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Considering Consequences: Autonomy's Missing Half

Catherine A. Hardee*

Abstract

In a subtle but discernible trend, courts, commentators, and policymakers increasingly use autonomy-based justifications to support expanding economic rights. Their use of autonomy, however, is inconsistent with the concept of traditional liberal autonomy that proponents of economic rights embrace. This is because many, if not most, economic choices have some measure of consequences ameliorated by state action.

This Article exposes the conceptual incoherence of this approach and argues that these autonomy-based arguments are invalid when they fail to acknowledge the vital role consequences play in constituting liberal autonomy. It also demonstrates that the failure to account for consequences in determining the value of a choice creates conceptual and practical problems that can unnecessarily hamper effective regulations while simultaneously undervaluing true autonomy. To do so, this Article uses the Supreme Court's landmark NFIB v. Sebelius decision and the debate over privatizing Social Security as case studies to critique autonomy-based arguments used to justify economic rights in circumstances where consequences are artificially constrained. This Article then provides an alternative consequence-focused framework for evaluating the regulation of such choices. Finally, this Article applies that framework to demonstrate that considering consequences helps ensure a more robust protection of true autonomy while still providing policymakers flexibility to address social issues.

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I. INTRODUCTION

A growing libertarian political movement uses arguments rooted in individual autonomy to advocate for decreased government regulation and increased economic rights.¹ Some legal commentators and courts have embraced these autonomy arguments, most notably five members of the Supreme Court in *NFIB v. Sebelius*.² Despite upholding the Patient Protection and Affordable Care Act's (Affordable Care Act or ACA) individual mandate as a valid exercise of Congress's tax power,³ a majority of the Court in *NFIB* agreed that the mandate exceeded Congress's power under the Commerce Clause.⁴ The majority concluded that individuals have an economic liberty

1. Proponents of economic rights define them as "the right to acquire, use, and possess private property and the right to enter into private contracts of one's choosing." Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5, 5 (2012).

2. 132 S. Ct. 2566 (2012).

3. *Id.* at 2594.

4. *Id.* at 2587. The Commerce Clause majority consists of the Chief Justice writing for himself, *id.* at 2577, and a separate opinion written by Justice Scalia that was joined by Justices Alito, Kennedy, and

interest under the Commerce Clause to choose not to purchase health insurance, and that this economic right trumps Congress's decision to require individuals to purchase health insurance as a means of supporting the health insurance market.⁵

Autonomy, also called liberty or the right to be left alone, is a value found at the core of much legal thinking on the Constitution, rights, and the limits of government power.⁶ The concept has also played a central role in courts' and commentators' conceptions of individual rights.⁷ It is not surprising, therefore, that in a contest of autonomy versus regulation, autonomy frequently prevails.⁸

Under a theory of liberal autonomy, individuals have the ability to deliberatively form and pursue their own conception of the good.⁹ Consequences are an important aspect of liberal autonomy as consequences provide individuals with the data necessary to deliberate on what constitutes "the good."¹⁰ They also act as an internal risk regulator that allows for

Thomas, *id.* at 2642 (Scalia, J., dissenting). The Chief Justice's opinion upholding the mandate under the tax power was joined by Justices Ginsburg, Sotomayor, Kagan, and Breyer. *Id.* at 2609 (majority opinion).

5. *Id.* at 2591; *id.* at 2648 (Scalia, J., dissenting); see also Ronald Kahn, *The Commerce Clause and Executive Power: Exploring Nascent Individual Rights in National Federation of Independent Business v. Sebelius*, 73 MD. L. REV. 133, 177 (2013).

6. See Richard H. Fallon, Jr., *Should We All Be Welfare Economists?*, 101 MICH. L. REV. 979, 990 (2003) ("Autonomy is a value of foundational moral importance."); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 3 (1995) (arguing that autonomy is one of "two bedrock structures of our constitutional document" and "guaranteed status of free and equal citizenship in our morally pluralistic constitutional democracy"); Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 663 (2004) ("As a matter of social, political, and moral fact, our culture places a high value on autonomy.").

7. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) ("[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., concurring) ("[The Founders] conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."); see also Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 186–92 (1982) (documenting "rise of autonomy as a fundamental value" supporting personal rights).

8. See, e.g., *Lawrence*, 539 U.S. at 579 (noting that "[a]s the Constitution endures, persons in every generation can invoke [the Due Process Clause's] principles in their own search for greater freedom").

9. See Randy E. Barnett, *Afterword: The Libertarian Middle Way*, 16 CHAP. L. REV. 349, 364 (2013) (noting that libertarians' primary end is "the pursuit of the good life," which requires individuals to take their own path as "living the good life is a do-it-yourself affair"); Jedediah Purdy & Neil S. Siegel, *The Liberty of Free Riders: The Minimum Coverage Provisions, Mill's "Harm Principle," and American Social Morality*, 38 AM. J.L. & MED. 374, 377–79, 383–84 (2012) (describing libertarian critiques of ACA and connecting them to the liberal autonomy of John Stuart Mill).

10. See JOHN STUART MILL, *ON LIBERTY* 48–49 (Dover Thrift 2002) (1859).

experimentation without government intervention.¹¹ Given the role of consequences in liberal autonomy, whenever a state-provided safety net or other protection exists that removes a significant measure of consequences from the equation, what is left is something less than full autonomy. In such situations, individuals are in fact protected from the most extreme consequences of freely made choices.¹² Not surprisingly though, the mitigation of consequences, even for those who have meaningful choice, is inevitable as society is generally unwilling to let its members suffer the worst consequences of poor decision making, such as death, disability, or lifelong crippling debt.¹³

Proponents of economic liberty, who came out in full force against the individual mandate, argue for a theory of liberal autonomy that emphasizes individual self-determination.¹⁴ This theory of autonomy was employed by the majority of the Supreme Court in their Commerce Clause opinions in *NFIB v. Sebelius*.¹⁵

If *NFIB* is an indication that the Court is moving toward protecting economic rights based on a theory of liberal autonomy, it is crucial that the Court be concerned with whether the liberty interest identified is consistent with their own conception of autonomy. Before utilizing autonomy to trump legislative mandates in favor of a theory of economic rights, the Court should formulate a coherent theory of autonomy that justifies trumping the political will of the elected branches. Without it, the Court runs the risk of repeating the mistakes of the *Lochner* era. Commentators have debated many aspects of the *NFIB* decision, such as whether the liberty interest identified by the majority

11. See *id.* at 10 (stating autonomy “requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow . . .”); *id.* at 48–49 (describing ability to experiment and “gather materials for decision” as necessary to choose one’s own path); see also Fleming, *supra* note 6, at 18 (explaining “the capacity to form, revise, and rationally pursue a conception of the good” is a component of autonomy).

12. See *infra* Part III.D.

13. See *infra* Part IV.A.

14. See Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight over Health Care*, 27 J.L. & POL. 177, 189–90 (2011) (drawing parallel between individualism “in the classical libertarian sense” of *Lochner* era of economic rights and ACA opponents’ arguments for economic and individual liberty). One of the architects of the legal challenge to the ACA was Georgetown law professor and noted libertarian legal scholar Randy Barnett. See Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331, 1332 (2013).

15. See Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 104 (2012) (describing Commerce Clause arguments made by the majority as “libertarian at their core”); see also *infra* Parts II.B, III.B.

was in fact substantive due process in disguise;¹⁶ whether the Court's federalism reasoning supports finding an individual right;¹⁷ and whether the harm caused by the uninsured should outweigh such a liberty interest.¹⁸ But no one has yet addressed whether the liberty interest the majority in *NFIB* sought to protect is consistent with the theory of liberal autonomy advanced by proponents of economic rights. Given the power that the concept of autonomy wields and its use as the driving force behind expanding economic liberty, it is crucial that the label "autonomy" not be used to trump the regulation of choices that are less than fully autonomous.

This Article argues that proponents of economic rights—such as the right implicated in *NFIB*—employ a simplistic view of liberty that does not comport with the traditional theory of liberal autonomy, which the same proponents utilize, because many consequences, including the most drastic consequences, are removed from the decision-making process.¹⁹ When the consequences of a freely made choice are removed by government action—such as the state safety nets in place that provide a basic level of health care for those who choose not to purchase insurance—the autonomy interest in the remaining choice is incomplete and less deserving of protection.²⁰

This Article develops a framework that is useful for evaluating autonomy-based arguments that, in fact, relate to choices that lack some measure of consequences. I call this framework "proportionalism" and explain how it is both intellectually consistent and useful because it allows policymakers adequate flexibility to efficiently address moral hazard that can be created when consequences are removed.²¹ In addition, this framework better respects autonomy by focusing the inquiry on the autonomy of the decision maker rather

16. See, e.g., Michael C. Dorf, *Commerce, Death Panels, and Broccoli: Or Why the Activity/Inactivity Distinction in the Health Care Case Was Really About the Right to Bodily Integrity*, 29 GA. ST. U. L. REV. 897 (2013); Kahn, *supra* note 5, 149–53.

17. See, e.g., Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044 (2014); Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 124 (2013).

18. See, e.g., Michael J. Graetz & Jerry L. Mashaw, *Constitutional Uncertainty and the Design of Social Insurance: Reflections on the Obamacare Case*, 7 HARV. L. & POL'Y REV. 343, 347 (2013). See generally Purdy & Siegel, *supra* note 9.

19. See *infra* Part III.A.

20. See *infra* Part III.B.

21. Moral hazard occurs when a party fails to take steps to minimize the possibility of harm because it does not bear the risk of loss. See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 537 (1986). See generally Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

than the diffused interests of taxpayers.²² Proportionalism prevents arguments in favor of incomplete liberty from trumping political efforts to increase social welfare while at the same time ensuring that true autonomy is given appropriate consideration in the political process. Increased calls for both stronger social safety nets and more respect for individual autonomy make this framework critical for balancing these, at times, competing concerns.²³

This Article proceeds in three parts. Part II surveys the autonomy arguments used to support economic rights, including popular opposition to the individual mandate and the Supreme Court's decision in *NFIB v. Sebelius*. It demonstrates that both these autonomy arguments and the majority's reasoning in *NFIB* employ a theory of liberal autonomy based on individual self-determination. Part III discusses the role that consequences play in this theory of liberal autonomy, illustrating that role with arguments in favor of privatizing Social Security. Part III then examines the choice to purchase health insurance and critiques arguments for economic rights based on liberal autonomy. Finally, Part IV examines the conceptual and practical problems that arise when choices lacking in consequences are conflated with full autonomy. Part IV suggests the "proportionalism" framework, which lawmakers and jurists may use to consider choices involving incomplete liberty. This Part offers concerns about health and dietary choices as an example. This Article concludes by identifying other areas of law and policymaking where this framework may be particularly useful.

II. AUTONOMY AND ECONOMIC RIGHTS

There is a growing political movement in the United States that embraces conceptions of individual autonomy or liberty to argue for freedom from government interference, especially in the realm of economic rights.²⁴ This movement has found support in the law from politicians, legal commentators, and the judiciary.²⁵ The ongoing legal and political challenges to the

22. See *infra* Part IV.B.

23. See generally Graetz & Mashaw, *supra* note 18 (outlining need for reform of social insurance programs, including savings mandates, due to changing societal needs).

24. See Randy Barnett, *The Tea Party, the Constitution, and the Repeal Amendment*, 105 NW. U. L. REV. COLLOQUY 281 (2011) (describing Tea Party movement); Rosen & Schmidt, *supra* note 17, at 129–31 (noting rise of libertarian movement and ideology's increased viability in mainstream politics and legal discourse); Robert Draper, *Has the 'Libertarian Moment' Finally Arrived?*, N.Y. TIMES MAGAZINE (Aug. 7, 2014), http://www.nytimes.com/2014/08/10/magazine/has-the-libertarian-moment-finally-arrived.html?_r=0 (describing rise of libertarian movement and ideology on American politics).

25. See, e.g., Barnett, *supra* note 1, at 7 (arguing Constitution supports broad economic rights);

Affordable Care Act's individual mandate have become a major battleground for the issue.²⁶ Questions of liberty and economic rights took center stage for months of political and legal debate culminating in the Supreme Court's decision in *NFIB v. Sebelius*.²⁷ In *NFIB*, a majority of the Court used arguments in favor of personal autonomy and economic liberty to craft an individual right under the Commerce Clause.²⁸ Despite justifying the right on federalism concerns, the majority uses the language of liberal autonomy to justify this new economic right.²⁹

A. *The Rhetoric of Liberty*

Autonomy or liberty has long held great moral and rhetorical force in policy arguments regarding the proper limits of government regulation.³⁰ “[O]ur political system rejects the notion of an objectively definable ‘good life,’ [and thus] the right to self-determination has become the preeminent value in the United States.”³¹

In recent years, as libertarian ideas have grown more politically popular, autonomy has been used more frequently as the basis to argue for economic rights. The Tea Party movement has been a populous, if extreme, branch of

James W. Ely Jr., *The Constitution and Economic Liberty*, 35 HARV. J.L. & PUB. POL'Y 27, 35 (2012) (arguing that Constitution “assigns a high value to property and contractual rights”); see also Graetz & Mashaw, *supra* note 18, at 344–46 (describing support for liberal autonomy by five Justices in *NFIB v. Sebelius*); Draper, *supra* note 24 (describing political support for libertarian positions from mainstream politicians).

26. See Rosen & Schmidt, *supra* note 17, at 130–31.

27. See Graetz & Mashaw, *supra* note 18, at 104–05, 113–14, 117–18 (describing debate leading up to *NFIB*).

28. See *supra* notes 5–7 and accompanying text.

29. See *supra* notes 5–7 and accompanying text.

30. See Fallon, *supra* note 6, at 990 (“Autonomy is a value of foundational moral importance.”); Pope, *supra* note 6, at 663 (“As a matter of social, political, and moral fact, our culture places a high value on autonomy.”); *id.* at 663 n.18 (citing decades of case law and legal, philosophical, and moral commentators discussing the importance of individual autonomy to modern western culture).

31. Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 474 (2000); see also David L. Shapiro, *Courts, Legislatures and Paternalism*, 74 VA. L. REV. 519, 530 (1988) (describing referendum and popular legislative actions opposing paternalistic infringements on autonomy). This individualism is not always beneficial to Americans. See Sabrina Tavernise, *For Americans Under 50, Stark Findings on Health*, N.Y. TIMES (Jan. 9, 2013), http://www.nytimes.com/2013/01/10/health/americans-under-50-fare-poorly-on-health-measures-new-report-says.html?_r=0 (describing international study that found Americans ranked near or at the bottom of rich countries for health and longevity outcomes, which researchers hypothesized might be due in part to “cultural factors like individualism and dislike of government interference”).

this movement.³² While the Tea Party is split between strict libertarians, who support libertarian social issues like drug decriminalization and reproductive choice, and social conservatives, who embrace regulation in the social sphere, they are united in their support for principles of economic autonomy, usually expressed in terms of “liberty.”³³ Libertarians outside the Tea Party are gaining political momentum with a generally unified push for economic and personal rights.³⁴

This argument for economic liberty has been very forcefully and publicly made in the public debates over the signature legislation of President Obama’s first term—The Affordable Care Act. Many on the right see the ACA, especially the mandate that all individuals purchase health insurance (the individual mandate), as an unprecedented intrusion into liberty that threatens the American way of life.³⁵ While some of the rhetoric employed by politicians and protesters is easily dismissed,³⁶ on the whole it speaks to deep concerns about American individualism as seen through the lens of economic freedom.³⁷

The rhetoric employed in the health care debate reflects an affinity for laissez faire economic policies and theories of individual autonomy. When

32. See Rosen & Schmidt, *supra* note 17, at 101 (discussing rise of Tea Party movement in 2009 and its embracing of libertarian rhetoric).

33. See Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 282 (2012) (citing study finding Tea Party is “unified on role of government questions regarding economics and business” but divided on social issues). “Autonomy” and “liberty” may at times reflect different meanings. See Smith, *supra* note 7, at 177. Professor Smith argues that the term “autonomy” as used during the rights revolution of the Warren Court reflected a “more relativistic stance[]” than the “higher law views” of natural rights earlier writers attributed to “liberty.” *Id.* However, the use of the term autonomy by modern libertarians appears to hearken back to John Stuart Mill’s use of “liberty” as individual self-determination in *On Liberty* rather than a relativist “autonomy.” See *supra* notes 10–15 and accompanying text. The terms are used interchangeably for purposes of this Article.

