the challenge, large majorities concluded that its legal claims had merit. One poll, taken as the Court prepared to hear oral arguments, found that Americans "overwhelmingly believe the 'individual mandate' . . . is unconstitutional, by a margin of [seventy-two percent] to [twenty percent]"—with even a majority of Democrats and supporters of the ACA believing that the provision is unconstitutional.[168] The split between how the public and legal elite perceived the merits of this challenge is a dramatic demonstration of parties' ability to shift constitutional sense by taking their case directly to the people.

The orchestrators of the *King* challenge attempted to follow a similar playbook, working to draw public attention to their still-developing statutory arguments, including through a series of opinion articles[169] and events.[170] These arguments initially attracted relatively

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between the two sides). *Cf.* W. Lance Bennett, *Toward a Theory of Press-State Relations in the United States*, 40 J. COMM., June 1990, at 103, 106–07 (introducing the "indexing hypothesis," holding that the parameters of debate on public issues—as reported by media—is determined by the range of public statements made by prominent political actors).

166. Press Release, GOP, RNC Releases Web Video "ObamaCare: It's a Tough Sell" (Mar. 28, 2012), https://www.gop.com/rnc-releases-web-video-obamacare-its-a-tough-sell [https://perma.cc/95NB-D65V].

167. Clement, *supra* note 8, at ix.

168. Jeffrey M. Jones, *Americans Divided on Repeal of 2010 Healthcare Law*, GALLUP POL. (Feb. 27, 2012), http://www.gallup.com/poll/152969/Americans-Divided-Repeal-2010-Healthcare-Law.aspx [https://perma.cc/2TCT-JE6V].

169. Jonathan H. Adler & Michael F. Cannon, *Another ObamaCare Glitch*, WALL STREET J. (Nov. 16, 2011), https://www.wsj.com/articles/SB10001424052970203687504577006322431330662

little attention in the media or in legal circles.[171] Indeed, even after the first lawsuit was filed to challenge the legality of the federally facilitated exchange subsidies in question, some observers largely dismissed the notion that the challengers' reading of the law might be taken seriously in court or represent a new threat to the health care law.[172] Yet in *King*, neither the challenge nor the underlying claims

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[https://perma.cc/5D9E-RDXW] ("Even if ObamaCare survives Supreme Court scrutiny next spring, its trials will be far from over. That's because the law has a major glitch that threatens its basic functioning. . . . Public-interest lawyers could file suit as soon as the IRS rule becomes final and they find an employer that will be harmed."); Jonathan Adler & Michael Cannon, *If ObamaCare Survives, Legal Battle Has Just Begun*, USA TODAY, (June 25, 2012, 11:18 AM), http://usatoday30.usatoday.com/news/opinion/forum/story/2012-06-24/obamacare-healthcare-supreme-court-unconstitutional/55796730/1 [https://perma.cc/B98D-ETBJ] ("Even if the Affordable Care Act survives its first Supreme Court test—a ruling is due as early as today—the lawsuits won't end. . . . Still another potential lawsuit poses as great a threat to the law as the case now before the high court.").

170. *See, e.g.*, Pema Levy, *The Case That Could Topple Obamacare*, NEWSWEEK (Dec. 17, 2013, 3:05 PM), https://www.newsweek.com/case-could-topple-obamacare-224747 [https://perma.cc/82FF-E4Y2] (referencing a Cato event featuring a litigator for one of the cases challenging the subsidies).

171. *See, e.g.*, Stuart Taylor Jr., *Analysis: Health Exchanges and the Litigation Landscape*, KAISER HEALTH NEWS (Nov. 29, 2012), https://khn.org/news/health-law-litigation-and-exchanges/ [https://perma.cc/3U28-VSQT] ("It's unclear at this point whether many businesses that would like to avoid the employer mandate, or many states besides Oklahoma, will be motivated to take on the Obama administration in the courts again."); Levy, *supra* note 170 ("A little-heard of challenge currently making its way through the court system . . . .").

172. *See, e.g.*, Timothy Jost, *Tax Credits in Federally Facilitated Exchanges Are Consistent with the Affordable Care Act's Language and History*, HEALTH AFF. BLOG (July 19, 2012), https://www.healthaffairs.org/do/10.1377/hblog20120719.021337/full/ [https://perma.cc/U339-F7BA] ("While this theory has little chance in succeeding in the courts, and even less chance of being addressed by the courts anytime in the near future because of jurisdictional problems, it may very well convince conservative state legislators and governors to refuse to establish health insurance exchanges in their states."); Abbe Gluck, *The "CBO Canon" and the Debate over Tax Credits on Federally Operated Health Insurance Exchanges*, BALKINIZATION (July 10, 2012, 8:55 PM), https://balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html [https://perma.cc/HXX8-C62Z] ("In my view, the overall structure of the Act and its legislative history, plus the confirmatory language in the health reform reconciliation bill, amply support the IRS's position. If more is wanting, however, the CBO evidence makes it a slam dunk."); *The Legally Flawed Rearguard Challenge to Obamacare*, BALKINIZATION (Nov. 27, 2012, 12:21 AM), https://balkin.blogspot.com/2012/11/the-legally-flawed-rearguard-challenge.html [https://perma.cc/EDY3-NF92] ("Whatever its value to conservative activists and those who wish to relitigate NFIB and the election, the rearguard effort to undermine Obamacare is deeply flawed as a matter of law."). Others, perhaps recognizing as one of the lessons from *NFIB* that politically-charged legal challenges to the ACA should not be underestimated, separated the objective legal

managed to capture the public's imagination in the same way as had happened in *NFIB*: prior to the Court's unexpected decision to hear the case, the challenge had received comparatively scant attention, from elected officials as well as (and as a consequence) from sources of traditional media.[173]

2. HELPING TO OVERCOME POPULAR CONSTITUTIONALISM'S "TRANSLATION PROBLEM"

To succeed in shifting constitutional sense, it is not enough to simply draw attention to the legal challenge—the underlying claims must come to be seen as plausible, not merely as abstract objections made by the public but as colorable legal arguments accepted by courts.[174] Mark Rosen and Christopher Schmidt have noted that "[o]ne of the perennial challenges for popular constitutional movements attempting to influence the courts is the difficulty of developing constitutional claims that resonate in extrajudicial contexts and that also speak the language of court-made doctrine."[175] This challenge, which they have termed popular constitutionalism's "translation problem," results from the fact that "[c]ourts and social movements operate on different registers when it comes to staking out claims on the Constitution."[176]

As in political battles, what ultimately determines the outcomes of cases is which side has been able to count the requisite votes to reach a

merits of the case from their handicapping of its likely of success. Health care expert Sara Rosenbaum, for example, was quoted in an early story as saying "I think it's a case without merit . . . [but] 'I think you have to take every case seriously.' . . . You have to take courts very seriously." Levy, *supra* note 170. *See also* Sean Trende, *How the Court Case Against Obamacare Subsidies Stacks Up*, REAL CLEAR POL. (Oct. 29, 2013), https://www.realclearpolitics.com/articles/2013/10/29/how_the_court_case_against_obamacare_subsidies_stacks_up.html [https://perma.cc/7NMQ-2Z73] ("If this were any other law, I'd actually be fairly confident that the court would rule for the plaintiffs and leave it to Congress to fix the language if it wanted to. . . . But this isn't just any law, as we saw in 2012.").

173. *See, e.g.*, Levy, *supra* note 170 ("A little-heard of challenge currently making its way through the court system . . . ."); David Harsanyi, *No Republicans Voted for Obamacare, so It's Not Their Problem to Fix*, NAT. REV. (June 5, 2015, 4:00 AM), http://www.nationalreview.com/article/419356/no-republicans-voted-obamacare-so-its-not-their-problem-fix-david-harsanyi [https://perma.cc/Z2YZ-YK6R] ("A mere [sixteen] percent [of Americans] have been following the story.").

174. Rosen & Schmidt, *supra* note 11, at 113–14.

175. *Id.* at 113.

176. *Id.*

majority; unlike political battles, judicial decisions operate not *simply* as a matter of counting votes. Rather, they must be defended in the often esoteric language of legal elites. Opinions may be influenced by social movements and other extrajudicial considerations, but their reasoning must be justified in the language of courts: through citations to legal authority, procedural considerations, logical reasoning, and other forms of accepted argument. The legalese that results often is technical, abstruse, and uninspiring—and may be disconnected or even unrelated to the concerns that animated the antecedent political debates.

The healthcare challenges show that political parties—in addition to drawing attention to a legal challenge—can play an important role in overcoming this translation problem, by connecting these legal arguments to the broader social and political context.[177] Scholars have noted the *NFIB* challengers' great success at broadening the scope of their effort by strategically engaging, and thereby drawing strength from, the influential Tea Party social movement.[178] Famously, this was represented by the often-invoked "broccoli horrible": the politically-powerful argument that the individual mandate represented an unprecedented expansion of government power and that, unless some limit were set by courts on the government's ability to impose behavioral mandates, fundamental liberty values would be at risk.[179] As Mark Rosen and Christopher Schmidt have argued, this hypothetical played a critical role in connecting the challengers' legal case, which was based on a novel and somewhat obscure theory about regulating

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177. Siegel and Post have suggested, in a different context, that this translation function ultimately enhances the democratic legitimacy of court judgments. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) (arguing that democratic constitutionalism can help root "[c]onstitutional judgments based on professional legal reason" in "popular values and ideals").

178. Rebecca Zietlow has noted the Tea Party's use of popular constitutional methods as a tool to advance originalism as a method of constitutional interpretation. Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 487 (2012). And indeed, early Tea Party objections to the healthcare reform often were stated in a broad constitutional register. *See* BLACKMAN, *supra* note 8, at 32–35 (quoting one protestor as saying, "'Nowhere in the entire Constitution does it say government has the right or power to mess with health care.'").

179. Blackman, *supra* note 31, at 186–87 ("Epitomized by the now-infamous image of broccoli, the challengers asked whether Congress could compel people to buy that flowery green." The challengers advanced a very simple constitutional idea: a mandate forcing people to engage in commerce is unprecedented.).

"inactivity" under the Commerce Clause, to the more salient liberty critique that had resonated with many among the broader public.[180]

These efforts appear to have contributed to the *NFIB* challengers' success. During oral arguments, Justice Scalia famously questioned whether under the government's legal theory "you can make people buy broccoli."[181] Although they rejected the argument, even the dissenting liberal justices felt compelled to respond to what Justice Ginsburg referred to as "the broccoli horrible."[182] And Randy Barnett has written that "the general acceptance of our claim that the individual insurance mandate was 'unprecedented' was . . . crucial to the unexpected legal success we enjoyed."[183]

Rosen and Schmidt argue that the broccoli horrible successfully "shrunk [the] disconnect"[184] between the popular, rights-based critique of the individual mandate (which would have been difficult to advance in court without overturning decades of precedent) to the actual claims brought by the challengers:

> In effect, broccoli served a two-way signaling function between judicial actors (lawyers and judges) and nonjudicial actors (political actors and the larger public). Its resonance in the political arena signaled to those litigating the case the importance of liberty concerns in the larger extrajudicial constitutional battle over the ACA. And it provided judicial

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180. *See* Rosen & Schmidt, *supra* note 11, at 98–120. *See also* Siegel, *supra* note 33, at 1061 ("The parade of horribles imagined by critics of the minimum coverage provision, such as forcing Americans to buy broccoli and American cars, seemed to have less to do with future congressional legislation and more to do with persuading the Court to strike down the minimum coverage provision—and then, having accomplished that, the entire ACA.").

181. Transcript of Oral Argument at 13, *Dep't of Health & Human Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398). Asked by a *Washington Post* reporter about the exchange former Reagan Solicitor General Charles Fried said: "I was appalled to see that at least a couple of [the justices] were repeating the most tendentious of the Tea Party type arguments. . . . I even heard about broccoli. The whole broccoli argument is beneath contempt. To hear it come from the bench was depressing." Greg Sargent, *How Did Legal Observers and Obamacare Backers Get it So Wrong?*, WASH. POST (Mar. 29, 2012), http://www.washingtonpost.com/blogs/plum-line/post/how-did-obamacares-backers-get-it-so-wrong/2012/03/29/gIQArH5wiS_blog.html.

182. *Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. 519, 613–17 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (internal quotation marks omitted).

183. Barnett, *supra* note 8, at 1349.

184. Rosen & Schmidt, *supra* note 11, at 72.

> actors a symbol with which to demonstrate their sympathy with this liberty-based critique of the health insurance mandate.[185]

Indeed, they have argued that the success of the ACA's opponents in deploying this hypothetical to "convince broad swaths of the American public, in breathtakingly short order, that the law's individual mandate posed a fundamental assault on personal liberty" represents "[p]erhaps the most remarkable achievement by the ACA's opponents."[186] By helping to coordinate this messaging—and thus allowing all the diverse parties and movements to speak in one register—the Republican Party helped facilitate the shift in challengers' arguments from off-the-wall to plausible, even compelling.[187]

The novelty and success of the broccoli horrible has been widely discussed, but observers have failed to appreciate that the *King* challengers attempted to repeat this success through the development of their own horrible, which was adopted and repeated by political allies who supported the challenge.[188] In many respects, the *King* case—whose entire claim was based on what even the challengers initially assumed was a "glitch"[189] appearing in one clause of a 906-page legislative text—represented a significantly more daunting translation problem. But perhaps taking cue from the broccoli hypothetical's surprising resonance, the challengers had—at least by 2014—created a new horrible to punctuate their challenge: "At its heart," Adler and Cannon wrote in the *Wall Street Journal*, their case "is not just about ObamaCare. It is about determining whether the president, like an autocrat, can levy taxes on his own authority."[190] This framing was

185. *Id.* ("The fact that the Court identified a concern with protecting individual liberty as a core principle of its commerce power analysis, and did so at least partly in response to extrajudicial demands from critics of the law, is a classic example of the generative, responsive potential of popular constitutionalism."). Reva Siegel has identified a similar parallel between the "law-and-order [conception of the] Second Amendment forged in culture wars of the New Right"—which, she notes, was adopted by powerful political allies in the Reagan Administration—and Justice Scalia's originalist opinion in *Heller*. *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 239 (2008).

