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## Night of the Living Dead Hand: The Individual Mandate and the Zombie Constitution

Gary Lawson  
*Boston University School of Law*

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# NIGHT OF THE LIVING DEAD HAND: THE INDIVIDUAL MANDATE AND THE ZOMBIE CONSTITUTION

Gary Lawson\*

## INTRODUCTION

If someone had told me on June 27, 2012, that five Justices of the U.S. Supreme Court were about to hold in *National Federation of Independent Business v. Sebelius*<sup>1</sup> (*NFIB*) that the individual mandate provision in the Patient Protection and Affordable Care Act<sup>2</sup> (PPACA) was not constitutionally authorized either by the Commerce Clause or the Necessary and Proper Clause,<sup>3</sup> I would have popped a cork. I don't even drink, but I would have popped the cork on principle just to hear the sound (and also to irritate my colleagues, most of whom revere the PPACA the way that cargo cultists revere airstrips<sup>4</sup>). I would have thought it obvious that such a holding would entail invalidation of the mandate; and while that would not necessarily have rid the world of the statute in its entirety, absent five solid votes for nonseverability, it would have been—as the old joke says of 10,000 lawyers at the bottom of the Atlantic—a good start.

Of course, I would have been wrong on pretty much every possible level (except in believing that invalidation of the mandate would have been a

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\* Philip S. Beck Professor of Law, Boston University School of Law.

1. 132 S. Ct. 2566 (2012).

2. Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.). Section 1501(b) of the PPACA mandates that “[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential [health insurance] coverage for such month” or else face a monetary “penalty.” § 1501(b), 124 Stat. at 244 (to be codified at 26 U.S.C. § 5000A(a)–(b)(1)). There are exceptions for prisoners and some members of narrowly defined religious communities. § 1501(b), 124 Stat. at 246 (to be codified at 26 U.S.C. § 5000A(d)(2)–(4)). The criteria for “minimum essential coverage” are defined in section 1501(b), 124 Stat. at 248 (to be codified at 26 U.S.C. § 5000A(f)).

3. If one judges by founding-era usage, the correct name for Article I, Section 8, Clause 18 of the Constitution is the Sweeping Clause. See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 270 (1993). But because this Essay discusses a Supreme Court opinion that uses the (incorrect) modern label, I reluctantly defer to modernity’s error and call it the Necessary and Proper Clause.

4. Is the cargo cult comparison unkind to supporters of the PPACA? Perhaps, though I am still waiting for someone to explain, without invoking magical thinking, how the PPACA will increase the supply of medical services.

good start, but that is a topic for another paper). Halfway through Chief Justice Roberts's opinion, the mandate was essentially pronounced dead. But like young Victor reviving the deceased Frankenweenie, Chief Justice Roberts resurrected the mandate from the grave by calling it an indirect tax. The operation was successful, but the patient unfortunately lived.

The decision's doctrinal consequences are difficult to gauge. First, the holding that the individual mandate was constitutionally justifiable under Congress's taxing power gives a very broad interpretation to the concept of an indirect tax, but it is hard to see where that will lead in future cases. Second, although the Supreme Court upheld most of the Act, it invalidated—by a 7–2 vote—the provisions that would have forced states dramatically to expand their Medicaid benefits. If the goal of supporters of the PPACA was to increase in a substantial way the number of persons nominally covered by some form of health insurance, Medicaid expansion was a critical vehicle for achieving that goal, and it has now lost at least some of its wheels. Both in the long and short term, that may be *NFIB*'s most consequential holding.<sup>5</sup> Third, the holding that neither the Commerce Clause nor the Necessary and Proper Clause (nor the two in combination) could justify the mandate<sup>6</sup> may or may not survive the next vacancy on the Supreme Court, so future predictions of doctrinal development are treacherous at best.

Accordingly, I will focus only on the present and discuss “The Good, the Bad, and the Ugly” aspects of the Court's holdings on the Commerce and Necessary and Proper Clauses, on the assumption that they represent good doctrine at least for the moment.<sup>7</sup> The “good” is that the Court, for the first time in nearly two centuries, explicitly recognized that one of the central requirements of legislation under the Necessary and Proper Clause is that it must be “incidental” to some principal enumerated power. This is an enormously important development that is entirely correct as a matter of

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5. For an analysis of the Medicaid holding and its possible consequences, see Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1 (2013).

