



Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case

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ABSTRACT

Crucial to the U.S. Supreme Court's disposition of the constitutional challenge to the Affordable Care Act (ACA) was a hypothetical mandate to purchase broccoli, which the U.S. Congress never had considered and nobody thought would ever be enacted. For the five justices who concluded that the ACA exceeded Congress's commerce power, a fatal flaw in the government's case was its inability to explain adequately why upholding that mandate would not entail also upholding a federal requirement that all citizens purchase broccoli. The minority insisted the broccoli mandate was distinguishable.

This Article argues that the fact that all the justices insisted on providing a limiting principle—which was the demand underlying the broccoli hypothetical—was perhaps the most notable, precedent-breaking aspect of its landmark decision. As the Article shows, the Court almost always uses narrow, localist reasoning that analyzes only the government's actual action when confronted with novel constitutional questions. Indeed, the Court ordinarily explicitly declines to provide a limiting principle until it has heard several cases from which it can confidently deduce one.

The Article provides the first comprehensive analysis of how, and why, the broccoli hypothetical ultimately proved so deeply consequential. Outside the courts, where the constitutionality of the mandate was robustly debated, the broccoli hypothetical served to highlight the potential liberty costs of the ACA. In the courts—where, strictly speaking, the doctrinal question involved not personal liberty but congressional power—broccoli ensured that liberty costs would be a significant element of the constitutional analysis, and it also generated a perceived need to identify a limiting principle. In short, broccoli was a critical bridging mechanism that brought together the popular constitutional movement mobilized against the ACA and the constitutional challenge taking place in the courts.

We conclude with a normative assessment of this extrajudicial influence on the courts. We argue that while popular constitutional theory might justify the majority's novel liberty-centered approach to congressional power, it cannot warrant the Court's unusual break from localist legal reasoning. The Court's premature engagement with limiting principles bypassed the benefits of its ordinary incremental, case-by-case analysis, and circumvented institutional synergies that can generate superior and more democratically legitimate outcomes when courts and legislatures work together, over time, to flesh out constitutional judgments.

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INTRODUCTION

Broccoli made its appearance early in the debate over the Patient Protection and Affordable Care Act (ACA).¹ At first it seemed a joke, one of those spasms of political hyperbole that seem to emerge in any heated public debate. At issue was the constitutional authority by which the U.S. Congress could require people to purchase health insurance—the individual mandate provision of the ACA. If the Constitution were read to allow the federal government to require individuals to purchase health insurance, critics asked, was there anything to prevent the government from requiring people to do all sorts of things against their will? Could the government demand that people purchase broccoli?

No one in Congress had ever seriously considered such a broccoli mandate, of course. The issue at hand was health care and insurance, not green vegetables. Broccoli was a pure hypothetical of the slippery-slope, *reductio ad absurdum* variety. Yet the broccoli hypothetical proved to be a surprisingly persistent presence in the constitutional challenge to health care. Conservative lawyers pressed the broccoli analogy (along with other hypothetical mandates) in their numerous legal challenges to the ACA,² and broccoli found its way into the text of several lower court opinions.³ When the U.S. Supreme Court justices pressed the broccoli hypothetical on Solicitor General Verrilli during oral arguments, the only surprise was that he did not have a crisp response to the question everyone fully expected would be asked.⁴

The Supreme Court's ruling in *National Federation of Independent Business v. Sebelius* (NFIB)⁵ sealed broccoli's immortality in constitutional jurisprudence. The three main written opinions included twelve references to broccoli and five

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1. Pub. L. No. 111-148, 124 Stat. 119 (2010).
 2. See, e.g., JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 269 (2012) (describing the discussion of broccoli hypothetical at oral arguments in *Thomas More Law Center v. Obama*, 651 F.3d 529 (6th Cir. 2011)); see also, e.g., *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011) (referencing the discussion of broccoli at oral argument).
 3. See, e.g., *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 422, 438, 440, 447–48 (4th Cir. 2011) (Davis, J., dissenting); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 811 F. Supp. 2d 1086, 1102 (M.D. Pa. 2011); *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1307, 1311 (N.D. Fla. 2011); *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1289.
 4. See Noah Feldman, *Broccoli-Bungling Defense Hurts Health Care*, BLOOMBERG (Mar. 27, 2012, 3:28 PM), <http://www.bloomberg.com/news/2012-03-27/broccoli-bungling-defense-puts-health-care-at-risk-noah-feldman.html>.
 5. 132 S. Ct. 2566 (2012).

separate discussions of the broccoli mandate's legal implications.⁶ Five justices cited the government's inability to provide a satisfying answer to the broccoli hypothetical as a justification for creating a novel limitation on Congress's Commerce Clause powers and for concluding that the ACA's mandate exceeded that limit. Even the dissenters to the Commerce Clause holding felt compelled to respond to what Justice Ginsburg referred to as "the broccoli horrible."⁷

The justices' consensus concerning broccoli's significance in their constitutional analysis of the ACA conceals an as-of-yet unrecognized puzzle: All the justices took for granted that the Court had to provide a response to the broccoli hypothetical. To appreciate the puzzle, three points must be recognized. First, the broccoli hypothetical was, at base, a provocative way to demand a limiting principle; any answer as to why Congress had power to enact the ACA's mandate, but not the hypothetical broccoli mandate, would require the identification of such a principle. Second, the ACA's mandate raised a novel constitutional question;⁸ Congress had never before used its Commerce Clause powers to require virtually everybody to purchase something.⁹ Third, a survey of constitutional history shows that when confronted with novel constitutional questions, the Court almost always declines to provide limiting principles that define the metes and bounds of the constitutional power or right at issue.¹⁰ Instead, the Court typically answers the question in a narrow, localist fashion that analyzes and answers the constitutionality of only the governmental action that is before the Court. Indeed, the Court typically avoids any attempt at identifying a limiting principle until it has considered the constitutional question many times, and not infrequently it declines to *ever* identify a limiting principle.

So here is the puzzle: Why did the *NFIB* Court assume that it could uphold the individual mandate on Commerce Clause grounds only if a limiting principle could be found? Indeed, why did not even a single justice suggest that the broccoli hypothetical need not be answered—that is to say, that a limiting principle need not have been provided—to decide *this* case?

6. See *id.* at 2591; *id.* at 2619–20, 2624–25 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2650 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

7. See *id.* at 2623–25 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (internal quotation marks omitted).

8. See *id.* at 2642 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (noting that the case presented a Commerce Clause "question[] of first impression"); see also *infra* note 37.

9. See *id.* at 2586 (majority opinion) (discussing the mandate's "novelty"); ROBIN SEILER, CONG. BUDGET OFFICE, THE BUDGETARY TREATMENT OF AN INDIVIDUAL MANDATE TO BUY HEALTH INSURANCE 1 (1994) ("The government has never required people to buy any good or service as a condition of lawful residence in the United States.").

10. See *infra* Part I.

The answer to this puzzle lies outside the Court. It requires attention to dynamics of constitutional development that scholars have examined under the label “popular constitutionalism.”¹¹ What made this case unique was the exceptional level of demand from outside the courts that the limiting-principles question play a central role in resolving the constitutional challenge. By the time the case reached the Supreme Court, a robust public engagement with the constitutional issues had already developed. This engagement was the product of the Tea Party movement, which was committed to a belief that the ACA violated core constitutional principles. The Republican presidential primary fueled these Tea Party sentiments with the contenders’ universal condemnation of the ACA. Lower court rulings that struck down the individual mandate animated these sentiments even further. At the center of this roiling public debate were the broccoli hypothetical and the difficult questions it raised about limiting principles. These popular constitutional demands, which revolved around the singularly evocative broccoli hypothetical, structured public expectations about the stakes of the ACA challenge to such a degree that it would have been notable had the Court chosen not to go beyond the facts of the case to engage with the limits of congressional power.

The story of broccoli, limiting principles, and the ACA challenge raises difficult questions about the relationship between popular constitutional demands and the courts. What are the costs and benefits of allowing extrajudicial pressures to influence the Supreme Court’s evaluation of constitutional issues? In this Article, we argue that popular mobilization against the ACA—including the demand for a response to the broccoli hypothetical—served to link the extrajudicial constitutional movement mobilized against the law and the constitutional challenge taking place in the courts. While much of the critique of the mandate outside the courts focused on ways in which it violated basic principles of liberty and free choice, a straight rights-based claim, such as one based on the Due Process Clause, never had a chance inside the courts.¹² The legal issue

11. Popular constitutionalism, as it has developed in scholarly literature over the past fifteen years or so, has proven to be a deviously complex concept. We define popular constitutionalism as requiring three elements: (1) extrajudicial actors (2) making explicit claims about the meaning of the Constitution (3) in extrajudicial settings. This Article considers the concept of popular constitutionalism both as a descriptive theory of constitutional development, *see infra* Part II, and as a normative theory of judicial constitutional interpretation, *see infra* Part III.

12. At the initial stages of litigation, some Affordable Care Act (ACA) opponents argued that the mandate violated the Due Process Clause. For an insightful analysis of the substantive due process argument against the mandate and its limitations, see generally Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 269 n.16 (2012), which catalogues instances of complaints claiming violations of the Due Process Clause. This argument was rejected (sometimes reluctantly) at the trial court stage. *See Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, 716

before the courts was, strictly speaking, a question of congressional power and federalism, not individual liberty. Thus there was something of a disconnect between the technical ways in which courts engaged with the constitutional challenge—as a question of structural limits and enumerated powers—and the ways in which most Americans thought about the constitutional issues—as a question of individual liberty versus government regulation. The ACA litigation offers a striking example of how doctrinal analysis can fail to map onto public sentiment about the constitutional stakes.

How the courts approach a particular constitutional issue often differs from how the public views the same issue of course. Yet in the ACA case, this dynamic was particularly notable because the difference was so significant and the public interest in the constitutional dispute was so intense. The hypothetical broccoli mandate shrunk this disconnect in a way that advantaged the law's challengers. In effect, broccoli served a two-way signaling function between judicial actors (lawyers and judges) and nonjudicial actors (political actors and the larger public). Its resonance in the political arena signaled to those litigating the case the importance of liberty concerns in the larger extrajudicial constitutional battle over the ACA. And it provided judicial actors a symbol with which to demonstrate their sympathy with this liberty-based critique of the health insurance mandate. The fact that the Court identified a concern with protecting individual liberty as a core principle of its commerce power analysis, and did so at least partly in response to extrajudicial demands from critics of the law, is a classic example of the generative, responsive potential of popular constitutionalism.

But another, more problematic, dynamic of popular constitutionalism is at play in the ACA case. In *NFIB*, popular constitutional demands not only pressured the Court to more squarely confront the potential liberty costs of the individual mandate but—by insisting that the limiting principle issue be resolved—also may have pressured the Court into abandoning the established practice by which it develops constitutional doctrine. In this way, the evocative broccoli hypothetical and related popular constitutional arguments not only affected the substance of the constitutional principles the Court considered in *NFIB* but also the process by which it worked through the doctrinal standard that emerged from the ruling.

F. Supp. 2d 1120, 1162 (N.D. Fla. 2010) (“There is, to be sure, a liberty interest in the freedom to be left alone by the government. We all treasure the freedom to make our own life decisions, including what to buy with respect to medical services. Is that a ‘fundamental right’? The Supreme Court has not indicated that it is—at least not yet. That is the current state of the law, and it is not a district court’s place to expand upon that law.”).

If one values the benefits of the common law, inductive approach to shaping constitutional principles in the courts, this little appreciated dynamic of popular constitutionalism¹³ may be cause for concern. The tools of constitutional decisionmaking in the judicial realm are—and we suggest should be—distinct from the tools of constitutional claim making that tend to resonate outside the courts. The Court’s premature engagement with limiting principles bypassed the benefits of its ordinary incremental, case-by-case analysis and circumvented institutional synergies that can generate superior and more democratically legitimate outcomes when courts and legislatures work together to flesh out constitutional judgments over time.

This Article unfolds in three parts. Part I demonstrates the broccoli puzzle: It operated in *NFIB* as a demand for a limiting principle, contrary to the ordinary practice of analyzing only the question before the Court in novel cases. Part II fully examines the social and political mobilization against the ACA mandate. These extrajudicial developments created an environment that made engagement with the liberty costs of the mandate, delivered most powerfully by way of the broccoli hypothetical, an accepted part of the discussion in the courts. Part III offers two normative claims: (1) The most viable justification for the *NFIB* majority’s novel integration of federalism and liberty is to be found in a moderate theory of popular constitutionalism, and (2) popular constitutionalism is less defensible when extrajudicial pressures lead to the abandonment of established methods of judicial craft, specifically the Court’s usual practice of relying on localist reasoning to resolve novel constitutional questions.

I. THE BROCCOLI PUZZLE

A. Broccoli in *NFIB*

Understanding how broccoli operated in *NFIB* requires a basic understanding of the ACA. The ACA aimed to create virtually universal health care coverage through private health insurance rather than a single-payer governmental system. Three provisions do the lion’s share of guaranteeing health insurance to those not covered by Medicaid.¹⁴ One provision, “guaranteed issue,”

13. As far as we can determine, the potential for extrajudicial constitutional mobilization to affect the process of judicial constitutional analysis has never been considered in the extensive literature on popular constitutionalism.

14. Other provisions of the ACA aimed to extend Medicaid coverage so as to provide health insurance for the poor.

prohibits health insurance issuers from denying coverage because of preexisting medical conditions or almost any other reason.¹⁵ Because guaranteed issue alone would have led insurers to raise rates and potentially make insurance too expensive for many, the “community-rating” provision was put in place to keep insurance affordable by restricting the factors insurance issuers may use to calculate premiums. Most importantly, the community-rating provision excludes the use of preexisting medical conditions or other health characteristics for these calculations.¹⁶ The “individual mandate” was the giveback to keep insurance companies solvent in the wake of the ACA’s requirement that they accept all applicants at controlled prices; it guaranteed the necessary volume of insureds by requiring almost everyone to obtain “minimum essential coverage.”¹⁷ The mandate also took aim at a free-ridership problem that the guaranteed issue and community-rating provisions otherwise would have created; healthy individuals would have had an incentive to delay purchasing health insurance until they got sick, a cost-shifting effect that may have destroyed the private market for health insurance.

In the Supreme Court, as well as the lower courts, the broccoli hypothetical played a crucial role in the argument that the individual mandate exceeded Congress’s Commerce Clause powers.¹⁸ Broccoli stood for the proposition that the government’s Commerce Clause theory lacked a limiting principle such that upholding the ACA would be tantamount to concluding that Congress had virtually, if not literally, unlimited power under the Clause. And broccoli was not a mere makeweight. Although Supreme Court opinions typically provide multiple justifications without explicitly identifying which is most important, the broccoli challenge served as one of the most powerful arguments for the five justices who held that the individual mandate went beyond the Commerce Clause power.

To understand broccoli’s significance, we must carefully examine the five justices who held that the mandate exceeded Congress’s Commerce Clause powers. We refer to these justices as *NFIB*’s “Commerce Clause Majority,” which is somewhat confusingly composed of what the opinion calls the four “joint dissenters” (Justices Scalia, Kennedy, Thomas, and Alito)¹⁹ along with two parts of Chief Justice Roberts’s opinion for the Court that were signed only by

15. See 42 U.S.C. § 300gg-1(a) (2006).

16. *Id.* § 300gg-1(a)(1)(A).

17. 26 U.S.C. § 5000A(a) (2006).

18. This was one of the two main lines of constitutional attack on the ACA. The other was that the ACA’s Medicaid expansion was unconstitutional.

19. See *NFIB*, 132 S. Ct. 2566, 2640, 2642 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

him.²⁰ First consider the joint dissent. Its authors wrote that the case was “difficult” insofar as it presented a “question[] of first impression” as to “whether failure to engage in economic activity (the purchase of health insurance) is subject to regulation under the Commerce Clause.”²¹ They quickly concluded, however, that “structural limits upon federal power” made the case’s resolution “easy and straightforward”: The “clear principle [that] carries the day here” is that the Commerce Clause “cannot be such as will enable the Federal Government to regulate all private conduct.”²² Upholding the individual mandate, argued the joint dissenters, would be “to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.”²³ They repeated this theme throughout their opinion: Upholding the ACA would mean that national power has “no principled limits,”²⁴ would “extend federal power to virtually everything,” and would mean that “the idea of a limited Government power is at an end.”²⁵ These arguments make sense only if one assumes that no limiting principle distinguishes health insurance from other goods. Aware of this, the joint dissenters concluded their Commerce Clause analysis by equating health care with food: “All of us consume food,” but this “does not empower the Government to say when and what we will buy. That is essentially what this Act seeks to do with respect to the purchase of health care.”²⁶

The joint dissenters’ inability to locate a satisfactory limiting principle led them to do two things. First, they declared that the individual mandate exceeded Congress’s Commerce Clause powers on the ground that the mandate “violates the background principle of enumerated (and hence limited) federal power.”²⁷ Second, they identified the never-before-articulated limitation that Congress cannot mandate the purchase of a good under the Commerce Clause.²⁸

Vegetables served the same function in Chief Justice Roberts’s opinion. “[T]he Government’s logic would justify a mandatory purchase to solve almost

20. See *id.* at 2575 (majority opinion). Parts III-A and III-B are the two sections of Chief Justice Roberts’s opinion that add to *NFIB*’s “Commerce Clause Majority.”

21. *Id.* at 2642 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

22. *Id.* at 2643.

23. *Id.*

24. *Id.* at 2648.

25. *Id.*; see also *id.* at 2646 (arguing that upholding the ACA under the Commerce Clause would mean that “the Commerce Clause becomes a font of unlimited power”); *id.* (arguing that upholding the individual mandate would “convert[] the Commerce Clause into a general authority to direct the economy”).

26. *Id.* at 2648.

27. *Id.* at 2646; see also *id.* at 2648 (concluding that the ACA “exceeds federal power” because it essentially “empower[s] the Government to say when and what we will buy”).

28. *Id.* at 2648.

any problem,” he wrote.²⁹ For example, since “many Americans do not eat a balanced diet,” and because the “failure of that group to have a healthy diet increases health care costs,” upholding the mandate would mean that “Congress could address the diet problem by ordering everyone to buy vegetables.”³⁰ Because a governmental mandate to purchase vegetables is “not the country the Framers of our Constitution envisioned,” the chief justice concluded that the ACA’s individual mandate must be unconstitutional.³¹

Like the joint dissent, Roberts predicated his reasoning on an absence of limiting principles.³² This led the chief justice to do the same two things as the joint dissenters: (1) to conclude that the mandate exceeded Congress’s Commerce Clause powers and (2) to assert the never-before-articulated limitation that Congress cannot rely on the Commerce Clause to regulate individuals who can be expected to, but have not yet, engaged in commerce.³³

The four justices who would have upheld the mandate on Commerce Clause grounds believed they had found a limiting principle that explained why the government could mandate the purchase of health insurance but not broccoli.³⁴ Commentators have refined these principles and suggested others.³⁵ The strength of these proposed limiting principles is an important question, but it need not detain us. Rather, we turn to the logically antecedent question of whether upholding the ACA necessitated the identification of a limiting

29. *Id.* at 2588 (majority opinion).

30. *Id.*; see also *id.* at 2591 (specifically referencing broccoli when considering, and rejecting, the government’s proposed limiting principle).

31. *Id.* at 2589.

32. See *id.* at 2591 (“The Government argues that the individual mandate can be sustained . . . because health insurance is a unique product. According to the Government, upholding the individual mandate would not justify mandatory purchases of items such as cars or broccoli because, as the Government puts it, ‘[h]ealth insurance is not purchased for its own sake like a car or broccoli; it is a means of financing health-care consumption and covering universal risks.’ But cars and broccoli are no more purchased for their ‘own sake’ than health insurance. They are purchased to cover the need for transportation and food.” (second alteration in original) (citation omitted)).

33. *Id.* at 2587; *id.* at 2618 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting Chief Justice Roberts’s “novel constraint on Congress[s] commerce power” that individuals “not engaged in commerce [cannot be compelled] to purchase an unwanted product”).

34. See *id.* at 2620 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (concluding that health insurance is unique such that upholding the mandate “would therefore carry no implication that Congress may justify under the Commerce Clause a mandate to buy other products and services”).

35. See, e.g., Ronald Dworkin, *Why the Mandate Is Constitutional: The Real Argument*, N.Y. REV. BOOKS, May 10, 2012, <http://www.nybooks.com/articles/archives/2012/may/10/why-mandate-constitutional-real-argument>; Henry Paul Monaghan, *A Conservative Law Professor on the Obvious Constitutionality of Obamacare*, NEW REPUBLIC, Apr. 16, 2012, <http://www.newrepublic.com/article/politics/102685/conservative-defense-obamacare-affordable-care-health>.

principle that could answer the broccoli hypothetical—a question that has been notably absent in the voluminous literature on the case.³⁶

B. The Puzzling Prominence of Limiting Principles in *NFIB*

As described above, all nine justices assumed that resolving the Commerce Clause question in *NFIB* demanded that they determine whether a limiting principle that could answer the broccoli hypothetical existed. This consensus conceals a puzzle: Why was it necessary to identify a limiting principle to resolve *this* case? Four linked considerations—the last three of which we explain fully in the Parts that follow—account for why this indeed is a puzzle.

First, all the justices accepted that the individual mandate was unprecedented insofar as it required almost everyone to purchase something and that the mandate accordingly presented the Court with a case of first impression.³⁷

36. Justice Ginsburg's opinion comes closest, in which she wrote:

When contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables. Yet no one would offer the “hypothetical and unreal possibilit[y]” of a vegetarian state as a credible reason to deny Congress the authority ever to ban the possession and sale of goods. THE CHIEF JUSTICE accepts just such specious logic when he cites the broccoli horrible as a reason to deny Congress the power to pass the individual mandate.

NFIB, 132 S. Ct. at 2625 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (alteration in original) (citations omitted); see also 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/gIQAmQigS_blog.html (“[T]he limiting principle point kind of begs the question. It assumes there's got to be some kind of articulatable [sic] limiting principle and that's in the Constitution somewhere.” (quoting Charles Fried, President Reagan's solicitor general and current Harvard Law professor)).