186. Rosen & Schmidt, *supra* note 11, at 114.

187. Blackman, *supra* note 31, at 186–87.

188. Gluck, *supra* note 17, at 68–73.

189. Adler & Cannon, *supra* note 169.

190. Jonathan H. Adler & Michael F. Cannon, *Reining in ObamaCare—and the President*, WALL STREET J. (July 22, 2014, 7:29 PM), https://www.wsj.com/articles/reining-in-obamacareand-the-president-1406071746 [https://perma.cc/8D7Z-TBF8].

echoed in remarks given by Senator Hatch before the Heritage Foundation, which connected a rule of law critique to courts' exercise of disciplined statutory interpretation.[191] Indeed, some variation of this language appears in nearly every opinion article, speech, interview, or press release on the subject by the law's opponents over the year prior to the Court's hearing of the case.[192]

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191. Jim Geraghty, *Hatch: We Need to Help Those Who Could Lose Obamacare Subsidies in Supreme Court Decisions*, NAT. REV. (Feb. 23, 2015, 5:53 PM), https://www.nationalreview.com/the-campaign-spot/hatch-we-need-help-those-who-could-lose-obamacare-subsidies-jim-geraghty/ [https://perma.cc/RZ3J-KBAG] ("[T]hat's what's ultimately at stake in *King*: Is the President bound to the law, or can he rewrite or simply ignore provisions he doesn't like in order to further his political agenda? Advocates of the President's position would have us believe that statutes are infinitely malleable—up can mean down, right can mean left, established by a state can mean not established by a state. . . . Those of us on the other side, however, insist . . . [that] the words in our statutes and in our Constitution are what bind our leaders, and what prevent them from doing whatever they want.").

192. *See, e.g.*, Jennifer Haberkorn, *Face of SCOTUS Case Hates Obama, Obamacare*, POLITICO (Feb. 6, 2015, 5:37 AM), https://www.politico.com/story/2015/02/face-of-supreme-court-case-hates-obamacare-and-obama-too-114953 [https://perma.cc/FN65-58CJ] ("'This case is about the IRS illegally rewriting the law . . . .' said Sam Kazman of the Competitive Enterprise Institute, which says it is 'coordinating and funding' the Supreme Court case."); Orrin Hatch, Lamar Alexander & John Barrasso, *We Have a Plan for Fixing Health Care*, WASH. POST (Mar. 1, 2015), https://www.washingtonpost.com/opinions/we-have-a-plan-for-fixing-health-care/2015/03/01/e0925502-becc-11e4-8668-4e7ba8439ca6_story.html ("But Wednesday, Obamacare will not be the key issue before the court. The key issue is whether the administration can unilaterally rewrite laws passed by Congress to meet its political objectives."); Sarah Kliff, *Meet Michael Cannon, the Man Who Could Bring Down Obamacare*, VOX, https://www.vox.com/2014/11/19/7242671/obamacare-lawsuit-supreme-court [https://perma.cc/BML2-HCX8] (quoting Cannon: "When the Obama administration decided to go beyond the very clear limits that the law imposes on its authority, the first thing that happened was, it disenfranchised voters in those 36 states that were electing state officials that promised to block the law. When the president rewrote the law that way, he effectively told millions of people, 'Your vote doesn't count.' That's what this lawsuit is about."); Paul Ryan, John Kline & Fred Upton, *An Off-Ramp from ObamaCare*, WALL STREET. J. (Mar. 2, 2015, 7:00 PM), https://www.wsj.com/articles/paul-ryan-john-kline-and-fred-upton-an-off-ramp-from-obamacare-1425340840 [https://perma.cc/SQ84-P6WK] ("The Supreme Court should tell the IRS to enforce the law as written—not as the administration wishes it had been written."); David Harsanyi, *No Republicans Voted for Obamacare, so It's Not Their Problem to Fix*, NAT'L REV. (June 5, 2015, 4:00 AM), http://www.nationalreview.com/article/419356/no-republicans-voted-obamacare-so-its-not-their-problem-fix-david-harsanyi [https://perma.cc/8F8S-KR3R] ("[T]echnically, *King v. Burwell* isn't a 'challenge' to Obamacare. It's a challenge to uphold Obamacare rather than allow the administration to implement the law in any manner it sees fit."). *See also* Gluck, *supra* note 26, at 68 ("Although aggressively framed as a choice between the ACA's text and its purpose — an effective strategy that built momentum

Here again, these attempts appear to have had some effect on the Court's reasoning: although it was rejected by the majority, Gluck has noted that the dissenting opinion "adopt[ed] the challengers' framing and portray[ed] the case as a text-versus-purpose showdown."[193] Nevertheless, while all nine justices in *NFIB* accepted the need for some limiting principle (to avoid the broccoli horrible), the six-vote majority in *King* rejected the challengers' underlying premise entirely—concluding that the purpose of the statute was never reasonably in doubt.[194]

D. Parties can Highlight and Strategically Frame Relevant Prudential Considerations

Finally, parties can help highlight relevant prudential considerations that may be expected to influence judicial actors, which might take on a greater importance in the types of politically charged cases that are most likely to follow the common architecture described here.[195] As described in the previous section, parties can play a key role in shifting novel claims from off- to on-the-wall in the sense that the *legal* arguments are made more plausible, helping to legitimize challenges based on those claims.[196] But particularly in the contentious, high-stakes challenges where parties are likely to get involved, observers widely assume that the justices' consideration of these claims also is affected by the perceived *practical consequences* of the various legal outcomes from among which they must decide.[197] And because political actors play a central role in shaping the national conversation about contested court opinions, parties have a unique ability to preemptively frame these prudential considerations for the deciding judges.

In the healthcare cases, political actors from both parties attempted to do this with respect to two types of prudential considerations: (1)

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given the text-centric approach that now dominates the federal courts — along the way, the challengers quietly injected their own purposive narrative into the case . . . .").

193. Gluck, *supra* note 17, at 66 ("As an initial matter, it was the challengers who, from the beginning, adopted an aggressive story of the ACA's purpose, supported by legislative history: they argued that Congress intended the statute to read as they claimed, and the King dissent essentially adopted that understanding.").

194. *Id.* at 64–65.

195. *See* Blackman, *supra* note 31, at 190.

196. *See id.* at 186–87.

197. Richard A. Posner, *Comment on Professor Gluck's "Imperfect Statutes, Imperfect Courts,"* 129 HARV. L. REV. F. 11, 11–15 (2015).

implications for the public reputation of the Court, which was relevant in both cases; and (2) the practical consequences of their decision, which appeared to have played a role in the Court's consideration of the *King* challenge, in particular.[198] Indeed, Judge Richard Posner has highlighted the importance of these considerations in the health care cases, perhaps to the exclusion of the doctrinal canons that had drawn the attention of many legal scholars.[199] In considering the role that politics and public opinion might have played in the healthcare cases, Ernest Young has similarly drawn a distinction between "constitutional doctrine" and "public perceptions of the status and role of the courts—particularly the U.S. Supreme Court."[200] And Blackman has connected parties' attempts to frame these factors to "the same currents of popular constitutionalism that enabled the Court to get to [the] point" of hearing the challenge—arguing that these may even have been dispositive to the outcome in *NFIB* by having "influenced Chief Justice Roberts to change his vote."[201]

1. PUBLIC STANDING OF THE JUDICIAL BRANCH

Although the Republican Party's use of the previous mechanisms has received the most attention in the literature, both parties—in both challenges—worked to frame these prudential considerations for the justices. In his closing arguments to the Court, Solicitor General

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198. *Id.* at 11–13.

199. *Id.* at 12 ("Professor Gluck suggests that Chief Justice Roberts is struggling to alter the relation of the courts to Congress in statutory cases, but an alternative is that he is struggling to preserve the Supreme Court's, and his own, standing in the public eye.").

200. *See* Young, *supra* note 37, at 160 ("Public opinion evolves not only with respect to matters of policy—for example, the appropriate level of government regulation and social provision—but also with respect to the role of judicial review itself. . . . [B]road trends in public opinion influence not only the weight that the courts give to other political institutions but also the confidence with which the courts approach their own tasks.").

201. Blackman, *supra* note 31, at 180 ("Rather than relying solely on legal arguments about the Commerce Clause—which even Chief Justice Roberts ultimately rejected—supporters of the law waged an alternate campaign to influence the outcome. These charged urged the Chief to vote in line with political considerations as opposed to simply how he viewed the law."). *Cf.* Posner, *supra* note 197, at 12–13 ("A decision against the [ACA] in either case would have been a gift to the Democrats . . . because the decisions would have created turmoil in the health care market and would have deprived many people of subsidized health benefits, and would have been produced by a judicial majority consisting exclusively of appointees of Republican Presidents . . . .").

Verrilli went out of his way to highlight these prudential considerations, arguing to the justices that citizens should be allowed to deliberate the policy design of the country's health care system through the democratic process.[202] At a press conference several days later, President Obama asserted his confidence that the Supreme Court would not take what he described as "an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress"—a possibility he suggested would be a "good example" of "judicial activism, or lack of judicial restraint. . . ."[203] Senate Judiciary Committee Chairman Patrick Leahy made a floor speech urging John Roberts to "be a Chief Justice for all of us" by respecting "the proper role of the Judicial Branch."[204]

In response, "[p]rominent conservatives . . . returned fire at what they perceived as liberal preemptive attacks and urged the chief justice to show some resolve."[205] Senate Majority Leader Mitch McConnell, for example, criticized the President's remarks as an attempt to "intimidate the Court while it's deliberating one of the most consequential cases of our time."[206] Numerous other Republicans,

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202. Transcript of Oral Argument at 83, *Florida v. Dep't of Health & Human Servs.*, 567 U.S. 519 (2012) (No. 11-400) ("I would suggest to the Court, with profound respect for the Court's obligation to ensure that the federal government remains a government of enumerated powers . . . that this was a judgment of policy, that democratically accountable branches of government made by their best lights.").

203. *See* Jeff Mason, *Obama Takes a Shot at Supreme Court over Healthcare*, REUTERS (Apr. 2, 2012), http://www.reuters.com/article/us-obama-healthcare-idUSBRE8310WP20120402 [https://perma.cc/D598-ZN5A]. Referencing the President's criticism of the *Citizens United* decision during the 2010 State of the Union Address, Blackman speculated that these comments were intended to "put . . . the justices on notice that he would not tolerate an activist court thwarting his agenda." BLACKMAN, *supra* note 8, at 69. *See also* Blackman, *supra* note 31, at 183 ("Perhaps this preview of the attack on the judiciary may have pushed Chief Justice Roberts toward his ultimate position of saving the law.").

204. Press Release, Senator Patrick Leahy, Chairman, Senate Judiciary Committee, On The Supreme Court's Review Of The Affordable Care Act, https://www.leahy.senate.gov/press/on-senate-floor-leahy-shares-observations-about-scotus-arguments-on-affordable-care-act [https://perma.cc/7ZUK-VURG] (noting that "it would be extraordinary for the Supreme Court not to defer to Congress in this matter . . .").

205. BLACKMAN, *supra* note 8, at xxiv.

206. Press Release, Mitch McConnell, U.S. Senator for Kentucky, McConnell Condemns President's Attempt to Intimidate Court (Apr. 3, 2012), http://www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=3331ECE4-71DD-46F9-85F5-33867DD98A9C [https://perma.cc/72UZ-3BKL] ("This president's attempt to intimidate the Supreme Court falls well beyond distasteful politics; it demonstrates a fundamental lack of respect for our system of checks and balances.").

including the candidates competing for the party's presidential nomination, voiced similar sentiments.[207] Strikingly, this conflict also spilled over into the judiciary: the morning following the President's remarks, a DOJ lawyer arguing an unrelated case was ordered by Fifth Circuit Judge Jerry Smith to have Attorney General Eric Holder personally certify, in a letter to the court, that he supported the principle of judicial review.[208] These comments echoed the message coming from leading conservatives outside government, who—in a "torrential response . . . unleashed" over "a ninety-six-hour period" in May[209]—delivered the message that Democrats' attempts to pressure Chief Justice Roberts were inappropriate and he should not be intimidated.[210] What inspired this coordinated effort to rebut Democratic politicians' efforts to frame the relevant political considerations? Reportedly, information about the Chief Justice's

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207. Mitt Romney, for example, stated that the Court's striking down the law would not be an act of an activist court, but rather "a court following the Constitution. . . ." *See Republicans Slam Obama over Warning to 'Unelected' Supreme Court*, FOXNEWS (last updated Dec. 23, 2015), http://www.foxnews.com/politics/2012/04/03/republicans-slam-obama-over-warning-to-unelected-supreme-court.html [https://perma.cc/LGW9-VLCQ].

208. *See* Jerry Markon, *Judge Tells Justice Dept.: Clarify Remarks on Judicial Activism Amid Health-Care Debate*, WASH. POST (Apr. 3, 2012), https://www.washingtonpost.com/politics/judge-tells-justice-dept-clarify-remarks-on-judicial-activism-amid-health-care-debate/2012/04/03/gIQAcP18tS_story.html. As Andrew Koppelman noted, "[w]hat the Supreme Court needed above all was the public's perception that the judiciary was above politics. This didn't help." KOPPELMAN, *supra* note 131, at 106. *See also* BLACKMAN, *supra* note 8, at xxvii (discussing this controversy and observing that, "[i]n the span of a few days, all three branches of our government clashed").

