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Perverted Liberty: How the Supreme Court’s Limitation of the Commerce Power Undermines Our Civil-Rights Laws and Makes Us Less Free

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PERVERTED LIBERTY: HOW THE SUPREME COURT’S LIMITATION OF THE COMMERCE POWER UNDERMINES OUR CIVIL-RIGHTS LAWS AND MAKES US LESS FREE

Chad DeVeaux∗

“I think that the word liberty . . . is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”1

INTRODUCTION

“Give me liberty or give me death!”2 Patrick Henry’s familiar slogan became a shibboleth for those opposing dictators throughout history. But tyranny comes in more than one form. While images of state-sponsored despotism are familiar—Iran,3 Syria,4 North Korea,5 China6—a different, yet equally vexing form of tyranny lurks under our noses: oppression by private actors left unchecked by the state. A government that allows, or worse, enables its most affluent constituents to bully the weak in the guise of liberty is no less tyrannical than one that commits that oppression directly.

The 2008 economic collapse painfully demonstrated the degree of control the

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4 See Syria’s Nightmare: It Is Past Time for President Assad to “Get Out of the Way”, N.Y. TIMES, June 18, 2011, at A18 (noting “thousands of Syrians” have been “slaughtered, jailed or forced to flee their country” by brutal Assad regime).
5 See David Marcus, Famine Crimes in International Law, 97 A.J.I.L. 245, 245-46 (2003) (explaining how North Korean regime deliberately exasperates ongoing famine and arguing that “North Korea may be the world’s worst current human rights catastrophe, as well as its most ignored”).
private sector exerts over our daily lives. The misdeeds of a handful of Wall Street miscreants brought the world’s financial system to its knees. Their reckless acts cost eight million jobs, evaporated life savings, cast unknown thousands into homelessness, and depleted our collective treasure with costly bailouts—all without triggering a single federal prosecution.

To students of history, the 2008 fiasco should seem like déjà vu. We’ve been here before. Repeated cycles of boom-and-bust punctuated the late nineteenth and early twentieth centuries, culminating in the Great Depression. The consequences of the Gilded Age’s laissez-faire regulatory model extended far beyond the fortunes won and lost in the nation’s financial centers. Child labor, unfathomable levels of poverty, endemic pollution of the environment and the food supply plagued the country. Consumer fraud was rampant. Workplace safety laws, the minimum wage, the

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13 CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 22, 52, 95, 117, 122, 131 (1994).
14 Rebecca S. Trammell, Orphan Train Myths and Legal Reality, 5 AM. U. MODERN AM. 3, 9 (2009) (noting that children were frequently employed in mining, fishing, lumber, agriculture and almost every other industry).
17 Bee Wilson, Swindled: The Dark History of Food Fraud, from Poisoned Candy to Counterfeit Coffee, ch. 4, PINK MARGARINE AND PURE KETCHUP 152-212 (2008).
forty-hour work week—21—even the weekend—22—seemed but distant dreams. To twenty-first century sensibilities, life for the average American worker in this era was a living hell.23 For African Americans and recent arrivals, it was even worse.24

Relief from this industrial purgatory came not from a sudden enlightenment among America’s venture capitalists, but from government intervention. Beginning with the New Deal and culminating in the administration of Richard Nixon, a stalwart liberal by contemporary standards,25 the mid-twentieth century witnessed increased regulation of finance,26 the workplace,27 the environment.28 Social security, Medicare, and the Clean

21 Peggie R. Smith, Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform, 48 AM. U.L. REV. 851, 887 n.226 (noting that the federal National Industrial Recovery Act paved the way for the standard forty hour work week).
27 See e.g., 29 U.S.C. § 651 (creating the Occupational Safety and Health Act in order to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources”).
Air and Water Acts became realities. While the nation’s industrial class decried such reform as “creeping socialism,” the overwhelming majority of Americans enjoyed greater freedom because of it.

The Constitution thus mediates a precarious balance. It must limit the power of government to prevent dictatorship, but at the same time endow the government with sufficient power to quell tyranny by the private sector. This is the essence of the social contract.

Yet, one of America’s two principal political parties now embraces the notion that the essence of freedom is the absence of government. Oppression in their view stems solely from overreach by the state. But this conception ignores the lessons of history. Liberty does not exist in a vacuum. A nation impotent to protect its constituents from the excesses of laissez-faire absolutism—consumer fraud, child labor, tainted food, endemic pollution, lack of meaningful access to healthcare—is no more free than one that unabashedly monitors the behavior of its own citizens. Sadly, in post-9/11 America we are inching ever closer to both these extremes.

The tension between the dual need to restrain government power and to empower the government to prevent private-sector abuse is perhaps best exemplified by the plight

32 See e.g., RICK PERRY, FED UP!: OUR FIGHT TO SAVE AMERICA FROM WASHINGTON (2010) (arguing that New Deal and Progressive era legislation violates Constitution and inhibits personal liberty).
of African Americans. The Constitution bars discrimination by state actors, but save for the Thirteenth Amendment, it does not prohibit—indeed in some instances it protects—discrimination by private parties.

_Brown v. Board of Education_ and its progeny heralded the end of state-sponsored discrimination, but from a social-justice perspective, half the battle remained. Blacks in all parts of the country faced persistent private-sector discrimination in all aspects of American life. And though frequently targeted for violence, law enforcement made little effort to protect against attacks by the Ku Klux Klan and other domestic terrorists.

Is a citizen who—due to discrimination by private parties—is unable to purchase a meal or secure lodging, unable to travel, and is unprotected from bands that would do him harm any less oppressed than an individual targeted directly by the state for these indignities? Such abuses constituted an everyday reality for African Americans in the United States. Simple adherence to the Constitution did not achieve liberty in any

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34 E.g., Loving v. Virginia, 388 U.S. 1, 11 (1967) (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”).
35 E.g., DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs., 489 U.S. 189, 201 (1989) (14th Amendment’s prohibitions only apply to state actors); The Civil Rights Cases, 109 U.S. 3, 23-25 (1883) (14th Amendment applies only to state action, not private discrimination).
38 Due to resistance at the state level, ongoing federal intervention was required to implement _Brown_.
39 JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 221 (2001) (noting that it took nearly 20 years of “firm federal enforcement” before Southern states began to comply with _Brown_).
meaningful sense. Government intervention was required.

After nearly a century of post-bellum neglect, Congress enacted the Civil Rights Act of 1964 (“CRA”). Among other things, the CRA includes a public-accommodations mandate, requiring hotels and restaurants to serve African-American patrons. The Act anchors its authority in Congress’s power to regulate interstate commerce.