37. See *NFIB*, 132 S. Ct. at 2586 (majority opinion) (stating that “Congress has never attempted to rely on [the Commerce Clause] power to compel individuals not engaged in commerce to purchase an unwanted product” and referring to the individual mandate as a “[l]egislative novelty”); *id.* at 2642 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (writing that the case presents a “question[] of first impression” as to “whether failure to engage in economic activity (the purchase of health insurance) is subject to regulation under the Commerce Clause”). Justice Ginsburg equivocated as to the mandate's novelty. Compare *id.* at 2625 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (observing that “an insurance-purchase mandate may be novel”), with *id.* at 2627 n.10 (noting that “Congress regularly and uncontroversially requires individuals who are ‘doing nothing’ to take action,” including requiring the “purchase [of] firearms and gear” (citation omitted)). Interestingly, most of the legal academy did not think the ACA presented a novel constitutional question. See, e.g., Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Health Care Law*, N.Y. TIMES, Mar. 26, 2012, <http://www.nytimes.com/2012/03/27/us/andy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html> (quoting Douglas Laycock as saying “[u]nder existing case law this is a very easy case; this is obviously

Second, when faced with constitutional questions of first impression, the usual—indeed, the nearly unbroken—practice of the Supreme Court is to abjure limiting principles and instead confine itself to a narrow focus on determining whether the challenged statute or other governmental action is constitutional. We call this typical approach to resolving novel constitutional questions “localist reasoning” (LR).³⁸

We are now in a position to articulate the broccoli puzzle: Why, notwithstanding the fact that the Court typically relies on LR to resolve novel constitutional questions, did the *NFIB* Court act as if it were obligated to locate a limiting principle to answer a novel Commerce Clause question? Our final two considerations substantially deepen the puzzle.

Third, the Court does not typically rely on LR only when deciding novel cases but rather continues to use LR to resolve the many nonnovel cases that arise after the Court has first tackled a novel issue. Indeed, sometimes the Court permanently foregoes limiting principles altogether. The willingness to live without limiting principles for extended periods of time, and sometimes indefinitely, further problematizes the *NFIB* Court’s rush to locate a limiting principle to answer a novel Commerce Clause question.

Fourth, and finally, *NFIB* cannot be explained as a discrete instance of LR amnesia because the Court relied on LR when deciding the case’s two other constitutional questions, which concerned the Taxing and Spending Clauses. So if the Court was willing to rely on LR there, why not also in its Commerce Clause analysis?

Before proceeding, we must clarify our claims concerning LR as reflected in the second and third considerations. We do not suggest that the Court never embraces limiting principles and rules; it frequently does, but only after having relied on LR the first time, or first few times, that it decides a constitutional issue. Hence our claim is as to how the Court reasons when confronting novel constitutional questions. That the Court sometimes elects not to identify limiting principles even in nonnovel cases sharpens the oddness of the *NFIB* Court’s rush to find a limiting principle. This should not be understood, however, as a suggestion that the Court should engage, or even that it almost always engage, in LR. Finally, our LR claim concerns how the Court reasons when writing its

constitutional. I think he’s going to lose eight to one” (internal quotation marks omitted)); Erwin Chemerinsky, *Health Care Reform Is Constitutional*, POLITICO (Oct. 23, 2009, 4:59 AM), <http://www.politico.com/news/stories/1009/28620.html> (“There is much to argue about in the debate over health care reform, but constitutionality is not among the hard questions to consider.”).

38. To be clear, we do not mean to suggest that localist reasoning (LR) is used only to decide cases of first impression. See, e.g., *infra* note 56 and accompanying text (analyzing Chief Justice Roberts’s use of LR to decide the taxing power question in *NFIB*).

opinions, not how appellate lawyers are expected to, and do, argue during oral arguments.

The rest of this Part unfolds as follows. Subpart C brings to light *NFIB*'s reliance on LR outside of its Commerce Clause holding. Subpart D shows two recent examples of how the Court has relied on LR when deciding novel questions. Subpart E demonstrates a wide range of other cases in which the Court has invoked LR. Subpart F identifies a handful of cases that may serve as counterexamples to our LR claims.

C. Localist Reasoning Elsewhere in *NFIB*

LR had a domineering presence in *NFIB*. Indeed, *NFIB* relied on LR for all its constitutional holdings except for the Commerce Clause. Consider first the part of Chief Justice Roberts's opinion, joined by Justices Breyer and Kagan,³⁹ holding that the ACA's Medicaid expansion exceeds Congress's powers under the Spending Clause. Prior to the ACA, Medicaid required participating states to cover many but not all needy individuals; most childless adults, for instance, were excluded.⁴⁰ The ACA substantially increased states' obligations, requiring coverage for all individuals under the age of sixty-five with incomes below 133 percent of the federal poverty line.⁴¹ It also specified an "[e]ssential health benefits" package that states had to provide to all Medicaid recipients.⁴² Under the ACA, the federal government would cover the full costs of covering all newly eligible recipients through 2016, but the federal share would decrease thereafter to a minimum of 90 percent, with the states paying the balance. Because Congress could not constitutionally compel states to participate in Medicaid, the ACA relied on the Spending Clause to give states an incentive to participate. The Act empowers the secretary of Health and Human Services to decide that states that do not participate in the ACA will not receive any Medicaid payments, including their existing Medicaid funds.⁴³

Under well-established Spending Clause doctrine, Congress may use federal spending to pressure, but not coerce, states. The first extensive discussion of the line between lawful pressure and unconstitutional coercion is found in

39. *NFIB*, 132 S. Ct. at 2575.

40. 42 U.S.C. § 1396a(a)(10) (2006).

41. See 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (Supp. 2011); *NFIB*, 132 S. Ct. at 2601 (describing the ACA's changes to Medicaid).

42. See 42 U.S.C. § 1396u-7(b)(5) (Supp. 2011).

43. See *id.* § 1396c (authorizing the Secretary of Health and Human Services to determine that "further payments will not be made to the State").

Steward Machine Co. v. Davis.⁴⁴ *Steward* addressed a challenge to a provision of the Social Security Act that taxed employers and then allowed them a tax credit of up to 90 percent for employer contributions made to unemployment funds established by states in compliance with federal requirements. In deciding that the Social Security Act had not passed the “point at which pressure turns into compulsion, and ceases to be inducement,”⁴⁵ the Court relied on LR. “In ruling as we do, we leave many questions open,” noted Justice Cardozo.⁴⁶ After detailing the Act’s characteristics as well as the circumstances giving rise to its enactment, the Court concluded, in paradigmatic LR reasoning, that “[i]n such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.”⁴⁷

While Justice Cardozo anticipated that LR would give way to more “precise . . . [d]efinition” in future cases, *NFIB* was not to be that case. Instead, Chief Justice Roberts’s three-justice opinion treated *Steward* as granting a license for continued reliance on LR: “We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it.”⁴⁸ And the four-justice joint dissent did the same: “Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine In this case, however, there can be no doubt.”⁴⁹

One possible explanation why the Court did not use LR in its Commerce Clause analysis in *NFIB* is that LR is appropriately relied on to strike down legislation but not to uphold it. If this were true, then there would be no contradiction between *NFIB*’s reliance on LR for the Spending Clause but not the Commerce Clause. But we do not see any reason why such a distinction should matter. Indeed, judicial practice belies any such distinction: Justice Cardozo invoked LR to uphold the Social Security Act in *Steward*, and we provide many other examples below in which the Court used LR to uphold constitutional challenges.⁵⁰

Similarly, LR is present in the crucial part of *NFIB* that upheld the individual mandate. The mandate survived on account of the chief justice’s taxing power analysis, which was joined by Justices Ginsburg, Breyer, Sotomayor,

44. 301 U.S. 548 (1937).

45. *Id.* at 590.

46. *Id.*

47. *Id.* at 591.

48. *NFIB*, 132 S. Ct. 2566, 2606 (2012).

49. *Id.* at 2662 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

50. See cases cited *infra* notes 83, 101, 102.

and Kagan. These five justices—the Taxing Power Majority—agreed that the mandate was a tax that fell within Congress’s taxing power.⁵¹ After deciding that the mandate could be fairly understood as a tax for purposes of statutory interpretation,⁵² the central constitutional question was whether the mandate was a tax for purposes of Congress’s taxing power, or if instead it was a “penalty with the characteristics of regulation and punishment” lying outside the taxing power.⁵³ The Taxing Power Majority noted an absence of clarity in the case law concerning the extent to which Congress may “use its taxing power to influence conduct,”⁵⁴ yet upheld the mandate as a tax without “decid[ing] the precise point at which an exaction becomes so punitive that the taxing power does not authorize it.”⁵⁵

This is an example of LR: The Taxing Power Majority examined only the mandate, and decided that it was constitutional, without identifying a limiting principle that would divide taxes from penalties and thereby determinately confine Congress’s taxing power. The oft-invoked bromide that “the power to tax is not the power to destroy while this Court sits”—hardly a limiting principle—was sufficient to assure these justices that upholding the mandate was not tantamount to giving Congress unchecked taxing authority.⁵⁶ In short, these justices demanded a limiting principle for the Commerce Clause but not for the taxing power. Wholly unexplained is why.

D. Two Recent Examples of Localist Reasoning in Novel Cases

LR featured prominently in two recent cases in which the Court confronted novel constitutional questions. Before turning to them, we wish to say a few words about novelty. Any definition is tricky because every constitutional question considered by the Court is novel in some respect.⁵⁷ For instance, it was only in the 1986 case of *California v. Ciraolo*⁵⁸ that the Court held that the Fourth Amendment does not extend to curtilage that is surrounded by a high double fence. But that case does not count as a novel constitutional question for our

51. *NFIB*, 132 S. Ct. at 2600.

52. *Id.* at 2582–84.

53. *Id.* at 2599.

54. *Id.* (observing that “[a] few of our cases policed these limits aggressively” whereas most cases “have declined to closely examine the regulatory motive or effect of revenue-raising measures”).

55. *Id.* at 2600.

56. *Id.* (quoting *Okla. Tax Comm’n v. Tex. Co.*, 336 U.S. 342, 364 (1949)) (internal quotation marks omitted).

57. With the exception of cases in which the Court is asked to overturn a prior constitutional holding.

58. 476 U.S. 207 (1986).

purposes because it simply applied a long recognized legal standard (do people have a subjective expectation of privacy?) to a specific set of facts.

While one of us has provided a model of constitutional doctrine that allows for a formal definition of constitutional novelty,⁵⁹ we shall not develop that here for two reasons. First, we believe that a sufficient consensus as to what counts as a novel constitutional question already exists, at least for our immediate purposes. We suggest that nobody would describe *Cirao* as having confronted a novel constitutional question. Conversely, there was a ready consensus among justices that *NFIB*,⁶⁰ and the cases we soon discuss, involved novel constitutional questions. Such agreement as to particulars may make it unnecessary to provide a precise, abstract definition.⁶¹ Second, we think that determining what counts as novel for present purposes is best done inductively, after having identified multiple qualifying examples as well as some cases that do not properly count as novel. Accordingly, we shall return to a more theoretical discussion of novelty at this Part's conclusion.⁶²

1. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*

First, consider *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.⁶³ Decided the same term as *NFIB*, *Hosanna-Tabor* was the first case in which the Court held that the Free Exercise Clause gives rise to a ministerial exception. The Court applied this exception to an Americans with Disabilities Act claim that had been asserted by a teacher—described by the church as a minister—who had been terminated by a church. Applying the exception, the Court upheld the lower court's dismissal of the plaintiff's claim.⁶⁴

The ministerial exception presents two basic doctrinal questions: (1) What counts as a minister, and (2) to what laws does the exception provide a defense? In a unanimous opinion, the chief justice resolved both questions through

59. See Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1524–27 (2005).

60. See *supra* note 37 and accompanying text.

61. Wittgenstein says that, for many words, “giving examples is not an indirect means of explaining[,] in default of a better” method, but instead is the best way of explaining, and hence of imputing, meaning. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 34e (G.E.M. Anscombe trans., 1953) (emphasis omitted). Utilizing the example of a game, Wittgenstein famously asks, “Isn’t my knowledge, my concept of a game, *completely expressed* in the explanations that I could give? That is, in my *describing examples* of various kinds of game.” *Id.* at 35e (emphasis added).

62. See *infra* Part I.F.2.

63. 132 S. Ct. 694 (2012).

64. *Id.* at 710.

reliance on LR, which he justified on grounds of novelty. As to the first question, the chief justice wrote: “We are reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers [respondent], given all the circumstances of her employment.”⁶⁵

As to the second question, the chief justice noted that opponents of the exception

foresee a parade of horrors that will follow our recognition of a ministerial exception to employment discrimination suits. According to [them], such an exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial. What is more, the EEOC contends, the logic of the exception would confer on religious employers “unfettered discretion” to violate employment laws by, for example, hiring children or aliens not authorized to work in the United States.⁶⁶

The Court could have chosen from at least three possible responses to this parade of horrors. One would have been to identify a limiting principle to explain why the concern is unfounded; the justices who dissented in *NFIB*’s Commerce Clause ruling did this. The second would have been to reject the ministerial exception because no limiting principle had been located; *NFIB*’s Commerce Clause Majority did the equivalent of this. The third would have been to reject the need for a limiting principle and instead decide only the facts that the case presented. While no justices took this approach, or even suggested it, in *NFIB*, this is the exact path that the chief justice took in *Hosanna-Tabor*:

The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.⁶⁷

In short, writing for a unanimous Court, the chief justice in *Hosanna-Tabor* relied on LR when confronting a novel constitutional claim, and justified doing so on the grounds of novelty.

65. *Id.* at 707.

66. *Id.* at 710.

67. *Id.*

2. *District of Columbia v. Heller*

Next consider *District of Columbia v. Heller*⁶⁸ in which the Court ruled that the Second Amendment “confers an individual right to keep and bear arms” and “guarantee[s] the individual right to possess and carry weapons in case of confrontation”⁶⁹ and possibly for hunting purposes.⁷⁰ Three points merit attention.

First, all justices acknowledged that the case decided a novel constitutional question. The four dissenters criticized the majority for having “announce[d] . . . a new constitutional right to own and use firearms for private purposes,”⁷¹ and Justice Scalia’s majority opinion conceded that the “significant matter” that the case addressed “ha[d] been for so long judicially unresolved.”⁷² It is instructive for our purposes that *Heller* was not the first case in which the Court interpreted the Second Amendment;⁷³ being first is not a prerequisite to novelty. *Heller* was the first case to address whether the Second Amendment granted an individual right unconnected to military purposes.⁷⁴

Second, the majority opinion left so many crucial questions unanswered that the decision constitutes an instance of LR. The Court noted “[l]ike most rights, the right secured by the Second Amendment is not unlimited,” yet the Court did “not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment.”⁷⁵ The majority observed that “nothing in our opinion should be taken to cast doubt on” the “longstanding prohibitions on the possession of firearms,”⁷⁶ but cautioned that “[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”⁷⁷ Finally, the majority went so far as to “declin[e] to establish a level of scrutiny for evaluating Second Amendment restrictions.”⁷⁸ In short, the

68. 554 U.S. 570 (2008).

69. *Id.* at 592, 622.

70. *See id.* at 599 (“The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right [to bear arms]; most undoubtedly thought it even more important for self-defense and hunting.”).

71. *See id.* at 679 (Stevens, J., dissenting).

72. *Id.* at 625 (majority opinion).

73. The Court interpreted the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939), and *Lewis v. United States*, 445 U.S. 55, 65–66 & n.8 (1980).

74. *See* Mark D. Rosen, *Beyond Interpretation: The “Cultural Approach” to Understanding Extra-Formal Change in Religious and Constitutional Law*, 3 J.L. ST. & RELIGION (forthcoming 2013).

75. *Heller*, 554 U.S. at 626.

76. *Id.*

77. *Id.* at 627 n.26.

78. *Id.* at 634; *see also id.* at 628–29 (“Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation

majority did not answer the critical questions of what constitutes a protected arm or how far the protection of such arms extends, but instead it addressed only the specifics of the governmental regulation before the Court. This is highly localist reasoning.

Third, *Heller*'s majority opinion openly acknowledged leaving "so many applications of the right to keep and bear arms in doubt,"⁷⁹ and like *Hosanna-Tabor* justified doing so on the grounds of novelty. Parrying Justice Breyer's dissent, which—according to the majority⁸⁰—criticized the Court for leaving many crucial questions unanswered, the majority opinion argued the following:

[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, 98 U.S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.⁸¹

In short, the *Heller* majority decided the case on the basis of LR and defended doing so on the grounds of novelty.

E. Additional Cases

We began our analysis of LR in cases of first impression with *Heller* and *Hosanna-Tabor*, two modern cases concerning constitutional rights. One possible way to make sense of these cases in light of *NFIB* would be to posit that LR is sensible in relation to rights but not to constitutional questions concerning powers. If true, this would explain *NFIB*'s reluctance to uphold the mandate on Commerce Clause grounds without identifying a limiting principle. But why should limiting principles be more important vis-à-vis constitutional powers than constitutional rights? Furthermore, any distinction in this regard between powers and rights is inconsistent with longstanding judicial practice. As shown above, Justice Cardozo relied on LR to uphold the Social Security Act under the

to keep and use for protection of one's home and family . . . would fail constitutional muster." (footnote omitted) (citation omitted) (internal quotation marks omitted)).

79. *Id.* at 635.

80. Breyer's primary point does not seem to be that the majority opinion leaves things undecided, but that the originalist methodology that the majority purports to be using cannot provide the answers to the questions the majority ultimately decides. *See id.* at 720–22 (Breyer, J., dissenting). In any event, how accurately Justice Scalia describes Justice Breyer's argument is not relevant to the point made above.

81. *Id.* at 635 (majority opinion).

Spending Clause, and *NFIB* itself invoked LR in both its Spending and Taxing Clause holdings.⁸²

Indeed, the Court has relied on LR to uphold statutes in past Commerce Clause decisions. The 1903 case of *Champion v. Ames*⁸³ concerned a challenge to a federal statute that barred the interstate transport of lottery tickets. As was true of *Heller*, *Champion* was not the Court's first Commerce Clause decision.⁸⁴ It was, however, the first case in which the Court confronted the question of whether "regulat[ing] commerce" encompassed the power to prohibit an activity in order to protect public morals.⁸⁵ The law's opponents made a broccoli-type argument that upholding the law in the absence of limiting principles would license infinitely expansive federal power. The majority acknowledged this challenge:

It is said . . . that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the states any article, commodity or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one state to another.⁸⁶

But *Champion* declared that the Court did not need to answer the challenge. It simply invoked LR and sustained the law: "It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States."⁸⁷ The majority

82. See *supra* Part I.C.

83. 188 U.S. 321 (1903).

84. Indeed, *Champion* discussed nearly a dozen Commerce Clause decisions. See *id.* at 346–62.

85. *Id.* at 355–56. Though *Champion* cited to other cases to support the proposition that "regulation may sometimes appropriately assume the form of prohibition," *id.* at 358, the statutes in those cases were distinguishable insofar as they did not aim to prohibit an activity wholesale to advance the federal government's views concerning public morals. One statute forbade the transportation of diseased livestock, and the Sherman Act outlawed contracts that constituted uncompetitive restraints. *Id.* at 358–61. The referenced statute closest to the one at issue in *Champion* forbade the import of alcoholic beverages into states that prohibited alcohol, but that only facilitated the operation and effect of state public morals laws. *Id.* at 361–62. Indeed, as discussed above in the text, *Champion* justified LR on the ground that the question before it was new.

86. *Id.* at 362.

87. *Id.*; see also *id.* at 363–64 ("We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that

admitted “[i]t would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several States” and that accordingly would be unconstitutional.⁸⁸ Yet “the possible abuse of a power is not an argument against its existence” for “[t]here is probably no governmental power that may not be exerted to the injury of the public.”⁸⁹

*McCulloch v. Maryland*⁹⁰ is another constitutional powers decision in which the Court upheld federal power while refusing to identify a limiting principle. At issue was whether Congress had power under the Sweeping Clause (also known as the Necessary and Proper Clause) to incorporate a national bank. Though the Court noted “[a]mong the enumerated powers, we do not find that of establishing a bank or creating a corporation,”⁹¹ it assumed that a national bank would be “convenient” and “useful” to the exercise of many of the powers, such as laying and collecting taxes, which the Constitution does enumerate.⁹² The constitutional question was whether Congress’s necessary and proper powers extended to creating something that was useful, though not indispensable, to the exercise of its enumerated powers.

The main argument against this understanding of the Sweeping Clause was that it lacked any principled limits on federal power. Antifederalist opponents of the Constitution first articulated this objection,⁹³ critics of the First Bank of the United States reiterated it,⁹⁴ and then it was picked up by the attorneys who

legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.”).

88. *Id.* at 363.

89. *Id.*

90. 17 U.S. (4 Wheat.) 316 (1819).

91. *Id.* at 406.

92. *Id.* at 423 (referring to “the universal conviction of the utility” of the bank); *see also id.* at 407–14.

93. *See, e.g.*, BRUTUS, NO. 1 (1787), *reprinted in* 3 THE FOUNDERS’ CONSTITUTION 240 (Herbert J. Storing ed., 1981), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_18s4.html.

94. JAMES MADISON, THE BANK BILL, HOUSE OF REPRESENTATIVES (1791), *reprinted in* 3 THE FOUNDERS’ CONSTITUTION, *supra* note 93, at 244, *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_18s9.html (“Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress.”); THOMAS JEFFERSON, OPINION ON THE CONSTITUTIONALITY OF THE BILL FOR ESTABLISHING A NATIONAL BANK (1791), *reprinted in* 3 THE FOUNDERS’ CONSTITUTION, *supra* note 93, at 245, *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_18s10.html (“[T]he constitution allows only the means which are ‘necessary’ not those which are merely ‘convenient’ for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one, for [there] is no one which ingenuity may not torture into a convenience, in some way or other, to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase as before observed. Therefore it was that the constitution restrained them to the *necessary* means, that is to say, to those

challenged the bank in *McCulloch*. In *McCulloch*, the attorneys argued that if Congress has the “the power of creating corporations . . . it might also be exercised to create corporations for the purpose of constructing roads and canals” or “to establish great trading monopolies, or to lock up the property of the country in mortmain.”⁹⁵ Similarly, counsel asked:

Can it possibly be said, that because Congress is invested with the power of raising and supporting armies, that it may give a charter of monopoly to a trading corporation as a bounty for enlisting men? Or that . . . it may establish an East or a West India company, with the exclusive privilege of trading with those parts of the world?⁹⁶

Several aspects of *McCulloch* merit close attention. First, the Court’s holding amounted to a rejection of the call for a limiting principle. In holding that the Sweeping Clause licensed the enactment of laws that Congress believed would be useful or convenient—and not merely those that would be indispensable—to the exercise of its granted powers,⁹⁷ *McCulloch* offered no limiting principle to answer the attorneys’ challenges.