6. A number of sore winners persist in maintaining that the Court's decisions on the Commerce Clause and Necessary and Proper Clause were dicta, because Chief Justice Roberts decided the case on other grounds. But Chief Justice Roberts made it inescapably clear that the mandate could only be considered a tax if it could not be sustained as a regulatory penalty. See *NFIB*, 132 S. Ct. at 2600–01. That is, if the Commerce Clause and/or Necessary and Proper Clause could sustain the mandate, then Chief Justice Roberts would have interpreted it as a regulatory penalty, which it most naturally appears to be. He would only consider it to be a tax once a very strong doctrine of constitutional avoidance kicked into play, and that avoidance doctrine needed holdings on the Commerce Clause and Necessary and Proper Clause as triggers. In Chief Justice Roberts's eyes, the mandate literally did not become a tax, capable of being sustained by the taxing power, until he had finished his analysis of the Commerce Clause and Necessary and Proper Clause. This reasoning may well be spectacularly silly, and even unconstitutional, see *infra* Conclusion, but it is not dicta.

7. I will touch only in passing on the decisive holding regarding the federal taxing power.

original meaning. The “bad” is that the Court spent much of its energy discussing the Commerce Clause, which, in a rational world, could not be invoked as support for the mandate with a straight face. While the Court avoided adopting an even sillier interpretation of the Commerce Clause than modern law has already generated, it missed an excellent opportunity to clarify the respective roles of the Commerce Clause and the Necessary and Proper Clause in the constitutional structure. The “ugly” was the string of propositions that the Court took for granted as starting points for analysis regarding federal power. Those propositions depart so far from any plausible understanding of the Constitution that it is a mistake in principle to describe the activity in which the Court was engaged as constitutional interpretation. Something was being interpreted, but that something was not the actual Constitution. Instead, it was a soulless shadow of the real document: a zombie constitution. Of course, that zombie constitution replaced the real one a long time ago (so perhaps *Invasion of the Body Snatchers* would have been a more apt reference); *NFIB* breaks no new ground on that score. But the decision does highlight, if highlighting is necessary, the irrelevance of the actual Constitution to modern governance.

#### I. THE GOOD: THE OBAMACARE INCIDENT

The individual mandate was defended in the Supreme Court<sup>8</sup> on three separate grounds: as a valid exercise of Congress’s power (1) to “regulate Commerce . . . among the several States”; (2) to enact laws “necessary and proper for carrying into Execution” other federal powers, such as the commerce power; and (3) to “lay . . . Taxes.”<sup>9</sup> Although the Court upheld the mandate on the third ground, from an interpretative standpoint the most noteworthy discussion concerned the second ground. Five Justices, in two separate opinions, concluded that the Necessary and Proper Clause did not provide constitutional authorization for the mandate. Both opinions advance important propositions about the Necessary and Proper Clause.<sup>10</sup>

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8. This is not to say that it could not be, or was not, defended on other grounds. For example, it would be difficult, and probably counterproductive, to try to pigeonhole Sotirios Barber’s defense of the PPACA, grounded on a teleological understanding of the Constitution, into one of the three clause-bound arguments made to the Court. See SOTIRIOS A. BARBER, *THE FALLACIES OF STATES’ RIGHTS* 24–29 (2012).

9. See *NFIB*, 132 S. Ct. at 2578–79.

10. Given the conventions of the legal academy, and my own general rejection of those conventions, I should note that I do not regard an idea’s appearance in a Supreme Court decision as evidence either for or against its merit. The Constitution means whatever it means, and the Supreme Court, as with anyone else, can either acknowledge or fail to acknowledge that meaning. There is no particular reason, either theoretical or empirical, to think that it will be any better at discerning that meaning than anyone else—and considerable reason to think that it will be worse in many contexts. Furthermore, to celebrate a correct idea’s recognition by the Supreme Court presupposes that it is a good thing for the Supreme Court to recognize correct interpretations of the Constitution. That may seem trivially true, but hopefully a moment’s reflection will show that such a claim can responsibly be defended only after elaboration of a foundationally sound moral theory that yields adjudicative fidelity to the Constitution as a derivative conclusion—and that is far from trivial. Consider this Essay a piece of legal anthropology that simply observes, with contingent interest, the

The joint opinion for Justices Scalia, Kennedy, Thomas, and Alito (joint opinion) contained a brief but powerful discussion of the Clause. After determining that the Commerce Clause could not justify the mandate—a determination about which I will say more in Part II—the joint opinion noted that “the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce.”<sup>11</sup> This conclusion followed a discussion of four prior cases, the first two of which—*New York v. United States*<sup>12</sup> and *Printz v. United States*<sup>13</sup>—involved regulation of states and the second two of which—*United States v. Lopez*<sup>14</sup> and *United States v. Morrison*<sup>15</sup>—involved regulation of private activity. The opinion then observed that “the last two of these cases show that the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.”<sup>16</sup>

