

**Letting Congress Be Congress: A Comment on
*Tiers of Scrutiny in Enumerated Powers
Jurisprudence***

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INTRODUCTION

When I entered legal academia more than twenty years ago, most constitutional scholars had very little to say about Congress. An especially popular subject was the Supreme Court's power of judicial review,¹ particularly the development of theories of constitutional interpretation that the Supreme Court could follow to solve the late Professor Alexander Bickel's famous countermajoritarian dilemma, the problem of unprincipled judicial interference with legislative or democratic actions.² Although in subsequent years Congress or the legislative process has become a more popular subject of academic discourse, constitutional scholars have tended either to denigrate Congress (often as the most dysfunctional branch) or to support more rigorous judicial review of legislative action.³

Professor Aziz Huq of the University of Chicago Law School, to his credit, has chosen a different path. In his recently published article, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, Professor Huq has proposed a sophisticated theory of judicial review that asks the Supreme Court in effect to allow Congress to be Congress.⁴ He argues that the Supreme Court's

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¹ For an overview of the arc of legal scholarship throughout the twentieth century, see generally Michael J. Gerhardt et al., *Constitutional Theory: Arguments and Perspectives* 6–12 (LexisNexis 4th ed 2013).

² See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–23 (Bobbs-Merrill 1962).

³ See, for example, *Symposium: The Most Disparaged Branch: The Role of Congress in the Twenty-First Century*, 89 BU L Rev 331, 332–33 (2009).

⁴ See generally Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U Chi L Rev 575 (2013).

“enumerated powers jurisprudence” has no principled basis in the Constitution; allows the Court to manufacture or manipulate, without good reason and with often quite negative consequences, various tiers of scrutiny; and is essentially a means or cover for judicial policy making.⁵ As an alternative to the Court’s manipulative doctrine, he suggests a “lockstep” approach requiring the Supreme Court to “jettison its use of discontinuous tiers of scrutiny and instead deploy a unitary standard of review for all of Congress’s enumerated powers.”⁶ This different approach “would force the Court to confront directly the question of how to calibrate the federal-state balance. No less importantly, it would require the justices to make clear their own responsibility for setting this balance—or, alternatively, their acquiescence in whatever equilibrium is set by the political process.”⁷ His lockstep approach would require the Supreme Court, in other words, to forge whatever balance between the federal and state government that it prefers “plainly, openly, and across-the-board. If indeed there is a new balance to be struck between the federal government and the states, the justices would have to announce it frankly, publicly, and without occluding subterfuge or camouflage.”⁸ Huq explains further that “[e]liminating discontinuous scrutiny in enumerated powers jurisprudence would hence yield gains denominated in judicial candor.”⁹ Rather than have the Supreme Court continue to develop multiple standards of review for different congressional powers, his uniform standard “would inject a healthy transparency into judicial action and thereby open a more candid conversation about the role that the Court properly plays in crafting boundaries on federal regulatory power in the twenty-first century.”¹⁰

There is much to admire in Professor Huq’s analysis. He offers an insightful explication and critique of the Supreme Court’s landmark decisions in several fields that ought to be familiar to every law student, including the Commerce, Spending, and Taxing Powers. His focus is carefully circumscribed but his objectives are huge—including, *inter alia*, eliminating legislative arbitrage and facilitating greater judicial clarity, coherence, and

⁵ *Id.* at 652–53.

⁶ *Id.* at 655.

⁷ *Id.* at 655–56.

⁸ Huq, 80 U Chi L Rev at 655 (cited in note 4).

⁹ *Id.*

¹⁰ *Id.* at 656.

candor.¹¹ His goals are, of course, laudable, and his proposed lockstep, or single, uniform standard for the Supreme Court to use in reviewing the constitutionality of statutes bearing on federalism (federalism enactments) is intriguing and seems well designed to achieve its stated objectives. Students and others interested in constitutional law can learn a great deal about the difficulties arising from the Court's federalism jurisprudence—particularly recent, controversial decisions—from Professor Huq's unique, critical, and illuminating analysis of the Court's decisions shaping the balance of power among the Court, the states, and Congress.

Nonetheless, I argue in this Essay that both Professor Huq's descriptive and normative analyses raise some serious questions, which risk undermining the utility, coherence, and appeal of his project. Most importantly, he weaves a theory about the relationship between the Supreme Court and Congress that artificially, and without good-enough reason, excludes substantial relevant constitutional activity. It does not include any institutional, or other, empirically sound, account of either the legislative or judicial branch, including Congress's capacity to engage in principled constitutional interpretation. Further, the enumerated powers jurisprudence that he describes is, as he acknowledges, an artificial construct at best. The problem is that the narrow focus of his critique is itself artificial and fails to take into account substantial portions of other doctrines and congressional decision making. There are many more cases—and far more congressional exercises of power—that he could have included in his analysis but did not. The case law he reviews involves merely a relatively small fraction of Congress's exercises of its enumerated powers. (Indeed, one may ask, isn't everything Congress does an exercise of some enumerated power? If so, nothing Congress does can be excluded sensibly from a theory of constitutional interpretation aimed at guiding both the Supreme Court and Congress.) His theory of the relationship between Congress and the Court aims to do nothing less than allow Congress to be Congress—to be freed from any judicially imposed expectations about what it can or should do when exercising its own powers—though it curiously lacks an inquiry into, much less any grounding in, an empirically sound, positive conception of what Congress actually does when it exercises its

¹¹ See *id.* at 653–55.

enumerated powers. Professor Huq's conception of Congress, such as it is, is largely taken from the Court's perspective (or the perspectives of some theorists interested in reshaping how the Court perceives the legislative process) and thus misses a great deal of what is relevant to consider when contemplating how best the Court should allow Congress actually to be Congress.

I am confident that, with his formidable analytical skills, Professor Huq could easily develop such an understanding (and critique) and that, unlike many other academics, he is aware of the risks of trying to understand Congress solely through the Court's doctrine or perspective. It is a good thing that Professor Huq's article does not follow the long, misguided path of scholarship nurturing the myth of the Supreme Court,¹² but it unfortunately fails to consider the institutional consequences of his suggested approach for both the Court and Congress. It is hard, if not impossible, to see how his asking the Court not to bother with analyzing either the grounds for congressional decision making or the scope of particular legislative powers will improve our jurisprudence or avoid producing the opposite, more dangerous consequence of allowing the Court more opportunity to construct whatever narrative of the legislative process it wishes. Professor Huq's prescriptions would, for instance, provide the Court with substantially more space to invent whatever narrative of the legislative process that it prefers, regardless of whether it is consistent with what is actually happening on the ground. Moreover, his proposal would probably produce even more aggressive inquiries from senators into the constitutional ideologies and philosophies of prospective judicial nominees in order to be convinced about how these nominees would handle reconstructing the legislative process in the absence of any doctrinal mandate to do so. While Professor Huq might prefer for this kind of change to occur, it would expose the relationship between what the Court does and how Congress responds, which is a fundamental aspect of federalism that Professor Huq largely ignores.