Second, *McCulloch* helps us to see an additional option for a court that is asked to provide a limiting principle when answering a novel constitutional question. We have seen two so far: (1) deciding the case on the basis of LR with an expectation that limiting principles will be identified in future cases and (2) articulating a limiting principle from the very beginning—an option the Court seldom takes. The third option *McCulloch* illuminates is this: a refusal to identify a limiting principle in the present case coupled with a stated expectation that no judicially articulated limiting principle will be provided in the future. Limits on the constitutional power are to come from the political process rather than from the courts.

This third option was advocated by counsel in support of the national bank, who argued that “the degree of political necessity which will justify a resort to a particular means, to carry into execution the other powers of the government, can never be a criterion of judicial determination, but must be left to legislative discretion.”⁹⁸ “The security against abuse,” stated counsel, “is to be found in the constitution and nature of the government, in its popular character and

means without which the grant of the power would be nugatory.” (second alteration in original) (emphasis omitted)).

95. 17 U.S. (4 Wheat.) at 368–69.

96. *Id.* at 365.

97. *Id.* at 413–14.

98. *Id.* at 388.

structure.”⁹⁹ The Court’s opinion in *McCulloch* comes close to this position. As Chief Justice Marshall famously wrote, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”¹⁰⁰ The *McCulloch* Court’s deferential formulation, which it applied in a highly deferential way, amounts to a rejection of a judicially drawn limiting principle and to reliance instead on the political process.

Examples of the Court’s reliance on LR when deciding novel questions are readily multiplied. The Court has relied on LR to resolve novel questions regarding free speech,¹⁰¹ due process,¹⁰² takings,¹⁰³ the Confrontation Clause,¹⁰⁴ and the rights against unreasonable search and seizure and self-incrimination¹⁰⁵—

99. *Id.* at 385.

100. *Id.* at 421.

101. See *Ex parte Jackson*, 96 U.S. 727, 730–31, 736–37 (1877) (upholding federal law excluding “obscene, lewd or lascivious” materials from the mails based on LR; ignoring counsel’s argument that “[i]f Congress can exclude from the mail a letter concerning lotteries which have been authorized by State legislation, and refuse to carry it by reason of their asserted injurious tendency, it may refuse to carry any other business letter [and] may cut off all means of epistolary communication upon any subject which is objectionable to a majority of its members,” and concluding that “[t]he only question for our determination relates to the constitutionality of the act; and of that we have no doubt”).

102. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 228–29 (1899) (upholding Sherman Antitrust Act against Fifth Amendment due process challenge using conclusory LR, stating that while “[i]t has been held that the word ‘liberty’ . . . included . . . a right to enter into certain classes of contracts . . . [I]t has never been, and in our opinion ought not to be, held that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject”); see also *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) (“While we have never attempted to define precisely the constitutional limits noted in *Patterson*, *i.e.*, the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases, and do not do so today, we are persuaded by several factors that Pennsylvania’s Mandatory Minimum Sentencing Act does not exceed those limits.”).

103. See *United States v. Causby*, 328 U.S. 256, 258, 266 (1946) (holding in a “case of first impression” that airplane flights over private land can constitute a taking but declining to define the contours of such a taking, stating that “[t]he airspace, apart from the immediate reaches above the land, is part of the public domain [and w]e need not determine at this time what those precise limits are”).

104. See *Delaware v. Fensterer*, 474 U.S. 15, 18, 20–23 (1985) (rejecting novel argument on facts presented that Confrontation Clause is violated where expert witness’s memory lapse frustrates opportunity for cross examination, but noting “[w]e need not decide whether there are circumstances in which a witness’ lapse of memory may so frustrate any opportunity for cross-examination that admission of the witness’ direct testimony violates the Confrontation Clause” and “[w]e need not decide whether the introduction of an expert opinion with no basis could ever be so lacking in reliability, and so prejudicial, as to deny a defendant a fair trial”).

105. See *Boyd v. United States*, 116 U.S. 616, 633–35 (1886) (deploying conclusive analysis in early search and seizure and self-incrimination decision in holding that “a compulsory production of the

to name just a few. When justifying adherence to LR, the Court has often fallen back on the same refrain: There will be “time enough” to consider the constitutionality of other laws, existing and imagined, if and when future litigation brings them before the Court.¹⁰⁶

In sum, the Court’s reliance on LR when confronted with novel constitutional questions is deeply ingrained in our country’s judicial practice. The Court invokes LR when it first hears claims regarding both constitutional rights and constitutional structure. The Court invokes LR when it strikes down governmental action and when it sustains government action. Finally, the Court invokes LR not only when confronting a novel constitutional question for the first time but in successive nonnovel cases as well until a pattern has emerged from which the Court feels comfortable formulating a general rule.¹⁰⁷

F. Possible Counterexamples

Supreme Court constitutional jurisprudence is the product of more than one-hundred Supreme Court justices who have rendered decisions over the span of more than 200 years.¹⁰⁸ Any effort to assert a sweeping generalization about constitutional decisionmaking in the Supreme Court is invariably susceptible to challenge by counterexample. Our argument concerning LR in novel constitutional claims is no exception. In this Part, we consider several cases that present potential counterexamples to our claim, and we offer reasons why we believe they fail to undermine our basic thesis.

private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself . . . and is the equivalent of . . . an unreasonable search and seizure”).

106. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 393 (1969); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 301 (1963); *Korematsu v. United States*, 323 U.S. 214, 222 (1944); *Champion v. Ames*, 188 U.S. 321, 362 (1903); *Downes v. Bidwell*, 182 U.S. 244, 262, 365 (1901); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 328 (1827); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 175–76 (1824); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 629 (1819); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 377 (1816).
107. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 485–90 (2000) (reviewing a large number of earlier-decided cases before announcing the “rule” that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt,” a formulation that covered far more than the facts of the case); see also *Crawford v. Washington*, 541 U.S. 36, 57–69 (2004) (reviewing earlier-decided cases, and rejecting the rationales of many of them, before announcing rule that testimonial statements must be subject to confrontation).
108. See *The Supreme Court of the United States*, U.S. SENATE COMMITTEE ON THE JUDICIARY, <http://www.judiciary.senate.gov/nominations/SupremeCourt/SupremeCourt.cfm> (last visited Oct. 11, 2013).

1. When Facts Do Not Matter

A small but highly significant category of cases exists in which the Court issued a broad, categorical holding to a novel constitutional question. A famous example is when the Court first confronted the constitutionality of legislative vetoes in *INS v. Chadha*.¹⁰⁹ It elected to strike down not only the legislative veto in the immigration statute challenged in the lawsuit but also ruled that all legislative vetoes—and nearly 200 federal statutes contained legislative vetoes at the time—were unconstitutional.¹¹⁰ One of Justice White’s arguments in dissent was that the Court should have evaluated only the statute before it—a call for the use of LR rather than resolving the constitutionality of legislative vetoes writ large.¹¹¹ Justice Powell’s separate concurrence likewise criticized the “breadth of [the majority’s] holding” and urged the Court to decide the case on a narrower ground that did not address any other statutes’ legislative vetoes.¹¹²

Consider as well *Printz v. United States*,¹¹³ in which the Court considered a constitutional challenge to a federal firearm law that required sheriffs to assist in the federal law’s execution for a limited period. *Printz* issued a broad ruling that addressed more than the statute that was before it, concluding that Congress could never require any state executive official to execute federal law.¹¹⁴ Like Justices White and Powell in *Chadha*, the *Printz* dissenters criticized the majority opinion for problematically deciding a host of questions that were not before the Court.¹¹⁵ Two other counterexamples to our claim concerning LR are *Printz*’s

109. 462 U.S. 919 (1983).

110. *Id.* at 944; *id.* at 967 (White, J., dissenting) (lamenting that the majority “sound[ed] the death knell for nearly 200 other statutory provisions in which Congress ha[d] reserved a ‘legislative veto’”).

111. *Id.* at 967–75, 1002 (White, J., dissenting) (stating “the apparent sweep of the Court’s decision today is regrettable” and noting that although he would have upheld the challenged statute, “I do not suggest that all legislative vetoes are necessarily” constitutional).

112. *Id.* at 959–60 (Powell, J., concurring). Justice Powell ruled only that “[w]hen Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country[,] it has assumed a judicial function in violation of the principle of separation of powers.” *Id.* at 960. He thought the Court’s holding “should be no more extensive than necessary to decide th[e] case[,]” *id.*, and his concurrence’s conclusion indeed does not extend beyond the immigration statute before the Court.

113. 521 U.S. 898 (1997).

114. *Id.* at 935.

115. Justice Stevens’s dissent enumerated an array of troubling implications that such a rule would have “in times of national emergency,” pointing to “the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist” that “may require a national response before federal personnel can be made available to respond” and noting that the majority’s holding “forbids the enlistment of state officers to make that response effective.” *Id.* at 940 (Stevens, J., dissenting). The majority opinion did not directly respond.

sister case—*New York v. United States*¹¹⁶—in which the Court held that Congress could not compel state legislatures to enact law,¹¹⁷ and *Plaut v. Spendthrift Farm, Inc.*,¹¹⁸ which held that Congress “categorical[ly]” cannot reopen federal courts’ final judgments.¹¹⁹

These cases run counter to our claim insofar as they issued broad rulings when confronted with novel constitutional questions—rulings that were intended to address a wide range of circumstances not before the Court. Later in this Article we provide a normative critique of the Court’s approach in these cases.¹²⁰ Here we suggest why, as a descriptive matter, these cases are outliers and are best treated as belonging in their own, distinct category of judicial decisionmaking. They are not instances of LR, to be sure, but neither are they instances in which the Court embraced the need for a limiting principle.

NFIB’s Commerce Clause Majority justified their holding on the ground that they could not find a limiting principle; upholding the mandate would have meant that Congress could mandate the purchase of broccoli, and surely *that* would be unconstitutional. Limiting principles played no role, however, in the majorities’ reasoning in *Chadha*, *Printz*, *New York*, and *Plaut*. This was due to the type of constitutional analysis used by these cases, what might be called a purely conceptual or formal approach under which facts did not matter to the Court’s analysis.¹²¹ These four cases all issued categorical constitutional rules that by their nature were insensitive to factual differences. For example, *Printz* held the Brady Act unconstitutional simply and exclusively because it “direct[ed] the functioning of the state executive,” and “[i]t is the very *principle* of separate state sovereignty that such a law offends.”¹²² The federal government can never compel state executives to administer federal law, held *Printz*, and factual particulars—the degree of federal interest and how minimal the executive intrusion may be—were

116. 505 U.S. 144 (1992).

117. *Id.* at 178.

118. 514 U.S. 211 (1995).

119. *Id.* at 240 (“We think legislated invalidation of judicial judgments deserves the same categorical treatment accorded by *Chadha* to congressional invalidation of executive action.”).

120. See *infra* notes 316–343 and accompanying text.

121. The examples of *Chadha*, *Printz*, *New York* and *Plaut* suggest that the role of LR and limiting principles may be linked to a justice’s preferred constitutional interpretive methodology. It is plausible to think, for instance, that strong textualist, formalist, or originalist commitments might favor limiting principles and disfavor LR. Whether this is in fact so, or whether longstanding judicial practices favoring LR overwhelm any preference for limiting principles that an interpretive methodology might seem to endorse, is a difficult question. Recall, for example, that the strongly originalist *Heller* opinion relied heavily on LR. Regardless, a satisfactory exploration of this question lies beyond this Article’s scope.

122. *Printz v. United States*, 521 U.S. 898, 932 (1997).

accordingly irrelevant.¹²³ *Plaut* relied on precisely the same conceptual reasoning,¹²⁴ concluding that legislatures can never open final judgments and that facts—such as the reasons for opening a final judgment—were simply irrelevant.¹²⁵ *Chadha* and *New York* relied on the same fact-independent, conceptualist reasoning.¹²⁶

Stated simply, *Chadha*, *Printz*, *New York*, and *Plaut* never discussed hypotheticals or limiting principles because hypotheticals and limiting principles are relevant only when facts are legally relevant. In *NFIB*, by contrast, broccoli tarred the individual mandate because the Court could not locate a limiting principle by which to distinguish a broccoli mandate from the individual mandate. Broccoli's prominence, in other words, reflected that facts *did* matter, and that a purchase mandate did not inherently offend some constitutional principle. Indeed, it would have been difficult to so argue because the federal government has previously enacted laws requiring citizens to purchase specified objects.¹²⁷ So, when justices do not rely on acontextual conceptual reasoning—and *NFIB*'s Commerce Clause Majority did not—our claim concerning LR fully applies. *Chadha*, *Printz*, *New York*, and *Plaut* are distinguishable for precisely this reason. The broccoli puzzle remains.

2. Fair Depiction or Overstatement?: Novelty Revisited

We emphasize that we do not argue that the Court always chooses LR over rules that incorporate limiting principles. We argue only that the Court typically elects LR when it hears novel questions.

123. *Id.* at 935.

124. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (holding that “[b]y retroactively commanding the federal courts to reopen final judgments,” Congress had violated Article III, which “gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy [I]n short, . . . a judgment conclusively resolves the case because a ‘judicial Power’ is one to render dispositive judgments” (internal quotation marks omitted)).

125. See *id.*

126. *Chadha* held that the immigration statute’s legislative veto was unconstitutional because legislative vetoes had the status of legislation yet were effectuated without the bicameralism and presentment that was required of all legislation. See *INS v. Chadha*, 462 U.S. 919, 957–59 (1983). *New York* similarly asserted a categorical rule that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.” See *New York v. United States*, 505 U.S. 144, 188 (1992).

127. See *NFIB*, 132 S. Ct. 2566, 2627 n.10 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). As we explain later, the same can be said about *Printz*. See *infra* note 342 and accompanying text.

Much of our claim accordingly turns on what counts as novel. Having identified several cases that confronted what we deem to be novel constitutional questions—*NFIB*, *Hosanna-Tabor*, *Heller*, *Chadha*, *Printz*, *New York*, and *Plaut*—we also note several seminal cases that do not:

- *United States v. Jones*,¹²⁸ in which the Court decided, with the use of a legal test developed in earlier cases, that the government's placement of a global positioning service device on an automobile without an owner's knowledge constitutes a search for purposes of the Fourth Amendment;¹²⁹
- *Caperton v. A.T. Massey Coal Co.*,¹³⁰ which found an additional situation in which the Due Process Clause requires that a judge recuse himself;¹³¹ and
- *Grutter v. Bollinger*,¹³² which held that diversity in university admissions constitutes a compelling governmental interest, satisfying the strict scrutiny standard that earlier cases held to apply to governmental affirmative action.

To be sure, all three of these cases resolved very important questions that theretofore were unanswered. We suggest, however, that none of the cases is properly understood as having addressed novel constitutional questions. All simply, though importantly, asked the Court to apply accepted legal tests to new facts. How narrowly (consistent with LR) or broadly the Court answered those

128. 132 S. Ct. 945 (2012).

129. See *id.* at 950 n.3 (articulating that a search occurs where “the Government obtains information by physically intruding on a constitutionally protected area”); *id.* at 957 (Sotomayor, J., concurring) (noting but refusing to answer many “difficult questions . . . because the Government’s physical intrusion on [respondent’s] Jeep supplies a narrower basis for decision”).

130. 556 U.S. 868 (2009).

131. The majority opinion acknowledged that prior to *Caperton*, failure to recuse had been deemed to violate due process only in the two circumstances that did not apply to *Caperton*’s facts. See *id.* at 877–81 (finding recusal was required where a judge has a financial interest in the outcome of the case or is trying a defendant for certain criminal contempts). An earlier case had noted that there were circumstances “in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable,” *id.* at 877 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (internal quotation marks omitted)), and the *Caperton* majority ruled that a third circumstance—where a judge did not recuse himself despite the fact that the president and chief executive officer of a corporation appearing before the judge had helped elect him by contributing three-million dollars to his judicial election campaign—also satisfied the standard. *Id.* at 886–87.

132. 539 U.S. 306 (2003).

questions is an interesting question indeed, but its answer does not implicate our thesis.¹³³ Likewise, we would not characterize a later case that substantially reworks the holding of an earlier case to be an instance of the Court addressing a novel legal question, even if the later case resolves the question in an entirely new way. For example, though *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹³⁴ rejected *Roe v. Wade*'s test of strict scrutiny,¹³⁵ adopting in its place the new and unique undue burden standard, we would not say that *Casey* confronted a novel legal question. Rather, *Casey* is a case that addressed questions that the Court had struggled with on many earlier occasions, and that provided some important new answers.

Properly understood then, we think that our claim concerning LR is a fair depiction of the Court's ordinary practice when confronting novel constitutional questions. That being said, we do not suggest that *NFIB* is the first, or only, outlier. The four cases explored in the previous Subpart—*Chadha*, *Printz*, *New York*, and *Plaut*—are potential examples of outlier cases, though they may be distinguishable for the reasons we mention above. The *Slaughter-House Cases*,¹³⁶ which was the first case to interpret the Fourteenth Amendment's Privileges or Immunities Clause and rendered it a "practical nullity,"¹³⁷ may be another; the Court did not simply decide that the challenged statute fell outside the Clause, but enumerated several examples that qualified as "privileges or immunities."¹³⁸ On the other hand, and consistent with LR, the *Slaughter-House* Court thought it could justifiably "hold [itself] excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so."¹³⁹ The Court also provided (what it said was only) a partial list of privileges and immunities in order to answer the objection "that no such privileges and immunities are to be found if those we have been considering are excluded."¹⁴⁰ And indeed, when the Court

133. Parenthetically, we note that the Court seems to have relied on LR in all three cases, with the sole exception of *Roe*'s detailed tripartite framework, an attempt to broadly flesh out the implications of strict scrutiny that did not survive the test of time. The Court's reliance on LR in *Caperton* prompted a sharp dissent by Chief Justice Roberts in which he enumerated forty "uncertainties that quickly come to mind" under the majority rule, essentially criticizing the majority for relying on LR. *Caperton*, 556 U.S. at 898 (Roberts, C.J., dissenting).

134. 505 U.S. 833 (1992).

135. *Roe v. Wade*, 410 U.S. 113, 152–54 (1973).

136. 83 U.S. (16 Wall.) 36 (1873).

137. LEGISLATIVE REFERENCE SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 965 (1953), S. DOC. NO. 170, 82d Cong., 2d Sess. (1953).

138. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74.

139. *Id.* at 78–79.

140. *Id.* at 79.

one year later considered another privileges or immunities claim—a challenge to women’s exclusion from the franchise—it relied on LR, noting that “[t]he Constitution does not define the privileges and immunities of citizens,” that “[f]or that definition we must look elsewhere,” and concluding that “[i]n this case we need not determine what they are, but only whether suffrage is necessarily one of them.”¹⁴¹

*United States v. Lopez*¹⁴² and *United States v. Morrison*¹⁴³ provide additional recent examples of non-LR. Both decisions invoked the need for limiting principles. For instance, the majority in *Lopez* stated that “if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate” and noted that “[a]lthough Justice Breyer [in dissent] argues that acceptance of the Government’s rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not.”¹⁴⁴ *Morrison* reproduced these arguments.¹⁴⁵

We are not convinced, however, that *Lopez* and *Morrison* properly qualify as counterexamples to our claim largely because we doubt they presented novel constitutional questions.¹⁴⁶ The Court has long aimed to identify activities that

141. *Minor v. Happersett*, 88 U.S. 162, 170 (1874).

142. 514 U.S. 549 (1995).

143. 529 U.S. 598 (2000).

144. *Lopez*, 514 U.S. at 564; *see also id.* (“[U]nder the Government’s ‘national productivity’ reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”).

145. *See Morrison*, 529 U.S. 598 at 615–16 (“If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption Petitioners’ reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.”).

146. Another reason to question whether they are properly understood as counterexamples is that at least one of the decisions explicitly embraces LR at one point. *Id.* at 613 (“While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” (emphasis added)). *Morrison*’s LR caveat is related to another way in which *Lopez* and *Morrison* can be distinguished from *NFIB*. Whereas broccoli was used to tar the mandate, the statutes at issue in *Lopez* and *Morrison*—which barred possession of a gun and gender-motivated violence—largely fell on their own. In other words, we think it fair to say that limiting principles played a makeshift role in the latter two cases because the majorities in both decisions thought the challenged statutes were normative outliers that obviously lay outside the Commerce Clause power and that on their own demonstrated the need for doctrinal

by definition lie outside Congress's Commerce Clause powers; the Court in the past "declar[ed] such activities as 'mining,' 'production,' 'manufacturing,' and union membership to be outside the definition of 'commerce.'"¹⁴⁷ We agree with the dissenting justices' argument that *Lopez's* and *Morrison's* rule that the Commerce Clause power does not extend to noneconomic¹⁴⁸ intrastate activity is properly understood as a continuation of this doctrinal effort.¹⁴⁹ And as part of this effort, the Court had been presented with, and answered, essentially the same constitutional challenge that was presented in *Lopez* and *Morrison*. The 1942 case of *Wickard v. Filburn*¹⁵⁰ demonstrates this most clearly. *Wickard* upheld the application of a federal statute to farmer Filburn, who harvested wheat for his family's consumption, even though the Court recognized that Filburn's activity "may not be regarded as commerce."¹⁵¹ Because *Wickard* considered whether Congress could reach noncommercial activity under its Commerce Clause power, the similar questions considered by *Lopez* and *Morrison* concerning noneconomic activity cannot be regarded as novel. Though *Lopez* and *Morrison* may have answered the question differently than before,¹⁵² a novel answer does not mean that the question presented was novel. Consistent with this, commentators have explained the two cases as altering prior doctrine, not addressing a novel constitutional question.¹⁵³

NFIB, by contrast, confronted a genuinely novel question because Congress had never relied on the Commerce Clause to mandate a purchase until the

lines to be drawn. For these reasons, limiting principles provided little analytical work in *Lopez* and *Morrison*.

147. *Id.* at 642 (Souter, J., dissenting).

148. The economic/noneconomic distinction appears clearest when the *Lopez* majority states that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567.

149. See *Morrison*, 529 U.S. at 642–45 (Souter, J., dissenting); see also *Lopez*, 514 U.S. at 627–30 (Breyer, J., dissenting) (critiquing majority's distinction between "commercial" and "noncommercial," linking it to past doctrinal distinctions that gave "controlling force to nomenclature such as 'production' and 'indirect,'" and arguing that the modern case law has "*not* focus[ed] upon the economic nature of the activity regulated" but instead "focused upon whether that activity *affected* interstate or foreign commerce" (quoting *Wickard v. Filburn*, 317 U.S. 111, 120 (1942))).