While the opinion is a bit cryptic, a straightforward meaning emerges when one reflects on what it means to say that the Necessary and Proper Clause reflects “background principle[s].” In *Printz*, the Court rejected the idea that the Necessary and Proper Clause could allow Congress to commandeer state officials to execute federal law because “[w]hen a ‘La[w] . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty . . . , it is not a ‘La[w] . . . proper for carrying into Execution the Commerce Clause.’”<sup>17</sup> In support, the opinion cited a law review article that carefully, and one might even say eloquently,<sup>18</sup> explained how the word “proper” in the Necessary and Proper Clause incorporates background principles of separation of powers, federalism, and the rights of citizens as limits on the extent of the powers granted to Congress under the Clause.<sup>19</sup> It is not enough for a law under the Necessary and Proper Clause to have an appropriate causal connection to effectuating an enumerated federal power.<sup>20</sup> The Clause requires such laws

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Supreme Court’s recognition of certain constitutional truths and its utter failure to notice others, without attempting to ascribe normative weight to that recognition.

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

12. 505 U.S. 144 (1992).

13. 521 U.S. 898 (1997).

14. 514 U.S. 549 (1995).

15. 529 U.S. 598 (2000).

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

17. *Printz*, 521 U.S. at 923–24 (emphasis in original).

18. Of course, one might be less inclined to say this if one were not the article’s coauthor, but never mind.

19. See Lawson & Granger, *supra* note 3.

20. What is that appropriate causal connection? Modern law appears to say “rational basis.” See *United States v. Comstock*, 130 S. Ct. 1949, 1956–57 (2010); *Sabri v. United States*, 541 U.S. 600, 605 (2004). As usual, modern law is wildly wrong. See Gary Lawson, *Discretion As Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 *GEO. WASH. L. REV.* 235, 242–48 (2005) (arguing that “necessary” describes a causal connection stronger than rational basis but weaker than strict indispensability).

to be both “necessary” and “proper,” in the conjunctive, and the best understanding of “proper” is that it incorporates basic fiduciary norms, including the norm that agents (in this case Congress) must stay within the reasonable confines of their delegated authority.<sup>21</sup> Those confines are determined as much by the nature and structure of the grants of power as by explicit limitations on the agent. *Printz* was an eminently correct recognition of this basic feature of the Necessary and Proper Clause.

Until *NFIB*, the only instances in which the Court expressly applied this understanding of the Necessary and Proper Clause involved direct regulation of states or state officials, as Justice Ginsburg accurately noted in her opinion for four Justices.<sup>22</sup> The joint opinion makes clear that at least four Justices do not see the word “proper” as limiting the scope of the Necessary and Proper Clause only when some notion of “state sovereignty” is at issue. Rather, a “proper” law must conform to *all* principles that define the appropriate reach of federal power. While *Lopez* and *Morrison* did not expressly invoke this reading of the Necessary and Proper Clause, the joint opinion clarifies that such a reading was implicit in and underlies those decisions.

Or so at least four Justices think. What about Chief Justice Roberts? The Chief Justice’s separate opinion agreed with the joint opinion that, “[e]ven if the individual mandate is ‘necessary’ to the [PPACA’s] insurance reforms, such an expansion of federal power is not a ‘proper’ means for making those reforms effective,”<sup>23</sup> because laws under the Necessary and Proper Clause are not “proper” when those laws “undermine the structure of government established by the Constitution.”<sup>24</sup> That makes five Justices who got it right.

But Chief Justice Roberts got something else right that is even more fundamental than the limiting role played in the Constitution by the requirement that executory laws be “proper.” At the outset of his discussion of the Necessary and Proper Clause, Chief Justice Roberts laid out some general principles that guide interpretation of the Clause:

The power to “make all Laws which shall be necessary and proper for carrying into Execution” the powers enumerated in the Constitution, Art. I, § 8, cl. 18, vests Congress with authority to enact provisions “incidental to the [enumerated] power, and conducive to its beneficial exercise.” Although the Clause gives Congress authority to “legislate on that vast mass of incidental powers which must be involved in the constitution,” it

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21. For more on the fiduciary roots of the Necessary and Proper Clause, *see infra* pp. 1705–06.

22. *See NFIB*, 132 S. Ct. at 2626–27 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

23. *Id.* at 2592.

