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FEDERALISM AND PHANTOM ECONOMIC RIGHTS IN *NFIB V. SEBELIUS*

Matthew J. Lindsay*

Few predicted that the constitutional fate of the Patient Protection and Affordable Care Act would turn on Congress' power to lay and collect taxes. Yet in NFIB v. Sebelius, the Supreme Court upheld the centerpiece of the Act—the minimum coverage provision (MCP), commonly known as the “individual mandate”—as a tax. The unexpected basis of the Court's holding has deflected attention from what may prove to be the decision's more constitutionally consequential feature: that a majority of the Court agreed that Congress lacked authority under the Commerce Clause to penalize people who decline to purchase health insurance. Chief Justice Roberts and the four joint dissenters endorsed the novel limiting principle advanced by the Act's challengers, distinguishing between economic “activity,” which Congress can regulate, and “inactivity,” which it cannot. Because the commerce power extends only to “existing commercial activity,” and because the uninsured were “inactive” in the market for health care, they reasoned, the MCP was not a regulation of commerce within the meaning of the Constitution. Critically, supporters of the activity/inactivity distinction insisted that it was an intrinsic constraint on congressional authority anchored in the text of Article I and the structural principle of federalism, rather than an “affirmative” prohibition rooted in a constitutional liberty interest.

This Article argues that the neat dichotomy drawn by the Chief Justice and joint dissenters between intrinsic and rights-based constraints on legislative authority is illusory, and that it obscures both the underlying logic and broader implications of the activity/inactivity distinction. In fact, that distinction is rooted less in the constitutional enumeration of powers or federalism than in a concern about individual liberty. Even in the absence of a formal constitutional “right” to serve as a doctrinal vehicle, the Justices' defense of economic liberty operates analogously to the substantive due process right to “liberty of contract” during the Lochner era—as a trigger for heightened scrutiny of legislative means and ends.

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Current scholarship addressing the role of individual liberty in NFIB v. Sebelius tends to deploy Lochner as a convenient rhetorical touchstone, to lend an air of illicitness or subterfuge to the majority's Commerce Clause analysis. This Article argues that the Lochner-era substantive due process cases are both more nuanced and more instructive than judges and many scholars have realized. They illustrate, in particular, that constraints on legislative authority that are rooted in individual liberty and constraints on legislative authority that are rooted in enumerated powers and federalism can and do operate in dynamic relationship to one another. Reading NFIB v. Sebelius through this historical lens better equips us to interrogate the role that economic liberty plays in the majority's Commerce Clause analysis, and provides an important alternative analytical framework to the structure/rights dichotomy advanced by the Chief Justice and joint dissenters. The activity/inactivity distinction not only portends a constitutionally dim future for federal purchase mandates, but may also herald more far-reaching restrictions on congressional interference with economic liberty, in which individual sovereignty assumes a place alongside state sovereignty in the Court's federalism.

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I. INTRODUCTION

Few predicted that the constitutional fate of the Patient Protection and Affordable Care Act (ACA) would turn on Congress' power to lay and collect taxes.¹ Yet in *NFIB v. Sebelius*,² the Supreme Court upheld the centerpiece of the Act—the minimum coverage provision (MCP), commonly known as the “individual mandate”—as a tax under the General Welfare Clause of Article I. The unexpected constitutional basis of the Court's holding,³ along with its dramatic political implications, have deflected attention from what may prove to be the decision's more constitutionally consequential feature: that a majority of the Court⁴ agreed that Congress lacked authority under the Commerce

1. *But see* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 45 (2010) (arguing that the MCP was a constitutional exercise of Congress' taxing power); Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 YALE L.J. ONLINE 407 (2011) (same). Though few commentators anticipated the basis of the Court's holding, Chief Justice Roberts' decision to uphold the individual mandate as a tax was to some extent foreshadowed by his well-established history as a judicial minimalist, who prefers “maintaining the status quo” and “narrow[ing] the role of the Court in public affairs.” Jonathan H. Adler, *Judicial Minimalism, the Mandate, and Mr. Roberts*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 171, 176–77 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013). Consistent with that posture, Jonathan Adler explains, Roberts has sometimes adopted even strained “saving constructions of federal statutes to preserve their constitutionality.” *Id.* at 174.

John Fabian Witt proposes that the Chief Justice's apparently broad, antiformalist reading of the tax power can be traced back through Judge Henry Friendly, an important intellectual and professional mentor of Roberts for whom the future Chief Justice clerked, to Louis D. Brandeis, a key architect of the modern American state for whom Friendly had clerked. Both Friendly and Brandeis preached “defer[ence] to the elected branches whenever possible,” and applied a distinctively functionalist approach to Congress' tax power. John Fabian Witt, *The Secret History of the Chief Justice's Obamacare Decision*, in *THE HEALTH CARE CASE, supra*, at 218. “Roberts practical evaluation of the ACA,” Witt concludes, and particularly his willingness to construe the MCP as a tax, thus “drew on a long professional history” comprised of “a remarkable line of American jurists yoked together by relations of mentorship and professional connections.” *Id.* at 221.

2. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

3. Notwithstanding the divergence of opinion among the courts of appeal—*see* Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011) (upholding the MCP as a valid exercise of the commerce power); *Florida v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (striking down the MCP as an improper exercise of the commerce power); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (upholding the MCP as a valid exercise of the commerce power)—throughout the litigation the vast preponderance of legal observers, including many well-known legal conservatives, believed that the MCP was clearly a constitutionally valid exercise of the federal commerce power, and predicted that at least five, and perhaps as many as eight, justices would vote to sustain the provision on that ground. As Charles Fried, President Reagan's Solicitor General, put it: “[H]ealth care is interstate commerce. Is this a regulation of it? Yes. End of story.” Ezra Klein, *Reagan's Solicitor General: 'Health care Is Interstate Commerce. Is This a Regulation of It? Yes. End of Story'*, WASH. POST WONKBLOG (Mar. 28, 2012, 1:09 PM), http://www.washingtonpost.com/blogs/wonkblog/post/reagans-solicitor-general-health-care-is-interstate-commerce-is-this-a-regulation-of-it-yes-end-of-story/2011/08/25/gIQAmaQigS_blog.html. It was only during oral argument in March 2012 that the breadth and depth of the Justices' skepticism toward the government's commerce rationale became evident.

4. The specific alignment of opinions on the Commerce Clause issue presents a challenge of

Clause to penalize people who decline to purchase health insurance.⁵ Specifically, Chief Justice Roberts and the four joint dissenters⁶ endorsed the novel limiting principle advanced by the Act's challengers, distinguishing between economic "activity," which Congress can regulate, and "inactivity," which it cannot. Because the commerce power extends only to "existing commercial activity," and because the uninsured were "inactive" in the market for health care, they reasoned, Congress could not compel the uninsured to purchase health insurance on the ground that their failure to do so affects interstate commerce.⁷

The five Justices that rejected the government's commerce rationale went to considerable lengths to emphasize that the activity/inactivity distinction was an intrinsic constraint on congressional authority anchored in the text of Article I and the structural constitutional value of federalism, rather than an "affirmative" prohibition rooted in an individual right. Indeed, Chief Justice Roberts opened his opinion with a civics lesson on the nature and limits of federal authority. "[R]ather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers,"⁸ he explained. That constitutional enumeration was "also a limitation of power, because '[t]he enumeration presupposes something not enumerated.'"⁹ At stake in that limitation, first and foremost, was the principle of dual sovereignty. In order to stave off

nomenclature. Five justices agreed that the MCP was not a valid exercise of the commerce power, but because the case was decided on other grounds—i.e. under the General Welfare Clause—we cannot properly call the Chief Justice and the joint dissenters' shared conclusion with respect to the commerce power a "holding" of the Court. That conclusion may well have significant influence on future Commerce Clause cases because it carries the weight of five Justices, but because it is inessential to the outcome of the case, it is dicta. When this Article refers to a "majority" of the Court, it is not intended to suggest that the shared conclusion of the Chief Justice and the joint dissenters is a holding, or otherwise binding.

5. This is not to suggest that the potentially broad implications of the majority's Commerce Clause analysis have entirely escaped notice. Immediately following the decision, for example, some commentators suggested that, by upholding the individual mandate on other grounds, Roberts immunized himself and the Court against charges of politically motivated judicial activism, in effect conceding the battle over the ACA in order to gain a long-term tactical advantage in the federalist war against the expansion of federal regulatory authority. On this reading, his opinion becomes an act of judicial statesmanship worthy of Chief Justice Marshall's decision in *Marbury v. Madison*. See, e.g., Bradley Joondeph, *A Marbury for Our Time*, SCOTUSBLOG (June 29, 2012, 2:36 PM), <http://www.scotusblog.com/2012/06/a-marbury-for-our-time/>; Daniel Epps, *In Health Care Ruling, Roberts Steals a Move from John Marshall's Playbook*, THE ATLANTIC (June 28, 2012, 12:47 PM), <http://www.theatlantic.com/national/archive/2012/06/in-health-care-ruling-roberts-steals-a-move-from-john-marshalls-playbook/259121/>.

6. The dissenting opinion in *NFIB v. Sebelius* was attributed jointly to Justices Scalia, Kennedy, Thomas, and Alito. See *NFIB*, 132 S. Ct. at 2642 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

7. See *id.* at 2585–93 (majority opinion); see also *id.* at 2644–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

8. *Id.* at 2577 (majority opinion).

9. *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 195 (1824)).

federal encroachment on the sovereignty of the states, the Chief Justice counseled, the commerce power “must be read carefully to avoid creating a general federal authority akin to the police power.”¹⁰

This framing raises a fundamental and ultimately perplexing question about the logical connection between the activity/inactivity distinction and the structural constitutional value of federalism. Specifically, how does exempting from Congress’ commerce power individuals who might plausibly be characterized as “inactive” in the regulated commercial market serve the proper allocation of authority between the states and the federal government? Neither the Chief Justice nor the joint dissenters provide a satisfactory answer. The incongruity between the specific limiting principle endorsed by the Justices and the structural constitutional value that their opinions purport to serve begs the question of whether other, unacknowledged values are at play. This Article argues that, notwithstanding the Chief Justice and joint dissenters’ insistence to the contrary, the activity/inactivity distinction is animated less by concerns about constitutional structure than concerns about individual economic liberty. Specifically, even in the absence of a formal constitutional economic “right” to serve as a doctrinal vehicle, the Justices’ defense of economic liberty operates much as the substantive due process right to “liberty of contract” did during the *Lochner* era—as a trigger for heightened scrutiny of legislative means and ends, through which the majority narrowed the intrinsic scope of the commerce power.

This Article is hardly the first to suggest that the activity/inactivity distinction “seems more redolent of Due Process Clause arguments’ than any principled enumerated powers analysis,”¹¹ as the U.S. Government argued in its brief to the Court.¹² Scholarly critics noted

10. *Id.* at 2578.

11. Brief for Petitioners (Minimum Coverage Provision) at 51, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-398, 11-400), 2012 WL 37168, at *51 [hereinafter Brief for United States] (quoting *Seven-Sky v. Holder*, 661 F.3d 1, 19 (D.C. Cir. 2011)).

12. President Obama joined in as well, clumsily proclaiming to a gathering of newspaper editors that “[a law] passed by Congress on an economic issue, like health care . . . has not been overturned at least since *Lochner*, right? So we’re going back to the ‘30s, pre New Deal.” *Obama’s Remarks to Newspaper Editors*, N.Y. TIMES (Apr. 3, 2012), http://www.nytimes.com/2012/04/04/us/politics/obamas-remarks-to-newspaper-editors.html?pagewanted=all&_r=0. In fact, the President was engaging in a long and robust tradition of invoking *Lochner*—usually as a metonym for *Lochner*-era police powers jurisprudence more generally—as a convenient, if often intellectually sloppy, symbol of illegitimate judicial activism. See Robert Barnes, *Health-Care Arguments Recall a Supreme Court Case That Is an Equal-Opportunity Offender*, WASH. POST (Apr. 8, 2012), http://articles.washingtonpost.com/2012-04-08/politics/35451691_1_law-rulings-supreme-court (quoting former judge Robert Bork characterizing *Lochner* as “the symbol, indeed the quintessence, of judicial usurpation of power,” and Chief Justice Roberts stating at his confirmation hearing that “you can read [the *Lochner*] opinion today and it’s quite clear that they’re not interpreting the law, they’re making the law”). As Professor David Bernstein has observed, “*Lochner* has been treated as a unique example of

throughout the ACA litigation that the principle “sound[s] in notions of personal liberty rather than state autonomy,”¹³ and identified a “fundamental mismatch” between the challengers’ evident concern with protecting individual liberty and the federalism-based limiting principle they were advocating.¹⁴ This Article argues that, in both the *Lochner*-era substantive due process cases and in *NFIB v. Sebelius*, the relationship between the Court’s defense of individual economic liberty and its enforcement of limits on legislative authority that are intrinsic to the authority itself, is more nuanced than is generally acknowledged. Existing scholarship tends to invoke *Lochner* as a convenient rhetorical touchstone, to lend an air of illicitness or subterfuge to the constitutional liberty interest smuggled into the Court’s Commerce Clause jurisprudence. On this reading, the activity/inactivity distinction operates, like the right to “liberty of contract” during the *Lochner* era, as an anti-compulsion principle that erects within the otherwise broad domain of congressional authority a bastion of individual economic liberty that Congress cannot breach. And in fact, the Chief Justice and joint dissenters objected forcefully to the economic compulsion inherent in the individual mandate.¹⁵ This Article instead uses the *Lochner*-era substantive due process cases to illustrate how constraints on legislative authority that are rooted in “fundamental” economic rights and constraints on legislative authority that are rooted in federalism and the constitutional enumeration of powers necessarily operate in dynamic

constitutional pathology to serve the felt rhetorical needs of advocates of various theories of constitutional law” DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 6–7 (2011). On the use and abuse of *Lochner* in modern constitutional discourse, see also Gary D. Rowe, *Lochner Revisionism Revisited*, 24 *LAW & SOC. INQUIRY* 221, 223 (1999) (describing the “ghost of *Lochner*” in post-New Deal constitutional adjudication); Jack M. Balkin, “*Wrong the Day it was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677 (2005).

Predictably, critics of the ACA pointed to a number of inaccuracies in the President’s statement, including the fact that *Lochner* involved a state regulation, not an act of Congress; that *Lochner* was decided in 1905, not the 1930s; and that the Court struck down a number of federal economic regulations between 1905 and its abandonment of *Lochner* in 1937. See, e.g., James Taranto, *The Man Who Knew Too Little*, WALL ST. J. (Apr. 3, 2012), <http://online.wsj.com/article/SB10001424052702303816504577321844137787970.html>.

13. Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1743 (2011). So, too, is it difficult to overlook the libertarian *bona fides* of activity/inactivity distinction’s chief scholarly advocates. See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010); Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Case a Slippery Slope?*, 75 *LAW & CONTEMP. PROB.* 75 (2012).

14. Arthur J. R. Baker, *Fundamental Mismatch: The Improper Integration of Individual Liberty Rights into Commerce Clause Analysis of the Patient Protection and Affordable Care Act*, 66 U. MIAMI L. REV. 259 (2011). See also Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 *YALE L.J. ONLINE* 1 (2011); Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1829 (2011).

15. See *infra* Part IV.A.

relationship to one another. The *Lochner*-era cases thus serve as an exemplar of how the Court can adapt the scope of both state and federal authority to vindicate the value of economic liberty.

Perhaps sensitive to the imputation of “*Lochnerism*,”¹⁶ the Chief Justice and the joint dissenters emphatically denied that their reasoning was animated by a defense of any constitutional liberty interest.¹⁷ In doing so, they drew a broad distinction between the “affirmative,” “express prohibition[s] in the Bill of Rights or elsewhere,” which, Roberts stressed, “come into play . . . only where the Government possesses authority to act in the first place,”¹⁸ and the federalism-based limits on legislative authority that inhere in the constitutional enumeration of powers. Whereas the *Lochner* Court had marshaled the “substantive due process” right of “liberty of contract” to repel an otherwise plenary state police power, they insisted, the scope of the commerce power was defined by the meaning of the words “regulate” and “commerce,” as they are used in Article I, Section 8 of the Constitution. In short, constitutional economic rights were irrelevant to the MCP because Congress lacked authority under the Commerce Clause to regulate the uninsured “in the first place.”

This Article argues that the Chief Justice and joint dissenters’ insistence on a neat dichotomy between structural and rights-based constraints on legislative authority is illusory, and that adhering to that

16. As Mark Rosen and Christopher Schmidt helpfully remind us, *NFIB v. Sebelius* was argued and decided against the backdrop of vigorous popular constitutional opposition to the ACA, “in which Barry Goldwater-style, to-the-barricades libertarian rhetoric was in the air.” Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Heath Care Case*, 61 U.C.L.A. L. REV. 66, 101 (2013). Because that rhetoric sounded more in the register of substantive due process economic rights than enumerated powers or constitutional structure, one can readily understand why the Chief Justice might seek to immunize himself against charges of “*Lochnerism*.”

17. When, during oral argument, the Solicitor General accused the Act’s challengers of attempting “to import *Lochner*-style substantive due process” into the Court’s Commerce Clause analysis, Chief Justice Roberts interjected:

The key in *Lochner* is that we were talking about regulation of the States . . . and the States are not limited to enumerated powers. The Federal Government is. And it seems to me it’s an entirely different question when you ask yourself whether or not there are going to be limits on the Federal power, as opposed to limits on the States, which was the issue in *Lochner*.

Transcript of Oral Argument at 30–31, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11–398). On its face, Chief Justice Roberts’ rejoinder appears to miss the Solicitor General’s point, as the *Lochner*-era Court used the Due Process Clause of the Fifth Amendment to substantively limit congressional regulation in precisely the same manner that it used the Due Process Clause of the Fourteenth Amendment to substantively limit state police regulations. Because the Chief Justice surely understands as much, I interpret his statement to mean that, whereas state legislative authority is constrained only by affirmative rights, which are extrinsic to the police power itself, the enumerated powers of Congress are (also) limited by their own terms, and that it is those intrinsic limits that are at issue in this case. As I explain below, *see infra* Part III, this is a false dichotomy.

18. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012).

dichotomy impedes our understanding of the limiting principle endorsed by a majority of the Court. It further argues that the Supreme Court's *Lochner*-era substantive due process cases shed valuable light on the majority's Commerce Clause analysis, but not necessarily in the way that the Act's defenders have suggested. When we step back from the remarkably durable mythology of "laissez-faire constitutionalism" that surrounds *Lochner*,¹⁹ and read the *Lochner*-era substantive due process cases on their own terms, we find that, while the Court did embed in the Fourteenth Amendment a novel and expansive value of individual economic liberty, it resembled little the constitutional trump against economic regulation that the slogan "liberty of contract" is often understood to imply. The affirmative "right" at work in *Lochner* operated instead as a trigger for heightened judicial scrutiny of legislative means and ends. In this respect, the constitutional right to "liberty of contract" prefigured modern "fundamental rights" analysis.²⁰ The statute at issue in *Lochner*—a maximum hours law for bakers—was ultimately invalid not simply because it interfered with a constitutional economic right, but because in so doing, the Court concluded, it failed to serve any of the legitimate ends of state police power—namely, the protection of the public health or general welfare. The Fifth and Fourteenth Amendment "right" to individual economic liberty furnished a convenient jurisdictional hook for the Court's selectively aggressive scrutiny of the challenged legislative rationale. The *Lochner*-era Court thus defined the specific limits on legislative authority not, strictly speaking, according to the presumed demands of constitutional economic liberty, but rather according to the constitutive terms of both the state police power and federal commerce power—the meaning of "general welfare" or "public health," and of "interstate commerce," respectively. Reading *NFIB v. Sebelius* through this historical lens provides an important alternative framework to the structure/rights dichotomy advanced by the Chief Justice and joint dissenters. That framework better equips us to recognize that the value of economic

19. The durability of that myth persists notwithstanding a now-massive body of revisionist scholarship debunking many of its key conclusions. For a small sampling, see Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 19 (1993); BERNSTEIN, *supra* note 12; Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881 (2005); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970 (1975); Balkin, *supra* note 1; Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751 (2009).

20. See *infra* note 83 and accompanying text. Since the New Deal, the Court has consistently refused to recognize a fundamental right to economic liberty. See *infra* notes 69–70 and accompanying text.

liberty infuses the majority's Commerce Clause analysis and, like the *Lochner*-era substantive due process cases, operates in dialogue with the constitutive, intrinsic terms of the commerce power.

Part II of this Article situates the activity/inactivity distinction within contemporary Commerce Clause jurisprudence in order to highlight its novelty as a structural constraint on the commerce power. Part III traces the historical arc of the constitutional right to individual economic liberty, beginning with its doctrinal origins in Justices Stephen Field and Joseph Bradley's dissenting interpretations of the Fourteenth Amendment in the 1870s; to the Court's adoption of a substantive due process right to "liberty of contract" in *Lochner*, *Adair v. United States*,²¹ and *Adkins v. Children's Hospital*,²² and finally, to the New Deal Court's rejection of substantive due process and fundamental economic rights. Part IV then reads Chief Justice Roberts and the joint dissenters' Commerce Clause analyses in *NFIB v. Sebelius* through the lens of the *Lochner*-era cases. It argues that the value of individual economic liberty operates in their opinions much as the right to "liberty of contract" did before the New Deal—as a trigger for heightened means/ends scrutiny, through which the Justices reinterpreted the intrinsic, constitutive terms of Congress' commerce power. Reading the activity/inactivity distinction not merely as a narrow prohibition on federal purchase mandates, but rather as an injunction against congressional interference with individual liberty, brings the potentially broader implications of the majority's Commerce Clause analysis into focus.

II. THE COMMERCE POWER AND THE MINIMUM COVERAGE PROVISION

This Part situates the activity/inactivity distinction within existing Commerce Clause jurisprudence. Subpart A provides a brief overview of the commerce power since the New Deal, highlighting two key features. First, even under the "New Federalism" of the past two decades, regulations enacted under the Commerce Clause continue to enjoy a presumption of constitutionality, and will be upheld so long as they bear a rational relationship to a constitutionally permissible end. Second, to the extent that the Rehnquist and Roberts Courts have reinvigorated the Court's role in enforcing limits on Congress' commerce authority, their efforts have centered on two discrete types of regulation: those targeting activities deemed to be "noneconomic"; and those seeking to coerce, or "commandeer," state officials into

21. *Adair v. United States*, 208 U.S. 161 (1908).

22. *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525 (1923).

implementing a federal regulatory scheme. Subpart B then considers the doctrinal novelty of the activity/inactivity distinction, and reviews the Justices' insistence that it operates as an intrinsic constraint on congressional authority that is anchored in the text of Article I and the structural constitutional value of federalism, rather than an extrinsic, "affirmative" prohibition rooted in a constitutional liberty interest.

A. The Modern Commerce Power

The recent history of the commerce power is a familiar one. In broad strokes, beginning in 1937 with *NLRB v. Jones & Laughlin Steel*,²³ the Supreme Court swept away a host of "artificial" constraints on congressional authority that had accreted over the previous half-century: the categorical distinctions between "direct" and "indirect" effects on interstate commerce,²⁴ or between "manufacturing"²⁵ or "mining,"²⁶ on the one hand, and "commerce" on the other; as well as the notion that "local trade and manufacture" was the exclusive domain of state and local authorities.²⁷ Within a few short years, the Court had virtually abandoned any meaningful role for the judiciary in policing the scope of federal economic regulation, effectively conferring on Congress the sole authority to determine whether a specific object of federal regulation was sufficiently related to interstate commerce. In the wake of the New Deal "revolution" in constitutional law, Congress could regulate even local, intrastate activities that, considered in aggregate, had a "substantial affect" on interstate commerce.²⁸ Federal commercial

23. *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

24. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

25. *See United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

26. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

27. *Hammer v. Dagenhart*, 247 U.S. 251, 274 (1918). Professor Barry Cushman has complicated the conventional focus on 1937 as the watershed moment in the New Deal "revolution" in constitutional law. Cushman argues that the first decisive shift in the Court's Commerce Clause (as well as substantive due process) jurisprudence came not in 1937, but three years earlier, in *Nebbia v. New York*, 291 U.S. 502 (1934), when the Court abandoned the long-standing distinction between businesses affected with a public interest, which Congress traditionally had broad authority to regulate under its commerce power, and "private" businesses, which were buffered against congressional regulation. In *Jones & Laughlin Steel*, 301 U.S. 1 (1937), Cushman maintains, the Court loosened the strictures on the federal commerce power, but nevertheless preserved a meaningful role for the judiciary in policing the constitutional sufficiency of the connection between the regulated activity and interstate commerce. The true "revolution," Cushman maintains, came several years later, in *United States v. Darby*, 312 U.S. 100 (1941) (upholding wages and hours provisions of the federal Fair Labor Standards Act of 1938), and *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding application of regulatory limits on wheat production in the Agricultural Adjustment Act of 1938 to wheat grown for home consumption), when the Court virtually withdrew from supervising the constitutionality of federal commercial regulations. *See BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998).

28. *See Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–39 (1937);

regulations would thus enjoy a strong presumption of constitutionality, with reviewing courts deferring to the judgment of Congress so long as the challenged regulation bore some rational relationship to a constitutionally permissible end.²⁹ As the Court later explained, the regulation of interstate commerce “is a matter of policy that rests entirely with Congress [and] not with the courts.”³⁰ The question of “what means are to be employed . . . is within the sound and exclusive discretion of the Congress. It is subject to only one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution.”³¹

Finally, the New Deal Court established that the sovereignty of the states would not operate as an independent constraint on the scope of Congress’ commerce authority. As the Court explained in *United States v. Darby*, “[t]he power of Congress over interstate commerce ‘is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the constitution.’”³² Therefore, “regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause,”³³ and “can neither be enlarged nor diminished by the exercise or non-exercise of state

United States v. Darby, 312 U.S. 100, 119–20 (1941); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

29. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (“[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . the facts . . . preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”). In *Carolene Products*, of course, the Court also famously identified several circumstances in which the “presumption of constitutionality” for commercial regulations may warrant a “narrower scope.” *Id.* at 152 n.4. These included “legislation [that] appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten [a]mendments;” “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation;” and statutes that reflect “prejudice against discrete and insular minorities.” *Id.*

30. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

31. *Id.* at 262. *Heart of Atlanta Motel* upheld Title II of the Civil Rights Act of 1964, prohibiting racial discrimination in public accommodations. “The commerce power . . . is a specific and plenary one authorized by the Constitution itself,” the Court explained. *Id.* at 258. The only questions for a reviewing court were: “(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.” *Id.*

32. *Darby*, 312 U.S. at 114 (rejecting the contention that Congress’ regulation of the wages and hours of labor under the Fair Labor Standards Act of 1938 treaded unconstitutionally into a domain reserved to the individual states) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)). A federal commercial regulation “is not a forbidden invasion of state power,” the Court continued, merely because “its exercise is attended by the same incidents which attend the exercise of the police power of the states.” *Id.* The quoted passage from Chief Justice Marshall’s opinion in *Gibbons v. Ogden* has been a favorite of the post-New Deal Court. See, e.g., *Carolene Prods.*, 304 U.S. at 147; *Heart of Atlanta Motel*, 379 U.S. at 254; *Wickard*, 317 U.S. at 120, 122; *Hodel v. Va. Surface Mineral and Reclamation Ass’n, Inc.*, 452 U.S. 264, 276 (1981).

33. *Darby*, 312 U.S. at 115.

power.”³⁴ The Court accordingly rejected the view³⁵ that the Tenth Amendment, reserving to the states or the people “[t]he powers not delegated to the United States by the Constitution,” should be read to “depriv[e] the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.”³⁶ Rather, the Amendment “states but a truism that all is retained which has not been surrendered.”³⁷

Throughout the half-century following the New Deal, the Court sometimes gestured toward certain unspecified “limits”³⁸ on the commerce power, and denied any intention to “obliterate the distinction between what is national and what is local”³⁹ In practice, however, the breadth of congressional authority under the Commerce Clause approached, in Chief Justice Rehnquist’s words, that of “a general police power of the sort retained by the States.”⁴⁰ Indeed, between 1937 and 1994, the Court did not strike down a single federal law as exceeding the commerce power.

Beginning in 1995 with *United States v. Lopez*,⁴¹ however, and again five years later with *United States v. Morrison*,⁴² the Supreme Court has reinvigorated the notion that Congress’ commerce authority, though expansive, is something less than plenary. The ACA litigation represents the most recent chapter in the Court’s perpetual recalibration of its outer limits. In *Lopez*, the Court set forth what has become the consensus⁴³ framework for contemporary Commerce Clause analysis, enumerating three “categories of activity” subject to the commerce power: 1) “the channels of interstate commerce;” 2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce;”⁴⁴ and 3) activity that “substantially affects interstate commerce,”⁴⁵ including, the Court later confirmed, “purely local activities that are part of an economic ‘class of activities’ that have

34. *Id.* at 114.

35. See *Hammer v. Dagenhart*, 247 U.S. 251, 275–76 (1918) (holding that a federal statute prohibiting the transportation in interstate commerce of goods produced at factories employing child laborers was an unconstitutional invasion of state sovereignty in violation of the Tenth Amendment).

36. *Darby*, 312 U.S. at 124.

37. *Id.*

38. See, e.g., *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968).

39. *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

40. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

41. *Lopez*, 514 U.S. 549.

42. *United States v. Morrison*, 529 U.S. 598 (2000).

43. *But see Lopez*, 514 U.S. at 584–602 (Thomas, J., concurring) (rejecting the “substantial effects” doctrine).

44. *Lopez*, 514 U.S. at 558.

45. *Id.* at 560.

a substantial effect on interstate commerce.”⁴⁶ At issue in the ACA litigation was whether the MCP regulated activity that “substantially affects” interstate commerce.

In both *Lopez* and *Morrison*, the constitutional infirmity centered on what the Court characterized as the *noneconomic* nature of the regulated activity. In *Lopez*, the Court struck down a provision of the Gun-Free School Zones Act of 1990 making it a federal crime to possess a firearm within one thousand feet of a school. The majority objected specifically that the challenged provision “has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”⁴⁷ In *Morrison*, the Court struck down a section of the Violence Against Women Act of 1994 providing for a federal civil remedy for victims of gender-motivated violence. Like mere gun possession, the majority concluded, “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”⁴⁸

Lopez and *Morrison* were animated, above all, by the structural constitutional value of federalism. Only by placing noneconomic activity beyond Congress’ reach, the *Lopez* Court explained, could the nation’s “dual system of government”⁴⁹ be preserved. The *Morrison* Court thus rejected the attempt to construct a “but-for causal chain” from a local, noneconomic activity like violent crime “to every attenuated effect upon interstate commerce.”⁵⁰ Were the Court to accept the government’s reasoning that Congress may regulate any activity “as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption,”⁵¹ the majority reasoned, it would obliterate any “distinction between what is truly national and what is truly local.”⁵² That rationale would convert the commerce power into a “plenary police power”⁵³ that extended not only to “all violent crime,” but also into traditional bastions of state

46. *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005).

47. *Lopez*, 514 U.S. at 561. “Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” the Court observed, “involved economic activity in a way that the possession of a gun in a school zone does not.” *Id.* at 560.

48. *United States v. Morrison*, 529 U.S. 598, 613 (2000). The majority reached that conclusion notwithstanding voluminous congressional findings documenting the economic impact of gender-motivated violence. *See id.* at 628–35 (Souter, J., dissenting).

49. *Lopez*, 514 U.S. at 557 (quoting *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

50. *Morrison*, 529 U.S. at 615. *See also Lopez*, 514 U.S. at 567 (declining to “pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States”).

51. *Morrison*, 529 U.S. at 615.

52. *Id.* at 617–18; *Lopez*, 514 U.S. at 568 (citing *Jones & Laughlin Steel*, 301 U.S. at 30).

53. *Morrison*, 529 U.S. at 618 (quoting *Lopez*, 514 U.S. at 566).

regulation, like “marriage, divorce, and childrearing.”⁵⁴

Finally, the “New Federalism” of the Rehnquist Court reopened the question of whether the principle of state sovereignty operates as an independent constitutional constraint on the scope of congressional authority. In *New York v. United States*⁵⁵ and *Printz v. United States*,⁵⁶ the Court held that federal statutes requiring state officials to implement federal regulatory schemes unconstitutionally invaded the “‘residuary and inviolable sovereignty’ reserved explicitly to the States by the Tenth Amendment.”⁵⁷ Although *New York* interprets the Tenth Amendment merely as an affirmation that the enumeration of powers in Article I necessarily connotes intrinsic limits on congressional authority,⁵⁸ *Printz* does arguably read the Tenth Amendment as an independent constraint on the powers delegated to Congress.⁵⁹ In any case, both *New York* and *Printz* make clear that, to the extent that the principle of state sovereignty does limit the scope of congressional authority, it does so only with respect to federal regulations that act directly on states as states,⁶⁰ while affirming Congress’ broad power to regulate

54. *Id.* at 615–16.

55. *New York v. United States*, 505 U.S. 144 (1992) (striking down the “take title” provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 as exceeding the scope of Congress’ commerce and spending powers).

56. *Printz v. United States*, 521 U.S. 898 (1997) (striking down the Brady Handgun Violence Prevention Act as inconsistent with the constitutional principle of “dual sovereignty”).

57. *New York*, 505 U.S. at 188 (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

58. As Justice O’Connor explained in her opinion for the majority, the questions of whether an Act of Congress “is authorized by one of the powers delegated to Congress in Article I” and whether it “invades the province of state sovereignty reserved by the Tenth Amendment” were “mirror images of each other.” *Id.* at 155–56. “If a power is delegated to Congress in the Constitution,” she explained, “the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.” *Id.* at 156. In this respect, “the Tenth Amendment ‘states but a truism that all is retained which has not been surrendered.’” *Id.* (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)). Perhaps most revealing was the manner in which Justice O’Connor distinguished the operation of the Tenth Amendment from limits on congressional authority rooted in individual constitutional rights. She explained:

[U]nder the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.

Id. at 156–57.

59. The “[r]esidual state sovereignty” that was “implicit” in the constitutional enumeration of congressional powers in Article I, Section 8 “was rendered express by the Tenth Amendment[],” Justice Scalia’s majority opinion explained. *Printz*, 521 U.S. at 919.

60. In both *New York* and *Printz*, the unconstitutionality of the respective statutes consists in

individuals.⁶¹

*B. The Minimum Coverage Provision and the
Activity/Inactivity Distinction*

Notwithstanding the “New Federalism” of the Rehnquist and Roberts Courts, at the outset of the ACA litigation the MCP appeared to be on solid constitutional footing. Whether one defines the relevant market broadly, as the *consumption* of health care; somewhat more narrowly, as the *financing* of health care; or still more discretely, as health care *insurance*, each affects interstate commerce in a proximate and palpable way. Indeed, the economic consequences of being uninsured would seem markedly more substantial than either gun possession or gender-motivated violence. In addition, as the Court explained in *Gonzalez v. Raich*, Congress can regulate “purely intrastate activity that is not itself ‘commercial,’ . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the [relevant] interstate market”⁶² And in fact, all acknowledged that two of the ACA’s key elements—the so-called “guaranteed issue” and “community rating” provisions—would be ineffectual unless they were coupled with a requirement that people without insurance purchase it. Furthermore, even in the post-*Lopez* era, the Court has continued to affirm that reviewing courts owe congressional enactments great deference. “In assessing the scope of Congress’ authority under the Commerce Clause,” the Court explained in 2005, “we stress that the task before us is a modest one.” The Court need not conclude that the regulated activities, “taken in the aggregate, substantially affect interstate

their “commandeering” of state officials and legislative processes in the implementation of a federal regulatory scheme. *New York*, 505 U.S. at 176 (“[T]he Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,” an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.” (citation omitted) (quoting *Hodel v. Va. Surface Mineral and Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981))); *Printz*, 521 U.S. at 914, 925, 929 (discussing federal commandeering of state officials and governments).

