

WHAT THE NEW DEAL SETTLED

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INTRODUCTION

Not since George H.W. Bush banned it from the menu of Air Force One¹ did broccoli receive as much attention as during the legal and political debate over the Patient Protection and Affordable Care Act (“ACA”).² Opponents of the ACA have forcefully and repeatedly argued that if Congress has the power to require Americans to purchase health insurance as a means of reducing health care costs, then it likewise has the power to require Americans to eat broccoli. Broccoli is mentioned twelve times across the four Supreme Court opinions issued in the ACA decision³—that’s eleven more appearances than it had made in all previous Supreme Court decisions combined.⁴ As Judge Roger Vinson wrote in his district court opinion invalidating the ACA’s minimum coverage provision, accepting the government’s position meant that Congress “could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system.”⁵

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1 See *Broccoli off Bush’s Table*, CHIC. TRIB., Mar. 18, 1990, § 1, at 3.

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

3 Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012) [hereinafter *NFIB*] (Roberts, C.J.) (mentioning broccoli three times); *id.* at 2619–20, 2624, 2625 (Ginsburg, J., concurring in part and dissenting in part) (five times); *id.* at 2650 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (four times).

4 The only other mention of broccoli in the U.S. Reports is buried within the transcript of George Carlin’s “Filthy Words” monologue, which was appended to Justice Stevens’ opinion in the Appendix to *FCC v. Pacifica Found.*, 438 U.S. 726, 752 (1978).

5 Florida *ex rel* Bondi v. U.S. Dep’t Health & Hum. Servs., 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011).

An obvious response to what Justice Ginsburg called “the broccoli horrible”⁶ is that, presumptively, neither Congress nor any state may require anyone to consume anything.⁷ Justice Frankfurter wrote for the Supreme Court sixty years ago that forcible extraction of the contents of a criminal suspect’s stomach via an emetic solution “shocks the conscience” and therefore violates the Due Process Clause.⁸ It would seem to follow *a fortiori* that force-feeding broccoli to an otherwise *sui juris* person suspected of nothing but an aversion to eating broccoli would also violate either the Fifth or the Fourteenth Amendment, depending on whether the force-feeders were federal or state officials. A reasonably competent IL could recite the Socratic dialogue that one would ordinarily expect to follow this observation: it would explore the degree to which forcible purchase of health insurance is or is not like forcible consumption of food. The discourse would, in other words, test the limits of substantive due process rather than the limits of Article I.

And yet the legal and political discourse surrounding the ACA has not taken this form. Litigation over the individual mandate focused on the limits of congressional power embodied within Article I of the Constitution, specifically the Commerce Clause⁹ and the General Welfare Clause.¹⁰ Challengers to the mandate generally either avoided due process arguments entirely or gave them rote, superficial attention, and judges deciding the mandate cases followed suit. This litigation choice would make sense if the Article I argument were obviously stronger than the due process argument. But that is not at all obvious, or at least it was not obvious at the start of the litigation. As Part I demonstrates, based on Supreme Court precedent at the time of the ACA’s passage, the Article I argument bordered on frivolous whereas the due process argument had, and still has, no “all-fours” doctrinal obstacles.¹¹

6 *NFTB*, 132 S. Ct. at 2624 (Ginsburg, J., concurring in part and dissenting in part) (internal quotation marks omitted).

7 *Cf. Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding a state-ordered compulsory vaccination program).

8 *Rochin v. California*, 342 U.S. 165, 172 (1952); *see also Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990) (recognizing that “a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment”).

9 U.S. CONST. art. I, § 8, cl. 2.

10 U.S. CONST. art. I, § 8, cl. 2.

11 It is useful to clarify the sense in which I believe the Commerce Clause argument was “frivolous.” I do not mean to say that an attorney advancing such an argument risked Rule 11 sanctions or even that any judge accepting such a claim, as five members of the Supreme Court did, would be doing so *ultra vires* the Constitution. What I mean, rather, is that the argument was in the nature of *ipse dixit*: a computer equipped with all of the

Part II proposes and evaluates a competing set of broadly political reasons for the nature of the discourse and, perhaps litigation choice in these cases. Advancing a substantive due process argument would have required opponents of the individual mandate and their financial sponsors to oppose the similar state-level mandate that Mitt Romney signed into law as governor of Massachusetts. A strictly libertarian objection to the individual mandate would also have threatened to rend the fragile coalition between libertarians and social conservatives that is essential to the vitality of the Tea Party and that ties many Tea Party members to the Republican Party. Finally, and relatedly, opponents of the mandate may have been reluctant to affiliate their arguments with the Court's reproductive freedom precedents, as reliance on substantive due process would inevitably invite. The most powerful argument against a health insurance purchasing mandate is precisely the one the government conceded (indeed heralded) in defending the case: the mandate interferes with an individual's personal "right to choose" how to allocate health care resources.¹²

An additional, non-exclusive set of reasons is neither political nor, in a narrow sense, doctrinal, but relates to the sociology of American constitutional argument. As Part III discusses, a substantive due process claim would have constituted an argument in favor of "economic" due process, a doctrine associated with *Lochner v. New York*¹³ and considered verboten in the wake of the so-called New Deal settlement. The status of *Lochner* as an anticanonical case forecloses constitutional arguments well out of proportion to its doctrinal significance narrowly construed. Thus, even as the New Deal settlement is said to condemn in equal measure limits on congressional power and forms of economic due process, *Lochner's* embodiment of the latter contributes to what in practical terms is a much more profound repudiation.

Lochner, then, distorts constitutional argument by stopping economic due process in its tracks. It does so not because such arguments were more forcefully rejected in 1937 than Article I arguments

Supreme Court's precedents and programmed to extrapolate reasonably from those precedents to new sets of facts would have been quite unlikely to invalidate the individual mandate as exceeding Congress's power under the Commerce Clause.

12 Brief for Petitioners at 33, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 37168 ("As Congress expressly found, the minimum coverage provision 'regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.'").

13 198 U.S. 45 (1905).

grounded in cases like *Hammer v. Dagenhart*,¹⁴ but rather because the Due Process Clause is and has been more contested and jurisgenerative than the Commerce Clause. *Lochnerism* was inaugurated because of the fecundity of *Lochner's* libertarianism, not the magnitude of its doctrinal errors. Ironically, then, the cottage industry in *Lochner* revisionism derives from the same source as the juridical need to repudiate the decision.

I

As of March 2012, twenty-two federal court complaints had been filed challenging the constitutionality of the individual mandate.¹⁵ Of

¹⁴ 247 U.S. 251 (1918).