209. BLACKMAN, *supra* note 8, at 228.

210. *See, e.g.*, Randy Barnett, *Judicial Minimalism and the Individual Mandate*, VOLOKH CONSPIRACY (May 20, 2012, 5:05 PM), http://volokh.com/2012/05/20/judicial-minimalism-and-the-individual-mandate/ [https://perma.cc/YMX5-V5T3]; *Pressuring the Chief*, NAT'L. REV. (May 24, 2012, 8:00 AM), http://www.nationalreview.com/article/300872/pressuring-chief-editors [https://perma.cc/4P68-QTKG]; Kathleen Parker, *Democrats Put John Roberts on Trial*, WASH. POST (May 22, 2012), https://www.washingtonpost.com/opinions/democrats-put-john-roberts-on-trial/2012/05/22/gIQAijq8iU_story.html; Jennifer Rubin, *What Would a Change of Vote on Obamacare Cost?*, WASH. POST (May 23, 2012), https://www.washingtonpost.com/blogs/right-turn/post/what-would-a-change-of-vote-on-obamacare-cost/2012/05/23/gJQApViNkU_blog.html; George F. Will, *Liberals Put the Squeeze to Justice Roberts*, WASH. POST (May 25, 2012), https://www.washingtonpost.com/opinions/liberals-put-the-squeeze-to-justice-roberts/2012/05/25/gJQANa4hqU_story.html. *See also* BLACKMAN, *supra* note 8, at 227 ("Just as those on the left were trying to nudge a wavering Roberts, those on the right began a concerted effort to solidify the vote of the 'wobbly' chief justice.").

shifting position was first made known to a small number of well-connected court observers at exactly this time.[211] This likely was no coincidence. Indeed, the reporting that first made public Roberts' purported switch specifically attributed his becoming "wobbly" to the public pressure coming from "[l]eading politicians, including the [P]resident himself" as well as from "countless news articles in May warning of damage to the court - and to Roberts' reputation - if the [C]ourt were to strike down the mandate."[212] If this report is to be believed, then these attempts to frame prudential considerations went beyond simply shaping the Court's consideration of the *NFIB* challenge in some abstract sense—they apparently were *determinative* of its ultimate outcome, as they led directly to the flip of the dispositive fifth vote.[213]

2. PRACTICAL CONSEQUENCES

Although these institutional and reputational concerns predominated in *NFIB*'s challenge to the not-yet-implemented health reform legislation, this sort of attempted framing took an additional dimension in *King*. In November 2014, just under a year and a half after the Court had decided *NFIB*, the ACA's federal health insurance

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211. *See* BLACKMAN, *supra* note 8, at 227–33 ("Soon after the message trickled from the Court that Roberts's vote was 'in flux,' a right-wing bat signal went out, with a clear message: we need to tell the chief justice to grow a backbone."). As Blackman noted, "[t]he timing of these barbs was especially apt, as Roberts was at this very time vacillating between striking down the law and finding a way to save it." *Id.* at 225.

212. Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:34 PM), https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/4/ [https://perma.cc/QW8D-J49D] (noting that "Roberts pays attention to media coverage. As chief justice, he is . . . sensitive to how the court is perceived by the public.").

213. These efforts took other forms, as well. In February 2011, seventy-three House Democrats wrote a letter calling for Justice Thomas to recuse himself from the case on the basis of his wife's involvement as a lobbyist with a Tea Party advocacy group that denounced the ACA as unconstitutional. *See* Michael O'Brien, *Democrats: Justice Thomas Should Recuse Himself in Healthcare Reform Case*, THE HILL (Feb. 09, 2011, 4:10 PM), http://thehill.com/blogs/blog-briefing-room/news/142969-democrats-justice-thomas-should-recuse-himself-in-healthcare-reform-case [https://perma.cc/NY69-HK72]. *But see* BLACKMAN, *supra* note 8, at 169 (stating that seventy-four House Democrats wrote a letter calling for Justice Thomas' recusal). On the other side, a number of Republican politicians joined conservative groups calling for Justice Elena Kagan to recuse herself from the case due to her apparent support for the law while serving as President Obama's solicitor general. *Id.* at 169–70.

exchanges began enrolling their first customers.[214] At the time of the challenge, the federal government was operating the health insurance marketplace in thirty-four states (the result of those states opting not to establish their own exchanges); in total, an estimated 7.5 million people had signed up for coverage for 2015 and qualified for the subsidy that was at the heart of the legal dispute.[215] As was widely reported in the months leading up to the Court's consideration of the *King* challenge, the immediate effect of a Court decision in favor of the plaintiff would be to cut off subsidies in these affected states, which could happen within a month of the decision."[216] As a result, the insurance markets in those states—absent congressional action—would likely face "near-certain collapse" as the healthiest customers moved to exit the marketplace.[217]

From the beginning, the Administration adopted a public "do-nothing" posture with respect to its preparations for an unfavorable ruling, a strategy that sources told the *New York Times* was "meant to reinforce for the [C]ourt what White House officials believe: that a loss in the health care case would be unavoidably disastrous for millions of people."[218] But a number of prominent congressional Republicans,

214. *See Introducing the Health Insruance Marketplace*, HEALTHCARE.GOV (June 21, 2013), https://www.healthcare.gov/blog/introducing-the-health-insurance-marketplace/ [https://perma.cc/GV7N-5BNP].

215. *See* Larry Levitt & Gary Claxton, *Insurance Markets in a Post-*King *World*, KAISER FAM. FOUND. (Feb. 25, 2015), https://www.kff.org/health-reform/perspective/insurance-markets-in-a-post-king-world/# [https://perma.cc/UQS8-B67E].

216. *Id.*

217. Abbe R. Gluck, King v. Burwell *Isn't About Obamacare*, POLITICO (Feb. 27, 2015), http://www.politico.com/magazine/story/2015/02/king-v-burwell-states-rights-115550[https://perma.cc/J9EA-2KJX]; *see* Levitt & Claxton, *supra* note 215.

218. Michael D. Shear, *White House Plans No Rescue if Court Guts Health Care Law*, N.Y. TIMES (Mar. 3, 2015), http://www.nytimes.com/2015/03/04/us/politics/obama-administration-says-it-has-no-plan-if-supreme-court-rules-against-health-law.html [https://perma.cc/MB6J-2YQC] ("Administration officials insist that any steps they could take to prepare for the potential crisis would be politically unworkable and ineffective, and that pursuing them would wrongly signal to the justices that reasonable solutions existed."). *See* Lyle Denniston, *Argument Analysis: Setting up the Private Debate on the ACA*, SCOTUSBLOG (Mar. 4, 2015, 1:43 PM), http://www.scotusblog.com/2015/03/argument-analysis-setting-up-the-private-debate-on-the-aca [https://perma.cc/8AT3-5MR5] ("Both President Obama and his top health policy aide, Health and Human Services Secretary Sylvia M. Burwell, publicly stressed that the administration would have no way to fix the law if that happened. The uncertain thing, as the hearing approached, was whether that message would get through to the nine members of the Court who would be the deciders."). *Cf.* Posner,

perhaps anticipating justices' susceptibility to prudential arguments arising from such potential disruptions, publicly disputed this characterization.[219] They drafted a series of op-eds in the weeks preceding oral arguments that aimed to convey a simple message to the Court: if you strike the subsidies and disruption ensues, we stand ready to act.[220]

Their framing sought to defuse a likely source of major prudential concern—defendants' assertion that a decision for the challengers would result in significant, disruptive harm to families receiving exchange subsidies—by characterizing this eventuality as practically irrelevant.[221] These congressional Republicans worked, in advance of oral arguments, to communicate that members of their party had a plan (or were acting to identify such a plan) that not only would protect individuals insured through the federal exchange, but also would be an opportunity to advance broader conservative goals through other reforms.[222] Of note, this coordinated message conflicted with numerous contemporaneous reports highlighting the sharp divisions within the GOP caucus regarding how—or even whether—they should respond to a ruling to strike down the subsidies.[223] But because members of

supra note 197, at 12–13 ("A decision against the Affordable Care Act in either case would have been a gift to the Democrats in campaigning for the Presidency, because the decisions would have created turmoil in the health care market and would have deprived many people of subsidized health benefits, and would have been produced by a judicial majority consisting exclusively of appointees of Republican Presidents. . . .").

219. *See, e.g.*, Hatch, Alexander & Barrasso, *supra* note 192.

220. *See, e.g.*, *id.* ("Millions of Americans may lose these subsidies if the court finds that the administration acted illegally. If that occurs, Republicans have a plan to protect Americans harmed by the administration's actions. . . . Republicans have a plan to create a bridge away from Obamacare."); Kline, Ryan & Upton, *supra* note 192 ("What about the people who will lose their subsidies—and possibly their coverage? No family should pay for this administration's overreach. That is why House Republicans have formed a working group to propose a way out for the affected states if the court rules against the administration."); Ben Sasse, *A First Step on the Way Out of ObamaCare*, WALL STREET J. (Feb. 25, 2015, 7:00 PM), https://www.wsj.com/articles/ben-sasse-a-first-step-on-the-way-out-of-obamacare-1424908814 [https://perma.cc/CF8W-JDJR] ("[I]n the event that the court strikes down the subsidies as illegal, Congress must be prepared to offer immediate, targeted protection to those hurt by this administration's reckless disregard for the rule of law.").

221. *See, e.g.*, Hatch, Alexander & Barrasso, *supra* note 192.

222. *Id.*

223. *See, e.g.*, Peter Sullivan & Sarah Ferris, *Republicans Debate Keeping ObamaCare Subsidies Until 2017*, THE HILL (Apr. 24, 2015, 6:00 AM), https://thehill.com/policy/healthcare/239936-republicans-debate-keeping-obamacare-

Congress can claim to speak with unique authority about how the legislature will respond to judicial decisions (in the same way the Administration could speak to its own contingency planning), party actors were uniquely well positioned to provide such assurances.[224]

How successful were these efforts? As evidenced by the comments and questions from the justices who spoke at the oral argument, it does appear that the consideration of the challengers' claims was deeply shaped by the practical and human consequences that would follow from the challengers' favored interpretation of Section 36B.[225] Court observer Lyle Denniston noted that "even the two Justices most openly sympathetic to the challengers — Justices Samuel A. Alito, Jr., and Antonin Scalia — seemed to concede the dire consequences that could follow . . . ."[226] But Republicans' efforts to preempt this argument may also have had an impact, at least with certain justices. At the oral arguments, both of these two justices "appeared to believe that Congress would quickly come up with a fix that would avoid the problem, and therefore no serious harm would come from upholding the petitioners' challenge."[227]

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subsidies-until-2017 [https://perma.cc/C5FS-AFUJ] ("[T]he push to find a 'backup plan' for ObamaCare is meeting resistance on the right, with conservative groups viewing it as a capitulation to a law that they want to repeal root and branch. . . . 'I think it will be extraordinarily difficult,' said Rep. Tom Cole (Okla.), a deputy majority whip, about the party reaching a final plan."); Rachael Bade, *Conservatives Fear Leaders Soft on Obamacare*, POLITICO (Apr. 27, 2015, 5:35 AM), https://www.politico.com/story/2015/04/conservatives-obamacare-repeal-republicans-117364 [https://perma.cc/6CPQ-QCF9] ("[S]ome conservatives want no part of what they view as an attempt to rescue the law. 'Save Obamacare?' an exasperated Rep. Tim Huelskamp (R-Kan.) said when asked his opinion of a *King v. Burwell* fix."). Moreover, as a general matter, recent scholarship has documented the trend of legislative overrides becoming increasingly rare amid persistent partisan gridlock. *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1319–22 (2014); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013).

224. *See, e.g.*, Hatch, Alexander, & Barrasso, *supra* note 192.

225. *See* Denniston, *supra* note 218 ("[I]f there was one dominant theme at the actual hearing, aside from how to read a complex federal statute, it was that a victory for the challengers would come at perhaps a serious loss — perhaps a constitutional loss, but at least a human and social loss in the end of the most ambitious (and audacious) health care plan ever enacted in America."). *See also* Transcript of Oral Argument at 31–32, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

226. *See* Denniston, *supra* note 218.

227. Jack M. Balkin, *Dueling Visions of Reality in* King v. Burwell, BALKINIZATION (Mar. 04, 2015), https://balkin.blogspot.com/2015/03/dueling-visions-of-reality-in-king-v.html [https://perma.cc/Q9H7-EV3P]. Scalia went so far as to state his own view on the matter in clear terms: "If the consequences are as disastrous as you

III. WHAT CONDITIONS MUST BE MET FOR PARTIES TO PLAY THIS ROLE?

The above discussion shows how these four connected mechanisms were used by political parties during the ACA challenges—most effectively by the Republican Party in the earliest stages of *NFIB*, but also increasingly by Democratic actors at the two challenges advanced. The path that these challenges navigated to reach the Court offers some preliminary answers to the question of *how* parties can support constitutional litigation—but the framework proposed here does not, by itself, explain whether this aspect of the ACA challenges represents a new type of litigation, or rather is one particular example of the sort of political advocacy that has long driven constitutional change.

As an initial matter, it should be noted that the use of all of these mechanisms exists on a spectrum. While the tools of partisan constitutionalism will be most effective where an entire party unites to deploy its resources in support of constitutional litigation, even partial efforts can still significantly affect the trajectory of contested cases.[228] Rather, this paper shows the different ways that parties *can* support strategic constitutional litigation, and suggests a number of conditions that must exist for the entire party to get behind a challenge in a way that can near immediately dislodge a contested claim from off the wall to plausible. But even where these conditions are not all present, nothing prevents party actors—individual members of Congress or state attorneys general, for example—from taking advantage of these mechanisms as best they can, even where the entire party has not united around the claims. And although these partial efforts will be less powerful than those instances in which the entire party unites to deploy its significant resources in support of constitutional litigation, they can still be effective. Indeed, this arguably is the one of the key takeaways from *King*—which, even though unsuccessful, did surprise many

say, so many million people without insurance and whatnot, yes, I think this Congress would act." Transcript of Oral Argument at 54–55, *King v. Burwell*, 135 S. Ct. 2480 (No. 14-114). Balkin has theorized that this seemingly misplaced confidence might result from "dueling realities" based in part on choice of external sources of news—suggesting that strategically placed (and then reported) opinion articles such as these might well have their intended effect. Balkin, *supra* ("Scalia . . . believes that when push comes to shove, Republicans will overcome their internal divisions and come up with a sensible solution that will preserve insurance coverage for millions while getting rid of the hated Obamacare. If you read the media that Scalia reads, you might well believe that this is the case.").