150. 317 U.S. 111.

151. *Id.* at 125; see *Morrison*, 529 U.S. at 644 n.13 (Souter, J., dissenting) (noting the Court's decision).

152. We recognize that the majorities in *Lopez* and *Morrison* did not concede this point, but instead characterized their holdings as wholly consistent with *Wickard*. See *Morrison*, 529 U.S. at 611 n.4 (claiming that "in every case where we have sustained federal regulation under the aggregation principle in *Wickard* . . . the regulated activity was of an apparent commercial character"); *Lopez*, 514 U.S. at 560 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.").

153. See, e.g., Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

ACA.¹⁵⁴ Similarly, the sort of constitutional questions considered in *Hosanna-Tabor* and *Heller* were discontinuous with earlier-considered cases and doctrines in a way that makes them far more akin to *NFIB* than to the questions presented in *Lopez* and *Morrison*.

Regardless of whether one regards *Lopez* and *Morrison* as providing a broad, categorical resolution of a novel constitutional question, our basic claim still stands: In the vast majority of cases, the Court has relied on LR when confronting novel constitutional questions. Accordingly, the Court's approach in *NFIB* was quite unusual.

II. BROCCOLIAS POPULAR CONSTITUTIONALISM

The analysis in Part I shows that the Supreme Court justices had three basic options when they considered the broccoli hypothetical:

1. They could have squarely faced the problem of limiting principles, and identified the limiting principle that would allow the Court to uphold the ACA mandate but strike down the hypothetical broccoli mandate.
2. They could have concluded that no judicially cognizable limiting principle that would distinguish the health insurance mandate from the broccoli mandate existed. From this point, they could have either upheld the ACA mandate, leaving the responsibility for protecting the people from a broccoli mandate to the political process,¹⁵⁵ or they could have concluded that the failure to

154. No justice denied this fact, *see supra* note 37, though there was deep disagreement as to its constitutional significance.

155. This was the path that Elena Kagan offered during her confirmation hearings. *See The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *Nomination of Elena Kagan*], available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/html/CHRG-111shrg67622.htm>. It was also favored by Harvard Law Professor Charles Fried. *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4 (2011) [hereinafter *Fried Testimony*] (statement of Charles Fried, Beneficial Professor of Law, Harvard Law School), available at <http://www.judiciary.senate.gov/pdf/11-02-02%20Fried%20Testimony.pdf> ("As for the veggies, I suppose such forced feeding would indeed be an [unconstitutional] invasion of personal liberty, but making you pay for them would not, just as making you pay for a gym membership which you can afford but do not use would not.").

Justice Ginsburg referenced this approach but did not rely upon it. *NFIB*, 132 S. Ct. 2566, 2624 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Supplementing these legal restraints is a formidable check on congressional power: the democratic process. As the controversy surrounding the passage of the Affordable Care Act attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the

provide a limiting principle was fatal to the ACA mandate and struck it down for this reason—the approach the Commerce Clause Majority took.

3. They could have bypassed the entire limiting principle dilemma, and either upheld or struck down the ACA mandate based on its merits as a Commerce Clause claim, without directly engaging with whether a broccoli mandate, or any other hypothetical law, would be constitutionally permissible.

The truly striking point in *NFIB* is that the one path that history shows to be the default opinion in situations such as this, bypassing the limiting principle issue and focusing squarely on the case at hand,¹⁵⁶ was the only one that failed to get any serious consideration. The entire debate within the Court was over variations of the first two options—the ones in which hypotheticals and limiting principles are at the center of the constitutional analysis.

Why did it turn out this way? In this Part we attempt to answer this question. The primary reason all the justices on the Court felt compelled to address the limiting principle issue—and, in so doing, break from the Court's well-established practices—had to do with pressures from outside the Court. The litigation challenge to the ACA mandate must be understood in the context of the social and political mobilization against the law that dominated the public scene during the time in which the courts assessed the constitutional merits of the issues. *NFIB* is a classic example of the ways in which the demands of a vibrant popular constitutional movement can shape constitutional law as defined in the judiciary.

But the story of the ACA challenge as an episode of popular constitutionalism is distinctive in two ways from most past episodes in which popular demands affected judicial decisionmaking. First is the disconnect between the constitutional issues considered by the courts and those issues that most resonated in the public sphere. Popular opposition to the ACA centered on claims that government cannot force individuals to enter into private commercial

behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so." (citations omitted)).

This approach is often supplemented with a reference to judicially enforced constitutional rights that might be brought to bear against the hypothetical bad law. See, e.g., *id.* ("Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause."); *Fried Testimony*, *supra*.

156. See *supra* Part I.

relations. Critics of the law's individual mandate provision argued that such a requirement violates a basic American constitutional liberty. Translated into constitutional doctrine, this kind of claim fits most logically within the realm of the kinds of liberty protected under the substantive component of the Due Process Clause. But straight liberty-based due process challenges to the mandate never stood a chance in court.¹⁵⁷ Rather, the constitutional issue considered by the courts involved the scope of congressional power under Article I of the Constitution—strictly speaking, a question of federalism and constitutional structure, not individual liberty.

The second distinctive factor when considering *NFIB* as an example of popular constitutionalism is the way in which the popular debate influenced the decisionmaking process in the Supreme Court. Scholars have generally focused on the outcome of the Court's decisionmaking as the primary measure of the influence of extrajudicial factors.¹⁵⁸ The *NFIB* example, while clearly demonstrating this kind of outcome-based influence, also shows a different kind of influence, one based more in the process of constitutional decisionmaking than in its substance or outcomes. The pressures created by popular constitutional mobilization helped to dislodge the Court's standard practice of avoiding theoretical engagement with the limits of constitutional principles when addressing novel issues.

How did extrajudicial pressures both force liberty concerns into a constitutional adjudication that did not directly involve this constitutional principle and also disrupt standard approaches to constitutional reasoning? The broccoli hypothetical did its work in both of these arenas.

A. Broccoli and the ACA Challenge

The broccoli hypothetical emerged around the same time constitutional arguments against the individual mandate began to gain traction among opponents of the ACA. What began as a colorful provocation eventually became a central element in a serious challenge to the law's constitutionality.

Much of the broccoli hypothetical's power was in its very ridiculousness. No one in Congress even thought of proposing a broccoli mandate, so when challengers first floated it—at a time when few thought the constitutional

157. See *supra* note 12.

158. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

challenge had much hope in the courts¹⁵⁹—it had a whiff of desperation. Yet like the Tea Party—the conservative populist movement that had burst onto the American political scene in 2009¹⁶⁰—and the constitutional challenge to the ACA generally, the very extreme and unlikely qualities that made the broccoli argument hard to take seriously also tapped into a particular political moment in which Barry Goldwater–style, to-the-barricades libertarian rhetoric was in the air. Challengers to health care regularly relied on dire warnings of the consequences of federal overreach, of the slippery slope toward unlimited federal power that would result if Congress were allowed to pass the individual mandate. The idea that the federal government could require the nation to purchase or even consume broccoli entered the discussion in this context. It became a memorable shorthand reference for the liberty dangers of unlimited federal power.

The first public reference to government regulation of America's eating habits in the context of health care came well before President Obama began pressing Congress to act on his campaign pledge to achieve universal health care. In a 1993 *Wall Street Journal* article attacking President Clinton's proposed health care plan,¹⁶¹ David B. Rivkin Jr. introduced the broccoli argument. The path of his argument is worth quoting at length, as it lays out the basic template and rhetorical moves by which broccoli and health care would become entwined almost twenty years later:

In the new health care system, individuals will not be forced to belong because of their occupation, employment, or business activities—as in the case of Social Security. They will be dragooned into the system for no other reason than that they are people who are here. If the courts uphold Congress's authority to impose this system, they must once and for all draw the curtain on the Constitution of 1787 and admit that there is *nothing* that Congress cannot do under the Commerce Clause. The polite fiction that we live under a government of limited powers must be discarded—Leviathan must be embraced.

159. See, e.g., Ruth Marcus, *An 'Illegal' Mandate? No.*, WASH. POST, Nov. 26, 2009, http://articles.washingtonpost.com/2009-11-26/opinions/36926860_1_individual-mandate-roscoe-filburn-health-insurance (commenting that the question of the constitutionality of the mandate is “[a]n interesting debate for a constitutional law seminar[but i]n the real world, not a big worry”); Charles Lane, *Is Health Reform Unconstitutional? Don't Laugh*, WASH. POST (Mar. 24, 2010, 5:14 PM), http://voices.washingtonpost.com/postpartisan/2010/03/is_health_reform_unconstitutio.html.

160. See JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* (2010); KATE ZERNIKE, *BOILING MAD: INSIDE TEA PARTY AMERICA* (2010); Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193 (2011).

161. David B. Rivkin Jr., Op-Ed., *Health Care Reform v. the Founders*, WALL ST. J., Sept. 29, 1993, at A19.

The implications of this final extension of the commerce power are frightening. If Congress can regulate you because you *are*, then it can do anything to you not forbidden by the handful of restraints contained in the Bill of Rights. For example, if Congress thinks Americans are too fat—many are—and that this somehow will affect interstate commerce—who’s to say it doesn’t?—can it not decree that Americans shall lose weight? Indeed, under the new system, any activity that might increase the costs of health care might be regulatable.

If individuals can be regulated because of their health, then surely any activity with an impact on health also can be regulated. Perhaps one day it will be decided that every member of the new health care system—everybody—will be tested for the HIV virus. After all, your HIV status affects your health, the costs of health care, and, thus, interstate commerce. If a mandatory federal health system is justified under a Commerce Clause analysis, then any regulation of any health-related activity also can be justified.¹⁶²

In 2009, when a federal health care law was again being considered, Rivkin returned to this line of constitutional critique.¹⁶³ Recognizing that improbable hypotheticals could be a powerful vehicle for advancing a constitutional challenge to President Obama’s health care law, he began pressing these points as the ACA moved unsteadily toward passage in the fall of 2009. Senator Orrin Hatch of Utah was one eager recipient of Rivkin’s advice,¹⁶⁴ and at an October 2009 hearing on the health care bill, the senator drew on language that echoed Rivkin’s: “If we have the power to simply order Americans to buy certain products, why did we need a Cash for Clunkers program or the upcoming program providing rebates for purchasing energy-saving appliances? . . . We could simply require Americans to buy certain cars, dishwashers or refrigerators.”¹⁶⁵

162. *Id.*

163. David B. Rivkin Jr. & Lee A. Casey, *Illegal Health Reform*, WASH. POST, Aug. 22, 2009, http://articles.washingtonpost.com/2009-08-22/opinions/36783210_1_mandate-supporters-health-insurance-general-police-power; David B. Rivkin Jr. & Lee A. Casey, *Mandatory Insurance Is Unconstitutional: Why an Individual Mandate Could Be Struck Down by the Courts*, WALL ST. J., Sept. 18, 2009, <http://online.wsj.com/article/SB10001424052970204518504574416623109362480.html>.

164. James B. Stewart, *How Broccoli Landed on Supreme Court Menu*, N.Y. TIMES, June 13, 2012, <http://www.nytimes.com/2012/06/14/business/how-broccoli-became-a-symbol-in-the-health-care-debate.html>.

165. *Id.* (quoting Senator Hatch during hearings in October 2009) (internal quotation marks omitted); see also Orrin Hatch, *Letter to Editor: ‘Unconstitutional,’* POLITICO (Nov. 9, 2009, 4:17 AM), <http://www.politico.com/news/stories/1109/29302.html> (“If there is no difference between regulating and requiring and between incentives and mandates, why did Congress bother creating

Listening to this exchange was Terence P. Jeffrey, the editor-in-chief of a conservative online news outlet, CNS News.¹⁶⁶ Jeffrey sympathized with Hatch's concerns and saw the potential for mobilizing public opinion in the Senator's hypothetical-based attack. But Hatch's point could be more effectively packaged; it needed a more easily accessible image. Jeffrey landed on broccoli. "I know George Bush didn't like broccoli," he recalled.¹⁶⁷ "It seemed an obvious thing that everyone thinks is good for you."¹⁶⁸ He wrote an online article titled "Can Obama and Congress Order You to Buy Broccoli?"¹⁶⁹

This is not a question about nutrition. It is not a question about whether broccoli is good for you or about the relative merits of broccoli versus other foods. It is a question about the constitutional limits on the power of the federal government. It is a question about freedom.

. . . .

Now, imagine an American sitting on his back porch casually enjoying the would-be anathematized state of not owning health insurance.

. . . .

All he wants from the government is to be left alone.¹⁷⁰

As the health care bill was eventually passed and the constitutional challenge gradually gained steam—at first outside the courts and then eventually in the courts as well—the broccoli mandate, along with other farfetched hypotheticals, bounced around the conservative media and blogosphere. Through the winter and spring of 2010, outlandish hypothetical mandates were just one of many lines of argument against the law offered by its constitutional critics. For example, one of the leading academic critics of the law, Randy Barnett of Georgetown University Law Center, wrote an opinion piece in the

the Cash for Clunkers program? If buying fuel-efficient cars is so important for the economy, Congress could just require people to buy them. Why does Congress need complicated bailouts when it could simply order people to deposit their paychecks in certain banks, invest in certain companies or purchase certain products? In this brave new world, Congress can tackle obesity by mandating that people buy fruits and vegetables. Perhaps this might also lead to a new chapter in regulating campaigns, with Congress requiring contributions to certain candidates to 'level the playing field.'").

166. Stewart, *supra* note 164.

167. *Id.*

168. *Id.*

169. Terence P. Jeffrey, *Can Obama and Congress Order You to Buy Broccoli?*, CNS NEWS (Oct. 21, 2009, 4:43 AM), <http://cnsnews.com/blog/terence-p-jeffrey/can-obama-and-congress-order-you-buy-broccoli>.

170. *Id.*

Washington Post on the eve of the ACA's passage in which he offered only one, brief hypothetical: "Regulating the auto industry or paying 'cash for clunkers' is one thing; making everyone buy a Chevy is quite another."¹⁷¹ Rather than following up the hypothetical car-purchase mandate with a slew of other hypotheticals, as would become commonplace in the coming years, he turned to history, noting that "[e]ven during World War II, the federal government did not mandate that individual citizens purchase war bonds."¹⁷² Later in 2010, Barnett delivered an influential lecture, titled "Commandeering the People," in which he offered a detailed argument against the constitutionality of the ACA mandate. He amplified the limiting principles concern and introduced the possibility that a ruling upholding the health insurance mandate could lead to the government "mandating what you eat."¹⁷³ But broccoli went unmentioned and the hypothetical-based attack on the government's Commerce Clause argument, along with the issue of limiting principles more generally, was just one line of critique among many. The thrust of Barnett's argument was based more on what he saw as the real liberty harms of the ACA than the hypothetical harms that might appear on the horizon if the courts refused to strike down the mandate.

By the end of 2010, however, broccoli, and the limiting principles concern in general, would emerge as a singularly powerful line of challenge to the law—one that ACA critics would return to again and again.

The vegetable hypothetical made its first major appearance in the mainstream press when it became a talking point at Elena Kagan's confirmation hearing in late June 2010. Senator Tom Coburn asked the nominee, "If I wanted to sponsor a bill and it said, Americans, you have to eat three vegetables and three fruits every day, and I got it through Congress and it's now the law of the land, you've got to do it, does that violate the Commerce Clause?"¹⁷⁴ Kagan responded, "Sounds like a dumb law,"¹⁷⁵ and then went on to differentiate dumb

171. Randy E. Barnett, Op-Ed., *Is Health-Care Reform Constitutional?*, WASH. POST, Mar. 21, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/19/AR2010031901470.html>.

172. *Id.*; see also RANDY BARNETT ET AL., HERITAGE FOUND., WHY THE PERSONAL MANDATE TO BUY HEALTH INSURANCE IS UNPRECEDENTED AND UNCONSTITUTIONAL 7, 9 (2009), available at http://s3.amazonaws.com/thf_media/2009/pdf/lm_0049.pdf.

173. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 634 (2010) ("If a power to impose an economic mandate because it is 'convenient' to the regulation of commerce is upheld here, then Congress could mandate *any* behavior so long as it is cast as part of a broad regulatory scheme."); see also Brief Amici Curiae of the Cato Institute and Professor Randy E. Barnett in Support of Appellants, *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011) (No. 10-2388), 2010 WL 6573011, at *21-22 (making the same point).

174. *Nomination of Elena Kagan*, *supra* note 155, at 210.

175. *Id.*

laws from unconstitutional laws. Not satisfied by this response, Coburn continued to press the point, asking, “[D]o we have the power to tell people what they have to eat every day?”¹⁷⁶

Following the Kagan confirmation discussion, the libertarian *Reason* magazine posted a short video titled “Wheat, Weed, and Obamacare.”¹⁷⁷ A primer in Commerce Clause doctrine with a strong conservative slant, the video is interspersed with interview clips of law professors Erwin Chemerinsky and John Eastman and culminates with a consideration of various hypothetical mandates. It also includes a clip from the Kagan confirmation hearing exchange on government-mandated vegetable consumption. Given a chance to discuss the vegetable-mandate issue, Chemerinsky pushes back against the hypothetical by noting that it would likely violate some constitutional personal liberty. When the questions turn from vegetables to American-made cars, Chemerinsky admits that “in theory” such a law could be within the commerce power, although “in reality it’s a ridiculous hypothetical.”¹⁷⁸

As much as supporters of the law’s constitutionality would have liked to see the farfetched hypothetical go away, it was fast becoming an integral part of the constitutional debate. On December 13, 2010, Judge Henry E. Hudson of the U.S. District Court for Eastern District of Virginia became the first federal judge to strike down part of the health care law when he ruled that the individual mandate provision was outside the scope of congressional commerce or taxing power.¹⁷⁹ Hudson’s opinion framed the issue as one of liberty and choice, concluding that the government’s theory of the commerce power failed on this front. The government’s basic problem, Hudson explained, was its inability to provide a sufficient limiting principle. By asserting “an expansive interpretation of the concept of activity,” the government relies on “reasoning [that] could apply to transportation, housing, or nutritional decisions.”¹⁸⁰ Such a “broad definition of the economic activity subject to congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence.”¹⁸¹ Hudson continued:

The unchecked expansion of congressional power to the limits suggested by the Minimum Essential Coverage Provision would invite unbridled exercise of federal police powers. At its core, this dispute is

176. *Id.*

177. ReasonTV, *Wheat, Weed, and ObamaCare: How the Commerce Clause Made Congress All-Powerful*, YOUTUBE (Aug. 25, 2010), http://www.youtube.com/watch?v=6SDf5_Thqsk.

178. *Id.*

179. *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010).

180. *Id.* at 781.

181. *Id.*

not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage—it’s about an individual’s right to choose to participate.¹⁸²

Thus we see the liberty claim and the limiting principle argument linked, as they would be throughout the constitutional challenge.¹⁸³

The limiting principle concern that Judge Hudson raised was the focus of commentary on the decision. Law professor Jason Mazzone, writing in the *New York Times* op-ed page under the title “Can Congress Force You to Be Healthy?,” highlighted the limiting principle issue as the most significant aspect of Hudson’s ruling.¹⁸⁴ In criticizing the government’s argument for its unsatisfactory treatment of commerce power limitations, Mazzone explained, Hudson identified a real problem with the government’s case. With the categorical distinction between activity and inactivity as the boundary of Commerce Clause power, “Judge Hudson has offered the justices a ready-made limit on Congressional power, a limit that makes sense of past cases, is steeped in the law’s traditions and allows the court to complete the task it began a century ago.”¹⁸⁵ Hudson’s ruling marked a significant event in the rise of the limiting principle critique as a centerpiece of the judicial evaluation of the mandate.

Litigants pursued another challenge to the ACA in a federal district court in Florida. The case heard by Judge Roger Vinson involved twenty-six states that had joined a constitutional challenge to the health care bill launched by Florida Attorney General Bill McCullom. From the start of the trial, Judge Vinson expressed considerable sympathy for the challengers’ arguments, proclaiming, “[i]t would be a giant leap for the Supreme Court to say that a decision to buy or not to buy is tantamount to activity.”¹⁸⁶ Judge Vinson was also the first judge to introduce the broccoli hypothetical. During oral argument, he posed the following hypothetical to the lawyer for the states, who happened to be none other than David Rivkin: “If they decided that everybody needs to eat broccoli because broccoli is healthy, they could mandate that everybody has to buy a

182. *Id.* at 788.

183. The argument that the core issue was liberty was commonplace among the constitutional challenge’s supporters. *See, e.g.*, Press Release, Kenneth T. Cuccinelli, II, Att’y Gen. of Va., Virginia Wins Federal Court Challenge Over Constitutionality of Federal Health Care Act: Health Insurance Mandate Is Unconstitutional (Dec. 13, 2010), *available at* http://www.oag.state.va.us/Media%20and%20News%20Releases/News_Releases/Cuccinelli/121310_HealthCare_Ruling.html (“[T]his lawsuit is not about health care. It is about liberty.”).

184. Jason Mazzone, Op-Ed., *Can Congress Force You to Be Healthy?*, N.Y. TIMES, Dec. 17, 2010, at A39.

185. *Id.*

186. Janet Adamy, *Judge Leery of Health Mandate*, WALL. ST. J., Dec. 17, 2010, <http://online.wsj.com/article/SB10001424052748703395204576023733405954012.html> (internal quotation marks omitted).

certain amount of broccoli each week.”¹⁸⁷ Rivkin liked what he was hearing. “The analogy you’re talking about is entirely apropos,” he responded.¹⁸⁸ Attorney General McCullom knew a good talking point when he heard it. “Why wouldn’t [Congress] be able to require you to buy broccoli and eat it?”¹⁸⁹ McCollum said following oral arguments. “I think [Judge Vinson] got it on that point.”¹⁹⁰

On January 31, 2011, Judge Vinson issued his decision striking down the individual mandate as beyond Congress’s commerce power.¹⁹¹ Judge Vinson went one step further than Judge Hudson and ruled that the individual mandate could not be severed from the rest of the law and therefore the entire law was unconstitutional. Vinson’s opinion was notable not only for the sweeping holding but also for the sharply critical tone he took toward the law and the government’s defense of it. One commentator described the opinion as a “Tea Party Manifesto.”¹⁹² The stakes could not be higher, Judge Vinson explained. The case “is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.”¹⁹³ His review of the commerce power’s evolution made little effort to hide his sympathy for a far more restrictive interpretation. “[F]or most of the first century and a half of Constitutional government . . . the Clause was narrowly construed But, everything changed in 1937”¹⁹⁴ Judge Vinson even tapped into the Tea Party-inspired vogue for revolutionary history:

It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in

187. Dara Kam, *States Make Final Pitch to Boot New Law*, PALM BEACH POST, Dec. 17, 2010, at 1A (internal quotation marks omitted).