In just the few months since the publication of Professor Huq's article, Congress had monumental debates over the debt

¹² For one of the first and most important works challenging the widespread presumption that the Supreme Court wields the most power in shaping constitutional law, see generally Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago 2d ed 2008).

ceiling¹³ and the filibuster¹⁴—neither of which directly affects federalism but both of which courts are unlikely ever to review. Further, these two disputes involve the exercise of enumerated powers with enormously significant constitutional consequences, including some for the states. As these examples illustrate, enumerated powers extend well beyond those with immediate consequences for federalism—including, but not limited to, individual rights and separation of powers. Whatever theories that Professor Huq—and others—develop about the proper boundaries between the Court and Congress cannot sensibly be limited only to the small set of issues the Court chooses to review. They should be informed by what we can learn from the exercise of the full array of congressional powers, as well as the extent to which, if at all, Congress approaches, or exercises, powers subject to judicial review any differently than those it exercises without the prospect of judicial review. This is especially true since Professor Huq’s solution is to require that *all* these activities be treated the same by the Court.

This Essay proceeds in four parts. After describing Professor Huq’s article in more detail in the first Part, I consider in each of the next three Parts different problems with his analysis. Part II challenges the assumption of his article that there actually is something that can be fairly described as the Court’s enumerated powers jurisprudence doctrine. I suggest that, in all likelihood, there is none. While Professor Huq is surely correct that the Court uses different tiers of scrutiny in analyzing the exercises of different congressional powers, it is largely a fiction to maintain that the Court has fashioned a settled body of law on Congress’ exercises of its so-called enumerated powers. On one level, one could argue that virtually every time the Court reviews a congressional action some enumerated power is involved, in which case it does not make sense to limit the jurisprudence to enactments impacting federalism. On another, more fundamental level, the Court’s decisions addressing questions

¹³ See, for example, Kenneth Rogoff, *US Debt Ceiling Debate Reflects a Troubling Constitutional Power Struggle*, Project Syndicate Economists (The Guardian Oct 2, 2013), online at <http://www.theguardian.com/business/2013/oct/02/us-debt-ceiling-constitutional-power-struggle> (visited Feb 17, 2014).

¹⁴ For just one example of the longstanding debate among legal scholars about the constitutionality of the filibuster, see generally Josh Chafetz and Michael J. Gerhardt, Debate, *Is the Filibuster Constitutional?*, 158 U Pa L Rev PENNumbra 245 (2010), online at <http://www.pennlawreview.com/online/158-U-Pa-L-Rev-PENNumbra-245.pdf> (visited Feb 6, 2014).

about the constitutionality of exercises of particular enumerated powers are less about actually enumerated powers and much more about legislative ends or objectives that are not explicitly expressed in the Constitution. This is true not just with respect to federalism enactments but with virtually everything else the Court ever reviews that Congress has done.

In Part III, I suggest that Professor Huq's focus on multiple tiers of scrutiny in enumerated powers cases should be measured as an alternative against a longstanding way in which legal scholars, among others, have analyzed congressional decision making within the Court. This way has been to analyze the Court's decisions in terms of formalism and functionalism. One thing to consider is whether Professor Huq's analysis offers a better way to understand the decisions on legislative powers (or federalism) than either or both of these two standard models.

In the fourth and final Part, I consider several significant questions about Professor Huq's lockstep approach. Among these is how he can offer such a theory—requiring the Court to review any congressional action as if it were the product of Congress's exercise of its full array of its powers—without examining or explicating most of what Congress actually does, including the possible connections (or differences) among its various attempted and other kinds of legislative action. There are many congressional actions that are not subject to judicial review but that have devastating consequences for the balance of power between Congress and the states (as well as between the Court and other branches). His framework does not consider the relevance of all these legislative actions, their consequences for figuring out the boundary between the Court and Congress, or the need for judicial review given Congress's capacity (or lack thereof) for principled constitutional interpretation. His theory supports whatever view the Court itself chooses to adopt about Congress or what it does, but we are given no metric to determine whether it is analytically or doctrinally sound or correct. Professor Huq's goals include, among others, facilitating judicial candor, but not an accurate or comprehensive understanding of Congress. Hence, his framework comes at the cost of reinforcing the myth that the Court is supreme when it comes to constitutional interpretation, that the Court's views about the Constitution are the only ones that do or should matter in constitutional law. Professor Huq appears, in other words, to accept a Court-centric view of constitutional law. Doing so, even if it is an exercise in candor, comes

at a price: It undermines our understanding of Congress. It exacerbates the consequences of the longstanding failure of the legal academy to develop a sound, positive conception of Congress's institutional capacity for constitutional decision making that is based on what Congress does rather than the justices', or even academics', perceptions of it. Because Professor Huq has taken the Court's focus as his own, he misses, and thus does not take into account, the critical fact that enumerated powers are the source and foundation of everything that Congress does.

I. THE FRAMEWORK OF TIERED SCRUTINY IN THE COURT'S ENUMERATED POWERS JURISPRUDENCE

In 2011, the Supreme Court split sharply over the appropriate standards of review in cases decided under the Commerce Clause,¹⁵ the Taxing Power,¹⁶ the Spending Power,¹⁷ § 5 of the Fourteenth Amendment,¹⁸ and the Copyright Clause.¹⁹ In *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, Professor Huq analyzes the standard of review used under these enumerated powers.²⁰ He does so by viewing the constraints on enumerated powers through the lens of federalism.²¹ For purposes of his article, Huq assumes that the Necessary and Proper Clause applies uniformly to all of the enumerated powers.²²

Under the Commerce Clause, the changing standard of review became particularly evident during the New Deal era.²³ First, *NLRB v Jones & Laughlin Steel Corp*²⁴ held that congressional regulation of interstate commerce could withstand constitutional scrutiny if it was merely "appropriate" and not "essential."²⁵ A few years later, *Wickard v Filburn*²⁶ applied an

¹⁵ Compare *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2585–93 (2012) ("The Healthcare Cases"), with id at 2615–26 (Ginsburg concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁶ Compare id at 2593–2601 (Roberts), with id at 2650–55 (Scalia dissenting).

¹⁷ Compare id at 2601–09 (Roberts), with id at 2629–42 (Ginsburg concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁸ Compare *Coleman v Court of Appeals of Maryland*, 132 S Ct 1327, 1333–35 (2012) (Kennedy), with id at 1339–50 (Ginsburg dissenting).

¹⁹ Compare *Golan v Holder*, 132 S Ct 873, 878, 887–89 (2012) (Ginsburg), with id at 899–904 (Breyer dissenting).

²⁰ See Huq, 80 U Chi L Rev at 584–86 (cited in note 4).

²¹ See id at 584.

²² Id at 588.

²³ See id at 590–92.

²⁴ 301 US 1 (1937).

²⁵ Huq, 80 U Chi L Rev at 591 (cited in note 4), citing *Jones & Laughlin*, 301 US at 37.

²⁶ 317 US 111 (1942).

extremely deferential rational basis standard, thus expanding Congress's power under the Commerce Clause.²⁷ Over time, the Court allowed a looser nexus between the regulated subject and interstate commerce.²⁸ The Court altered the standard of review again by conditioning rational basis review on the commercial or noncommercial nature of the subject of the regulation.²⁹ Most recently, in the challenge to the Patient Protection and Affordable Care Act,³⁰ Chief Justice John Roberts focused on the scope of the powers exercised, instead of whether there was a nexus, meaning he did not apply traditional rational basis scrutiny.³¹

Next, Professor Huq examines the standards of review applied in cases under the Spending and Taxing Powers. Though the Court has not enforced direct limits on the Spending Power, it has used the "notice" requirement to demand an increasingly close nexus between legislative process and policy outcomes.³² On the other hand, the Taxing Power entails first-order rules for Congress instead of the standard of review.³³ Without a change in its standard of review, Professor Huq believes it is unlikely the Court will be able to apply a meaningful limit to Congress's Taxing Power.³⁴

Professor Huq explains that, under § 5 of the Fourteenth Amendment, the standard of review in the case law has changed from a "weak form of rationality review" to a closer form of scrutiny based on the "congruence and proportionality" of a federal law to the problem addressed.³⁵ The change was significant for two different reasons: first, the Court must now determine "the scope of the constitutional right at issue," and, second, the court has increased Congress's burden of proof.³⁶

Finally, the Supreme Court's deference to Congress under the Intellectual Property Clause is distinguished from the closer scrutiny used for other enumerated powers.³⁷ In fact, the Court

²⁷ Huq, 80 U Chi L Rev at 591–92 (cited in note 4), citing *Wickard*, 317 US 111.