34. See generally Barnett, *supra* note 24 (describing theoretical principles behind modern libertarian movement); Draper, *supra* note 24.

35. See Leitch, *supra* note 14, at 183–87 (detailing popular opposition to individual mandate). Activists are quoted as stating that the mandate “strikes at the heart of individual freedom” and “should be offensive to all people who love liberty.” *Id.* at 185–86; see also, Barnett, *supra* note 14, at 1332 (describing issue at stake in *NFIB* as “saving the Constitution for the country”).

36. One favorite of internet commenters was the argument to “[k]eep your government hands off my Medicare.” Bob Cesca, *Keep Your Goddamn Government Hands Off My Medicare*, HUFFINGTON POST (Aug. 5, 2009), http://www.huffingtonpost.com/bob-cesca/get-your-goddamn-governme_b_252326.html. Sarah Palin’s claims about “death panels” in the ACA was PolitiFact’s inaugural “Lie of the Year” in 2009. Angie Drobnic Holan, *PolitiFact Lie of the Year: Death Panels*, POLITIFACT (Dec. 18, 2009), <http://www.politifact.com/truth-o-meter/article/2009/dec/18/politifact-lie-year-death-panels/>.

37. Barnett, *supra* note 24, at 282 (describing Tea Party concerns with governmental overreach, as exemplified by individual mandate); Leitch, *supra* note 14, at 185–86 (describing the Tea Party movement against mandate as defense of Constitution and individual liberty through the protection of economic rights).

opponents of the individual mandate refer to “autonomy” or “liberty,” they appear to be referencing a libertarian ideal of individual self-determination heralded by liberal thinkers such as John Stuart Mill.³⁸ Mill’s position on individual autonomy “was genuinely and deeply libertarian” and in line with more recent arguments for economic liberty.³⁹ This definition of autonomy gives primacy to the individual’s ability to make choices and experiment with different ways of living to both further individual liberty and perfect society—what this Article will refer to as “liberal autonomy.”⁴⁰ The hallmark of liberal autonomy is that every individual is equally autonomous and responsible for her choices.⁴¹

This idea of autonomy as self-determination has made its way, in various forms, into legal theory. Professor James Fleming tethers autonomy to the Constitution by placing what he refers to as deliberative autonomy at the heart of his theory of constitutional constructivism.⁴² He defines autonomy as an individual’s ability to develop and exercise that capacity “in forming, revising, and rationally pursuing their conceptions of the good.”⁴³ In other words, autonomy is the ability of individuals “to apply their power of deliberative reason to deliberating about and deciding how to live their own lives.”⁴⁴

38. See Purdy & Siegel, *supra* note 9, at 387–88 (drawing parallel between libertarian position of mandate’s opponents and Mill’s philosophy); Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1742 (2011) (arguing that objection to individual mandate is “at bottom, a libertarian objection”).

39. Purdy & Siegel, *supra* note 9, at 383; see also Draper, *supra* note 24 (quoting prominent libertarian writer and blogger as saying, “It’s better to run trials and experiments, as John Stuart Mill talked about.”).

40. See MILL, *supra* note 10, at 10 (noting that autonomy “requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow”); *id.* at 47 (noting that individual liberty is necessary for personal fulfillment and social progress); *id.* at 48–49 (describing ability to experiment and “gather materials for decision” as necessary to choose one’s own path); see also Fleming, *supra* note 6, at 18 (noting “the capacity to form, revise, and rationally pursue a conception of the good” is a component of autonomy).

41. See MILL, *supra* note 10, at 10 (“Each is the proper guardian of his own health, whether bodily, or mental or spiritual.”).

42. See generally Fleming, *supra* note 6. Professor Fleming’s limits the scope of constitutional protection for autonomy to only those “basic liberties that are significant preconditions” for furthering deliberative autonomy, such as the freedom of speech. *Id.* at 40. He makes no claim that the constitution protects “everyone’s pursuit of individuality or autonomy in a broad sense.” *Id.* at 43. Nevertheless, his conception of the value of autonomy and how it operates mirrors discussions of autonomy in the broader sense as well. *Id.*

43. *Id.* at 19; see also Fallon, *supra* note 6, at 1017 (“We value for ourselves, and we owe to others, the basic liberties necessary to develop and pursue independent conceptions of choice-worthy lives.”).

44. Fleming, *supra* note 6, at 19; see also Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 878 (1994) (“To be autonomous, one must be able to form a conception of the good,

The notion of protecting deliberative decision-making is widely held.⁴⁵ In American society, it is a guiding principle that everyone has the right to make decisions for themselves unless the government has a good reason to impose on their free choices.⁴⁶ While the idea of autonomy is generally accepted, there is great disagreement as to what constitutes “good reason” to infringe on autonomy.⁴⁷ Some are willing to accept broader justifications for infringing on individual autonomy, such as hard paternalism to prevent self-harm or redistributive programs to further other social goals.⁴⁸ Others see autonomy in less individualistic terms and argue that some restrictions of choice can actually increase autonomy by promoting equality and removing barriers to access.⁴⁹

For ardent supporters of autonomy, such as Mill, the only legitimate justification for infringement on this right is to prevent harm to others.⁵⁰ Mill limits this justification to harm that “violates any specific duty to the public” or any action that “occasions perceptible hurt to any assignable individual except himself.”⁵¹ All other harms “society can afford to bear, for the sake of the greater good of human freedom.”⁵² To adequately protect autonomy, the harm principle must be carefully constrained or else it has the potential to “collapse

deliberate rationally, and act consistently with one’s goals.”).

45. Even those who reject theories of autonomy that prioritize the individual over recognizing the relational aspect of autonomy still find the decision-making of individuals to be important. *See* JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 58 (2011) (arguing that the “essence of autonomy” is the capacity to determine what influences in one’s life to embrace); *see also infra* Part III.C.

46. *See* Pope, *supra* note 6, at 664–67 (describing importance of autonomy in Western-American classical liberal tradition and noting that it is widely believed that “the state should limit liberty only when a justifiable reason for doing so exists”).

47. Some argue that regulations can increase autonomy by removing consequences that reduce individuals’ “capacity to act in accord with their higher-order goals.” Fallon, *supra* note 44, at 890 (defining theory of “descriptive autonomy”); *see also* Adam J. MacLeod, *The Mystery of Life in the Laboratory of Democracy: Personal Autonomy in State Law*, 59 CLEV. ST. L. REV. 589, 590 (2011) (describing debate over acceptable limitations on autonomy).

48. *See, e.g.*, Fallon, *supra* note 44, at 879–93 (describing several conceptions of autonomy that allow for differing levels of justifiable government regulation).

49. *See also infra* Part III.C (discussing relational autonomy). *See generally* NEDELSKY, *supra* note 45.

50. MILL, *supra* note 10, at 8 (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”); *see also* Pope, *supra* note 31, at 435 (noting that Mill’s harm principle is “the primary philosophical, political, and legal rationale for interfering with individual autonomy”).

51. MILL, *supra* note 10, at 69.

52. *Id.* Not everyone takes such a hard line on infringements to autonomy. Many embrace the idea of self-determination but still find infringement on autonomy acceptable for at least some paternalistic or social welfare reasons. *See* Fallon, *supra* note 44, at 883–84.

[autonomy] to a null set.”⁵³

The difficulty in restraining the harm principle is especially acute in modern society where nearly every action can be said to have some effect on others.⁵⁴ Even personal behavior like wearing a motorcycle helmet or seat belt could be justified by an expansive harm principle by invoking the cost of accidents on family members and society.⁵⁵ Any regulation that cannot be justified under the harm principle is considered unacceptable to an ardent supporter of autonomy. But even for those who are willing to balance autonomy against other social goals, any regulation that cannot be justified on the harm principle, especially paternalistic regulations, is generally viewed with more skepticism at a policy level.⁵⁶

B. *Autonomy and the Law: NFIB v. Sebelius*

The libertarian popular movement shifted the debate over the ACA, bringing the issue of individual liberty over economic choices into the legal challenge to the mandate.⁵⁷ Autonomy is not a new concept in the law, but the ACA debate shifted its focus from personal rights to economic rights and led to the Court embracing a theory of liberal autonomy to support economic rights in

53. Fallon, *supra* note 44, at 897; *see also* Pope, *supra* note 31, at 435 (noting that if harm to others expands to include all “negative externalities,” it “can be found in almost any type of behavior”); *id.* at 447 (“Theoretically, there is little, if any, individual conduct that does not ‘harm’ other people. The term ‘harm’ is thus plagued with conceptual ambiguities that permit its expansive interpretation.”).

54. “Because the harm principle provides the least controversial basis for regulation, and because some kind of harm can always be attributed to a particular behavior, many invoke the harm principle to ‘explain’ regulations that would be more appropriately justified on pure paternalistic grounds.” Pope, *supra* note 31, at 445.

55. *See id.* at 436–37. Pope describes how state courts, which for years rejected motorcycle helmet and car seatbelt laws as unjustified paternalistic regulations, eventually upheld them under the harm principle on the theory that one’s injury or death will negatively impact society. *Id.* He notes that the current strategy to defeat autonomy claims is to “illustrat[e] that seemingly personal behavior does in fact violate the harm principle and is therefore subject to societal control.” *Id.* at 437.

56. *See* Stephen A. McGuinness, *Time to Cut the Fat: The Case for Government Anti-Obesity Legislation*, 25 J.L. & HEALTH 41, 50–51 (2012) (describing and responding to objections to paternalistic regulations); Pope, *supra* note 31, at 427–28 (describing “liberty limiting principles” that can justify infringements on autonomy, including the harm principle and soft and hard paternalism). Not all theories of autonomy are as suspicious of paternalistic interventions. *See also infra* Part III.C (discussing relational autonomy).

57. *See* Rosen & Schmidt, *supra* note 17, at 114–15 (describing how individual liberty argument made its way into court battle over the ACA despite federalism rationale relied on by Court). Rosen and Schmidt trace the “broccoli horrible”—the Chief Justice’s argument that the mandate could lead to forced vegetable purchases—from popular discourse to the Supreme Court. *Id.*; *see also* Leitch, *supra* note 14, at 198–99 (noting how social movements can alter interpretations of constitutional norms).

a way not seen since before the New Deal.⁵⁸

Although there is no constitutional “right to autonomy” in the United States, it has been identified as animating several fundamental rights, such as freedom of speech and religion, privacy, and the right to contraception and abortion.⁵⁹ Legal commentators have long recognized the importance of the concept of autonomy and grappled with the role conceptions of self-determination or liberty do (or should) play in the law.⁶⁰ Beginning in the Warren and Burger Courts, the notion of autonomy drove the development of personal rights, such as the right to privacy.⁶¹

Prior to the Warren era, notions of economic liberty had been used to support economic rights, most infamously in *Lochner v. New York*,⁶² but such arguments fell out of favor following the New Deal.⁶³ In recent years, some academic commentators have begun heralding autonomy-based justifications for economic freedom that are in line with popular libertarian rhetoric, going so far as to question whether the *Lochner*-era decisions regarding freedom of contract have been incorrectly vilified.⁶⁴

The lead up to the Court’s review of the individual mandate saw a number

58. See Leitch, *supra* note 14, at 199 (arguing that Tea Party was “moving to normalize and legitimize discussion of economic substantive due process in contemporary legal argument through persistent iteration of their political values”).

59. See Fleming, *supra* note 6, at 45 (arguing constitutional constructivism does not protect a “comprehensive libertarian principle of autonomy”); Shapiro, *supra* note 31, at 543–44 (discussing liberty-based arguments in First Amendment scholarship and doctrine); Smith, *supra* note 7, at 185–92 (tracing use of autonomy in Supreme Court precedent).

60. See Fallon, *supra* note 6, at 990 (“Autonomy is a value of foundational moral importance.”); Fleming, *supra* note 6, at 18–19 (placing deliberative autonomy at center of his theory of constitutional constructivism). See generally NEDELSKY, *supra* note 45; Fallon, *supra* note 44; Smith, *supra* note 7.

61. Smith, *supra* note 7, at 186, 189 (describing history of autonomy in Supreme Court); see, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (“[C]hoices central to personal dignity and autonomy[] are central to the liberty protected by the Fourteenth Amendment.”).

62. 198 U.S. 45 (1905).

63. See Greene, *supra* note 33, at 285 (noting that *Lochner* is “an anticononical case”); Shapiro, *supra* note 31, at 538–42 (describing use of substantive due process based on “right to be let alone” that first surfaced in regard to economic rights during the *Lochner* era and then later with regard to personal liberty).

64. See Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 788–89 (2009) (noting that “*Lochner* revisionism has generated a veritable cottage industry of claims”); Jeffrey Rosen, *Economic Freedoms and the Constitution*, 35 HARV. J.L. & PUB. POL’Y 13, 13–15 (2012) (noting that “[s]ome libertarians now argue that *Lochner* is defensible” and detailing position of several prominent scholars); see also Randy E. Barnett, *Is the Constitution Libertarian?*, 2009 CATO SUP. CT. REV. 9, 13 (2009) (disclosing that Peckham’s opinion in *Lochner* is his favorite Supreme Court majority opinion).

of articles attempting to predict the Court's response to the plaintiff's liberty arguments.⁶⁵ That speculation was put to rest when the Court released its opinion in *NFIB v. Sebelius*.⁶⁶ First, a brief summary of the Court's multiple opinions in the case is in order. Both Chief Justice Roberts and Justice Scalia, joined by Justices Kennedy, Thomas, and Alito,⁶⁷ authored separate opinions that emphasize a liberty interest inherent in the Commerce Clause, which they found was violated by the individual mandate.⁶⁸ These two opinions will be discussed jointly as the "Commerce Clause majority."⁶⁹ Justice Ginsburg wrote in favor of finding the mandate constitutional under the Commerce Clause and was joined by Justices Breyer, Kagan, and Sotomayor.⁷⁰ The Justices who signed onto Ginsburg's concurrence joined the part of the Chief Justice's opinion holding that the mandate is constitutional under the tax power.⁷¹

The Commerce Clause majority rejected the mandate, arguing that there is a liberty right inherent in the Commerce Clause that protects an individual's decision to enter a regulated market.⁷² The crux of the matter to the Commerce

65. See, e.g., Randy E. Barnett, *Turning Citizens into Subjects: Why the Health Insurance Mandate Is Unconstitutional*, 62 MERCER L. REV. 608, 617 (2011) (predicting five votes to strike down the individual mandate); Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 2 (2011) (referring to constitutional objections to ACA as "silly"); Rosen, *supra* note 64, at 22 ("It is doubtful there are five votes on behalf of striking down healthcare in the name of a Lochnerian right of personal autonomy."); Smith, *supra* note 38 (casting doubt on federalism claims).

66. 132 S. Ct. 2566 (2012).

67. Justice Thomas wrote a brief separate dissent solely to reassert his rejection of the "substantial effects" test under the Commerce Clause. *Id.* at 2677 (Thomas, J., dissenting).

68. The precedential value of the Commerce Clause opinions are subject to debate given that none of the Justices who signed on to Justice Scalia's dissent signed on to the Chief Justice's opinion and the Chief Justice's Commerce Clause discussion is arguably unnecessary dicta given the tax holding. Compare Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 799 (2013) (discussing Chief Justice's attempt to characterize his Commerce Clause analysis as binding and potential limited use of the opinion in future cases), with Barnett, *supra* note 14, at 1336–37 (arguing Chief Justice's opinion is holding).

69. It is unknown why the Justices who joined Justice Scalia's dissent did not sign on to the Chief Justice's opinion, but it is "rumored to have been driven by spite towards Roberts for switching sides on the constitutionality of the mandate as a tax." Jacobi, *supra* note 68, at 826.

70. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2615 (Ginsburg, J., concurring).