Shortly after its enactment, trade groups and several states challenged the mandate, asserting that it exceeded Congress’s authority and threatened to open “the flood gates of federal power.” The Supreme Court unanimously confirmed the Act’s constitutionality in *Heart of Atlanta Motel, Inc. v. United States*. The Court found that private discrimination inhibited interstate commerce by making it exceedingly difficult for blacks and other minorities to travel. Thus, the CRA’s mandate fell within the ambit of the Commerce Clause. In the years that followed, *Heart of Atlanta*’s rationale became the template for all federal public-accommodations statutes. The decision paved the way for laws prohibiting discrimination in housing and employment as well as statutes baring sexual harassment and making businesses accessible to people with disabilities. For nearly five decades, the Court’s rationale was regarded as axiomatic.

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41 42 U.S.C. § 2000a et seq.
42 42 U.S.C. § 2000a(b)
43 *Heart of Atlanta Motel*, 379 U.S. at 242.
46 *Id.* at 252-53.
47 *Id.*
48 See e.g., *Morgan v. Dep’t of Hous. & Urban Dev.*, 985 F.2d 1451, 1455 (10th Cir. 1993) (finding Commerce Clause empowered Congress to enact law prohibiting housing discrimination); *Seniors Civil Liberties Ass’n v. Kemp*, 965 F.2d 1030, 1034 (11th Cir. 1992) (same); *United States v. Miss. Dep’t of Pub. Safety*, 321 F.3d 495, 500-01 (5th Cir. 2003) (finding Commerce Clause empowered Congress to enact law prohibiting employment discrimination); *Equal Emp’t Opportunity Comm’n v. Ratliff*, 906 F.2d 1314, 1315-16 (9th Cir. 1990) (finding Congress may prohibit private businesses from engaging in sexual
All that changed with the Supreme Court’s recent decision in *National Federation of Independent Business v. Sebelius* ("NFIB").\(^49\) *NFIB* narrowly upheld the Affordable Care Act’s ("ACA") controversial individual mandate on the strength of Chief Justice Roberts’s vote. The mandate requires that most Americans obtain health insurance or pay a fine.\(^50\) The Chief Justice’s opinion upheld the mandate as a valid exercise of Congress’s taxing power.\(^51\)

Justices Kennedy, Alito, Scalia, and Thomas penned a joint dissent (hereinafter "Dissent") contending that the entire statute is invalid.\(^52\) While the Dissent conspicuously fails to reference the Chief Justice’s opinion,\(^53\) both Roberts’s opinion and the Dissent’s agree that the individual mandate exceeds Congress’s commerce power.\(^54\) This conclusion stems from a novel argument: The Commerce Clause empowers the regulation of “exist[ing] commercial activity,” but does not permit Congress to “create” commerce by “compel[ling]” one to engage in unwanted transactions.\(^55\)

In the Chief Justice’s words, the Clause draws a regulatory distinction between

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\(^{49}\) 132 S. Ct. 2566 (2012).

\(^{50}\) 26 U.S.C. § 5000A. The mandate exempts prisoners and undocumented aliens. 26 U.S.C. § 5000A(c).


\(^{52}\) *Id.* at 2608 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).


\(^{55}\) *Id.* at 2587 (Roberts, C.J.); *accord id.* at 2647-49 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
“activity and inactivity.” 56 Because the ACA’s individual mandate compels individuals to engage in unwanted transactions—rather than regulate existing ones—Chief Justice Roberts and the four dissenting Justices conclude that it exceeds Congress’s commerce power. 57

Since NFIB ultimately upheld the ACA’s constitutionality, many commentators dismissed the Court’s Commerce Clause discussion as an academic debate with few real-world consequences. 58 In so doing, they accepted at face value the Court’s assertion that the ACA’s individual mandate represents a first-of-its-kind exercise of congressional power. 59 This is not so.

The CRA’s public-accommodations mandate unanimously upheld by Heart of Atlanta as a valid exercise of the commerce power likewise bridges the activity/inactivity divide. The CRA’s public-accommodations mandate, like the ACA’s individual mandate, does not regulate existing transactions. It creates commerce by compelling transactions that would not occur but for the statute.

The CRA’s Commerce Clause rationale is the foundation upon which all federal public-accommodations laws stand. 60 Thus, the Chief Justice’s opinion threatens to demolish the very edifice of American civil rights law.

In my view, the Chief Justice and Dissent’s contortionist revision of the

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56 Id. at 2589 (Roberts, C.J.) (emphasis added); accord id. at 2649 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
57 Id. at 2587 (Roberts, C.J.); id. at 2647-49 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
59 Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2589 (Roberts, C.J.) (arguing for “200 years . . . Congress’s actions have reflected” the activity-inactivity distinction proposed by Roberts and the Dissent); accord id. at 2647 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (asserting ACA’s individual mandate is “unprecedented”).
60 See cases cited supra note 48.
commerce power not only ignores *Heart of Atlanta*, it is quite simply a feat of linguistic legerdemain. Worse, the Dissent’s attempt to utilize a historically dubious assertion to strike down an act of Congress comes perilously close to revisiting the discredited *Lochner* era. As the Roberts opinion itself recognizes, because the Justices “possess neither the expertise nor the prerogative to make policy judgments,” the Constitution empowers the Court to “strike down an Act of Congress only if the lack of constitutional authority to pass the act in question is clearly demonstrated.” The Dissent’s uncritical analysis ignores this limitation and quite simply smacks of politics.

As Justice Holmes warned long ago, “the word liberty . . . is perverted” by jurists who abuse their office to interpret the Constitution “to embody a particular economic theory, whether of paternalism . . . or of laissez faire.” The Constitution “does not enact Mr. Herbert Spenser’s Social Statistics.”

This Essay consists of three Parts. In Part I, I discuss the ACA’s background, purpose, and the legal bases for its enactment offered by Congress. In Part II, I examine

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61 Lochner v. New York, 198 U.S. 45 (1905). The *Lochner* line of cases is generally understood to consist of decisions striking down state health and safety laws as violative of the Fourteenth Amendment Due Process Clause. I view the *Lochner* line more broadly to include other decisions from the era utilizing a host of constitutional provisions to frustrate state and federal attempts to regulate industry, thereby preserving the laissez-faire status quo. See e.g., Hammer v. Dagenhart, 247 U.S. 251, 274-75 (1918) (striking down federal law restricting child labor as outside ambit of Congress’s commerce power); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 292-93 (1921) (holding that dormant Commerce Clause barred Kentucky from imposing its own law on a contract for the sale of wheat “made in Kentucky and [] to be performed there” because “the transaction was in interstate commerce”); Leisy v. Hardin, 135 U.S. 100, 110 (1890) (applying dormant Commerce Clause to strike down an Iowa law prohibiting the sale of alcoholic beverages because such beverages are “subjects of exchange, barter and traffic, . . . in which a right of traffic exists” and thus “a State in the absence of legislation on the part of Congress” cannot prohibit “their importation from abroad or from a sister State”).