²⁸ Huq, 80 U Chi L Rev at 592 (cited in note 4).

²⁹ *Id.* at 593–95.

³⁰ Pub L No 111-148, 124 Stat 119 (2010), codified in various sections of Title 42.

³¹ Huq, 80 U Chi L Rev at 595 (cited in note 4).

³² *Id.* at 598–99.

³³ *Id.* at 601.

³⁴ *Id.* at 602.

³⁵ Huq, 80 U Chi L Rev at 604–06 (cited in note 4), quoting *City of Boerne v Flores*, 521 US 507, 520 (1997).

³⁶ Huq, 80 U Chi L Rev at 606–07 (cited in note 4), quoting *Board of Trustees of the University of Alabama v Garrett*, 531 US 356, 365 (2001).

³⁷ Huq, 80 U Chi L Rev at 609 (cited in note 4).

expressly rejected using the congruence and proportionality test that it used in other contexts, such as judicial challenges involving § 5 of the Fourteenth Amendment.³⁸

The Supreme Court's different tiers of scrutiny under different enumerated powers have had bad consequences for Congress and the courts. First, Congress may engage in "legislative arbitrage" by strategically creating laws under one enumerated power instead of another in order for the act to be constitutional.³⁹ Since the burden of evidentiary production for Congress is different under different powers, Congress may be barred from enacting the same statute under different enumerated powers based only on the record.⁴⁰ Further, he suggests, Congress does not always acknowledge the specific power(s) it is exercising.⁴¹ This puts invalidation largely outside of legislative control, making congressional action less likely, thus further hindering the democratic process in exchange for judicial convenience.⁴² For the judiciary, different standards allow the courts to decide whether a law is valid based on the enumerated power the court chooses.⁴³ Judges have more flexibility to conform their decisions to their personal opinions and not to what Congress has actually done.⁴⁴

Professor Huq examines but rejects six possible justifications for the Supreme Court's current tiered framework.⁴⁵ First, he argues that the text of the Constitution supports a single standard of review, rather than multiple ones, because the Necessary and Proper Clause "provides a broad and uniform gloss" across all legislative powers.⁴⁶ Though some argue that judicial scrutiny should be more demanding when the end Congress is empowered to promote is constitutionally, not exogenously, defined, he maintains that it is difficult, if not impossible, to make a clear, principled distinction among such powers.⁴⁷ Huq doubts that Congress's choice of one enumerated power over another carries a special weight or meaning such that it compromises

³⁸ Id at 610, citing *Eldred v Ashcroft*, 537 US 186, 218 (2003).

³⁹ Huq, 80 U Chi L Rev at 614 (cited in note 4).

⁴⁰ Id at 615–16.

⁴¹ Id at 616–17, 619–20.

⁴² Id at 617.

⁴³ Huq, 80 U Chi L Rev at 619 (cited in note 4).

⁴⁴ Id at 622.

⁴⁵ Id at 626.

⁴⁶ Id at 626–27 (emphasis omitted).

⁴⁷ Huq, 80 U Chi L Rev at 629–30 (cited in note 4).

the Constitution under one power but not the other.⁴⁸ Third, he argues that federalism is not a good reason for divergent standards because it assumes that the judiciary can identify where states are most vulnerable to interest groups and that the courts will be out of reach of those interest groups.⁴⁹ Moreover, he notes that the Court has never explained why some of Congress's enumerated powers are a greater risk to federalism values than others.⁵⁰ Next, he argues that, since the Constitution protects many forms of liberty in addition to individual liberty, tiers of scrutiny should not be special for individual liberty.⁵¹ Lastly, he observes that, though changes in standards of review could reflect changes in substantive standards, the judiciary does not balance the two.⁵²

Professor Huq concludes that “there is simply no sound justification for tiered review in enumerated powers jurisprudence.”⁵³ He urges reform in judicial review by requiring powers to move in lockstep.⁵⁴ He argues that this would result in a more open judicial decision-making process.⁵⁵ As a result, the Court would have to directly face the question of how to define the balance of power between the federal government and the states.⁵⁶

II. THE FICTION OF ENUMERATED POWERS JURISPRUDENCE

Professor Huq may well be correct about the incoherence and arbitrariness of the Supreme Court's “enumerated powers jurisprudence,” but for reasons that go well beyond his analysis. To begin with, his argument that the doctrine is arbitrary can be extended much further. The scope of that doctrine is subject to the Court's arguably arbitrary deployment of other doctrines, such as standing. It could expand or contract, often at a moment's notice. For years, the Court did not review disputes involving the Second Amendment or recess appointments, but now it has done so.⁵⁷ Yet, these disputes involve interesting questions

⁴⁸ Id at 632–33.

⁴⁹ Id at 644.

⁵⁰ Id at 647.

⁵¹ Huq, 80 U Chi L Rev at 648–50 (cited in note 4).

⁵² Id at 650–52.

⁵³ Id at 653.

⁵⁴ Id at 653–55.

⁵⁵ Huq, 80 U Chi L Rev at 655 (cited in note 4).

⁵⁶ Id at 655–56.

⁵⁷ See generally *District of Columbia v Heller*, 554 US 570 (2008); *NLRB v Noel Canning*, Docket No 12-1281 (2014).

about enumerated powers. If the scope of judicial review is not fixed but can move, then it's a mistake to take as a given whatever falls inside of it at a particular moment in time. If other things can be included, then why not include them all in the analysis?

The larger point is that it is arbitrary to define the scope of the jurisprudence as narrowly as Professor Huq does. Enumerated powers are involved any time Congress acts. This is true even with Professor Huq's own analysis, in which he maintains that it should not matter to the Court (or apparently to us) what powers Congress has attempted to exercise in any given case. Congress does not merely use its enumerated powers when it is regulating federalism but also in everything else it does, including, but not limited to, the realm of separation of powers. For example, conflicts between Congress and the president involve basic questions about the enumerated powers of either or both branches, only some of which are subject to judicial review. Why not include those not subject to judicial review in the same analysis? Indeed, every area of constitutional law that the Court does not review involves, at least arguably, the exercise of some enumerated power. While Professor Huq leaves many of these out of his analysis because they are not subject to judicial review, they nonetheless involve questions about the scope of enumerated powers. He has cut an extensive swath of constitutional law out of his analysis because it is not (currently) subject to judicial review, but this raises the question of why not treat *all* instances involving, or questions about, the scope of enumerated powers the same. The Constitution does. Indeed, that seems to be Professor Huq's point—namely, that they all should be treated the same; in other words, one size (or one standard) should fit all.⁵⁸