¹⁵ Challenges to the Affordable Care Act are summarized at the ACA Litigation Blog. Brad Joondeph, ACA LITIGATION BLOG, <http://acalitigationblog.blogspot.com> (last visited July 20, 2012). The complaints in cases challenging the constitutionality of the individual mandate are: First Amended Complaint for Declaratory and Injunctive Relief, Baldwin v. Sebelius, No. 10-cv-1033 DMS (WMc) (S.D. Cal. 2012), 2012 WL 294466; Complaint Re Section 1501, Patient Protection and Affordable Care Act, Boyle v. Sebelius, No. CV11-07868 GW (AJWx) (C.D. Cal. Jan. 31, 2012); Amended Complaint, Kinder v. Geithner, No. 10-cv-00101-RWS (E.D. Mo. Apr. 26, 2011), 2011 WL 1576721; Second Amended Civil Rights Complaint for Declaratory and Injunctive Relief, Coons v. Geithner, No. CV-10-1714-PHX-GMS (D. Ariz. May 10, 2011), 2012 WL 3778219; Second Amended Petition for Injunctive and Declaratory Relief, Bryant v. Holder, 809 F. Supp. 2d 563 (S.D. Miss. Mar. 4, 2011) (No. 2:10-cv-76); Complaint for Declaratory and Injunctive Relief, Oklahoma *ex rel.* Pruitt v. Sebelius, No. CIV11-030-RAW (E.D. Okla. Jan. 21, 2011); Second Amended Complaint, Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1307 (N.D. Fla. 2011) (No. 3:10-cv-91-RV/EMT); Amended Complaint for Declaratory and Injunctive Relief, Peterson v. Obama, 774 F. Supp. 2d 418 (D.N.H. 2011) (No. 10-CV-170-JL); Violation Title 28 U.S.C. §1331 & Civil Rights Request for Declaratory Judgment Trial by Jury, Purpura v. Sebelius, No. 1904814 (GEB) (D.N.J. 2011), 2011 WL 1547768; Second Amended Complaint for Declaratory and Injunctive Relief, U.S. Citizens Ass'n v. Sebelius, No. 5:10-cv-01065-DDD (N.D. Ohio 2011), 2011 WL 3200242; Second Amended and Supplemental Complaint for Declaratory and Injunctive Relief, Ass'n of Am. Physicians & Surgeons v. Sebelius, No. 1:10-cv-0499-RJL (D.D.C. Sept. 13, 2010); Class Action Complaint for Declaratory and Injunctive Relief, PeopleV.US v. Obama, No. 2:10-cv-01477-JCL-RJJ (D. Nev. Aug. 31, 2010); Complaint, Calvey v. Obama, 792 F. Supp. 2d 1262 (W.D. Okla. 2011) (No. CIV-10-353-R); Second Amended Complaint, Liberty Univ. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010) (No. 6:10-cv-000-15-nkm); Complaint for Declaratory and Injunctive Relief, Sissel v. U.S. Dep't of Health & Human Servs., No. 1:10-cv-01263-BAH (D.D.C. July 26, 2010); First Amended Complaint for Declaratory and Injunctive Relief, Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011) (No. 1:10-cv-00950 (GK)); Class Action Petition for Injunctive and Declaratory Relief, Bursworth v. Holder, No. 4:10-cv-00258-SWW (E.D. Ark. Apr. 27, 2010); Complaint, Fountain Hills Tea Party Patriots, L.L.C. v. Sebelius, No. 2:10-cv-00893-DKD (D. Ariz. Apr. 22, 2010); Complaint, Goudy-Bachman v. U.S. Dep't of Health & Human Servs., 811 F. Supp. 2d 1086 (M.D. Pa. 2011) (No. 1:10-cv-00763-CCCC); First Amended Complaint for Declaratory and Injunctive Relief and Certification Pursuant to L. Civ. R. 11.2, New Jersey Physicians Inc. v. Obama, 757 F. Supp. 2d 502 (D.N.J. 2010) (No. 2:10-cv-01489(SDW-MCA)); Complaint, Bellow v. U.S. Dep't of Health & Human Servs., No. 1:10CV0165

those twenty-two complaints, only eleven argued that the mandate to purchase health insurance violated the Due Process Clause of the Fifth Amendment.¹⁶ Only four of those eleven complaints alleged a due process claim in the first four counts,¹⁷ and none alleged it as its first argument. Just one district court opinion and no court of appeals opinions have addressed the merits of these substantive due process claims. The one opinion to reach the argument rejected it as foreclosed by *Lochner* and its progeny and the claim was subsequently abandoned on appeal.¹⁸ By contrast, a majority of the Supreme Court

(E.D. Tex. Mar. 24, 2010), 2011 WL 2462205; Complaint, Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (No. 2:10-cv-11156-GCS-RSW); Complaint for Declaratory and Injunctive Relief, Virginia v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10-cv-00188-HEH).

- 16 First Amended Complaint for Declaratory and Injunctive Relief at 20, Baldwin v. Sebelius, No. 10-cv-1033 DMS (WMc) (S.D. Cal. 2012), 2012 WL 294466; Complaint Re Section 1501, Patient Protection and Affordable Care Act at 91–94, Boyle v. Sebelius, No. CV11-07868 GW (AJWx) (C.D. Cal. Jan. 31, 2012); Second Amended Civil Rights Complaint for Declaratory and Injunctive Relief at 20, 22, Coons v. Geithner, No. CV-10-1714-PHX-GMS (D. Ariz. May 10, 2011), 2012 WL 3778219; Amended Complaint at 46–55, Kinder v. Geithner, No. 10-cv-00101-RWS (E.D. Mo. Apr. 26, 2011), 2011 WL 1576721; Second Amended Petition for Injunctive and Declaratory Relief at 34–36, Bryant v. Holder, 809 F. Supp. 2d 563 (S.D. Miss. Mar. 4, 2011) (No. 2:10-cv-76); Second Amended Complaint, Florida *ex rel* Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1307 (N.D. Fla. 2011) (No. 3:10-cv-91-RV/EMT); Second Amended Complaint for Declaratory and Injunctive Relief at 19–20, U.S. Citizens Ass’n v. Sebelius, No. 5:10-cv-01065-DDD (N.D. Ohio 2011), 2011 WL 3200242; Class Action Complaint for Declaratory and Injunctive Relief at 43, PeopleV.US v. Obama, No. 2:10-cv-01477-JCL-RJJ (D. Nev. Aug. 31, 2010); Complaint at 24, Calvey v. Obama, 792 F. Supp. 2d 1262 (W.D. Okla. 2011) (No. CIV-10-353-R); Amended Complaint at 24, Florida *ex rel*. McCollum v. U.S. Dep’t of Health & Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010); First Amended Complaint for Declaratory and Injunctive Relief and Certification Pursuant to L. Civ. R. 11.2 at 9, New Jersey Physicians Inc. v. Obama, 757 F. Supp. 2d 502 (D.N.J. 2010) (No. 2:10-cv-01489(SDW-MCA)); Complaint at 14, Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (No. 2:10-cv-11156-GCS-RSW).
- 17 First Amended Complaint for Declaratory and Injunctive Relief at 20, Baldwin v. Sebelius, No. 10-cv-1033 DMS (WMc) (S.D. Cal. 2012), 2012 WL 294466; Second Amended Petition for Injunctive and Declaratory Relief at 24, 36, Bryant v. Holder, 809 F. Supp. 2d 563 (S.D. Miss. Mar. 4, 2011) (No. 2:10-cv-76); Second Amended Complaint for Declaratory and Injunctive Relief at 19–20, U.S. Citizens Ass’n v. Sebelius, No. 5:10-cv-01065-DDD (N.D. Ohio 2011), 2011 WL 3200242; Amended Complaint at 24, Florida *ex rel* McCollum v. U.S. Dep’t of Health & Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010); First Amended Complaint for Declaratory and Injunctive Relief and Certification Pursuant to L. Civ. R. 11.2 at 9, New Jersey Physicians Inc. v. Obama, 757 F. Supp. 2d 502 (D.N.J. 2010) (No. 2:10-cv-01489(SDW-MCA)).
- 18 See Florida *ex rel*. Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011); Florida *ex rel*. Atty. Gen. v. U.S. Dep’t Health & Human Servs., 648 F.3d 1235, 1291 n.93 (11th Cir. 2011) (noting that the due process ruling was not appealed).

agreed that the individual mandate exceeded Congress's power under the Commerce Clause.¹⁹