188. Stewart, *supra* note 164 (internal quotation marks omitted).

189. Kam, *supra* note 187 (internal quotation marks omitted).

190. *Id.* (internal quotation marks omitted).

191. *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff’d in part, rev’d in part sub nom. Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011).

192. Mark Hall, *Judge Vinson’s Tea Party Manifesto*, HEALTH REFORM WATCH (Jan. 31, 2011), <http://www.healthreformwatch.com/2011/01/31/judge-vinsons-tea-party-manifesto>; *see also* Timothy Jost, *Analyzing Judge Vinson’s Opinion Invalidating the ACA*, HEALTH AFF. BLOG (Feb. 1, 2011), <http://healthaffairs.org/blog/2011/02/01/analyzing-judge-vinsons-opinion-invalidating-the-aca> (“This is a radical decision. Judge Vinson has a clear vision of the limited federal government the founders intended that is very much in line with that espoused by the Tea Party Movement.”).

193. *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1263.

194. *Id.* at 1279.

America would have set out to create a government with the power to force people to buy tea in the first place.¹⁹⁵

“Surely this is not what the Founding Fathers could have intended,” he concluded about the notion of Congress requiring individuals to purchase health insurance.¹⁹⁶ To allow Congress to extend its reach this far would leave us with “a Constitution in name only.”¹⁹⁷

Vinson’s opinion attracted attention not only for this Tea Party-style rhetoric but also for his prominent use of the broccoli hypothetical. The real threat to the constitutional system, by Vinson’s reasoning, was not just the ACA. It was what the reasoning the government offered in support of the constitutionality of the individual mandate would mean for the constitutional system. “It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause,” Vinson noted, before moving into a series of claims about what this would lead to:

If [Congress] has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting—as was done in the Act—that compelling the actual transaction is *itself* “commercial and economic in nature, and substantially affects interstate commerce” [*see* Act § 1501(a)(1)], it is not hyperbolizing to suggest that Congress could do almost anything it wanted . . . If some type of already-existing activity or undertaking were not considered to be a prerequisite to the exercise of commerce power, we would go beyond the concern articulated in *Lopez* for it would be virtually *impossible* to posit *anything* that Congress would be without power to regulate.¹⁹⁸

Vinson went on to offer more concrete hypotheticals as he challenged the government’s defense of the law. When pressed for a limiting principle, the government had emphasized the uniqueness of health care, thus indicating that the legal reasoning by which the commerce power justified the ACA did not apply to other potential individual mandates. One factor that separated health care from other areas of economic life was the near impossibility of being able to opt out of the health care market completely, government lawyers had argued. To this, Vinson replied, “[T]here are lots of markets—especially if defined broadly enough—that people cannot ‘opt out’ of. For example, everyone must participate

195. *Id.* at 1286.

196. *Id.*

197. *Id.*

198. *Id.* at 1286–87 (second alteration in original).

in the food market.”¹⁹⁹ Under this reasoning, the commerce power would seem to allow Congress to mandate the purchase and consumption of wheat bread in order to boost the wheat market. Then, he turned to the broccoli hypothetical.

Or, as was discussed during oral argument, Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system. Similarly, because virtually no one can be divorced from the transportation market, Congress could require that everyone above a certain income threshold buy a General Motors automobile—now partially government-owned—because those who do not buy GM cars (or those who buy foreign cars) are adversely impacting commerce and a taxpayer-subsidized business.²⁰⁰

Vinson’s opinion even included a citation to the “Wheat, Weed, and Obamacare” video.²⁰¹

Vinson’s ruling was a landmark in the emergence of the so-called broccoli horrible in the constitutional challenge to the ACA. It was the first time a court had embraced the hypothetical as a central element in its reasoning against the constitutionality of the mandate. In the wake of Vinson’s opinion, broccoli—according to a *New York Times* report—“quickly became the defining symbol for the debate.”²⁰²

In most subsequent litigation challenges to the health care law, broccoli, or some analogous vegetable-based hypothetical, made an appearance. It was tossed around in the oral argument of the appeal of Judge Hudson’s ruling when one of the judges asked if the government could force people “to buy an automobile, to join a gym, [or] to eat asparagus.”²⁰³ Broccoli was also discussed in a challenge to the law in the Sixth Circuit,²⁰⁴ and Judge Laurence H. Silberman of the D.C. Circuit raised the hypothetical when his court considered the mandate’s constitutionality.²⁰⁵ In addition to the broccoli reference in Judge Vinson’s two

199. *Id.* at 1289.

200. *Id.*

201. *Id.*

202. Stewart, *supra* note 164.

203. *Id.* (internal quotation marks omitted).

204. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 565 (6th Cir. 2011); TOOBIN, *supra* note 2, at 269 (describing discussion of broccoli hypothetical at oral arguments).

205. Stewart, *supra* note 164.

rulings on the ACA challenge,²⁰⁶ two other federal courts issued opinions that included a discussion of broccoli.²⁰⁷

By the time the Supreme Court heard oral arguments in *NFIB*, the limiting principles critique was ubiquitous. In passing the ACA, “Congress has crossed a fundamental constitutional line,” warned Rivkin and Casey in a *Wall Street Journal* op-ed.²⁰⁸ The arguments in defense of the mandate’s constitutionality “are flawed because they admit no judicially enforceable limiting principle marking the outer bounds of federal authority.”²⁰⁹ Ilya Somin, a law professor at George Mason University and outspoken critic of the ACA, wrote an article on the health care challenge and the use of slippery slope arguments in which he repeatedly referenced the broccoli argument, even offering citations demonstrating the health benefits of vegetables.²¹⁰

The most widely noted discussion of the limiting principles problem—and of the broccoli hypothetical—came in oral arguments before the Supreme Court. Right from the start of the session devoted to the individual mandate, several of the justices challenged Solicitor General Verrilli with a barrage of hypotheticals designed to test the limits of the government’s Commerce Clause argument. First, Chief Justice Roberts pressed the solicitor general on emergency services. “[C]an the government require you to buy a cell phone because that would facilitate responding when you need emergency services?” he asked.²¹¹ Verrilli said no, emphasizing the existence of a health care market.²¹² The chief justice further pressed his hypothetical: “You don’t know when you’re going to need police assistance. You can’t predict the extent to emergency response that you’ll need, but when you do—and the government provides it.”²¹³ The solicitor

206. *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1307, 1311 (N.D. Fla. 2011); *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1289.

207. *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 422, 438, 440, 447–48 (4th Cir. 2011) (Davis, J., dissenting); *Goudy-Bachman v. U.S. Dep’t of Health & Human Servs.*, 811 F. Supp. 2d 1086, 1102 (M.D. Pa. 2011).

208. David B. Rivkin Jr. & Lee A. Casey, Op-Ed., *The Supreme Court Weighs ObamaCare*, WALL ST. J., Mar. 22, 2012, at A15.

209. *Id.*

210. Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Case a Slippery Slope?*, 75 LAW & CONTEMP. PROBS. 75 (2012); see, e.g., *id.* at 85 (“Not everyone eats broccoli. But everyone inevitably participates in the market for food. Therefore, a mandate requiring everyone to purchase and eat broccoli would be permissible under the federal government’s argument.”).

211. Transcript of Oral Argument at 6, *Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398) [hereinafter *Mandate Oral Argument*].

212. *Id.*

213. *Id.*

general distinguished this situation by noting the absence of a market for police protection.²¹⁴

Justice Alito then brought his own hypothetical: What about a federal requirement for burial insurance?²¹⁵ Here Verrilli accepted that a market indeed exists for these services.²¹⁶ As Alito spun out the hypothetical, Verrilli struggled to articulate a clear distinction between the ACA and such services.²¹⁷

Next up was the hypothetical everyone was waiting for: broccoli. As Verrilli was working through his burial service response, Justice Scalia jumped in: “[W]hy do you define the market that broadly? . . . [E]verybody has to buy food sooner or later. So, you define the market as food; therefore, everybody’s in the market; therefore, you can make people buy broccoli.”²¹⁸ “No, that is quite different,” Verrilli responded.²¹⁹

It is quite different. The food market, while it shares that trait that everybody’s in it, it is not a market in which your participation is often unpredictable and often involuntary. It is not a market in which you often don’t know before you go in what you need, and it is not a market in which, if you go in and—and seek to obtain a product or service, you will get it even if you can’t pay for it.²²⁰

Scalia interrupted: “[I]s that a principled basis for distinguishing this from other situations?”²²¹

In the wake of Scalia’s remarks at the oral argument, broccoli and the problem of limiting principles were all over the news.²²² For example, *New York Times* columnist Paul Krugman, in a column titled “Broccoli and Bad Faith,” referenced “the already famous exchange in which Justice Antonin Scalia compared the purchase of health insurance to the purchase of broccoli.”²²³ “That

214. *Id.* at 7.

215. *Id.* at 8.

216. *Id.* at 8–9.

217. *See id.* at 7–9.

218. *Id.* at 13.

219. *Id.*

220. *Id.*

221. *Id.*

222. *See, e.g.,* Alan Bjerga, *Broccoli Gets Respect in Health-Care Arguments*, BLOOMBERG BUSINESSWEEK (Mar. 28, 2012), <http://www.businessweek.com/news/2012-03-27/broccoli-banned-by-bush-gets-respect-in-health-care-arguments>; Feldman, *supra* note 4; Jeffrey Rosen, *One Simple Argument Could Have Saved Obamacare. Too Bad Verrilli Didn't Make It*, NEW REPUBLIC (Mar. 30, 2012), <http://www.tnr.com/article/politics/102203/supreme-court-obamacare-verrilli>; Byron Tau, *Scalia Wonders About a Broccoli Mandate*, POLITICO (Mar. 27, 2012, 1:33 PM), <http://www.politico.com/politico44/2012/03/scalia-wonders-about-a-broccoli-mandate-118823.html> (opening with the line, “Can the federal government make you buy broccoli?”).

223. Paul Krugman, Op-Ed., *Broccoli and Bad Faith*, N.Y. TIMES, Mar. 30, 2012, at A27.

comparison horrified health care experts all across America,” Krugman wrote, “because health insurance is nothing like broccoli.”²²⁴ Former Regan Solicitor General Charles Fried told a *Washington Post* reporter, “I was appalled to see that at least a couple of [the justices] were repeating the most tendentious of the Tea Party type arguments.”²²⁵ Fried continued: “I even heard about broccoli. The whole broccoli argument is beneath contempt. To hear it come from the bench was depressing.”²²⁶ Similarly, columnist E. J. Dionne lamented that “[t]he conservative justices were obsessed with weird hypotheticals.”²²⁷

Not surprisingly, now that the broccoli analogy had received its Supreme Court imprimatur, opponents of the ACA doubled down on the analogy and the demand for a limiting principle. For example, an article titled “Can Government Be Limited?,” published in *The American*—a conservative online magazine run by the American Enterprise Institute—argued that Verrilli’s inability to articulate a persuasive rebuttal to the justices’ hypotheticals was a weakness shared by everyone in favor of the ACA.²²⁸ “Let’s cut to the chase here,” conservative radio host Rush Limbaugh said to a caller. He continued:

You’re telling me that you want the Supreme Court to decide that the government can tell you that you have to buy health insurance and broccoli?

. . . .

. . . Now, a lot of people think this is an academic exercise. Stop and think about this. You have to buy broccoli. You go to the grocery store, you have to buy it. And if you don’t you [can] get fined. You want that world. You want to live like that. You want to have those requirements.²²⁹

Believing that the law was particularly vulnerable on the limiting principle question, critics pounced on the issue, using broccoli as a powerful weapon to

224. *Id.*

225. Greg Sargent, Op-Ed., *How Did Legal Observers and Obamacare Backers Get It So Wrong?*, WASH. POST (Mar. 29, 2012, 11:10 AM), http://www.washingtonpost.com/blogs/plum-line/post/how-did-obamacares-backers-get-it-so-wrong/2012/03/29/gIQA_rH5wiS_blog.html (internal quotation marks omitted).

226. *Id.* (internal quotation marks omitted).

227. E.J. Dionne Jr., Op-Ed., *Judicial Activists in the Supreme Court*, WASH. POST, Mar. 28, 2012, http://www.washingtonpost.com/opinions/activist-judges-on-trial/2012/03/28/gIQA_kdE2gS_story.html.

228. James V. DeLong, *Can Government Be Limited?*, AMERICAN (Apr. 20, 2012), <http://www.american.com/archive/2012/april/can-government-be-limited> (“No one in Verrilli’s camp has developed a limiting principle.”).

229. *Liberal “Fine” With Obamacare, Broccoli Mandates*, RUSH LIMBAUGH SHOW (Apr. 9, 2012), http://www.rushlimbaugh.com/daily/2012/04/09/liberal_fine_with_obamacare_broccoli_mandates (transcript of radio show).

bring their point home. The traction the broccoli hypothetical attained resulted in the widely held expectation on both sides of the debate—among commentators, lawyers, and eventually even judges and justices—that the Obama administration would have to provide a convincing limiting principle in order to win the case.²³⁰ That this striking—and historically exceptional—assumption was virtually unquestioned shows just how all-encompassing the broccoli-centered narrative had become.

B. Popular Constitutionalism and the Translation Problem

One of the perennial challenges for popular constitutional movements attempting to influence the courts is the difficulty of developing constitutional claims that resonate in extrajudicial contexts and that also speak the language of court-made doctrine. Constitutional doctrine can be technical and abstruse, concerned more with issues of institutional competence and the stabilizing function of the law than with clear, resonant assertions of constitutional meaning. Yet these characteristics simply do not work when it comes to injecting constitutional claims into a social movement. Courts and social movements operate on different registers when it comes to staking out claims on the Constitution. This dynamic might be termed popular constitutionalism's translation problem.

The ACA challenge offers a classic example of the translation problem in action. From the perspective of popular constitutional opposition to the ACA, the core issue was one of individual liberty. The individual mandate, opponents argued, infringed on the American people's basic personal liberties. That the

230. See, e.g., Wendy K. Mariner et al., *Can Congress Make You Buy Broccoli? And Why That's a Hard Question*, 364 NEW ENG. J. MED. 201, 201–02 (2011) (“If the Obama administration is to prevail, it must provide a persuasive limiting principle to convince the Supreme Court that ruling in favor of the individual mandate would not create a precedent for unlimited federal authority to require citizens to buy goods from private sellers to sustain important industries.”); Feldman, *supra* note 4 (“What’s the difference between broccoli and health insurance? The fate of President Barack Obama’s health-care plan rests on this question, which Supreme Court Justice Antonin Scalia pressed on Solicitor General Don Verrilli. . . . Verrilli’s failure to offer a sharp distinction could be disastrous for the government’s case.”); Daniel Fisher, *Obamacare Judges Must Answer the “Broccoli Question,”* FORBES (Nov. 18, 2011, 2:15 PM), <http://www.forbes.com/sites/danielfisher/2011/11/18/obamacare-judges-must-answer-the-broccoli-question> (“Whether you’re for Obamacare or against it, you must have pondered the broccoli question.”); Rosen, *supra* note 222 (“Verrilli’s error was substantive: He failed squarely to answer Roberts and Kennedy’s repeated questions about what limits he envisioned to Congress’s power to regulate interstate commerce.”); Greg Sargent, Op-Ed., *Yes, There Is a Limiting Principle*, WASH. POST (Mar. 28, 2012, 11:25 AM), http://www.washingtonpost.com/blogs/plum-line/post/yes-there-is-a-limiting-principle/2012/03/28/gIQA8Q3VgS_blog.html (“At this point, it seems likely that Obamacare’s fate will hinge on whether Justice Roberts or Justice Kennedy come to believe there is a ‘limiting principle’ under the government’s theory of the individual mandate.”).

federal government rather than a state government required individuals to purchase health insurance surely strengthened public opposition, but those who challenged the law in extrajudicial settings generally condemned the mandate as a violation of individual liberty regardless of its source. Yet as a matter of constitutional adjudication, the challenge involved questions of federalism and constitutional structure, not individual rights. Efforts to challenge the mandate on Fifth Amendment due process grounds, the logical home for an individual liberty-based claim, went nowhere in the courts.²³¹ Their constitutional logic was too sweeping (such a ruling would have invalidated not only the federal mandate but also the one in Massachusetts); its doctrinal pedigree, based on the expansive reading of liberty in infamous cases such as *Lochner*²³² was too problematic.²³³

This is an instance in which the limiting principle argument, delivered most powerfully via the broccoli hypothetical, served its critical role. The image of government forcing individuals to purchase, and perhaps even eat, their vegetables served as a politically and culturally resonant way in which to ensure that concerns with personal liberty remained at the forefront of the debate. Perhaps the most remarkable achievement by the ACA's opponents was to convince broad swaths of the American public, in breathtakingly short order, that the law's individual mandate posed a fundamental assault on personal liberty.²³⁴ Evocative imagery such as the broccoli mandate likely fueled the growth of this liberty-based critique of the ACA.

The broccoli horrible thus served to link a popular constitutional movement mobilized against the ACA with the constitutional challenge that was taking place in the courts.²³⁵ Broccoli, and other green vegetables, became an evocative

231. See *supra* note 12 and accompanying text.

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

233. See, e.g., Greene, *supra* note 12; Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1726, 1742–46 (2011); Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part I: The Misguided Libertarian Objection*, FINDLAW (Oct. 21, 2009), <http://writ.news.findlaw.com/dorf/20091021.html>.

234. That the mandate's perceived threat to American liberty became a staple of American conservatism in this period is all the more extraordinary considering the insurance mandate was first embraced by conservatives as an alternative to a single-payer national health care program. See Ezra Klein, *Unpopular Mandate: Why Do Politicians Reverse Their Positions?*, NEW YORKER, June 25, 2012, http://www.newyorker.com/reporting/2012/06/25/120625fa_fact_klein.

235. The story of broccoli and the ACA challenge highlights the critical role played by various figures who acted as intermediaries between the public debate and judicial consideration of the issues, such as state attorneys general, publicly engaged legal scholars, and members of the media. These people worked to translate the language of popular constitutionalism into the language of the courts, and vice versa. See, e.g., Kenneth T. Cuccinelli, II et al., *Why the Debate Over the Constitutionality of the Federal Health Care Law Is About Much More Than Health Care*, 15 TEX. REV. L. & POL. 293, 338 (2011) ("The battle for liberty is never over. The challenges to the health care law are our generation's battle field in that ceaseless struggle."); Barnett, *supra* note 171; Rivkin

proxy for the risks of government intrusion into personal liberty. This is a classic case of extrajudicial constitutional argumentation. Complex doctrinal issues are distilled and simplified into the blunter components of popular constitutional argumentation. In this case, the transformation was particularly impressive. An issue of congressional power under Article I of the Constitution was translated into a question of individual liberty—from federalism to personal rights.

C. Why the Popular Demand for Limiting Principles?

The broccoli hypothetical offered an evocative way to press the issue of limiting principles to the front of discussions of the mandate's constitutionality, both inside and outside the courts. Critics of the ACA were able to press the idea that the government's primary burden in defending the individual mandate was to supply a convincing limiting principle to its theory of the commerce power—that is, a theory that would allow for the health insurance mandate while preventing the government from passing other mandates, such as the broccoli mandate. As the *Wall Street Journal* editorialized on the eve of the ACA's Supreme Court oral arguments:

A thread that runs through all these cases is that the Court has always required some limiting principle that is meaningful and can be enforced by the legal system. As the Affordable Care Act suits have ascended through the courts, the Justice Department has been repeatedly asked to articulate some benchmark that distinguishes this specific individual mandate from some other purchase mandate that would be unconstitutional. Justice has tried and failed, because a limiting principle does not exist.²³⁶

Note the line of critique here: The flaw of the argument in favor of the ACA's constitutionality is not necessarily any argument related to the ACA and

& Casey, *supra* note 163 (“The Constitution’s Framers divided power between the federal government and states . . . for a reason. They viewed these structural limitations on governmental power as the most reliable means of protecting individual liberty—more important even than the Bill of Rights.”); Press Release, Office of the Fla. Att’y Gen., Florida Attorney General Pam Bondi Issues Statement on U.S. Supreme Court’s Decision to Hear Federal Health Care Challenge (Nov. 14, 2011), *available at* <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/A19C8BA75E9EE67585257948005C14D2> (“Throughout this case, we have urged swift judicial resolution because of the unprecedented threat that the individual mandate poses to the liberty of Americans simply because they live in this country.”).

236. *Liberty and ObamaCare*, WALL ST. J., Mar. 22, 2012, <http://online.wsj.com/article/SB10001424052702304724404577291762007718228.html>.

commerce. Rather, the flaw is a failure of theory—a failure to provide a limiting principle.²³⁷

This kind of abstract demand for a limiting principle generally does not gain much purchase in public constitutional debates. “We must have a theory!” is not a particularly resonant rallying cry. And as we have demonstrated above, the Court has not, in most cases, demanded that a theory be provided when a new constitutional issue emerges.²³⁸ But in the case of the ACA, the demand for a limiting principle was accompanied by an evocative collection of hypotheticals, with broccoli standing out above all others. The above-quoted *Wall Street Journal* editorial exemplifies this fusion of theoretical critique with hypothetical application. It quickly shifts from an abstract concern with the Obama administration’s failure to provide a limiting principle to the supposed real consequences of this failure:

The reality is that every decision not to buy some good or service has some effect on the interstate market for that good or service. The government is asserting that because there are ultimate economic consequences it has the power to control the most basic decisions about how people spend their own money in their day-to-day lives. The next stops on this outbound train could be mortgages, college tuition, credit, investment, saving for retirement, Treasuries, and who knows what else.

Confronted with these concerns, the Administration has echoed Nancy Pelosi when she was asked if the individual mandate was constitutional: “Are you serious?” The political class, the Administration says, would never abuse police powers to create the proverbial broccoli mandate or force people to buy a U.S.-made car.

But who could have predicted that the government would pass a health plan mandate that is opposed by two of three voters? The argument is self-refuting, and it shows why upholding the rule of law and defending the structural checks and balances of the separation of powers is more vital than ever.

....