⁵⁸ The failure to include in this analysis other constitutional disputes involving enumerated powers exposes some other possible fundamental problems with Professor Huq's focus. First, his ignoring disputes involving enumerated powers but not subject to judicial review underscores that his principal concern is with the Supreme Court, rather than Congress or even with the scope of legislative powers. Congress seems to be merely an afterthought in his analysis. While he discusses the Spending Power, it is only in contexts that are subject to judicial review and, even then, only with respect to federalism and not other equally relevant deployments. For example, the dispute over the debt ceiling involves an exercise of an enumerated power—the same Spending Power that he discusses in other contexts—but he ignores it outright because the Court has not yet reviewed a dispute over the debt ceiling and because it does not directly affect or involve the states. Yet, the dispute clearly has ramifications for states (think about the ramifications of the federal government's shutdown for the states and the people who live in

To be sure, Professor Huq explicitly rejects that he is addressing any larger questions or areas of constitutional activity. He describes his project as “narrow” and steadfastly maintains that he is not attempting “to resolve the question whether the federal government should be subject to across-the-board, exacting limitations to preserve federalism values and individual rights, or whether it should be given more leeway.”⁵⁹ He acknowledges that

[t]he appropriate scope of federal power is a large, controversial question. Judges and commentators have weighed in on both sides from the dawn of the Republic onward No one new law review article can decide what boundaries are appropriately limned to circumscribe federal legislative power. It would be hubris to attempt as much, and I do not do so.⁶⁰

The effort to maintain a “narrow” focus on doctrine is ultimately doomed. For one thing, the doctrine could simply have erred in excluding significant realms of congressional action on various nonjusticiability grounds. For another thing, Professor Huq’s article raises the question of what standard should be used—in every case—for analyzing the constitutionality of some congressional action. If we have one standard that the Court should use when analyzing the constitutionality of federal regulations of federalism or individual rights, why not use it for analyzing everything else Congress does? Why not subject all

them), and it’s not unthinkable that it could someday be subject to judicial review. His lockstep approach thus presumably has the potential to extend to this dispute as well, but he talks only sketchily about this approach and leaves unaddressed any ramifications it might have for, or in, Congress. Moreover, this dispute could tell us a lot about how Congress actually deploys its enumerated power when it doesn’t expect (at least immediate) judicial review. Surely, the “enumerated powers jurisprudence” has something to do with Congress, but Professor Huq is leaving Congress, for the most part, out of the equation. He’s attempting to fix the Court’s jurisprudence without considering the ramifications of the fix, or any other part of his analysis, for Congress. Second, Professor Huq’s focus on constitutional interpretation is unjustifiably myopic. To the extent he is concerned with constitutional interpretation, it is only with the Court’s. He seems entirely agnostic about how the Constitution should be interpreted either at all or in Congress. Does the Court do a better, or worse, job than Congress? Does it matter? I gather the answer to either question is no. He is concerned with the balance of power between the Court and Congress, but how can we assess the utility and coherence of his analysis of that relationship or the lockstep approach without knowing its likely effect on this balance, particularly whether it will be good or bad, or even consistent with the constitutional scheme?

⁵⁹ Huq, 80 U Chi L Rev at 582 (cited in note 4).

⁶⁰ *Id.*

regulations, or all congressional actions, to the same standard? His answer is that he need not answer these questions, since his concern is not with understanding what Congress does but rather with finding a way to force the justices to be more candid, or open, in discussing their attitudes about legislative regulations affecting the states. But, this, too, is ultimately arbitrary, since candor is a concern not confined to a narrow range of cases. It is a concern in everything the Court does, including every time it reviews Congress—no matter what the field or the reason—and we are thus left wondering throughout the article whether the arguments given by Professor Huq to support a single standard to review the constitutionality of federalism enactments should be applied uniformly to all congressional constitutional activities.

There may, however, be a more fundamental problem with the Court's so-called enumerated powers jurisprudence. Professor Huq agrees that the problem is that the Court's case law on enumerated powers is nothing but a fiction. The case law is not about enumerated powers. It is really about those ends that the Court makes up as permissible for Congress to pursue. Moreover, the Court is looking to see whether in each case there is some marker, indicia, or signal requiring, or triggering, its suspicion or skepticism.⁶¹ It's looking for a breakdown in the legislative process, not at the enumerated powers of Congress.

Look at the Supreme Court's landmark decision in *M'Culloch v Maryland*,⁶² the case that presumably launched its enumerated powers jurisprudence. The Court went from its notable declaration that "[t]his government is acknowledged by all to be one of enumerated powers,"⁶³ to speculating about the ends that Congress had in mind when it created the National Bank.⁶⁴ Chief Justice John Marshall famously declared that

the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into

⁶¹ I owe special thanks to Professor Rick Hills of NYU Law School for these insights and arguments. At the time I was reviewing Professor Huq's article, I happened to be with Professor Hills at a symposium at the University of Utah College of Law. In his presentation, Professor Hills gave a cogent critique of the Court's so-called enumerated powers jurisprudence, a critique that I have found persuasive.

⁶² 17 US (4 Wheat) 316 (1819).

⁶³ Id at 405.

⁶⁴ Id at 422–23.

execution Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.⁶⁵

What happened to a discussion of enumerated powers? It dissolved. The late Professor Philip Kurland once observed that whenever a judge quotes from *M'Culloch's* famous admonition we should never forget that "it is a *constitution* we are expounding,"⁶⁶ "you can be sure that the Court will be throwing the constitutional text, its history, and its structure to the winds in reaching its conclusion."⁶⁷ One has to wonder whether Professor Huq is, in effect, doing just that—that is, ignoring constitutional text, history, structure, and even historical practices for the sake of constructing a provocative theory. Frankly, one has to wonder as well whether Kurland's characterization could be fairly applied to the Court's enumerated powers jurisprudence. Is the Court's doctrine of enumerated powers, such as it is, merely a cover for the Court to think up whatever ends it wants to allow Congress to regulate?

The more recent cases Professor Huq discusses maintain the same pretense that the Court is concerned with enumerated powers when reviewing federalism enactments—rather than merely making up the ends that it will allow Congress to use under what has effectively become, for lack of a better way of putting it, a federal police power. For a federal police power is assuredly what it appears Congress is exercising in many of the cases Professor Huq reviews, particularly given that the Court has recognized a remarkable range of private activities that it has allowed Congress to regulate pursuant to its enumerated powers. For example, consider the most famous, or infamous, of these cases, *National Federation of Independent Business v. Sebelius*⁶⁸ ("The Healthcare Cases"), which upheld the constitutionality of the controversial individual-mandate provision of the Patient Protection and Affordable Care Act.⁶⁹ In concluding, 5–4, that Congress lacked the authority under the Commerce Clause

⁶⁵ Id at 421.

⁶⁶ *M'Culloch*, 17 US (4 Wheat) at 407.

⁶⁷ Philip B. Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts to "Say What the Law Is,"* 23 Ariz L Rev 581, 591 (1981).

⁶⁸ 132 S Ct 2566 (2012).