228. *See* Hasen, *supra* note 223, at 209–10.

observers by reaching the Court and coming closer to victory than most had expected at the outset.[229]

If parties frequently play the sort of central role that they did in *NFIB*, then it is clear that our existing narratives of historical constitutional transformations may require significant revisions. Alternatively, the two ACA cases may instead represent a new kind of constitutional challenge that is without close precedent—in which case these existing accounts may provide a complete account of the historical changes they have attempted to explain, even if they only incompletely explain the development of the two ACA challenges described here. But this explanation would raise new questions—for after all, each of the mechanisms described above have been available to political parties, at least in some form, for much of our history.[230] If we are to assert that the ACA cases indeed represent something truly *different in kind* from previous constitutional challenges, we should also be able to explain why parties have not previously taken advantage of these long-available mechanisms (or at least, not to the extent that we saw in these two challenges). We must provide an account for what might have changed—in our politics, in our legal culture, or perhaps something else—that could explain why this happened, and why it happened now.[231]

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229. *See* Michael A. Bailey, *Surprised that* King v. Burwell *was 6-to-3?*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/06/26/surprised-that-king-v-burwell-was-6-to-3/?noredirect=on.

230. Some aspects of these four pathways have been shaped by recent historical developments. For example, the changing media landscape—and in particular the recent rise of reliably partisan media, as well as the proliferation of social media platforms—likely has made it easier for parties to amplify an "off-the-wall" constitutional claim that may have few adherents among the legal elite. But although these trends may make it *easier* for parties to make use of this particular mechanism, it cannot be said that political actors previously had no way to make known their support for novel constitutional claims. *See, e.g.*, Jack Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001) ("*Bush v. Gore* was troubling because it suggested that the Court was motivated by a particular kind of partisanship, one much more narrow than the promotion of broad political principles through the development of constitutional doctrine.").

231. There is another, different but similar objection to this framework. If the partisan constitutionalism narrative described above has descriptive value, then it should be true of any (or at least either major) political party—which does not appear to be the case. In all of the major liberal judicial wins from the Warren Court era to present—advances in LGBTQ rights, some environmental victories, state education finance cases, the procedural due process revolution—the Democratic Party was by no means united in supporting, much less prioritizing and orchestrating, the challenges in the way that we saw in *NFIB* and *King*. *See* Hasen, *supra* note 223, at 209–10.

To begin to answer these questions, it may help to first consider what these two cases might tell us about *when* parties decide to play this role. As the *King* challenge illustrates, parties always have the option of leaving these challenges to private litigants—even where they may be ideologically supportive of their goals.[232] What distinguishes the types of cases where parties dedicate scarce resources (and their political reputations) to get behind a constitutional claim from those in which the nature of their support is more limited, and where affiliated civil society and interest groups assume the leading role? The way that these two cases played out—and in particular, the contrast between the success of the *NFIB* challenge and the relative disappointment (for the challengers) of *King*—suggests that at least two basic conditions must exist in order for parties to play this function successfully in strategic constitutional litigation. First, there be an alignment of perceived interests (both among various party actors as well as between the party and ideologically-aligned outside interest groups) around the immediate goal of the litigation—a condition I argue was present in *NFIB* but not in *King*. Second, there must exist a majority on the Court that, from the perspective of the challengers, may be receptive to the claims.[233]

In this section I offer a preliminary exploration of these two factors, as applied to the ACA challenges. I conclude with a discussion of how these conditions interact with the recent secular trends towards persistent political hyperpolarization and divided government, which I suggest explains why this type of party-driven constitutional litigation should indeed be understood as a relatively recent phenomenon.[234] From this discussion I suggest that although the tools of partisan constitutionalism have long been available to political parties—and this sort of litigation has long been *possible*—only recently has broad use of these mechanisms been in the strategic interests of relevant party actors.[235]

A. Political Unity Condition

As discussed above, the effectiveness of each mechanism I identify varies directly with the degree of internal unity demonstrated by the

232. *See King v. Burwell*, 135 S. Ct. 2480, 2487 (2015).

233. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2327 (2006).

234. *Id.*

235. *Id.*

party actors.[236] Indeed, Blackman has suggested that "the seamless union at all levels of government and the populace of the theories of the movement" was exactly what made the *NFIB* challenge "so unprecedented, at least as far as constitutional challenges goes."[237] Others also have noted the dispositive significance of party unity the context of the ACA challenges.[238] The important corollary to this requirement is that parties will play a central role in supporting constitutional litigation *only when* they are internally aligned behind the challenge.[239] This political unity condition has two dimensions. First, actors within the party supporting the challenge must be united around, and committed to, the immediate goal of the litigation.[240] Second, there must be an alignment of incentives between outside interest groups and the party apparatus.[241] I argue that this unity condition was met in *NFIB*, but not in *King*—helping to explain not only the relative success of the two challenges, but also why it can be so difficult for

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236. Josh Blackman, *Updated Article: Back to the Future of Originalism*, JOSH BLACKMAN'S BLOG (Dec. 9, 2012), http://joshblackman.com/blog/2012/12/09/updated-article-back-to-the-future-of-originalism/ [https://perma.cc/L6VT-YCC4].

237. *Id.* ("The political and social climate in which this challenge came of age created a veritable perfect storm for this popular originalist case. Learning how to replicate this dual-focused phenomenon may be the most enduring lesson for future constitutional challenges.").

238. *See, e.g.*, BLACKMAN, *supra* note 8, at 292–93 ("After the states and the Republican Party nationwide put their weight behind [the *NFIB* challenge], it soon became the most formidable challenge. Without this unity at the state and local levels, the challenge would not have gone nearly as far."); Balkin, *supra* note 29 ("Was there a magic moment when the challenge to the [individual] mandate moved from off the wall to on the wall? There are many possible candidates. But the most important ingredient was the overwhelming support of the Republican Party and its associated institutions for the challenge.").

239. *See, e.g.*, *id.* at 292 (noting that Republican Party politicians "saw political gold and shifted their focus" to back the constitutional challenge upon recognizing that they had become internally aligned with the states who suddenly opposed the ACA in its entirety).

240. *See, e.g.*, Balkin, *supra* note 5 ("[T]he single most important factor in making the mandate opponents' constitutional claims plausible was strong support by the Republican Party . . . . As Republicans sought to prevent passage of the Affordable Care Act, Republican politicians who had previously supported an individual mandate now denounced it as the most egregious assault on the Constitution in recent memory, and the measure was enacted without a single Republican vote in either House.").

241. *See id.* (suggesting unity exists when the party apparatus builds on the groundwork laid by outside interest groups, such as: intellectuals and social movements).

parties to find it in their interest to play this central role in strategic constitutional litigation.[242]

Section II.A.1 above highlighted the difficulty encountered by the *King* challengers in recruiting support from elected Republicans, even as the party continued to advocate for the law's full repeal.[243] To explain this apparent inconsistency, it is useful to refer to the distinction that Balkin has made "between the 'symbolic agenda' of the Republican Party—the symbolic rhetoric about what the Constitution means—from [its] 'material agenda'—that is, the actual reforms that the presidential and congressional wings of the Party seek to achieve through judicial appointments and legislation."[244] He argued that these two agendas departed in the context of Republicans' support for the Rehnquist Court's federalism revolution, suggesting "the Republican commitment to federalism in practice has been largely symbolic, if not completely bogus" in that "it may easily be overridden in order to serve [competing] political interests."[245] Although he didn't use this same terminology, Balkin has also employed a similar concept to explain the Republican Party's approach to abortion[246] and executive power.[247]

When a party is deciding whether to get behind a constitutional challenge, it will very frequently encounter a divergence between its material and symbolic agendas.[248] That is because in litigation, unlike in elections, the *immediate* consequence of victory is the full

242. *See* BLACKMAN, *supra* note 8, at 293 (concluding that the unity condition failed in *King* because "states that once opposed the [Medicaid] expansion [had] now voluntarily opt[ed] in").

243. *See* discussion *supra* Section II.A.1.

244. Balkin & Levinson, *supra* note 36, at 511–12 ("[T]he Rehnquist Court's federalism revolution was part of the Republicans' 'symbolic agenda'—that is, constitutional claims that pleased its conservative base—but that there was not, in fact, a serious and principled commitment to using constitutional doctrine to restore genuine state autonomy, much less the degree of autonomy that existed before the New Deal.").

245. *Id.* at 511.

246. *See* Jack M. Balkin, Roe *and Partisan Entrenchment*, BALKINIZATION (June 28, 2008, 9:05 AM), http://balkin.blogspot.com/2008/06/roe-and-partisan-entrenchment.html [https://perma.cc/K6X3-VNGN] (citing political "incentive structures" in explaining why Republican presidents have chosen to pursue a "hollow-out-but-don't-overturn" strategy with respect to repealing *Roe v. Wade*).

247. *See* Jack M. Balkin, *Are The Parties Dividing over Executive Power?*, BALKINIZATION (Dec. 28, 2007, 11:02 AM), http://balkin.blogspot.com/2007/12/are-parties-dividing-over-executive.html [https://perma.cc/46Z9-39JY] (drawing a parallel to abortion in arguing that "in many respects the divide we are seeing over executive power between the two parties is symbolic more than substantive").

248. See *supra* notes 254–57 for examples of divergences between symbolic and material agenda.

implementation of the material agenda—support for which, as Balkin notes, may largely be "bogus."[249] At a minimum, material victory may present political challenges that politicians may otherwise prefer to avoid.[250] When politicians run—and win—on a given policy platform, they are often able to navigate these divergences by acting strategically to advance the popular parts of their platform while dropping or modifying the purely symbolic positions, which may have polled well (or mollified a particular constituency) but whose actual implementation would be unpopular and risk provoking electoral backlash.[251] By contrast, when parties decide to get behind a constitutional challenge like *NFIB* or *King*, they are asking the Court to deliver a particular material outcome, delivered immediately through a process over which they have only limited control. At a minimum, material victory may present political challenges that politicians (as distinct from private litigants) may otherwise prefer to avoid.

The history of these two challenges suggests that at some point between *NFIB* and *King*, a complete dismantling of the ACA—the immediate consequence of victory in either case—had shifted from being a material policy goal of the Republican Party to an element of its *symbolic* agenda. The Republican Party's recent failure to achieve legislative repeal—despite full control over all three political branches, supports this conclusion—indeed suggests that ACA repeal may no longer unite the Republican Party even as a symbolic matter.[252]

What could explain this shift? One of the many unusual aspects of the *NFIB* challenge is that it reached the Court in a highly unusual posture—operating as a preemptive strike to a law that had passed (despite tremendous, and growing, popular backlash) but had not yet been implemented in any way.[253] The *King* challengers, by contrast,

249. Balkin & Levinson, *supra* note 36, at 511.

250. *See, e.g.*, *id.* (noting that during "the Rehnquist Court's federalism revolution," the Republican Party selectively backed moderate constitutional challenges to avoid the political challenge of ostracizing its donors and business allies, despite the importance of these issues to its conservative base).

251. *See, e.g.*, Balkin, *supra* note 246 ("[A] president might choose more moderate nominees on a key issue of his time than we would otherwise choose . . . [to] preserve a coalition.").

252. *See* Michael D. Shear & Robert Pear, *From 'Repeal' to 'Repair': Campaign Talk on Health Law Meets Reality* N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/us/politics/obamacare-tom-price-trump.html [https://perma.cc/T5F2-CEGM].

253. Balkin, *supra* note 5 (describing procedural history of the *NFIB* and recognizing that "perhaps more important, the Affordable Care Act requires considerable implementation by state and federal governments. The enforceability of a

were seeking to dismantle an existing status quo, and the result of victory would be to invalidate subsidies currently flowing to the millions of residents of states with a federal exchange.[254] This single change fundamentally altered the calculus not only for the justices (as discussed above) but also for party members: "The Republicans now have realized that a court decision in their favor poses political risks to members of their party, who are frantically trying to come up with alternatives to the Affordable Care Act and a strategy to respond to such a ruling."[255]

Loss aversion is a powerful political force, and upon the law's implementation, the practical—and political—stakes of the challenge increased accordingly.[256] As one report summarized, "Given that the individuals who would lose subsidies and coverage are disproportionately residents of Republican-leaning states, the situation could prove politically perilous for the GOP, say analysts from both parties."[257] In their efforts to unify party members around a

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key provision of the ACA in several states created uncertainty and slowed down implementation.").

254. *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) ("So without the tax credits, the coverage requirement would apply to fewer individuals. And it would be a *lot* fewer. In 2014, approximately 87 percent of people who bought insurance on a Federal Exchange did so with tax credits, and virtually all of those people would become exempt.").

255. Robert Pear, *Health Law Case Poses Conundrum for Republicans*, N.Y. TIMES (Feb. 7, 2015), http://www.nytimes.com/2015/02/08/us/health-law-case-poses-conundrum-for-republicans.html [https://perma.cc/G55B-XVWK] ("[I]f Republicans prevail in court, many people could lose their insurance plans because they would lose the subsidies and could no longer afford the premiums. Afraid of being blamed for such disruption, Republicans are trying to prepare a remedy.").

256. Amy Howe, *Court Backs Obama Administration on Health-Care Subsidies: In Plain English*, SCOTUSBLOG (June 25, 2015, 12:01 PM) http://www.scotusblog.com/2015/06/court-backs-obama-administration-on-health-care-subsidies-in-plain-english/ [https://perma.cc/UQ36-FF5Q] (noting that a legal victory for the challengers "could have had effects far beyond the insurance markets and the wallets of people who would no longer receive subsidies: it almost certainly would have carried over into both the political arena – as the people who could no longer afford health insurance directed their frustration at elected officials – and the stock market.").