61. *New York*, 505 U.S. at 165 (The Framers “opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States”); *Printz*, 521 U.S. at 919–20 (“[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton’s words, ‘the only proper objects of the government.’”).

62. *Gonzalez v. Raich*, 545 U.S. 1, 18 (2005). As Justice Scalia explained in his concurring opinion, “[t]he regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself ‘substantially affect’ interstate commerce.” *Id.* at 37 (Scalia, J., concurring). Moreover, the “substantial affects” doctrine extends to “even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” *Id.*

commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”⁶³

The ACA plaintiffs navigated this inhospitable doctrinal terrain⁶⁴ by advancing a limiting principle that focused, not on the noneconomic nature of the regulated conduct—i.e., being uninsured—but on the apparent absence of any regulable activity. The Commerce Clause authorizes Congress “to ‘regulate’ extant commerce,” argued the state respondents, but not “to bring commerce into existence.”⁶⁵ Congress cannot “compel individuals to engage in commerce so that Congress has something to regulate.”⁶⁶ Under this limitation, congressional authority extends only to people who are presently active in the relevant commercial market. Because the uninsured are not active in the market for health insurance, and thus not engaged in the commerce regulated by the MCP, they are beyond the reach of the commerce power.

Two features of this ultimately successful limiting principle bear special notice. First, it is novel. It is true, of course, as the challengers observed, that many of the leading Commerce Clause cases describe the commerce power as reaching economic “activity.” As Mark Hall points out, however, “[a]ctivity” appears in various permissive or limiting phrases only because activity was what Congress actually regulated in these cases.”⁶⁷ There is no reason to read the Court’s references to “activity” in cases like *Lopez* and *Morrison*, where the constitutional challenge turned instead on whether the regulated activity was sufficiently “economic,” to imply that economic “inactivity” lies beyond the scope of the commerce power.

Second, the principle was urged as an intrinsic constraint on congressional authority that was anchored in the text of Article I and structural constitutional values of federalism, rather than an extrinsic, “affirmative” prohibition rooted in an individual right. Though judges, policymakers, and legal scholars differ over the breadth of Congress’ power to regulate interstate commerce, all understand that the scope of

63. *Raich*, 545 U.S. at 22. See also *Lopez*, 514 U.S. at 557 (Since 1937, the Court has “undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.”); *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010) (“[T]he relevant inquiry is simply ‘whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power’ or under other powers that the Constitution grants Congress the authority to implement.” (quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment))).

64. The apparent weakness of the of the challengers’ position under existing Commerce Clause doctrine was well canvassed in Hall, *supra* note 14.

65. Brief for State Respondents on the Minimum Coverage Provision at 15, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-398, 11-400), 2012 WL 392550, at *15 [hereinafter Brief for State Respondents].

66. *Id.* at 16.

67. Hall, *supra* note 14, at 1831. See also Baker, *supra* note 14, at 280–82.

that authority is derived from Article I, Section 8 of the Constitution. Even as the outer boundary of the commerce power has migrated, sometimes fitfully, over time, the basic terms with which the boundary line is fixed—for example, the meaning of “commerce” or the requisite degree of connection to an interstate market—inhere in the original grant of authority. In short, the MCP’s challengers and, ultimately, five Supreme Court Justices, endorsed the notion that the activity/inactivity distinction is inherent in the constitutional grant of authority.⁶⁸

A rights-based constraint on regulatory authority, by contrast, is understood to be *extrinsic* to the authority itself, in the sense that it can invalidate a regulation even though the government otherwise possesses the authority to regulate in a given domain. Even when Congress (typically under the commerce or taxing powers) or a state legislature (under its police power) has broad authority to regulate a particular class of economic or criminal activities, the regulation will nevertheless be subject to strict constitutional scrutiny if it interferes with either an express constitutional right or a right otherwise deemed “fundamental.”⁶⁹ Since the New Deal, the Court has consistently refused to recognize a fundamental right to economic liberty.⁷⁰ And in fact, the state plaintiffs initially auditioned a Fifth Amendment substantive due process argument, citing individual “liberty interests in the freedom to eschew entering into a contract”⁷¹ In dismissing that challenge, the district court noted that while such a claim “would

68. Professors Rosen and Schmidt very profitably frame the plaintiff’s conceptual challenge as that of translating popular constitutional opposition to the ACA, which was preoccupied almost exclusively with the threat to individual liberty posed by the unchecked expansion of highly coercive federal power, into the doctrinal terms in which the legal challenge would be decided—namely, enumerated powers and constitutional structure. The activity/inactivity distinction was the solution to that challenge. See Rosen & Schmidt, *supra* note 16.

69. Nonenumerated fundamental rights are typically protected under the Due Process Clause of the Fifth or Fourteenth Amendments. See *Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (describing the “line of cases which interprets the Fifth and Fourteenth Amendments’ guarantee of ‘due process of law’ to include a substantive component, which forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest”). See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (identifying a fundamental right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to have children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right of parents to direct the education of their children); *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261 (1990) (right to refuse medical treatment).

70. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 148 (1937) (rejecting substantive due process challenge to economic regulation); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).

71. *Florida v. U.S. Dep’t of Health and Human Servs.*, 716 F. Supp. 2d 1120, 1161 (N.D. Fla. 2010) (quoting Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss at 43, *Florida v. U.S. Dep’t of Health and Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 3:10-cv-91 RV/EMT), 2010 WL 3163990, at *43).

have found Constitutional support . . . in the years prior to . . . the mid-1930s, when the Due Process Clause was interpreted to reach economic rights and liberties, '[t]he doctrine that prevailed in *Lochner* . . . has long since been discarded.'"⁷² That the challengers chose not to press the issue on appeal is unsurprising, given *Lochner*'s prominent place in the American constitutional anticanon.⁷³

III. ECONOMIC RIGHTS AND THE SCOPE OF LEGISLATIVE AUTHORITY DURING THE "LOCHNER ERA"

Today, more than seventy-five years after the Supreme Court abandoned *Lochner* as a legal precedent,⁷⁴ the decision continues to occupy a central place in the nation's ongoing debate over the proper scope of judicial review. As President Obama and Solicitor General Verrilli's imputations of "Lochnerism" to the MCP's opponents suggest,⁷⁵ *Lochner* remains a vital symbol of politically motivated judicial activism. The origin of this rhetorical tradition lies in Justice Holmes' celebrated dissent in *Lochner* itself, chiding the majority for deciding the case based on its preferred "economic theory" rather than constitutional principle, and thereby "pervert[ing]" the Fourteenth Amendment to "prevent the natural outcome of dominant opinion."⁷⁶ Holmes' dissent inaugurated what scholars have labeled the "progressive" interpretation of *Lochner*-era police powers jurisprudence.⁷⁷ In its starkest terms, the progressive interpretation holds that judges steeped in *laissez-faire* economic theory—or, as

72. *Id.* at 1161 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)).

73. Jamal Greene, who (very plausibly) views the substantive due process argument as stronger than the Article I argument, attributes the ACA challenger's decision to not press the issue on appeal at least in part to political considerations. In addition to the strategic risk of associating their challenge with a generally disreputable legal precedent, Greene explains, a challenge to the individual mandate could have harmed Mitt Romney's presidential candidacy by implicitly condemning "the similar state-level mandate that Mitt Romney signed into law as governor of Massachusetts." Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 267 (2012). So, too, Greene speculates, might "opponents of the mandate . . . have been reluctant to affiliate their arguments with the Court's reproductive freedom precedents . . ." *Id.*

74. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding the constitutionality of a Washington state minimum-wage law).

75. See *supra* note 12.

76. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Holmes' dissent is rightly understood as a clarion call for judicial restraint, and defense of "the right of a majority to embody their opinions in law." *Id.* at 75. A constitution, he explained, "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Id.* at 76.

77. On the generative role that Holmes' dissent played in the development of the progressive interpretation of *Lochner*, see BERNSTEIN, *supra* note 12, at 40–55 (describing progressive jurists and legal scholars' lionization of Holmes and adulation for his *Lochner* dissent).

Holmes put it, “Mr. Herbert Spencer’s Social Statics”—who identified with the nation’s capitalist class and opposed any governmental interference in the private marketplace, were determined to scuttle legislative efforts to mitigate the socially destructive consequences of the industrial labor system. In order to mask this illegitimate intrusion into the domain of the legislatures, the progressive interpretation runs, these judicial activists invented novel economic rights—most importantly “liberty of contract”—that they engrafted upon the Fourteenth Amendment through the intellectually dubious doctrine of substantive due process.⁷⁸ Although subsequent generations of scholarship have debunked some of its key premises and conclusions,⁷⁹ the progressive interpretation of *Lochner* continues to stalk appellate briefs, constitutional law courses, and popular legal discourse as a cautionary tale of judicial transgression. As the ACA litigation illustrates, the charge of “Lochnerism” serves as a convenient, if often intellectually clumsy, weapon with which to bludgeon those bringing constitutional challenges to economic regulations.⁸⁰

This Part argues that, while the *Lochner*-era Court did embed in the Fourteenth Amendment a novel and expansive right to economic liberty, it resembled little the constitutional trump against economic regulation that the slogan “liberty of contract” is often understood to imply.⁸¹ Notwithstanding *Lochner*’s enduring reputation as an act of naked

78. See, e.g., ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF THE BAR AND BENCH, 1887–1895 (1960); CARL BRENT SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 393, 520–21 (1943); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942); Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L. J. 668 (1933).

79. Over the past several decades, legal historians and constitutional scholars have developed a rich and compelling revision of the progressive narrative that substantially undermines the imputation of ideologically motivated judicial activism. In particular, scholars have identified a host of principled, if sometimes anachronistic, bases for *Lochner*-era police powers jurisprudence, including the Jacksonian aversion to “class legislation,” see GILLMAN, *supra* note 19, at 19–60; Benedict, *supra* note 19; the adulation of individual economic liberty as a constitutive element of human freedom in the antislavery movement and following emancipation, see William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 783 (1985); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974); and the nation’s traditional social contract vision of political membership, see OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOLUME 8, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 157–59, 164 (Stanley N. Katz ed., 1993).

80. As Professor Gary Rowe writes, “avoiding ‘*Lochner*’s error’ remains the central obsession . . . of contemporary constitutional law. . . . To *Lochner* is to sin, egregiously.” Rowe, *supra* note 12, at 223. For helpful discussions of the “career” of *Lochner* in the post-New Deal era, see David E. Bernstein, *Lochner Era Revisionism, Revisited: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO L.J. 1 (2003); BERNSTEIN, *supra* note 12, at 108–24; Cushman, *supra* note 19.

81. On this point, this Article joins a substantial body of historical scholarship challenging the progressive critique of *Lochner* as an instrument of “laissez-faire constitutionalism.” See *supra* note 79 and accompanying text.

judicial transgression, the meaning of constitutional economic liberty in the *Lochner* era, as well as its “lessons” for our own time, are both more subtle and more penetrating than either supporters or critics of *NFIB*’s Commerce Clause majority have realized. The affirmative “right” to contractual liberty at work in *Lochner* served not as a constitutional trump, but rather as a trigger for heightened judicial scrutiny of legislative means and ends. The statute at issue—a maximum hours law for bakers—was ultimately invalid not merely because it interfered with that right, but because, in the Court’s view, it failed to serve any of the legitimate ends of state police power—namely, the protection of the public health or general welfare. The specific constraint that the Court placed on the authority of the New York legislature thus closely tracked the long-standing prohibition on “class legislation.”⁸² In this respect, the “right” to individual economic liberty served as a convenient, politically and ideologically resonant trigger for the Court’s selectively aggressive scrutiny of the challenged regulation, but it did not operationalize conceptually novel limits on the exercise of the police power. Such limits would continue to be drawn according to the constitutive terms of the police power itself, rather than the right to economic liberty supposed to be demanded by the Fourteenth Amendment. Thus understood, the *Lochner*-era substantive due process cases illustrate how constraints on legislative authority that are rooted in economic rights and constraints on legislative authority that are intrinsic to the authority itself necessarily operate in dynamic relationship to one another. In this reading, the *Lochner*-era cases are exemplars of how the Court adapts the scope of both state and federal legislative authority in the service of economic liberty. Indeed, this is the basic blueprint for modern “fundamental rights” analysis.⁸³ Reading *NFIB v. Sebelius* through this historical lens provides an important alternative analytical framework to the structure/rights dichotomy advanced by the Chief Justice and joint

82. For the leading account of the “anticlass legislation” interpretation of *Lochner*-era police powers jurisprudence, see GILLMAN, *supra* note 19.

83. See *supra* note 69 and accompanying text. As Professor Bernstein has persuasively argued, the *Lochner*-era Court’s recognition of an individual right to economic liberty protected by the Due Process Clause of the Fifth and Fourteenth Amendments played a generative role in the subsequent development of more robust constitutional protections of civil liberties. Bernstein demonstrates how the Court extended Fourteenth Amendment protection to certain noneconomic fundamental liberties, including the right to direct the education of one’s children, see *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a state law prohibiting the instruction of pre-high school students in a foreign language), and the right to free expression, see *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (recognizing that “freedom of speech and of the Press” were among the “fundamental personal rights and ‘liberties’ protected by the Due Process Clause of the Fourteenth Amendment”), against the state police power. See BERNSTEIN, *supra* note 12, at 90–96, 99–102. See also David E. Bernstein, *The Conservative Origins of Strict Scrutiny*, 19 GEO. MASON L. REV. 861 (2012) (arguing that modern fundamental rights analysis owes as much to the Progressive-Era Supreme Court’s liberty of contract jurisprudence as to the more celebrated free speech dissents of Justices Holmes and Brandeis in the 1920s).

dissenters.

This Part proceeds in three Subparts. Subpart A analyzes the emergence in the 1870s and 1880s of a constitutionally novel understanding of “liberty” and “property” in the dissenting and concurring opinions of Justices Stephen Field and Joseph Bradley. It argues that, although Justices Field and Bradley theorized a Fourteenth Amendment “right of free labor” that would, decades later, provide the jurisprudential foundation for the substantive due process right to “liberty of contract,” they were less concerned with individual economic liberty per se than with prohibiting legislatures from extending special privileges to a preferred class of citizens. Constitutional economic liberty thus functions in their opinions as a convenient jurisdictional hook through which the federal courts might enforce constraints on state authority that were intrinsic to the police power. Subpart B analyzes the Court’s adoption of a Fourteenth Amendment right to economic liberty during the so-called *Lochner* era. It argues that, even as the Court’s desire to repel legislative compulsion in the private labor market triggered at times aggressive scrutiny of economic regulations, the specific limits it placed on the state police power were drawn, again, according to the constitutive terms of the police power itself—namely, the meaning of “public health” and “general welfare”—rather than the economic right. The 1908 case of *Adair v. United States* illustrates how the Court deployed a substantive due process right to economic liberty to define the scope of not only the state police power, but also, and in virtually identical terms, Congress’ authority to regulate under the Commerce Clause. Finally, Subpart C explains that when the New Deal Court rejected the idea of “fundamental” economic rights and, in the Commerce Clause cases, the manufacturing/commerce and direct/indirect effects distinctions, it replaced those doctrines with a unified framework for reviewing state and federal economic regulations, premised on a strong presumption of constitutionality.

A. The Fourteenth Amendment and the Constitutionalization of Economic Liberty Before Lochner

The jurisprudential foundation of *Lochner*-era constitutional economic liberty was laid several decades before the *Lochner* decision, in the years following the adoption of the Fourteenth Amendment.⁸⁴ In

84. In fact, depending on how one understands *Lochner*’s “foundation,” it goes back further than that. This Subpart emphasizes the development in the post-Civil War era of an expansive, constitutionally novel understanding of “liberty” and “property.” But the origins of the notion that the Due Process Clause of the Fifth Amendment affords certain substantive, in addition to procedural, protections against legislative interference with an individual’s liberty or property precede the Civil

separate dissenting opinions in the landmark 1873 *Slaughter-House Cases*,⁸⁵ Justices Stephen Field and Joseph Bradley famously argued that, in granting a single corporation, the Crescent City Company, a twenty-five year butchering monopoly, the Louisiana legislature had deprived butchers excluded from the monopoly of their privileges and immunities as citizens of the United States, in violation of the Fourteenth Amendment.⁸⁶ After the Louisiana legislature subsequently revoked the butchering monopoly, the Crescent City Company brought suit, claiming that, because it had expended great sums on a vast slaughterhouse and stockyard in reliance on its exclusive right, the legislative charter had taken on the character of an “irrepealable contract.”⁸⁷ The Court unanimously upheld the repeal in *Butchers’ Union v. Crescent City Co.*,⁸⁸ but Justices Field and Bradley wrote separate concurring opinions in order to further theorize the Fourteenth Amendment right to individual economic liberty. In these four opinions, Justices Field and Bradley planted the seeds of constitutional economic liberty that would, decades later, blossom into the substantive due process right to liberty of contract. This Subpart argues that we should understand the constitutional “right of free labor” advanced by Field and Bradley less as a defense of economic liberty per se than a jurisdictional hook that enabled the federal courts to enforce conditions on state legislative authority that were intrinsic to the police power itself—namely, that regulations of liberty or property serve the *general* welfare, rather than the narrow interests of a favored class.

The *Slaughterhouse Cases* marked the Supreme Court’s first interpretation of the Fourteenth Amendment. A five-Justice majority concluded that the Amendment had not made the Supreme Court “a perpetual censor upon all legislation of the States, on the civil rights of

War. *Dred Scott v. Sanford* represents only the most infamous example of protecting a “substantive” property right—the right to own slaves—under the Due Process Clause of the Fifth Amendment. See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). See generally MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1126 (2010). By the time the Fourteenth Amendment was ratified in 1868, explains Ryan Williams, the phrase “due process of law” in both state and federal constitutions “had developed . . . well-established substantive connotations as both a prohibition of legislative interference with vested rights and as a guarantee of general and impartial laws.” Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 416 (2011).

85. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

86. *Slaughter-House Cases*, 83 U.S. at 83–111 (Field, J., dissenting); *id.* at 111–24 (Bradley, J., dissenting).

87. *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 749 (1884).

88. Specifically, the Court held that a legislature “cannot by any contract divest itself” of its police authority to protect public health, order, and morals. *Id.* at 752.

their own citizens”⁸⁹ Justices Field and Bradley argued strenuously in dissent that Section 1 had in fact upended the nation’s federalist structure of “double citizenship”⁹⁰ in order “to provide National security against violation by the States of the fundamental rights of the citizen.”⁹¹ What, exactly, were the fundamental rights of American citizenship? Justices Field and Bradley agreed that when the Declaration of Independence proclaimed “life, liberty, and the pursuit of happiness” to be among the “inalienable rights” endowed in all men by “their Creator,” it was affirming “the fundamental rights which can only be taken away by due process of law, and which can only be interfered with . . . by lawful regulations necessary or proper for the mutual good of all”⁹²

Although Justices Field and Bradley differed sharply with the *Slaughterhouse* majority over the extent to which the Fourteenth Amendment had unsettled the nation’s traditional federalism, their contention that the Privileges and Immunities Clause authorized the federal courts to vindicate the fundamental rights of national citizenship against hostile state legislatures was not especially remarkable.⁹³ Their innovation consisted, rather, in the breadth of meaning they ascribed to the phrase “life, liberty, and the pursuit of happiness.”⁹⁴ The right “to adopt such calling, profession, or trade” was “an essential part of that liberty which it is the object of government to protect,” Justice Bradley urged, “and a calling, when chosen, is a man’s property and right.

89. *Slaughter-House Cases*, 83 U.S. at 78.

90. *Id.* at 121 (Bradley, J., dissenting).

91. *Id.* at 122. Before the adoption of the Amendment, Bradley explained, the Constitution afforded “no machinery . . . for any interference by the General Government between a State and its citizens. Rather, the protection of the citizen in the enjoyment of his fundamental privileges and immunities . . . was largely left to State laws and State courts.” *Id.* at 121. Field agreed that Section 1 had “place[d] the common rights of American citizens under the protection of the National government.” *Id.* at 93 (Field, J., dissenting). As a result, the “fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.” *Id.* at 95.

92. *Id.* at 116 (Bradley, J., dissenting). The Fourteenth Amendment did not itself *create* fundamental rights of national citizenship, Field and Bradley maintained. Rather, the privileges and immunities referred to in Section 1 consisted of certain “primordial,” *Butchers’ Union*, 111 U.S. at 765 (Bradley, J., concurring), “traditionary rights,” *Slaughter-House Cases*, 83 U.S. at 114 (Bradley, J., dissenting), that had been “wrested from English sovereigns,” *id.*, over the course of centuries, and thus existed independently of any specific constitutional provision. Those fundamental rights of citizenship had then found expression in the great monuments to English liberty—the Magna Charta, the common law, the English Bill of Rights, and, most importantly, that “new evangel of liberty,” the American Declaration of Independence. *Butchers’ Union*, 111 U.S. at 756 (Field, J., concurring).

93. See generally WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2006).

94. *Slaughter-House Cases*, 83 U.S. at 116 (Bradley, J., dissenting) (internal quotation marks omitted).

Liberty and property are not protected where these rights are arbitrarily assailed.”⁹⁵ Justice Field agreed, in a passage that would become an indispensable touchstone for late-nineteenth century state high courts reviewing legislative interference with individual economic liberty:

The equality of right . . . in the lawful pursuits of life . . . is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The fourteenth amendment . . . makes it essential . . . that this equality of right should be respected [B]y [the butchering monopoly] the right of free labor, one of the most sacred and imprescriptible rights of man, is violated.⁹⁶

Of what, exactly, did the “sacred and imprescriptible” right of “free labor” consist? Justice Field quoted at length one of the seminal texts of classical liberal political economy, Adam Smith’s *The Wealth of Nations*:

“The property which every man has in his own labor,” says Adam Smith, “as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing his strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of

95. *Id.*

96. *Id.* at 109–10. In the 1870s, a time of rapid industrialization in the northern states, the meaning of “free labor” was an ideologically freighted subject of social and political debate. As the traditional centerpiece of republican political theory, the ideal of personal “independence” had long been embodied in the figure of the self-employed farmer or artisan, whose ownership of productive property served as a guarantee of economic self-sufficiency—the essential requisite for virtuous citizenship. To labor for a wage, by contrast, was to subject one’s personal autonomy, including one’s economic livelihood and even political will, to the authority of an employer. See generally Forbath, *supra* note 79; LAWRENCE B. GLICKMAN, *A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY* 22–24 (1997); DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862–1872*, at 30–33 (1967); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 9–10 (1998).

For Field, the New Orleans butchers were exemplars of this traditional vision of free labor, struggling against a legislative monopoly that threatened to deprive them of their independence and reduce them to the condition of mere wage laborers. By championing the butchers’ “equality of right . . . [in] the ordinary avocations of life,” *Slaughter-House Cases*, 83 U.S. at 109 (Field, J., dissenting), Field was thus attempting to vindicate their republican independence at a moment when the industrial revolution was fast transforming small farmers and skilled craftsmen into propertyless wage earners. See Forbath, *supra* note 79, at 773–79; Matthew J. Lindsay, *In Search of “Laissez-Faire Constitutionalism,”* 123 HARV. L. REV. F. 55, 70–71 (2010).

those who might be disposed to employ him.”⁹⁷

The most important jurisprudential legacy of Justice Field’s opinion lies in this radical redefinition of constitutional “liberty” and “property.” For Justice Field, “property” encompassed not only land and tangible goods, but anything with market value; “liberty” referred not only to physical freedom, but freedom to act in the marketplace.⁹⁸ This was a vision of individual economic liberty adapted not to a republic of independent artisans and craftsmen, but to the propertyless hirelings who increasingly populated the nation’s swelling industrial labor force—men whose economic personhood consisted entirely in their capacity to alienate their labor for a price.⁹⁹ Justices Field and Bradley’s recognition of a constitutional right of property in, and liberty to dispose of, one’s labor distinguishes their opinions from the constitutional protections of liberty and property that came before. It was this theory that would later ripen into “liberty of contract.”

Even as Justices Field and Bradley characterized the right to pursue one’s calling as an “inviolable” or “sacred and imprescriptible” privilege of U.S. citizenship, however, the key issue, writes Howard Gillman, was not “the *importance of the liberty* but the *character of the legislation*: did it actually promote the good of the public or was it designed to promote the special interests of some favored groups?”¹⁰⁰ For Justices Field and Bradley, a citizen’s Fourteenth Amendment “right to free labor” was no citadel of economic liberty. Rather, that right protected him only against “discriminating and partial enactments, favoring some to the impairment of the rights of others.”¹⁰¹ It thus served as a

97. *Slaughter-House Cases*, 83 U.S. at 110 n.39 (Field, J., dissenting) (quoting ADAM SMITH, *THE WEALTH OF NATIONS* (1776)). See also *Butchers’ Union*, 111 U.S. at 757 (Field, J., concurring).

98. Field and Bradley were joined in this project by the jurist and treatise writer Thomas Cooley, whose influential *Treatise on Constitutional Limitations*, first published shortly before the ratification of the Fourteenth Amendment, argued that state due process clauses substantively limited the authority of legislatures to regulate common law property rights. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 351–61 (5th ed. 1883).

99. It was also a vision of economic liberty that resonated with the great moral and political cause of the previous generation—the abolition of slavery. Abolitionists had celebrated the voluntary sale of one’s labor as the antithesis of slavery. Slave emancipation and the adoption of the Civil Rights Act of 1866, securing the right to contract for the sale of one’s labor as an essential right of citizenship, enshrined this vision into law. See generally STANLEY, *supra* note 96, at 1–59; Lindsay, *supra* note 96, at 71 n.90, 72 n.91.

100. Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 633–34 (1994).

101. *Butchers’ Union*, 111 U.S. at 758 (Field, J., concurring). And in fact, leading scholars of *Lochner*-era police powers jurisprudence have interpreted Field and Bradley’s opinions in this light. In particular, scholars have traced *Lochner*-era judicial scrutiny of economic regulations to the Jacksonian opposition to special legislative privileges. See, e.g., GILLMAN, *supra* note 19, at 64–76. Intellectual-biographical studies of leading late-nineteenth century figures in the constitutionalization of individual economic liberty persuasively present jurists such as Stephen Field and Thomas Cooley not as *laissez-*

constitutional bulwark against the “arbitrary invasion by state authority of the . . . right to pursue happiness unrestrained, except by just, equal, and impartial laws.”¹⁰² It was not the regulation of butchering per se that troubled Justices Field and Bradley, or even the legislature’s interference with the economic freedom of individual butchers; but rather its unjust, “partial,” “arbitrary” discrimination against a disfavored class of butchers.¹⁰³ And indeed, the New Orleans butchering monopoly was widely viewed at the time as an act of naked legislative favoritism.¹⁰⁴ Understood as a demand for legislative impartiality, the Fourteenth Amendment right to economic liberty appears not as constitutional trump against state economic regulation, but rather as a convenient jurisdictional hook through which the federal courts might enforce constraints on legislative authority that were intrinsic to the police power itself.

Although the police power has never lent itself to easy definition, it was generally understood to encompass, in the words of Massachusetts Chief Justice Lemuel Shaw, “all manner of wholesome and reasonable laws . . . as [the legislature] shall judge to be for the good and welfare of the commonwealth.”¹⁰⁵ Because “[a]ll property . . . [was] derived . . . from the government,” Shaw explained, it was “held subject

faire ideologues, but rather as principled neo-Jacksonians, committed to the defense of the general good against the corrupting influence of powerful economic interests. See, e.g., Alan Jones, *Thomas M. Cooley and “Laissez-Faire Constitutionalism”: A Reconsideration*, 53 J. AM. HIST. 751 (1967); McCurdy, *supra* note 19.

102. *Butchers’ Union*, 111 U.S. at 759 (Field, J., concurring).

103. *Id.* at 758. Justice Bradley agreed:

[T]he ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand; and the grant to the favored few of a monopoly in any of these common callings is necessarily an outrage upon the liberty of the citizen as exhibited in one of its most important aspects—the liberty of pursuit.

Id. at 763 (Bradley, J., concurring). And in fact, this formulation reflected the mode of protecting individual liberty against governmental encroachment that had prevailed throughout the nineteenth century. Like the federalists of the founding era, many of whom only reluctantly acceded to the addition of a Bill of Rights to the Constitution, nineteenth-century judges believed that the best way to protect fundamental rights and liberties was to confine the powers of government to a relatively narrow, well-defined, and judicially enforceable set of permissible legislative ends. In the case of the federal Congress, those ends were specifically identified, or enumerated, in Article I of the U.S. Constitution. In the case of the state legislatures, those ends were inherent in the police power itself, and required no textual basis other than the common law decisions through which the contours of the police power had been drawn. Under this regime, explains Howard Gillman, “the liberties of citizens were safeguarded, not by the identification and protection of preferred freedoms”—that is, certain affirmative, fundamental constitutional rights—“but by a judicial inquiry into whether a piece of legislation was sufficiently general and whether it was dictated by public necessity.” Gillman, *supra* note 100, at 631.

104. On the political background of the legislation, see RONALD M. LABBE & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT* (2005).

105. *Commonwealth v. Alger*, 61 Mass. 53, 85 (Mass. 1851).

to those general regulations, which are necessary to the common good and general welfare.”¹⁰⁶ Two aspects of the police power bear special emphasis. First, the rights of private property were subordinate to the authority of the state to engage in reasonable regulations. Second, and most importantly for present purposes, in order for a regulatory “limitation” on the rights of private property to qualify as “reasonable,” it had to serve the “common good and general welfare.” Along with “public health,” these constituted the finite universe of the police power’s legitimate ends. As such, they operated, much like the congressional ends enumerated in Article I, as intrinsic limits on the legislative authority of the states. It was these limits that Justices Field and Bradley, with their condemnation of “partial” legislation and defense of the butchers’ “equality of right,” were seeking to enforce.¹⁰⁷

The seeds planted by Justices Field and Bradley began to bear fruit almost immediately. First, in the 1880s several state supreme courts drew inspiration from their opinions in striking down state labor regulations.¹⁰⁸ Next, in 1896 a unanimous United States Supreme Court endorsed, in dicta, an expansive definition of the “liberty” protected by the Fourteenth Amendment’s Due Process Clause.¹⁰⁹ The doctrinal

106. *Id.*

107. Indeed, they denied any intention to “limit the subjects upon which States can legislate,” *Butchers’ Union*, 111 U.S. at 759 (Field, J., concurring), and insisted that the Fourteenth Amendment had left undisturbed their authority “to promote health, good order, and peace, to develop their resources, enlarge their industries, and advance their prosperity.” *Id.*

108. The New York Court of Appeals’ opinion in *In re Jacobs*, invalidating a state law prohibiting the manufacture of cigars in certain tenement houses, exemplifies the new property and liberty: “The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property . . .” *In re Jacobs*, 98 N.Y. 98, 105 (N.Y. 1885). Any law that “destroys it or its value, or takes away any of its essential attributes” deprives a person of his property. *Id.* “Liberty, in its broad sense as understood in this country,” explained the court, “means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.” *Id.* at 106. See also *Godcharles v. Wigeman*, 6 A. 354, 356 (Pa. 1886) (striking down a state law requiring that iron workers be paid in cash at regular intervals as an unconstitutional attempt to “prevent persons who are *sui juris* from making their own contracts” that was “not only degrading to his manhood, but subversive of his rights as a citizen of the United States”); *State v. Goodwill*, 10 S.E. 285, 286 (W. Va. 1889) (striking down a state law forbidding payment in company script on the ground that it interfered with the “liberty” of every man “to pursue any lawful trade or avocation”). See generally Lindsay, *supra* note 96; *supra* notes 95–100 and accompanying text.

109. *Allgeyer v. Louisiana*, 165 U.S. 578 (1896) (holding that a Louisiana law forbidding residents from purchasing marine insurance from out-of-state companies deprived the defendant of his liberty without due process of law). Although the holding of *Allgeyer* was quite narrow, dicta in Justice Peckham’s opinion for the Court was potentially far-reaching. He wrote:

The ‘liberty’ mentioned in [the fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts

table was set for the adoption of a new constitutional right to economic liberty.

*B. "Liberty of Contract" and the Limits of Legislative Authority
During the "Lochner Era"*

Long-standing use of the phrase "liberty of contract" as a shorthand for the "rule" of *Lochner* has obscured the meaning of Justice Peckham's majority opinion. In striking down a New York law restricting the hours of labor for bakers, the *Lochner* majority did indeed endorse an expansive, constitutionally novel definition of "liberty" and "property." But that right did not consist of a prohibition against state interference with private economic transactions, as "liberty of contract" is often understood to imply. This Subpart joins a substantial body of scholarship¹¹⁰ reinterpreting the substantive due process right to economic liberty not as a trump against state economic regulation, but rather as a jurisdictional hook through which federal courts could enforce conditions on legislative authority that were intrinsic to the police power itself—specifically, that police regulations serve the *public* health and *general* welfare. When we step back from the remarkably durable mythology of "*laissez-faire* constitutionalism" that surrounds *Lochner* and instead read Justice Peckham's majority opinion on its own terms, we find a far more textured account of constitutional liberty and governmental authority informed by long-standing judicial values. First and foremost, Justice Peckham's opinion reflects the traditional prohibition on "class legislation" discussed in the previous Subpart, which common law courts had enforced intermittently for several decades. In this respect, we might understand the substantive due process right to economic liberty as an *artifact* of long-standing police power categories—as Professor Howard Gillman has described it, the *residuum* of individual liberty that is "left over after government has reached the limits of its authorized power."¹¹¹ Yet Justice Peckham's opinion also reflects a broader, more historically specific impulse to buffer the economic prerogatives of individuals engaged in "private"

which may be proper, necessary, and essential to his carrying to a successful conclusion the purposes above mentioned.

Id. at 589. The Court's description of the "liberty" protected by the Fourteenth Amendment is notable on two counts. First, following the *Slaughter-House Cases* majority's very narrow construction of the "privileges and immunities" of citizenship, the constitutional right to individual economic liberty took up residence instead in the Due Process Clause, where it would remain until 1937. Second, the citizen's right to pursue a lawful calling earlier elaborated by Field and Bradley here swells to include his freedom to "enter into all contracts" directed toward that end. *Id.*

110. See *supra* notes 19 and 79.

111. Gillman, *supra* note 100, at 625.

economic transactions from what the majority viewed as the runaway police power of the states. In this respect, the right takes on a more libertarian cast, as an affirmative, extrinsic constraint on governmental authority rooted in natural, prepolitical rights.¹¹²

This Subpart uses *Lochner* and a number of other early twentieth-century substantive due process cases to illustrate that the constitutional right to economic liberty, on the one hand, and intrinsic limits on both state and federal legislative authority, on the other, are deeply interconnected modes of constraining the powers of government. As this Article will argue in Part IV, this understanding of *Lochner* fundamentally unsettles the dichotomy drawn by Chief Justice Roberts and the joint dissenters in *NFIB v. Sebelius*, between intrinsic and rights-based constraints on legislative authority.

* * *

As a preliminary matter, it is important to situate the *Lochner* Court's defense of economic liberty within its historical context. In the half-century following the end of the Civil War, Americans experienced a remarkable revolution in their social and economic order, as their traditional, if idealized, republic of independent farmers and artisans was transformed into an industrial society characterized by large corporate employers, the deskilling of labor and the ascendancy of an intensively competitive wage system. In response to this industrial reorganization of American life and labor, wage workers and their allies in progressive reform movements prevailed on state legislatures to intercede in the terms of employment to prescribe certain basic guarantees and protections for workers, such as requiring payment of wages in cash and at regular intervals, or establishing minimum wages and maximum hours. Such demands for "special protection from the coercive effects of a corporate industrial economy," writes Professor Gillman, "constituted a direct challenge to an established tenet of political legitimacy"—the principle of state neutrality.¹¹³ That neutrality principle was embodied in the constitutive terms of the police power—specifically, the requirement that regulatory interference with individual liberty or property serve the public good and general welfare, rather than the "partial" interests of a favored class.