⁶⁹ Patient Protection and Affordable Care Act § 1501, 124 Stat at 242–49.

to enact such a provision, the Court focused not on whether Congress has the enumerated power to regulate interstate commerce (which it plainly does) but rather on the permissibility of Congress's objective. This inquiry led the Court away from considering any textual limit on the power(s) in question but instead toward a consideration of whether "Congress can . . . command that those not buying wheat do so," an inquiry requiring it to consider whether the regulated inactivity actually qualified as "economic activity," a concept found only in the case law and not anywhere within the text of the Constitution.⁷⁰ Presumably, the marker that made the Court suspicious was what Congress was seeking to regulate—inactivity. To be sure, the concept of (economic) activity is one that exists in the doctrine, but the point is that the doctrine appears to have little to do with the enumerated powers set forth in the Constitution. Instead, the doctrine has to do with the ends, or objectives, that the Court decides to allow Congress to pursue. Thus, in *The Healthcare Cases*, the Court was saying, in effect, which kind of activity Congress may regulate through its Commerce Clause power and which kind of activity it may not. In upholding the individual mandate under Congress's Taxing Power, the Court's focus was not on the enumerated power of taxation (which, again, it plainly has) but rather on whether the law in question actually could raise revenue, accepting that any attempt to raise revenue is itself a legitimate objective. Here, the marker that could have made the Court skeptical was a regulation that was arguably punitive, but a majority rejected this characterization of Congress's objective.

In fact, Professor Huq agrees. He argues that the whole enumerated powers jurisprudence has no principled basis in the Constitution and is ultimately just a means of judicial policy making. On his view, the tiers of scrutiny the Court has developed are just another means by which the justices implement their preferred policy preferences.⁷¹ Yet, having swept aside all this doctrine because it is untethered to the Constitution, Professor Huq suddenly stops. It is inevitable to wonder, at this juncture, why stop there? Is there any doctrine that's more principled? If so, why not hold that up as a model for the Court to follow? One has to wonder whether this entire article is really an

⁷⁰ *The Healthcare Cases*, 132 S Ct at 2588, 2590.

⁷¹ Huq, 80 U Chi L Rev at 619 (cited in note 4).

indictment of judge-made doctrine more generally. This might explain why his solution to defects in the doctrine is increased candor from the Court, but it's hard to see how more candor actually will make the doctrine any more persuasive or coherent. It won't.

Focusing on (or complaining about) the multiple tiers of scrutiny in the Court's case law on enumerated powers risks suggesting, misleadingly, that merely crafting the correct level of scrutiny will clarify this area of law altogether. Doing so might promote judicial candor, as Professor Huq hopes, but that's just a hope, and it presumes that, all because the doctrine lacks coherence for Professor Huq, the justices themselves don't believe what they're saying. What if they do? What if they believe that their fiction is actually real, or that their reasoning is more persuasive and convincing than Professor Huq finds it? It is doubtful that the Court will become so candid as to acknowledge that what it has been doing for more than two hundred years is actually making up the ends for Congress to regulate under what has effectively become a federal police power. How would we even be able to recognize whether the Court has become more candid? It's unlikely to abandon the pretense of doctrine altogether, if only because it would invite a political backlash unlike any seen before in American history. If the objective is to find a way to facilitate greater candor from the Court, Professor Huq might have considered not just daring the Court to be more frank about the preferred balance between federal and state power, but also daring it to drop the pretense of doctrine altogether. I doubt the Court will take that last dare. It never has.

III. WHY NOT FORMALISM AND FUNCTIONALISM?

One has to wonder whether some of Professor Huq's objectives—specifically, constraining judicial activism and facilitating greater clarity, coherence, and candor in the Court's doctrine—may be achieved more easily and comprehensively under a different approach than they would with his proposed single, lock-step standard of review. It's fair to ask what Professor Huq's multiple tiers of scrutiny analysis adds to the longstanding framework or terminology that legal scholars, as well as the Court, have usefully employed when analyzing constitutional conflicts. I do not think there is much doubt that there is such an alternative—which Professor Huq does not mention, much

less consider—for understanding the same case law; indeed, this alternative is a longstanding, perfectly sound way of talking about the constitutionality of what Congress does. In particular, I suggest that the doctrine he is reviewing has long been understood (properly, in my view) as the byproduct of persistent debates over whether the Supreme Court is, or should be, formalist or functionalist in its constitutional decision making. After defining these analytical frameworks, I point to *The Healthcare Cases* as illustrating how understanding what the Court, or Congress, has done as either formalist or functionalist is at least as illuminating as, and much more comprehensive than, the framework Professor Huq suggests. It is especially pertinent to consider the utility of this conventional framework since Professor Huq’s analysis, intentionally or not, is designed to displace it. In my view, the formalist/functionalist distinction captures accurately how both the Court and scholars have understood constitutional doctrine generally, including the Court’s enumerated powers jurisprudence. If the framework ain’t broke, don’t fix it.

At least since the 1970s, two approaches have come to dominate academic thinking in a wide range of constitutional law, including separation of powers and federalism. These ways of thinking have been reflected in the doctrine as well. First, some scholars (and justices) advanced a “formalist approach” that was “premised on the beliefs that the text of the Constitution and the intent of its drafters are controlling and sometimes dispositive, that changed circumstances are irrelevant to constitutional outcomes, and that broader ‘policy’ concerns should not play a role in legal decisions.”⁷² This approach was closely associated with the view that the Constitution not only grants to each branch distinct powers but also sets forth the maximum degree to which the branches may share those powers. Similarly, this approach was closely associated with the view that the Constitution grants distinct, limited powers to the federal government and, by inference and original meaning, demarcates a realm of state (or private) activity with which the federal government may not interfere. Second, other scholars (and justices) argued for a “functional” approach to separation of powers and federalism cases that focused on “whether present practices undermine

⁷² Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 Harv L Rev 421, 493 (1987). For an example, see Antonin Scalia, *A Matter of Interpretation* 25 (Princeton 1997) (defending formalism on the ground that “[t]he rule of law is *about form*”).

constitutional commitments that should be regarded as central.”⁷³ This approach was closely associated with the view that the Constitution does not set forth the full range of ways in which the federal branches (or the federal government and the states) may interact. Rather, the Constitution defines the limits of how much power may be shared among the apexes of the branches (in separation of powers) or the competing considerations that Congress and the Court ought to take into consideration whenever the federal government is attempting to regulate either state or private action.

These two approaches are the basic methodologies (or premises) that the justices, as well as most scholars and members of Congress, use when reviewing the constitutionality of federal action. It could well be that Professor Huq is agnostic with respect to these methods or, as I suspect (but perhaps quite wrongly), has developed a framework that takes something from each of these methodologies. For example, formalists prefer to develop bright-line rules (rigid, inflexible principles) against which federal action may be measured (and which constitutional actors may find easy both to understand and to employ),⁷⁴ and Professor Huq’s lockstep approach seems to have the rigidity and clarity of the bright-line rules that formalists tend to favor. At the same time, functionalists prefer standards (usually a multifactored measure) over rules and balancing over rigid tests,⁷⁵ and Professor Huq’s single standard is, as he himself describes it, a standard, not a rule. It’s not impossible to be both a formalist and functionalist at the same time, but it’s confusing.

Consider, again, the Supreme Court’s decision in *The Healthcare Cases* to uphold the constitutionality of the individual mandate. Perhaps the most confusing part of Chief Justice Roberts’s opinion is that it’s half formalist and half functionalist. The part declaring that Congress lacks the power under the Commerce Clause to enact such a mandate is purely formalist,

⁷³ Sunstein, 101 Harv L Rev at 495 (cited in note 72). For an example, see Erwin Chemerinsky, *Getting beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 Okla L Rev 1, 2 (2001) (“[V]alue choices in constitutional adjudication are inevitable and desirable.”).