64 *Lochner*, 198 U.S. at 75 (Holmes, J, dissenting).

the activity/inactivity distinction proffered by the Chief Justice and Dissent. I argue that their assertion that “200 years” of precedent support their reading of the Commerce Clause cannot be squared with Heart of Atlanta’s unanimous affirmation of the CRA’s public-accommodations mandate. Further, I contend that their revision of the commerce power opens the door to challenges to all federal public-accommodations laws.

In Part III, I argue that Chief Justice Roberts’s Commerce Clause exposition ignores the canon of constitutional avoidance. The canon furthers judicial restraint by “allow[ing] courts to avoid the decision of [unnecessary] constitutional questions” by “press[ing] statutes away from the constitutional danger zone.” Because the Court’s decision to uphold the individual mandate under Congress’s taxing power raises significantly less serious constitutional issues than under the commerce power, the avoidance doctrine counsels against the Chief Justice’s unnecessary foray into the Court’s Commerce Clause jurisprudence.

I. THE AFFORDABLE CARE ACT

More than fifty million Americans live without health insurance. This represents not just a statistic but an on-going economic and social-justice crisis. While the lack of insurance substantially limits one’s access to medical care, it is not a complete bar. Under state and federal law, most hospital emergency rooms must admit and treat...

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66 Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2589 (Roberts, C.J.); accord id. at 2647 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
69 Hank Johnson & John Lewis, Verdict a Step Forward and Best Yet to Come, ATLANTA J. CONST., June 29, 2012, at 18A.
individuals, regardless of their ability to pay.\textsuperscript{71} As a result, hospitals are saddled with $43 billion in annual losses stemming from unsubsidized care.\textsuperscript{72}

This creates a three-fold problem. First, because uninsured individuals have no access to preventative care, their medical problems are typically not diagnosed until they become chronic, thereby dramatically increasing the cost of treatment.\textsuperscript{73}

Second, many common chronic conditions such as cancer and diabetes cannot be adequately treated in emergency rooms. Since the uninsured otherwise lack access to medical care, they are usually left to fend for themselves once released from the hospital, meaning, at best, they are sure to return or worse they will die.\textsuperscript{74}

Third, hospitals pass the $43 billion in annual losses incurred providing uncompensated treatment onto private insurance companies who raise their rates, thereby shifting the cost to consumers nationwide.\textsuperscript{75}

The ACA seeks to mitigate the health-care crisis’s social costs by forcing providers to expand coverage and making low-cost insurance available for the poor and

\textsuperscript{71} Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2611 (Ginsburg, J., concurring).
\textsuperscript{72} Id.
\textsuperscript{73} Arduous Road to Healthy Future, S.J. MERCURY NEWS, Dec. 27, 2006, at A1 (noting that the “failure to provide preventive care and basic health care to everyone in the state ultimately costs . . . taxpayers an even greater amount when the uninsured wind up in safety-net hospital emergency rooms with expensive, chronic diseases that the state is legally and morally bound to treat”); SUSAN STARR SERED & RUSHIKA FERNANDOPULLE, UNSURED IN AMERICA 12 (Univ. of Cal. Press 2005) (Noting that “emergency room visits typically cost about four times as much as treating the same problem in a regular office visit.”); Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2611-12 (Ginsburg, J., concurring) (“Because those without insurance generally lack access to preventative care, they do not receive treatment for conditions—like hypertension and diabetes—that can be successfully and affordably treated if diagnosed early on.”).
\textsuperscript{74} Christine Mangoian, Hidden Side Effects of Cancer on the Family: The Struggle for Mandated Insurance Coverage of Clinical Trials, 5 Whittier J. Child & Fam. Advoc. 577, 600 (2006) (noting that uninsured individuals “diagnosed with cancer are made to go without anything beyond the minimum health services that the local county emergency room will provide,” ruling out chemotherapy or surgical treatment).
\textsuperscript{75} Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2611 (Ginsburg, J., concurring).
unemployed. In conjunction with these measures, the Act addresses the cost problem by enacting the much-maligned individual mandate. The mandate dictates that most Americans obtain health insurance by 2014 or pay an annual fee to the IRS. The mandate will relieve hospitals—and ultimately consumers—of the costs of

The ACA employs five key provisions.

First, Congress made health insurance available to millions more low-income individuals by expanding eligibility for Medicaid. Beginning in 2014, Medicaid eligibility will extend to anyone under age 65 with income up to 133% of the federal poverty level. Currently, Medicaid beneficiaries are primarily children in low-income families, their parents, low-income pregnant women, and low-income elderly or disabled individuals. The newly eligible persons will consist primarily of low-income non-elderly adults without dependent children.

Second, Congress enacted taxing measures that encourage expansion of employer-sponsored insurance. The Act establishes new tax incentives for eligible small businesses to purchase health insurance for their employees. In addition, the Act’s employer responsibility provision imposes a tax liability under specified circumstances on large employers that do not offer adequate coverage to full-time employees.

Third, Congress provided for creation of health insurance exchanges to enable individuals and small businesses to leverage their collective buying power to obtain health insurance at rates competitive with those charged for typical large employer plans.

Fourth, Congress enacted market reforms that will make affordable insurance available to millions who cannot now obtain it. Certain reforms have already taken effect, including provisions that bar insurers from canceling insurance absent fraud or intentional misrepresentation, and from placing lifetime caps on benefits. In addition, the Act establishes medical loss ratios for insurers, i.e., minimum percentages of premium revenues that insurers must spend on clinical services and activities that improve health care quality, as opposed to administrative costs or profits. The Act also requires insurers providing family coverage to continue covering adult children until age 26, which has led to an additional 2.5 million young adults gaining coverage.

Beginning in 2014, the Act will bar insurers from denying coverage to any person because of medical condition or history.