71. The Chief Justice, joined by Justices Breyer and Kagan, and the Scalia dissent both wrote separately rejecting the Medicaid expansion. *Id.* at 2606–07 (plurality opinion); *id.* at 2666 (Scalia, J., dissenting). Justices Ginsburg and Sotomayor would have permitted the Medicaid expansion as written in the statute. *Id.* at 2642 (Ginsburg, J., concurring).

72. The Chief Justice argued that individual rights are not just located in the Bill of Rights but rather that the Framers intended for the limited rights of the federal government to be a powerful check against infringement on personal liberty. *Id.* at 2577–78 (Roberts, C.J.) ("[T]he Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to

Clause majority was the distinction between activity and inactivity.⁷³ While the Commerce Clause allows regulation of economic activity, it does not allow the government to “compel[] individuals to become active in commerce by purchasing a product.”⁷⁴ In other words, there is a liberty interest involved in choosing to subject oneself to federal regulation.⁷⁵

The Commerce Clause majority rejects the government’s argument that the cost the uninsured impose on the market for health care by utilizing services for which they cannot pay constitutes economic activity.⁷⁶ Although these costs are substantial—approximately \$1,000 a year to every insured—that harm is insufficient to override the liberty interest.⁷⁷ Accepting this harm justification, they reason, would set a precedent that “individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.”⁷⁸

This activity/inactivity distinction leads to a concern that the mandate would create a slippery slope of potentially unlimited federal power.⁷⁹ If Congress can compel this action because the aggregate economic harm is felt by others, they reason, then there is no limit to what Congress can compel because nearly every action or inaction in our interdependent economy has some impact on commerce.⁸⁰ Today, Congress compels the purchase of health insurance, tomorrow it will be mandates to purchase domestic cars to improve

restrain the Government. As Alexander Hamilton put it, ‘the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.’”); *see also id.* at 2677 (Scalia, J., dissenting) (arguing that notions of freedom embodied in structural protections of the Constitution are “central to liberty”).

73. *See id.* at 2587 (Roberts, C.J.); *see also id.* at 2648 (Scalia, J., dissenting).

74. *Id.* at 2587 (Roberts, C.J.) (emphasis omitted); *see also id.* at 2648 (Scalia, J., dissenting).

75. *See id.* at 2586 (Roberts, C.J.) (“The power to *regulate* commerce presupposes the existence of commercial activity to be regulated.”); *id.* at 2587 (arguing that mandate does not regulate activity but rather “compels individuals to *become* active in commerce by purchasing a product”); *id.* at 2646 (Scalia, J., dissenting) (arguing that Commerce Clause does not allow Congress to “command” individuals to “participate in the market [for health insurance]”); *see also id.* at 2592 (Roberts, C.J.) (finding mandate unconstitutional under Necessary and Proper Clause because it is not limited to “those who by some preexisting activity bring themselves within the sphere of federal regulation”).

76. *Id.* at 2585.

77. *See id.*

78. *Id.* at 2588; *see also id.* at 2650 (Scalia, J., dissenting) (rejecting aggregate harm to the economy as adequate justification for infringement on this liberty interest).

79. *See id.* at 2588 (Roberts, C.J.) (reasoning that cost to society of obesity is greater than cost of uninsured and thus would open the door for vegetable mandate); *id.* at 2650 (Scalia, J., dissenting) (stating that if harm to economy that could be caused by uninsured justifies regulations, then so would harm from failure to buy domestic cars or broccoli).

80. *See id.* at 2588 (Roberts, C.J.); *id.* at 2650 (Scalia, J., dissenting).

the economy or vegetables to lower health care costs imposed by obesity.⁸¹ In essence, this line of reasoning reflects a concern that once diffused, aggregated, economic harm is accepted to justify government regulation it will be difficult to find an appropriate limitation.⁸²

Although couched in terms of separation of powers, the Commerce Clause majority seems most concerned with liberty in the sense of liberal autonomy.⁸³ Many commentators have argued that this federalism argument is merely a substantive due process liberty claim in disguise.⁸⁴ Even Justice Ginsburg's concurrence notes that although the substantive due process claims were abandoned by the plaintiffs in the litigation, the Commerce Clause majority had "plant[ed] such protections in the Commerce Clause."⁸⁵ The critique is not surprising.⁸⁶ Both opinions are rife with references to the Framers and their concerns for the protection of liberty.⁸⁷ They also frequently speak in terms of autonomy and choice, focusing on the freedom to choose whether to enter the insurance market.⁸⁸

This liberty interest represents a strict view of liberal autonomy. The right

81. *Id.*

82. *See* Rosen & Schmidt, *supra* note 17, at 144–45 (arguing Commerce Clause majority was incorrect to require limiting principle for novel question of constitutional interpretation).

83. *See, e.g., Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2587 (allowing Congress to regulate inactivity would empower Congress to make unlimited decisions for individuals); *id.* at 2591 ("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.").

84. *See, e.g., Dorf, supra* note 16, at 900 (arguing Chief Justice and Scalia's dissent "import a substantive due process limitation into the Commerce Clause"); Smith, *supra* note 38, at 1746 (stating arguments made by opponents of mandate are actually "[s]muggling a libertarian-based limitation into constitutional law by concealing it in the garb of federalism").

85. *Nat'l Fed'n of Indep. Bus.*, 132 St. Ct. at 2623 n.8 (Ginsburg, J., concurring). Justice Ginsburg also quipped that the argument 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." *Id.* at 2623 (quoting *Seven-Sky v. Holder*, 661 F.3d 1, 19 (D.C. Cir. 2011)).

86. As commentators have noted, the focus on individual rights is not a good fit with a doctrine generally concerned with the relationship between the federal and state governments. *See* Rosen & Schmidt, *supra* note 17, at 124 (critiquing new "Liberty-Centered Federalism" found in *NFIB*).

87. *See, e.g., Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2578 (describing how Framers intended "federalism [to] protect[] the liberty of the individual from arbitrary power"); *id.* at 2589 (allowing Congress to compel action "is not the country the Framers of our Constitution envisioned"); *id.* at 2646 (Scalia, J., dissenting) (quoting *Federalist No. 58*).

88. *See, e.g., id.* at 2586–87 (Roberts, C.J.) (describing mandate as Congress's attempt to "compel individuals not engaged in commerce to purchase an unwanted product"); *id.* at 2646 (Scalia, J., dissenting) (arguing that "Congress has impressed into service" healthy individuals and forced them to purchase insurance they do not want).

not to enter a market is used as a trump to federal regulation—neither opinion balances this liberty interest against the social harm to be avoided.⁸⁹ This position arguably goes even further than *Lochner* by using economic rights as trumps rather than balancing the right against other social concerns.⁹⁰ In addition, the Commerce Clause majority’s slippery slope discussion reflects a concern about the difficulty of reigning in the harm principle.⁹¹ They recognized that allowing aggregate economic harm to override autonomy makes the harm principle virtually limitless in an interconnected world.⁹²

Even the Chief Justice’s swing vote to uphold the mandate under the taxing power was based on autonomy.⁹³ The Chief Justice determined that the mandate’s shared responsibility payment is a tax and not a punitive penalty because individuals are still left “with a lawful choice” to purchase insurance “so long as he is willing to pay a tax levied on that choice.”⁹⁴ In other words, the difference between a penalty (unauthorized by the Commerce Clause) and a constitutionally permissible tax centers on notions of autonomy. The only difference is that liberty from taxes is trumped by Congress’s explicit tax power.⁹⁵

Justice Ginsburg’s concurrence makes the case for a more expanded harm principle by attacking the notion that the harm caused by free riders on the health care system does not outweigh whatever liberty interest might be found in the Commerce Clause.⁹⁶ Unlike other markets, everyone will eventually need to enter the health care market, often at unexpected times, and will receive that care regardless of their ability to pay.⁹⁷ The cost of free riders thus

89. *See id.* at 2589 (Roberts, C.J.) (rejecting consideration of cost of uninsured); *id.* at 2650 (Scalia, J., dissenting) (rejecting social cost of failure to purchase insurance as irrelevant because no “activity” is regulated there).

90. *See* Nourse, *supra* note 64, at 767–68 (arguing that *Lochner* did not use right to contract as trump because the right did not trigger strict scrutiny but rather was weighed against reasonable police power of state).

91. *See supra* notes 79–82 and accompanying text.

92. *See Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2589 (“People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce.”).

93. Metzger, *supra* note 15, at 85 (noting Chief Justice’s treatments of Commerce Clause and tax power “share a libertarian resistance to compulsory measures in favor of choice and incentives”).

94. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2600.

95. *See* Metzger, *supra* note 15, at 89–90 (describing extensive breadth of tax power). Even while allowing the mandate under this broad power, the Chief Justice still limited his tax holding by signaling that the tax question was right on the border of constitutionality. Jacobi, *supra* note 68, at 778–79.

96. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2610–12 (Ginsburg, J., concurring).

97. *See, e.g., id.* at 2610–11.

imposes a substantial harm on society.⁹⁸ These features, she argued, distinguish the mandate from the parade of horrors the Commerce Clause majority argued would result from upholding the mandate under the Commerce Clause.⁹⁹

Justice Ginsburg also rejects the activity/inactivity distinction and Chief Justice Roberts and Justice Scalia's concerns about unbridled federal power.¹⁰⁰ She argues that the difference between action and inaction in doctrine is a matter of semantics and the mandate should be characterized as an economic choice to self-insure.¹⁰¹ In addition, she reasons the activity/inactivity distinction is not needed to reign in the Commerce Clause, as the Court has already limited the Commerce Clause when the action regulated has "only an attenuated effect on interstate commerce and is traditionally left to state law."¹⁰² To justify the Chief Justice's hypothetical vegetable mandate, the Court would have to accept a "chain of inferences" that the "vegetable-purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans,"¹⁰³ and the Court has already rejected this type of "piling of inference upon inference."¹⁰⁴

III. AUTONOMY AND CONSEQUENCES

There has been much debate over whether the *NFIB* majority was correct in finding a liberty interest in the Commerce Clause,¹⁰⁵ but very little has been said about whether the choice to purchase health insurance involves a liberty interest that is aligned with the conceptions of autonomy advanced by

98. *Id.* at 2611 (noting that uninsured receive \$43 billion worth of uncompensated care).

99. *Id.* at 2620 (noting that if an individual "eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment").

100. *Id.* at 2621–22.

101. For example, she notes that the holding in *Wickard v. Filburn*, 317 U.S. 111 (1942), which the Chief Justice describes as regulating the activity of growing wheat for home consumption, actually states that the Commerce Clause allows "forcing some farmers into the market to buy what they could provide for themselves." *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2621 (Ginsburg, J., concurring); *see also id.* at 2622.

102. *Id.* at 2623.

103. *Id.* at 2624. The Court would have to accept that "individuals forced to buy vegetables would then eat them . . . would prepare the vegetables in a healthy way . . . would cut back on unhealthy foods, and would not allow other factors . . . to trump the improved diet." *Id.*

104. *Id.* In addition, she notes that other protections, including the "liberty interest protected by the Due Process Clause," would likely invalidate such a purchase mandate. *Id.*

105. *See, e.g.*, Craig L. Jackson, *The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause*, 15 U. PA. J. CONST. L. 11, 11–13 (2012); Kahn, *supra* note 5; Rosen & Schmidt, *supra* note 17; David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 1 (2012).

opponents of the mandate. This Article argues that opponents of the individual mandate, including the majority of the Supreme Court, are advancing a simplistic view of liberty that ignores the role of consequences in the theory of autonomy that best comports with their worldview. Without consequences, liberty is incomplete and does not possess either the consequentialist or non-consequentialist values that are attributed to liberal autonomy. Economic choices in general, including the decisions to purchase health insurance, are more likely than personal rights to have consequences limited by the state. Therefore, we should be careful before attributing the full value of autonomy to them because elevating less than full autonomy leads to conceptual and practical problems that can put true liberty in jeopardy.

A. Considering Consequences in Constituting Autonomy

As discussed, proponents of economic liberty, including the Commerce Clause majority in *NFIB*, advance a conception of liberty that most coincides with liberal autonomy. This Millian individual self-determination can be defined as an individual's ability to develop and exercise that capacity to form, revise, and pursue one's conceptions of "the good."¹⁰⁶ To exercise this capacity for self-determination, experimentation is necessary. Autonomy "depends on opportunities to choose among different types of life and to pursue diverse goals."¹⁰⁷ This experimentation allows an individual to "use and interpret experience in his own way."¹⁰⁸ By trying out different actions, one can reflect on what is good, refine and revise what one values, and determine the best means to achieve those ends.¹⁰⁹ Two people may interpret a particular experience in two different ways, or they may interpret an experience the same way but come to two different conclusions about whether the experience was a positive one.¹¹⁰ In other words, autonomy does not require agreement on a predetermined outcome.¹¹¹ Rather, autonomy provides individuals the capacity

106. See *supra* notes 38–41 and accompanying text.

107. Fallon, *supra* note 44, at 888; see also MILL, *supra* note 10, at 47 ("[T]he worth of different modes of life should be proved practically, when any one thinks fit to try them.").

108. MILL, *supra* note 10, at 48.

109. *Id.* at 49 (noting that choosing a plan for one's life requires use of "observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide"); Fallon, *supra* note 44, at 888 (describing an autonomous self as "one capable of at least partially transforming herself through thought, criticism, and self-interpretation").

110. MILL, *supra* note 10, at 48.

111. *Id.* at 56 ("There is no reason that all human existences should be constructed on some one, or some small number of patterns. If a person possesses any tolerable amount of common sense and

and opportunity to determine what it is they most desire and the method they believe will be best to achieve those ends.¹¹²

Defined as such, liberal autonomy requires consequences for the deliberation and experimentation necessary to constitute autonomy.¹¹³ In order to deliberate, one needs data on which to deliberate.¹¹⁴ In order to choose a plan for oneself, an individual must “use observation to see, reasoning and judgment to foresee, [and] activity to gather materials for decision.”¹¹⁵ In other words, to make a deliberative decision you must collect information about the world through your personal experiences and then interpret it to come to your own conception of the good.

A crucial component of this data is the outcome of previous experiences—both one’s own and the experiences of others.¹¹⁶ The consequences of previous choices inform deliberation regarding current choices.¹¹⁷ Viewing the outcome of others’ decisions also provides valuable data points to consider in deliberation and experimentation.¹¹⁸ As such, even if a decision is only made once in one’s life or the consequences of the decision are not felt until after it is too late to change course, the observation of the consequences of others’ decisions will help shape how an individual deliberates and forms her own choice.¹¹⁹

experience, his own mode of laying out his existence is the best, not because it is the best itself, but because it is his own mode.”).

112. Not only did Mill not require homogenous outcomes, he considered them to be the very ill that liberty was meant to remedy. *See id.* at 50 (“[S]ociety has now fairly got the better of individuality; and the danger which threatens human nature is not the excess, but the deficiency, of personal impulses and preferences.”); *see also* Fleming, *supra* note 6, at 17 (noting that liberalism embraces plurality of opinions and beliefs as byproducts of pursuit of the good).

113. *See supra* Part III.A.

114. *See* MILL, *supra* note 10, at 49.

115. *See id.*

116. *Id.* at 35 (“[T]here are many truths of which the full meaning *cannot* be realized, until personal experience has brought it home.”).

117. *See id.* at 17.

118. *Id.* at 47–48.

119. Direct experience and the opportunity for repeated experimentation with time to change course arguably holds more practical value to individuals than second-hand data through observation. Studies have shown that decisions that are not repeated or decisions with delayed consequences are ones where individuals have the most difficulty making decisions that will lead to outcomes that match their expressed preferences. *See generally* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1172–79 (2003). It is perhaps not surprising then that many circumstances where the state steps in to ameliorate consequences relate to choices where negative consequences are delayed until changing course is difficult or impossible, such as the decision to save for retirement.

In this way, consequences are essential for experimentation. An experiment is “something that you do to see how well or how badly it works.”¹²⁰ The consequences of the experiment, either one’s own consequences or the observed consequences of others’ choices, are how one determines whether the outcome was desirable (and similar choices should be repeated) or undesirable (and similar choices should be avoided).