⁷⁴ See William N. Eskridge Jr., *Relationships between Formalism and Functionalism in Separation of Powers Cases*, 22 Harv J L & Pub Pol 21, 21 (1998) (“Formalism might be associated with bright-line rules that seek to place determinate, readily enforceable limits on public actors.”).

⁷⁵ See *id.* (noting that functionalism is generally thought to entail “standards or balancing tests that seek to provide public actors with greater flexibility”).

depending, as it does, on drawing and enforcing a rigid distinction between what Congress may do (regulate activities) and what it may not do (regulate inactivity).⁷⁶ The part declaring that nonetheless Congress does have the authority to enact such a mandate is perfectly functionalist, depending, as it does, on the “practical” considerations of upholding the exercise of power as a tax rather than as a regulation of interstate commerce.⁷⁷

Regardless of whether one agrees with the majority or dissent in *The Healthcare Cases*, the formalist/functionalist distinction is useful for describing the differences among the Justices. After all, the four Justices, besides Chief Justice Roberts, upholding the mandate did so on the basis of functionalist reasoning, while the four Justices rejecting his arguments in support of the constitutionality of the individual mandate as a tax did so on the basis of largely, if not purely, formalist grounds.

To be sure, it is at this juncture that one can see most easily the value of Professor Huq’s suggested lockstep approach. Chief Justice Roberts’s opinion in *The Healthcare Cases* arguably demonstrates how a single standard of review might curb judicial policy making or activism; the different tiers of scrutiny enabled the Chief Justice to arrive at his preferred outcome by exploiting the different standards of review for different enumerated powers. A single standard of review (say, strict scrutiny) might have made it more difficult for justices to enact their own policy preferences because, under a single standard, tinkering in one area would impact the standard of review of congressional action in a different area.

The formalist/functionalist divide is nonetheless useful—and evident—in numerous contexts besides federalism. Separation of powers is an obvious one, with formalists favoring confining each of the federal branches strictly within the boundaries of the powers it has been explicitly given in the Constitution and allowing overlaps only explicitly authorized by the text of the Constitution or its original meaning, and functionalists preferring to take historical practices into account and to balance the competing considerations that arise with any innovation or redistribution of power among the three branches. If the concern is to facilitate greater candor or clarity in the debates on the Court, this framework has the advantage of not introducing into

⁷⁶ *The Healthcare Cases*, 132 S Ct at 2587.

⁷⁷ *Id.* at 2597–98.

the equation anything new. It merely requires asking the justices to push each other harder to explain which methodology each prefers and why.

As an analytical framework, the formalist/functionalist divide has one further advantage over Professor Huq's lockstep approach. Both formalism and functionalism may be used as frameworks or metrics for assessing either branch's constitutional decision making. While Professor Huq leaves aside whether members of Congress would employ a single standard to assess the constitutionality of any regulations of states, they already divide along the lines of formalism or functionalism in their debates. For example, the debates over President Clinton's impeachment turned along these very lines, with those favoring his removal tending to support rigid rules defining both the scope of the impeachment power and the conditions for presidential misconduct and those opposing his removal tending to favor balancing the competing considerations.⁷⁸

If the point of a project is to recast the terms or framework of our understanding of a particular area of constitutional law, I have to wonder whether, or why, it works better than the frameworks or metrics we already have, particularly the dominant ones. I have to wonder, in other words, both whether and why we need to reinvent the wheel. In the context of enumerated powers doctrine, does the doctrine, or the Court, really need to be reconceived? Professor Huq obviously thinks so. He must believe that the Court needs a completely new set of wheels for at least some of its work, while I'm inclined to think that both the Court's and ours just require some readjustment—namely, a fine-tuning of our understanding of how the legislative process actually works, especially within the particular cases or contexts that the Court is choosing to review.

IV. UNANSWERED QUESTIONS ABOUT THE COURT AND CONGRESS

Perhaps the most serious problem with Professor Huq's framework is its proposed solution. His lockstep approach is designed to demarcate a sharp boundary between Congress and the Supreme Court, but the boundary he identifies has been drawn primarily, if not solely, for the sake of the Court, rather

⁷⁸ See Michael J. Gerhardt, *The Story of Clinton v. Jones: The Perils of Presidential Promiscuity and the Paths of Constitutional Retribution*, in Michael C. Dorf, ed., *Constitutional Law Stories* 119, 138–41 (Foundation 2004).

than for that of Congress or even both branches. His concern throughout is with the Court's perspective, but he hasn't said, much less cannot know, how the Court would employ a lockstep approach, particularly in the absence of sound, positive accounts of how both the Court and Congress function. Yet, we are given no such account, much less one about how Congress actually functions.

To be fair, Professor Huq deliberately forgoes delineating any specific, single standard that the Court should use for evaluating the constitutionality of legislative action. He argues that any single standard would work better than the multiple tiers the Court currently uses in its federalism jurisprudence.

It is, however, this latter contention that I find most problematic with the article. He has, in effect, attempted to beat something, the multiple tiers currently employed in the Court's doctrine, with almost nothing—a single, lockstep approach that is, at best, sketchily made and lacks any empirical support whatsoever. Nor has he offered any guidance on how a lockstep approach should be calibrated to ensure that it can work, given the peculiar institutional characteristics of both the Court and Congress.

It is hard to evaluate something that gets such short shrift in his article. According to Professor Huq, the lockstep approach requires the Court to treat the exercise of all legislative powers the same. Every power, no matter what it is, is subject to the same standard. According to Professor Huq, jettisoning multiple tiers of scrutiny in favor of a single standard would “largely eliminate opportunities for strategic behavior [by the justices] by diminishing the space for judicially initiated changes to the scope of federal legislative authority and by forestalling the possibility of doctrinal arbitrage (either by Congress or the courts) across the enumerated powers.”⁷⁹ He explains that “[e]liminating tiers of scrutiny . . . would force the Court to confront directly and frankly [the question of the scope of federal power to regulate states or state activity] and render the stakes of ensuing decisions more pellucid.”⁸⁰ He explains further that “the move to lockstep judicial review of the enumerated powers would push the Court to take seriously the enduring project of sculpting boundaries to Congress's fulsome enumerated authorities.”⁸¹ His

⁷⁹ Huq, 80 U Chi L Rev at 653 (cited in note 4).

⁸⁰ Id at 654.

⁸¹ Id.

solution is, in short, to replace the multiple tiers of scrutiny with a single standard for assessing the constitutionality of federalism enactments. Though he purposely avoids spelling out the specifics of this standard (which is apparently left completely to the discretion of the justices to fashion), his “proposed reform would render the political and policy stakes of such judicial review more transparent in ways that enable more meaningful public discussion.”⁸²

Professor Huq may be right about the ramifications of this proposed approach, but it’s pure speculation. How do we know that the justices would become more candid and transparent if they employed a lockstep approach instead of the multi-tiered framework they currently use? Once the justices are freed from having to understand (at least as a matter of doctrine) the actual grounds of a congressional action, they are less bounded than ever before. Who’s to say they will handle this new freedom more responsibly than they handled being (somewhat) shackled by their own doctrine? As I have asked before, how do we even know that the justices are not being candid now in the doctrine they have constructed? How do we know when we cannot trust the doctrine as candid? Is all doctrine subterfuge? If this is true, then isn’t it true for any doctrine that the Court fashions; does all doctrine merely obscure what the justices are really doing? By the way, greater candor does not necessarily mean greater coherence. If it all comes down to the justices’ policy preferences, as so many political scientists also claim,⁸³ then the critical thing is to defend the preferences. Persuading people to give up their preferences, even in the face of reason, is difficult at best. This is especially true for people who have well-settled preferences, which is what I expect both the justices and members of Congress to have. None of these questions is asked in the article, much less answered. It would be useful to have metrics for candor and transparency, but we are not given any. In addition, it would be very useful to examine as a metric or analogue any other area(s) of constitutional doctrine in which the Court has actually employed a lockstep approach. Nor does Professor Huq

⁸² *Id.*

⁸³ See, for example, Jeffrey A. Segal and Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 *Am J Pol Sci* 971, 983 (1996) (finding that 90.8 percent of Supreme Court votes evaluated “conform[ed] to the justices’ revealed preferences”).

consider how Congress might respond if the Court were to employ the method he suggests.