257. Paul Demko, *Republicans Jockey over Post-*King *Reform Plans*, MOD. HEALTHCARE (Apr. 29, 2015, 1:00 AM), http://www.modernhealthcare.com/article/20150429/NEWS/150429880 [https://perma.cc/FE2G-JWVK]. *See also* Byron York, *GOP Scrambles to Keep Obamacare Subsidies Flowing in Case of Supreme Court Victory*, WASH. EXAMINER (Feb. 26, 2015, 5:16 PM), http://www.washingtonexaminer.com/gop-scrambles-to-keep-obamacare-subsidies-flowing-in-case-of-supreme-court-victory/article/2560786 [https://perma.cc/K43R-TF73] ("The prospect of seeing those people lose their subsidies . . . is just too much for Republican lawmakers to risk. 'We're worried about

replacement plan or temporary "bridge" to be implemented in the event that the Court invalidates the contested subsidies, Republicans openly cited these concerns.[258] In the individual mandate challenge, the Republican governors and attorneys general, senators, and would-be presidents who lent their support to the legal effort each faced a relatively straightforward political calculus. That was because the consequence of a ruling in that case would not be to alter any existing benefit—there would be no immediate losers—but rather to simply prevent some future (and poorly understood) benefit from coming to existence.[259] But in the wake of the *NFIB* challenge, the Republican Party's (once remarkable) "unified opposition . . . largely crumbled in the wake of *NFIB* . . . [as] states that once opposed the expansion are now voluntarily opting in[.]"[260] And while observers cited the political mobilization around the 2010 midterms as having contributed to the success of the first legal challenge, by the time the *King* case was making its way through the courts it appeared that this calculus has been reversed for potential presidential nominees and vulnerable Republican senators.[261] For this reason, the single most significant difference between the cases—arguably more even than the doctrinal distinctions that drew the attention of commentators—may be the simple

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ads saying cancer patients are being thrown out of treatment, and Obama will be saying all Congress has to do is fix a typo,' said one senior GOP aide involved in the work."); Steven Brill, *Should Obamacare Be Derailed by a Single Sentence?*, REUTERS (Nov. 13, 2014), http://blogs.reuters.com/stories-id-like-to-see/2014/11/11/should-obamacare-be-derailed-by-a-single-sentence/ [https://perma.cc/QMA7-EPYP] ("It's one thing for Republican governors, such as Rick Perry in Texas or Rick Scott in Florida, to refuse to take advantage of a different provision in Obamacare allowing them to expand Medicare, leaving poor people in their states much worse off than the poor in neighboring states. But will these Republicans opt to short-change their middle class political base the same way?").

258. Pear, *supra* note 255 ("Lawmakers from both parties said that repeal and replacement had become more difficult as more people gained coverage under the law and insurers found ways to profit from it.").

259. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 584 (2012) ("While Congress pays [fifty] to [eighty-three] percent of the costs of covering individuals currently enrolled in Medicaid, § 1396d(b), once the expansion is fully implemented Congress will pay [ninety] percent of the costs for newly eligible persons, § 1396d(y)(1).").

260. BLACKMAN, *supra* note 8, at 293.

261. *See* Pear, *supra* note 255 ("The Republicans now have realized that a court decision in their favor poses political risks to members of their party, who are frantically trying to come up with alternatives to the Affordable Care Act and a strategy to respond to such a ruling. With a significant increase in their numbers on Capitol Hill, Republicans . . . have more responsibility for the results.").

fact that the *King* challenge, through an accident of timing, reached the Court after the ACA had been implemented.

But what is notable here is the *reason* why this mattered: because the threatened interests in the case transformed both the Court's prudential considerations but also the underlying political dynamics, by driving a wedge between the party's symbolic and material agendas.[262] Indeed, Blackman has suggested that "the seamless union at all levels of government and the populace of the theories and the movement" was exactly what made the *NFIB* challenge "so unprecedented, at least as far as constitutional litigation goes."[263] The most significant effect of this change in this context is that it severed the alignment that had previously existed between the strategic interests of the party and the outside ideological groups who were seeking its support for their challenge.[264] It also split the Republican Party internally, reflecting strategic differences both across differently situated political actors (between GOP governors of exchange states and the representatives of safe congressional seats, for example) as well as among politicians who differed with respect to their weighting of ideological goals versus electoral risk.[265] That could hardly be more different from *NFIB*, which saw Republicans united in their opposition to the ACA both as a matter of political strategy as well as an immediate policy goal.[266] Indeed, in *King* it was the Democrats, not the GOP, who were unified behind their side of the challenge—a remarkable reversal of roles.[267]

262. *See, e.g.*, *id.* ("'We want to help people who have been hurt by the president's illegal actions, but we don't want to help this terrible law. We don't want to help Obamacare,' said Senator John Barasso . . . the chairman of the Senate Republican Policy Committee.").

263. Blackman, *supra* note 8 ("The political and social climate in which this case came of age created a veritable perfect storm for this [popular originalist] challenge. . . . Learning how to replicate this dual-focused phenomenon . . . may be the most enduring lesson for future constitutional challenges.").

264. *Compare* Pear, *supra* note 255 ("[I]f Republicans prevail in court, many people could lose their insurance plans because they would lose the subsidies and could no longer afford the premiums. Afraid of being blamed for such disruption, Republicans are trying to prepare a remedy. 'We want to help people who have been hurt by the president's illegal actions, but we don't want to help this terrible law. We don't want to help Obamacare,' said Senator John Barrasso of Wyoming . . . ."), *with* Balkin, *supra* note 20 ("The architects['] of the litigation . . . goal was to cripple the Affordable Care Act to force a political reconsideration of its terms. The key idea was that by eliminating the tax credits for federally run exchanges, many people could no longer afford health insurance.").

265. *See supra* note 81 and accompanying text.

266. *See supra* notes 70–71 and accompanying text.

267. *See supra* notes 91–93 and accompanying text.

In the ACA litigation, the Republican Party's unity was splintered by the sudden divergence that the Act's implementation created between the Party's symbolic and material agendas.[268] Noting that "[e]ntitlement programs build constituencies that make them difficult to repeal," Michael Dorf has recently cited the challenges to the ACA as one example of how "a constitutional challenge to major legislation will be more likely to succeed before that legislation has become broadly embedded in the law and society."[269] To the extent that this dynamic presents itself in other contexts, it suggests that there will be a time-limited window—immediately following the legislative enactment, agency action, or other contested event—during which partisan constitutional challenge will be most effective, or indeed perhaps available at all.[270]

But there are many reasons why a party might fail to achieve internal unity behind a court challenge. This is particularly true when the stakes are high, or when the party is unified less by a coherent ideology than by delivering benefits to its various constituent groups.[271] Moreover, this divergence is likely to be especially true of causes that are so unpopular as to face uphill or apparently impossible odds in the political branches—that is, exactly the type of challenge where this sort of challenge might otherwise be most attractive.[272] Thus the party unity

268. *See supra* note 261 and accompanying text.

269. Dorf, *supra* note 162, at 76.

270. *See id.* ("Obviously, even old statutes can be repealed or held unconstitutional, but some constitutional challenges may have a limited window within which they can succeed.").

271. *See* Matt Grossmann & David A. Hopkins, *Ideological Republicans and Group Interest Democrats: The Asymmetry of American Party Politics*, 13 PERSP. ON POL. 119, 119 (2015) ("The Republican Party is primarily the agent of an ideological movement whose supporters prize doctrinal purity, while the Democratic Party is better understood as a coalition of social groups seeking concrete government action. This asymmetry is reinforced by American public opinion, which favors left-of-center positions on most specific policy issues yet simultaneously shares the general conservative preference for smaller and less active government.").

272. Partisan constitutionalism can be used to advance ideological goals, for partisan entrenchment, or for ideological goals that also have entrenchment effects. But one implication of this discussion is that we may be less likely to see this where ideological goals undermine partisan imperatives—where the two conflict, the partisan or electoral aims will tend to win. This happened in *King*, where the party's electoral considerations overrode its symbolic ideological goal of undoing Obamacare, resulting in the party walking away from the challenge—or it can happen the other direction, like in *Bush v. Gore*, where the electoral goal of winning the presidential election overrode the party's previous commitment to a narrow Equal Protection jurisprudence. *See* Balkin, *supra* note 229 ("*Bush v. Gore* was troubling because it suggested that the Court was motivated by a particular kind of partisanship, one much more narrow than

condition, although met in *NFIB*, may often work to prevent a party from playing this central role in strategic constitutional litigation—even where it is unified behind the symbolic goal of the challenger.

B. Nature of the Claim

Second, the nature of the claim must be something that can be open for debate. One way that claims are difficult to make is that arguments might be *so far* off the wall that they are difficult to pull back—or they might be impossible to pull back without splitting the party, thus undermining the political unity condition.[273] But this challenge can take various forms. For example, an additional major difficulty for the *King* plaintiffs was that their legislative history claims were falsifiable—which is not a problem for claims about the broadly malleable nature of our constitutional protections.[274] One major distinction between the two challenges is that—although they were advanced using many of the same tools of extrajudicial persuasion, as inspired by the literature on popular constitutionalism—*King* was not, strictly speaking, a constitutional challenge.[275] It turns out that this had notable, and perhaps unexpected, consequences.

Under longstanding administrative law precedent giving agencies broad authority to interpret ambiguous statutes, the *King* challengers needed to show that the language either was unambiguous or reflected the clear intent of Congress.[276] But doing so required the apparent

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the promotion of broad political principles through the development of constitutional doctrine.").

273. *See, e.g.*, Beutler, *supra* note 149 ("To get their argument off the ground, and keep it airborne, they needed to fabricate a new legislative and political history of the Affordable Care Act. At this juncture, more even-keeled activists might have backed off, recognizing that a legal case draped in a tissue of lies would risk ruin.").

274. Indeed, even where a theory of constitutional interpretation places history at the forefront of constitutional debates, this history can be strategically manipulated. *See* Siegel, *supra* note 185, at 194 ("The Second Amendment's twentieth-century history shows how political conflict can both motivate and discipline the claims that mobilized citizens make on the text and history of the Constitution.").

275. Michael S. Greve, Halbig *and Obamacare: What We Have Learned (Part I)*, L. & LIBERTY (Aug. 5, 2014), http://www.libertylawsite.org/2014/08/05/halbig-and-obamacare-what-we-have-learned-part-i/ [https://perma.cc/3Y9F-54YM] ("*Halbig* and *King* strike at Obamacare's core: the exchanges. Yet no constitutional argument is directly in sight. The cases aren't about what Congress *can* do but what it *did* do . . . .").

276. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (analyzing *King* under lens of *Chevron* deference).

construction—or as they described the process, a "discover[y]"[277]—of an elaborate narrative about the unspoken intent of political actors and other observers who, rather inconveniently for the challengers, were still around to dispute those claims. And because the Democrats were unified in defense of the law both as a symbolic and actual matter—they now met the party unity condition—they were able to use many of the tools from the *NFIB* challengers' toolbox to dispute that characterization.[278]

As has been documented elsewhere, the challengers worked to transform the theory of the case from a "glitch" to a narrative that Congress *intended* the statute to function as the challengers read it.[279] When Christina presented his reading of Section 1321 at the 2010 AEI conference, he noted that his interpretation "could be an unintended consequence."[280] The challengers soon began to suggest that the language might be a "defect[]" that the drafters might have wished to

277. Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 123 (2013). *See also* Levy, *supra* note 170 ("As Cannon tells it, the duo then decided to do more research, which led them to believe that this was not, as they had called it in the *Journal*, a 'glitch.' Instead, they argue Congress intentionally decided to withhold subsidies from federal exchanges.").

278. *See* Jost, *supra* note 81 ("[An] . . . important brief was filed by the Constitutional Accountability Center on behalf of the Democratic members of Congress who played a key role in drafting the ACA in the 111th Congress and over 100 individuals who served in state legislatures at the time their states were deciding whether to operate their own exchange or invite the federal government to do so. The members clarify that it was always the intent of Congress to permit FFM as well as state-operated marketplace states to have access to premium tax credits.").

279. *See, e.g.*, Beutler, *supra* note 149; Weiner, *supra* note 82.

280. American Enterprise Institute, Thomas Christina, *Who's in Charge? More Legal Challenges to the Patient Protection and Affordable Care Act*, YOUTUBE (Mar. 11, 2014), https://youtu.be/C7nRpJURvE4?t=1h19m20s at 1:19:20 (July 26, 2016) [https://perma.cc/HS9A-3L25]. When Adler and Cannon announced their discovery of the disputed language in a November 2011 op-ed, they described the language as "a major glitch that threatens [the ACA's] basic function" and sought to elide the question of congressional intent by arguing that if Congress passed an imperfect bill, then by definition "that is what Congress intended." Adler & Cannon, *supra* note 177. *See also* Rob Weiner, *En Bunk: A Response to Professor Adler on En Banc Review of the ACA,* BALKINIZATION (Aug. 7, 2014, 6:00 AM), http://balkin.blogspot.com/2014/08/en-bunk-response-to-professor-adler-on.html [https://perma.cc/T4LF-2Y2G] ("Back then, Professor Adler and his co-author Michael Cannon touted that discovery as a statutory 'glitch' and a 'surprise,' not a clarion declaration of Congress's intent. Cannon gleefully announced that this new finding would 'gut' the Affordable Care Act. Only later did the advocates seek to improvise an argument that Congress deliberately sought this self-destructive result, even though Congress explicitly stated its contrary intent in the statute . . . .").

fix but could not because of the rushed reconciliation process.[281] Yet by the start of August 2012, challengers Jonathan Adler and Michael Cannon had changed tune, and were testifying before the House Oversight Committee that "[b]oth the text of the statute and Congress' intent are thus crystal clear."[282] And by the spring of 2013, they were telling a story about how, despite their initial characterization of the language, "further research demonstrates that this feature was intentional and purposeful and that the IRS's rule has no basis in law."[283]

But this new narrative was forcefully challenged, most prominently in a brief coordinated and filed on behalf of Democratic members of the 111th Congress who were involved in drafting the ACA and state legislators involved in their government's consideration of whether to create a state exchange.[284] Notably, the brief cites a letter from Senator Ben Nelson that directly contradicts a key element of the challengers' narrative (the claim that the conditioned availability of the subsidies was demanded by Nelson in exchange for his vote), which the challengers had made in court filings as well as in oral argument before the D.C. Circuit panel.[285] Previously, after being questioned on the

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281. Michael Cannon & Jonathan Adler, *The Illegal IRS Rule to Expand Tax Credits Under the PPACA: A Response to Timothy Jost*, HEALTH AFFAIRS (Aug. 1, 2012), http://www.healthaffairs.org/do/10.1377/hblog20120801.021703/full [https://perma.cc/WU4C-4Q6V] ("[E]ven though some members of Congress and the President might have preferred a law that authorized tax credits in federal Exchanges, they nevertheless enacted a law that did not. Many advocates of health care reform urged passage of the Senate bill even though there were parts of the bill they did not like, and knowing full well that not all defects could or would be fixed through the reconciliation process.").