When the state steps in to deliberately remove or distort consequences, it interferes with the intrinsic value of autonomy. Deliberation on distorted data is not as useful to an individual in forming the individual’s own conception of the good or how to pursue it.¹²¹ The removal of consequences can lead individuals on a path away from their conception of the good if they make otherwise bad decisions that lead to positive outcomes.¹²² In addition, when outcomes are predetermined, there is less value to experimenting because there is no way to achieve a new result.

Even if an individual is aware of the distorting effects of altered consequences, autonomy is not fully restored.¹²³ Taking for granted that one would be able to account for the distorted results in one’s deliberations, individuals are still deprived of the value of experimentation because all experiments lead to the same result.¹²⁴ If a particular outcome is desired, the state has the option of either regulating choices in such a way as to ensure a uniform outcome or simply providing a uniform outcome via a government program. Both options greatly lessen the benefits of deliberation and experimentation and, thus, both constitute an infringement of autonomy. Finally, there is a limited right to claim autonomy by someone who is aware

120. Experiment, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/experiment> (last visited Jan. 22, 2016).

121. See MILL, *supra* note 10, at 97. Mill argues that governments should not “substitute [their] own activity for” the mental exertion and development work of its citizens because doing so “dwarfs” individuals and eventually injures the state. *Id.*

122. In addition, Mill argues that autonomous experimentation has a utilitarian value to society by allowing others to view the results of their peers’ experiments and learn from the results. *Id.* at 53. This lesson is only valuable if viewing a poor decision is coupled with “displays [of] painful or degrading consequences.” *Id.* at 70.

123. See Sunstein & Thaler, *supra* note 119, at 1177.

124. It is questionable whether individuals will correctly internalize the effect of the lack of consequences in charting their course toward the good, given demonstrated limited cognitive abilities. See *infra* note 239 (discussing cognitive biases). The benefit to others in evaluating choices through observation will also be distorted regardless of the decisionmaker’s knowledge of the ameliorated consequences because they may not realize that the good consequences are not the natural result of the observed choices. See Sunstein & Thaler, *supra* note 119, at 1174–75.

that her actions are being absolved of any negative consequences.¹²⁵ In other words, general notions of fairness suggest that no one has the right to play a rigged game.

To provide a concrete example of the way consequences change the way individuals exercise their autonomy, consider the movement to privatize Social Security. Over the years, there have been proposals to partially privatize Social Security by allowing individuals to make investment decisions regarding their Social Security funds and even allow individuals to decide their level of contribution.¹²⁶ Given that current Social Security payments are barely above the poverty line, it is almost certain that any privatization plan that gives people an option of saving less or taking risks with those savings would lead to large numbers of retirees with inadequate savings on which to live.¹²⁷ Some additional payments to ameliorate the consequences of their failure to save adequately or their poor investment decisions would be necessary to avoid a large number of senior citizens living in abject poverty.¹²⁸

Such a system provides distorted feedback on investment decisions: If you invest insufficient funds or make risky investment choices, the upside of risky investments can be substantial while the downside is greatly limited by the safety net. Friends and neighbors who hear of risky investment decisions may suffer from these distortions as well if they are told of investments and any big payoffs but negative consequences are never observed. Additionally, any moral claim to the right to make investment decisions while socializing the risk of the downside of those decisions appears incredibly weak.

Apart from deliberation and experimentation, the role of consequences helps justify the utilitarian value of autonomy. Perhaps due to the success of

125. See Purdy & Siegel, *supra* note 9, at 387 (quoting then-Governor Mitt Romney as remarking with respect to his state's mandate that "a free ride on the government is not libertarian").

126. See Graetz & Mashaw, *supra* note 18, at 359–60 (noting current efforts to privatize Social Security); Kathryn L. Moore, *Privatization of Social Security: Misguided Reform*, 71 TEMP. L. REV. 131, 148 n.105 (1998) (describing various privatization proposals from 1990s); *id.* at 150 n.110 (listing nine examples of bills introduced by members of Congress to partially privatize Social Security by allowing some portion of payroll taxes to be placed into private accounts controlled by individuals).

127. Social Security payments are currently barely above the poverty line, and 34% of workers have no savings set aside for retirement. See *Social Security Fact Sheet*, U.S. SOC. SECURITY ADMIN., <https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf> (last visited Jan. 22, 2016). At \$1,269 per month, the average Social Security income for an individual is less than \$4,000 per year above the federal poverty line. See *2013 Poverty Guidelines*, U.S. DEP'T HEALTH & HUM. SERVICES (Dec. 1, 2013), <http://aspe.hhs.gov/poverty/13poverty.cfm>.

128. These payments would be inevitable, given the nation's moral commitment to alleviating poverty in the elderly. See Metzger, *supra* note 15, at 108 (noting that Social Security and Medicare are "plainly emblematic of [our] national and collective commitment to meeting certain basic needs").

liberal autonomy as a governing philosophy, it is generally taken for granted that society will not devolve into chaos and immorality if individuals are allowed free reign, subject only to their own judgment and an appropriately constrained requirement not to harm others. In advancing the idea of autonomy over a model of stricter governmental and societal control, Mill needed to articulate a case for what is now presumed.¹²⁹ *On Liberty* is, at its heart, a strong utilitarian defense of personal autonomy that parallels Mill's defense of the freedom of speech.¹³⁰

In Mill's argument, consequences play a crucial role by providing a substitute for government regulation (or oppressive social approbation). As noted above, autonomy does not require a particular choice or conception of the good and, in fact, promotes a variety of individualized value preferences.¹³¹ Consequences allow for this neutrality by providing a risk-regulating pressure on individual actions that reflects the values and risk tolerance of that individual.¹³² If a choice leads to an outcome an individual deems negative, she does not do it again. If an individual understands the risks of an activity, she will only choose that activity if she has sufficient tolerance for that risk. In this way, autonomy has value not just as self-direction but also as an internal risk regulator based on the individual's conception and tolerance for the risk of harm to self. Under a robust notion of autonomy, it is, therefore, unnecessary

129. Purdy & Siegel, *supra* note 9, at 383–84 (describing Mill's struggle to “strip[] away arbitrary, unnecessary, and self-serving regulation of individuals”).

130. Mill likens freedom of action to freedom of speech. Mill's argument in favor of dissident speech takes three parts: First, that dissent may, in fact, be true and refusing to allow such an opinion on the mistaken belief that current custom is infallible robs society of new and better ideas. MILL, *supra* note 10, at 14–15. Second, the dissenting opinion may be false, but rebutting false opinions provides new strength to the recognized truth. Such dissent is necessary to reinvigorate doctrine and prevent those in the right from growing lax in their defense of the truth and to prevent the meaning of doctrine from being lost to “mere formal profession.” *Id.* at 43. Third, neither doctrine nor dissent is entirely correct; rather, they “share the truth between them; and the non-conforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part.” *Id.* at 38. Without the missing piece the dissent provides, doctrine runs the risk of becoming extremist. *Id.*

131. *See supra* note 111.

132. Mill repeatedly invokes consequences as a counterweight to cabin autonomy based on the individual's own value system. *See, e.g.,* MILL, *supra* note 10, at 9 (stating liberty is right to “fram[e] the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow”); *id.* at 46 (“[M]en should be free to act upon their opinions—to carry these out in their lives, without hindrance . . . from their fellow-men, so long as it is at their own risk and peril. This last proviso is of course indispensable.”); *id.* at 64 (“In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences.”); *id.* at 65 (arguing additional consequences cannot be imposed to limit choice unless they are naturally imposed); *id.* at 67 (noting that punishing those who make bad decisions is not necessary because negative consequences are sufficient punishment); *id.* at 70 (“[T]he decision ought to rest with those who are to abide the consequences.”).

for the state to step in and regulate behavior with one-size-fits-all regulations based on values and risk tolerance that may not align with an individual's views. Consequences provide a custom regulation of sorts that is naturally tailored to the individual regulated.¹³³

Without consequences, this risk regulation function does not work. Consider the example of a program to privatize Social Security that allows for broad discretion in investment decisions but ameliorates much of the negative consequences of those decisions by providing a minimum level of financial support to the elderly.¹³⁴ Such a system encourages an out-sized tolerance for risk as the upside of such risk returns to the individual while the downside is at least partially ameliorated.

Consequences are thus important, from both a deontological and consequentialist perspective, and are a necessary component of fully robust liberal autonomy. Liberal autonomy can be conceived of as a fulcrum, with choice and consequences placed on either end. When the state does not intervene to infringe on choices or consequences, the scales are balanced and fully robust autonomy exists. If the state intervenes to remove consequences, the balance of autonomy is upset and something less than autonomy remains.

Like limitations on choices, the state can limit consequences to varying degrees. Consequences can be fully removed or only partially removed, leaving liberty lacking in varying degrees, which counsels attaching different values to the choices at issue.¹³⁵ The bankruptcy system, for example, provides a way to avoid some of the consequences of poor credit decisions by giving debtors a fresh start.¹³⁶ In this way, every credit decision is lacking in full autonomy. However, the bankruptcy process is difficult and many families still struggle post-bankruptcy with the same difficult financial circumstances the "fresh start" was meant to alleviate.¹³⁷ There are still a wide range of choices and significant remaining consequences, suggesting that Americans still retain a large level of autonomy over credit decisions, even if they are not fully

133. Consequences also provide an argument against paternalistic regulation. It is more difficult to argue that the state knows what is best for an individual if the individual is the one who lives with the consequences. *See id.* at 70 (dismissing paternalism as illegitimate justification for regulation because the individual, not state, bears consequences of failure to care for oneself).

134. *See supra* notes 126–28 and accompanying text.

135. *See infra* Part IV.B (describing proportionalism framework to determine value of choices with diminished consequences).

136. *See* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 71–75 (2006) (discussing theoretical underpinnings for idea of "fresh start" in bankruptcy).

137. *See id.* at 83–93 (collecting empirical data demonstrating that benefits of bankruptcy do not alleviate all, or even most, financial difficulties faced by struggling families).

autonomous.¹³⁸ Even a fully consequence-free choice may have some value,¹³⁹ but the quality of that choice falls far short of a fully autonomous choice.

When dealing with incomplete liberty, some regulations can be useful to restore or replace the deliberative or risk-regulating functions of autonomy. For example, Social Security provides a safety net for seniors to help alleviate the consequences of failing to adequately save for retirement. Given that the consequences of failing to save are largely mitigated, the Social Security tax that replaces the deliberative decision of whether to save for retirement should not be seen as an independent infringement on liberty. One could argue that the entire Social Security system should be scrapped in favor of full autonomy over retirement and savings decisions,¹⁴⁰ but it is internally inconsistent to argue for liberty over the choice to save while maintaining the safety net that ameliorates the consequences.¹⁴¹ In other words, when consequences are significantly diminished, autonomy is incomplete and the proper question is not autonomy versus the regulatory justification but rather whether the regulation restores or replaces the consequences.¹⁴²

B. Incomplete Consequences for Economic Rights

The use of autonomy to justify individual personal rights—such as freedom of speech, religious exercise, and privacy—does not generally raise issues with limited consequences because these rights are not particularly susceptible to having a meaningful measure of consequences removed. The consequences of such choices are personal and, therefore, difficult to alter through state interference.¹⁴³

The move to embrace liberal autonomy as a justification for economic

138. See *infra* Part IV.C.2 (discussing value of choices when a meaningful measure of consequences remain).

139. See *infra* Part III.D.1 (discussing value of public-private social programs that involve choices where large portion of consequences are removed).

140. Some libertarians are in favor of doing away with Social Security, but there is no consensus on the issue even among libertarians. See Draper, *supra* note 24.

141. There may be some middle ground that could increase choice while still maintaining the safety net, but that possibility may be foreclosed by the Commerce Clause majority in *NFIB*. See *infra* Part III.D.1.

142. It should not be necessary to rely on harm to others or the heavier burden required to justify paternalistic regulations to justify these regulations.

143. For example, the decision to speak publicly on a controversial topic may gain you the admiration of your peer group or the scorn of those who disagree with you, but those consequences are not particularly susceptible to government interference. In fact, the First Amendment prohibits the government from stopping those who would speak in response to your speech.

rights creates more potential for the mislabeling of incomplete liberty. The interconnectedness of our economy and the existence of broad economic safety nets mean that economic choices are often lacking in at least some consequences, and thus, involve some level of incomplete liberty.¹⁴⁴ The choice to purchase health insurance provides a compelling example of such a decision.

The Affordable Care Act was enacted to address the problem of large numbers of Americans who do not have health insurance and to rein in the cost of health care.¹⁴⁵ For many, the “choice” to purchase health insurance was largely illusory because they lacked the means or opportunity to do so.¹⁴⁶ The ACA’s first goal was to make private health insurance more accessible to all.¹⁴⁷ To do so, the ACA creates a regulatory structure that prevents insurance companies from denying coverage due to pre-existing conditions (the guaranteed-issue provision) and requires insurance companies to price policies based on the general risks of a community rather than on individual health (the community-rating provision).¹⁴⁸ These measures alone run the risk of making health insurance prohibitively expensive by encouraging only unhealthy people to procure health insurance and allowing individuals to wait to purchase insurance until they fall ill.¹⁴⁹ The individual mandate was designed to address this adverse selection problem by ensuring that all those with sufficient income would purchase insurance to offset the cost of coverage for the unhealthy.¹⁵⁰ These provisions together were intended to make health insurance more

144. See *United States v. Morrison*, 529 U.S. 598, 660 (2000) (Breyer, J., dissenting) (“We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate.”).

145. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2571 (2012).

146. Private insurance on the open market was often prohibitively expensive and insurance companies would frequently refuse to insure individuals with expensive pre-existing medical conditions or charge significantly higher rates to individuals in poor health. *Id.* at 2613 (Ginsburg, J., concurring).

147. In addition, the ACA greatly expanded Medicaid to allow states to provide coverage to more of their citizens. *Id.* at 2582 (Roberts, C.J.) (noting ACA requires states to “provide Medicaid coverage to adults with incomes up to 133% of the federal poverty level”). Although the Court struck down the requirement that states provide the expansion, it left intact the option for states to accept the Medicaid expansion. *Id.* at 2608.

148. See, e.g., 42 U.S.C. §§ 300gg, 300gg-1 to -4 (2012).

149. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2613–14 (Ginsburg J., concurring) (describing failed experiment by various states to enact guaranteed-issue and community-rating laws without mandate and subsequent “death spiral” in those states’ insurance markets).

150. *Id.* at 2585 (Roberts, C.J.).

affordable for more people, thus providing a larger group access to quality, affordable health care.¹⁵¹

The individual mandate serves another purpose, independent of its redistributive function. It corrects a situation where autonomy was fragmented by the government's intervention to ameliorate the consequences of failing to purchase health insurance.¹⁵² For the group of individuals who can afford to purchase health insurance, a significant measure of the consequences of the failure to purchase insurance has been mitigated by a patchwork of safety nets, which ensures that those who cannot afford insurance, or choose not to purchase it, are still provided a minimal level of healthcare.¹⁵³ The 1986 Emergency Medical Treatment and Active Labor Act (EMTALA) and various state laws require hospitals to provide emergency care to all, regardless of their ability to pay.¹⁵⁴ Public and private charitable clinics provide additional preventative and non-emergency services, although their reach is not comprehensive.¹⁵⁵ The bankruptcy system also ensures that the failure to purchase insurance will not lead to a lack of care because individuals can receive life-saving non-emergency treatment they know they cannot afford and declare bankruptcy after the fact.¹⁵⁶ Hospitals and doctors pass on the cost of

151. See Peter Brandon Bayer, *The Individual Mandate's Due Process Legality: A Kantian Explanation, and Why It Matters*, 44 LOY. U. CHI. L.J. 865, 912 (2013) (arguing individual mandate is justified as tax under Kantian theory because it prevents individuals from becoming so destitute that they cannot function as dignified individuals).

152. The individual mandate makes a good case study to explore the concept of incomplete liberty because, by statute, it relates to decisions by only those who have a meaningful level of choice in purchasing health insurance. Patient Protection and Affordable Care Act § 1501, 26 U.S.C. § 5000A (2012) (outlining "shared responsibility payment" that applies only to those whose income exceeds a certain threshold and for whom purchase of health insurance would not exceed a certain percentage of their income). Thus, the question of whether a true choice exists over the decision to purchase health insurance is answered by statute. See *infra* Part IV.B (step one of proportionalism framework).

153. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2610 (Ginsburg, J., concurring) ("[T]he inability to pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient's ability to pay.>").

154. 42 U.S.C. § 1395dd (2012); see also *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2610.

155. Some politicians opposed to the Affordable Care Act touted this patchwork of care as a reason why healthcare reform was not needed because all can access this safety net. Brietta Clark, *A Moral Mandate & the Meaning of Choice: Conceiving the Affordable Care Act After NFIB*, 6 ST. LOUIS U. J. HEALTH L. & POL'Y 267, 312–13 (2013) (noting that federal and state politicians made remarks "that insurance is not even that important because people can always get care in the emergency room").

156. See W. David Koeninger, *The Statute Whose Name We Dare Not Speak: EMTALA and the Affordable Care Act*, 16 J. GENDER RACE & JUST. 139, 169 (2013). Bankruptcy is not a consequence-free decision, see *supra* note 136, but it is better than the alternative of being unable to access treatment without the ability to pay up front.

this uncompensated care to insurance companies through higher rates, which trigger higher premiums for the insured.¹⁵⁷

The uninsured may choose not to purchase insurance either assuming that they will not incur unexpected substantial healthcare costs or recognizing the risk and intentionally relying on the safety net should such costs occur.¹⁵⁸ These are individuals who choose to gamble on not needing health insurance, secure in the knowledge that should they lose that bet the worst consequences of the failure to insure will be ameliorated due to a public commitment to provide minimum healthcare for all.¹⁵⁹ The ACA's guaranteed-issue provision provides a further backstop against the consequences of not purchasing health insurance because the guaranteed-issue provision enables individuals to purchase health insurance when they discover an expensive medical condition that would have excluded them from coverage as a pre-existing condition in a free market.¹⁶⁰

There are certainly still some negative consequences to not having health insurance. Many without insurance do not have access to preventative care, which leads to worse health outcomes.¹⁶¹ There is evidence that the uninsured, especially those who live in poor areas where local hospitals are overburdened with nonpaying patients, have less access to quality preventative medicine and care for chronic illnesses.¹⁶² However, for those who can afford monthly health insurance premiums, it is likely that they could also afford routine preventative care if they chose it, thus avoiding the negative effects caused by the combination of poverty and lack of insurance. These individuals who are

157. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2585 (“Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over \$1,000 per year.”).

158. The percentage of uninsured who are in a financial position to purchase health insurance but choose not to may be a relatively small number. *See id.* at 2613 & n.1 (Ginsburg, J., concurring) (noting that in National Center for Health Statistics study, when asked why they lack coverage, most cited high cost of insurance while a negligible number of people stated they lacked coverage because they “[d]id not want or need coverage”). It is difficult to determine at what cost insurance switches from a begrudged expense to truly unaffordable. The insurance mandate provides a bright line by applying only to those who meet a certain income cutoff and the cost of insurance will not exceed a certain percentage of their income. *See supra* note 152 and accompanying text.

159. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2620 (Ginsburg, J., concurring).

160. Justice Scalia recognized that the guaranteed-issue provision makes it more attractive for the uninsured to gamble on purchasing insurance because they have a government-provided way out if they develop a costly medical condition. *Id.* at 2645 (Scalia, J., dissenting). He saw that as a reason to respect the choice not to purchase insurance, however, rather than limiting the value of that choice. *Id.*

161. *Id.* at 2611–12 (Ginsburg, J., concurring).

162. *See* Emily Whelan Parento, *Health Equity, Healthy People 2020, and Coercive Legal Mechanisms as Necessary for the Achievement of Both*, 58 *LOY. L. REV.* 655, 684–85 (2012) (“Evidence indicates that uninsured persons are more likely to have negative health outcomes.”).

uninsured by choice can pay for most routine care, only being forced to rely on the public safety net for larger, unexpected costs.¹⁶³ The Commerce Clause majority was particularly concerned with the liberty interests of these young, healthy individuals who could purchase health insurance but chose not to.¹⁶⁴ It is this type of individual who is “attempt[ing] self-insurance with the back-stop of shifting costs to others” that the mandate was meant to capture.¹⁶⁵

Thus, for those covered by the individual mandate, there was an incomplete liberty interest in the decision to purchase health insurance.¹⁶⁶ This concept was not foreign to the mandate’s original creators. The brainchild of a conservative think tank, the mandate was originally conceived of to instill a sense of personal responsibility in those who did not purchase health insurance because they knew that social morals would prevent any harm that might come to them.¹⁶⁷ It was meant to instill a “moral mandate” that everyone has a personal obligation to purchase health insurance to cover the cost of their own healthcare.¹⁶⁸ The limited liberty interest remaining in the choice to purchase health insurance was not recognized, however, by those who opposed the adoption of the individual mandate.¹⁶⁹ Nor did the Commerce Clause majority

163. *See Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2610 (Ginsburg, J., concurring) (noting that most uninsured people cannot pay out of pocket for cost of non-routine care because a single hospital stay costs upwards of \$10,000, the cost for treating a heart attack exceeds \$20,000, and the cost of a year of cancer treatment exceeds \$50,000). While those who remain uninsured by choice rather than necessity may be a small subsection of the uninsured, it is for their benefit that the Commerce Clause majority found a right to remain uninsured as they are the only individuals coerced by the mandate. *See id.* at 2608 (Roberts, C.J.).

164. *Id.* at 2590 (noting that mandate primarily affects healthy young people who “have other priorities for spending their money”); *id.* at 2646 (Scalia, J., dissenting); *see also* Koeninger, *supra* note 156, at 166–67 (describing “striking” amount of time conservative Justices spent questioning counsel about cost shifting to “healthy young adults”).

165. *See Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2589–90 (quoting government’s brief in support of mandate under Commerce Clause).

166. Even those who might swear off government interference and pledge not to use assistance in order to maintain their autonomy could do so secure in the knowledge that they will be able to change their minds and access that care if (or when) they need it. *See id.* at 2620 (Ginsburg, J., concurring) (“Under the current health-care system, healthy persons who lack insurance receive a benefit for which they do not pay: They are assured that, if they need it, emergency medical care will be available, although they cannot afford it.”). There is no indication that individuals have refused to use this safety net in life threatening situations in order to preserve their autonomy.

167. Jennifer B. Wriggins, *Mandates, Markets, and Risk: Auto Insurance and the Affordable Care Act*, 19 CONN. INS. L.J. 275, 286 (2012) (describing the original justification for mandate proposed by domestic policy director of Heritage Foundation in 1989).

168. Clark, *supra* note 155, at 276 (describing federal government’s response to mandate, including messaging that there is a duty that “those who can afford to buy insurance should and must do so”).

169. *See id.* at 275–76 (noting that opponents of ACA, including politicians, popular media and general public, feared that mandate was a “federal intrusion into every aspect of our personal lives that

acknowledge that the liberty interest was diluted by the lack of consequences.¹⁷⁰ Rather, they found that the liberty at stake was so vital as to justify a new theory of federalism focused on individual liberty.¹⁷¹

C. *Do Consequences Always Matter?*

How can we explain the failure of the ACA's opponents, including the Commerce Clause majority, to consider the role of consequences in constituting liberal autonomy? Perhaps those who oppose the mandate conceive of liberty in such a way as to make consequences less necessary?¹⁷² Liberal autonomy is not without its critics, and there are other ways to conceive of autonomy where consequences may not play as vital a role.¹⁷³ Relational autonomy, a theory that rejects the pure individualism of liberal autonomy, could provide a possible explanation for the failure to consider consequences but that theory is not consistent with the advancement of economic liberty.¹⁷⁴

Critical legal theorists, including many influential feminists, challenge the basic assumption of liberal autonomy that individuals are purely self-determining.¹⁷⁵ The liberal model, they argue, is one that presumes "that individual autonomy is to be achieved by erecting a wall (of rights) between the

would ultimately destroy civilization as we know it").

170. See *infra* note 171 and accompanying text.

171. See Rosen & Schmidt, *supra* note 17, at 124 (arguing that *NFIB* introduced new theory of federalism that makes individual liberty focal point rather than a by-product of protecting states' rights).

172. There are numerous other definitions of autonomy in philosophy and the law. See NOMY ARPALY, *UNPRINCIPLED VIRTUE: AN INQUIRY INTO MORAL AGENCY* 118–26 (2003) (describing "eight distinct things" that are called autonomy); *id.* at 118–19 (noting that "autonomy" may be "a term of art [that] performs so many tasks that it becomes at least as elusive and complex as the natural-language term[] it was supposed to help clarify"); see also Fallon, *supra* note 44, at 876 ("Autonomy . . . is a protean concept, which means different things to different people, and occasionally appears to change its meaning in the course of a single argument."). This Article focuses on two broad theories of autonomy—liberal and relational—that relate most closely to the debate over economic rights grounded in autonomy.

173. One response to the perceived limitations of liberal autonomy is to reject autonomy as a value. Others see value, and power, in the concept of autonomy but wish to re-conceptualize the term to take into account the relatedness of human experience. Carlos A. Ball, *This Is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective*, 28 HARV. J.L. & GENDER 345 (2005) (outlining relational autonomy as developed in feminist literature); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 10 (1989).

174. See Jurgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 774 (1996) (describing difference between governance based on individual liberty, which requires individuals "to carry the responsibility for the consequences of his decisions" and welfare-state models where that is not a requirement).

175. See, e.g., Nedelsky, *supra* note 173, at 8–12.

individual and those around him,”¹⁷⁶ and “thus fails to recognize the inherently social nature of human beings.”¹⁷⁷ Relational autonomy accepts the idea of autonomy as self-reflection and a way to “find and live in accordance with one’s own law”¹⁷⁸ but recognizes that “one’s own law is shaped by the society in which one lives and the relationships that are a part of one’s life.”¹⁷⁹ Although relational autonomy retains the importance of deliberation and experimentation, it rejects the primacy of independence and self-sufficiency in liberal autonomy.¹⁸⁰ Recognizing that no one is entirely self-sufficient, autonomy is not an inherent state but rather a capacity that must be developed.¹⁸¹ As such, the state “may have certain obligations to ensure that conditions exist that serve to nurture it.”¹⁸²

Rejecting the independence or self-sufficiency model, paternalistic intervention, such as the removal consequences, is not always stigmatized as an infringement on relational autonomy. When an individual is not autonomous because she lacks capacity, action that seeks to “promote or enable the autonomy of the person” may be justified.¹⁸³ One possible capacity-building intervention is removing consequences to provide more space for risk taking to those who would otherwise be limited in their choices. This can be more productive than dictating choices that will lead to good outcomes because it builds the self-deliberative capacity while lessening the risks of the choice.¹⁸⁴ The portions of the ACA that seek to increase access to health insurance, such

176. *Id.* at 12.

177. *Id.* at 8.

178. *Id.* at 10.

179. *Id.*

180. *See* Ball, *supra* note 173, at 353.

181. *See* Nedelsky, *supra* note 173, at 10.

182. Milton R. Regan, Jr., *Getting Our Stories Straight: Narrative Autonomy and Feminist Commitments*, 72 IND. L.J. 449, 452 (1997). Relational autonomy is not a negative liberty, as liberal autonomy would suggest, where autonomy is achieved by simply leaving people alone. Rather, relational autonomy is a positive liberty that creates “affirmative duties” to foster and develop individual self-determination in society at large. *Id.* To put it another way, law and society are not “neutral” with respect to autonomy. “The ‘neutral’ rules of the game correspond to a particular vision of the good society which gives advantages to some players over others in systematic, if not perfectly predictable ways.” Nedelsky, *supra* note 173, at 19. Therefore, it is not enough to recognize that social forces impact the individual; society must “make the interdependence of citizen and state conducive to, rather than destructive of, autonomy.” *Id.* at 20.

183. *See generally* John Christman, *Relational Autonomy and the Social Dynamics of Paternalism*, 17 ETHICAL THEORY & MORAL PRAC. 369 (2013).

184. *Id.* at 378–79 (arguing that providing services to individuals who have had their capacity for autonomy destroyed by great suffering should include affirmative attempts to build capacity for autonomy).

as the Medicaid expansion and the guaranteed-issue and community-rating provisions, can be seen as efforts to increase the autonomy of beneficiaries by providing the healthcare that is necessary to exercise autonomy in all other areas of life.¹⁸⁵

Although relational autonomy provides a compelling argument for the possibility of limiting consequences while still preserving (or advancing) autonomy, it is not in line with the rhetoric or the legal arguments made against the mandate or in favor of economic rights. First, those covered by the mandate are not lacking in the capacity for robust choice because the mandate only applies to those who can afford insurance.¹⁸⁶ Second, the argument for economic rights relies on the notions that everyone has equal autonomy and a level playing field exists absent government interference.¹⁸⁷ This is anathema to the idea that certain groups might need consequences diminished to provide breathing room to develop capacity for autonomy. Finally, proponents of relational autonomy would likely applaud the mandate for helping to increase the capacity for autonomy of those who were shut out of the market for health insurance.¹⁸⁸

The Commerce Clause majority was clearly not embracing a theory of relational autonomy.¹⁸⁹ Their opinions were a move away from precedent that focuses on increasing the autonomy of members of systematically disadvantaged groups by requiring economic actors to engage in commerce with them, such as the public accommodation cases under the Civil Rights Act.¹⁹⁰ Instead, they moved toward a more liberal autonomy ideal, using individual economic rights as a trump, rather than a factor to consider, in

185. See Parento, *supra* note 162, at 663 (stating that health “has a particular significance to individuals—without health, individuals cannot fully function as human beings”); see also Bayer, *supra* note 151, at 914. Professor Bayer uses Emmanuel Kant’s philosophy to argue that “poverty is an intolerable condition” and that autonomy requires the ability to rise above “mere animal survival” to realize a higher potential. *Id.*

186. See *supra* note 152 and accompanying text.

187. See *supra* note 41 and accompanying text.

188. See *supra* note 185 and accompanying text.

189. This reflects the Rehnquist and Roberts Courts’ trend of “moving decisively away from any protection for the egalitarian elements of American society” and towards economic rights and individual autonomy. Stephen E. Gottlieb, *Does What We Know About the Life Cycle of Democracy Fit Constitutional Law?*, 61 RUTGERS L. REV. 595, 606 (2009).

190. See Koeninger, *supra* note 156, at 179. Professor Koeninger notes that anti-discrimination laws can be characterized as addressing inactivity—the failure to hire or enter into economic transactions with minority populations—and finds unconvincing the Chief Justice’s attempt to distinguish them as regulating activity in a way that is materially different than the individual mandate. *Id.*; see also Strauss, *supra* note 105, at 15–16 (arguing difficulty in reconciling *NFIB* with Civil Rights Act cases).

balancing the capacity for autonomy among various groups within the economy.¹⁹¹

If the argument for economic liberty is firmly rooted in the individualism of liberal autonomy, as it appears to be, then when the state intervenes to remove the consequences of a choice to ensure a uniform outcome, the infringement on autonomy occurs when the protection is put into place.¹⁹² After such infringement occurs, the remaining liberty is incomplete and should not be valued as highly as choices where consequences are fully felt. In the case of health insurance, liberty was infringed upon by ensuring that every individual will have access to lifesaving care. The choice to purchase health insurance was already lacking a meaningful level of autonomy.

D. Failure to Recognize Incomplete Liberty Undermines True Autonomy

As discussed, the majority of the Court in *NFIB* did not take the limited nature of the autonomy interest over health insurance into account. Instead, it embraces a liberty interest in choosing to purchase health insurance to expand economic rights under the banner of federalism, essentially applying the harm principle to a notion of complete autonomy.