In practice, the lockstep approach hardly seems to point to any clear or better way out. For example, it is unclear how a lockstep approach would improve the analysis of whether particular legislative acts violate individual rights. Professor Huq is concerned about federalism issues, but of course identifying the limits of federal power is based in part on demarcating the realm of individual liberty left unregulated. So, Professor Huq may be correct that it does not matter what power Congress is using if it violates the First Amendment or some other constitutionally guaranteed individual right. The lockstep approach adds nothing useful to our analysis or understanding of whether a law violates a right or not. A law either violates a right or it does not. The lockstep approach would appear to have to be just grafted onto the basic question of whether a law violates a right. It doesn't help to clarify what the right is.

Even more problematically, Professor Huq's lockstep approach is likely to have a perverse, unintended consequence. He does not call upon Congress to be more precise when it claims an authority for a law it enacts; indeed, he suggests that the Court need not look at what Congress actually does and that Congress need not bother to be any more careful or deliberative than it already is (or is not).⁸⁴ This seems to give Congress an incentive to take less, rather than more, care in its deliberations over the constitutional issues arising from any of the exercises of its enumerated powers. Even worse, it allows the Supreme Court to make up whatever grounds (or support) for legislative action it wants. Ironically, this brings us full circle back to the basic problem with the Court's enumerated powers jurisprudence—it's all made up. Professor Huq simply gives the Court more room to fabricate while providing an incentive for Congress to be lazy in framing its laws. At the same time, his approach is strikingly counterhistorical in that Congress almost always has specified the source of the authority of its laws and the specific power(s) it is attempting to exercise at any given time. It makes little sense to require less of Congress than the doctrine—or practice—currently does. His proposed reform allows either the Court or Congress, or perhaps both, to engage in more, not less, mischief.

⁸⁴ See Huq, 80 U Chi L Rev at 616–17 (cited in note 4).

Two examples should illustrate this problem. First, assume that the Supreme Court were to adopt strict scrutiny to assess the constitutionality of legislative actions. If this were the standard, it's conceivable that it gives Congress ample incentive to take great care in all its deliberations. The problem is that, under Professor Huq's approach, it wouldn't matter what Congress did. Professor Huq's suggestion is that the Court should not take Congress's justifications or actions into account, even when Congress will likely have attempted to be very careful or deliberate in its action. Moreover, we will then have to gloss over the fact that having strict scrutiny applied to everything Congress does is an Anti-Federalist's dream. The Constitution wasn't designed to ensure that the Court strikes down nearly everything Congress does, though that is the likely consequence of applying the most heightened judicial scrutiny across the board.

Things would not necessarily be any better, at least for constitutional law (and our society), if the uniform standard were the traditional rational basis test. If this were the standard, we'd have good reason to presume that it would give Congress little (extra) incentive to take any more care than it already does in its deliberations. But, it wouldn't matter, since the Court would be able to conceive of a plausible justification for everything Congress did under the more deferential standard. The Court would simply cease to be a check on legislative action—of every kind, even legislation involving the arguable violation of fundamental rights.

In fact, one of the most serious costs of the lockstep approach, at least in the form that Professor Huq has proposed it, is that it provides a disincentive to understand what Congress actually does, particularly its institutional capacity, or competency, to interpret the Constitution or grapple with complex constitutional questions. The focus of Professor Huq's analysis and proposed lockstep approach to judicial review is all about the Court. The problem is that constitutional law generally and the exercises of Congress's enumerated powers are not just about the Court or the Court's perspective. The Court is generally peripheral to most constitutional decision making,⁸⁵ and Professor

⁸⁵ See Michael J. Gerhardt, *The Power of Precedent* 111–46 (Oxford 2008) (discussing the domain of constitutional activity outside the Court).

Huq does not acknowledge that, assess its consequences for his analysis, or suggest anything about what should be done about it.

A theory about the relationship between the Supreme Court and Congress requires developing sound, positive accounts of how these two institutions function and interact. Professor Huq discusses the Court's doctrine at great length, but his discussion of Congress is largely done from the perspective of the Court or public choice theory.⁸⁶ A useful exercise would be to consider the accuracy (and coherence) of the Court's understanding of Congress, how the Court's understanding (or lack thereof) affects its doctrine, and the institutional capacity for Congress to undertake principled constitutional interpretation. Given Professor Huq's suggestion that the justices need not bother with how Congress actually has attempted to ground its own lawmaking,⁸⁷ they would have less incentive than ever before to care about whether they have an accurate understanding of how the law or legislative action they are reviewing actually came about.

Yet, refining the Court's perspective on Congress is only half the equation. The other half is how Congress looks at constitutional law and the Court, not to mention how Congress itself understands and actually exercises its own powers. There are fundamental questions that Professor Huq does not raise, much less answer, with respect to how a lockstep approach—or any standard of review—should be fashioned. For example, should it take into account the different design of each chamber of Congress—the House and the Senate? Are their structural differences, in other words, relevant to the construction of a standard of review of their constitutional decision making? What is the significance of the special procedures or rules that guide the House or Senate in exercising certain powers or enacting certain kinds of laws, such as budget enactments? Does Congress, in other words, exercise all its powers in the same way—or not? Again, these questions are not asked, much less answered, though they seem critically important for deciding the feasibility of any single, lockstep approach to evaluating legislative action.

Yet another fundamental question is whether Congress has the institutional capacity or competency to undertake principled constitutional interpretation. If it does not, then one could make a case on that basis for enhanced judicial review—or developing

⁸⁶ See, for example, Huq, 80 U Chi L Rev at 634–45 (cited in note 4).

⁸⁷ See *id.* at 616 (arguing that the existence of a congressional record “has no immediate normative relevance”).

sounder, more meaningful political checks on its constitutional construction. If Congress does have the institutional capacity or competency to undertake principled constitutional interpretation or construction, there would be less reason for judicial review and less skepticism of Congress's constitutional decision making and its consequences.

Consider as an example the Senate's recent triggering of the so-called nuclear option, a subject that Professor Huq excludes from his study because it does not directly involve federalism and is not subject to judicial review. This was a procedural move made by a majority of senators to establish a precedent in the Senate that they had the power to enforce their understanding that Senate rules did not allow filibusters of executive appointments and lower court judicial nominations.⁸⁸ This move gives rise to a very rich discussion of constitutional law.⁸⁹ Perhaps most importantly for present purposes, it showcases senators engaged in a remarkable moment of constitutional construction. In doing so, they were both exercising and constructing their enumerated power to make internal rules of governance for the Senate.⁹⁰ I appreciate that such a moment falls outside the scope of Professor Huq's project, but it's myopic, if not purely arbitrary, to suggest that this kind of constitutional activity is unimportant or irrelevant to understanding how Congress goes about both understanding and exercising its enumerated powers. Both that understanding and the actual exercises of power in Congress cannot be left out of any effort to understand enumerated powers. At the very least, it seems indispensable for ensuring a lockstep approach that is well calibrated to fit, or apply to, the real world of congressional activity.