In light of these outcomes, there is every reason to believe that focusing on federal constitutional limits internal rather than external to the Commerce Clause was correct as a matter of litigation strategy. This Article does not challenge *whether* that strategy was correct but seeks to explore *why* it was correct.²⁰ The doctrinal obstacles to invalidation of the individual mandate under the Commerce Clause are well stated in Justice Ginsburg's partial dissent and we need not long linger on the case here. In brief, Congress validly legislates pursuant to the Commerce Clause when it regulates the channels of commerce, the instrumentalities of commerce, or economic activities having substantial effects on interstate commerce.²¹ Congress may also target non-economic activity that it reasonably believes must be regulated in order to ensure the effectiveness of a broader regulatory scheme that substantially affects interstate commerce.²²

The ACA regulates activities having substantial effects on interstate commerce in at least two ways. First, and most directly, it regulates the decision to self-insure rather than to purchase health insurance on the open market. Because medical expenses are unpredictable, many who choose to self-insure cannot ultimately afford to do so. Extant legal and social norms require that emergency medical care be provided to individuals regardless of ability to pay, and the cost of providing that care is passed on in the form of higher premiums to those who pay for health insurance.²³ Individuals who self-insure are also substantially less likely to seek preventive care, and so when they do receive care it is disproportionately costly.²⁴

No one in the litigation before the Supreme Court denied that self-insurance has substantial effects on interstate commerce. The crux of the challengers' argument, rather, was that self-insurance is

¹⁹ See *NFIB*, 132 S. Ct. 2566, 2575 (2012) (Roberts, C.J.).

²⁰ Nor have I any quarrel, as a general matter, with legal advocates advancing novel constitutional arguments. It does seem to be incumbent upon the Supreme Court to exercise caution in adopting such arguments, particularly when reviewing landmark congressional statutes drafted, debated, and passed in reliance on a well-settled legal framework. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.").

²¹ *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005).

²² *Id.* at 18–19.

²³ See *NFIB*, 132 S. Ct. at 2611 (Ginsburg, J., concurring in part and dissenting in part).

²⁴ See *id.* at 2612.

not economic activity.²⁵ If that claim does not carry its own refutation, one need look no further than the Court's decision in *Wickard v. Filburn*,²⁶ in which a farmer's decision not to enter the wheat market was validly subject to regulation on the ground that his decision, aggregated with others similarly situated, substantially affected the price of wheat.²⁷ Or to the Court's more recent decision in *Gonzales v. Raich*, in which a marijuana grower's decision not to enter the commercial marketplace did not exempt her from the reach of federal criminal laws justified under the commerce power precisely because "leaving home-consumed marijuana outside federal control would . . . affect price and market conditions."²⁸

Neither *United States v. Lopez*²⁹ nor *United States v. Morrison*,³⁰ the two Rehnquist Court precedents imposing internal constitutional limitations on the reach of the Commerce Clause, implicates any of the above reasoning. The Gun Free School Zones Act, which was invalidated in *Lopez*, sought to regulate possession of a gun near a school, which is neither an economic activity itself nor an essential component of any existing and constitutionally valid regulatory program.³¹ The federal civil remedy for victims of gender-motivated violence that the Court struck down in *Morrison* did not itself target economic activity and was not connected in any direct way to regulation of a commercial market.³² One need not repudiate either case in order to believe that Congress was on firm constitutional ground in including an individual mandate as part of the ACA; it is therefore simply untrue that this particular rationale presumes unlimited federal power.³³

There is a second, independent way in which the ACA may (indeed, must) be described as a regulation of activity with substantial effects on interstate commerce. The Act is designed, among other things, to prevent insurance carriers from discriminating on the basis of preexisting medical conditions to a degree that makes the pur-

²⁵ See Brief for Private Respondents on the Individual Mandate at 7–9, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398).

²⁶ 317 U.S. 111 (1942).

²⁷ *Id.* at 127–28.

²⁸ *Gonzalez v. Raich*, 545 U.S. 1, 19 (2005); see also *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that, acting through its commerce powers, Congress could require restaurants to serve black customers).

²⁹ 514 U.S. 549 (1995).

³⁰ 529 U.S. 598 (2000).

³¹ For a concise summary of *Lopez*, see *Raich*, 545 U.S. at 23 (citing *Lopez*, 514 U.S. 549).

³² For a concise summary of *Morrison*, see *id.* at 25 (citing *Morrison*, 529 U.S. 598).

³³ See Neil S. Siegel, *Four Constitutional Limits That the Minimum Coverage Provision Respects*, 27 CONST. COMM. 591, 598 (2011) (“[U]pholding the minimum coverage provision would not authorize Congress to impose mandates that regulate noneconomic subject matter.”).

chase of insurance cost-prohibitive.³⁴ It is, in this sense, a regulation of the market for health insurance. Again, no one in the litigation before the Supreme Court denied, nor could plausibly deny, that an insurer's refusing coverage or raising prices on the basis of preexisting conditions is an economic activity substantially affecting interstate commerce.³⁵ The individual mandate is included within the statute because it is financially infeasible to restrict preexisting condition discrimination without substantially broadening the pool of the insured to include people who are unlikely to become extremely sick in the near future.³⁶ From this perspective, the individual mandate is justified as a means of making Congress's concededly valid regulatory scheme effective.

McCulloch v. Maryland announces the rule governing the scope of Congress's choice of means to effect its constitutionally valid ends: "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."³⁷ The Court reiterated in a much more recent case, *United States v. Comstock*,³⁸ that Congress may choose any means "that [are] rationally related to the implementation of a constitutionally enumerated power."³⁹ *Comstock* upheld the authority of the federal government to confine federal inmates classified as mentally ill and "sexually dangerous" beyond their terms of imprisonment where their state of domicile or trial refuses to assume custody.⁴⁰ The Court upheld this practice on the grounds that confinement of such persons helps to ensure the safety of communities surrounding prisons, which are themselves rationally related to the existence of federal crimes, which are themselves rationally related to various substantive enumerated regulatory powers (including the power to regulate interstate commerce).⁴¹ The link between the individual mandate and the regulation of preexisting condition discrimi-

³⁴ 42 U.S.C. § 300gg(a) (Supp. IV 2011) (prohibiting discriminatory health insurance premium rates).

³⁵ See *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 539–40 (1944) ("The modern insurance business . . . has become one of the largest and most important branches of commerce." (internal footnote omitted)).

³⁶ See *NFIB*, 132 S. Ct. 2566, 2613–15 (U.S. June 28, 2012) (Ginsburg, J., concurring in part and dissenting in part).

³⁷ 17 U.S. 316, 421 (1819).

³⁸ 130 S. Ct. 1949 (2010).

³⁹ *Id.* at 1956.

⁴⁰ *Id.* at 1954–55.

⁴¹ *Id.* at 1958.

nation in the health insurance industry is much shorter and much tighter than the link upheld in *Comstock* eight weeks after the ACA was signed into law.