Fifth, Congress enacted new tax credits, cost-sharing reduction payments, and tax penalties as incentives for individuals to maintain a minimum level of health insurance. The Act establishes federal premium tax credits to assist eligible individuals with household income up to 400% of the federal poverty level purchase insurance through the new exchanges. These premium tax credits, which are advanceable and fully refundable such that individuals with little or no income tax liability can still benefit, are designed to make health insurance affordable by reducing a taxpayer’s net cost of insurance.


uncompensated care.\textsuperscript{78}

Trade groups and twenty-six states promptly initiated litigation challenging the ACA’s constitutionality.\textsuperscript{79} Their principal argument was that the federal government lacks the power to impose the individual mandate.\textsuperscript{80} The Government offered two sources of constitutional authority supporting the mandate: Congress’s power to regulate interstate commerce, and its power to tax.\textsuperscript{81} The \textit{NFIB} Court tackled these issues in its June 28, 2012 opinion.\textsuperscript{82}

II. THE CHIEF JUSTICE’S REVISION OF THE COMMERCE POWER UNDERMINES THE EDIFICE OF ALL FEDERAL PUBLIC-ACCOMMODATIONS LAWS

With the exception of those who just awoke from a coma, it is likely that all readers of this Essay know \textit{NFIB}’s outcome. Chief Justice Roberts cast the deciding vote in a 5-4 opinion upholding the ACA and the individual mandate.\textsuperscript{83} While the Chief Justice and four dissenting Justices—Kennedy, Alito, Scalia, and Thomas—agreed that the mandate exceeds the commerce power,\textsuperscript{84} Roberts sided with the Court’s so-called “liberal wing”\textsuperscript{85} in concluding that the mandate falls within Congress’s power to levy

\begin{itemize}
\item \textsuperscript{78} \textit{Nat’l Fed’n of Indep. Bus.}, 132 S. Ct. at 2611 (Ginsburg, J., concurring).
\item \textsuperscript{79} \textit{Id.} at 2572.
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Id.} at 2584.
\item \textsuperscript{82} \textit{Id.} at 2572-73.
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{Id.} at 2587; \textit{Id.} at 2647-49 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
\item \textsuperscript{85} Justices Breyer, Ginsburg, Kagan, and Sotomayor are frequently referred to as the Court’s “liberal wing.” Peter L. Strauss, \textit{On the Difficulties of Generalization—Pcaobi N the Footsteps of Myers, Humphrey’s Executor, Morrison, and Freytag}, 32 \textit{CARDOZO} L. REV. 2255, 2275 (2011). I find this label misleading. When he retired in 2010, Justice John Paul Stevens was widely regarded as the Court’s most liberal jurist. LAWRENCE BAUM, \textit{THE SUPREME COURT} 117 (6th ed., Cong. Q. Inc. 1998). But when he joined the Court in 1975, Stevens, a Ford appointee, was considered a center-right pragmatist. Cass R. Sunstein, \textit{The Myth of the Balanced Court}, \textit{AMERICAN PROSPECT}, Aug. 12, 2007, \textit{available at} \texttt{http://prospect.org/article/myth-balanced-court} (last visited Aug. 5, 2012). Yet, aside from his notable conversion on the death penalty, Justice Stevens’s positions remained relatively consistent throughout his career. \textit{Id.} Thus, a Justice whose views would have been regarded as center-right in 1975 qualifies as a
\end{itemize}
The wisdom and merits of the Court’s conclusion that the mandate is actually a tax has been much debated and will not be rehashed here. My purpose for this Essay is to explore the consequences—whether intended or unintended—of the Court’s apparent conclusion that the mandate exceeds Congress’s commerce power.

A. The Commerce Clause Empowers Congress to Regulate Intrastate Activity that Substantially Effects Interstate Commerce

While the States possess plenary police power, it is axiomatic that the federal government possesses only regulatory authority vested to it by the Constitution.

Article I, section 8, clause 3 empowers Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” While the Supreme Court initially construed the Commerce Clause more narrowly, precedent evolved to

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“liberal lion” on today’s Court. Id.; Charles Lane, In Ruling on Constitutional Controversies, the Justices Are Leaving Them Unsettled, WASH. POST, July 4, 2004, at A12 (calling Justice Stevens a “liberal lion”).


The “[s]hared responsibility payment,” as the statute entitles it, is paid into the Treasury by “taxpayer[s]” when they file their tax returns. 26 U.S.C. §5000A(b).

It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. §5000A(e)(2). For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. §§5000A(b)(3), (c)(2), (c)(4). The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which . . . must assess and collect it “in the same manner as taxes.” Supra, at 13-14. This process yields the essential feature of any tax: it produces at least some revenue for the Government.

Indeed, the payment is expected to raise about $4 billion per year by 2017.

Id. at 2594.

NFIB makes evident that a majority of the Court accept the activity/inactivity distinction. Id. at 2589 (Roberts, C.J.); accord id. at 2649 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). But the dissenting Justices chose not to join the portion of the Chief Justice’s opinion on this matter. Id. at 2577. Thus, we will have to wait for a future decision to see if this new vision of the commerce power will be applied in subsequent cases.

Id. at 2578.

U.S. CONST. ART. I, § 8, CL. 3.

recognize that the Clause generally authorizes federal regulation of local activities which produce effects that cross state lines.\textsuperscript{91}

1. \textit{Wickard v. Filburn}

The Court’s decision in \textit{Wickard v. Filburn}\textsuperscript{92} represents the high-water mark of congressional power. \textit{Wickard} addressed a provision of the Agricultural Adjustment Act of 1939 capping the number of acres wheat farmers were permitted to harvest each year.\textsuperscript{93} Congress imposed the acreage limitation in order to raise market prices for wheat and other commodities.\textsuperscript{94} Congress premised its authority to enact the limitation upon the Commerce Clause.\textsuperscript{95}

Pursuant to the Act, the Department of Agriculture allotted the Appellee, Roscoe Filburn,\textsuperscript{96} 11.1 acres for the 1941 growing season.\textsuperscript{97} Despite this allotment, Filburn sowed 23 acres.\textsuperscript{98} Filburn used the wheat harvested on the excess acreage for his personal consumption. The Government fined him $117.11.\textsuperscript{99} Litigation ensued.\textsuperscript{100}

Filburn argued that the federal acreage limitation exceeded Congress’s commerce power because neither the wheat he grew nor the seed from which he sowed it ever crossed state lines.\textsuperscript{101} He argued that his activities were “local in character, and their

\textsuperscript{91} Gonzales v. Raich, 545 U.S. 1, 18 (2005) (finding that Commerce Clause empowers Congress to regulate intrastate activities that substantially effect interstate commerce).
\textsuperscript{92} 317 U.S. 111 (1942).
\textsuperscript{93} Id. at 113-14.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{97} Wickard, 317 U.S. at 114-15.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 119.
effects upon interstate commerce [were] at most indirect.”

The Court did not disagree with his assertions, but unanimously upheld the fine. It found that by utilizing his home-grown wheat, Filburn avoided purchasing wheat on the open market. This decreased the demand for wheat, lowering its market price.

Wickard based its ruling on two conclusions. First, the Court held that Congress may regulate purely local activity that “exerts a substantial economic effect on interstate commerce.”

Second, Wickard concluded that in determining whether a particular activity substantially affects interstate commerce, courts must look not to whether the individual litigant’s behavior alone had such an effect. Rather, the test is whether the behavior of all regulated parties in the aggregate could substantially affect commerce. While Filburn’s impact on “the demand for wheat may [have] been trivial by itself,” it was still subject to congressional regulation because “his contribution, taken together with that of many others similarly situated” substantially effected interstate commerce.