A final consideration is whether there are any useful analogies for understanding how well the lockstep approach Professor Huq suggests would work in practice. Interestingly, I think something similar has been proposed before, indeed a classic proposal that remains worthwhile.

⁸⁸ See, for example, Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option: Eliminate Most Filibusters on Nominees*, *The Washington Post* (Nov 21, 2013), online at http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html (visited Feb 19, 2014).

⁸⁹ See note 14 and accompanying text.

⁹⁰ See US Const., Art I, § 5 (specifying that "[e]ach House may determine the Rules of its Proceedings").

One of our first constitutional theorists, Harvard Professor James Bradley Thayer, proposed near the end of the nineteenth century that the Supreme Court should strike down federal laws only when Congress has made “a very clear” mistake.⁹¹ Thayer maintained that “the constitution does not impose upon the legislature any one specific opinion, but leaves open [the] range of choice [of how to interpret the Constitution]; and that whatever choice is rational is constitutional.”⁹² As he explained presciently,

The judicial function is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the line of its grants.⁹³

Later, Thayer describes his suggested standard as similar to the standard of “beyond a reasonable doubt” juries employ; that is, unless a law is unconstitutional beyond a reasonable doubt, a court should let it stand.⁹⁴

This was, to say the least, a remarkably deferential test. It was based in part on respect for Congress as a “co-ordinate” or coequal branch.⁹⁵ It gave substantial room for Congress to make constitutional decisions and demanded that the Court not interfere with laws merely because it disagreed with them or because it had a different construction of the constitutional issues involved. (It’s easy to imagine that other scholars, then and now, would not have trusted Congress nearly as much as Professor Thayer did.) It was grounded as well on judicial review as a relatively undemocratic, countermajoritarian exercise of power, the kind of power that should be carefully circumscribed, particularly because of the fact that the justices were not politically accountable for their decisions. This is arguably the first instance of the kind of proposal Professor Huq has made—a lockstep approach to judicial review of federalism enactments—except it was a lockstep approach to all judicial review of congressional action.

⁹¹ James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129, 144 (1893).

⁹² Id.

⁹³ Id at 148.

⁹⁴ Id at 151.

⁹⁵ Thayer, 7 Harv L Rev at 150 (cited in note 91).

The Thayerian proposal arguably had at least two difficulties: One was that it was a standard, which justices might easily manipulate. The other was that Congress did not merit such deference. This is the point at which public choice theory might suggest some reasons for being skeptical about the institutional design of Congress insofar as its constitutional construction is concerned.

Yet, the point is not whether one should agree with Thayer's proposal or whether it was perfect. The point is that Thayer's proposal went one step further than Professor Huq's analysis, because it is an example of the lockstep approach. Why not take it seriously, particularly since it was based on respect, rather than disdain, for Congress, and skepticism of, rather than reverence for, the Court? Since Thayer's day, many scholars have become more skeptical of Congress than the Court, in which case they might be inclined to inquire more deeply into the legislative process than Thayer's test allowed.

Legal scholars should be careful, however, not to presume that, just because there is some reason to be skeptical of Congress's capacity or competency to undertake principled constitutional construction, it necessarily follows that judicial displacement of such construction is desirable. No such thing follows. It follows only if you skip over some other steps. For example, one necessary consideration is whether, or in what ways, the process producing the legislative action was defective. Is judicial review necessary to fix that defect? Another question is which, if any, political checks constrain, or at least channel, Congress's constitutional decision making. Yet another is whether the Court itself is dysfunctional or whether it is at least less dysfunctional than Congress when it comes to interpreting the Constitution. If it is dysfunctional, in what ways? How extensive is its dysfunction? Still another is whether one has a preference, stated or otherwise, in favor of the Court's construction of the Constitution over that of Congress. Is this a preference that applies across-the-board or on a case-by-case basis? All of these questions are raised by Professor Huq's project, and it does not make sense to adopt his—or anyone else's—lockstep approach without answering them.

We should answer these questions as candidly as possible. Academics should be candid about our own biases and policy preferences, including our own potential conflicts of interest, in developing theories about the relationship between the Supreme

Court and Congress, as well as about the relative institutional competence of each branch to engage in principled constitutional construction.

CONCLUSION

Professor Huq has sensibly suggested that multiple tiers of scrutiny in the Supreme Court's doctrine on enumerated powers are confusing, are not grounded in a principled (or consistent) interpretation of the Constitution, and produce more problems than would the use of a single or uniform standard in every federalism case. He argues that a uniform standard applied in every case involving enumerated powers that the Court reviews would, *inter alia*, curb judicial activism and make the justices more candid. Presumably, under his approach, the justices would find themselves freer to talk more openly about their conceptions of the Court's and Congress's respective authorities.

Professor Huq's analysis and proposed solution raise, however, more questions than they answer. For example, it is purely speculative whether the suggested lockstep approach would actually curb judicial activism or make the justices more candid. It's impossible to know, since we are given no metric. It is possible there is no workable or principled metric, since the only ones who know best whether the justices have been candid are the justices themselves, and I doubt they would ever acknowledge having not been candid, even if that were the case. Another question is whether the lockstep approach might actually be worse for judicially constructed doctrine and for Congress. It might be worse for the doctrine since it does not require the justices to take more care than they already do when construing congressional powers. For example, it does not require the Court, as some might consider sensible, to defend its use of judicial review over an exercise of congressional power when the record properly suggests there has been an actual breakdown in the legislative process in that particular instance. This requirement at least demands the Court to take a more exacting look at—and develop more exacting, well-calibrated standards for evaluating—the legislative process. Yet another question is what effect the lockstep approach might have on Congress. Will it become more, or less, responsible when it undertakes constitutional interpretation?

If we look more closely at a long-standing suggested lockstep approach, we can learn a lot. Professor Thayer's reasonableness

test as applied to legislative action is one such standard. It is grounded both on skepticism of judicial review and respect for Congress. It would require the Court to accept as legitimate most of what Congress does since most of it is reasonable. Such a test would clarify a great deal of doctrine and allow Congress plenty of room to be Congress.

Many people, perhaps most academics, would probably reject Professor Thayer's standard. A principal reason, in all likelihood, is that they fear Congress more than they fear the Court. Professor Huq does not fear Congress, or at least there is nothing in his article to suggest he does so merely because Congress has the powers it does. If he did fear Congress, I doubt he would be willing to give Congress the space he does to exercise its powers. The major problem is that he's willing to give considerable space to the Supreme Court as well but doesn't say, much less predict, how well either the Court or Congress would do with the latitude he wants to give to it. Indeed, given Professor Huq's skepticism of the Court's doctrine and disposition to implement its own policy preferences, it is curious that he does not explore how the Court might abuse the task he assigns it. If past is prologue, then (at least insofar as Professor Huq has understood the past) the odds are not good. Nor does he explore how Congress would likely occupy the ample space he would give it or how this would affect the relationship between itself and Congress and vice versa. As Thayer himself suggested more than a hundred years ago, these questions are indispensable to an understanding of American constitutional law.