Congress's power under the Necessary and Proper Clause is not unlimited, of course, and it is the absence of obvious limits that animates much of the ACA litigation.⁴² But *Comstock* addressed this objection by referring to the limits embedded within substantive enumerated powers and within other provisions of the Constitution.⁴³ The reach of the Necessary and Proper Clause itself is left "primarily . . . to the judgment of Congress,"⁴⁴ and certainly does not preclude federal regulation of a decision not to do something. Consider, for example, the decision not to file a tax return, or not to register for Selective Service, or not to report for federal jury duty.⁴⁵ And so the

⁴² A brief additional word on broccoli and related objections is irresistible. The most powerful "limiting principle" that prevents a federal broccoli mandate is neither any specific legal doctrinal principle nor the principle of political accountability as such. Cf. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (describing the strong role of states in American federalism as important safeguards against overbearing Congressional power). It is more precisely what we might call a principle of social membership. It is not that any member of Congress supporting a broccoli mandate would be voted out of office—this kind of political accountability story is premised, implicitly, on the vaguely conspiratorial notion that members of Congress would enact tyrannical regulations (for their own sake?) if left unchecked by their constituents. The more direct explanation for members of Congress not seeking to enact tyrannical regulations is that they do not support them. A society in which the broccoli objection counts as a slippery slope argument is one whose elected officials are quite unlikely to support a broccoli mandate. It follows that we cannot actually count on such officials being voted out of office for supporting the mandate because the society in which such support was possible would not find the mandate self-evidently unacceptable.

⁴³ *Comstock*, 130 S. Ct. at 1956–57.

⁴⁴ *Id.* at 1957 (quoting *Burroughs v. United States*, 290 U.S. 534, 547 (1934)).

⁴⁵ One distinction between failing to file a tax return and failing to purchase health insurance is that the former is regulated only if the person engages in certain prerequisite activities, namely earning a specified amount of income, whereas under the ACA the latter is not (or so some have claimed). There are a number of responses to this objection. First, the ACA penalty does not in fact apply to everyone who fails to purchase health insurance, only those "applicable individuals" who meet certain income requirements and are not otherwise exempt, for example, for religious reasons. See generally 26 U.S.C. § 5000A(d) (2006). Second, it is not at all clear why either the Necessary and Proper Clause or the Sixteenth Amendment would prevent the government from requiring all Americans to file a tax return regardless of whether they earned any income. Third, even if either of the first two responses were unavailing, it is difficult to imagine why constitutional significance should attach to the distinction between requiring someone to do something by virtue of being human and requiring her to do it only if she earns income or engages in some other activity essential to one's livelihood. It is true that the Constitution imposes certain requirements on "direct" taxes, namely that they be proportionate to state population. See U.S. CONST. art. I § 9, cl. 4. But given that the ACA penalty does not apply to people who have health insurance, it is plainly not a capitation tax, property tax,

Necessary and Proper Clause inquiry either returns us to the Commerce Clause itself or refers us to independent constitutional limitations on congressional power, two of which I discuss below. Note, though, that when we frame the internal Commerce Clause inquiry in terms of regulating preexisting condition discrimination, the concern over regulation of inactivity disappears, because it is indisputable that pricing health insurance policies is an economic activity that substantially affects interstate commerce.

The doctrinal explanations just described, in addition to others I have reserved,⁴⁶ led several prominent constitutional scholars to conclude that the challengers' Article I arguments were frivolous. Akhil Reed Amar compared Judge Vinson's opinion invalidating the individual mandate to Roger Taney's opinion in *Dred Scott v. Sandford*.⁴⁷ Andrew Koppelman described the arguments for the constitutionality of the individual mandate as "obvious" and the objections as "silly," writing that "no one had heard of [the action/inaction distinction] until the mandate's opponents invented it."⁴⁸ Charles Fried called the notion that Congress is impermissibly forcing people into the health insurance market "a canard that's been invented by the tea party and Randy Barnetts of the world," adding that he was "astonished to hear it coming out of the mouths of the people on [the Supreme Court]."⁴⁹

or anything else that could reasonably fit the definition of a direct tax. See *NFIB*, 132 S. Ct. 2566, 2598–99 (2012) (Roberts, C.J.). Fourth, even if that response were not sufficient, because virtually all people must at some point finance the costs of medical care, and because those costs are radically unpredictable, the market for health insurance is quite unlike most other markets, and so may easily justify sui generis regulatory strategies. Finally, the distinction does not apply to the failure to register for Selective Service or to report for jury duty, regulatory requirements that are also justified, if at all, under the Necessary and Proper Clause.

⁴⁶ As the Court held, Congress's taxing power is sufficient to justify the individual mandate, which is enforced solely by the Internal Revenue Service and whose provisions are contained within the Internal Revenue Code. See *NFIB*, 132 S. Ct. at 2594 (Roberts, C.J.). The taxing power argument was well-regarded by many in the scholarly community throughout the litigation, see, e.g., Brief of Constitutional Law Scholars as Amici Curiae Supporting Petitioners (Minimum Coverage Provision) at 2–6, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 135050, but it was not a significant focus of public debate over the individual mandate until the Court's decision issued.

⁴⁷ Akhil Reed Amar, *Constitutional Showdown: A Florida Judge Distorted the Law in Striking Down Healthcare Reform*, L.A. TIMES, Feb. 6, 2011, at A25.

⁴⁸ Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 2, 3, 20 n.93 (2011).

⁴⁹ Ezra Klein & Charles Fried, *Reagan's solicitor general: 'Health care is interstate commerce. Is this a regulation of it? Yes. End of story.'*, WONKBLOG (WASH. POST) (Mar. 28, 2012, 1:09 PM), <http://www.washingtonpost.com/blogs/ezra-klein/post/reagans-solicitor-general->

So much for the constitutional objections to the individual mandate that are native to the Commerce Clause or the Necessary and Proper Clause. The challengers might yet have a case grounded in limitations external to Article I. One possible restriction on congressional power to require Americans to purchase health insurance might be the Tenth Amendment. The Tenth Amendment has historically been invoked to support the existence of residual sovereign power retained by state governments.⁵⁰ Thus, the Court discussed the Tenth Amendment in holding that the federal government may not require state law enforcement officers to conduct background checks on purchasers of handguns under the Brady Handgun Violence Prevention Act even if it could do so itself or could require private gun dealers to do so.⁵¹ The text of the Tenth Amendment is not, however, limited to protecting state prerogatives. It reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*.”⁵² Challengers to the ACA relied on this language to argue that, just as the right to control the actions of state police officers is inherent in state sovereignty, an individual’s capacity over health care financing is inherent in individual autonomy and cannot be infringed by the fed-

health-care-is-interstate-commerce-is-this-a-regulation-of-it-yet-end-of-story/2011/08/25/gIQAmAQigS_blog.

50 *See Alden v. Maine*, 527 U.S. 706, 713–14 (1999) (referring to the Tenth Amendment to “confirm” the residual sovereign immunity of states); *Printz v. United States*, 521 U.S. 898, 935–36 (1997) (O’Connor, J., concurring) (arguing that an act requiring state officers to perform background checks on prospective handgun purchasers “violates the Tenth Amendment”); *id.* at 936 (Thomas, J., concurring) (writing separately to emphasize that the Tenth Amendment “affirms” that the federal government has limited powers); *New York v. United States*, 505 U.S. 144, 155–57 (1992) (explaining that, in cases implicating vertical separation of powers, the inquiries into the scope of enumerated power and the reserved province of state sovereignty “are mirror images of each other”); *Nat’l League of Cities v. Usery*, 426 U.S. 833, 842–44 (1976) (discussing the Tenth Amendment as an affirmation of limits on federal authority to regulate in certain core areas of state sovereign authority), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985); *Hammer v. Dagenhart*, 247 U.S. 251, 273–74 (1918) (“The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.”), *overruled by United States v. Darby*, 312 U.S. 100, 116–17 (1941). *See generally* U.S. Term Limits v. Thornton, 514 U.S. 779, 848–57 (1995) (Thomas, J., dissenting) (elaborating the position that the Tenth Amendment protects powers reserved to the people as assembled in states).