Commentators have opined on various aspects of the *NFIB* decision—both commending and attacking it.¹⁹³ Many of these discussions either implicitly or explicitly utilize the same autonomy-versus-harm framework inherent in the Court's decision.¹⁹⁴ Some see the *NFIB* decision as the first step by the conservative members of the Court to use the liberty right to reign in the broad

191. See *supra* notes 82–85 and accompanying text.

192. These interventions are often justified on paternalistic grounds. Despite the fact that paternalism is generally disfavored when it comes to limiting choices, many programs that use paternalistic interventions to directly remove negative consequences are popular and accepted as social norms. See Regina T. Jefferson, *Privatization: Not the Answer for Social Security Reform*, 58 WASH. & LEE L. REV. 1287, 1290–91 (2001) (“Social Security is one of the most popular and successful social programs in this country’s history.”); Koeninger, *supra* note 156, at 170 (noting that right to emergency care is an embedded social norm that no parties to the ACA litigation advocated repealing); Parento, *supra* note 162, at 697 (“Medicare is popularly considered a right (or, an ‘entitlement’) for U.S. seniors.”).

193. See generally Gary Lawson, *Night of the Living Dead Hand: The Individual Mandate and the Zombie Constitution*, 81 FORDHAM L. REV. 1699 (2013) (praising some parts of decision and deriding others); Rosen & Schmidt, *supra* note 17 (criticizing federalism argument); Strauss, *supra* note 105 (criticizing Commerce Clause ruling).

194. See Ilya Shapiro, *Like Eastwood Talking to a Chair: The Good, the Bad, and the Ugly of the Obamacare Ruling*, 17 TEX. REV. L. & POL. 1, 2–5 (2012) (praising “strong language” in Chief Justice Roberts’s opinion providing limiting principle that implicitly recognizes autonomy interest and rejects infringement). See generally Purdy & Siegel, *supra* note 9 (explicitly utilizing Mill’s harm principle to evaluate mandate and *NFIB* decision).

power of the Commerce Clause.¹⁹⁵ If that is the case, they chose a poor liberty interest on which to stake their first flag. The conflation of incomplete liberty and true autonomy creates both practical and conceptual problems that threaten to undermine the concept of autonomy.

1. Incomplete Liberty Threatens Public/Private Safety Nets

First, the Commerce Clause majority's framework limits the ability to take incomplete liberty situations into account when revising or expanding social programs or social insurance.¹⁹⁶ By treating incomplete liberty as having value equivalent to other autonomy-based rights such as speech or privacy, and thereby trumping Congressional power, the *NFIB* majority may have foreclosed further public/private safety nets.¹⁹⁷ Modifications to social programs that combine public benefits with required private action are often advanced in an effort to *increase* autonomy by providing some private choice in tandem with (or instead of) government-run programs.¹⁹⁸

Congress has broad power to remove the consequences of choices by providing safety nets. Importantly, these programs to alleviate harm are generally politically popular, and it seems safe to assume that a democratically responsive government will continue to mitigate at least some of the consequences of poor economic decisions.¹⁹⁹ Despite the popularity of the benefits of such programs, there are still those who argue for more individual choice over the means by which benefits are delivered.²⁰⁰ If incomplete liberty over the private portion of these programs is treated with the same reverence as fully autonomous choices, like they were in *NFIB*, Congress may be left with two untenable options for privatization—either allow consequence-free

195. See Barnett, *supra* note 14, at 1333 (noting that *NFIB* was a definitive ruling that the Commerce Clause has limits); Jacobi, *supra* note 68, at 799 (making strong case that Chief Justice's opinion was a calculated move to restrain Commerce Clause and Necessary and Proper Clause).

196. See Graetz & Mashaw, *supra* note 18, at 356–65.

197. See *id.* at 361 (noting that *NFIB* casts constitutional doubts over any plans to privatize Social Security).

198. The individual mandate itself was conceived of by a conservative think-tank as a way to do just that. Rather than reforming healthcare into a single-payer system where the government provides one health care plan to everyone, the mandate was designed to preserve choice over health insurance plans while still eliminating the free rider problem created by the willfully uninsured. See *id.* at 358 (noting that mandate is alternative to single-payer system); Wriggins, *supra* note 167, at 286 (describing origins of mandate).

199. See *supra* note 197 and accompanying text.

200. Graetz & Mashaw, *supra* note 18, at 360 (discussing benefits of private savings programs, including “enhanc[ing] personal responsibility for retirement”).

decisions (and the attendant free rider and moral hazard problems) or remove the safety net so any poor decisions will be met with negative consequences.²⁰¹ The only other alternative is to permit no autonomy over the decision at all.

One example of a proposed public/private safety net is the partial privatization of Social Security. Any privatization plan will necessarily include a minimum level of required contributions and require some limits on the level of risk for investments in such accounts or the potential cost of poor decisions that would need to be ameliorated by welfare payments would overwhelm the system.²⁰² Concerns about this cost being used to override the liberty interest in controlling one's saving decisions should be rejected because the liberty interest involved in any "savings mandate" would not entail full autonomy. As discussed, the autonomy involved in a privatization plan that gives individuals freedom to choose how much to save and where to invest those savings implicates only incomplete autonomy if there is a safety net that ensures that the elderly will have at least a minimum standard of living.²⁰³ Given moral commitments to alleviating extreme poverty among seniors, such a safety net is inevitable.²⁰⁴

If this incomplete liberty is not recognized, however, then the Commerce Clause majority's reasoning in *NFIB* would suggest that any savings mandate would likely be found unconstitutional under the Commerce Clause because it mandates activity.²⁰⁵ Like the hypothetical "vegetable mandate," the savings mandate would be susceptible to slippery slope comparisons to fully autonomous decisions such as the decision to save for a car. This would be the same mistake the Commerce Clause majority made in *NFIB*: forbidding regulations based on incomplete liberty because they offend true autonomy.²⁰⁶

201. The latter is unlikely to occur because of our society's moral commitments and the recognition of imperfect decision making driven by cognitive biases. *See infra* Part IV.A.

202. *See* Graetz & Mashaw, *supra* note 18, at 360 (arguing that contributions to privatized Social Security accounts would need to be mandatory to be successful in providing universal coverage).

203. *See supra* p. 121.

204. *See* Metzger, *supra* note 15, at 108 (describing "[our] national and collective commitment to meeting certain basic needs" as a reason behind Social Security's popularity).

205. *See supra* notes 72–78 and accompanying text. Relying on the tax power would likely not save a retirement savings mandate because the amount of "tax" that would be needed to recoup the cost of someone who failed to save would be the entirety of that person's Social Security payments. This would greatly exceed the small shared responsibility payment of the ACA. *See also* Graetz & Mashaw, *supra* note 18, at 361 (questioning whether a tax that is equivalent to amount put in savings would pass muster under *NFIB*).

206. Such reasoning would mirror the Commerce Clause majority's comparison of purchasing health insurance to purchasing domestic cars. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2650 (2012) (Scalia, J., dissenting).

If Congress is not permitted, on liberty grounds, to require individuals to act when they would prefer inactivity—i.e., save for retirement in a private account—the only choices are to maintain the current system with no autonomy over savings and investments or to create an economically unfeasible system that allows individuals to gamble with their retirement savings and leave the public to absorb the losses.

Programs that mix public safety nets with private choice demonstrate that there can be some value in incomplete liberty. Even if society desires a benefit that removes the most disastrous of consequences, it still may prefer having a few different paths that can lead to results that might be incrementally better or worse but never below a basic threshold. Incomplete liberty may be impossible to deliver as a practical matter, however, if there is no recognition that such choices should not be valued the same as fully autonomous choices. If those who ascribe to liberal autonomy fail to recognize this distinction, they lose potential opportunities to provide increased choice in circumstances where there is no political will to dismantle the safety net. This increased choice comes without any additional infringement on true autonomy because the safety net has already diminished it, so such choices are a valuable compromise for proponents of libertarian autonomy.

2. Reining in the Ever-Expanding Harm Principle

In addition to hampering autonomy-increasing programs, elevating incomplete liberty threatens to undermine arguments in favor of genuine autonomy by expanding the harm principle. There is already great pressure to expand the harm principle.²⁰⁷ Proponents of regulations often attempt to characterize arguments based on paternalistic or redistributive goals, such as preventing social harm, to make such regulations politically or legally palatable.²⁰⁸ A theory of robust liberal autonomy requires that much harm caused by individual experimentation be tolerated.²⁰⁹ But this theory runs up against those who wish for a more expanded harm principle to address social ills.

Equating choices that involve incomplete liberty with fully autonomous

207. See Pope, *supra* note 31, at 445–49 (noting outward pressure on harm principle and that its misuse can create slippery slope that justifies extensive regulations).

208. *Id.* at 437 (noting that proponents of regulation use a strategy to “illustrat[e] that seemingly personal behavior does in fact violate the harm principle and is therefore subject to societal control”).

209. MILL, *supra* note 10, at 69.

decisions adds additional fodder to those who argue for an expanded harm principle to account for the negative externalities caused by the lack of consequences. When consequences are removed from a decision, moral hazard is often created and free-rider problems can arise.²¹⁰ In addition to the economic cost of moral hazard, there is an instinctual feeling that it is unjust to argue that you should have a choice when others pay for the consequences; at a gut level, we understand that a choice without consequences is less valuable than truly autonomous decisions.²¹¹ This idea resonates throughout Justice Ginsburg's concurrence in *NFIB*.²¹²

This sense of moral turpitude leads to a desire to expand the harm principle to take morality issues into account. Take, for example, Professors Purdy and Siegel's discussion of the mandate that specifically utilizes Mill's harm principle.²¹³ They argue that the harm caused by the free riders who choose not to purchase health insurance justifies infringement on the autonomy interest involved because "individual insurance coverage falls squarely into the zone of interdependence where legal and social judgments inevitably decide which interests qualify for libertarian protection, rather than into the area of self-regarding actions where only paternalistic interests are present."²¹⁴ They argue society's commitment to provide health care to those who need it demonstrates that interdependence relating to health care is a "protected interest[]," making the harm posed by free riders subject to regulation under the harm principal.²¹⁵

This injects a form of morality into the autonomy question that depends on determining what social goods play a sufficiently central role in society.²¹⁶ The argument that harm to others can be found by the failure to act in alignment

210. See Russell Korobkin, *Comparative Effectiveness Research As Choice Architecture: The Behavior Law and Economics Solution to the Health Care Cost Crisis*, 112 MICH. L. REV. 523, 529 (2014) (describing moral hazard problem that arises when costs are borne by a third party, such as through insurance).

211. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2620 (2012) (Ginsburg, J., concurring) (noting that the uninsured receive the safety net "for which they do not pay" and that the insured "bear the cost of this guarantee"); see also Bayer, *supra* note 151, at 919 ("[T]he uninsured have no liberty interest in courting awaiting beggards."); Purdy & Siegel, *supra* note 9, at 387 (quoting then-Governor Mitt Romney as remarking that "[a] free ride on the government is not libertarian").

212. See, e.g., *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2611 (Ginsburg, J., concurring) (referring to uninsured as free riders); *id.* at 2620 (noting that uninsured "receive a benefit for which they do not pay").

213. See generally Purdy & Siegel, *supra* note 9.

214. *Id.* at 386.

215. See *id.* at 395.

216. See Bayer, *supra* note 151, at 889–90 (critiquing Professors Purdy and Siegel for relying on contemporary social morality to justify infringement on liberty).

with agreed upon social values subverts the purpose of autonomy as a way of promoting individual choice over required compliance with social norms.²¹⁷

Although such moral judgments should not play a role in deciding whether autonomous choices should be allowed, without a way to account for the difference in the quality of choice this morality is bound to creep in to account for the lesser value of the consequence-reduced choice.²¹⁸ In a framework that makes no distinction between autonomous choices and incomplete liberty, the only outlet for this sense of unfairness is to expand the harm principle to encompass the harms caused by limiting the consequences of a choice.

Once the harm principle is expanded with respect to such choices, it is difficult to rein it in when true autonomy is at stake. As noted by the Commerce Clause majority, aggregate economic harm poses a particular concern for the harm principle, given its potentially limitless reach.²¹⁹ Take Justice Scalia's concern that the reasoning in Justice Ginsburg's concurrence regarding the aggregate economic harm of the failure to purchase insurance could apply to the aggregate effects of individuals' decisions not to purchase American cars.²²⁰ It is easy to see how the harm caused by the failure of the domestic automobile industry due to aggregate purchasing decisions could easily outstrip the \$1,000 per year cost to society of the uninsured.²²¹ If the liberty interests for both choices are equal, why would the \$1,000 per year that the uninsured cost each American be sufficient to infringe on the choice to purchase health insurance but not on car selection?

When viewed this way, the Commerce Clause majority's concern about an unbridled federal power is more understandable. They were correct to be concerned about using aggregate economic harm to justify infringing on a protected autonomy interest.²²² Their error lies in finding an autonomy interest

217. The existence of moral hazard does not remove the moral component of this argument as it does not make a situation universally harmful to society. The purchase of health insurance (or any insurance) creates moral hazard because individuals have less incentive to avoid the costs covered by insurance. See Korobkin, *supra* note 210, at 529. This does not mean that insurance is normatively bad—in the case of the mandate, it was deemed to be the most socially desirable outcome.

218. See, e.g., Purdy & Siegel, *supra* note 9, at 382–87.

219. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2588 (2012) (opining that approving mandate would override all limitation on federal government); *id.* at 2646 (Scalia, J., dissenting) (allowing mandate would give federal government unlimited power).

220. *Id.* at 2650.

221. *Id.*

222. *Id.* at 2589 (Roberts, C.J.) (noting the failure of individuals to “do things that would be good for them or good for society . . . joined with the similar failures of others [can] readily have a substantial effect on interstate commerce”). Whether such concern should have led to finding an individual right in the Commerce Clause that trumps congressional action is a question outside the scope of this Article.

in the decision to purchase health insurance that is equal to the decision to purchase a car or any litany of fully autonomous choices.²²³

NFIB might give proponents of a strictly construed harm principle false hope because a majority of the Court rejected the idea of using aggregate economic harm to justify the individual mandate.²²⁴ This outlook is shortsighted. Most regulations will not benefit from the trump given to the choice to purchase health insurance in *NFIB*. First, the concerns about federalism that justified the opinion do not apply to state regulations.²²⁵ Second, by focusing on the action/inaction distinction—rather than whether full autonomy, including consequences, existed—the Court gave Congress the option of framing most regulations as activity moving forward.²²⁶ Therefore, most future regulations evaluated under a framework where incomplete liberty is at issue will be susceptible to being overridden by an expanded harm principle.²²⁷ Given the strong pressures to expand the harm principle to address certain expensive social ills, without the Commerce Clause right as a trump, many more regulations are likely to succeed under this notion of expanded harm. Proponents of liberal autonomy may have won the battle in *NFIB*, but it could cost them the war.

By focusing on the quality of autonomy inherent in the decision rather than the harm caused, it becomes significantly easier to find a bright (or at least brighter) line. Rather than arguing about moral hazard and slippery slopes, this framework provides a more consistent reason for distinguishing between the lesser interests involved in the decision to purchase health insurance and the autonomous decisions to purchase other goods where the government has not stepped in to modify the consequences of free choice. There is no longer a

223. Saving the mandate under the tax power does not undo the damage done by ignoring the impact of consequences in the Commerce Clause. As noted, the Chief Justice's opinion conditioned the tax power on the relatively small size of the shared responsibility payment and the true choice still available to those who wish not to purchase insurance. *Id.* at 2595–96. This caps the government's ability to balance the scales to compensate for the lack of consequences to less than the cost of the insurance itself. In addition, the tax power is politically difficult to utilize, so the "opinion left Congress with a great deal of power where it often has the least room to maneuver." Glenn H. Reynolds & Brannon P. Denning, *National Federation of Independent Business v. Sebelius: Five Takes*, 40 HASTINGS CONST. L.Q. 807, 831 (2013).

224. See *supra* notes 79–82 and accompanying text.

225. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2578; Reynolds & Denning, *supra* note 223, at 829.

226. See Dorf, *supra* note 16, at 902–03 (arguing that for most legislation going forward, the activity/inactivity distinction may not matter as Congress rarely needs to regulate inactivity). Although a prohibition on mandates may prove problematic in reforming social insurance like Social Security. See *supra* Part III.D.1.