282. Cannon & Adler, *supra* note 281.

283. Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA*, 23 HEALTH MATRIX 119, 123 (2013) ("It may be somewhat surprising that the PPACA contains such a gaping hole in its regulatory scheme. We were both surprised to discover this feature of the law and initially characterized it as a 'glitch.' Yet our further research demonstrates that this feature was intentional and purposeful and that the IRS's rule has no basis in law.").

284. Brief for Members of Congress and State Legislatures as Amici Curiae Supporting Respondents, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114). In that brief, the members provided testimonial evidence "that the purpose attributed to the statute by Petitioners was, in fact, never contemplated by the legislators who enacted the law, nor by the state officials charged with deciding whether to establish their own Exchange." *Id.*

285. Doug Kendall, *Carvin's Cornhusker Quandary in* King, HUFFINGTON POST (Jan. 30, 2015, 2:52 PM), https://www.huffpost.com/entry/carvins-cornhusker-quanda_b_6581690 [https://perma.cc/7P7Q-GWHH] ("I *always* believed that tax

meaning challengers' had imputed to isolated floor remarks from Sen. Max Baucus (which had been presented as evidence that Baucus believed the tax credits would not be available on the federal exchanges), Cannon had felt the need to publicly amend his interpretation of this statement.[286] Still other similar examples exist.[287]

This highlights the key challenge implicated in *King*'s reliance on statutory interpretation and congressional intent: unlike the *NFIB*'s broad constitutional claims, many of the *King* challengers' claims were based on knowable fact rather than abstract meaning—and were thus falsifiable.[288] From the beginning, the *NFIB* challenge was about what it claimed to be about: the government's authority under the Constitution to enact the Affordable Care Act.[289] The mainstream agreement that had defined the *NFIB* argument as existing "off-the-wall" reflected, on some practical level, simply consensus opinion: within the wide range set by the constitutional text itself, the scope of congressional authority under the Commerce Clause is nearly infinitely malleable.[290] Yet the

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credits should be available in all 50 states regardless of who built the exchange, and the final law also reflects that belief as well."). *See also* Robert Barnes, *Supreme Court Case on Key Obamacare Provision Takes up This Senator's Account*, WASH. POST (Jan. 28, 2015), https://www.washingtonpost.com/politics/courts_law/supreme-court-case-on-key-obamacare-provision-takes-up-this-senators-account/2015/01/28/339ca646-a6fc-11e4-a2b2-776095f393b2_story.html.

286. Michael F. Cannon, *The Halbig Cases: Changing My Mind on the Baucus-Ensign Colloquy*, FORBES (Aug. 22, 2014), https://www.forbes.com/sites/michaelcannon/2014/08/22/the-halbig-cases-changing-my-mind-on-the-baucus-ensign-colloquy/#475f0bff2102 [https://perma.cc/7KAF-D4X9] ("I now think the aforementioned statement does not necessarily indicate . . . that Baucus intended to offer subsidies only in state-established Exchanges.").

287. *See generally* Weiner, *supra* note 82 ("In other respects as well, the ACA opponents are having trouble keeping their legal theories straight. Since the grant of review in *King*, a January 2010 article by Senator Hatch resurfaced criticizing the ACA provisions on Exchanges. Senator Hatch maintained that a State's decision to set up an Exchange '*is not a condition for receiving federal funds*, which would still leave some kind of choice to the states.' . . . That is not the challengers' coercion theory. In fact, it is a direct rebuttal.").

288. Steven Brill, *The Supreme Court Hears an Obamacare Fairytale*, REUTERS (Mar. 2, 2015), http://blogs.reuters.com/great-debate/2015/03/02/the-supreme-court-hears-an-obamacare-fairytale/ [https://perma.cc/L5VA-TFTF] ("[A]t its core, this case, as with any about congressional intent, is about knowable facts, not about the lawyers' views of the law.").

289. Robert Barnes, *Supreme Court to Hear Challenge to Obama's Health-Care Overhaul*, WASH. POST (Nov. 14, 2011), https://www.washingtonpost.com/politics/supreme-court-to-hear-challenge-to-obamas-health-care-overhaul/2011/11/11/gIQALTvrKN_story.html.

290. Of course, the malleability of our constitutional commitments is not without limit. And thus, it should be noted that the number of scholars who have

King challengers' factual claims—due in part to doctrines of administrative law and statutory interpretation that required a showing of congressional intent, rather than a simpler presentation of the challenged language in isolation—were vulnerable from the beginning to counter-challenge, including from those who drafted and voted for the law (and thus had every reason to oppose the challengers' interpretation).[291] Especially in light of the other political complications discussed above relating to the timing of the challenge, this factor may have undermined their ability to expand their circle of support even among the health care law's political and ideological opponents, both on and off the Court.[292]

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objected to the politics-centered narrative of the *NFIB* challenge described above argue that this story's emphasis of social and political mobilization overlooks the specific doctrinal context in which ACA challenge played out. *See* Young, *supra* note 37, at 157 ("Jack Balkin has observed that politics and political parties played an important role, perhaps the crucial role, in combination with intellectual and social movements. But the role of political institutions is mediated by constitutional understandings that help to shape the space within which politics can operate."). In particular, a number of the conservative and libertarian academics who had been involved in the *NFIB* case argue that their challenge, and the Court's ultimate decision, reflected a straightforward application of the Rehnquist Court's "New Federalism" doctrine, as developed in *Lopez* and *Morrison*—that the challenge, in other words, never should have been characterized as being "off-the-wall" in the first instance. *See, e.g.*, Jonathan H. Adler, *The Conflict of Visions in NFIB v. Sebelius*, 62 DRAKE L. REV. 937, 952–53 (2014). Exploring that doctrinal distinction is beyond the scope of this essay, but I note it here to draw an additional contrast between the *NFIB* case—which centered on the meaning and application of historically-contested, centuries-old constitutional text, where recent precedent could at least plausibly be offered in support for the challengers' position—and the narrow, *sui generis* statutory claim at issue in *King*.

291. *Cf.* Bradley Silverman, *Statutory Ambiguity in* King v. Burwell: *Time for a Categorical* Chevron *Rule*, 125 YALE L.J.F. 44 (June 8, 2015), http://www.yalelawjournal.org/forum/statutory-ambiguity-in-king-v-burwell-time-for-a-categorical-chevron-rule [https://perma.cc/HJG2-TEYW].

292. Arguably, the Trump Administration's Justice Department encountered precisely this sort of obstacle in its efforts to defend the addition of the citizenship question to the Census, despite clear and overwhelming factual evidence that the government's justification was pretextual. Amy Howe, *Opinion Analysis: Court Orders Do-Over on Citizenship Question in Census Case*, SCOTUSBLOG (June 27, 2019), 5:50 PM), https://www.scotusblog.com/2019/06/opinion-analysis-court-orders-do-over-on-citizenship-question-in-census-case/ [https://perma.cc/3SKL-QHRN]. That case shared certain features of partisan constitutionalism, including the Court's decision to accept the government's direct appeal of an unfavorable district court decision and an amicus brief filed by the Democratic House of Representatives (which noted that "The Republican Leader and the Republican Whip do not agree with the merits discussion in this brief"). *See* Brief of Amicus Curiae United States House of Representatives in Support of Respondents, *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

But what is notable in this context is that, as a general matter, we might expect this factor to vary *inversely* with the party unity condition—to be easiest to satisfy in precisely those cases where party unity is most difficulty to achieve.[293] That is because almost invariably, the unity condition will prove most difficult when the challenger attempts to advance a far-reaching constitutional right that would have the effect of disturbing large and uncertain swaths of decided policy outcomes.[294] For example, Balkin argues that the *NFIB* challengers decided to proceed on a relatively narrow claim focused on the individual mandate—rather than a broader challenge to the Court's longstanding New Deal precedent—because "[m]ost Republican politicians don't actually want to strip the federal government of most of the [New Deal] powers to regulate, tax and spend" because they wanted to protect those authorities in order to "use those powers to promote Republican policies."[295]

The initial perceptions of the *NFIB* challengers' inactivity argument were shaped by both the lack of clear supporting precedent as well as the Republican Party's relatively recent support for the individual mandate.[296] But the advantage of this particular constitutional claim, as Balkin has suggested, is that it was "so precise and so narrowly targeted that it would take out one and only one law . . . while leaving everything else standing for the next Republican majority."[297] In this way, the challengers in both cases presented the

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293. *See* Niel S. Siegel, *None of the Laws but One*, 62 DRAKE L. REV. 1055 (2014).

294. Phillip A. Wallach & James Walner, *Party Unity is an Illusion,* REALCLEAR POL'Y (July 24, 2018), https://www.realclearpolicy.com/articles/2018/07/24/party_polarization_is_an_illusion_110725.html [https://perma.cc/JP4Y-S6CE].

295. Balkin, *supra* note 20. Arguing that the targeted nature of the challengers' claim "may be most noteworthy" aspect of the challenge, Niel Siegel has offered a similar explanation, proposing that "the most likely reason that they wanted the challenges to be narrow is that Republican politicians, too, value relatively robust federal power." Siegel, *supra* note 293, at 1055, 1058, 1068 ("Rather than mount a broadside constitutional attack on either the Great Society welfare state or the New Deal regulatory state, Republicans in Congress endorsed a surgical strike that was intended to destroy . . . none of the laws but one: the ACA.").

296. Adam J. White, *Without Precedent*, WASH. EXAMINER (Mar. 26, 2012), https://www.washingtonexaminer.com/weekly-standard/without-precedent [https://perma.cc/WK42-JY8V]; Michael Cooper, *Conservatives Sowed Idea of Health Care Mandate, Only to Spurn it Later*, N.Y. TIMES (Feb. 14, 2012), https://www.nytimes.com/2012/02/15/health/policy/health-care-mandate-was-first-backed-by-conservatives.html [https://perma.cc/T8CT-X584].

297. Balkin, *supra* note 29. *See* THE AFFORDABLE CARE ACT DECISION: PHILOSOPHICAL AND LEGAL IMPLICATIONS 34 (Fritz Allhoff & Mark Hall eds., 2014)

Court with the type of precedential free pass that it had so famously attempted to create for itself in *Bush v. Gore*.[298] Indeed, several observers have identified this case as representing the closest analogue to the *NFIB* challenge, in terms of the speed at which the challenge moved from off- to on-the-wall,[299] the nature of the partisan divide,[300] and the distinction between "high" and "low" politics.[301]

It thus appears that the legal claims in these cases—even where they are framed as constitutional questions—tend to be quite narrowly targeted at particular outcomes (rather than general constitutional principles) that are known to the party in advance. This dynamic is in turn related to the party unity imperative, since broader constitutional claims tend to be more disruptive and uncertain, and thus more likely to create internal divisions within the party.[302]

Perhaps the best counterexample to this would be the originalism-based Second Amendment challenges in *District of Columbia v. Heller*,[303] another case that has been analogized to *NFIB*,[304] and *McDonald*.[305] And indeed, these two challenges do share a number of important parallels to the ACA challenges—and especially to *King*. Although the litigation was not initiated by state attorneys general, in

("The ingenuity of the strategy was to conform their argument within the Court's existing precedents—to strike down the mandate would not require overturning a single precedent.").

298. 531 U.S. 98, 109 (2000) (per curiam) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

299. *See* BLACKMAN, *supra* note 8, at 301 ("The legal challenge to Obamacare was unprecedented. Never before had a constitutional argument flourished and developed so quickly, gaining acceptance by courts in a matter of months rather than years (with possible exception of *Bush v. Gore*, which materialized in thirty-six days).").

300. Greenhouse, *supra* note 35.

301. Michael C. Dorf, *What Really Happened in the Affordable Care Act Case*, 92 TEX. L. REV. 133, 159 (2013) (explaining that "in both [*Bush v. Gore* and *NFIB*], the highly partisan nature of the fight over the underlying issue only strengthened the resolve of the conservative Justices to stand firm on what they regarded as nonpartisan ground").

302. *See, e.g.*, Wallach & Wallner, *supra* note 294.

303. 554 U.S. 570 (2008).

304. *See* Blackman, *supra* note 40 ("The movement behind the challenge to the Affordable Care Act, however, was like the *Heller* movement on steroids."); Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108 (2011) (discussing the role of state attorneys general in *Heller* and the ACA litigation).

305. SARAH HERMAN PECK, CONG. RESEARCH SERV., R44618, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE (2019).

both *Heller* and *McDonald*, state and federal political actors voiced support for the constitutional challenge in ways broadly analogous to the role they played in *King*.[306] Most notably, in *McDonald* thirty-eight attorneys general filed an amicus brief urging the incorporation of the Second Amendment against the states,[307] which accompanied a similar brief filed by fifty-eight Senators and 251 members of the House on behalf of the challengers.[308] Additionally, the official Republican Party platform has for many years included specific language supporting an expansive reading of the Second Amendment.[309] But even this analogy is limited in important respects. In particular, the Republican Party's most important support for this transformation was shaped by its control of the Executive Branch, through both the litigation supported by the Reagan Justice Department as well as the appointments power—that is, through mechanisms that were closer to the more familiar social movement and partisan entrenchment narrative than to the near overnight shifts we saw a party achieve in the ACA litigation.[310]

But as the *King* litigation illustrates, basing this type of strategic litigation on non-constitutional claims—which may be more likely to satisfy the party unity condition—can present challenges of a different sort. The upshot is that the universe of claims that both satisfy the party unity condition and also rely on authority that is malleable enough to support a novel challenge may be far more limited than it might initially appear.