51 *See Printz*, 521 U.S. at 919–20.

52 U.S. CONST. amend. X (emphasis added).

eral government even acting pursuant to otherwise legitimate authority.⁵³

Let us assume for the sake of argument (and only for its sake)⁵⁴ that “the people” as used in the Tenth Amendment refers to individuals rather than a broader body politic. On that assumption, which is required to make sense of the claim, the presence of this novel argument in the ACA litigation makes even more urgent the question animating this article. We have a name for powers reserved to individuals and not delegated to government: they’re called *rights*, and the Constitution has a great deal to say about them. But rather than argue in a straightforward way that the individual mandate infringes upon rights protected by the Fifth Amendment or some other obviously rights-sensitive constitutional provision, challengers to the mandate have embedded their rights claims in roundabout arguments about federalism. At the start of the litigation, there was no case holding, even remotely, that either the constitutional structure or the Tenth Amendment itself prevents the federal government from conscripting individuals into acting against their will to accomplish some federal regulatory objective.⁵⁵ It makes sense that this would be so given that the Court’s rights jurisprudence is substantial and available to serve arguments of just this sort. If someone has no *right* against compelled purchase of health insurance, it is difficult to understand why the federal government may not compel that purchase when acting pursuant to otherwise legitimate powers.⁵⁶

Challenging the individual mandate primarily on federalism grounds would yet make strategic sense if it were abundantly clear that there is indeed no constitutional right against compelled purchase of health insurance. I am not inclined to argue, doctrinally or otherwise, for the existence of such a right, but unlike with the Article I argument discussed above, precedent at the start of litigation did not foreclose the possibility. Let us begin, as we must, with *Lochner*. Judge Vinson dismissed the substantive due process claim by refer-

53 See Brief for Private Respondents on the Individual Mandate, at 46–49, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398).

54 See, e.g., Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 825 (2008) (“Prior to the adoption of the Federal Constitution, the term ‘the people’ referred to the collective sovereign entity of the citizens of a given state.”).

55 Cf. *Printz*, 521 U.S. at 920 (“[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.” (quoting *New York v. United States*, 505 U.S. 144, 166 (1992))).

56 See *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824) (“[The Commerce] power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”).

ring to the *Lochner* era: “[T]his claim would have found Constitutional support in the Supreme Court’s decisions in the years prior to the New Deal legislation of the mid-1930’s, when the Due Process Clause was interpreted to reach economic rights and liberties.”⁵⁷ According to Judge Vinson, the right claimed by the challengers was a form of economic substantive due process, which the rejection of *Lochner* forecloses.

A puzzle arises immediately. In rejecting the due process claim, Judge Vinson cited an Eleventh Circuit decision stating that “[a] searching inquiry into the validity of legislative judgments concerning economic regulation is not required.”⁵⁸ That is, the substantive due process claim failed because the legislative scheme counted as economic regulation, but the Commerce Clause claim succeeded because it did not count as economic regulation. One gets the distinct impression that either a bad argument was disguised as a good one or vice versa.

Anyone making an argument that may reasonably be styled as economic substantive due process is certainly on rough constitutional terrain. But government regulation of economic transactions is not, ipso facto, immune from substantive due process attack. The Supreme Court held in *Carey v. Population Services International* that the State of New York could not restrict the retail distribution of contraceptives to sales by licensed pharmacists.⁵⁹ The Court applied strict scrutiny to the regulation, because “the same test must be applied to state regulations that burden an individual’s right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely.”⁶⁰ The lesson of the case, consistent with *Buckley v. Valeo*⁶¹ and its progeny,⁶² is that restrictions on financial activity cannot be evaluated in a vacuum but must be considered in light of the interests to which the activity is instrumental. The State presumptively may not burden fundamental rights, and burdens occasioned by commercial regulation are no exception.

57 Florida *ex rel.* McCollum v. U.S. Dep’t of Health & Human Servs., 716 F. Supp. 2d 1120, 1161 (N.D. Fla. 2010) (internal citations omitted).

58 *Id.* (quoting TRM, Inc. v. United States, 52 F.3d 941, 945 (11th Cir. 1995)).

59 431 U.S. 678, 700–02 (1977).

60 *Id.* at 688.

61 424 U.S. 1 (1976) (invalidating restrictions on political campaign expenditures).

62 *See, e.g.*, Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876 (2010) (invalidating a prohibition on certain election expenditures by corporations and unions funded out of general treasury funds).

The appropriate framing question is not, then, whether the government is regulating an economic transaction, but whether, in doing so, the government is infringing upon a fundamental right. Whether or not individuals have a fundamental right to self-insure for health care cannot be answered by staring harder at the text of *Lochner*. A sympathetic rendering of the ACA claim would compare it to the case in which, rather than restricting the ability of bakers to contract to work more than sixty hours per week, the New York legislature had instead restricted the ability of bakers to contract to work *fewer* than sixty hours a week. Putting aside Thirteenth Amendment concerns, *Lochner* is surely not sufficient to reject a substantive due process challenge to such a law.

A far more germane precedent is *Jacobson v. Massachusetts*,⁶³ decided three days before *Lochner* was argued. The *Jacobson* Court upheld a compulsory smallpox vaccination program in Massachusetts against a due process challenge.⁶⁴ If the government may, consistent with the Due Process Clause, require its citizens to take a potentially dangerous vaccine (in the *Lochner* era, no less!), then may it not a fortiori require its solvent citizens to purchase health insurance?⁶⁵ Not necessarily. First, the state interest in a mandatory vaccination program for a deadly and contagious illness might reasonably (though not inevitably) be described as more compelling than the interest in preventing either pre-existing condition discrimination by insurers or free-riding and cost-shifting by health care consumers. Second, *Jacobson* indeed precedes the effective rejection of *Lochner* in *West Coast Hotel Co. v. Parrish*,⁶⁶ but it also precedes the revitalization of substantive due process in *Griswold v. Connecticut*.⁶⁷ And *Griswold* and its progeny are concerned precisely with an individual's autonomy over private decision-making. Under the modern Due Process Clause, a woman has a presumptive constitutional right to determine whether to bear or beget a child,⁶⁸ an individual has both the right to bodily integrity⁶⁹ and the right to refuse unwanted medical treatment,⁷⁰ and even a prisoner has a "significant liberty interest" in not being administered

63 197 U.S. 11 (1905).

64 *Id.* at 39.

65 See Koppelman, *supra* note 48, at 22–23.

66 300 U.S. 379 (1937).

67 381 U.S. 479 (1965).