112. The *Lochner* opinion itself affords ample support for each of these interpretations. For example, Professor Bernstein acknowledges that "judicial hostility to class legislation" informed the Court's review of labor legislation, but maintains that Peckham's opinion focused primarily "on the right to liberty of contract, and relegated the more egalitarian concerns" rooted in the principle of state neutrality to an "oblique aside." BERNSTEIN, *supra* note 12, at 16.

113. GILLMAN, *supra* note 19, at 14.

As heirs to the Jacksonian opposition to special legislative privileges, *Lochner*-era courts thus understood their critical duty to be that of distinguishing between the vast majority of state police regulations that were legitimately directed toward the public health and welfare, and the illegitimate minority that were intended to serve the interests of a narrow class. Judges reared on a pre-industrial understanding of state neutrality in which the market itself functioned as a neutral arbiter of economic transactions were sometimes inclined to view direct state intervention in the terms of employment as legislative favoritism. As a result, even courts that routinely upheld all variety of economic regulations could condemn as illegitimate “class legislation” reform initiatives directed toward redressing inequality in bargaining power between employers and employees.¹¹⁴

Justice Peckham’s particular framing of the issue before the Court warrants close attention. He wasted little time in announcing that a man’s “general” substantive due process right “to make a contract in relation to his business” that the Court had endorsed in *Allgeyer v. Louisiana* included “[t]he right to purchase and sell labor”¹¹⁵ Although the challenged hours regulation “necessarily interfere[d]” with that right, that was not the end of the matter. There existed “certain powers . . . somewhat vaguely termed police powers,” Peckham explained, that inhered “in the sovereignty of each state,” and with which the “Fourteenth Amendment was not designed to interfere.”¹¹⁶ “Both [the] property and liberty” protected by that Amendment were thus “held on such *reasonable conditions* as may be imposed by the . . . state in the exercise of those powers.”¹¹⁷ Foremost among those conditions was the requirement that police regulations serve “the safety, health, morals, and general welfare of the *public*,”¹¹⁸ rather than the partial interests of a particular class.

The Fourteenth Amendment right to liberty and property delimited state authority not by establishing a bastion of individual economic

114. See generally Lindsay, *supra* note 96.

115. *Lochner v. New York*, 198 U.S. 45, 53 (1905). As Part III.A makes clear, the *Lochner* majority did not invent a constitutional right to individual economic liberty out of whole cloth. Recall that Justices Field and Bradley had identified a right to pursue one’s trade or calling several decades earlier in the *Slaughter-House Cases* and *Butchers’ Union*. Inspired by those opinions, in the 1880s and 1890s a number of state courts had likewise divined such a right from the due process provisions of their state constitutions. See *supra* note 108 and accompanying text. And then the *Allgeyer* Court indicated in dicta that the “liberty” and “property” protected by the Due Process Clause of the Fourteenth Amendment encompassed the right to form contracts in relation to one’s business. It was thus a relatively short, if highly consequential, conceptual step for the *Lochner* majority to conclude that the economic liberty protected by the Fourteenth Amendment included the purchase and sale of labor.

116. *Id.*

117. *Id.* (emphasis added).

118. *Id.* (emphasis added).

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prerogative that the legislature could not breach, but rather by enabling the federal courts, for the first time, to enforce conditions on the exercise of state regulatory authority that were intrinsic to the police power itself. “It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State,” Justice Peckham explained. “Otherwise the [Fourteenth] Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people”¹¹⁹ Were courts to defer to every legislative assertion of public purpose, “no matter how absolutely without foundation,” “[t]he claim of the police power would be a mere pretext—[and] become [a] delusive name for the supreme sovereignty of the state to be exercised free from constitutional constraint.”¹²⁰ The Fourteenth Amendment had made it the business of the federal courts to scrutinize the police rationale proffered by a state legislature, and thereby to ensure that the claims of public purpose were more than “mere pretext.” “In every case that comes before this court . . . where legislation of this character is concerned, and where the protection of the Federal Constitution is sought,” Justice Peckham continued, “the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty . . . ?”¹²¹

This formulation of the basic question is telling. The hours law was *either* a legitimate exercise of the police power *or* an unconstitutional deprivation of personal liberty. Justice Peckham’s framing left no room for the possibility that it might serve a legitimate end of the police power but nevertheless unconstitutionally deprive employers and employees of their economic liberty without due process of law. The natural, intrinsic scope of the police power, on the one hand, and the unconstitutional interference with individual economic liberty, on the other, were mutually exclusive. This makes sense once we understand that Joseph *Lochner*’s substantive due process right was operating not as a constitutional trump, but rather as a trigger for heightened judicial scrutiny, through which the Court enforced conditions on the exercise of legislative authority that were intrinsic to the police power itself. “[B]efore an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor,” Justice Peckham explained, the regulation “must have a more direct relation, as a means to an end, and

119. *Id.* at 56.

120. *Id.*

121. *Id.*

the end itself must be appropriate and legitimate.”¹²² The economic compulsion inherent in the statute raised the constitutional stakes, thereby triggering a more exacting review of the legislative rationale.

Justice Peckham considered two possible legislative ends. The first, whether the act was valid “as a labor law, pure and simple,” could “be dismissed in a few words.”¹²³ Assuming that “bakers as a class are . . . equal in intelligence and capacity to men in other trades or manual occupations, [and] that they are . . . able to assert their rights and care for themselves without the protecting arm of the State,” he reasoned, “the interest of the public is not in the slightest degree affected” by a law “interfering with their independence of judgment and of action.”¹²⁴ Viewed as a “labor law,” the regulation was naked class legislation. Justice Peckham then turned to the second proffered legislative end—that the law protected “the health of the individual engaged in the occupation of a baker.”¹²⁵ Justice Peckham acknowledged that, in light of the voluminous “statistics regarding all trades and occupations” that had been introduced into evidence, “the trade of a baker does not appear to be as healthy as some other trades”¹²⁶ In the pre-*Lochner* era marked by judicial deference toward a state’s regulatory rationale, such a finding would have supplied ample factual basis to uphold the law as a valid health regulation. Indeed, earlier in his opinion Justice Peckham noted that judicial scrutiny of state police regulations traditionally had “been guided by rules of a very liberal nature”¹²⁷ But because the challenged hours regulation implicated “the right of free contract on the part of the individual,” the Court required greater congruence between legislative ends and means. As Justice Peckham explained, “[t]here must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty.”¹²⁸ Because baking was not distinctly more dangerous than many other commonplace trades, Peckham concluded, it was not “unhealthy . . . to that degree which would authorize the legislature to interfere with the right to labor”¹²⁹ By scrutinizing the means and ends of legislation that seriously interfered with individual economic liberty, reviewing

122. *Id.* at 57–58.

123. *Id.* at 57.

124. *Id.*

125. *Id.* The hours regulation “does not affect any other portion of the public than those who are engaged in that occupation,” Peckham explained, for “[c]lean and wholesome bread does not depend upon whether the baker works but ten hours per day or sixty hours a week.” *Id.*

126. *Id.* at 59.

127. *Id.* at 54.

128. *Id.* at 59.

129. *Id.*

courts could enforce the condition that police regulations serve the health or welfare of the public, and thus guard against the kind of governmental favoritism that, in the majority's view, characterized the New York statute.

To read *Lochner* simply as an injunction against class legislation, however, does not capture the full range of the majority's concerns. Heightened judicial scrutiny also served as a bulwark against the ominous expansion of the state police power generally. Peckham noted the recent increase in legislative "interference . . . with the ordinary trades and occupations of the people," and approvingly cited a series of state court decisions striking down such regulations as unconstitutional deprivations of individual liberty and property.¹³⁰ If the State of New York could abridge "the right of an individual, *sui juris*," to contract for the sale of his labor, "there would seem to be no length to which legislation of this nature might not go."¹³¹ "No trade, no occupation, no mode of earning one's living, could escape this all-pervading power,"¹³² he cautioned. As a result, the state "would assume the position of a supervisor, or *pater familias*, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld."¹³³ At stake for the majority was not only the principle of governmental neutrality, or even freedom of contract, but the sovereignty of the individual in his relation to the authority of the state.¹³⁴

130. *Id.* at 63.

131. *Id.* at 58.

132. *Id.* at 59. "A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature," Peckham continued. *Id.* If the Court were to endorse "the interest of the state that its population should be strong and robust," and thereby sanction as a valid health law "any legislation which may be said to tend to make people healthy," all manner of human conduct "would come under the restrictive sway of the legislature." *Id.* at 60. By way of illustration, Peckham described a parade of horrors running more than a page in length. Under the government's theory, he declared, "[n]ot only the hours of employees, but the powers of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired." *Id.* at 60–61. "We mention these extreme cases," Peckham explained, "because the contention is extreme." *Id.* at 61.

133. *Id.* at 62.

134. Professor Bernstein, in particular, argues that some *Lochner* revisionists have overstated the importance of the "state neutrality" principle, which, he maintains, was "barely evident in Peckham's majority opinion." BERNSTEIN, *supra* note 12, at 33. Bernstein thus reads *Lochner* as emphasizing "individual liberty rights rather than hostility to class legislation . . ." *Id.* at 33–34. In my view, the dual themes of individual liberty and state neutrality are best understood not as alternative principles or judicial values, but rather as interdependent elements in the Court's enforcement of limits on state authority that are indigenous to the police power itself. That said, I agree with Bernstein that by the early 1920s, the "anticlass legislation" theme had receded and the right to economic liberty had become

At bottom, the *Lochner* Court struck down New York's maximum hours law because, in an era when individual economic prerogatives were increasingly constrained by the state in new and significant ways, five Justices were not persuaded that limiting the number of hours worked by bakers meaningfully served the general welfare or public health.¹³⁵ Because the statute transgressed the constitutive terms of the police power, the legislature had exceeded its authority.¹³⁶ Limiting state regulatory authority to matters of the public health and general welfare was not new in principle; in practice, however, those limits had rarely been tested.

Just as the substantive due process right to economic liberty in *Lochner* operated in dialogue with the constitutive terms of the state police power, so, too, did it shape, and was shaped by, Congress' constitutionally enumerated power to regulate interstate commerce. In *Adair v. United States*,¹³⁷ decided just three years after *Lochner*, the Court struck down on substantive due process grounds the federal

dominant. *See id.* at 48–50.

135. The constitutional logic of Justice Peckham's majority opinion is famously resistant to simple characterization, and for that reason has furnished generations of historians and legal scholars with a fertile subject of interpretation and debate. The difficulty of pointing to *Lochner*'s singular, *real* meaning is due, at least in part, to the fact that the decision occupies a critical place in the Court's highly contested, decades-long transition between two historical modes of protecting individual liberty. For most of the nineteenth century, Professor Gillman writes, the Court's individual liberties jurisprudence "view[ed] rights as specific immunities from government power," in which judges protected liberty "residually by limiting legislative power to a set of acceptable objects and purposes . . ." Gillman, *supra* note 100, at 639. During the first several decades of the twentieth century, in response to an increasingly plenary governmental authority with few meaningful, intrinsic limits, the Court gradually relinquished the traditional "limited powers-residual freedoms" model in favor of a jurisprudence that "extend[ed] special protections to particularly important rights and liberties"—what Gillman calls our modern "general powers-preferred freedoms" model. *Id.* at 640, 643. Peckham's opinion bears the distinct stamp of both of these regimes.

136. Indeed, in several other *Lochner*-era police powers cases, the Court upheld economic regulations that interfered directly with the contractual freedom of employers and employees, on the ground that they bore a sufficiently direct relationship to a legitimate end of the police power. *See, e.g.*, *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding a Utah law limiting the hours of labor for miners and smelters); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon law limiting the hours of labor for women to ten hours per day); *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding an Oregon law limiting the hours of labor for women and men to ten hours per day, and requiring employers to pay time-and-a-half wages for up to three overtime hours per day).

Justice Harlan's dissent in *Lochner*, which was joined by Justices White and Day, reinforces this reading. In contrast to Justice Holmes' more famous charge of ideologically motivated judicial activism, Justice Harlan's criticism of the majority opinion centered on the demanding means/ends scrutiny to which it had subjected the challenged regulation. "[U]nless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law," he maintained, "they do not extend beyond the power of the state to pass . . ." *Lochner*, 198 U.S. at 67 (Harlan, J., dissenting). Notwithstanding the fundamental rights of liberty and property, the "burden of proof" remained at all times "upon those who assert [the regulation] to be unconstitutional." *Id.* at 68.

137. 208 U.S. 161 (1908).

Erdman Act of 1898, making it a criminal offense to refuse to hire or to discharge a worker because of membership in a labor union. To forbid an employer from hiring and firing whomever he pleased, the majority explained, was “an invasion of the personal liberty, as well as of the right of property,” guaranteed by the Due Process Clause of the Fifth Amendment.¹³⁸ On the one hand, this conclusion is fairly unremarkable—after all, because the due process clauses of the Fifth and Fourteenth Amendments are identical, one would expect that a substantive due process right to economic liberty would apply symmetrically to federal and state legislation.¹³⁹ And in fact, in this respect *Adair* amounts to a straightforward application of the rule of *Lochner*, in which the commerce power serves as the federal analogue to the state police power.

The basic structure of Justice Harlan’s majority opinion is particularly telling. After describing the statute, Justice Harlan announced that the “first inquiry” was whether the challenged provisions deprived the parties to an employment contract of their liberty or property without due process of law. The majority had little difficulty concluding that it did. Justice Harlan affirmed that “[t]he right to purchase or to sell labor is part of the liberty protected by”¹⁴⁰ the due process clauses of the Fifth and Fourteenth Amendments. Therefore, legislation that interfered with an employer and employee’s “equality of right” in fixing the terms of employment was “an arbitrary interference with the liberty of contract which no government can legally justify in a free land.”¹⁴¹ Because “an employer is under [no] legal obligation, against his will, to retain an employee in his personal service,” *Adair* had the “legal right . . . to discharge [an employee] because of his being a member of a labor organization”¹⁴² In theory, that conclusion should have ended the Court’s analysis of the challenged provision. After all, if the Erdman Act unconstitutionally deprived employers of their contractual liberty without due process of law, it would be unnecessary to consider whether the Commerce Clause might have otherwise empowered Congress to adopt the statute. If the substantive due process right to economic

138. *Id.* at 172.

139. *Cf.* Williams, *supra* note 84, at 428–99 (demonstrating that, by the time the Fourteenth Amendment was ratified in 1868, the phrase “due process of law” had acquired a host of substantive connotations that it lacked eight decades earlier, when the Fifth Amendment was ratified).

140. *Adair*, 208 U.S. at 173.

141. *Id.* at 174. “While . . . the right of liberty and property . . . [were] subject to such reasonable restraints as the common good or the general welfare may require,” Harlan explained, “it is not within the functions of government . . . to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another.” *Id.*

142. *Id.* at 175.

liberty operates as it is conventionally understood (and as Chief Justice Roberts characterized it during oral argument in *NFIB v. Sebelius*)—as an affirmative, extrinsic constraint on Congress—it should trump whatever authority Congress might have by virtue of its commerce power to regulate the terms of employment.

Yet even in the face of the Fifth Amendment violation, Justice Harlan proceeded to consider at length whether the Act might nevertheless qualify as a valid regulation of interstate commerce. Congress' impairment of *Adair's* Fifth Amendment substantive due process right, like New York's impairment of Joseph *Lochner's* Fourteenth Amendment right, triggered heightened judicial scrutiny of the proffered legislative rationale. As in *Lochner*, the inquiry in *Adair* centered on the relationship between the challenged regulation and the constitutive terms of the governmental authority at issue—here, whether prohibiting employers from discriminating against members of labor unions qualified as a regulation of commerce among the several states. According to the majority, the connection between the legislative means selected by Congress and the constitutionally sanctioned ends of the commerce power was lacking. “[B]ettering the conditions and conserving the interests of . . . wage-earners,” Harlan declared, had “nothing to do with interstate commerce, as such.”¹⁴³ Although Congress had “a large discretion” in its “choice of the means . . . in the regulation of interstate commerce,” the majority could discern no “possible legal or logical connection . . . between an employee’s membership in a labor organization and the carrying on of interstate commerce[.]”¹⁴⁴

Justice Harlan’s summation of the Court’s holding underscores the doctrinal interchange between the constitutional right at issue and the construction of “interstate commerce.” The statute “must be held to be repugnant to the [Fifth] Amendment,” he concluded, “and as not embraced nor within the power of Congress to regulate interstate commerce, but, under the guise of regulating interstate commerce . . . it arbitrarily sanctions an illegal invasion of personal liberty as well as the right of property”¹⁴⁵ Notably, Harlan does *not* say that, although regulating the labor relations of employers and workers engaged in interstate commerce might otherwise fall within Congress’ purview, the statute is nevertheless invalid because it unconstitutionally interferes with economic liberty. Rather, the statute exceeded the scope of Congress’ authority under the Commerce Clause *because* it deprived employers of economic liberty in violation of the Fifth Amendment.

143. *Id.* at 178.

144. *Id.* at 177–78.

145. *Id.* at 180.