237. See Mazzone, *supra* note 184 (“How do we define the limits, because limits there must be, on this federal power? . . . The conservative justices in particular will no doubt wonder what else Congress can make Americans do if it can make us buy health insurance. Can Congress tell us to join a gym because fit people have fewer chronic diseases? Can Congress direct us to purchase a new Chrysler to help Detroit get back on its feet?”).

238. See *supra* Part I.

. . . It is not an exaggeration to say that the Supreme Court's answers may constitute a hinge in the history of American liberty and limited and enumerated government.²³⁹

Here we can see liberty and limiting principles brought together and impressed on the public consciousness through a series of disturbing hypotheticals.

This demand for theorizing the limits of a constitutional principle, which seemed so natural and inevitable in the context of the ACA challenge, was actually quite distinctive. Debates over constitutional claims have historically included demands for limiting principles. They have often featured prominently in oral arguments before the Supreme Court. But rarely have they become the core of the constitutional evaluation for a major Supreme Court case.²⁴⁰ Perhaps never before has a concern with an improbable hypothetical law served as prominent a role in a constitutional dispute. The reason for this historically exceptional development is not hard to identify. Simply put, it was the product of the Tea Party moment in which the constitutional challenge took shape. It is far from obvious that a ruling upholding an individual mandate for health insurance would augur the demise of the principle of enumerated powers. Yet this was an argument that resonated among the law's critics because of a particularly powerful political backlash to the ACA that was framed in constitutional terms and was advanced through dire, even apocalyptic warnings of the threat of a socialist state emerging in the United States.²⁴¹

Several elements of the Tea Party's constitutional activism helped to push broccoli and the limiting principle debate to the center of the ACA challenge. Tea Party literature and statements emphasized that the nation's founding was an exceptional moment. Our founding documents were works of inspired genius

239. *Liberty and ObamaCare*, *supra* note 236.

240. For example, when Congress sought to prohibit racial discrimination in privately owned public accommodations in the Civil Rights Act of 1964, opponents gave dire warnings. They argued that if the Commerce Clause were read to allow this kind of regulation, then, as a matter of constitutional logic, Congress would also have the authority to regulate all manner of private businesses, perhaps even relations within "a man's home or a man's yard or even his fields." Jurisdictional Statement and Brief at 22, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (No. 515), 1964 WL 81380, at *22. The Court basically ignored this parade-of-horribles argument in upholding the Civil Rights Act. *Heart of Atlanta Motel, Inc.*, 379 U.S. 241. See generally Christopher W. Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 417 (Sally E. Hadden & Patricia Hagler Minter eds., 2013). Chief Justice John Marshall similarly bypassed demands for clear limiting principles to congressional power in his famous opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See *supra* notes 90–100 and accompanying text.

241. See generally Schmidt, *supra* note 160 (characterizing the Tea Party as a constitutional movement and examining its impact on popular constitutional dialogue in America).

and they provide a stable anchor for the nation when it loses its way.²⁴² In the words of Tea Party–favorite Senator Rand Paul of Kentucky, “belief in self-reliance, limited government and the Constitution hold the keys to fixing our problems and getting our nation back on track.”²⁴³

This idealizing vision of the past was coupled in the Tea Party mindset with a deep sense of disillusionment with the contemporary situation. A dominant theme of Tea Party ideology has been a sense that contemporary society is in decline.²⁴⁴ According to one Tea Party polemicist, over the course of the twentieth century the U.S. government has been taken over by elites, “[e]ach succeeding generation . . . less competent than its predecessor.”²⁴⁵ As a result, government has “generally made life worse” for the American people.²⁴⁶ The Tea Party’s sense of social and political decline was evident in opinion polls. While the economic downturn has caused marked increases in pessimism toward the direction of the country generally, this pessimism was near unanimous among Tea Party supporters.²⁴⁷ According to Sarah Palin’s apocalyptic assessment, the nation is on a “road to ruin.”²⁴⁸ “The Tea Party is bound by a deep sense of betrayal,” wrote a *Washington Post* reporter after spending a weekend in the fall of 2010 traveling with a group bound for Glenn Beck’s Restoring Honor rally on the Washington Mall.²⁴⁹

The declension narrative promulgated by the Tea Party, combined with the hyperbolic condemnations of the direction President Obama and the Democrats were taking the nation, made the ACA opponents’ patently ridiculous claims about what the government is likely to do seem marginally more possible. For the conspiratorially minded, the ridiculous was transformed into the probable or even likely. The threat to liberty was real and it was imminent. As Virginia

242. See *id.* at 201–03.

243. Rand Paul, *Rand Paul, Libertarian? Not Quite*, USA TODAY, Aug. 9, 2010, http://usatoday30.usatoday.com/news/opinion/forum/2010-08-10-column10_ST2_N.htm.

244. See Schmidt, *supra* note 160, at 203–06.

245. ANGELO M. CODEVILLA, *THE RULING CLASS: HOW THEY CORRUPTED AMERICA AND WHAT WE CAN DO ABOUT IT* 15 (2010).

246. *Id.* at xix.

247. A New York Times/CBS poll conducted in April 2010 found that among Tea Party supporters 92 percent of respondents agreed with the statement that “things in this country . . . have pretty seriously gotten off on the wrong track.” ZERNIKE, *supra* note 160, at 199. Among all people polled, 59 percent agreed with this statement. *Id.*; see also Susan Page & Naomi Jagoda, *What Is the Tea Party? A Growing State of Mind*, USA TODAY, July 8, 2010, http://www.usatoday.com/news/politics/2010-07-01-tea-party_N.htm (reporting similar polling numbers).

248. *Palin: America out of Step With Reagan Values*, CBS NEWS (Feb. 5, 2011, 1:07 AM), http://www.cbsnews.com/8301-503544_162-20030774-503544.html (internal quotation marks omitted).

249. Bill Donahue, *Tea Party Road Trip: What the Movement Wants—and Why*, WASH. POST, Oct. 24, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/15/AR2010101505259.html>.

Attorney General Cuccinelli warned: “In seeking to protect the liberties guaranteed by the Constitution, we are vigorously pursuing freedom for our citizens in the face of a government that, no matter how well intentioned, seeks to expand its power at citizens’ expense.”²⁵⁰ “Today it is buying government approved health insurance. Tomorrow it could be having an annual physical or mandating what you eat. What sounds farfetched now can change with the political winds,” cautioned Randy Barnett.²⁵¹ It was in this context that farfetched hypotheticals, such as the broccoli mandate, did their work.

* * *

Thus we see the broccoli horrible working on two levels. In the constitutional battle taking place outside the courts, it was a vehicle for promulgating a liberty-based critique of the ACA. In the courts, it served to force the question of limiting principles to the forefront of the debate over Commerce Clause doctrine. This thoroughly unlikely vegetable-mandate hypothetical effectively encapsulated popular anxieties about the liberty costs of the ACA while also raising a serious doctrinal concern. Signaling two different messages for two different audiences, broccoli’s efficacy for opponents of the ACA was in its ability to link popular constitutional mobilization with judicial decisionmaking. And in the process of creating this bridge, the two levels on which broccoli operated were conflated. Skeptical judges could demand a limiting principle and do so in a way that tapped into a groundswell of libertarian sentiment. Social movement activists and political actors could demand increased attention to individual liberty and do so in a way that tapped into the struggle with limiting principles that had come to dominate the litigation challenge. This was the brilliance of broccoli.

250. Ken Cuccinelli, *Liberty Is Finite*, AM. SPECTATOR, Mar. 2010, <http://spectator.org/archives/2010/03/16/liberty-is-finite>.

251. Barnett, *supra* note 173, at 634; *see also, e.g.*, Kathleen Parker, *Obamacare Is Not a Civil Rights Issue*, WASH. POST, Mar. 27, 2012, http://www.washingtonpost.com/opinions/obamacare-is-not-a-civil-rights-issue/2012/03/27/gIQA5KT2eS_story.html (“Ah, but no, government can’t dictate what people consume or how much they exercise. Wanna bet? Stick around.”); DeLong, *supra* note 228 (claiming that supporters of the ACA “happily anticipate the day when the government will mandate a healthy diet”); Lee Harris, *More Than Just Broccoli: The Real Slippery Slope of ObamaCare’s ‘Must-Buy’ Provision*, AMERICAN (Mar. 28, 2012), <http://www.american.com/archive/2012/march/more-than-just-broccoli-the-real-slippery-slope-of-obamacares-must-buy-provision> (“It is not simply that Congress might pass a law forcing people to buy broccoli, but that in an economic crisis, it would be tempted to jump start the national economy by forcing people [to] go out and buy things, while penalizing those who don’t.”).

III. POPULAR CONSTITUTIONALISM AND *NFIB*: TWO NORMATIVE ASSESSMENTS

Thus far, we have used popular constitutionalism as a descriptive theory of constitutional development. The key to understanding the extraordinary role of limiting principles and hypothetical broccoli mandates in *NFIB*, we have argued, lies in understanding the extraordinary popular engagement with the constitutional issues surrounding the mandate. Simply as a matter of historical explanation, *NFIB* puts on display a common pattern of constitutional development in which constitutional claims expressed by extrajudicial actors in extrajudicial settings affect the way judges understand and articulate the stakes of the constitutional challenge.

But if a descriptive theory of popular constitutionalism explains why broccoli and limiting principles came to play such an important role in the judicial evaluation of the ACA mandate, the question remains whether this kind of relatively direct extrajudicial influence on the courts is desirable. This question requires us to engage with a different side of popular constitutionalism—popular constitutionalism as a normative theory of judicial constitutional interpretation. As a normative theory, popular constitutionalism's basic premise is that the courts should respond to the considered, durable constitutional commitments of the American people.

In this Part we offer, and briefly defend, two normative claims. We first show that, under a fair application of popular constitutionalism, the Commerce Clause Majority's distinctive blend of liberty values and federalism was an appropriately responsive act of judicial decisionmaking. The liberty-inflected federalism of *NFIB* can very well be understood as a demonstration of how, from a popular constitutionalist perspective, law does and should develop—as an ongoing dialogue between existing constitutional doctrine and the evolving constitutional expectations of the American people.

Yet even if the substance of the Commerce Clause doctrine that emerged from *NFIB* could be legitimated under a normative theory of popular constitutionalism, the question remains as to whether the unusual process of judicial reasoning employed by the Commerce Clause Majority—namely, insisting on resolving the limiting principles issue and thereby abandoning LR—could be similarly justified. Here we argue that such reasoning was inappropriate. The values of popular constitutionalism that justify a responsive constitutional jurisprudence when it comes to the substance of constitutional meaning do not apply with similar force when it comes to the modes of legal analysis practiced by the courts. The kinds of legal argumentation that resonate in extrajudicial

contexts may very well be inappropriate in the distinctive context of the judiciary. Ironically, such argumentation may be inappropriate because certain kinds of legal argumentation distort or shut down the very constitutional dialogue that popular constitutionalists rely on. We argue that this was one of the costs of the Commerce Clause Majority's embracement of broccoli and the limiting principles issue in *NFIB*. We thus identify a side of popular constitutionalism that is distinctly problematic.

A. Substantive Considerations

1. Liberty and Federalism in *NFIB*

While much of the reasoning about federalism in Chief Justice Roberts's opinion and in the joint dissent references familiar arguments about the way federalism serves to protect the liberty of Americans, a closer inspection of the relation between liberty and federalism in *NFIB* reveals something new afoot—a novel approach to integrating liberty values into federalism doctrine.

For most of its history, the Supreme Court tended to treat the value of federalism as self-evident. While the justices struggled over the appropriate balance of power between the states and the national government, they assumed state sovereignty to be a valuable end in itself; it did not need to be justified as serving some other value, such as individual liberty. Indeed, in *McCulloch v. Maryland*,²⁵² Chief Justice John Marshall explicitly distinguished structure from liberty. He noted that the constitutionality of the national bank involved a question of “adjust[ing] . . . the respective powers of those who are equally the representatives of the people,” a question with which “the great principles of liberty are not concerned.”²⁵³ Even in the late-nineteenth and early-twentieth centuries, when the Court asserted for itself a more substantial role in protecting states against expanding federal authority, references to liberty and individual rights were notably absent from its federalism analysis.²⁵⁴

252. 17 U.S. (4 Wheat.) 316 (1819).

253. *Id.* at 401.

254. *See, e.g.*, *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (omitting reference to “liberty” or “freedom” in the context of federalism); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (same); *Adair v. United States*, 208 U.S. 161 (1908) (same). Since the kinds of federal regulations at issue in these cases were commonplace on the state level, it would have been notably incongruous for the Court to reference the costs these regulations imposed on individual liberty. Furthermore, the Court during this period had in substantive due process a far more direct way in which to consider the liberty costs of government regulation. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). Thus, we can see the Court in *Adair* striking down a federal law designed to protect labor organization in interstate railroads on two

Following the New Deal, when the Court largely abandoned its role as the arbiter of the constitutional line between federal and state power,²⁵⁵ critics of expansive national authority were forced to reconsider the underlying values of the federal system.²⁵⁶ That the leading voices of states' rights during this period were segregationists making their last, desperate stand against federal protection of civil rights made this project of reconstructing the bases of federalism more difficult and more urgent. When New Federalism emerged in the 1970s and 1980s, and reshaped federalism doctrine in the following decades,²⁵⁷ its proponents offered a more results-oriented defense of federalism—one that emphasized liberty as a consequence of protecting state power and limiting federal power.²⁵⁸ If federalism's first premise is that state government must retain substantial authority vis-à-vis the federal government, New Federalists provided a corollary supposition—that, in Justice O'Connor's words, federalism creates

separate grounds: (1) It violated the Fifth Amendment's right to liberty and property and (2) it was beyond the scope of the commerce power.

255. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
256. See, e.g., *FEDERALISM: MATURE AND EMERGENT* (Arthur W. MacMahon ed., Russell & Russell, Inc. 1962) (1955).
257. See, e.g., EDWARD A. PURCELL JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY* 161–77 (2007) (describing defenders of federalism in this period turning to discussion of its “values”); MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 249–78 (2005) (overview of the “Federalism Revolution”).
258. See, e.g., *Alden v. Maine*, 527 U.S. 706, 751 (1999) (“When the Federal Government asserts authority over a State’s most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.”); *id.* at 758 (“[F]reedom is enhanced by the creation of two governments, not one.”); *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (“[T]he federal balance is too essential a part of our constitutional structure and 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.”); *New York v. United States*, 505 U.S. 144, 181 (1992) (“[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))); *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (“In the tension between federal and state power lies the promise of liberty.”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting) (“[B]y usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.”); *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 790 (1982) (O’Connor, J., concurring in part and dissenting in part) (warning that to violate basic principles of federalism is to “risk upsetting the balance of power that buttresses our basic liberties”). For a critique of the validity of these assertions, see PURCELL, *supra* note 257, at 165–69, which describes the relationship between liberty and the federal structure as “at best, dubious and unproven.”

“the balance of power that buttresses our basic liberties.”²⁵⁹ This was not a new argument. As its advocates invariably emphasize, its foundational articulation came in Alexander Hamilton and James Madison’s defense of the Constitution in *The Federalist*.²⁶⁰ But as a matter of judicial justification for its federalism doctrine, this heightened attention to federalism’s value in protecting individual liberty was novel.

Importantly, the state remains as the key mechanism in protecting liberty under the New Federalists’ articulation of federalism. This is a structural approach to preserving personal liberty. Federalism protects liberty, but it does so indirectly. Various rationales for how precisely the structural constraints of federalism operate to preserve individual freedom have been offered. There is the subsidiarity principle, premised on the idea that government works better when authority is localized to the greatest extent feasible.²⁶¹ There is the diffusion principle, premised on the idea that increasing the bases of governing authority diffuses power and thereby protects liberty.²⁶² There is the checking principle, premised on the idea that a system of competing bases of power in the state and federal government allows each government to challenge liberty infringements by the other.²⁶³ The common denominator for these various justifications is the premise that a central benefit of preserving state authority is the protection of liberty. In *NFIB*, the Commerce Clause Majority referenced each of these liberty-protecting justifications for federalism.²⁶⁴

259. *Fed. Energy Regulatory Comm’n*, 456 U.S. at 790.

260. See, e.g., THE FEDERALIST NO. 28 (Alexander Hamilton) (“Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.”); THE FEDERALIST NO. 51 (James Madison) (describing the combination of federalism and separation of powers as a “double security” for “the rights of the people” because “[t]he different governments will control each other, at the same time that each will be controlled by itself”).

261. See, e.g., STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 123–25 (2010) (discussing principle of subsidiarity).

262. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) (“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.”).

263. This checking function was emphasized in Hamilton’s FEDERALIST NO. 28 and Madison’s FEDERALIST NO. 51. See THE FEDERALIST NO. 28 (Alexander Hamilton); THE FEDERALIST NO. 51 (James Madison).

264. *NFIB*, 132 S. Ct. 2566, 2578 (2012) (identifying subsidiarity and checking functions as ways in which federalism protects liberty); *id.* at 2602 (arguing that “individual liberty would suffer” if we were to abandon “the two-government system established by the Framers” in favor of “a system that vests power in one central government”); *cf. id.* at 2677 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“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.”).

Yet, alongside this now relatively established idea of structural liberty, we see in *NFIB* a new theory of federalism at work—one in which liberty has been transformed from a consequent benefit of state sovereignty to an independent value of federalism itself. Under this approach, the state recedes into the background and the individual citizen takes center stage. We call this reformulation of federalism “Liberty-Centered Federalism” (LCF).

We see the embrace of LCF to make a liberty-based argument through the vehicle of a commerce power analysis in the briefs and articles in which opponents attacked the mandate,²⁶⁵ in the lower courts that struck down the mandate,²⁶⁶ and in the reasoning of the Commerce Clause Majority in *NFIB*. LCF is most visible in the Commerce Clause Majority’s treatment of the distinction between government regulation of activity and a government requirement that individuals engage in certain activity. This activity/inactivity distinction was the basis for their conclusion that neither the Commerce Clause nor the Necessary and Proper Clause give Congress the power to require individuals to purchase health insurance. The mandate does not involve the regulation of economic activity that is required by the Commerce Clause, and the requirement that individuals purchase something is not proper under the Sweeping Clause.

A rather simple premise lies at the heart of the activity/inactivity distinction: A federal requirement that a private individual enters the private market is qualitatively different from the regulation of an individual who has chosen to participate in a private market. For those who defend the mandate’s constitutionality, this is a difference without a distinction. If the federal government is looking to solve problems of national scope, refusal to enter the market can have just as significant an impact on the national economy as one’s

265. See, e.g., Brief for State Respondents on the Minimum Coverage Provision at 1, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 392550, at *1 [hereinafter States’ Brief] (“The Constitution protects and promotes individual liberty while the mandate’s threat to liberty is obvious.”); *id.* at 18 (noting that upholding the mandate “would allow Congress to control the most basic of decisions about how to live life—in other words, to withhold from individuals the very liberty that the Constitution was designed to protect”); *id.* at 32 (“[T]he argument that Congress has exceeded its enumerated powers and the argument that Congress has encroached upon individual liberty are, in fact, one and the same.”); Cuccinelli et al., *supra* note 235, at 295–96.

266. See, e.g., *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1284 (11th Cir. 2011) (“While these structural limitations are often discussed in terms of federalism, their ultimate goal is the protection of individual liberty.”); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010) (“At its core, this dispute is not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage—it’s about an individual’s right to choose to participate.”).

behavior once in the market.²⁶⁷ The chief justice rejected this reasoning, however. Even if “[t]o an economist, perhaps, there is no difference between activity and inactivity,” the Constitution’s framers were “practical men” who did not subscribe to such abstractions.²⁶⁸ For the joint dissenters, the distinction is based on “common sense.”²⁶⁹

To place on this contested distinction between the regulation of activity and inactivity the analytical weight that the Commerce Clause Majority does—to treat it as a distinction of constitutional significance and to describe this conclusion as nothing more than “common sense”—requires a baseline assumption about the nature of government regulation and individual freedom. This is the critical division between those who believed that the mandate was constitutional and those who did not. This is where LCF entered into the analysis. LCF assumes that protecting liberty is not just a consequence of limiting the federal government but a factor in deciding where those limits lie. Those who accept the activity/inactivity distinction as one of constitutional magnitude are working from a basic assumption that government-compelled entrance into a market is significantly more intrusive into the realm of personal liberty than is regulation of those already in a market. This liberty-centered critique was what energized the challenge to the mandate outside the courts.²⁷⁰

In other words, the action/inaction distinction, which only really makes sense if one approaches the issue with a certain degree of libertarian skepticism toward government regulation, functionalizes a liberty value in the Commerce Clause and Necessary and Proper Clause analyses themselves.²⁷¹ The chief justice, in his analysis of the commerce power claim, explained that “to regulate what we do not do” would “fundamentally chang[e] the relation between the

267. See, e.g., *NFIB*, 132 S. Ct. at 2617 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“[T]he decision to forgo insurance is hardly inconsequential or equivalent to ‘doing nothing’; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause.” (citation omitted)).

268. *Id.* at 2589 (majority opinion).

269. *Id.* at 2649 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

270. See, e.g., Smith, *supra* note 233, at 1726, 1742–46; Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 LAW & CONTEMP. PROBS. 157, 165 (2012) (“At its heart, the constitutional objection to the individual mandate sounds in individual liberty.”); Barry Friedman, *Obamacare and the Court: Handing Health Policy Back to the People*, FOREIGN AFF., Sept./Oct. 2012, at 87, 95 (“To begin with, this case was never truly about federalism; the real underlying concern was for individual liberty.”).

271. For a notably direct articulation of this move, see Cuccinelli et al., *supra* note 235, at 295 (“[M]aintaining an activity/inactivity distinction vindicates the insights of *Gregory* and of Justice Kennedy’s concurrence in *Lopez*, that there is a practical sense in which our liberties are preserved by federalism.” (footnotes omitted)).

citizen and the Federal Government.”²⁷² He and the authors of the joint dissent framed the mandate in Orwellian terms, as “dictat[ing] the conduct of an individual today because of prophesied future activity”²⁷³ and “impress[ing] into service third parties.”²⁷⁴ “The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.”²⁷⁵

Similarly, in concluding that the mandate was not proper under the Necessary and Proper Clause,²⁷⁶ the Commerce Clause Majority fell back on the same point underlying their commerce analysis; this was a regulation of inactivity and therefore categorically different—basically more intrusive—from all other laws that Congress has passed. Laws that “undermine the structure of government established by the Constitution,” are not “proper,” Chief Justice Roberts explained.²⁷⁷ In support of this conclusion—a limitation on the Sweeping Clause with much potential significance—the chief justice cited *Printz v. United States*.²⁷⁸ According to a line of argument pioneered by Randy Barnett, just as federalism principles drive the *Printz* holding that the federal government cannot commandeer state officials, so too might federalism principles prohibit the federal commandeering of private citizens.²⁷⁹ This was an argument that various lower courts embraced²⁸⁰ and that the chief justice seemed to accept.²⁸¹ To allow the regulation of inactivity means that, in the chief justice’s reasoning,

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

273. *Id.* at 2590.