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306. *See, e.g.*, Robert Barnes, *Cheney Joins Congress in Opposing D.C. Gun Ban*, WASH. POST (Feb. 9, 2008), www.washingtonpost.com/wp-dyn/content/article/2008/02/08/AR2008020803802_pf.html.

307. As Bulman-Pozen has noted, the states' arguments mapped along similar partisan lines as was also seen in the ACA challenges, with "only Democratic attorneys general [making] arguments about state sovereignty." *See* Bulman-Pozen, *supra* note 87, at 1100 fn.86. *See also* Brief for the States of Illinois, Maryland, and New Jersey as Amici Curiae in Support of Respondents, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521). Thirty-one state attorneys general filed in *Heller*. Blocher, *supra* note 304, at 110.

308. Brief for Amici Curiae Senator Kay Bailey Hutchison et al. in Support of Petitioners at 4, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521).

309. *See, e.g.*, Republican National Committee, *We The People: A Restoration of Constitutional Government*, https://www.gop.com/platform/we-the-people/ [https://perma.cc/3PTN-F9LH] ("We uphold the right of individuals to keep and bear arms, a natural inalienable right that predates the Constitution and is secured by the Second Amendment. . . . [we affirm] the Court's decisions upholding an individual right to bear arms as affirmed by the Supreme Court in Heller and MacDonald.").

310. *See generally* Siegel, *supra* note 185, at 211–16 (detailing a variety of movement-party relationships and concluding that "the developments that would do most to legitimate the new Second Amendment arguments unfolded in the Reagan Justice Department").

C. Institutional Considerations and Court Majority

The final condition is that the party must have reasons to prefer going through the courts rather than through political branches. Although this is in most respects a less tangible requirement than the previous two, it does include one very specific threshold requirement: from the beginning, the party initiating the challenge must expect that a majority on the Court will be ideologically receptive to its claims.[311] If this condition is not met, then neither the challenger nor the party will have a reason to pursue its claim through the judicial branch.[312]

But the institutional considerations do not end with a simple seat count. As a general matter, parties will likely be strategic about how to pursue their policy goals based on which institutions they control.[313] Thus, parties' chosen strategy for contesting constitutional questions will be influenced by their control over one or more of the branches of government.[314] And due to the combination of polarization and other structural features of our electoral system, parties looking ahead are going to know that they have built-in advantage in certain arenas. For example, under current circumstances the Republican Party might expect to have a persistent advantage in states and the legislative branches, and by contrast—at least under conventional wisdom—a relative disadvantage in presidential contests.[315] In order to decide to get

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311. Keith Whittington, *"Interpose your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 583–84 (2005).

312. *Id.* at 584 ("Political majorities are unlikely to benefit from supporting courts that are ideologically divergent from then and are unlikely often to be able to work in tandem with them to achieve common political goals.").

313. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2312, 2327 (2006) ("When control is divided between parties, we should expect party competition to be channeled through the branches, resulting in interbranch political competition resembling the Madisonian dynamic of rivalrous branches (perhaps even fueling more extreme competition than the Framers envisioned).").

314. Bulman-Pozen has made a similar observation, arguing that political parties will use states as the site of their opposition to federal policy based on their respective control over each. Bulman-Pozen, *supra* note 87, at 1080 ("Put in only slightly caricatured terms, Republican-led states challenge the federal government when it is controlled by Democrats, while Democratic-led states challenge the federal government when it is controlled by Republicans.").

315. *See* Philip Elliott, *How State Races Starting this Fall Will Shape Congress for the Next Decade*, TIME (Sept. 5, 2019), https://time.com/5669522/battleground-states-2019-2020-elections/ [https://perma.cc/356T-MCEW]; Nate Cohn, *Huge Turnout is Expected in 2020. So Which Party Would Benefit?* N.Y. TIMES (July 15, 2019),

behind a judicial challenge, the party must both (1) have a reason for pursuing its claim through this avenue, as compared to through political branches, and (2) have the resources, in terms of control over the relevant institutions, to succeed in such a challenge—which requires, at a minimum, an appointed or ideological majority on the Supreme Court.[316]

In both *NFIB* and *King*, the Republican Party could expect to receive a hearing before a Court that might be at the very least ideologically sympathetic to its claims. It also was unable to pursue its goal through the legislative process—due to Democratic control over, initially (at the time *NFIB* was filed), the presidency and both law-making bodies, and then later (after 2014) over the executive branch.[317] The GOP thus had both a strategic reason (no viable hope for a political branch victory) and the simple most important necessary resource (a Court majority) to pursue its claims through strategic litigation.[318]

But these institutional advantages are very difficult to adjust by parties, especially in the near term. As a consequence, the strategy of partisan constitutionalism will in practice be *available* to only one of the two major parties at any given time (the one with the Court majority, which has been the Republicans since 1971)—and even then will be *strategically attractive* only during periods where the party has insufficient control in the political branches to achieve its goals through that avenue.[319] Like each of the other conditions discussed above, this has the effect of limiting the universe of claims that might be pursued through this strategy. This also helps answer the question of why

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https://www.nytimes.com/2019/07/15/upshot/2020-election-turnout-analysis.html [https://perma.cc/KG63-KYNV].

316. Whittington, *supra* note 311, at 583–84.

317. *See* Elana Schor & Ewen MacAskill, *Congress: Big Democratic Gains put Party in Firm Control After 16 Years*, THE GUARDIAN (NOV. 5, 2008), https://www.theguardian.com/world/2008/nov/06/democrat-gains-congress-senate-elections [https://perma.cc/8A67-EAY8]; Cristian Farias, *The Supreme Court Saved Obama's Legacy. His Legacy Changed the Court.*, HUFFINGTON POST (Jan. 13, 2017), https://www.huffpost.com/entry/obama-supreme-court-legacy_n_58704aafe4b02b5f85890071 [https://perma.cc/V2N2-FK2X]; Dan Roberts, Megan Carpentier, Paul Lewis, Jon Swaine, Ed Pilkington, & Rory Carroll, *Republicans Win Majority in US Senate, Giving Party Full Control of Congress*, THE GUARDIAN (Nov. 5, 2014), https://www.theguardian.com/us-news/2014/nov/04/us-midterm-elections-republican-wins-senate-takeover [https://perma.cc/5AKZ-56VM].

318. *See* Whittington, *supra* note 311, at 583–84.

319. For example, the GOP's control of the political branches between 2000 and 2006 reduced the attractiveness of a Court-focused strategy—which can be difficult to achieve for the reasons noted in the previous two subsections—relative to alternative (and more predictable) avenues for policy change.

partisan constitutionalism has not been deployed as a strategy by both parties in equal measure—as control of the Court has never switched over the entire window of the hyperpolarization era.

IV. INTERACTIONS WITH POLARIZATION AND DIVIDED GOVERNMENT

The last section addresses the question of when we should expect to see parties get behind strategic constitutional challenges, and also indirectly whether this role is common or rare. The conclusion is that the conditions that act to prevent parties from intervening directly in constitutional litigation in the way that they did in *NFIB* are quite restrictive, and thus have the effect of sharply limiting the universe of claims that might be pursued this way. But the question still remains: if this sort of litigation can, in fact, be distinguished from other previous types of popular constitutional change, why are we seeing it only now? I suggest that the answer can be found in the relatively recent rise of political polarization, which makes it increasingly possible to meet the party unity condition for a given issue, as well as the very recent condition of persistent divided government, which has changed the parties' institutional considerations in ways that make this sort of litigation more attractive.

As Daryl Levinson and Richard Pildes have noted, "American political parties today are both more internally ideologically coherent and more sharply polarized than at any time since the turn of the twentieth century."[320] Indeed, the stark—and by some measures, unprecedented in modern history—sorting of the two American parties into completely non-overlapping polarized groups of elected representatives has arguably been the most important secular trend in our politics over at least the past forty years.[321] Responding to this trend, at least under conditions of divided government, legislative gridlock has become the default outcome for almost all areas of policymaking—and political actors have had to shift tactics to achieve not only their ideological goals, but also even the basic end of simple

320. Levinson & Pildes, *supra* note 313, at 233. *See also* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 273 (2011) ("We have not seen the intensity of political conflict and the radical separation between the two major political parties that characterizes our age since the late nineteenth century. Within Congress, the parties have become purer and purer distillations of themselves. The parties are now more internally unified, and more sharply differentiated from each other, than anytime over the last 100 years.").

321. *See generally* Levinson & Pildes, *supra* note 313.

governing.[322] Moreover, this trend is affecting not only federal politics, but also states[323]—contributing to the rise of partisan attorneys general—and even courts themselves.[324]

In particular, rising polarization changes the incentive structure of political actors in ways that make it more likely for such challenges to be initiated. Additionally, where such party-led challenges are attempted, hyperpolarization makes those significantly more likely to be successful.

A. Polarization Increases the Likelihood that Partisan Constitutional Challenges will be Initiated

As Bruce Ackerman and others have noted, parties attempting to initiate fundamental changes will face strong incentives to deny that this is their ambition—that is, they will suppress rather than amplify the signal—and then, to the extent this cannot be denied, attempt to minimize the extent to which the underlying principle is represented as

322. *See, e.g.*, Jack M. Balkin, *The Last Days of Disco: Why the American Political System is Dysfunctional*, 94 B.U. L. Rev. 1159, 1169 (2014) ("Democrats and Republicans have simultaneously become polarized on multiple policy dimensions and multiple policy issues, even issues that ostensibly have little to do with each other. In earlier generations, the Democratic and Republican Party coalitions were cross cutting . . . . These intraparty divisions – and opportunities for cross-party coalitions – have gradually disappeared."); Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC'Y 152, 171 (2010) (describing the "increasing polarization of the two major political parties, which has fostered partisan stalemate even on issues that once featured cross-party bipartisan coalitions"); Drew DeSilver, *The Polarized Congress of Today Has Its Roots in the 1970s*, PEW RES. CTR., (June 12, 2014), http://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/ [https://perma.cc/SJW2-KDF2] ("With Democrats and Republicans more ideologically separated than ever before, compromises have become scarcer and more difficult to achieve, contributing to the current Congress' inability to get much of consequence done.").

323. Richard S. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 823 (2014) ("In state politics, we see a pattern similar to that in Congress. On average, state legislatures are becoming significantly more polarized."). *See also* Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 546–47 (2011).

324. *See, e.g.*, Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 801 n.82 (2006) ("[T]he Court [has become] a more political body than it has ever been—certainly one that the public increasingly recognizes as being political.").

a departure.[325] Ackerman has acknowledged this difficulty in the context of judicial nominations, particularly in light of the New Deal legacy and Reagan's failed Bork nomination[326]—but the same dynamic presents itself no matter what form the attempted amendment takes, whether through judicial appointment or landmark legislation. Indeed, Balkin has suggested that this has been true of most successful constitutional movements.[327]

But what has been less widely noted—and may be of at least equal significance—is that the resisting party often will find it to be electorally beneficial to claim that a fundamental value has been threatened.[328] Indeed, the resisting party will *nearly always* face an incentive to describe the party initiating change as a threat to the current constitutional order—just as assuredly as it will be in the interests of the initiating party to hide rather than announce its constitutional ambitions. One motivation for this, certainly, is to provide pretext for courts to halt the resisted change through judicial intervention. But we should understand that the resisting party also is likely to derive electoral benefit from making this sort of objection—whether or not those objections ever reach any court, and whether or not they represent an accurate characterization of the actual stakes. Political polarization greatly magnifies this dynamic, since the constitutional contest will in all likelihood split the two parties and political actors' electoral threat.

For the past several decades, our two parties have waged repeated high-stakes battles—very frequently citing fundamental values in their appeals—not only in the political arena but also in the courts, both through strategically supported constitutional litigation as well as

325. 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 404 (1998).

326. *Id.* ("Is [the President] embarked on a systematic effort to jolt constitutional law into a new direction? It will often pay for the President to deny this intention even if he harbors it—since it is usually much harder to gain Senate consent for a constitutional visionary than a distinguished professional.").

327. JACK M. BALKIN, LIVING ORIGINALISM 11 (2011) ("Most successful political and social movements in America's history have claimed authority for change . . . either as a call to return to the enduring principles of the Constitution or as a call for fulfillment of those principles. Thus, the key tropes of constitutional interpretation by social movements and political parties are restoration, on the one hand, and redemption, on the other.").

328. *See, e.g.*, ACKERMAN, *supra* note 325, at 385 ("[T]raditionalists looked upon the reformers as cynical demagogues, exploiting a moment of crisis to transform the Constitution in profoundly harmful ways.").

through their approaches to judicial appointments and confirmations.[329] As the parties have moved further apart, every election has become described by the parties (and, therefore, likely seen by voters) as a high-stakes question about the core values of our country.[330]

We have seen this dynamic play out repeatedly in this modern era of polarization. As David Super has pointed out, Democratic attacks on Republican efforts to partially privatize Social Security (under President Bush) and restructure Medicare (under Speaker Paul Ryan) stated their objections in a constitutional register, even though the ongoing existence of these programs is not protected by any recognized or justiciable right.[331] Meanwhile, Republican attacks on the ACA went beyond mere intimation to make explicit, coordinated constitutional claims—vindication of which was then pursued through waves of strategic constitutional litigation, very nearly culminating in the law's undoing.[332] It made little difference that the constitutional claims started as off-the-wall: it was in Republicans' interest, both for the purposes of the anticipated litigation *and also electorally*, to portray the landmark statute as implicating fundamental values.[333]

B. Where Party-Led Challenges are Initiated, Polarization Increases the Likelihood that They Will Succeed

Polarization and divided government do not just change the incentives faced by political actors to state their policy objections in the constitutional register, they also make partisan constitutional challenges more powerful—and increase the likelihood that they will be successful.

329. See Stephen L. Carter, *Why the Confirmation Process Can't Be Fixed*, 1993 U. ILL. L. REV. 1, 8–11, for a discussion of the politicization of judicial confirmations, enforcing political values and policy preferences over constitutional and legal arguments.