227. See, e.g., Purdy & Siegel, *supra* note 9, at 386.

need to rely on the activity/inactivity distinction that the Commerce Clause majority utilized to group the individual mandate together with the hypothetical vegetable or domestic car mandates.²²⁸

This is not to say that the harm principle may never justify infringing on autonomy. The Commerce Clause certainly grants Congress the power to regulate commerce based on harm to others.²²⁹ In addition, Congress and state governments frequently find sufficient justification for paternalistic regulations.²³⁰ The provision of health care to all, regardless of ability to pay, is itself a paternalistic measure—infringing on autonomy by removing consequences. It is there that the justification for the individual mandate can be found rather than justifying it under the harm principle.²³¹ By avoiding an overreliance on the harm principle, the slippery slope is avoided and there is a clearer argument for why the liberty interest claimed by the Commerce Clause majority is illusory in the circumstances of the individual mandate. If there is a substantive due process interest dormant in the Commerce Clause, the individual mandate should not have called it to the fore.

IV. A BETTER FRAMEWORK FOR EVALUATING INCOMPLETE LIBERTY

As the previous Part demonstrates, there is an inherent tension between autonomy-based arguments in favor of economic rights and finding solutions for the social ills caused by aggregate individual decisions, especially for those lacking in consequences. This tension makes it crucial to have a framework for

228. In addition, this framework provides a better reason for a limitation on government mandates than Justice Ginsburg's reliance on the fact that Congress may not pile "inferences upon inferences" to regulate matters tangentially related to commerce. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2624 (Ginsburg, J., concurring). Although the inferences argument does an adequate job of distinguishing the individual mandate from a vegetable mandate, it is not as successful against Justice Scalia's concern about a mandate to buy American cars. *Id.* at 2588 (Roberts, C.J.); *id.* at 2650 (Scalia, J., dissenting). That regulation would require no inferences to see a meaningful affect on commerce. *Id.* at 2588 (Roberts, C.J.); *id.* at 2650 (Scalia, J., dissenting). The more meaningful distinction between the individual mandate and a buy-American mandate is the free rider problem that Justice Ginsburg documents. *Id.* at 2620 (Ginsburg, J., concurring). Although Justice Ginsburg focuses on the harm imposed by free riders, the lack of consequences that alters the nature of the choice is what truly undermines whatever liberty interest might be inherent in the Commerce Clause. *Id.* at 2611.

229. See *Heart of Atlanta Hotel v. United States*, 379 U.S. 241, 250 (1964). For example, federal anti-discrimination laws are meant, at least in part, to prevent the harm caused by racial discrimination. See *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/facts/qanda.html> (last modified Nov. 21, 2009).

230. See Pope, *supra* note 31, at 477–78 (arguing that much public health law can be justified only by hard paternalism).

231. See *supra* Part III.D.1.

evaluating autonomy-based arguments that takes into account the value of choices rather than simply aggregating the harm caused. If it is inevitable that democratic societies will relieve their members of at least some measure of disastrous consequences, and it seems likely that it is, then such a framework provides a better way to think about regulations designed to address the problems created by diminishing the consequences of choices. As America struggles with how to deal with the cost of the aggregation of poor health decisions, this framework provides an alternative way of conceiving regulations that better protects autonomy while still retaining some flexibility for policy solutions.

A. *Mitigation of Some Consequences Is Inevitable*

As a threshold matter, given the importance of consequences to autonomy, some of those who advocate for economic rights on liberty grounds are likely to argue that the government should stop intervening to prevent the negative consequences of poor decision making, thereby preserving autonomy.²³² Those who favor this libertarian stance argue that if social safety nets did not exist, and people were responsible for the consequences of their decisions, people would make better decisions for themselves.²³³ In other words, without Social

232. This argument is often raised in favor of cutting government benefits in favor of teaching individuals “personal responsibility.” See Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 807–08 (2003). The programs generally attacked using this argument are those that serve vulnerable populations who arguably have the fewest economic choices. *Id.* at 809–10 (arguing that limits on benefits further reduces beneficiaries’ bargaining power in the labor or marriage market).

233. See, e.g., Noah Smith, *Does the Social Safety Net Make Us Lazy*, BLOOMBERGVIEW (Jan. 16, 2015), <http://www.bloombergview.com/articles/2015-01-26/social-safety-net-business-startups-and-risk-aversion> (quoting then-Vice Presidential Candidate and current Speaker of the House Paul Ryan describing social safety net as a “hammock that lulls able-bodied people into lives of dependency and complacency, that drains them of their will and their incentive to make the most of their lives”). Most politicians who argue for this type of sink or swim approach, however, often temper the potential harsh outcomes with the promise that private charity will step in and ameliorate the negative consequences restored by the removal of the government-provided safety net. *Id.* For example, during a Republican primary debate in 2001, Congressman Ron Paul was asked whether a healthy man who chose not to purchase health insurance and falls into a coma should be allowed to die. Sam Stein, *GOP Tea Party Debate: Audience Cheers, Says Society Should Let Uninsured Patient Die*, HUFFINGTON POST (Sept. 12, 2011), http://www.huffingtonpost.com/2011/09/12/tea-party-debate-health-care_n_959354.html. Congressman Paul blasted the government for intervening in these circumstances, but avoided stating that the coma patient should be allowed to die. *Id.* Instead he stated that a private or religious charity should step in and take care of the man rather than the government. *Id.* Although Congressman Paul’s argument focused on the idea that individuals should “assume responsibility” for themselves and that “freedom is all about taking your own risks,” *id.*, it is difficult to see how a solution that replaces the

Security, people would save more; without access to emergency room care, people would choose to purchase health insurance; without government bailouts, banks and corporations would not take outsized risks. While the internal consistency of such an argument in favor of robust autonomy may resonate with certain theorists and laymen, it is unlikely to occur as a practical matter in a democratic society.

First, it is now well documented that people do not always make decisions based on careful determination, and even when they do carefully reflect on their choices, they frequently come to decisions that are not in line with their own stated subjective values.²³⁴ This makes it likely that at least a significant portion of the population at some time will need, and want, some safety net to avoid truly disastrous consequences.²³⁵ Second, the tension between autonomy and other values, such as democratic rule and shared moral values, makes mitigation of especially disastrous consequences inevitable.²³⁶ Recognizing that there is a good chance that they will fail to make good decisions, some people might not wish to use their autonomy if it means facing extremely severe consequences.²³⁷

government with private charity, but still ameliorates the worst consequences of the decision, advances that goal. The substitution only restores the autonomy of the taxpayer, by allowing the taxpayer to decide how much to give and which recipients are worthy of the charity, but does nothing for the recipient's autonomy. *Id.*

234. Professors Sunstein and Thaler summarize research findings related to various cognitive biases that affect decision making and lead to decisions that do not reflect the actual preferences of individuals, even when they have full knowledge of risks. CASS R. SUNSTEIN & RICHARD H. THALER, *NUDGE* 23–37 (2008) [hereinafter *NUDGE*] (describing various heuristics and biases that lead to deficiencies in the decision-making process); Sunstein & Thaler, *supra* note 119, at 1172–79. These biases are most pronounced when decisions are difficult and rare, when “choices and their consequences are separated in time, or when feedback from choices is lacking.” *NUDGE, supra*, at 214.

235. *See generally* SARAH CONLY, *AGAINST AUTONOMY, JUSTIFYING COERCIVE PATERNALISM* (2013) (crafting argument against autonomy, including that people would prefer not to be responsible for decisions that may lead to ruinous circumstances).

236. *See supra* notes 234–35 and accompanying text. *See generally* CONLY, *supra* note 235.

237. *See generally* CONLY, *supra* note 235. In addition, studies have shown that people have a “finite store of mental energy for exerting self-control” and making decisions creates “decision fatigue,” which makes further decisions mentally exhausting and prone to error. John Tierney, *Do You Suffer from Decision Fatigue*, N.Y. TIMES MAG. (Aug. 17, 2011), http://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html?_r=0; *see also* Sunstein & Thaler, *supra* note 119, at 11 1199 (noting that some would prefer not to make hard choices). It might be tempting to argue that individuals need to exercise their full autonomy by making their own decisions and living with the consequences so as to avoid arresting their development and infantilizing themselves. *See* MILL, *supra* note 10, at 97. But this argument is a form of paternalism itself—that people must be forced to exercise their autonomy for their own good in order to better perfect their autonomous decision-making. *See* CONLY, *supra* note 235, at 89–90.

If given the choice between having a choice and living (or dying) with the consequences or being relieved of the burden of making a complicated choice or resisting temptation, the majority has chosen the latter in many cases. Social Security and the requirement that emergency rooms treat everyone regardless of ability to pay are examples of such popular programs.²³⁸ If we value democratic self-governance, as well as the individual self-governance that autonomy provides, society should be able to decide to ameliorate those negative consequences through the democratic process for the protection and happiness of its members.²³⁹

This is not to say that the inevitable, or ideal, situation is one in which every negative consequence is alleviated by the state. Just as a world in which choices are narrowed by state mandate leads to a society in which new ideas and new paths of action are stunted by restrictions, so too is a society that lacks a variety of feedback from untempered consequences.²⁴⁰ If we are to value autonomy, individuals must have great freedom to experiment with their lives even given humanity's inherent cognitive limitations.²⁴¹ At the extremes, however, where poor decisions can lead to unnecessary death or abject poverty, the reduction of such consequences can be justified for most by paternalistic arguments.²⁴²

The emergency care safety net is not the first social safety net designed to ameliorate consequences, nor is it likely to be the last. Outside of concerns over the individual mandate and the Commerce Clause, a framework to

238. See *supra* note 192.

239. See CONLY, *supra* note 235. Even providing an option for full autonomy, with choice and consequences for individuals who prefer it, does not solve the problem unless society is in fact willing to let people who have opted for a more autonomous life to suffer or die for preventable reasons due to their decisions. If not, then autonomy was never actually restored, as the ability to opt into the safety net when needed is itself the same as alleviating the consequences in the first place. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2620 (2012) (Ginsburg, J., concurring) (acknowledging benefit of promise of safety net as a good that all receive regardless of use).

240. See MILL, *supra* note 10, at 97. In addition, while there are limits to individuals' cognitive abilities, government is made up of individuals that suffer from the same cognitive limitations, so a lack of individual autonomy does not totally resolve these issues. See also CONLY, *supra* note 235, at 26, 28 (arguing individuals cannot think around their biases because they either do not recognize them or think they do not apply to themselves).

241. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

242. Staunch defenders of libertarian autonomy may never find any paternalistic justifications for ameliorating consequences sufficient but that view does not appear to be held by the majority. See Pope, *supra* note 6, at 666 ("Almost no one disputes the vague proposition that liberty limitation is *sometimes* morally justifiable."). The popularity of safety nets that benefit the majority suggests that most are comfortable with alleviating their own consequences at least in some circumstances. See also Jefferson, *supra* note 192, at 1290–91 (describing the popularity of Social Security).

evaluate autonomy-based arguments against government regulation that incorporates consequences as part of autonomy is necessary to focus on the value of autonomy at stake in policy debates regarding social insurance and safety nets. The remainder of this Part proposes and applies a framework, proportionalism, to determine what weight should be attributed to autonomy-based arguments against regulation.

B. Proportionalism

If the alleviation of some consequences is inevitable, a framework is necessary to evaluate the value of the choice that remains. When consequences are taken into account, it becomes clear that liberty is not an on/off switch, even under a theory of liberal autonomy. Some choices have minimal consequences removed, and thus remain largely autonomous, while others are devoid of a meaningful level of consequences, making autonomy largely illusory. When meaningful consequences are removed, regulations that attempt to replicate or replace the lost deliberative and risk-regulating function of autonomy do not constitute an independent infringement on liberty.²⁴³

While regulations can never perfectly replace the role that consequences play in autonomy, they can be used to encourage deliberation or to replicate the risk-regulating function of consequences.²⁴⁴ Regulations that “rebalance” autonomy after consequences are removed are justified as restoring the nature of autonomy itself without reference to the harm principle or paternalistic arguments. In these situations, arguments against such regulations on autonomy grounds should be rejected.²⁴⁵ The question becomes, what (if any) regulations are necessary to restore autonomy? Proportionalism is a framework for analyzing autonomy-based arguments to answer this question.

First, given the concerns that relational autonomy present regarding the lack of neutrality in existing social and legal structures, it is necessary to determine whether the consequences ameliorated result from a fully robust choice. If the decision maker is overly burdened in her choices, the reduction or elimination of consequences may be necessary to nurture autonomy.²⁴⁶

For example, Professor Hadfield posits a solution to the problem of women entering into unfavorable separation agreements immediately following

243. Or at the very least, those who oppose such regulations have a less valid autonomy argument.

244. *See supra* note 47 and accompanying text.

245. *See supra* note 242 and accompanying text.

246. *See supra* Part III.C.

divorce.²⁴⁷ There is a concern that women may be influenced by societal pressure and the cultural role of women to “defer to, or act on the basis of the interests of, others” to enter into an agreement that does not promote their own welfare.²⁴⁸ Rather than limiting choices by not allowing women to mediate binding settlement agreements, Hadfield suggests limiting the duration of these agreements and requiring renegotiation after a few years.²⁴⁹ After that time, “we might expect that the emotional difficulties that distort women’s exercise of autonomy in the agreement will have subsided somewhat and women will have gained a greater sense of their autonomy from their ex-husbands.”²⁵⁰ This model proposes to foster autonomy and protect women’s ability to make self-determining choices by limiting some of the consequences of their decisions.²⁵¹ In these circumstances, autonomy-based arguments opposing regulations of choice would continue to be valid despite the lack of consequences. Regulating choice would defeat the purpose of minimizing consequences in order to allow space for risk-taking to build autonomous capacity.²⁵²

As noted, ardent libertarians are unlikely to agree with theories of relational autonomy and would likely skip this first step.²⁵³ Most would agree that there is some line, however, where “choice” is so meaningless given an individual’s circumstances that the removal of consequences is necessary on fairness or moral agency grounds—for example, developmentally disabled individuals or children.²⁵⁴ For those individuals, removing consequences provides space for lower-risk choices that increase autonomy rather than diminish it.

Proportionalism has the most to say in the second step when the decision maker does have sufficient choice. The second step is to determine whether the consequences of that choice have been removed by state action. If they have,

247. Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on the Limits of Freedom of Contract*, 33 OSGOOD HALL L.J. 337, 346 (1995).

248. *Id.*

249. *Id.* at 349.

250. *Id.* at 349–50.

251. *See id.*

252. *See supra* notes 175–85 and accompanying text. For example, the provisions of the ACA designed to provide health insurance to those who cannot afford it enhance the autonomy of recipients by ensuring they remain healthy enough to live a more autonomous life. Bayer, *supra* note 151, at 914. The benefits they receive are defined by statute, but there is no need to further regulate their health insurance decisions in the name of balancing the scales.

253. *See supra* note 242 and accompanying text.

254. Even Mill argued that children and “barbarians” lacked the capacity for autonomy. *See* MILL, *supra* note 10, at 8.

regulations are justifiable without resort to paternalism or the harm principle.²⁵⁵ Regulations are justified to the extent that they are needed to balance the negative effects of removing consequences. A balance should be struck by considering what portion of the consequences of the decision is still felt by individuals compared to the consequences removed. Because the goal is to replicate or replace the removed consequences, regulations should replace only that portion of the consequences that the safety net alleviates. By looking at the role consequences are meant to play in balancing the scales, it is possible to craft regulations that are proportional to the consequences that are ameliorated.²⁵⁶

Proportionalism values autonomy more accurately than looking at the aggregate cost to society to remove the consequences. Autonomy requires that most indirect harm caused by individual choice be absorbed by society.²⁵⁷ It is more respectful of autonomy to consider the recipient's autonomy in the decision-making process rather than thinking about autonomy solely in terms of the diffused burden to the taxpayer.²⁵⁸

In addition, regulations based on the cost to society ignore the reasoning behind trying to replicate the lost consequences.²⁵⁹ The fact that a consequence is expensive to mitigate divulges nothing about whether other consequences to that choice exist and are sufficient to reliably regulate risk and inform choices. Focusing on consequences avoids the overvaluation of incomplete liberty that might hamper efforts to replace consequences to avoid moral hazard. At the same time, it prevents aggregate economic harm from justifying massive infringement on liberty that is still largely intact due to the deliberative and risk-regulating benefits of the remaining consequences.²⁶⁰

255. This Article takes no position on policy arguments regarding the validity of regulations that infringe on true autonomy. Regulations intended to replace the missing consequences are meant to restore autonomy, but autonomy is not an absolute right and once restored may be limited in most cases on other grounds.