2. Gonzales v. Raich

While Wickard was decided unanimously, in the years that followed it became the subject of considerable academic and judicial criticism. By the dawn of the twenty-

102 Id.
103 Id. at 128.
104 Id.
105 Id. at 125.
106 Id. at 127-28.
107 Id.
108 Two relatively recent Supreme Court decisions cast doubt upon Wickard’s continued vitality. In United States v. Lopez, 514 U.S. 549 (1995), the Court struck down a federal law criminalizing possession of firearms in school zones, concluding that one “would have to pile inference upon inference” to conclude that violent crime sufficiently effected interstate commerce to permit federal jurisdiction over such activity. Id. 567. In United States v. Morrison, 529 U.S. 598 (2000), the Court struck down a provision of the
first century, *Wickard’s* viability was in question. The Court resolved these doubts with its 2005 decision in *Gonzales v. Raich.*

*Raich* tested the constitutionality of the federal marijuana ban. The case involved an as-applied challenge brought by Angel Raich, a forty year old woman battling a terminal brain tumor. Raich used marijuana as prescribed by a “licensed, board-certified family practitioner” pursuant to California’s Compassionate Care Act, which legalized marijuana use for medicinal purposes. Two caretakers provided Raich’s marijuana “at no charge.” It was “locally grown” and neither it nor the seed from which it was sowed ever crossed any state lines.

The *Raich* Court upheld the ban on the strength of a six-to-three majority that included Justice Kennedy. *Raich* reaffirmed *Wickard,* finding that “Congress can
regulate purely intrastate activity that is not itself commercial, in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”\footnote{Raich, 514 U.S. at 17.} Applying Wickard, the Raich Court found that even the non-commercial use of home-grown marijuana that has not crossed state lines substantially affects interstate commerce because such use “has a substantial effect on supply and demand in the national market for that commodity.”\footnote{Id. at 19.}

The Court acknowledged that Raich’s modest consumption, like Filburn’s, had no measureable impact on the interstate market when viewed in isolation.\footnote{Id. at 22.} But the Court found that Congress could rationally conclude that “taken in the aggregate” such in-home use, while purely intrastate, could “substantially affect interstate commerce.”\footnote{Id.}

\textit{Raich} made evident—to the surprise of many jurists and scholars\footnote{See authorities cited supra note 108.}—that Wickard’s expansive reading of federal power had indeed lived to see the twenty-first century.

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\footnotesize

\textsuperscript{116}Raich, 514 U.S. at 17.
\textsuperscript{117}Id. at 19.
\textsuperscript{118}Id. at 22.
\textsuperscript{119}Id. The Raich Court clarified another important aspect of the expansive commerce power identified in Wickard. The power to regulate intrastate commercial “activities that substantially affect interstate commerce” does not arise from the Commerce Clause alone, but rather from “the conjunction of the Commerce Clause and the Necessary and Proper Clause.” Id. at 44 (emphasis added). This conclusion is critically important because the Court’s dormant Commerce Clause jurisprudence recognizes that the Clause contains a self-executing “negative command.” Am. Trucking Ass’ns., Inc. v. Mich. Pub. Serv. Comm’n, 545 U.S. 429, 433 (2005). “By bestow[ing] Congress with exclusive plenary powers” the Clause inversely “deprives in like degree the states’ authority to regulate these activities” it empowers Congress to regulate. Kickapoo Tribe v. Kansas, 818 F. Supp. 1423, 1431 (D. Kan. 1993) (emphasis added). If the Commerce Clause alone empowered Congress to regulate intrastate activities “substantially affecting” interstate commerce, then the Clause’s “negative command” would deprive the States of the power to regulate such activities. Chad DeVeaux, \textit{Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause}, GEO. WASH. L. REV. 995, 1058-59 n.515 (2011).
B. The Individual Mandate Appears to Pass the Test Proffered by Wickard and Raich

Raich reaffirmed without qualification Wickard’s holding that the Commerce Clause empowers federal regulation of purely intrastate behavior that “substantially affects” interstate commerce.121

At first blush the ACA’s individual mandate appears to easily clear this hurdle. The mandate requires almost all Americans to acquire health insurance.122 The uninsured impose $43 billion in uncompensated costs upon hospitals annually.123 Hospitals pass these costs onto private insurance companies who, in turn, raise premiums paid by consumers.124 These increased rates do not adhere to state lines. Rather, insurers spread the costs to consumers nationwide.125 While a consumer’s failure to acquire insurance involves purely intrastate conduct, in the aggregate, the byproduct of such decisions substantially affects the national health insurance market.126 Indeed, uninsured emergency room visits impose far more significant effects on interstate commerce than Raich’s or Filburn’s de minimis home consumption ever did.

Thus, based on precedent existing at the time of the ACA’s enactment, most commentators believed it easily fell within Congress’s commerce power.127 The NFIB Court did not agree.128

121 Raich, 545 U.S. at 17 (citing Wickard v. Filburn, 317 U.S. 111, 128-129 (1942)).
124 Id.
125 Id.
126 Id.
127 See Ilya Shapiro, A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare, 6 FIU L. REV. 29, 55 n.78 (2010) (noting over 100 law professors offered opinions arguing the ACA was a valid exercise of Congress’s commerce power).
128 Nat’l Fed’n of Indep. Bus., 132 U.S. at 2587 (Roberts, C.J.); id. at 2647-49 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
C. In NFIB, the Chief Justice and Dissent Distinguish the Wickard-Raich Test by Asserting that the Commerce Clause Does Not Empower Congress to Create Commerce by Compelling Unwanted Transactions

Faced with Raich’s reaffirmation of Wickard, in NFIB the Chief Justice and the Dissent embrace a novel interpretation of the Commerce Clause. They never contest the Government’s assertion that “the failure to purchase insurance has a substantial and deleterious effect on interstate commerce.” Nor do their opinions contend that Wickard or Raich were wrongly decided. Nonetheless, they claim that the individual mandate exceeds the Clause’s ambit.

Distinguishing the individual mandate from Raich’s marijuana ban, Chief Justice Roberts argues that the Commerce Clause empowers the regulation of “existing commercial activity,” but does not permit Congress to “create” commerce by “compelling” a party to engage in unwanted transactions.