68 See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

69 See *Rochin v. California*, 342 U.S. 165, 172–74 (1952).

70 See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

antipsychotic drugs against his will.⁷¹ A panel of the United States Court of Appeals for the District of Columbia Circuit held that this line of cases supported a constitutionally protected right to receive potentially life-saving experimental drugs.⁷²

This series of cases has led Abigail Moncrieff to identify a constitutional “freedom of health” that includes “a freedom to reject unwanted medical care and implicitly . . . a freedom to obtain at least certain kinds of medical care.”⁷³ If such a liberty interest indeed exists and is sufficient to warrant heightened constitutional scrutiny, then the argument that the government may not compel the purchase of health insurance becomes more colorable. Moncrieff argues that the individual mandate raised constitutional questions because it effectively required consumers to pay for care through a system that interposes a third-party auditor between the individual and her physician’s health care choices.⁷⁴ More broadly, a right to direct one’s own medical care might reasonably be threatened by a system that requires limited funds to be spent on health insurance rather than saved for future care insofar as it uses (commandeers?) the consumer’s own finances to alter the costs and benefits of particular care options. Routine and preventive care, rationally avoided in the absence of the mandate, is made a moral hazard under the ACA.⁷⁵

Moncrieff ultimately concludes that to the extent there is a presumptive constitutional objection to the individual mandate grounded in the freedom of health, the presumption of unconstitutionality is overcome by a sufficiently compelling governmental interest and the narrow tailoring of the individual mandate’s remedial scheme.⁷⁶ I agree, and I am less certain than Moncrieff that the most reasonable interpretation of the Court’s cases supports a broad “freedom of health.” The important point, however, is not whether I believe the substantive due process argument is a loser, but why virtually everyone of consequence in the massive litigation over the ACA appeared to hold the same view, even as many of those same people were un-

71 See *Washington v. Harper*, 494 U.S. 210, 221–22 (1990).

72 *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 445 F.3d 470, 476 (D.C. Cir. 2006), *rev’d en banc*, 495 F.3d 695 (D.C. Cir. 2007).

73 Abigail R. Moncrieff, *The Freedom of Health*, 159 U. PA. L. REV. 2209, 2237 (2011).

74 See *id.* at 2249–50.

75 See Steven Shavell, *On Moral Hazard and Insurance*, 93 QJ. ECON. 541 (1979) (identifying the moral hazard created by the presence of insurance and proposing a formal model evaluating mitigation strategies); cf. Moncrieff, *supra* note 73, at 2248 (noting that the ACA’s mandate is not satisfied by “the most freedom-preserving” forms of insurance coverage such as high-deductible sickness and accident insurance).

76 See Moncrieff, *supra* note 73, at 2250–51.

moved by seemingly persuasive defenses of congressional power under Article I.

In different terms, we may identify the litigation choices in this case, and the judicial responses to those choices, as emblematic of an aggressive, but distinctly partial, unsettling of the New Deal settlement. As Larry Kramer writes, the New Deal settlement entailed “the Court restor[ing] to politics questions respecting the definition or scope of the powers delegated by the Constitution to Congress and the Executive, subject only to a very limited rational basis scrutiny.”⁷⁷ As indicated by Footnote Four of *United States v. Carolene Products*,⁷⁸ it also entailed “more exacting judicial scrutiny” for certain individual rights⁷⁹ but not for others, namely those represented by *Lochner* and falling generally under the category of economic and social rights.⁸⁰ The ACA litigation placed the twin pillars of the New Deal settlement in sharp relief, and pulled them apart. Under the settlement, both the Article I and the substantive due process claims against the individual mandate should have been off limits. In reality, only one was.

II

It is possible to tell a reasonably powerful but wholly extralegal story about the paucity of substantive due process claims in this litigation and in its surrounding discourse. Like many good stories, it begins where the money trail ends.

Consider the following. The litigation immediately before the Court in the ACA litigation⁸¹ was brought by twenty-six states, two private plaintiffs, and the National Federation of Independent Business (“NFIB”). The NFIB is a business lobbying organization funded in part by the Claude R. Lambe Charitable Foundation, which is con-

77 Larry D. Kramer, Foreword, *We the Court*, 115 HARV. L. REV. 5, 122 (2001) (internal citations omitted).

78 304 U.S. 144, 152 n.4 (1938).

79 *Id.*

80 *See id.* at 152; *see also* Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 686 (2005) (discussing the *Lochner* narrative in which “the New Deal revolution produced a new breed of Justices who believed in judicial restraint and appropriate respect for democratic processes in ordinary social and economic regulation”); Kramer, *supra* note 77, at 121 (explaining that, under the New Deal settlement, the Court “reserved room for ‘a more exacting judicial inquiry’ to protect a broad category of individual rights, including those specified in or inferred from the Bill of Rights and Reconstruction Amendments; those pertaining to voting and the political process; and those necessary to protect racial, religious, or other ‘discrete and insular minorities.’”).

81 *NFIB*, 132 S. Ct. 2566 (2012).

trolled by Charles G. Koch.⁸² Koch's brother David endorsed Mitt Romney for President in 2008 and hosted a major fundraiser in the Hamptons for Romney in 2010.⁸³ The Kochs' brother Bill and his coal company, Oxbow Carbon, donated \$1 million to Romney's Super PAC, Restore Our Future, in 2011.⁸⁴ David Koch is a co-founder of and has donated more than \$1 million to Americans for Prosperity, among the most significant financial and logistical backers of the Tea Party movement.⁸⁵ All of the plaintiffs, including the states, were represented by David Rivkin and Lee Casey of BakerHostetler.⁸⁶ Rivkin and Casey were legal advisors to Romney on his justice advisory committee throughout the primary season and, as of this writing, remain two of his most high-profile supporters within the legal community.⁸⁷

In other words, the litigation against the ACA has been funded and directed in significant part by a network of elite Republicans committed to Mitt Romney's presidential aspirations and to the sustenance of the Tea Party movement. If the individual mandate violates the Fifth Amendment's Due Process Clause then it also violates the Fourteenth Amendment's Due Process Clause.⁸⁸ A successful substantive due process argument against the individual mandate would therefore mean that the only other American executive to sign such a mandate into law, Mitt Romney, would have supported equally unconstitutional health care legislation. Significant litigation backed by

82 See Robert Greenwald & Jesse Lava, *Koch Brothers v. Health Reform*, OPEN SALON (Mar. 26, 2010, 3:41 PM), http://open.salon.com/blog/robert_greenwald/2012/03/26/koch_brothers_v_health_reform.

83 See Ari Berman, *Romney's Koch Brothers Connections*, NATION (Feb. 24, 2012, 12:56 PM), <http://www.thenation.com/blog/166447/romneys-koch-brothers-connections>; Maggie Haberman & Kenneth P. Vogel, *GOP mega-donors look toward 2012*, POLITICO.COM (Oct. 23, 2010, 5:33 PM), <http://dyn.politico.com/printstory.cfm?uuid=DAEF889F-ABE-91FE58FF12C47CE0C5A7>.

84 See Ian Duncan & Matea Gold, *Romney Backers Test a Ban on Donors*, L.A. TIMES, Mar. 19, 2012, at A1, A7.

85 See Jane Mayer, *Covert Operations: The Billionaire Brothers Who Are Waging a War Against Obama*, NEW YORKER, Aug. 30, 2010, at 44, 46, available at http://www.newyorker.com/reporting/2010/08/30/100830fa_fact_mayer?printable=true; Laurie Bennett, *Tracking Koch Money and Americans for Prosperity*, FORBES (Mar. 31, 2012, 10:35 AM), <http://www.forbes.com/sites/lauriebennett/2012/03/31/tracking-koch-money-and-americans-for-prosperity/>.

86 Amended Complaint at 33, *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010).

87 See Ashley Killough, *Bork to co-chair Romney justice committee*, CNN.COM (Aug. 2, 2011, 12:12 PM), <http://politicalticker.blogs.cnn.com/2011/08/02/bork-to-co-chair-romney-justice-committee>.

88 See generally Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010).

establishment Republicans and premised on the unconstitutionality of Romney's signature legislative achievement would have been deeply threatening to Romney's Republican primary prospects and, therefore, to the possibility of a Republican victory in the 2012 presidential election. Threading the federalism needle would be a rational strategy for anyone with this suggested set of priorities.