256. One could argue that if taking away consequences diminishes autonomy, then the solution to restrict choices further diminishes autonomy unnecessarily. But choices unbalanced by consequences not only lose the intrinsic benefit to the individual but also the benefits to society. *See supra* Part III.A. In addition, regulations on choice in these circumstances are justified by a waiver of autonomy by those receiving the benefit. *See supra* notes 123–25 and accompanying text.

257. *See* MILL, *supra* note 10, at 69. Focusing on the harm caused by the safety net is appropriate only when justifying regulations based on the harm principle, which is arguably not appropriate for aggregate economic harm caused by completely autonomous decisions.

258. This is especially true given the broad tax power of the government and the limited autonomy right to avoid paying taxes. *See supra* note 95 and accompanying text.

259. *See supra* pp. 143–44.

260. *See supra* Part III.A.

C. *Applying Proportionality: Health Choices*

Proportionality is a guiding principle rather than an exact science because consequences can be difficult to measure and their importance will vary between individuals. This section will apply the framework to health-related policy issues to better explore its application.

1. When Most Significant Consequences Are Removed

An autonomy argument that involves only individuals with robust choice and most (or all) of the consequences of that choice removed is the easiest to evaluate. The proportionality of requiring a particular financial choice in exchange for being relieved of the worst of the financial consequences of that decision is relatively straightforward. As argued above, the individual mandate falls under this category of choices, calling into question the validity of autonomy-based arguments regarding the freedom not to purchase insurance.²⁶¹

Taking consequences into account, the majority of the Court in *NFIB* would be hard-pressed to find a liberty interest worthy of their novel use of federalism. As noted, the individual mandate applies only to individuals who can afford health insurance;²⁶² thus, the first step is satisfied. For covered individuals, the most damaging consequences of the failure to purchase health insurance were already mitigated by the safety net because catastrophic care is provided.²⁶³ There are still some consequences of failing to purchase insurance that remain, as the safety net does not provide comprehensive coverage.²⁶⁴ In addition, while care is provided regardless of ability to pay, if a provider decides to pursue the patient for payment, discharging medical debts in bankruptcy has its own set of negative consequences.²⁶⁵ Despite these consequences, the alternative—the refusal of care in painful or life-threatening situations—is far worse.

If Congress had the authority to remove the consequences of the failure to purchase health insurance, it should have the authority to mandate the choice to

261. *See supra* note 88 and accompanying text.

262. *See supra* note 152 and accompanying text.

263. *See supra* Part III.B.

264. Although those covered by the mandate, i.e., those who could afford to purchase insurance but choose not to, may not feel the full brunt of the negative consequences of lacking health insurance because their income is likely sufficient to purchase some preventable care. This is unlike those who are uninsured due to poverty and not choice.

265. *See Porter & Thorne, supra* note 136, at 83–93 (detailing negative effects after bankruptcy).

purchase health insurance.²⁶⁶ This argument can be made under the Commerce Clause as a matter of economics and market forces.²⁶⁷ But it is also a valid argument against finding an economic right backed by a liberty interest. The “liberty” at issue is incomplete in a meaningful way, and regulations are appropriate to replicate the function of the consequences removed.

Critics of the ACA could argue that the mandate is not proportional because it goes beyond replicating consequences because the insurance mandated exceeds the “insurance” provided under the social safety net. The minimum plans under the Affordable Care Act provide many of the bells and whistles coverage that the safety net lacks, such as mental health coverage and certain preventative care.²⁶⁸ In other words, while there is no valid autonomy argument against a mandate to purchase catastrophic health insurance, there may be an autonomy argument for the right to decide between catastrophic coverage and the minimum plan under the ACA. This may be a valid policy argument, but it would be difficult to make as a constitutional matter. It is hard to see how it would rise to the level of a new economic right under the Commerce Clause, or would not, at the very least, be authorized under the Necessary and Proper Clause.²⁶⁹

2. When Significant Consequences Remain

Situations where the consequences removed by government action are only a fraction of the consequences of a particular decision are more complicated to address. The Chief Justice’s concern about the cost of poor health decisions provides a helpful example.²⁷⁰ As he noted, the rising cost of health care for individuals who make poor health decisions puts an even greater strain on the health care system than the cost of the uninsured.²⁷¹ While the Chief Justice’s

266. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2619–20 (Ginsburg, J., concurring).

267. See *id.* (making economic argument for mandate).

268. See Barry Cushman, *NFIB v. Sebelius and the Transformation of the Taxing Power*, 89 NOTRE DAME L. REV. 133, 192 (2013); see also Parento, *supra* note 162, at 693 (describing essential health benefits package required under the ACA). Parento notes that a new Health and Human Services (HHS) bulletin announced that the agency intends to permit states to determine the minimum insurance package within the statutory guidelines, so states may have varying comprehensive minimum plans. *Id.* at 694.

269. See *id.* (describing breadth of Necessary and Proper power before *NFIB*).

270. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2588.

271. *Id.* There is some debate over the actual cost of obesity and the role of personal responsibility for health-related decisions. See Colin Hector, *Nudging Towards Nutrition? Soft Paternalism and Obesity-Related Reform*, 67 FOOD & DRUG L.J. 103, 104–08 (2012) (describing debate). This Article will assume the Chief Justice’s position for the sake of the argument.

argument that Congress might attempt to address this problem by passing a “vegetable mandate” is probably not a realistic concern, commentators have proposed regulations, and some have been implemented, in an attempt to address the problem of America’s expanding waistline and declining health.²⁷² Many of these regulations have been opposed on autonomy grounds.²⁷³

If health decisions were fully autonomous, then the relevant question would be whether the cost of obesity or poor health is sufficient harm to society to trigger the harm principle.²⁷⁴ If the harm principle is satisfied, then comprehensive health regulations should be permitted to avoid that harm; if not, then no regulations are acceptable without resort to paternalistic justifications.²⁷⁵ Many of the arguments in favor of the regulation of health choices focus on the aggregate economic cost of poor health decisions to support a harm-based argument in favor of regulation.²⁷⁶ As discussed, that reasoning mistakes the nature of the inquiry by focusing the autonomy argument on the diffused cost to society rather than the quality of the choice.²⁷⁷

Under a framework of autonomy that gives consequences their due, the focus is on the decision maker’s autonomy—both choices and consequences—rather than on the taxpayers’ purse. In examining consequences, it is clear that some consequences of poor health decisions are limited, specifically many of the financial consequences. Under the ACA, insurance companies are required to accept all applicants regardless of pre-existing conditions, including those brought on by poor health decisions, and are prohibited from charging rates based on an individual’s health, thus spreading the cost of poor health to all insured individuals.²⁷⁸ These provisions, therefore, remove much of the

272. See McGuinness, *supra* note 56, at 48–49 (listing potential regulations including nutritional labeling, restrictions on advertising unhealthy food, a “fat tax” on unhealthy food, and banning certain foods); Hector, *supra* note 271, at 118–19 (proposing “soft paternalism” regulations such as clear labeling and changing defaults such as portion size).

273. See McGuinness, *supra* note 56, at 50 (citing arguments against intervention to combat obesity, which hold “that the cost of obesity must be borne by the individual for the greater good of individual freedom”); see also Hector, *supra* note 271, at 119–20 (noting that soft paternalism, while it is considered not to infringe on autonomy, has been criticized as being insufficient to affect real change).

274. This dichotomy presumes a strict view of liberal autonomy where paternalistic justifications for health regulations would be rejected.

275. The Commerce Clause majority rejected the idea of the individual mandate as a penalty because of a concern that it opened the door for such regulations. See *supra* notes 72–78 and accompanying text.

276. See McGuinness, *supra* note 56, at 56 (arguing that cost of treatment for obesity justifies “fat tax” under harm principle); Pope, *supra* note 31, at 442–43 (arguing that cost to society of smoking justifies regulations under harm principle).

277. See *supra* note 258 and accompanying text.

278. See *supra* notes 147–51 and accompanying text (discussing guaranteed-issue and community-

financial strain of poor health that would be caused by denial of coverage or increased insurance premiums.²⁷⁹ In addition, healthcare is provided to all senior citizens through Medicare, effectively passing on the cost of the culmination of a lifetime of health decisions onto the taxpayer.²⁸⁰ Does this justify comprehensive regulations regarding decisions about health and diet? From the standpoint of the healthy insured and the taxpayer, it could seem reasonable to place conditions on any health decisions that will increase the price tag of that care.

Proportionalism would counsel a more nuanced approach that better respects the autonomy of decision makers.²⁸¹ Although the financial impact of poor health is lessened by existing policies, there are more consequences to health decisions than the cost of healthcare. Someone who makes poor health decisions during her lifetime, be it smoking, overeating, or failing to exercise, is likely to suffer many consequences far more severe than the financial cost of care.²⁸² Obesity alone has been linked to type-2 diabetes, coronary heart disease, hypertension, stroke, cancer, depression, anxiety, suicidal tendencies, and premature death.²⁸³ While the cost of treating preventable illnesses related to poor health decisions is undoubtedly a daunting prospect, the potential of pain, illness, impaired mobility and lifestyle, and premature death are consequences that cannot be alleviated.²⁸⁴ Therefore, regulations need not take over all the work that consequences would supply absent government involvement.

By cabining regulations in such a way, the deliberative and experimentation value of autonomy is preserved. Individuals still retain most of the freedom to consider where health fits into their concept of the good and make decisions that they expect will lead to a life they find most fulfilling. Those choices may lead to consequences they did not intend and do not want,

rating provisions).

279. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2645 (2012) (Scalia, J., dissenting) (describing how the guaranteed-issue and community-pricing provisions pass the costs of those with high actuarial risks onto healthy individuals with low actuarial risks).

280. Kelli K. Garcia, *The Fat Fight: The Risks and Consequences of the Federal Government's Failing Public Health Campaign*, 112 PENN ST. L. REV. 529, 557 (2007) (reporting CDC findings that approximately half of the \$100 billion cost of obesity is covered by Medicare and Medicaid).

281. See *supra* Part IV.B.

282. See, e.g., Garcia, *supra* note 280, at 557 (describing negative health consequences of obesity and lack of exercise).

283. McGuinness, *supra* note 56, at 45.

284. See Parento, *supra* note 162, at 702 (noting that damage to health caused by poor health choices "can only be partially undone by modifications later in life").

which they can then incorporate when charting a new course. They can see the consequences that flow from others' health decisions and incorporate that feedback.²⁸⁵ In addition, the risk-regulating function of autonomy is still largely present because there are still significant negative consequences to counsel against poor health decisions.²⁸⁶

Finding the correct balance of limited regulations to replace the lost financial consequences will not be an exact science, nor is there likely to be a universal formula in such complicated cases. Just as people have different notions of what constitutes pursuit of the good, individuals will place different value on various consequences. A dedicated athlete who gains immense pleasure from running marathons may consider a lack of mobility caused by dietary choices to be a truly disastrous consequence, while a less active person might not place much value on it. A single person without children might not be particularly concerned with the cost of end of life treatment for lung cancer, while a husband and father might consider leaving his family destitute a consequence that must be avoided at all costs.²⁸⁷

This is not to say that all (or even most) individuals will make healthy choices with consequences restored. A large measure of autonomy over health decisions means that people will be free to fail—to live unhealthy lives and live (or die) with the consequences. Autonomy-restoring regulations should not be designed to punish or ensure uniform outcomes but rather to replace or replicate the informative and risk-regulating function that the removed consequences would have played in individuals' decision making.

Policy prescriptions on proper health regulations to strike that balance are well outside the scope of this Article, and certainly, people will disagree where that balance should be struck. However, a framework that focuses on the consequences rather than aggregate economic harm provides a good starting point. After autonomy is restored, only then must regulations lead to debates over the proper limit of the harm principle or paternalistic justifications.

285. Learning from consequences experienced by others helps us avoid those same consequences in the future. See Stephen D. Easton & Julie A. Oseid, "And Bad Mistakes? I've Made a Few": *Sharing Mistakes to Mentor New Lawyers*, 77 ALB. L. REV. 499, 512–13 (2013) (recognizing that sharing mistakes with others helps them learn from your experience, and that embracing and sharing those consequences is beneficial for both parties); see also; Fallon, *supra* note 44, at 887–88.

286. See *supra* Part III.A.

287. To use an example from popular culture, in the television program "Breaking Bad," a father diagnosed with inoperable lung cancer becomes a methamphetamine producer and distributor to pay for treatment and secure his family's financial future.

V. CONCLUSION

This Article has demonstrated that thinking about consequences as an integral part of autonomy is a better approach for policymakers and courts when evaluating choices whose consequences have been ameliorated by the provision of a social safety net *ex post*. By identifying when claims to autonomy are undermined by the lack of consequences, we can avoid the false conflicts created by requiring justifications, such as the harm principle, for infringements on incomplete liberty.

These false “autonomy versus harm” arguments lead to two potential bad outcomes: First, decisions involving incomplete liberty can be overvalued as true autonomy, and the state may be unable to utilize justifiable regulations to appropriately regulate choice to account for the diminished autonomy and the social harms caused by removing consequences.²⁸⁸ This threatens the viability of social safety nets because it prevents the government from disincentivizing free riders by restoring a proportional level of consequences.²⁸⁹ Alternatively, true autonomy may be undervalued if attempts to regulate choices involving incomplete liberty are accepted by expanding the harm principle unnecessarily to incorporate diffused aggregate economic harm.²⁹⁰ Expanding the harm principle without distinguishing between harms created by consequence-reduced choices and those created by autonomous choices could undermine autonomy by applying the expanded harm to the regulation of fully autonomous choices.

Considering consequences when appropriate and applying proportionalism to determine what regulations are justified to restore the portion of consequences removed by the safety net provides a better framework.²⁹¹ It avoids overreliance on the harm principle and provides a way to address situations where only some of the consequences of a decision are removed, while retaining sufficient respect for the autonomy that remains.

This framework is useful in a variety of contexts. The role of consequences should be considered any time an autonomy-based argument is advanced to challenge a regulation. As the pressure increases to expand “economic liberty,” the ability to correctly identify issues of incomplete liberty

288. See *supra* notes 65–104 and accompanying text (discussing *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012)).

289. See Graetz & Mashaw, *supra* note 18, at 361 (questioning whether Congress will have the flexibility to adopt reforms to existing safety nets after *NFIB*).

290. See Pope, *supra* note 31, at 449 (discussing the danger of expanding the harm principle).

291. See *supra* Part IV.B–C.

will become more important. The framework is also relevant in evaluating arguments to increase autonomy in relation to social insurance programs by providing private choice in tandem with public benefits. Even claims of autonomy-based rights held by corporations could be suspect given the limited liability that corporate shareholders enjoy.²⁹²

In addition, recognizing up front that programs to mitigate consequences open the door to related regulations can avoid an outcry over unpopular regulations that are imposed long after generally popular safety nets are accepted.²⁹³ This allows legislatures and their constituents to negotiate the tradeoffs between autonomy and safety nets. For example, the movement to allow discharge of student loans in bankruptcy arguably invokes this framework.²⁹⁴ Stakeholders should come to an agreement as to the value of being relieved of student loan debt through bankruptcy in relation to the other consequences of potentially ill-advised educational decisions and what regulations on student choices are acceptable. By passing a complete system that makes the connection between safety nets and limited choices explicit, rather than patchwork legislation, situations like the furor over the individual mandate may be avoided.

292. I intend to further explore this issue in future work.

293. *See supra* Part IV.A.

294. There may be concerns about the level of autonomy young people have under a relational autonomy model if they are unable to finance their educations without crippling debt. *See supra* Part III.C. Arguably, allowing for bankruptcy may be a way to increase the autonomy of less economically privileged students by providing an education to nurture future autonomy while limiting the attendant risk of debt.