The power to “regulate Commerce,” Roberts reasons, does not include the power to “create” it because “[t]he power to regulate commerce presupposes the existence of commercial activity to be regulated.” As such, he argues, Congress can regulate one’s “activity” but cannot force her to undertake a transaction when she would prefer to remain “inactive.” Thus, the Chief Justice posits, the Clause draws a regulatory distinction between “activity and inactivity.” The Dissent agrees with this assertion, contending that the Clause only empowers Congress to regulate “activity” and “not

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129 Id. at 2585.
130 Id. at 2586 (Roberts, C.J.) (emphasis added) (“The Individual Mandate . . . does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product . . . .”).
131 Id. (Roberts, C.J.) (emphasis in original).
132 Id. (Roberts, C.J.)
133 Id. at 2589 (Roberts, C.J.) (emphasis added).
merely the failure to engage in commerce.”\textsuperscript{134}

Roberts and the Dissent argue that the individual mandate falls outside the Clause’s ambit because by forcing consumers to engage in transactions against their will it does not merely \textit{regulate} existing commerce.\textsuperscript{135} They contend the mandate \textit{creates} commerce by \textit{compelling} transactions that absent federal intervention, would not take place.\textsuperscript{136}

The Dissent argues that permitting Congress to compel commerce in this manner “threatens . . . our constitutional order . . . because it gives such an expansive meaning to the Commerce Clause that . . . the failure to act . . . becomes subject to federal control, effectively destroying the Constitution’s division of governmental powers.”\textsuperscript{137} Such power, the Dissent contends, could be used to mandate the purchase of broccoli on the grounds that “the failure of some to eat broccoli may be found to deprive them of a newly discovered cancer-fighting chemical . . . producing health-care costs that are a burden on the rest of us.”\textsuperscript{138} The Chief Justice concurred with this assessment.\textsuperscript{139}

Both Roberts and the Dissent conclude their opinions with the assertion that by compelling \textit{activity} where one would prefer to remain \textit{inactive}, the mandate ventured into territory never before visited by Congress.\textsuperscript{140} They are wrong. The CRA’s public-accommodations mandate—the statute upon which all federal public-accommodations

\textsuperscript{134} \textit{Id.} at 2649 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (emphasis in original).
\textsuperscript{135} \textit{Id.} at 2586 (Roberts, C.J.) (emphasis added); \textit{accord id.} at 2649 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
\textsuperscript{136} \textit{Id.} at 2586 (Roberts, C.J.) (emphasis added); \textit{accord id.} at 2649 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
\textsuperscript{137} \textit{Id.} at 2649 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
\textsuperscript{138} \textit{Id.} at 2650 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
\textsuperscript{139} \textit{Id.} at 2591 (Roberts, C.J.).
\textsuperscript{140} \textit{Id.} at 2589 (Roberts, C.J.) (arguing for “200 years . . . Congress’s actions have reflected” the activity-inactivity distinction proposed by Roberts and the Dissent); \textit{accord id.} at 2647 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (asserting the statute is “unprecedented”).
laws are based\textsuperscript{141}—does precisely what Roberts and the Dissent now contend the Constitution forbids. It creates commerce by compelling individuals to engage in unwanted transactions.

\textbf{D. The CRA’s Public-Accommodations Mandate Compels Parties to Engage in Involuntary Transactions}

1. \textit{Heart of Atlanta Motel, Inc. v. United States}

The CRA’s public-accommodations mandate dictates that establishments that “serve the public”—defined as hotels, restaurants, and movie theaters—cannot deny service to patrons on the basis of race, religion or national origin.\textsuperscript{142} Congress premised its authority to enact the mandate on the Commerce Clause, reasoning that discrimination in such venues substantially effected interstate commerce by inhibiting the ability of minorities, particularly African Americans, to travel.\textsuperscript{143}

The Supreme Court assessed the statute’s constitutionality in \textit{Heart of Atlanta Motel, Inc. v. United States}. The Appellee, a Georgia lodging house brought a declaratory-judgment action challenging the Act.\textsuperscript{144} It asserted that the public-accommodations mandate exceeded the commerce power and infringed civil liberties:\textsuperscript{145}

\begin{quote}
If the wants and desires of the Negro race, currently referred to as “civil rights,” can be forced upon other people, whose wants and desires are in direct conflict . . . then there is no logical or foreseeable end to the extension of the power of Congress under the commerce clause. There will be no area left for the exclusive jurisdiction of state legislatures because the Congress can appropriate any field of law . . . .
\end{quote}

\textsuperscript{141} See cases cited \textit{supra} note 48.
\textsuperscript{142} \textit{Heart of Atlanta Motel, Inc. v. United States}, 379 U.S. 241, 247 (1964).
\textsuperscript{143} \textit{Id. at} 243-44.
\textsuperscript{144} \textit{Id. at} 242.
\textsuperscript{145} \textit{Id. at} 243-44.
\textsuperscript{146} Brief for Appellant at 18, \textit{Heart of Atlanta Motel, Inc. v. United States}, 379 U.S. 241 (1964) (No. 64-515), 1964 WL 81380, at *41.
As if prophesying NFIB’s broccoli mandate, the Appellee forecasted that if the Court upheld the statute “[t]hen the next act of Congress . . . could include your home.”

The Court unanimously rejected the Appellee’s contentions, finding that the mandate constituted a valid congressional effort to remove obstructions from interstate commerce. The Court noted that “the record . . . [wa]s replete with evidence of the burdens that discrimination by race or color places upon interstate commerce” and that such discrimination was nationwide. The Court took judicial notice of the Green Book, a special guidebook used by African Americans providing detailed nationwide listings of businesses willing to transact with black travelers. In the Court’s view, the book—whose listings included hotels, gas stations, restaurants, garages, barber shops, drug stores and physicians—constituted “dramatic testimony to the difficulties [African Americans] encounter[ed] when they travel[ed].”

Heart of Atlanta found that while the Appellee’s refusal to serve black patrons entailed purely intrastate conduct, the aggregate impact of discriminatory practices by it

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148 Brief for Appellant at 18, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (No. 64-515), 1964 WL 81380, at *44.
149 Heart of Atlanta, 379 U.S. at 253.
150 Id. at 252.
151 Id. at 253.
152 Id. at 253 (citing THE NEGRO MOTORIST GREEN BOOK (Victor H. Green & Co. 1949) (hereinafter “GREEN BOOK”).
153 GREEN BOOK, supra note 152 at 12-13.
154 Heart of Atlanta, 379 U.S. at 253. In sum, the Court found that the record presented “overwhelming evidence that discrimination by hotels and motels impede[d] interstate travel” by African Americans. Id. [Private discrimination bore] a qualitative as well as quantitative effect on interstate travel by Negros. The former was the obvious impairment of the Negro traveler’s pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community.