The constitutional meaning of “interstate commerce”—specifically, the narrowness of its scope—is inseparable from the conclusion that Congress had invaded employers’ constitutional right to economic liberty. Reading the right to economic liberty not as a constitutional trump, but rather as a trigger for heightened means/ends scrutiny, illuminates that, just as the Court’s defense of constitutional economic liberty was essential to the meaning of “general welfare” or “public health” in *Lochner*, so, too, did it shape the *intrinsic* scope of the commerce power in *Adair*. Professor Barry Cushman has similarly suggested that the conception of federal authority that Justice Harlan posited in *Adair* amounted to a kind of federal “commercial police power,” under which Congress might, if circumstances warranted, be empowered to interfere with Fifth Amendment economic rights in order to “protect the free flow of interstate commerce.”¹⁴⁶ The effect, Cushman concludes, was to define such rights “in terms of the impact that employer-employee relations exerted on interstate commerce.”¹⁴⁷

Whether one emphasizes that *Adair*’s Fifth Amendment right to economic liberty informed the majority’s construction of “interstate commerce” (as I have), or that the majority’s construction of “interstate commerce” defined the “sphere of liberty [of contract] protected by the Fifth Amendment” (as Cushman does),¹⁴⁸ the essential point is that both *Adair*’s right and Congress’ authority took shape in relation to the other; and that this mutually constitutive quality defies the conventional dichotomy between external, rights-based constraints on legislative authority, on the one hand, and internal, textual and structural constraints, on the other. Indeed, throughout the decades preceding the New Deal, Fifth Amendment substantive due process rights, even if not always fully articulated, came to operate as structural features in the Court’s federalism jurisprudence.¹⁴⁹ *Adair* thus illustrates how the

146. CUSHMAN, *supra* note 27, at 111.

147. *Id.* at 112.

148. *Id.*

149. In *Hammer v. Dagenhart*, for example, the Court struck down, ostensibly on federalism grounds, a provision of the federal Child Labor Act of 1916 prohibiting the interstate shipment of goods produced by enterprises that employed child labor. *Hammer v. Dagenhart*, 247 U.S. 251 (1918). According to the Court, the Act was “in a two-fold sense . . . repugnant to the Constitution. It not only transcend[ed] the authority delegated to Congress over commerce but also exert[ed] a power as to a purely local matter to which the federal authority does not extend.” *Id.* at 276. Notwithstanding this federalist framing of the issue, Cushman explains, “the restriction on congressional power . . . was derived neither from the internal limitations on the Commerce Clause, nor from whatever affirmative limitations the Tenth Amendment might impose, but instead from the limitations of the Due Process Clause of the Fifth Amendment.” Barry Cushman, *Carolene Products and Constitutional Structure*, 2012 SUP. CT. REV. 321 (2012). *Cf.* Logan E. Sawyer III, *Creating Hammer v. Dagenhart*, 21 WM. & MARY BILL RTS. J. 67 (2012) (arguing that, at the time *Hammer* was decided, the doctrinal lynchpin of the majority opinion—the “harmless items limit” to Congress’ Commerce Clause authority—was a principled and widely recognized constraint on the federal commerce power).

customary division of constitutional law into “structure” and “rights”—a division that is essential to Chief Justice Roberts and the joint dissenters’ Commerce Clause opinions in *NFIB v. Sebelius*—obscures what Cushman aptly characterizes as the “deep and important relationships that often have obtained between these two [doctrinal] domains”¹⁵⁰

The substantive due process right to “liberty of contract” reached its apex in the 1923 case of *Adkins v. Children’s Hospital*.¹⁵¹ In *Adkins*, a five-Justice majority struck down a federal statute establishing a minimum wage for women in Washington, D.C. as an unconstitutional deprivation of liberty in violation of the Due Process Clause of the Fifth Amendment. Justice Sutherland’s majority opinion applied the basic analytical framework adopted in *Lochner*, first affirming the constitutional economic right at issue and then subjecting the legislative rationale to heightened scrutiny. Justice Sutherland’s principal challenge was to distinguish the case from *Muller v. Oregon*, in which the Court had upheld a maximum hours law for women just fifteen years earlier. In *Muller*, the Justices had unanimously accepted the state’s argument that, due to “difference[s] between the sexes,” limiting women’s hours of labor served the public health in ways that limiting men’s hours of labor did not.¹⁵² Under the exacting scrutiny of the *Adkins* majority, however, interfering with private labor contracts in order to redress inequalities in bargaining power between women workers and their employers no longer bore a sufficient relationship to the public health. In light of the political and legal strides that women had made over the prior generation, Sutherland reasoned, the Court could no longer “accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not be imposed in the case of men under similar circumstances.”¹⁵³ With that, the *Adkins* Court disposed of the public

150. Cushman, *supra* note 149, at 376.

151. *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525 (1923).

152. *Muller v. Oregon*, 208 U.S. 412, 419 (1908). “That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious,” the Court had observed, “and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.” *Id.* at 421.

153. *Adkins*, 261 U.S. at 553. “In view of the great—not to say revolutionary—changes which have taken place since [*Muller*], in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment,” the Court reasoned, sex differences “have now come almost . . . to the vanishing point.” *Id.* It is tempting to read Justice Sutherland’s invocation of the Nineteenth Amendment as a cynical, or at least opportunistic, deployment of women’s equality discourse in the service of his *real* purpose of constraining the ability of governments to interfere in employment relationships; and perhaps it was. But *bona fide* women’s rights activists, including Alice Paul of the national Women’s Party and other prominent advocates of an Equal Rights Amendment, actively

health rationale that had carried the day less than a generation before.

In *Adkins*, the constitutional right to “liberty of contract” thus ripened into a more pointed injunction against interfering with individual economic prerogatives in the private labor market. The majority opinion omits *Lochner*’s broad reflection on the scope of the state police power; instead, the constitutional right itself takes center stage, and does most of the analytical work. “[F]reedom of contract is . . . the general rule,” Justice Sutherland explained, “and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.”¹⁵⁴ In forming labor contracts, “the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining.”¹⁵⁵ The Court’s virtual presumption of unconstitutionality was triggered by the law’s denial to both employers and employees of the full freedom to engage in that bargaining process. The law was “simply and exclusively a price-fixing law,” Justice Sutherland declared, because it prevented individuals from “freely contract[ing] with one another in respect to the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree”¹⁵⁶ When the government fixes a wage according to the minimum needs of the employee rather than the value of the services provided, “it amounts to a compulsory exaction from the employer” of an “arbitrary payment . . . having no causal connection with his business, or . . . the work the employee engages to do.”¹⁵⁷ This compelled disbursement, divorced from a market-driven notion of value, rendered the statute “a naked, arbitrary exercise of power,”¹⁵⁸ and thus “put[] upon it the stamp of invalidity”¹⁵⁹ The forceful anti-compulsion language of *Adkins*,

supported the Children’s Hospital and individual employees challenging the minimum wage law. Moreover, Sutherland himself had long been a vocal supporter of women’s rights, and as a Republican Senator from Utah had even introduced the Nineteenth Amendment in the U.S. Senate. See BERNSTEIN, *supra* note 12, at 66–69.

154. *Adkins*, 261 U.S. at 546.

155. *Id.* at 545.

156. *Id.* at 554–55.

157. *Id.* at 557–58. “The price fixed by the board need have no relation to the capacity or earning power of the employee” *Id.* at 555. It applies “without regard to [the] nature or the character of the work.” *Id.*

158. *Id.* at 559.

159. *Id.* at 558. Twelve years later, in *Morehead v. New York*, the Court relied entirely on *Adkins* to strike down a New York law prohibiting the payment of “oppressive and unreasonable wage[s].” *Morehead v. New York*, 298 U.S. 587, 619–22 (1936). The Act’s fatal flaw, according to the Court, was the legislature’s definition of “oppressive and unreasonable” to include wages that were “less than sufficient to meet the minimum cost of living necessary to health.” *Id.* at 605 (internal quotation marks omitted). As in *Adkins*, to fix a wage through any means but private bargaining rendered the wage an “arbitrary” “exaction,” and as such an instance of economic compulsion in conflict with constitutional economic liberty.

and the virtual presumption of unconstitutionality that accompanied it, has perhaps clouded both the principle of legislative impartiality that animated *Lochner* and the extent to which the *Lochner* Court understood itself to be enforcing limits on legislative authority that were intrinsic to the police power itself.

*C. Economic Regulation and the Presumption of Constitutionality
in the Post-New Deal Era*

In light of the “doctrinal cross-pollination”¹⁶⁰ between the Supreme Court’s Fifth Amendment and Commerce Clause jurisprudence, it was no coincidence that the Court abandoned both substantive due process and federalism-oriented constraints on the commerce power in tandem. The conventional scholarly account of the New Deal “revolution” in constitutional law has centered on the Court’s apparent “switch in time” in the spring of 1937, when its two “moderates”—Chief Justice Charles Evans Hughes and Justice Owen Roberts—joined its three stalwart “liberals” to remove the most troublesome constitutional impediments to legislative regulation of the economy. First, in *West Coast Hotel v. Parrish*, the Court upheld a Washington State minimum wage law for women, rejecting the *Adkins* Court’s notion of “an absolute and uncontrollable liberty”¹⁶¹ protected by the Due Process Clause. “Liberty under the Constitution is . . . necessarily subject to the restraints of due process,” the Court explained, and “regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”¹⁶² Two weeks later, in *United States v. Jones & Laughlin Steel*, the Court upheld under the commerce power provisions of the

160. CUSHMAN, *supra* note 27, at 140.

161. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937). The Court continued:

In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . . [T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people.

Id.

162. *Id.* In fact, the Court had disavowed the “absolute and uncontrollable liberty” of *Adkins* three years earlier, in *Nebbia v. New York*, when it rejected a substantive due process challenge to a New York State statute fixing the price of milk. *Nebbia v. New York*, 291 U.S. 502 (1934). The Due Process Clauses of the Fifth and Fourteenth Amendments, the Court explained, “do not prohibit governmental regulation for the public welfare,” but merely require “that the end shall be accomplished by methods consistent with due process.” *Id.* at 510. “And the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.” *Id.* at 510–11. On the importance of *Nebbia* in the New Deal constitutional revolution, see *infra* notes 165–167 and accompanying text.

National Labor Relations Act guaranteeing the right of workers to form labor unions and obliging employers to engage in collective bargaining with union representatives. In so doing, the Court relaxed the categorical distinction between interstate commerce and formerly “intrastate” activities such as “manufacturing” and “production,” thus dramatically loosening the constitutional strictures on Congress’ exercise of its commerce power.¹⁶³ Because commercial disruption borne of industrial conflict “presents in the most striking way the very close and intimate relation which a manufacturing industry may have to interstate commerce,” the majority reasoned, there could be “no doubt that Congress had constitutional authority to safeguard the right of . . . employees to self-organization and freedom in the choice of representatives for collective bargaining.”¹⁶⁴

More recently, revisionist scholars have challenged this narrative. Professor Cushman argues persuasively that the watershed moment in the New Deal constitutional revolution came not in 1937, but three years earlier, in *Nebbia v. New York*,¹⁶⁵ when the Court abandoned the long-standing distinction between businesses “affected with a public interest,” over which the states and Congress traditionally enjoyed broad regulatory authority under their police and commerce powers, respectively, and “private” businesses, which were buffered against governmental intervention. By the time the Court decided *Parrish*, Cushman argues, it had already discarded an essential premise of economic substantive due process—the notion that only a discrete class of public and quasi-public enterprises were susceptible to wage and price regulations. Although *Nebbia* involved the state police power, “[t]he breakdown of the public/private distinction . . . held dramatic potential consequences for commerce clause doctrine,” as well.¹⁶⁶ Under this reading, *Jones & Laughlin Steel* merely made manifest a doctrinal shift set in motion years earlier.¹⁶⁷

Whatever the precise nature and timing of the doctrinal revolution,

163. See *supra* notes 23–27 and accompanying text.

164. *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937).

165. *Nebbia*, 291 U.S. 502 (upholding a New York state law regulating the price of milk).

166. CUSHMAN, *supra* note 27, at 155. Under the prevailing doctrinal framework, Cushman explains, the commerce power could not reach an intrastate business unless the enterprise was both “affected with a public interest” and “located within a current of interstate commerce . . .” *Id.* at 146. As long as the class of businesses affected with a public interest was small, “the channel cut by the current of commerce promised to remain narrow.” *Id.* at 155. By throwing open that class, *Nebbia* left unchecked the inherent volatility of the current of commerce doctrine—namely, its “capacity to transform the local into the national.” *Id.* at 152.

167. *Nebbia*’s transformative potential for Commerce Clause doctrine remained suppressed in *Schechter Poultry*, 295 U.S. 495 (1935), and *Carter v. Carter Coal*, 298 U.S. 238 (1936), Cushman explains, because the plaintiffs in those cases persuaded a majority of the Court that the regulated activities lay outside the stream of interstate commerce. *Id.* at 165.

however, the important point is that the New Deal Court replaced both substantive due process and, in the Commerce Clause cases, the manufacturing/commerce and direct/indirect effects distinctions, with a unified framework for reviewing state and federal economic regulations that was premised on a strong presumption of constitutionality. “[A]ll we have to decide,” the *Parrish* Court declared, was that a statutory minimum wage was not an “arbitrary or capricious” means of protecting women from “[the] most injurious competition” in the labor market.¹⁶⁸ “[R]egulatory legislation affecting ordinary commercial transactions” would be upheld, the Court explained four weeks later, unless the available facts “preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”¹⁶⁹

With respect to federal commercial regulations, as well, the Court showed great deference toward the legislative judgments of Congress. In *Jones & Laughlin Steel*, the Court had accepted Congress’ appraisal, supported by abundant findings of fact, that preventing industrial strife between employees and employers had a “close and intimate relation” to the legislative end of preserving the free flow of interstate commerce. In *United States v. Darby* and *Wickard v. Filburn*, that relative deference ripened into the virtual withdrawal of the judiciary from any meaningful role in supervising Congress’ asserted Commerce Clause rationale. The “only function of the courts” was “to determine whether the particular activity regulated or prohibited is within the reach of the federal power,”¹⁷⁰ a unanimous *Darby* Court declared. If it was, Congress could “choose the means reasonably adapted to the attainment of the permitted end”¹⁷¹ In short, the Court would no longer police the

168. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937). “[I]f the protection of women is a legitimate end of the exercise of state power,” the Court queried, “how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?” *Id.* at 398.

169. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). “[B]y their very nature,” the Court concluded, “such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.” *Id.* at 154. Any lingering doubts that reviewing courts faced with substantive due process challenges to economic regulations would defer to the judgment of the legislature were erased in *Williamson v. Lee Optical*. There, the Court made clear that the presumption of constitutionality was virtually irrebuttable, and that it would search the speculative universe of possible legislative rationales to uphold even a “needless, wasteful requirement” *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955). The Court continued: “The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.” *Id.* at 488.

170. *United States v. Darby*, 312 U.S. 100, 120–21 (1941).

171. *Id.* at 121. The commerce power extended even “to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.” *Id.* at 118. Moreover, the “motive and purpose of a regulation of

constitutional sufficiency of the relationship between the specific object of regulation and the end of regulating interstate commerce. The *Wickard* Court went still further, announcing that “effective restraints on [the commerce power] must proceed from political rather than judicial processes,”¹⁷² and accepting on faith Congress’ assertion that wheat consumed on the farm where it was grown could, considered in aggregate, have a substantial effect on the interstate wheat market. As Justice Jackson, the author of the *Wickard* opinion, acknowledged in private correspondence, “[w]e have all but reached an era in the interpretation of the commerce clause of candid recognition that we have no legal judgment upon economic effects which we can oppose to the policy judgment made by Congress in legislation”¹⁷³

The presumption of constitutionality for economic regulations was subject to an important qualification, however, identified in the famous footnote four of *United States v. Carolene Products*.¹⁷⁴ “There may be narrower scope for operation of the presumption,” the Court explained, “when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments”¹⁷⁵ Three decades later, in *Griswold v. Connecticut*,¹⁷⁶ the Court extended the application of heightened scrutiny to legislation that interfered with some nonenumerated rights, as well. As a result, the “liberty” protected under the Due Process Clause of the Fourteenth Amendment now extends to “those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.”¹⁷⁷ Since its decision in *Parrish*, however, the Court has steadfastly rejected invitations to include economic liberty on the list of nonenumerated

interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.” *Id.* at 115. “Whatever the[ir] motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.” *Id.*

172. *Wickard v. Filburn*, 317 U.S. 111, 120 (1942).

173. Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1143 (2000) (quoting Memorandum for Mr. Costelloe, Re *Wickard* Case 15 (July 12, 1942)). Jackson continued: “It is perhaps time that we recognize that the introduction of economic determinism into constitutional law of interstate commerce marked the end of judicial control of the scope of federal activity.” *Id.*

174. *Carolene Prods.*, 304 U.S. 144.

175. *Id.* at 152 n.4. Of course, footnote four also famously identified two additional circumstances that may warrant “more searching judicial inquiry”: “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation;” and legislation motivated by “prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities” *Id.*

176. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (identifying a fundamental right to marital privacy).

177. *Id.* at 486 (Goldberg, J., concurring).

fundamental rights.¹⁷⁸

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During the *Lochner* era, the Court selectively applied heightened means/ends scrutiny to state police and federal commercial regulations that were found to interfere with individual economic liberty. Since the New Deal, however, when the Court abandoned the notion of fundamental economic rights, both state and federal economic legislation have been afforded the same strong presumption of constitutionality. So long as the means employed are rationally related to a permissible legislative end, courts will uphold the regulation. As Part IV explains, this congruence between the Court's approach to state police and federal commercial legislation confounds the distinction drawn by Chief Justice Roberts and the joint dissenters between a federal commerce authority that flows from and is limited by the terms of Article I, and a "plenary" state police power constrained only by the "affirmative" prohibitions of the Bill of Rights or other "fundamental" liberty interest.

IV. ECONOMIC LIBERTY AND FEDERALISM IN *NFIB v. SEBELIUS*

Faced with a federal statute that was unambiguously economic in nature, a market that was undeniably interstate, and a Court that was unlikely to revisit the "substantial effects" or "aggregation" doctrines,¹⁷⁹ the ACA plaintiffs were challenged with formulating a limiting principle that would nevertheless exclude the MCP from the scope of congressional authority. Their solution, which Chief Justice Roberts and the four joint dissenters endorsed, was to distinguish between "activity," which can be subject to the federal commerce power, and "inactivity," which cannot. As the Chief Justice explained, Congress' constitutionally enumerated authority to "regulate commerce" necessarily "presupposes the existence of commercial activity to be regulated;"¹⁸⁰ this "natural understanding" of the constitutional text, moreover, had been further confirmed by two centuries of Commerce Clause jurisprudence that "uniformly describe[s] the power as reaching

178. See *supra* note 70.

179. Indeed, Chief Justice Roberts acknowledged that while "[t]he path of our Commerce Clause decisions has not always run smooth . . . it is now well established that Congress has broad authority" to regulate not only "activities that 'have a substantial effect on interstate commerce,'" but also "activities that do so only when aggregated with similar activities of others." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585–86 (2012) (quoting *United States v. Darby*, 312 U.S. 100, 118–19 (1941); *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942)).