330. *See generally* Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 80–81 (2004) ("That value and ideological judgments are often inextricably bound up with even seemingly objective determinations concerning matters of fact is undoubtedly true. . . . The question is not whether some neutral means . . . can be brought to bear on the design of districts or other aspects of elections. The question is whether intermediate institutions, designed in particular ways, are likely to handle these tasks better than self-interested partisan actors inevitably seeking entrenchment of both themselves and their parties.").

331. *See* Super, *supra* note 32, at 889–90.

332. *See id.* at 890–91.

333. Of course, there is a good case to be made that Obamacare did indeed represent a fundamental transformation of our public law. *See id.* at 891. But the key point here is that the incentives faced by the Republican Party did not turn on the accuracy of those objections.

Recall that the two major impediments preventing parties from playing the sort of role that they played in the ACA cases are that they must have both (1) unity, both internally and across outside groups, behind the immediate material goal of the legislation, and (2) a majority on the court.[334] One of the most important consequences of these polarization trends is that the first condition will be met on increasingly more constitutional questions—indeed, it may now be the rare contested political issue where this unity condition is *not* met, at least with respect to the parties' symbolic agendas.

In order to initiate such a legal challenge, all that is required (in terms of institutional control) of a major party—one that will always have at least some control of House and Senate seats and state attorneys general—is that it has a majority on the Court. This is because there will always be at least *some* state attorneys general and members of Congress in office from both parties, even after a series of electoral wipeouts—and for so long as at least some members from the losing party remain that will be sufficient to take advantage of these mechanisms.

These trends also provide an explanation for why we have not seen parties play this role over the course of our history: the condition that allows them to do so (near-perfect internal unity) has been met for contested policy and constitutional questions only in recent years.[335] Moreover, the entire period over which this has been true has coincided with a conservative majority on the Court—helping to explain why this strategy has not thus far been used by the Democratic Party to advance progressive claims.[336]

Of course, meeting the party unity requirement is only a necessary condition, and does not mean that the party will opt to play this role (since it always retains the option of cheering on private litigants from the sidelines). Among other factors, the other two conditions identified here will limit the universe of potential claims. This includes control over our various institutions, which can change every few years.[337] And

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334. *See* John M. Carey, *Competing Principals, Political Institutions, and Party Unity in Legislative Voting*, 51 AM. J. POL. SCI. 92, 104–05 (2007); *see also* Richard L. Hasen, *End of the Dialogue? Political Polarization, The Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 205–10 (2013).

335. Hasen, *supra* note 223, at 209 (discussing the recent phenomenon of partisan overriding, requiring unity across political branches).

336. *See id.* at 242–44.

337. As Pildes has noted, the consequences of polarization "will depend on whether government is unified, with one party controlling the House, Senate, and Presidency, or divided, with different parties each controlling at least one of these

at the same time, the healthcare cases could be read as suggesting that this trend may already have reached its peak—that *NFIB*, in addition to being the best example of how parties may play this role, also was and will remain for some time the closest a minority party has come to undoing, through strategic constitutional litigation, a major loss in the political branches.[338] But intervening political events over the past few years suggest that there is at least an equal chance that this sort of legal challenge may soon become the new normal.

In this modern era, our politics have been characterized by the combination of persistent party polarization and divided government—and in particular, split advantage between the political and judicial branches. This paper raises the possibility that for so long as this underlying dynamic persists, we should expect that *every* major policy achievement will be subjected to legal challenges that receive some form of support from the opposing party. And when the party that has lost in the political branches benefits from a continuing majority on the Court (as the Republican Party does now), then we should expect *every one* of those challenges to receive a favorable hearing before its appointed judges—no matter how novel the legal theory, or unfavorable the underlying facts or procedural posture.

In those conditions, observers should not assume that the success of any legal argument that has been strategically adopted by an entire political party—when deployed against a major policy achievement of the opposition—will depend mainly on historical precedent. And they should not be surprised when off-the-wall arguments ultimately are accepted by judges and justices who have been selected for their lifetime appointments at least in part because of their demonstrated hostility to the policy goals of the opposition party.

V. IMPLICATIONS FOR ROLE OF THE COURT

As described above, partisan constitutional challenges often spillover from losses in the political branches, and thus challengers—

institutions." Pildes, *supra* note 323, at 325. *See also* Levinson & Pildes, *supra* note 145, at 2332 ("The consequences of whether government is unified or divided depend crucially on the internal ideological coherence of and political distance between the two major parties. Significantly . . . [this depends] on the internal ideological coherence of and political distance between the two major parties.").

338. Balkin, *supra* note 20 ("In *King v. Burwell*, the Court sent a signal to the political branches: Don't try to uproot the ACA through technical legal arguments designed to throw sand in its gears. . . . If you want to change health care policy, do it through . . . democratic politics. If you can't manage to do that, then you had better get used to the idea of universal health care in the United States.").

rather than seeking transformational revisions of *constitutional* doctrine—will often advance narrow legal claims that target a particular *policy* outcome.[339] Under hyperpolarization and divided government, there will be a tendency for every political issue to be constitutionalized in this manner—not just rhetorically but also in practice, through strategic judicial challenges that attempt to relitigate political debates on a more favorable battleground.[340] This fundamentally changes the role of the judiciary, which will tend to function—and thus be seen (and treated) by political actors—as a new institutional veto point for the political process.

The effects of this can be observed in the unprecedented standoff over the vacancy that was created by Justice Scalia's death. As Ferejohn has observed, "When courts can make politically consequential and more-or-less final decisions . . . those interested in judicial decisions have reason to seek to influence and, if possible, to control appointments to the courts and other legal institutions."[341] Consider in this context a recent plea by Hugh Hewitt, a prominent conservative commentator, who urged his fellow Republicans to support the presidential nominee, despite acknowledged (from Hewitt's perspective) flaws.[342] In his insistence that a liberal Supreme Court majority would nullify the entire conservative agenda, Hewitt perfectly captures the stakes of partisan constitutionalism: "Every issue, EVERY issue, will end up there, and the legislatures' judgments will matter not a bit."[343] A similar assessment from the former House Speaker John Boehner highlighted the ways that this emerging dynamic is a function of the trends towards hyperpolarization and divided government:

> The legislative process, the political process, is at a standstill and will be regardless of who wins [the 2016 presidential election] and the only thing that really matters over the next four years or eight years is who's going to appoint the next

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339. Levinson & Pildes, *supra* note 313, at 2357 ("Congress delegates not to abnegate policymaking responsibility, but to maximize accomplishment of its policy goals.").

340. Hasen, *supra* note 334, at 211 (explaining that the strict requirements that must be met to overturn a ruling "usually leaves the Court's constitutional decisions standing").

341. Ferejohn, *supra* note 40, at 63–64 ("In this sense, 'judicialization' of politics tends to produce the politicization of courts.").

342. Hugh Hewitt, *It's the Supreme Court, Stupid*, WASH. EXAMINER (July 31, 2016, 5:00 PM), https://www.washingtonexaminer.com/its-the-supreme-court-stupid [https://perma.cc/LK3Z-DECM].

343. *Id.*

> Supreme Court nominees. . . . because more and more issues [that] can't be dealt with legislatively are going to end up in the court system.[344]

Balkin has argued that sustained political dysfunction in moments of constitutional regime change (including, in his view, the present) empowers an active judiciary: "[t]he expansion of judicial review is overdetermined because judges appointed by the older dominant party, late in the regime, will tend to push the jurisprudential envelope."[345] He connects this to the sort of shift we saw in both ACA challenges, arguing that "[c]ourts behave this way . . . because as the regime progresses, members of the dominant party will increasingly turn to their allies on the courts to promote their agendas."[346] But this paper suggests that these dynamics may present themselves not only during moments of regime change, but rather—under the condition of hyperpolarized politics—may trend towards a new normal.

In addition to changing the Court's role in our politics, partisan constitutionalism also challenges many of the normative claims that have been made in defense of democratic constitutional change. In particular, partisan constitutionalism—unlike the other primary informal amendment mechanisms available to parties, namely judicial appointments and landmark legislation—allows parties to advance novel constitutional claims through strategic litigation even where they control neither the presidency nor either chamber of Congress. This stands in contrast to other successful social movements—such as those advancing the rights of women and gays—where popular constitutionalism changes proceeded alongside, and in complement to, contemporaneous political changes.[347]

Indeed, one implication of the unity condition is that a minority party that is internally unified around a given claim, however far it may be from the mainstream, could well expect to be more successful in this

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344. Anna Giaritelli, *Former Speaker John Boehner is Standing by Trump for This One Reason*, WASH. EXAMINER (Oct 12, 2016, 8:33 PM), http://www.washingtonexaminer.com/boehner-is-standing-by-trump-for-this-one-reason/article/2604430 [https://perma.cc/HJ4Y-P8V6].

345. Balkin, *supra* note 322, at 1196.

346. *Id.* at 1197 ("Positions that before had seemed unthinkable or 'off the wall' now become thinkable, especially as the courts are increasingly stocked with true believers who take these claims seriously.").

347. Super, *supra* note 32, at 884 (explaining that for a constitutional moment to occur, one factor is that "the proposed constitutional change must receive unusually broad public deliberation," which, among others, "provide[s] a means of weighing competing policies and a way of building legitimacy for the choices ultimately made").

sort of challenge, compared to a larger coalition-based party that is unable or unwilling to fully get behind a given constitutional claim. Thus, it may be *more likely* that parties will pursue this strategy where they have failed to secure control of the political branches at the federal level—raising important questions about the democratic legitimacy of these party-supported challenges.

CONCLUSION

Americans are taught that our political system is governed by fixed rules that distribute power among its actors and across its institutions. In fact, these rules often presume adherence to variable norms of governing behavior—and thus can be set aside by political actors who are willing to deviate from such precedents to advance their agendas. Various recent developments have highlighted the many ways in which longstanding assumptions about the nature of our legal and political systems are vulnerable to shifting political tactics.[348] Although these changes can be hard to identify in real time, failing to understand them—and the implications that predictably follow—will significantly limit observers' ability to make accurate predictions about the world.

And indeed, legal scholars—accustomed to the old rules—have repeatedly been surprised by the trajectory and outcome of recent partisan constitutional challenges, above all the two healthcare cases.[349] Famously, the legal academy—looking to existing precedent and the other factors that normally determine major cases—assumed from the outset that both *NFIB* and *King* represented frivolous challenges that would not advance far.[350] The outcomes of judicial challenges to other recent legislative and executive actions—such as the Court's decision to stay the Clean Power Plan in response to a similar state-led challenge, even before any lower court had reviewed the action—likewise have

348. *See, e.g.*, Balkin, *supra* note 322, at 1169–70 (discussing the polarization of the political parties in recent years); *see also* Pildes, *supra* note 330, at 31 ("[T]he last generation has also witnessed a dramatic, but largely unappreciated, transformation in constitutional law. This transformation is most acute in the United States Supreme Court . . . . [I]n American constitutional law, political parties now have broader associational autonomy rights than ever before.").

349. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *King v. Burwell*, 135 S. Ct. 2480 (2015).

350. *See, e.g.*, Jeffrey Toobin, *Hard Cases*, The NEW YORKER (Mar. 1, 2015), https://www.newyorker.com/magazine/2015/03/09/hard-cases-jeffrey-toobin [https://perma.cc/2ZDG-2A8P].

surprised many observers.[351] Similarly, many scholars failed to foresee the possibility that every single Republican senator might agree to refuse holding any hearings on President Obama's nomination of a relatively moderate and objectively qualified appellate judge for an open Supreme Court seat.[352]

I argue here that these developments are connected—that they result in part from the nature of partisan constitutionalism, and specifically the coalescing view among political actors that courts can be called upon (by those actors) to serve as a final veto point following the conclusion of legislative battles. Political actors—particularly where they are able to coordinate, through our party system, and act together in relative unison—possess unique advantages in initiating and supporting legal challenges, beyond what is available to private litigants and social movements. This dynamic continues to be underexplored in academic literature, despite its ability to explain the speed at which a number of prominent recent claims have come to be accepted by courts—as well as the changing politics of judicial appointments. Just as scholars of legislation have worked to revise longstanding assumptions about the legislative process to account for the new ways that parties are using old rules, so must scholars of constitutional change revisit existing narratives in light of the judiciary's emerging role as a quasi-legislative branch.[353]

This paper explains that shift and lays out a framework for understanding this new set of rules. In doing so, this account contributes to the literature exploring how certain contested claims come to be accepted in our constitutional system. Scholars have long understood that political parties play an important role in shaping our constitutional culture over the long arc of history, most obviously through judicial appointments but also by participating in the shaping of

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351. Jonathan H. Adler, *Supreme Court Puts the Brakes on the EPA's Clean Power Plan*, WASH. POST (Feb. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan ("The Supreme Court's decision comes as a surprise, as it is unusual for the high court to block federal regulations, particularly where (as here) the D.C. Circuit had denied a similar request.").

352. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 364.

353. Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 695 (1999) ("[I]n recent years, for a variety of reasons, the appropriate roles of the three constitutional branches have become increasingly more difficult to define. In the judicial branch, judicial activists of both the left and right have emerged; many judges see themselves as quasi-legislators . . . .").

public opinion and passing legislation affecting the scope of our fundamental commitments.[354] I use the two healthcare challenges to show that our two competing political parties—and not just the coalitions and broad social movements that support them—can help shift the scope of our constitutional and policy commitments also in the very short run, via their strategic support for high-stakes litigation.

Parties will not always play a leading role in supporting litigation-driven constitutional change, or even be directly involved in the process where it is attempted. But the healthcare cases show that when they do, they have a unique ability to accelerate the speed at which novel claims may become accepted by courts. Understanding how parties play this role is pressing, because this type of litigation appears to be becoming an increasingly frequent occurrence—made both more attractive and feasible by the background condition of hyperpolarization and divided government that uniquely characterizes our modern politics. This trend has profound implications for our courts and our politics, challenging existing assumptions about what pathways are available to political actors aspiring to achieve (or prevent) fundamental change.

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354. Balkin & Levinson, *supra* note 36, at 30–32 (discussing how social movements affect political parties, thereby influencing both judicial appointments and public opinion).