Id.
2. The CRA Creates Commerce by Conscripting Parties to Serve a Market They Do Not Wish to Serve

In their NFIB opinions, both the Chief Justice and Dissent assert that the ACA’s individual mandate constitutes Congress’s first attempt to conscript actors to engage in commercial transactions.\(^{157}\) As the Dissent explains, the Commerce Clause affords Congress wide latitude to regulate *existing* commercial transactions, “but it must be *activity* affecting commerce that is regulated,” not merely one’s *refusal* to engage in a particular transaction.\(^{158}\) Thus, the Dissent asserts that the individual mandate exceeds Congress’s commerce power because it seeks to punish individuals for what they “*do not purchase.*”\(^{159}\)

The problem with this analysis is that the CRA’s public-accommodations mandate does the very same thing. It compels parties to engage in transactions against their will. The core deficiency attacked by the CRA concerns a matter of *inactivity*—the refusal of public-service providers to transact with black patrons. The Act, like the ACA, corrects this problem by imposing a mandate. The CRA requires that vendors “serving the

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155 *Id.* at 257.
156 *Id.*
158 *Id.* at 2649 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (emphasis in original); *accord id.* at 2589 (Roberts, C.J.).
159 *Id.* at 2648 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (emphasis in original); *accord id.* at 2589 (Roberts, C.J.).
public” transact with African Americans. Heart of Atlanta applied the CRA’s mandate to the Appellee-Motel, which had “refused to provide lodging for transient [African Americans] because of their race or color.” Just as the ACA fines those who “do not purchase” health insurance, the CRA, in effect, punishes providers who do not sell services to black patrons.

The CRA’s mandate, like the ACA’s, does not regulate activity. It does not seek to regulate what vendors were doing, i.e., transacting with white customers. The law targets what they refused to do. The mandate conscripts unwilling actors and forces them to engage in transactions because their inactivity substantially affected interstate commerce.

Yet, nearly five decades after Heart of Atlanta unanimously upheld the public-accommodations mandate five Justices now contend that the Constitution denies Congress the power to compel activity—regardless of the impact of inactivity on interstate commerce. As the Chief Justice wrote in NFIB, sustaining Congress’s power to impose the individual mandate would mean that actors “may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.”

The Chief Justice contends that permitting such regulation would constitute a break from precedent. “The Framers gave Congress the power to regulate commerce, not

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161 Id. at 249.
163 Heart of Atlanta Motel, 379 U.S. at 249.
164 Id. at 255.
166 Id. at 2588 (Roberts, C.J.).
to compel it, and for over 200 years both our decisions and Congress’s actions have reflected this understanding.”167 But this analysis ignores the fact that Heart of Atlanta unanimously upheld the CRA’s public-accommodations mandate precisely because too few vendors served African Americans.168

Inexplicably, the Government raised barely a glimmer of this argument in its defense of the ACA. The best it mustered is a string cite in its Reply Brief meekly noting in a parenthetical that Heart of Atlanta “upheld regulation of seemingly passive conduct.”169

The CRA’s public-accommodations mandate does differ in one important respect from the ACA’s individual mandate. The public-accommodations mandate applies only to inn keepers and other public-service providers.170 Thus, one might argue the CRA does not compel transactions because it only applies to those already in the service industry. Unlike the ACA, it does not require the public at large to participate in a particular market. But the CRA does compel parties to engage in commerce with a segment of the population that in many parts of the country was essentially shut out of that market.171 The CRA thus expands a market—establishments serving African Americans—by conscripting businesses into it. If the regulated parties were willing to participate in this market, the Act would have been unnecessary. As with the individual mandate the sole purpose of the public-accommodations mandate is to compel commerce that would not take place but for the statute.

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167 Id. at 2589 (Roberts, C.J.) (emphasis in original); accord id. at 2647 (joint opinion of Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
168 Heart of Atlanta Motel, 379 U.S. at 252-53.
170 Heart of Atlanta Motel, 379 U.S. at 242.
171 Id. at 253.
Admittedly, the ACA’s mandate applies to a significantly larger pool of actors than the CRA’s does. But the ACA’s wider scope merely makes it different in degree, not in kind. The Chief Justice and the Dissent assert that the power to conscript one to engage in a transaction when she would prefer to remain inactive does not lie within the font of the commerce power.\textsuperscript{172} This is exactly what the CRA’s public-accommodations mandate does. If Congress lacks the power to compel consumers to engage in transactions with approved insurers, logically it likewise lacks the authority to compel restaurants and inn keepers to enter into transactions with particular patrons.

\textbf{E. The CRA Is the Template for All Federal Public-Accommodations Laws}

In the wake of \textit{Heart of Atlanta}, Congress enacted a host of civil-rights laws utilizing its commerce power to compel individuals and businesses to engage in unwanted transactions. In 1968, the Fair Housing Act (“FHA”) became law.\textsuperscript{173} The FHA prohibits property owners from discriminating against blacks and other minorities when selling or leasing real estate.\textsuperscript{174} The FHA, like the CRA and ACA, \textit{mandates} that individuals engage in unwanted transactions by prohibiting sellers and landlords from refusing to transact with a person because of her ethnicity.\textsuperscript{175}

Congress followed up the FHA by enacting laws banning discrimination in employment.\textsuperscript{176} These statutes likewise punish inactivity by imposing sanctions on employers who refuse to hire or promote qualified individuals on account of their race or

\textsuperscript{173} 42 U.S.C. § 3601.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} United States v. Miss. Dep’t of Pub. Safety, 321 F.3d 495, 500-01 (5th Cir. 2003) (finding Commerce Clause empowered Congress to enact law prohibiting employment discrimination).
Most recently, in 1990 Congress enacted the Americans with Disabilities Act ("ADA"). The ADA mandates that proprietors make their businesses accessible to customers and employees with disabilities. The ADA likewise uses the Commerce Clause to compel parties to facilitate transactions that, absent the statute, would not take place.

All these laws use the commerce power, in one way or another, to create commerce. Thus, as with the CRA, the Chief Justice’s revision of the Court’s Commerce Clause jurisprudence—while ultimately irrelevant to the ACA’s validity—has rattled the foundation upon which they stand.

III. THE CHIEF JUSTICE’S COMMERCE-CLAUSE EXPOSITION IgNORES THE CANON OF CONSTITUTIONAL AVOIDANCE

The Chief Justice’s foray into the Court’s Commerce Clause jurisprudence ignores a fundamental tenet of statutory interpretation. The canon of constitutional avoidance counsels that when “choosing between competing plausible interpretations of a statutory text,” a reviewing court should err toward a reading that avoids “rais[ing] serious constitutional doubts.” This maxim serves twin functions.

First, the canon serves a *statutory-preservation function*. It requires courts to defer to the will of Congress and uphold a statute so long as at least one constitutional avoidance.
basis supports it. Second, the canon serves a *judicial-restraint function*. It “allows courts to *avoid* the decision of [unnecessary] constitutional questions” \(^{181}\) by “press[ing] statutes away from the constitutional danger zone” into firmer territory. \(^{182}\)

In *NFIB*, the Chief Justice avers to the canon, noting that “as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.” \(^{183}\) But while his ultimate decision to uphold the mandate as a tax honors the maxim’s statutory-preservation value, his unnecessary foray into Congress’s commerce power ignores the canon’s judicial-restraint function.