Quite apart from Romney's presidential prospects, the link between the Tea Party movement and the Republican Party, so vital to Republican political energy in 2010 and since, has depended on tempering the Tea Party's fundamentalist libertarian elements and supporting its anti-Washington impulses. As has been well-documented,⁸⁹ the modern Republican Party comprises a tenuous coalition of economic and social conservatives, a partial result of William F. Buckley's and Frank Meyer's famous "fusion" strategy.⁹⁰ Libertarianism that takes the form of anti-regulatory zeal directed at Congress is harmonious with that fusion, whereas a purer form of anti-statist libertarianism is threatening to it. Tea Party supporters appear to be divided between libertarians on one hand and fiscal and social conservatives on the other. Based on extensive survey research conducted during the fall of 2010, Emily Ekins concludes that "[t]he Tea Party seems unified on role of government questions regarding economics and business; however, they are roughly split in half about the government promoting a particular set of values."⁹¹ Libertarians within the Tea Party align with Democrats on social and cultural issues but align with Republicans on economic issues.⁹² Conservatives within the Tea Party align with Republicans on both sets of issues.⁹³ Challenging the ACA as an overreach by Washington can be supported not only by establishment Republicans but also by both wings of the Tea Party, whereas challenging the ACA as more generally statist threatens to split significant elements of the Tea Party from the Republican mainstream.

89 See GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945*, at 235 (Intercollegiate Studies Inst. 1996) (1976).

90 See John Micklethwait & Adrian Wooldridge, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* 51 (2004); Kevin Smant, *PRINCIPLES AND HERESIES: FRANK S. MEYER AND THE SHAPING OF THE AMERICAN CONSERVATIVE MOVEMENT* 49–52 (2002).

91 Emily McClintock Ekins, *The Character and Economic Morality of the Tea Party Movement*, 1, 27 (Sept. 5, 2011) (unnumbered working paper presented at the 2011 American Political Science Association Annual Meeting, available at <http://ssrn.com/abstract=1902394>).

92 *Id.* at 23–24.

93 *Id.*

Relatedly, the unity of the Republican coalition requires official opposition to abortion rights. Pro-abortion rights Republican politicians, once common, are nearly extinct, and hostility to *Roe v. Wade*⁹⁴ remains the most significant, if at times *sub rosa*, litmus test for Republican judges. An integrated political and legal strategy for overturning the ACA must, like any strategy that relies on mass conservative mobilization, be compatible with *Roe*'s incorrectness. But it is difficult to conceive of a competent legal brief advocating invalidation of the individual mandate on due process grounds that does not rely on *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁹⁵ which affirmed the "essential holding" of *Roe*.⁹⁶ The controlling joint opinion in *Casey* states that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter"⁹⁷ and that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."⁹⁸ The freedom to make healthcare decisions arguably falls within the carapace that these various decisional rights erect, and indeed the individual mandate requires consumers to purchase insurance plans that provide coverage for "maternity and newborn care" and "pediatric services."⁹⁹ The mandate therefore affects an individual's allocation of financial resources to competing health care options; that allocation decision is plausibly covered by the liberty interests articulated in *Casey*. That language from *Casey*, moreover, was co-authored by Justice Kennedy, who most observers assumed would be a significant swing vote in the ACA litigation. To rely on a substantive due process argument but to eschew reliance on the Court's controlling abortion decision would border on legal malpractice.

To be clear, none of the above is offered as either psychoanalysis or investigative journalism. I have no special insight into the actual reasons that motivated the choice to rely on federalism arguments and not to rely on substantive due process. It may suffice as explanation to note that the choice was likely correct strategically, on which I have more to say in Part III. And even if the lawyers, funders, and clients making that choice were motivated by the kinds of political con-

94 410 U.S. 113 (1973).

95 505 U.S. 833 (1992).

96 *Id.* at 846.

97 *Id.* at 847.

98 *Id.* at 851.

99 Patient Protection and Affordable Care Act § 1302(b)(1)(A)–(J), 42 U.S.C. § 18022(b)(1)(A)–(J) (Supp. IV 2011).

siderations I have discussed, cognitive dissonance may well have led them to experience their decision-making process as free from such influences. At a minimum, however, this Part demonstrates that, in the context of the ACA litigation, there were substantial political obstacles to reliance on substantive due process. Whatever the doctrinal benefits of doing so might have been, the strategic costs were likely much higher.

III

The story Part II tells remains incomplete. It gestures suggestively a partial explanation for the litigation choices of some prominent challengers to the individual mandate, but it does not explain the responses of judges to the substantive due process claims that have in fact been made. As discussed above, Judge Vinson ruled that the individual mandate was unconstitutional but was quite skeptical of the substantive due process argument. Judge Sutton referred to the due process version of the plaintiff's argument in the individual mandate challenge rejected by the Sixth Circuit:

Why construe the Constitution . . . to place this limitation—that citizens cannot be forced to buy insurance, vegetables, cars and so on—solely in a grant of power to Congress, as opposed to due process limitations on power with respect to all American legislative bodies? Few doubt that the States may require individuals to buy medical insurance, and indeed at least two of them have. The same goes for a related and familiar mandate of the States—that most adults must purchase car insurance. Yet no court has invalidated these kinds of mandates under the Due Process Clause or any other liberty-based guarantee of the Constitution. That means one of two things: either compelled purchases of medical insurance *are* different from compelled purchases of other goods and services, or the States, even under plaintiffs' theory of the case, may compel purchases of insurance, vegetables, cars and so on. Sometimes an intuition is just an intuition.¹⁰⁰

Judge Sutton treats the absence of successful due process claims against the individual mandate as evidence that such claims are inadequate. It may well be that judges who have rejected the substantive due process argument have been socialized into a political culture that prioritizes limits on federal power over aggrandizement of individual rights. That argument, however, is speculative, vaguely paranoid, and happily unnecessary. The better view links the doctrinal account of Part I with the socio-political account of Part II to arrive at

¹⁰⁰ Thomas More Law Ctr. v. Obama, 651 F.3d 529, 565 (6th Cir. 2011) (Sutton, J., concurring) (internal citations omitted).

a more complete picture of the legal status of economic due process arguments. In brief, *Lochner's* status as an anticanonical case, which results in large measure from its *compatibility* with other rights-based claims, distorts doctrinal arguments about economic rights.

Lochner is the dean of the anticanon.¹⁰¹ No case is more consistently labeled anticanonical by academics;¹⁰² no repudiated case more consistently receives significant treatment in leading constitutional law casebooks;¹⁰³ and no case is negatively cited more frequently in modern Supreme Court opinions.¹⁰⁴ As David Strauss writes, “[y]ou have to reject *Lochner* if you want to be in the mainstream of American constitutional law today.”¹⁰⁵

A judicial decision does not acquire this unhappy status by happenstance or even through the ordinary operation of the common law. Within the U.S. constitutional tradition, the few cases that become strongly anticanonical are the detritus of regimes that succumbed to constitutional revolutions. The Civil War and Reconstruction represent the repudiation of *Dred Scott v. Sandford*; the New Deal settlement represents the repudiation of *Lochner*; and the Second Reconstruction represents the repudiation of *Plessy v. Ferguson*.¹⁰⁶ One of the functions of anticanonical discourse is to reconcile constitutional continuity with the rejection of the traditions these cases represent. We persuade ourselves that these cases were wrong the day they were decided so that we may assure ourselves that we are not as one with a people committed to slavery, to sweatshops, and to Jim Crow.¹⁰⁷

Under the circumstances, it is not enough for someone arguing in favor of a form of economic due process to dance around the unyielding *Lochner* precedent. She must confront it directly, proactively, and successfully. The oral argument in *Florida v. Department of Health and Human Services* was devoted largely to articulating and debating a limiting principle to the federal government’s assertion of regulatory power under the Commerce Clause.¹⁰⁸ Had the litigation instead focused on substantive due process, the argument (in the unlikely event it made it to the Supreme Court) would instead have focused

101 See generally Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (discussing the role of *Lochner* and other cases that stand as exemplars of constitutional law gone wrong).