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

275. *Id.* at 2591 (majority opinion); *see also id.* at 2649 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (warning that the government argument would allow Congress to regulate “all private conduct” under the Commerce Clause).

276. The chief justice accepted that the mandate could be justified as necessary to the regulation of the health care industry. *Id.* at 2591–92 (majority opinion). The joint dissenters went further than the chief justice here, concluding that the mandate was neither proper nor necessary. *Id.* at 2646–47 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

277. *Id.* at 2592 (majority opinion); *see also id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“[T]he scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.”).

278. 521 U.S. 898 (1997).

279. Barnett, *supra* note 173; *see also* States’ Brief, *supra* note 265, at 35, 39, 40–43.

280. *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1298 (N.D. Fla. 2011), *aff’d in part, rev’d in part sub nom. Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011).

281. *NFIB*, 132 S. Ct. at 2592; *see also id.* at 2626–27 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (challenging the chief justice’s application of the anti-commandeering cases to a law that operates directly on individuals).

“Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it.”²⁸²

This commandeering-the-people argument is pure LCF. Federalism’s role in protecting state sovereignty has receded into the background, if not entirely disappeared. Federalism now serves individual liberty directly. Opponents of the mandate, including the chief justice and the joint dissenters, justified the sharp action/inaction distinction in this way, which turned out to be the critical element of Court’s Commerce Clause holding. The protection of liberty has moved from a secondary effect of federal structure to a primary factor in drawing the boundaries of federal power.

The approach the Commerce Clause Majority adopted reduced the gap between the constitutional claim that advanced the challenge outside the courts and the narrower constitutional claim demanded by the constitutional doctrine. The doctrinal question that the courts considered involved the scope of congressional authority under the Commerce Clause—a structural question, strictly speaking, and therefore not the most logical forum in which to face concerns for the protection of individual liberty. LCF 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*, still the third rail of constitutional law. So rather than incorporating a liberty interest as a constitutional principle in its most direct form—a negative liberty right that would immunize individuals from this kind of government regulation—the Court took the novel approach of incorporating a liberty interest as an element of its federalism analysis.²⁸³

282. *Id.* at 2592 (majority opinion); see also *id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (rejecting the Necessary and Proper Clause as a justification for the mandate because it “represent[s] the expansion of the federal power to direct into a broad new field”).

283. Some critics have argued that this move is disingenuous, even nonsensical. Justice Ginsburg questioned whether the Commerce Clause Majority was just trying to bring *Lochner* back into the Court’s jurisprudence but through a backdoor mechanism. *Id.* at 2623 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“At bottom, the Chief Justice’s and the joint dissenters’ view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts that enter him or her into, or affect, the interstate market expresses a concern for individual liberty that [is] more redolent of Due Process Clause arguments.” (alteration in original) (quoting *Seven-Sky v. Holder*, 661 F.3d 1, 19 (D.C. Cir. 2011))); *id.* at 2623 n.8 (criticizing the dissenters for “their willingness to plant such [Due Process liberty] protections in the Commerce Clause”); see also *Mandate Oral Argument*, *supra* note 211, at 30 (comments of Solicitor General Donald B. Verrilli) (“[T]o embark on the kind of analysis that my friends on the other side suggest the Court ought to embark on is to import *Lochner*-style substantive due process.”); *id.* at 62 (comments of Justice Breyer) (“I’m focusing just on the Commerce Clause; not on the Due Process Clause, the Commerce Clause.”).

2. Popular Constitutionalism and Liberty-Centered Federalism

a. Theory

In highlighting LCF, our goal is not to challenge the legitimacy of the Commerce Clause Majority's approach. Although there are grounds on which to criticize what the Court did—not the least of which is the important question of whether federalism is an appropriate vehicle for protecting individual liberty²⁸⁴—we seek in this Subpart to present, without necessarily subscribing to, only a modest claim: A viable argument can be made out that the Commerce Clause Majority's reading of the Constitution was defensibly responsive to extrajudicial developments under the general principles of popular constitutionalism.

The premise of popular constitutionalism, when considered as a normative theory of constitutional interpretation, is that the constitutional system functions better when the courts interpret the Constitution in a way that is responsive to durable, widespread shifts in popular constitutional expectations.²⁸⁵ When courts consider themselves as participants in a wider dialogue about the meaning of the Constitution—a dialogue that involves the political branches of government, people acting outside formal government institutions, as well as the courts—then, the popular constitutionalist argues, we have a system that is more democratic,²⁸⁶ that strengthens the legitimacy of the courts and the Constitution,²⁸⁷ and that provides more protection for individual rights.²⁸⁸

If the Commerce Clause Majority's analysis is to be justified, it will not be on the tenuous grounds of precedent, which is at best agnostic on the mandate issue, or on the far more tenuous grounds of original meaning, which was

284. See, e.g., Smith, *supra* note 233, at 1742–46; Rick Hills, *Federalism & Healthcare: The Dangers & Benefits of Confusing Individual Rights With Federalism*, PRAWFSBLAWG (Dec. 14, 2010, 10:07 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/12/federalism-healthcare-the-dangers-benefits-of-confusing-individual-rights-with-federalism.html>. But see Young, *supra* note 270, at 169–72 (defending federalism as a vehicle for protecting individual liberty).

285. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Robert C. Post & Reva B. Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

286. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

287. See, e.g., JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 10 (2011); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007).

288. See, e.g., TUSHNET, *supra* note 285, at 172; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000); Waldron, *supra* note 286.

conspicuously absent in *NFIB* apart from some generic references to the Founders and quotations from *The Federalist*. It will be justified on the grounds of popular constitutionalism—that the Court was acknowledging and validating an understanding of the Constitution embraced by a substantial portion of the American populace. We need not resolve the difficult question of how to measure the precise scope and content of popular constitutional commitments (a perennial problem for the theory of popular constitutionalism) to recognize that a significant portion of the American people sympathized with the constitutional challenge to the ACA mandate and its underlying libertarian assumptions.

b. Empirics

A full popular constitutionalist defense of *NFIB*'s pivot to LCF requires a historical and sociological study beyond the scope of what we can provide here. Even a cursory overview, however, strongly suggests that American sensibilities have shifted in a way that could justify the Court's move.

In the post–World War II era, a diffuse libertarian sensibility has grown steadily in American society, characterized by the belief that government regulation should be limited in order to maximize individual freedom. The general contours of this development have been well documented. Cultural libertarian trends toward sexuality and expression that were ignited in the 1960s merged with disillusionment toward government in the wake of the Vietnam War and Watergate, producing an antiauthoritarian groundswell in America. Conservatives proved particularly effective at capitalizing on this sentiment. Popular resentment toward taxes, social welfare policy, and civil rights energized a grassroots movement fueled by a potent combination of social conservatism and economic libertarianism.²⁸⁹ The Republican Party transformed itself, moving in a direction that was both more conservative and more populist, while still maintaining its solid foothold in the business community. The New Right's embrace of lower taxes and deregulation found intellectual respectability in the work of a cadre of newly relevant libertarian intellectuals, who for decades had been making the case for freer markets and limited government.²⁹⁰ These developments brought an era defined by tax revolts and deregulation, by a sharply

289. See KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* (2005); MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* (2006); KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* (2009).

290. See ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* (2012).

chastened vision of the social welfare state, and by a general atmosphere of antagonism toward government.²⁹¹ Although actual reforms of government practices never matched the bold conservative rhetoric,²⁹² the rise of the New Right marked an ideological sea change from the New Deal and Great Society periods.²⁹³

The years leading up to *NFIB* saw a flurry of libertarian activism. The Tea Party fervor, which culminated in the 2010 midterm elections, brought its own style of libertarianism to the front lines of the political debate—a libertarianism that Tea Partiers put in terms that were amplified and explicitly constitutional.²⁹⁴ Popular skepticism toward government has reached all-time highs.²⁹⁵ The basic premise of libertarianism—that government regulation inflicts substantial liberty costs on the American people, costs that must be borne in many instances, but not all—seems to have captured broad swaths of the American people.²⁹⁶

It was in this atmosphere of a long-term trend in the direction of libertarian principles, combined with the Tea Party-fueled burst of antigovernmentalism and aggressive popular constitutional mobilization, that the constitutional challenge to the ACA took shape. Opponents of the ACA's individual mandate effectively framed the mandate in terms of this larger story of ever-expanding federal bureaucracy trenching on the freedoms of the American people. In doing so, they transformed a policy designed as a moderate alternative to a big-government solution²⁹⁷—a policy in which the private market would play a central role—into an assault on human liberty and constitutional principle.

From the beginning, the constitutional argument against the mandate that was articulated outside the courts was disarmingly simple. This was a story of

291. See generally JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* (2004) (documenting the rise of the Republican Party in the United States since 1964); SEAN WILENTZ, *THE AGE OF REAGAN: A HISTORY, 1974–2008* (2008) (detailing how the conservative movement came to dominate American politics over the last thirty-five years).

292. See, e.g., Milton Friedman, *The Battle's Half Won*, WALL ST. J., Dec. 9, 2004, <http://online.wsj.com/article/SB110255773839695254.html> (“After World War II, opinion was socialist while practice was free market; currently, opinion is free market while practice is heavily socialist. We have largely won the battle of ideas . . . ; we have succeeded in stalling the progress of socialism, but we have not succeeded in reversing its course. We are still far from bringing practice into conformity with opinion.”).

293. See, e.g., MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003).

294. See Schmidt, *supra* note 160.

295. See *id.* at 202.

296. See, e.g., Nate Silver, *Poll Finds a Shift Toward More Libertarian Views*, N.Y. TIMES FIVETHIRTYEIGHT BLOG (June 20, 2011, 9:26 AM), <http://fivethirtyeight.blogs.nytimes.com/2011/06/20/poll-finds-a-shift-toward-more-libertarian-views>.

297. See Michael Cooper, *Conservatives Sowed Idea of Health Care Mandate, Only to Spurn It Later*, N.Y. TIMES, Feb. 15, 2012, at A15; Klein, *supra* note 234.

government oppression and personal liberty. “[C]ompelling people to spend part of their income on something they may not want is an unwarranted intrusion by government,” was how one news account explained the issue in the fall of 2009, just as opponents were beginning to mobilize behind their constitutional claim.²⁹⁸ Captured in this narrative, the ACA mandate became increasingly unpopular in the period following the ACA’s passage.²⁹⁹ Various states passed laws or public referenda opposing the mandate,³⁰⁰ and twenty-seven states joined lawsuits challenging the ACA. In remarkably short order, a belief that the mandate violated the Constitution went from a fringe argument of libertarian ideologues to a Tea Party tenet to a consensus position in the Republican Party, with the party’s presidential primary turning into a contest of one-upsmanship in attacking the mandate. The Court considered the constitutional challenge to the mandate in this context.

In short, while the data on America’s ideological pulse are conflicting, and conflicted,³⁰¹ it is plausible to suggest that the nation may have settled on a new baseline of skepticism toward government regulation and of commitment to the belief that their constitutional liberties are at stake when the government regulates their personal behavior. At minimum, a libertarian sensibility is more viable today in mainstream political and legal discourse than it was in the middle of the twentieth century when the framework of modern constitutional law took shape. Popular constitutional theory suggests that those empowered to provide official interpretations of the Constitution could, and should, recognize the

298. Katharine Q. Seelye, *A Constitutional Debate Over a Health Care Mandate*, N.Y. TIMES PRESCRIPTIONS BLOG (Sept. 26, 2009, 2:22 PM), <http://prescriptions.blogs.nytimes.com/2009/09/26/the-right-the-duty-to-bear-insurance-cards>.

299. CNN/OPINION RESEARCH CORP. POLL (2011), *available at* <http://i2.cdn.turner.com/cnn/2011/images/06/09/healthcare.pdf> (reporting, from a poll conducted from June 3 to 7, 2011, that 54 percent opposed the mandate); KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL 2 (2012), <http://kff.org/health-reform/poll-finding/kaiser-health-tracking-poll-march-2012> (finding, from a poll conducted February 29 to March 5, 2012, that 51 percent believe the Supreme Court should hold that the mandate is unconstitutional, 28 percent believe the Supreme Court should hold that it is constitutional); *Washington Post-ABC News Poll*, WASH. POST, http://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll_031012.html (last visited Sept. 12, 2013) (reporting, from a poll conducted from March 7 through March 10, 2012, that 42 percent want the Supreme Court to strike down the entire ACA, with an additional 25 percent wanting the Court to strike down just the mandate).

300. *See, e.g.*, States’ Brief, *supra* note 265, at 38 n.4 (cataloguing states that passed laws opposing the individual mandate); Sam Baker, *Ohio Voters Reject Health Insurance Mandate*, HILL (Nov. 8, 2011, 10:42 PM), <http://thehill.com/blogs/healthwatch/politics-elections/192549-ohio-voters-reject-health-insurance-mandate> (reporting on the Ohio referenda rejecting the mandate by a 2-1 majority); Sarah Kliff, *Arizona and Oklahoma Vote to Reject Insurance Mandate*, POLITICO (Nov. 3, 2010, 4:11 AM), <http://www.politico.com/news/stories/1110/44614.html#ixzz14EKuvVid>.

301. *See, e.g.*, E.J. DIONNE JR., *OUR DIVIDED POLITICAL HEART: THE BATTLE FOR THE AMERICAN IDEA IN AN AGE OF DISCONTENT* (2012).

populace's evolving constitutional commitments. Under this reasoning, extrajudicial developments can function to broaden the options available to the justices. One could therefore plausibly argue that the modified analysis of the commerce power in *NFIB*, informed by libertarian assumptions, was a responsive constitutional interpretation.

B. Procedural Considerations

Although popular constitutionalism may be used to justify the substantive Commerce Clause doctrine that emerged from *NFIB*, we argue that *NFIB*'s Commerce Clause Majority serves as a cautionary tale to the extent that popular constitutionalist pressures may have steered the Court away from its usual methods of judicial craft. The mere fact that the Court's insistence on a limiting principle departed so sharply from the ordinary case-by-case analysis of novel constitutional questions³⁰² is cause for notice. We also think such a deviation from LR calls for a justification. The *NFIB* Court neither acknowledged nor justified its abandonment of LR. Indeed, we think it would be tough to do so, for three powerful considerations justify courts' ordinary practice of LR: (1) judicial competency, (2) the legislature's competence and democratic pedigree, and (3) institutional synergies between courts and legislatures.³⁰³

1. Judicial Competency

LR in cases of novel constitutional questions can be defended on the grounds of judicial competency, in both a negative and positive sense. The negative sense is that courts should rule modestly because they have limited foresight.³⁰⁴ The positive sense is that LR in first cases allows courts to come to

302. See *supra* Part I. The closest the justices have come to explicitly recognizing a rule in favor of LR appears to be in *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885) (noting it was "bound" by the requirement that it is "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," stating that this "rule" is a "safe guide[] to sound judgment," and that "[i]t is the dictate of wisdom to follow [it] closely and carefully"). Justice Brandeis cited *Liverpool* in his influential concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Justice White invoked *Liverpool* and *Ashwander* in his *Chadha* dissent when he rebuked the majority for deciding the constitutionality of all legislative vetoes rather than decide the case narrowly vis-à-vis only the single statute that had been challenged. See *INS v. Chadha*, 462 U.S. 919, 975 (1983) (White, J., dissenting).

303. Space limitations preclude us from considering the important role played in this process by the executive branch.

304. The Court explicitly referenced this concern in *Champion v. Ames*, 188 U.S. 321 (1903). See *supra* note 83 and accompanying text. Though constitutional abuses of the Commerce Clause were not

genuinely deep insights in later cases that might have been foreclosed by a prematurely issued final rule. This is because a narrow ruling in a first case invites follow-up cases, and this opportunity to repeatedly tackle a question that is presented in varying factual settings—and that is differently framed³⁰⁵—can be epistemologically beneficial. Normatively relevant factors that are impossible to anticipate may emerge over time in successive cases. Further, it can take some time before it is fully understood why a factor is normatively relevant and how important it is. Setting a rule before these factors are recognized and understood and that accordingly does not take full and proper account of them might result in suboptimal doctrine. Furthermore, the challenges that varying fact patterns present can facilitate comprehension of the deeper principles that are normatively relevant to sorting out a problem. In other words, LR is beneficial for problems that are suited to inductive analysis: bottom-up reasoning that begins with multiple data points—here, decided cases on specific facts—and that generalizes from them to generate more abstract governing principles. Inductive reasoning is the epistemological theory behind the common law’s case-by-case system, and insofar as our case-based method of constitutional adjudication is a common law system, longstanding practice suggests it is well suited to analyzing a wide range of constitutional questions.³⁰⁶

Moreover, some difficult problems can be mastered only after wrestling with them for a time, taking a break, returning to them, leaving them again for some time, and repeating the process until a steady equilibrium solution is reached. As to these sorts of problems, deciding matters before necessary likely results in suboptimal outcomes.

It might be suggested that these epistemological advantages can be reproduced by hypotheticals. If this were so, a court hearing a new constitutional question could consider the range of relevant facets through hypotheticals and safely issue a broad-yet-informed ruling. We are deeply skeptical, however, that

“difficult to imagine,” *Champion* elected to “decide nothing more in the present case than that” the particular challenged statute was constitutional on the ground that providing a limiting principle would have been too difficult for courts. *Champion*, 188 U.S. at 363. “The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause.” *Id.* The Court accordingly only passed judgment on what Congress had actually enacted.

305. See Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 954–55 (2006).

306. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 46 (2010) (referring to the United States as having a “common law Constitution”); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 242 (1999) (noting that our country’s “system of case-based constitutional law . . . owes a great deal to the common law heritage”).

armchair hypotheticals are an adequate substitute. We doubt that even the most inquisitive of minds can build a sufficient bridge between present and future by means of hypotheticals; there is no escaping humanity's limited foresight. Moreover, even when a future-anticipating hypothetical is identified, it cannot be safely assumed that the hypothetical's discussants will give it the same treatment it would receive by parties for whom it is real. Indeed, there are reasons to think that conclusions reached in real life may be generally preferable to products of armchair reasoning.³⁰⁷ These considerations suggest that hypotheticals are no substitute for the insights that only time and the real world can provide.

Hypotheticals are not only inadequate for the reasons adduced above but also can be problematic. Though government must be designed so it can respond to unusual and hard-to-anticipate circumstances, it is unwise to design governmental institutions to accommodate outlandish eventualities that cannot arise.³⁰⁸ Doing so can not only be wasteful but also lead to distortions that make government function suboptimally across the range of circumstances that actually present themselves.³⁰⁹ While hypotheticals present the danger of hypercautionary design, modest judicial decisionmaking is its antidote; courts can prevent

307. Many factors suggest that real-life decisionmaking can result in superior decisionmaking. First, people may not invest the same energy in analyzing hypotheticals as they do when confronted with a real circumstance. Second, the limits on imagination make it impossible to fully consider, and thereby fully analyze, all the normatively relevant circumstances that real situations present. Third, and closely related, it may be the case that emotions and other inputs that cannot be adequately activated by imagination play a vital role in decisionmaking and hence are problematically absent from hypothetical-based reasoning. *See generally* MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001) (arguing that emotions are an aid to moral understanding). None of this is inconsistent with the observation that some decisions, like Ulysses's decision to tie himself to the mast, may best be made by precommitment. *See generally* JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979). But there are strong reasons to think that "the panic-stricken model of Odyssean precommitment seems singularly inappropriate as a basis or template for constitutional theory," JEREMY WALDRON, *LAW AND DISAGREEMENT* 281 (1999), and, in any event, constitutions necessarily underdetermine what is constitutionally permitted, required, and prohibited. The arguments above in the text are particularly directed to these underdetermined constitutional questions. *See infra* Part III.B.

308. *Cf. Nixon v. United States*, 506 U.S. 224, 238 (1993) (Stevens, J., concurring) ("Respect for a coordinate branch of the Government forecloses any assumption that improbable hypotheticals like those mentioned by Justice White and Justice Souter will ever occur.").

309. *Cf. NFIB*, 132 S. Ct. 2566, 2625 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("When contemplated in its extreme, almost any power looks dangerous."); Brief of Edward W. Brooke, Attorney General of the Commonwealth of Massachusetts, as Amicus Curiae in Support of the United States, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (No. 515), 1964 WL 81381, at *19 ("It is not the function of this Court to imagine bizarre circumstances, isolated from the problem sought to be alleviated by the statute, merely to invalidate the statute. Were this not true, little legislation could pass muster.").

distortive unrealistic eventualities from shaping their opinions to the extent that they limit themselves to deciding the question that is presented.

In noting the dangers of hypercautionary design, we do not mean to condemn hypotheticals categorically but only to caution that there can be costs to considering the outlandish hypothetical. The extent to which hypotheticals are appropriate in making constitutional judgments about governmental powers would seem to turn on the likelihood that the outlandish hypothetical might actually occur.³¹⁰ Importantly, not all governmental institutions are equally prone to act outlandishly.³¹¹ For instance, there are reasons to think that the legislative branch is less prone to outlandish action than the executive is and that Congress is less predisposed to such action than are state legislatures. To begin, legislatures are multimember institutions that can act only when agreement exists among a large number of people who ordinarily enact only generally applicable statutes; the procedural hurdles to enactment, coupled with the publicity that attends legislation, provide checks to outlandish action. By contrast, executive branch decisions are frequently made by individuals, regularly apply only to individuals rather than to the public at large, and are not commonly known or realistically knowable to the public.³¹² Moreover, the executive branch contains far fewer members than the legislative branch. Compared to legislatures, in other words, the executive branch can act with relative ease and opacity, making executives more prone than legislatures to act outlandishly; what starts out as an adventurous hypothetical may actually occur, thereby lessening hypercautionary design concerns vis-à-vis the executive branch. Similar considerations suggest that state legislatures are more apt to act outlandishly than Congress; because Congress has many more members than does any single state's legislature, federal legislation requires agreement among many more people. Moreover, Congress is typically subject to greater public scrutiny and accountability than are state legislatures. All these considerations suggest that the costs of hypercautionary

310. Cf. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1030–31 (2003) (arguing that slippery-slope concerns must take account of how realistic a future potential consequence is).