180. *Id.* at 2586.

‘activity.’”¹⁸¹ This was a limiting principle, the Justices insisted, deduced from the text and history of the Commerce Clause and the structural constitutional value of federalism.

This Part analyzes that limiting principle in light of the Supreme Court’s *Lochner*-era substantive due process decisions. As Part III argued, the constitutional right to individual economic liberty operated in those opinions not as a trump against governmental interference with private economic prerogatives, but as a convenient warrant for the Court’s selectively aggressive scrutiny of federal and state economic regulation. In assessing the adequacy of the “fit” between the regulatory end (in *Lochner* and *Adkins*, the “general welfare” or “public health”; in *Adair*, the regulation of interstate commerce) and the regulatory means adopted (establishing maximum hours or minimum wages, or prohibiting employment discrimination against union members) the Court was reinterpreting the intrinsic, constitutive terms of the state police and federal commerce powers. The *Lochner*-era substantive due process cases thus illustrate how the Court can adapt the intrinsic scope of both state and federal legislative authority in order to vindicate the value of economic liberty.

This Part proceeds in three Subparts. Subpart A describes Chief Justice Roberts and the joint dissenters’ contention that the activity/inactivity distinction is a strictly intrinsic constraint on congressional authority rooted in the text and history of the Commerce Clause. Subpart B argues that, notwithstanding the Justices’ insistence that economic rights played no part in their reasoning, their threshold finding that the MCP improperly interferes with individual economic liberty operates much as the substantive due process right to freedom of contract did during the *Lochner* era, as a trigger for heightened means/ends scrutiny. Finally, Subpart C considers Chief Justice Roberts’ conclusion that Congress lacked authority under the Necessary and Proper Clause to enact the MCP. It argues that, in reading the term “proper” to impose federalism-derived limits on the scope of the commerce power, the Chief Justice recasts congressional interference with individual liberty as a sin against the structural Constitution.

A. The Activity/Inactivity Distinction as a Structural Constraint on Congressional Authority

The logic of Chief Justice Roberts’ Commerce Clause opinion is relatively straightforward. It consists of the major premise that the commerce power extends only to existing commercial activity; the

181. *Id.* at 2587.

minor premise that the MCP does not regulate existing commercial activity; and the conclusion that Congress lacked authority under the Commerce Clause to enact the MCP. The Chief Justice began his opinion with a familiar civics lesson on the nature and limits of federal authority. “In our federal system,” he explained, “the National Government possesses only limited powers”¹⁸² “[R]ather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government’s powers.”¹⁸³ That constitutional enumeration, in turn, “is also a limitation of powers, because ‘[t]he enumeration presupposes something not enumerated.’”¹⁸⁴ Perhaps seeking to buffer the majority against charges of “Lochnerism,”¹⁸⁵ the Chief Justice was at pains to distinguish between the federalism-oriented limits on congressional authority that are inherent in enumerated powers, and “the restrictions on government power foremost in many Americans’ minds”—namely, “affirmative prohibitions, such as contained in the Bill of Rights.”¹⁸⁶ “These affirmative prohibitions come into play . . . only where the Government possesses authority to act in the first place,” he explained, but when “no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.”¹⁸⁷ The joint dissenters likewise emphasized the distinction between structural and rights-based limits on congressional authority:

The constitutional protections that this case involves are protections of structure. Structural protections—notably, the restraints imposed by federalism and separation of powers—are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril.¹⁸⁸

182. *Id.* at 2577.

183. *Id.*

184. *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)).

185. See notes 11–14, 16 and accompanying text.

186. *NFIB*, 132 S. Ct. at 2577.

187. *Id.*

188. *Id.* at 2676–77 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

In light of the Court's general and repeated disavowal during the post-*Lochner* era of a substantive due process right to economic liberty,¹⁸⁹ the distinction was vital to the perceived legitimacy of what had become a highly politicized decision.¹⁹⁰ *Lochner* was about long-since-abandoned constitutional economic rights; at stake in the challenge to the MCP was the American system of dual sovereignty.

Chief Justice Roberts made a similar point to distinguish the enumerated, and thereby limited, powers of the federal government from the extra-constitutional, plenary authority of the states. State authority was subject to the "affirmative prohibitions" embodied in federal constitutional rights, he explained, "[b]ut where such prohibitions do not apply, state governments do not need constitutional authorization to act."¹⁹¹ Because states are unburdened by the constraints on legislative authority that are a natural concomitant of constitutionally enumerated powers, the states "can and do perform many of the vital functions of modern government—punishing street crime, running schools, and zoning property for development"—that are beyond Congress' reach. In order to prevent federal encroachment into the regulatory domain of the states, Roberts counseled, enumerated powers "must be read carefully to avoid creating a general federal authority akin to the police power."¹⁹² Indeed, Roberts and the joint dissenters reiterated throughout their opinions that the government's theory of congressional authority threatened to convert the Commerce Clause into a federal police power.

Even as Chief Justice Roberts rendered the activity/inactivity distinction in the language of federalism, however, his analysis was directed less toward preserving dual sovereignty than protecting individuals against federal compulsion. To permit Congress to regulate individuals "precisely because they are doing nothing," Roberts worried, "would open a new and potentially vast domain of congressional authority."¹⁹³ "Every day individuals do not do an infinite number of things," and if the mere "effect of inaction on commerce" were a sufficient constitutional warrant for the exercise of the commerce power, "countless decisions an individual could *potentially* make" would be drawn within the scope of federal authority, thus empowering Congress to "make those decisions for him."¹⁹⁴ "Congress already enjoys vast

189. See *supra* note 70.

190. See *supra* note 16.

191. *NFIB*, 132 S. Ct. at 2578 (majority opinion).

192. *Id.*

193. *Id.* at 2587.

194. *Id.* This unchecked power to direct the decisions of individuals might even include forcing people to "buy vegetables" or "eat a balanced diet" in order to reduce the medical, and thus financial, "burden of obesity." *Id.* at 2588. The joint dissenters were more dire still in their prediction. To go beyond the aggregation theory of *Wickard*, they declared, "is to make mere breathing in and out the

power to regulate much of what we do,” he cautioned, and “[a]ccepting the Government’s theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.”¹⁹⁵ The Commerce Clause was not “a general license to regulate an individual from cradle to grave”¹⁹⁶ Notably, this ostensibly federalism-based exemption of “inactivity” from federal commercial regulation neglects to identify how the MCP threatens the sovereignty of the states or otherwise implicates the constitutional distribution of authority between the states and the federal government. Rather, to the extent that state sovereignty makes any appearance in the Chief Justice’s analysis, it is primarily as a foil to the specifically constituted authority of Congress.¹⁹⁷

B. Phantom Economic Rights and Heightened Scrutiny

After establishing that the commerce power extends only to regulable “activity,” the Chief Justice and the joint dissenters turned to their minor premise: that the status of *being uninsured* did not qualify as such. In response to the challengers’ characterization of the MCP as an improper regulation of “inactivity,” the government had contended that the “uninsured as a class”—the regulatory objects of the MCP—were in fact

basis for federal prescription and to extend federal power to virtually all human activity.” *Id.* at 2643 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). “If all inactivity affecting commerce is commerce, commerce is everything,” and “everything is within federal control simply because it exists.” *Id.* at 2649. As Professors Rosen and Schmidt point out, the parade of horrors marched out by the Commerce Clause majority served to shrink the “disconnect” between the “liberty-based critique of the health insurance mandate” advanced by popular constitutional opponents of the ACA, and the doctrinal terms in which the Court would ultimately resolve the Commerce Clause question—namely, enumerated powers and federalism. The so-called “broccoli horrible,” in particular, Rosen and Schmidt demonstrate, had the effect of imposing upon the government the burden of articulating a limiting principle under which Congress could require people to purchase health insurance but not broccoli. This was an extraordinary strategic accomplishment, in light of the “nearly unbroken [] practice of the Supreme Court,” including the Roberts Court, to “abjure limiting principles and instead confine itself to a narrow focus on determining whether the challenged statute . . . is constitutional.” Rosen & Schmidt, *supra* note 16 at 78.

195. *NFIB*, 132 S. Ct. at 2589.

196. *Id.* at 2591. The joint dissenters were even more colorful in their denunciations of the government’s theory. “If Congress can reach out and command” participation in the health insurance market, “the Commerce Clause becomes a font of unlimited power . . . ‘the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.’” *Id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (quoting *THE FEDERALIST* No. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

197. As I argued in Part III, it is misleading to suggest that because we understand the police power as an extra-constitutional adjunct to state sovereignty, it does not contain its own intrinsic limits. When the *Lochner* Court scrutinized and found lacking the fit between the challenged hours law and the general welfare or public health, it was enforcing conditions on the exercise of state legislative authority that were intrinsic to the police power itself. See *supra* Part III.

“active in the market for health care.”¹⁹⁸ Because the uninsured “regularly seek and obtain” medical services, the government maintained, the MCP “merely regulates how individuals finance and pay for that active participation—requiring that they do so through insurance, rather than through attempted self-insurance with the backstop of shifting costs to others.”¹⁹⁹ The Chief Justice and joint dissenters met this argument not by reasoning from the text of the Commerce Clause or the principle of federalism, but rather with the language of liberty and compulsion. The MCP improperly “compels individuals to *become* active in commerce,”²⁰⁰ the Chief Justice objected. By acting directly on “individuals not engaged in commerce,” the mandate thus exceeded the scope of congressional authority established in *Wickard*, “perhaps the most far reaching example of Commerce Clause authority over intrastate activity”²⁰¹ Roscoe Filburn was, at the very least, engaged in the *activity* of growing wheat, even if not for market. The joint dissenters similarly charged that Congress had “impressed into service third parties”²⁰² unconnected with the market for health care services; and that in “forc[ing] these individuals to purchase insurance” it had “command[ed] even those furthest removed from an interstate market to participate in the market”²⁰³

198. Brief for United States, *supra* note 11, at 50.

199. *Id.* The minimum coverage provision thus regulated not “inactivity,” but rather the “manner” in which individuals who were already or soon would be active in the market for health care “finance and pay for [those] services” *Id.* at 25.

200. *NFIB*, 132 S. Ct. at 2587 (majority opinion). See also *id.* at 2586.

201. *Id.* at 2586 (quoting *United States v. Lopez*, 514 U.S. 549, 560 (1995)).

202. *Id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

203. *Id.* The state and private plaintiffs similarly described the MCP in terms of liberty and compulsion. To recognize a “power to force individuals to engage in commercial transactions against their will” in order to “compel commerce the better to regulate it,” argued the state plaintiffs, would enable Congress “to withhold from individuals the very liberty that the Constitution was designed to protect.” Brief for State Respondents, *supra* note 65, at 17–18. The private plaintiffs, in particular, repeatedly characterized the MCP’s alleged abridgement of individual contractual liberty as a transgression of the structural limits of federal power. “The mandate imposes an extraordinary and unprecedented duty on Americans to enter costly private contracts,” they wrote. Brief for Private Respondents on the Individual Mandate at 7, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-398, 11-400), 2012 WL 379586, at *7 [hereinafter Brief for Private Respondents]. “By commanding citizens to subsidize voluntary participants in the insurance industry through disadvantageous contracts,” they continued, the MCP “exemplifies the threat to individual liberty that occurs when Congress exceeds its limited and enumerated powers.” *Id.* Especially remarkable was their reliance on the 1819 case *Dartmouth College v. Woodward* to support the proposition that “Congress should not be presumed to have the power to force ‘a new contract’ on a party ‘without [his] assent,’ for ‘the assent of all the parties to be bound by a contract be of its essence.’” *Id.* at 61 (quoting *Trs. of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 662–63 (1819)). In *Dartmouth College*, the Court famously held that the trustees of Dartmouth College held a vested contractual right in their corporate charter, which the state of New Hampshire was prohibited from revoking by the Contract Clause of the U.S. Constitution. That the plaintiffs relied on a case striking down a state law in defense of a vested contractual right, in support of a proposed limitation on the

Just as the *Lochner*-era Court had defended the integrity of “private bargaining”²⁰⁴ against the “compulsory extraction” of “arbitrary payment[s],”²⁰⁵ the Chief Justice and joint dissenters objected to the MCP’s interference with private economic decision-making in order to benefit one class (people otherwise unable to afford health insurance) at the expense of another (the voluntarily uninsured). Indeed, they cited the potential financial disadvantageousness of the compelled transaction for some of the uninsured as evidence that the uninsured were not, as the government maintained, already active in the market for health care services. “Congress has impressed into service third parties”²⁰⁶ in order offset the additional cost to insurers of the guaranteed-issue and community rating provisions, argued the joint dissenters. The decision to force into commerce these disproportionately “young and healthy individuals,” many of whom had rationally concluded that purchasing health insurance was not an “economically sound decision,”²⁰⁷ was thus “motivated by the fact that they are further removed from the market than unhealthy individuals with pre-existing conditions”²⁰⁸ The regulation of the uninsured “as a class” was therefore “particularly divorced from any link to existing commercial activity.”²⁰⁹

The Chief Justice similarly characterized the mandate as a compulsory subsidy, extracted from the voluntarily uninsured for the benefit of others. “It is precisely because [the uninsured], as an actuarial class, incur relatively low health care costs,” he explained, “that the mandate helps counter the effect of forcing insurance companies to cover others who impose greater costs than their premiums are allowed to reflect.”²¹⁰ The MCP’s financial unfairness to the uninsured—particularly the fact that the mandate could compel economically irrational purchases—thus bolstered the conclusion that they constituted an “actuarial class” whose “commercial inactivity rather than activity is its defining feature.”²¹¹ The Justices’ repeated references to “subsidies”

federal commerce power underscores the doctrinal disconnect between their core objection to the MCP and the constitutional basis of their legal challenge.

204. *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 545 (1923).

205. *Id.* at 558.

206. *NFIB*, 132 S. Ct. at 2646.

207. *Id.* at 2645.

208. *Id.* at 2646.

209. *Id.* at 2590.

210. *Id.*

211. *Id.* Recall the discussion in Part III of the *Adkins* case. See *supra* notes 151–159 and accompanying text. According to the *Adkins* Court, the Washington D.C. minimum wage law deprived employers and employees of the economic liberty protected by the Due Process Clause of the Fifth Amendment because it fixed the minimum wage according to the minimum needs of the employee rather than the value of the services provided, as determined by “private bargaining.” *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 545 (1923). Because the statutory wage was thus a “payment

and “actuarial risk” are redolent of Justice Peckham’s objection in *Lochner* to what he viewed as legislative favoritism. Just as the *Lochner*-era Court concluded that maximum hours and minimum wage laws afforded special privileges to workers by intervening on their behalf in the process of private bargaining, the Chief Justice and the joint dissenters objected that the MCP improperly benefited one class at the expense of another by preventing the uninsured from acting voluntarily in the health care market.

The parallels with the *Lochner*-era “liberty of contract” cases are more than rhetorical. The Justices’ defense of economic liberty operates within the broader logic of their opinions remarkably like the substantive due process right to economic liberty did a century ago—as a trigger for heightened means/ends scrutiny. The government’s contention that the MCP regulated “activity” was premised on the close logical and practical connection between the inevitable *consumption* of health care by the uninsured, and health *insurance*—the interstate commercial market that, all acknowledged, was a legitimate end of congressional regulation. The case record included considerable evidence that the uninsured are significant and predictable consumers of health care; that a substantial portion of the more than \$100 billion in health care they consume annually goes uncompensated; and that the cost of that uncompensated care is shifted to the other payers in the health care system—the government, private insurance companies, and, ultimately, those who do carry health insurance.²¹² Under the prevailing post-New Deal judicial approach to federal commercial regulation, such evidence should have furnished an ample legislative basis for the MCP. As the Court has often affirmed, a reviewing court “may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.”²¹³

for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do”—that is, because the minimum wage defied the logic of the private marketplace—it amounted to “a naked, arbitrary exercise of power that . . . cannot be allowed to stand under the Constitution of the United States.” *Id.* at 558–59.

Perhaps seeking to appeal to a similar judicial instinct against special legislative privileges, the state plaintiffs repeatedly referred to the MCP as a “subsidy.” Brief for State Respondents, *supra* note 65, at 46. The private plaintiffs complained that the MCP “compels insurers to . . . ignore actuarial risk,” Brief for Private Respondents, *supra* note 203, at 2, and then, by forcing the young and healthy uninsured to “enter into disadvantageous contractual associations with *wealthier businesses*,” *id.* at 62, under which they are obliged to pay “inflated premiums that exceed their actuarial risk,” *id.* at 38, furnishing “insurers and their voluntary customers with a \$28-39 billion annual subsidy . . .” *Id.*

212. Brief for United States, *supra* note 11, at 7–8.

213. *Hodel v. Indiana*, 452 U.S. 314, 323–24 (1981). See also *Gonzales v. Raich*, 545 U.S. 1, 22

Instead of deferring to the judgment of Congress, however, Chief Justice Roberts demanded an extraordinary degree of congruence between the MCP and a regulable commercial activity—here, the consumption of health care by the uninsured. Even as he accepted the government’s evidence that “almost all those who are uninsured will . . . engage in a health care transaction,” the Chief Justice concluded that uncertainty surrounding the precise timing of such future consumption was fatal to the government’s theory. “The proposition that Congress may dictate the conduct of an individual today because of a prophesied future activity finds no support in our precedent,”²¹⁴ he declared. In fact, as Justice Ginsberg noted in dissent, more than 60% of the uninsured obtain medical care in a given year, and nearly 90% do so within five years. “An uninsured’s consumption of health care is thus quite proximate,”²¹⁵ she observed. Under the Chief Justice’s exacting scrutiny, however, the well-documented legislative premise that most of the uninsured will inevitably consume health care, and that a substantial portion of those will not pay for it, becomes mere prophesy.²¹⁶

Underscoring the alleged discrepancy between legislative means and ends, the Chief Justice likewise took issue with the government’s seemingly uncontroversial observation that “health care and health care financing are inherently integrated.” “No matter how ‘inherently integrated’ health insurance and health care consumption may be,” he insisted, “they are not the same thing: They involve different transactions, entered into at different times, with different providers.”²¹⁷ On its face, this statement, which appears to require virtual identity between legislative ends and means, borders on incoherence. After all,

(2005) (A reviewing court need not determine that the regulated activities, “taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”). On rational basis review in the post-*Lopez* era, see *supra* note 63 and accompanying text.