102 *Id.* at 391.

103 *Id.* at 395.

104 *Id.* at 398.

105 David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003).

106 Greene, *supra* note 101, at 468.

107 See Balkin, *supra* note 80, at 709–10.

108 See Transcript of Oral Argument at 16–18, 23, 27–31, 39–45, *NFIB*, 132 S. Ct. 2566, 2591 (2012) (No. 11-398).

on how the challengers' claims differed from the claims accepted in *Lochner*. In fact, *Lochner* made several appearances at the Supreme Court oral argument even without any due process claim to speak of. Solicitor General Donald Verrilli argued that "to embark on the kind of analysis that [the challengers] suggest the Court ought to embark on is to import *Lochner*-style substantive due process."¹⁰⁹ Later in the argument, Chief Justice Roberts said that "it would be going back to *Lochner* if we were put in the position of saying, no, you can use your commerce power to regulate insurance, but you can't use your commerce power to regulate this market in other ways."¹¹⁰ And Justice Sotomayor asked Paul Clement, arguing on behalf of the respondents, "Is this a *Lochner* era argument that only the States can [require the purchase of insurance], even though it affects commerce?"¹¹¹

Notice that each invocation of *Lochner* associated the case with a different substantive proposition. The first tied *Lochner* to the notion that unenumerated liberty interests limit governmental regulatory power; the second to the notion that courts should import "nested oppositions" such as activity/inactivity or direct/indirect into judicial review of federal power;¹¹² the third to the notion that the Tenth Amendment or its equivalent acts as an independent limitation on otherwise valid exercises of federal authority. None of these propositions needs to be linked to *Lochner*, and indeed the latter two align more closely with cases like *Hammer v. Dagenhart*¹¹³ and *Carter v. Carter Coal Co.*,¹¹⁴ which invalidated federal statutes. Moreover, notwithstanding their association with *Lochner*, none of the three propositions is fully discredited. All of modern substantive due process jurisprudence involves limitations that unenumerated liberty interests place on regulatory power; the nested opposition of economic/non-economic is a fixture of modern Commerce Clause case law; and *New York v. United States*¹¹⁵ and *Printz v. United States*¹¹⁶ are difficult to understand in the absence of an external limit on congressional power grounded in federalism concerns.

109 *Id.* at 30.

110 *Id.* at 39.

111 *Id.* at 66–67.

112 See Jack M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669, 1669 (1990) (reviewing JOHN M. ELLIS, *AGAINST DECONSTRUCTION* (1989)); Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 112–16 (1991).

113 247 U.S. 251 (1918).

114 298 U.S. 238 (1936).

115 505 U.S. 144 (1992).

116 521 U.S. 898 (1997).

Lochner, then, is the hardest-working case in the U.S. Reports. It is both a synecdoche and a rhetorical resource. Its unquestionably negative valence enables it to stand in for—and thereby to attack—a very broad set of propositions, even some that, in other contexts, are embedded within our constitutional tradition. One such proposition is economic due process. Even if we can rather easily distinguish statutory invalidation of a labor contract from statutory compulsion to enter into an insurance contract, *Lochner* casts a shadow—a penumbra, if you will—over the entire enterprise. It forces recalculation of the anticipated costs and benefits of advancing certain kinds of claims and therefore may strongly distort doctrinal argument. Like an athletic seven-footer, *Lochner* alters even the shots that it cannot block.

An irony bears mention. *Lochner*'s anticanonicity, its stickiness as a negative precedent, both motivates and derives from its usefulness across the ideological and doctrinal spectrum. *Lochner* became anticanonical in the late 1960s and early 1970s, not because advocates and judges suddenly discovered that economic due process was a losing claim but rather because they discovered that noneconomic due process was a winning one.¹¹⁷ *Lochner* is an instrument of opposition, not affirmative argumentation, and so its effectiveness has expanded in proportion to the numerosity of its potential targets. *Griswold*¹¹⁸ and its progeny provided conservatives with reason to invoke *Lochner* as a negative precedent, and liberals, who had long embraced anti-*Lochner* rhetoric, continued to do so as a means of distinguishing progressive due process arguments from conservative ones.¹¹⁹ And so it is the conceptual generativity of due process arguments that engenders *Lochner*'s anticanonicity. *Lochner* revisionism, rampant within the legal academy and at conservative think tanks,¹²⁰ may be better described as a feature of *Lochner*'s anticanonical status than as a threat to it.

It remains to explain why *Lochner* does not effectively condemn federalism arguments—the other claims the New Deal settlement was thought to have settled—even as many seek to call it to that service.¹²¹ The answer may be, in part, that *Griswold*, and later *Roe*, have helped to fix the socio-legal meaning of *Lochner* as a case about economic

117 See David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1473 (2005); Greene, *supra* note 101, at 454–55.

118 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

119 See Greene, *supra* note 101, at 453–56.

120 See *id.* at 417.

121 See *supra* notes 108–111 and accompanying text.

due process and unenumerated rights rather than as a full-fledged stand-in for limitations on governmental regulatory authority. Abortion rights cases give liberals strong reason to defend substantive due process and therefore give conservatives strong reason to attack it. Economic due process gives some conservatives strong reason to defend substantive due process and so gives liberals strong reason to attack it. By contrast, one finds strong critics of broad congressional power almost exclusively on the political right, and so states' rights arguments are not universally deployed. Federalism has not found its *Lochner* because it has not found its *Roe*.

CONCLUSION

The force of the broccoli objection derives from its self-evident incompatibility with liberal democratic premises. And yet the logic of the ACA challengers' principal argument would suggest no constitutional infirmity in a state-level mandate to purchase (and consume?) broccoli. There is no conceptual incongruity in the notion that we have rights that only states, and not the federal government, may infringe. The right to a grand jury¹²² and to a civil jury trial¹²³ are among those rights,¹²⁴ and we get along fine with that tension. Moreover, the idea that the federal structure is not concerned with limitations on centralized power for its own sake but rather for the sake of rights protection has a lengthy and distinguished intellectual history.¹²⁵

But there is little reason in principle to suppose that among the rights less protected as against states than as against the federal government is the right to refuse participation in an interstate commercial market. And if such a right is among those the federal govern-

122 U.S. CONST. amend. V.

123 U.S. CONST. amend. VII.

124 See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.13 (2010).

125 See, e.g., THE FEDERALIST NO. 28, at 180–81 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.”); THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”).

ment has less leeway to infringe, then surely the reason for that is grounded not in limitations inherent in Article I, but in independent limitations housed within the Bill of Rights. Putting principle aside, there is still less justification in pre-ACA doctrine for the suggestion that neither the Commerce Clause nor the Necessary and Proper Clause permits regulation of self-insurance for medical costs but that the Fifth Amendment has nothing to say about the matter.

The most persuasive explanation for this confusing mix of propositions rests neither in principle nor in doctrine, but rather in party politics and in our socio-legal culture. A substantive due process attack on the individual mandate would threaten Mitt Romney's political prospects and Republican Party unity, would associate conservatives with reproductive freedom precedents, and perhaps as significantly, would place *Lochner*, rather than broccoli, at the center of the legal argument. Yuck.