311. See generally Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1582–1601 (2005) (arguing that different governmental institutions are prone to different types of malfunctions and that constitutional doctrine should be tailored to take account of such institutional differences).

312. Though this is an ultimately empirical claim, the demonstration of which lies beyond this Article's scope, the basic concept of collective-action costs strongly suggests it is true. For an instructive discussion of why citizen involvement and knowledge of government varies across governmental institutions on account of the varying costs of political participation, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 30–70 (1994).

design are least justifiable vis-à-vis Congress. It follows that judicial use of hypotheticals to decide cases should be modulated depending on which governmental institution's actions are being challenged, and that the active use of hypotheticals is least justifiable when reviewing federal statutes.

These lessons are pertinent to *NFIB*. Congress has seldom required the purchase of anything and never before has it done so in reliance on the Commerce Clause. It is not hard to understand why. Compelled purchases are unpopular. They are costly to citizens and, even worse than taxes—a cost that voters also do not like—they interfere with liberty by requiring citizens to buy something. These factors suggest that the risk of future congressionally compelled purchases was slight,³¹³ and that deciding the scope of the Commerce Clause's powers based on such concerns accordingly may well have been a regrettable instance of hypercautionary design.

2. Appropriate Respect for Congress

When the Court leaves constitutional questions undecided, it leaves space for Congress³¹⁴ to consider the question and offer its judgments as to what the Constitution permits, requires, or proscribes.³¹⁵ For instance, while the ACA reflected Congress's judgment that the compelled purchase of health insurance was constitutional, Congress never had an opportunity to determine whether the compelled purchase of any other item would be constitutional. If Congress views *NFIB* as having settled the constitutionality of compelled purchases—that is to say, as having determined that they are flatly unconstitutional—then we will never have Congress's judgment. In other words, if the Court too quickly answers a constitutional question, it prevents other institutions from ever offering their judgment on the matter.

313. Cf. Greene, *supra* note 12, at 273 n.42 (“The most powerful ‘limiting principle’ that prevents a federal broccoli mandate is neither any specific legal doctrinal principle nor the principle of political accountability as such. It is more precisely what we might call a principle of social membership. It is not that any member of Congress supporting a broccoli mandate would be voted out of office—this kind of political accountability story is premised, implicitly, on the vaguely conspiratorial notion that members of Congress would enact tyrannical regulations (for their own sake?) if left unchecked by their constituents. The more direct explanation for members of Congress not seeking to enact tyrannical regulations is that they do not support them. A society in which the broccoli objection counts as a slippery slope argument is one whose elected officials are quite unlikely to support a broccoli mandate. It follows that we cannot actually count on such officials being voted out of office for supporting the mandate because the society in which such support was possible would not find the mandate self-evidently unacceptable.” (citation omitted)).

314. This includes other societal institutions as well, such as the president, states, and the public. For present purposes, however, we shall confine our discussion to Congress.

315. For an extended discussion, see SUNSTEIN, *supra* note 306, at 117–36.

While there are various justifications for an approach to constitutional interpretation in which the Court shares interpretive responsibility with Congress—including historical practice dating back to the earliest years of the Supreme Court³¹⁶ and principles of democratic theory³¹⁷—we focus here on three institutional benefits of congressional participation in the rendering of constitutional judgments.

a. Harmonizing Competing Commitments

Almost all determinations as to what the Constitution permits, requires, or proscribes, turn on judgments as to how to harmonize competing commitments. Harmonization is necessary because virtually no constitutional commitments are absolute. This is the case for two reasons. First, one constitutional commitment can conflict with another. For instance, the constitutional value of a free press can jeopardize the right to a fair trial.³¹⁸ In such a circumstance, both commitments cannot be absolute; at least one must yield. Second—and far more important in our tradition—constitutional commitments can almost always conflict with important, albeit subconstitutional, commitments. The usual practice is to compromise the constitutional value in order to accommodate one of these sufficiently important subconstitutional interests if (and only if) the governmental action is carefully designed to achieve that interest.³¹⁹

How are these two types of harmonization determinations made? The commitments involved are almost always incommensurable: they cannot be translated to a meaningful common scale such that the choice between or among them is a matter of logic about which all rational people must agree.³²⁰

316. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401–02 (1819) (relying heavily on the fact that Congress had extensively debated the constitutional basis for creating a national bank as a reason for deferring to congressional judgment on this question).

317. There is a vast literature on this issue. A seminal articulation can be found in James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

318. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 350, 361 (1966) (holding that while “[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field,” the constitutional requirement of a fair trial demanded that trial court should have “proscribed extrajudicial statements by any lawyer, party, witness, or court official” about many matters).

319. See *infra* note 328 and accompanying text.

320. One might think that there is an objective way of ordering conflicts between constitutional and subconstitutional commitments, namely that the constitutional commitment always trumps by virtue of its constitutional status. The simple answer is that our tradition does not work that way. See Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 429 (1993). Other liberal democracies also do not work that way. See generally AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (Doron Kalir trans., 2012) (discussing the limitations of constitutional rights in a constitutional democracy).

Accordingly, the decision of how to harmonize the commitments is inherently, and irreducibly, subjective.³²¹

Understanding harmonization helps one recognize why Congress³²² appropriately plays at least some role in harmonizing competing constitutional and subconstitutional commitments. The Constitution's text identifies constitutional commitments but does not indicate how they are to be harmonized with competing commitments. Harmonization decisions often cannot be made simply by consulting traditional legal materials³²³ because neither these materials nor legal acumen provide the resources for resolving the deeply political (in the sense of being both subjective and identity-forming) questions that are harmonization's province. Philosophers persuasively argue that decisions as to how to harmonize competing commitments both define and express the decisionmaker's character, and in that sense are deeply constitutive of the decisionmaker.³²⁴ More concretely, how an individual harmonizes her competing incommensurable commitments goes far in determining who she is as a person,³²⁵ how a polity harmonizes competing constitutional and subconstitutional commitments goes far in determining its political culture.³²⁶ We do not

321. An array of metaphors typically is invoked to represent this decisionmaking process—such as balancing, or deciding that one commitment has more weight than another, or that one trumps or overrides another. We prefer the phonic metaphor “harmonization” because it suggests two things that these other metaphors do not: (1) that all incommensurable commitments are meaningfully present in the rendered decision (just as the chord heard after striking multiple notes is a single composite of its constitutive notes) and (2) that the decision, insofar as it is an amalgam of the two or more incommensurable commitments, is qualitatively new and different from any of the commitments singly considered. (To anticipate a possible misconception, harmonization is not intended to suggest that the decision somehow eliminates the conflict among competing commitments.) We are not the first to make use of aural metaphors. *See, e.g.*, Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 819–23 (2008) (discussing “monophonic” and “polyphonic” federalism).

322. This includes not only Congress, but the president and the public as well, though this Article is not the place to fully make this argument.

323. This statement may be made with one caveat: before a judicial decision has been rendered and there is binding precedent on a specific question.

324. *See* Elijah Millgram, *Incommensurability and Practical Reasoning*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 151 (Ruth Chang ed., 1997) (focusing on individual decisionmaking under circumstances of incommensurability); Joseph Raz, *Incommensurability and Agency*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra*, at 110 (arguing that choice, not rationality, governs the selection among incommensurables); Charles Taylor, *Leading a Life*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra*, at 170 (arguing that justified choice among incomparables can be made by analyzing how the competing goods fit within the “shape” of a person's life).

325. *See* sources cited *supra* note 324.

326. For instance, whereas the constitutions of all liberal democracies protect speech, *see generally* ERIC BARENDT, FREEDOM OF SPEECH (2d ed. 2005) (comparing free speech laws in liberal legal systems such as the United States, Canada, Germany, and other jurisdictions), U.S. doctrine

suggest that courts are without competence or sufficient democratic pedigree to participate in harmonization—to the contrary, as we soon shall explain. But considerations of democratic theory and institutional competence suggest that surely Congress also plays a substantial role.

b. Facts' Centrality to Normatively Correct Outcomes

The harmonization process described above sheds light on another reason Congress properly plays a substantial role in rendering constitutional judgments. If constitutional commitments can come into tension with other constitutional principles as well as with subconstitutional commitments, and if there is no metaprinciple for sorting out such conflicts, then harmonizing competing commitments is invariably a fact-intensive, context-sensitive enterprise.³²⁷ Stated differently, factual particulars likely matter to the harmonization process, which itself is an aspect of constitutional decisionmaking. Accordingly, we should not be surprised if constitutional outcomes cannot be mechanically plotted as a function of a single constitutional principle. Normatively correct constitutional outcomes are messier because multiple competing commitments concertedly determine the appropriate outcome and because the significance of each commitment may shift as facts vary.

Constitutional doctrine for the most part is consistent with the understanding that facts matter to constitutional outcomes. Consider this representative statement from the affirmative action context:

Whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. But that observation says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.³²⁸

This means that government can treat people unequally because of their race so long as there is a compelling government interest and the law is narrowly

permits speech to be overridden by countervailing interests far less readily than do other countries, most of which permit the regulation of hate speech. See Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1601 (2010) (discussing hate speech legislation of other liberal democracies). In other words, how liberal democracies harmonize the constitutional commitment to speech with other commitments varies, and each polity's harmonization decision is a signature feature of its political culture.

327. For a similar account of moral decisionmaking, see JOHN MCDOWELL, *MIND, VALUE, AND REALITY* 67–69 (1998).

328. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229–30 (1995)) (internal quotation marks omitted).

tailored. But what meets these criteria? Answers invariably must be highly context specific and fact dependent, which means that taking account of factual particulars is indispensable to determining whether any particular affirmative action program is constitutional. And this conclusion concerning the constitutional significance of facts can be generalized to all constitutional commitments that are judicially enforced by noncategorical legal tests—which is to say, to almost all constitutional commitments.³²⁹

The constitutional significance of facts has important institutional implications. If facts matter to constitutional judgments, then Congress appropriately plays another critical role in the process of constitutional judgmentmaking: finding and evaluating facts, two well-understood competencies of legislatures.³³⁰ This means there is an intelligible connection among Congress's three main tasks in making constitutional judgments—(1) finding and (2) evaluating facts is a necessary precursor to (3) harmonizing competing commitments. To be clear, this implies nothing about courts' appropriate role in reviewing Congress's judgments. But it does provide grounds for a deep suspicion of judicial practices that bypass, foreclose, or ignore congressional participation in constitutional judgmentmaking. One such suspicion-inducing judicial practice is that of broad pronouncements by the Court when it hears a novel constitutional question. LR, by contrast, allows for participation by Congress.

c. Revisiting the Exceptions

As discussed above, a small group of cases—*Chadha*, *Printz*, *New York*, and *Plaut*—rely on ostensibly categorical legal tests in which the Court has said that facts did not matter to the outcomes.³³¹ For example, *Printz* ruled that the federal government can never compel state executives to administer federal law, and *Plaut* held that legislatures can never open final judgments.³³² The Court declared factual particulars—for instance, the degree of federal interest and how

329. For an exhaustive examination of the noncategorical legal tests that are used by courts to protect different constitutional commitments, see RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001).

330. There is substantial literature addressing legislatures' peculiar competencies in finding and evaluating facts. See, e.g., Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971) (offering seminal discussion of the issue).

331. See *supra* notes 109–127 and accompanying text.

332. See *supra* notes 113–115, 118–119 and accompanying text.

minimal the executive intrusion was in *Printz*³³³ and the justifications for reopening the final judgment in *Plaut*—to be constitutionally irrelevant.³³⁴

We would like to make three observations. First, categorical, fact-independent rules are highly unusual because virtually all constitutional commitments are nonabsolute, with the line between permissible and illicit being a function of facts. For instance, though the First Amendment commands that freedom of speech shall not be abridged, laws that prohibit political advocacy near polling stations on election day are constitutional.³³⁵ More generally, the judicial tests of strict scrutiny, intermediate scrutiny, rational basis, and balancing—which implement virtually all our constitutional commitments³³⁶—contemplate circumstances under which the constitutional interests they protect can be regulated, and the distinction between constitutionally permissible and constitutionally illicit turns on the facts that satisfy (or do not satisfy) these legal tests.

Second, the preference for deciding constitutional cases based on categorical principles independent of facts likely grows out of a specific jurisprudential view, which may have been best articulated by Justice Scalia.³³⁷ Justice Scalia rejects a case-by-case, common law-type approach to deciding constitutional questions³³⁸ on the grounds that it is inconsistent with democracy and wrongly licenses changes to the Constitution.³³⁹ Our discussion points to flaws in his critique.³⁴⁰ Because the Constitution does not itself determine how to harmonize its many commitments, a case-by-case approach to constitutional decisionmaking that is appropriately responsive to factual differences is, rather than a license for problematic change, a necessary mechanism for constitutional development. Further, it is the premature judicial pronouncement of categorical fact-independent rules that is undemocratic, for it displaces the roles that Congress

333. See *Printz v. United States*, 521 U.S. 898, 935 (1997).

334. See *id.*

335. See *Burson v. Freeman*, 504 U.S. 191 (1992).

336. See, e.g., FALLON, *supra* note 329.

337. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) (arguing that a text-based approach to statutory and constitutional interpretation is more compatible with democratic governance than one that relies on legislative intent and legislative history). Not surprisingly, Justice Scalia played a crucial role in, what we have termed, the four outlier cases. He authored the majority opinions in *Plaut* and *Printz*, and was the lead author of an amicus brief filed with the Court in *Chadha*. See *INS v. Chadha*, 462 U.S. 919, 922 (1983).

338. See SCALIA, *supra* note 337, at 39–40 (identifying case-based constitutional adjudication as “preeminently a common-law way of making law, and not the way of construing a democratically adopted text”).

339. See *id.* at 9, 38–45.

340. Cass Sunstein has written a long critique of Justice Scalia’s argument, with which we largely agree. See SUNSTEIN, *supra* note 306, at 209–43.

and other institutions properly apply in determining what the Constitution requires, proscribes, and permits.³⁴¹

Third, we question the extent to which *Plaut*, *New York*, *Printz*, and *Chadha* count as normative counterexamples, for we believe all have shown themselves to be uniquely disruptive to the constitutional system. *Plaut*, *New York*, and *Printz* distilled single principles only by means of unpersuasive formal distinctions and disfiguring treatments of earlier decisions, which together disregarded longstanding precedent and practices that were inconsistent with the single principle each case identified.³⁴² Similarly, *Chadha*'s flat rule that all legislative

341. More generally, Justice Scalia's argument is in deep tension with Justice Holmes' famed observation that "[g]eneral propositions do not decide concrete cases," *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), and is sharply discontinuous with the Court's longstanding case-by-case methodology of constitutional decisionmaking. See sources cited *supra* note 306.

342. *Plaut* asserted a categorical rule that "a judgment conclusively resolves the case," and therefore prevents Congress from reopening a final judgment, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (internal quotation marks omitted), despite an earlier decision that upheld a federal statute that waived the res judicata effects of a prior judgment, and that thereby allowed plaintiffs to pursue a claim notwithstanding a federal court's prior rejection of that very claim. See *id.* at 255–56 (Stevens, J., dissenting) (discussing *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)); see also *id.* at 247 (marshalling statutes to support the proposition that "[t]hroughout our history, Congress has passed laws that allow courts to reopen final judgments"). *Plaut*'s majority distinguished *Sioux Nation* on the basis that it relied on a "line of precedent . . . that stood . . . for the proposition that 'Congress has the power to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States.'" *Id.* at 230 (majority opinion) (quoting *Sioux Nation*, 448 U.S. at 397). This distinction, however, does not vindicate—but instead undermines—*Plaut*'s categorical constitutional rule against the legislative reopening of final judgments.

Printz concluded that state executives categorically cannot be commandeered notwithstanding the Extradition Act of 1793, a federal statute that requires the "executive authority" of a state to cause the arrest and delivery of fugitives from another state. *Printz v. United States*, 521 U.S. 898, 909 (1997). The majority distinguished the Extradition Act on the basis that it was enacted pursuant to the Constitution's Extradition Clause rather than the Commerce Clause. *Id.* But this distinction does not support *Printz*'s principal claim that "[i]t is the very principle of separate state sovereignty that [commandeering] offends." *Id.* at 932.

New York's majority opinion found support for its categorical rule that state legislatures can never be commandeered in *Federal Energy Regulatory Commission v. Mississippi*, from which the *New York* court quoted as follows: "[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." See *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 761–62 (1982)) (internal quotation marks omitted). The full quotation from *Federal Energy Regulatory Commission*, however, suggested something quite different: "While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." *Fed. Energy Regulatory Comm'n*, 456 U.S. at 761–62 (citation omitted).

veto is unconstitutional has not prevented Congress from continuing to pass legislative vetoes.³⁴³

In short, these cases all attempt to impose a single principle over constitutional regions that had been governed by a messier mix of multiple competing considerations that had been harmonized in intricate, situation-specific ways. We suggest that reality's failure to neatly map to a single decisive constitutional principle in area after area raises substantial doubts as to whether fact-independent, categorical constitutionalism is normatively attractive. If this is correct, then facts matter, and Congress accordingly has an important role in finding and evaluating those facts that are relevant to constitutional judgmentmaking.

3. Institutional Synergies

Allowing time and space for courts and legislatures to exercise their unique competencies can bring about substantively superior and more democratically legitimate outcomes than if only a single institution acts alone to make constitutional judgments, as happens if courts prematurely identify limiting principles.³⁴⁴

First consider the value that courts can add over time. Courts are particularly well suited to tease out the principles that underlie constitutional commitments, and to reveal the many countervailing interests with which such commitments may be in tension. Legislatures, by contrast, are not well situated to identify underlying principles and countervailing considerations because it is hard to flesh these things out in the abstract under the best of circumstances, and

343. See LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 152 (5th ed. 2007) ("From the day that *Chadha* was issued on June 23, 1983, to the end of 2006, more than 500 new legislative vetoes had been enacted into law.").

344. It may be wise to say a few words about our argument's relation to one of the most important discussions of constitutional decisionmaking, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Wechsler famously argued that courts must decide constitutional cases by means of "reasons that in their generality and their neutrality transcend any immediate result that is involved." *Id.* at 19; see also *id.* at 16–17. We do not disagree, though we think that Wechsler's critique of "*ad hoc* evaluation," *id.* at 12, presupposes a clarity that often is not immediately apparent—but that might become evident over time—as to what factors adequately distinguish two scenarios such that different outcomes do not impugn equality and the rule of law. Likewise, many decisions that Wechsler criticizes for failing to "disclose[] the grounds on which [the Court's] judgments rest," *id.* at 20–21, appear to us as instances of early and defensible LR that preceded the Court's later articulation of general principles. More generally, we question to what extent the "appraisal of conflicting values" present in constitutional adjudication is susceptible to "reason" and "principle." *Id.* at 16. Further, Wechsler's strong commitment to neutral principles is an outgrowth of a view of strong judicial review that we do not share. *Id.* at 6–10.

because legislators typically operate in a nonideal world of heavily burdened agendas that does not allow for such cogitation. Further, legislators—by temperament—may not generally have the patience for such analysis anyway.

After courts have considered matters through multiple cases, legislatures can work with what is effectively a court-generated menu of considerations.³⁴⁵ Congress can use its special skills in finding and evaluating the facts that have a bearing on the context at hand, and it can then take these facts and evaluations to the deeply subjective and identity-defining task of harmonizing competing commitments when it legislates.

After Congress has acted, its statutes can be challenged in court, allowing the judiciary a chance to carefully review the legislature's judgments. Further, there almost always will be controversies that bring about lawsuits that reflect conflicts and tensions never contemplated by the legislature, whose handiwork is invariably marked by humanity's limited foresight. This allows courts the opportunity to further refine both the constitutional principles and their countervailing considerations. At the same time, legislation helpfully focuses courts' attention on what has actually been done, rather than what can be imagined, thereby reducing risks of hypercautionary design.

In short, there are institutional synergies when courts and legislatures work together over time to flesh out constitutional judgments. The complicated multiinstitutional, iterative process we have sketched can lead to outcomes that are substantively superior and more democratically legitimate than if courts alone aim to determine what the Constitution permits, requires, or prohibits. The premature embrace of limiting principles forecloses these institutional synergies.

CONCLUSION

That the broccoli hypothetical loomed so large in the constitutional challenge to the ACA's individual mandate seemed to some an unfortunate concession to the hyperbolic rhetoric of the political moment—an unserious distraction in a deeply serious discussion about the Constitution and the federal government's authority to address the nation's problems. While the broccoli hypothetical was all of this, it was also much more. It served as a powerful tool for translating the liberty concerns that dominated the constitutional debate outside the courts into a viable constitutional claim inside the courts. For all of its surface irreverence, it also raised fundamental questions about the role of limiting

345. See, e.g., Mark D. Rosen, *Congress's Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, 41 CAL. W. INT'L L.J. 7, 13 & n.21 (2010) (discussing interplay of the Court and Congress in the context of the 1982 Amendments to the Voting Rights Act).

principles in the development of constitutional doctrine. The unusually vibrant debate over the mandate's constitutionality that took place outside the courts, with the hypothetical broccoli mandate prominently featured, may have pressured the justices to modify their traditional approach to developing constitutional doctrine. In assuming an obligation to provide a limiting principle to resolve the novel constitutional question before them, the justices broke with an underappreciated but remarkably well-entrenched tradition of constitutional decisionmaking.

The story of broccoli, limiting principles, and *NFIB* provides new insights into dynamics of popular constitutionalism. On the one hand, the Court was acting in an arguably responsive manner by taking seriously the liberty-based concerns pressed by opponents of the mandate. The broccoli problem and limiting principles were at the heart of the constitutional issue for a significant proportion of the American people. The Court's response to this widespread constitutional concern is a casebook example of popular constitutionalism in action. Indeed, we suggest that the best possible justification for the novel Liberty-Centered Federalism analysis of the Commerce Clause Majority in *NFIB* may be found in a normative theory of popular constitutionalism. On the other hand, the Court's insistence on confronting the limiting principles issue was not only unusual but also a problematic departure from the localist approach to doctrinal development that the Court has relied on over the years. In this way, popular constitutional pressures may have affected not only the substance of the Court's decision in *NFIB* but also the process by which the justices approached their judicial craft. This heretofore-unexplored aspect of popular constitutionalism is a cause for concern.