214. *NFIB*, 132 S. Ct. at 2590. The joint dissenters similarly insisted that the uninsured cannot be made participants in the health care market “by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods and services covered by the mandated insurance.” *Id.* at 2648 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

215. *Id.* at 2618 (Ginsberg, J., concurring in part, concurring in the judgment, and dissenting in part).

216. The State Respondents likewise objected to the alleged mismatch between legislative means and ends, and urged exacting scrutiny. In response to the government’s claim that the MCP regulates how “individuals finance their participation in the health care market,” Brief for United States, *supra* note 11, at 33, the State Respondents observed that the ACA did not “require individuals to actually *pay* for health care services with the insurance that the mandate requires them to obtain.” Brief for State Respondents, *supra* note 65, at 25. Rather, the mandate merely “force[d] individuals to purchase *insurance*, which they are free to use or not use in the event that they actually need health care services.” *Id.* Whereas “a mandate that individuals who obtain health care services use insurance when they do so . . . would regulate *actual participation* in the market for health care services,” a simple insurance mandate does not. *Id.* Under this reasoning, Congress was not entitled to presume that people would actually use the insurance that the MCP had compelled them to purchase.

217. *NFIB*, 132 S. Ct. at 2591 (majority opinion).

the post-New Deal Court had often upheld legislation premised on a far more attenuated connection between the specific object of the challenged regulation and the relevant interstate commercial market.²¹⁸ Indeed, Congress' factual basis for the MCP surely rests on no more a "prophesied future" than the prospect that the marijuana grown by Angel Raich and others for their own medical use would somehow, at some time in the future, through means not evident in the case record, find its way into the interstate drug market.²¹⁹ Moreover, by subdividing an individual's engagement with the health care system into distinct "transactions," and thus cabining health care "consumption" and "financing" from "insurance," Chief Justice Roberts recalls the "artificial" distinctions between manufacturing and commerce, or direct and indirect effects on interstate commerce, deployed by the Court to limit Congress' commerce authority before 1937.²²⁰

The apparent incoherence dissolves, however, once we understand that Congress' unwarranted interference with individual economic liberty has triggered a shift from a posture of judicial deference to one of heightened, even unforgiving, judicial scrutiny. How else to make sense of the Chief Justice's conclusion that "[t]he proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception" to the principle that Congress cannot "force[] individuals into commerce precisely because they elected to refrain from commercial activity"?²²¹ Once the Justices concluded that the MCP abridged individual liberty by forcing the uninsured to participate in unwanted commerce, they jettisoned the presumption of constitutionality that normally accompanies federal commercial legislation. The effect is to shift the burden to the government to justify the MCP as an "exception" to the principle that Congress cannot regulate "inactivity."

218. This is perhaps especially true of the so-called "aggregation" theory. See, e.g., *Wickard v. Fillburn*, 317 U.S. 111, 133 (1942) (upholding congressional regulation of wheat grown for home consumption); *Raich*, 545 U.S. at 32–33 (upholding congressional regulation of marijuana grown for personal use).

219. As Justice Scalia explained in *Raich*, Congress' authority to prohibit a host of drug-related conduct, including the mere possession of marijuana intrastate, "depends only upon whether they are appropriate means of achieving the legitimate end of eradicating [such] substances from interstate commerce. . . . [M]arijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market" *Raich*, 545 U.S. at 40 (Scalia, J., concurring).

220. Roberts' assertion that, because health insurance and health care consumption are "not the same thing" and "involve different transactions," the insurance mandate bore an insufficiently proximate connection to the interstate commercial market in health care financing strikes one as a similarly cramped and almost willfully unreal reading of "interstate commerce." *NFIB*, 132 S. Ct. at 2591. The Court explicitly rejected this kind of transaction-specific analysis in *Jones & Laughlin Steel*, in 1937, in favor of a more functional, "practical conception" of interstate commerce. *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937).

221. *NFIB*, 132 S. Ct. at 2591.

Indeed, the Chief Justice's demand for virtual congruence between the MCP and the consumption and financing of health care recalls Justice Peckham's pronouncement in *Lochner* that legislation that impairs individual economic freedom "must have a more direct relation, as a means to an end" than it would otherwise.²²² The *Adair* Court's threshold conclusion that the challenged federal labor regulation invaded the plaintiff's substantive due process right to economic liberty similarly triggered heightened scrutiny of the "legal or logical connection" between "bettering the conditions and conserving the interests of . . . wage-earners"²²³ and the regulation of interstate commerce.²²⁴ In *NFIB v. Sebelius*, the Justices' conclusion that the MCP denied the uninsured liberty to remain outside of the regulated commercial market triggered a similarly exacting scrutiny of congressional means and ends. In concluding that the "proximity and degree of connection between the mandate and the subsequent commercial activity" were insufficient to qualify the MCP as a regulation of commerce,²²⁵ the Chief Justice was, like the *Adair* Court, remapping the intrinsic limits on congressional authority in the service of individual liberty.

C. Federalism Without States

Having concluded that the individual mandate did not qualify as a regulation of commerce, Chief Justice Roberts turned to the government's attempt to circumvent the "inactivity" problem by channeling Congress' commerce authority through the Necessary and Proper Clause. Recall from Part II that even in the post-*Lopez* era, the Necessary and Proper Clause authorized Congress to "regulate purely intrastate activity that is not itself 'commercial,' . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the [relevant] interstate market"²²⁶ The government accordingly argued that the MCP was "necessary to make effective the Act's core reforms of the insurance market, i.e., the guaranteed-issue and community-rating provisions."²²⁷ And in fact, all of the Justices

222. *Lochner v. New York*, 198 U.S. 45, 57 (1905).

223. *Adair v. United States*, 208 U.S. 161, 178 (1908).

224. See *supra* notes 137–150 and accompanying text.

225. *NFIB*, 132 S. Ct. at 2591.

226. *Gonzales v. Raich*, 545 U.S. 1, 18 (2005). See *supra* note 62 and accompanying text. "The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself 'substantially affect' interstate commerce." *Id.* at 37 (Scalia, J., concurring).

227. Brief for United States, *supra* note 11, at 24. Under the government's theory, the Chief Justice explained, "it is not necessary to consider the effect that an individual's inactivity may have on interstate commerce; it is enough that Congress regulate commercial activity in a way that requires

appeared to accept that the guaranteed issue and community-rating provisions would be ineffectual so long as those currently uninsured remained outside of the insurance risk pool.

Chief Justice Roberts and the joint dissenters nevertheless concluded that “the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms.”²²⁸ Although the Court had “been very deferential to Congress’s determination that a regulation is ‘necessary,’” often upholding legislative means that are merely “‘convenient, or useful’ or ‘conducive’” to the regulation of interstate commerce, the Chief Justice explained, the Necessary and Proper Clause had never been read to authorize “laws that undermine the structure of the government established by the Constitution.”²²⁹ The MCP may well be “necessary” to the operation of the ACA, he declared, but as a “‘usurpation’”²³⁰ of “‘state sovereignty,’”²³¹ it was not a “proper” means of executing an enumerated power. Under this novel reading, the Necessary and Proper Clause thus acts as a structural constraint on the scope of congressional authority.

Notwithstanding (or perhaps because of) its novelty, however, the Justices in the Commerce Clause majority couched the MCP’s alleged impropriety in a staple tenet of the New Federalism—the notion that federalism “‘secures to citizens the liberties that derive from a diffusion of sovereign power.’”²³² The Framers lodged the police power in “50 different States rather than one national sovereignty,” the Chief Justice explained, in order to ensure that “the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed,” which are “more accountable than a distant federal bureaucracy.”²³³ “By denying any one government complete jurisdiction over the concerns of public life,” he continued, federalism thus “‘protects the liberty of the individual from arbitrary power.’”²³⁴ The joint dissenters likewise emphasized the essential connection between the Constitution’s “structural protections—notably, the

regulation of inactivity to be effective.” *NFIB*, 132 S. Ct. at 2591.

228. *Id.* at 2592.

229. *Id.* (quoting *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010)).

230. *Id.* (quoting *Printz v. United States*, 521 U.S. 898, 924 (1997)).

231. *Id.* (quoting *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment)).

232. *Id.* at 2578 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). For a helpful overview of the “values of federalism,” including the protection of individual liberty, see Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 525–30 (1995); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 402–04 (1997).

233. *NFIB*, 132 S. Ct. at 2578 (citing THE FEDERALIST No. 45, at 109 (James Madison) (Clinton Rossiter ed., 1961)).

234. *Id.* (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)).

restraints imposed by federalism and the separation of powers—[and the] personal freedom” of the governed. “The fragmentation of power produced by the structure of our Government is central to liberty,” they warned, “and when we destroy it, we place liberty at peril.”²³⁵

As a matter of constitutional discourse, such claims are relatively uncontroversial.²³⁶ The notion that federalism serves to protect liberty enjoys a distinguished heritage stretching back to the founding era;²³⁷ in recent decades, moreover, the federalism/liberty nexus has been a prominent feature of the Court’s New Federalism.²³⁸ Critically, however, even as various Justices have celebrated the protection of individual liberty as a particularly salutary *consequence* of the Constitution’s diffusion of governmental authority, the essential object of the Court’s federalism jurisprudence has remained the preservation of *state* sovereignty. To the extent that enforcing federalist limits on congressional authority served to enhance liberty, it did so incidentally,

235. *Id.* at 2677 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Perhaps aware that their proffered limiting principle fit awkwardly at best into existing Commerce Clause jurisprudence, the Act’s challengers strained mightily to repackaging their argument in the language of federalism. One notable result is the unsupportable claim that, in adopting the ACA, Congress had treaded into a “sector traditionally left to the States.” Brief for State Respondents, *supra* note 65, at 38. “Since its earliest days,” they reasoned, “the Court has recognized that ‘health laws of every description’ are among ‘that immense mass of legislation . . . which can be most advantageously exercised by the States themselves.’” *Id.* at 37 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824)). There was therefore “no question that the individual mandate usurps the States’ police power to protect the health and liberty of their residents.” *Id.* at 38. This argument cynically conflates the meaning of “health” in traditional state police power rubric with the modern health care system, in which the federal government has long acted as both the single largest payer and a pervasive regulator.

236. See *infra* note 238. Whether they are also empirically valid is, of course, a separate question. See, e.g., EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 165 (2007) (describing the “dubious and unproven” relationship between federalism and liberty).

237. See, e.g., THE FEDERALIST No. 28, at 225 (Alexander Hamilton) (Benjamin F. Wright ed. 1996) (“It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.”); THE FEDERALIST No. 51, at 357 (James Madison) (“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.”).

238. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (“In the tension between federal and state power lies the promise of liberty.”); *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (The balance of power between the federal government and the states “plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.”); *Printz v. United States*, 521 U.S. 898, 921 (1997) (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”); *United States v. Morrison*, 529 U.S. 598, 655 (2000) (Breyer, J., dissenting) (“No one denies the importance of the Constitution’s federalist principles. Its state/federal division of authority protects liberty—both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is close to home.”).

as an indirect result of protecting *states* against federal encroachment.

By reading the term “proper” as a federalist constraint on Congress’ authority to enact the MCP, however, the Chief Justice and joint dissenters confound this traditional formulation. The basic difficulty lies in the fact that the MCP acts directly on individuals, and does not meaningfully implicate the sovereignty of the states. Indeed, in both *New York* and *Printz*—the cases from which the Chief Justice draws in laying out the individual liberty rationale for federalism—the federal statute at issue exceeded Congress’ authority because it acted on the states *as states*, by “commandeering” state officials or legislative processes in the implementation of a federal regulatory scheme. By forbidding such federal commandeering, and thus preserving an inviolable bastion of state sovereignty, the *New York* and *Printz* majorities had maintained, the Constitution also protected individual liberty.²³⁹ At the same time, however, those cases affirmed Congress’ broad authority to regulate individuals directly.²⁴⁰

Chief Justice Roberts inverts the logic of the federalism-liberty theorem described in the anti-commandeering cases. Immediately after announcing that the term “proper” in the Necessary and Proper Clause prohibited usurpations of state sovereignty, he proceeded to describe the impropriety of the MCP not as a violation of state prerogatives, but rather in terms of unchecked congressional authority to compel individuals into commerce. By “vest[ing] Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power,” he declared, the MCP would empower Congress to “reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it.”²⁴¹

In fact, the conventional markers of state sovereignty—the prerogatives of state officials; the integrity of state legislative processes; the essentially “local” nature of the regulated conduct; the natural domain of state regulatory competence—are not implicated by the MCP, and do not enter into the Chief Justice’s ostensibly “federalist” account of the MCP’s impropriety. The improper “expansion of federal

239. “The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States,” the *New York* majority explained. *New York v. United States*, 505 U.S. 144, 181 (1992). “To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.” *Id.*

240. As Justice Scalia wrote for the *Printz* majority, “the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people—who were . . . ‘the only proper objects of the government.’” *Printz v. United States*, 521 U.S. 898, 919–20 (1997) (quoting *THE FEDERALIST* No. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

241. *NFIB*, 132 S. Ct. at 2592 (majority opinion).

authority” centers, in Chief Justice Roberts’ analysis, not on any usurpation of state sovereignty, but rather on the threatened usurpation of individual sovereignty. Whereas *New York* and *Printz* preserve state sovereignty in order to, among other things, protect individual liberty, the Chief Justice concludes that, because the MCP improperly interferes with individual liberty, it necessarily “undermines the [federalist] structure of government established by the Constitution.”²⁴² This is, for all intents and purposes, federalism without states.

V. CONCLUSION

This Article reads Chief Justice Roberts and the joint dissenters’ Commerce Clause analyses in *NFIB v. Sebelius* through this historical lens of the Supreme Court’s *Lochner*-era substantive due process jurisprudence. As Part III argued, those cases illustrate how constraints on legislative authority that are rooted in “fundamental” economic rights and constraints on legislative authority that are rooted in federalism and the constitutional enumeration of powers necessarily operate in dynamic relationship to one another; and, further, that the *Lochner*-era Court adapted the scope of both state and federal legislative authority in order to vindicate the value of economic liberty.

Understanding that rights-based constraints on legislative authority, on the one hand, and textual and structural constraints, on the other, are in fact mutually constitutive provides an important alternative analytical framework to the structure/rights dichotomy advanced by the Chief Justice and joint dissenters. That framework better equips us to recognize that the value of individual economic liberty infuses the reasoning of *NFIB*’s Commerce Clause majority. Even in the absence of a formal constitutional economic “right” to serve as a doctrinal vehicle, the Justices’ defense of economic liberty operates much as the substantive due process right to “liberty of contract” did during the *Lochner* era—as a trigger for heightened scrutiny of legislative means and ends, through which they reinterpreted the constitutive terms of the commerce power and thereby narrowed its intrinsic scope.

This is problematic for two reasons. First, heightened scrutiny is normally reserved for rights that are “fundamental” (as well as suspect

242. *Id.* Professors Rosen and Schmidt reach a similar conclusion, identifying “a new theory of federalism” at work in the Chief Justice’s opinion, “in which liberty has been transformed from a consequent benefit of state sovereignty to an independent value of federalism itself.” Rosen & Schmidt, *supra* note 16, at 124. By embedding “a liberty value into the Commerce Clause and Necessary and Proper Clause analyses themselves,” *id.* at 125, they argue, this novel “Liberty-Centered Federalism” “allowed the Court to acknowledge that the critics of the ACA were raising a legitimate concern with regard to the mandate’s impact on the freedoms of the American people, but to do so without resurrecting substantive due process and *Lochner*.” *Id.* at 127.

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classifications), and the Supreme Court has disavowed the fundamentality of constitutional economic rights since 1937.²⁴³ The activity/inactivity distinction circumvents this obstacle by embedding an individual liberty interest directly in the Court's enumerated powers jurisprudence. Because the Court upheld the MCP under the General Welfare Clause, however, it is tempting to conclude that, notwithstanding its novelty, the limiting principle endorsed by a majority of the Court is unlikely to be of much consequence. After all, Congress had never adopted a purchase mandate before, and there is no reason to expect it to do so in the future.

This brings us to the second difficulty. When we read the activity/inactivity distinction not only as a discrete limitation on the scope of the commerce power, but also a nearly successful effort to embed a *Lochner*-style constitutional liberty interest in the structural constitution, the principle threatens to upend the traditional relationship between individual liberty and federalism. The *Lochner*-era substantive due process right to economic liberty evolved from a trigger for heightened (though by no means fatal²⁴⁴) scrutiny into something approaching a constitutional presumption against legislative interference in the private labor market.²⁴⁵ One might reasonably worry that the economic liberty interest endorsed by the Chief Justice and joint dissenters could similarly ripen from a narrow prohibition on federal purchase mandates into a broader injunction against congressional interference with individual liberty, in which individual sovereignty takes its place alongside state sovereignty in the structural constitution.

243. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955).

244. See *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding a Utah law limiting the hours of labor for miners and smelters as a valid exercise of the police power); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon law limiting the hours of labor for women as a valid exercise of the police power); *Lochner v. New York*, 198 U.S. 45 (1905).

245. See *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525 (1923) (striking down federal law providing for a minimum wage for women in Washington D.C.); *Morehead v. New York*, 298 U.S. 587 (1936) (striking down a New York law prohibiting the payment of "oppressive and unreasonable" wages).