The individual mandate could potentially fall within the ambit of either Congress’s taxing power or its power to regulate interstate commerce. A decision upholding or striking down the mandate on the basis of the commerce power must confront difficult constitutional issues because, according to Roberts, “Congress has never attempted to rely on the [commerce] power” in this manner before. \(^{184}\) Conversely, by the Chief Justice’s own lights, upholding the mandate as a tax involves resolution of the comparatively straightforward question of whether the Act imposes punishment upon those who refuse to comply. \(^{185}\)

The Chief Justice concludes that the ACA clearly does not penalize the failure to obtain insurance:

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\(^{181}\) *Clark*, 543 U.S. at 381 (emphasis in original).

\(^{182}\) Vermeule, *supra* note 68 at 1960 (cited approvingly in *Clark*, 543 U.S. at 381).


\(^{185}\) *Id.* at 2585-86 (citing United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996).
Neither the [ACA] nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law.\textsuperscript{186}

Because, in the Chief Justice’s view, the individual mandate is plainly not punitive, he concludes that it must be a tax.

Since, according to Roberts, the individual mandate can be upheld under the tax power with comparably little difficulty,\textsuperscript{187} the constitutional-avoidance canon’s judicial-restraint function counsels against his foray into the much thornier Commerce Clause issue.

During his confirmation hearings, the Chief Justice won many admirers by proclaiming that he views the judicial role as analogous to that of an “umpire, calling balls and strikes.”\textsuperscript{188} Implicit in this remark is the recognition that jurists should steer clear of unnecessary constitutional thicketts. Yet in \textit{NFIB}, Roberts waded headlong into just such a quagmire—and in so doing rattled the very bedrock of American civil-rights law.\textsuperscript{189} We would have been better served if he had heeded his own advice.

\textbf{CONCLUSION}

The Supreme Court first confronted the Commerce Clause in \textit{Gibbons v. Ogden}\textsuperscript{190} in 1824. In that opinion, Chief Justice Marshall recognized what, until the Court’s last

\begin{flushleft}
\textsuperscript{186} \textit{Id.} at 2586.
\textsuperscript{187} While the Chief Justice’s opinion regards the classification of the individual mandate as a tax to be a straightforward analysis, many commentators disagree. \textit{See e.g.}, Richard W. Garnett, \textit{Chief Justice Roberts and the ACA Cases}, PRAWFSBLAWG, July 3, 2012, \url{http://prawfsblawg.blogs.com/prawfsblawg/rick_garnett/} (last visited July 31, 2012) (calling the Chief Justice’s tax argument “glaringly unconvincing”).
\textsuperscript{189} \textit{See} cases cited \textit{supra} note 48.
\textsuperscript{190} 22 U.S. (9 Wheat.) 1 (1824).
\end{flushleft}
term, had been regarded as a central tenet of Commerce Clause jurisprudence: The power to regulate interstate commerce “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations.”

Bestowing such power on any organ of government opens the door for abuse. Hence, every time Congress has utilized its commerce power to tackle a social-justice problem, opponents—often afraid to acknowledge their true interests—sprang forth offering dazzling parades of horribles that would follow if the day’s legislation were sustained. When Congress enacted the CRA’s public-accommodations mandate, opponents asserted that if the Court upheld the law, intrusive regulation of the home would surely follow. One litigant predicted the statute would open the door to legislation mandating “larger families.” North Carolina filed an amicus brief arguing that a Marxist conspiracy to “abolish all individualism and private property rights” lurked behind Wickard’s expanded conception of the commerce power. So today’s claim that the ACA has opened the door to broccoli mandates, while entertaining, is an old shtick. What all these critiques seem to forget is that Congress is an elected body. As Chief Justice Marshall recognized in *Gibbons*, like the power to “declar[e] war” Congress’s exercise of the commerce power is restrained by “the influence which . . . constituents possess at elections.” Imagine the attack ads that would hound the

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191 *Id.* at 196.
192 *Heart of Atlanta* explicitly recognized the fact that Congress’s motive in enacting the CRA’s provisions was to “legislat[e] against moral wrongs render[s] its enactments no less valid.” *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964).
congressman who proposed a bill mandating broccoli consumption. Does anyone really think such a bill could become law? Moreover, the States exercise plenary police power. If the political will existed to muster such legislation, wouldn’t it appear at the state level first where it would face less resistance?

Of course, courts must vigilantly guard against statutes that exceed constitutional bounds. But this is not a license to second guess legislative decisions on policy grounds—or to use the power of judicial review to constitutionalize a jurist’s own economic or political beliefs. We have been there before and that story did not end well.

Government can oppress. But so can the private sector. Judicial opinions that overly impair the government’s ability to remove private impediments to freedom, while sometimes well intentioned, are just as great a threat to liberty as decisions sanctioning abuse of power by the government.

I am reminded of a passage from the Green Book, the travel guide cited by the Heart of Atlanta Court as evidence of the pervasive private-sector discrimination faced by African Americans. The book’s authors predicted a better future.

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197 I believe the Court should be particularly vigilant in separation of power cases. See Chad DeVeaux, Rationalizing the Constitution: The Military Commissions Act and the Dubious Legacy of Ex parte Quirin, 42 AKRON L. REV. 13 (2009) (arguing that the Military Commissions Act of 2006, which authorizes the prosecution of alleged “war on terror” offenders by military tribunals, encroaches upon quintessential Article III functions violating the separation of powers).

198 See Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (“the word liberty... is perverted” by jurists who abuse their office to interpret the Constitution “to embody a particular economic theory”).

There will be a day sometime in the near future when this guide will not have to be published. That is when we as a race will have equal opportunities and privileges in the United States. It will be a great day for us to suspend this publication for then we can go wherever we please, and without embarrassment.\footnote{GREEN BOOK, supra note 152 at 1.}

True to its word, the Green Book published its last edition in 1964.\footnote{Neal Conan, “Green Book” Helped African-Americans Travel Safely, NPR.ORG, Sept. 5, 2010, available at http://www.npr.org/templates/story.php?storyID=129885990 (last visited July 31, 2012).} Its authors believed that Heart of Atlanta’s affirmation of the CRA rendered future volumes unnecessary.\footnote{Id.} I hope at least one of the authors is still alive. If the views of a majority of the Supreme Court come to fruition, it might become necessary to introduce the text to a new generation.

\footnote{GREEN BOOK, supra note 152 at 1.}


\footnote{Id.}