24. *Id.*

does not license the exercise of any “great substantive and independent power[s]” beyond those specifically enumerated.<sup>25</sup>

This is strange-sounding language to modern ears. What does it mean to speak of a “great substantive and independent power” that is beyond the compass of the Necessary and Proper Clause? And what is an “incidental” power? When is an exercise of authority “incidental” to some enumerated power?

It is in some respects sobering that this language is largely unfamiliar in modern times, because it was crucial to Chief Justice Marshall’s opinion in *McCulloch v. Maryland*, from which it is drawn. *McCulloch* is presumably taught in every Constitutional Law course, so how could this language and its significance escape notice? Nonetheless, escape notice it has. Indeed, the present author is moderately ashamed to admit that he did not understand the import of this language until a few short years ago, when it was made clear to him by Robert Natelson, who to my knowledge is the only modern scholar who has truly understood the role of the Necessary and Proper Clause in the constitutional design.<sup>26</sup>

Fortunately, Mr. Natelson was available to coauthor a brief in *NFIB* that pointed out to the Court this language’s importance.<sup>27</sup> Recall that *McCulloch* involved the constitutionality of federal incorporation of a national bank, in the absence of express constitutional provisions authorizing either federal banks or federal corporations.<sup>28</sup> The enduring legacy of *McCulloch* is its discussion of the meaning of the word “necessary,” in which the Court rejected the strict Jeffersonian construction of the term in favor of some looser construction.<sup>29</sup> (Whether that looser construction was or was not the Hamiltonian “rational basis” test of modern law is a topic for another time.) But before engaging in that discussion, Chief Justice Marshall devoted seven pages to what he recognized was a

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25. *Id.* at 2591 (alterations in original) (citations omitted) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411, 418, 421 (1819)).

26. And I say that as someone who has spent much of his professional life studying the Necessary and Proper Clause. I think I managed to blunder into some right answers along the way, but without Rob Natelson’s insights, first laid out systematically in Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004), I would have missed the most central feature of the Clause. I do, however, give myself credit for being a fast learner. See Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011), <http://yalelawjournal.org/images/pdfs/1025.pdf>.

27. See Brief of Authors of *The Origins of the Necessary and Proper Clause* (Gary Lawson, Robert G. Natelson & Guy Seidman) and the Independence Institute As Amici Curiae in Support of Respondents (Minimum Coverage Provision), Dep’t. of Health & Human Servs. v. Florida, No. 11-398 (U.S. Feb. 13, 2012), 2012 WL 484061. Chief Justice Roberts did not cite this brief, in keeping with his general reluctance to cite secondary literature. We (meaning the authors of the brief) would like to think that it provided the inspiration for his discussion of the Necessary and Proper Clause, but we may never know. It is hard to believe, however, that by sheer coincidence Chief Justice Roberts independently rediscovered the principal/incident language from *McCulloch* just as we filed the brief.

28. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 318–19 (1819).

29. *Id.* at 322–26.

question preliminary to a discussion of causal necessity: whether establishment of a federal corporation was properly an *incident* to any of the enumerated powers.<sup>30</sup> As Marshall explained, incorporation was “not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers.”<sup>31</sup> Rather, incorporation of a bank “must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means.”<sup>32</sup> Therefore the power of incorporation may “pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.”<sup>33</sup>

The key to this passage is understanding that the Necessary and Proper Clause is an expression of basic principles of agency law, well understood by the framing public (and particularly by the agency lawyers on the Committee of Detail who drafted the Clause). Any agency instrument will grant certain powers to the agent. Because it is difficult or costly to specify every possible contingency that can arise, it is sensible to construe agency instruments, unless otherwise specified by the drafters, to allow the agent to exercise powers that regularly accompany, or are incidental to, the specifically enumerated, or principal, powers granted by the instrument.

For example, an agent’s power to enter into contracts might well include, depending on the context and the custom in the trade, the power to extend credit to the purchaser on behalf of the principal, even if the agency instrument makes no mention of credit sales. Eighteenth-century agency law so held. But these implications of ancillary, or incidental, powers have limits; the agent with authority to enter contracts might be able to imply a power to extend credit if that was customary among such agents, but it would be a very different matter to imply a power to sell the principal’s entire business—even for a good price. The power to sell the business is surely a principal power in that context, meaning that one would expect it to be specifically enumerated in the agency instrument if it existed. It would not be an ordinary accompaniment, or incident, of the agent’s power to sell goods.

By the late eighteenth century, there was a thick body of law governing what kinds of powers in various contexts were properly incidents to the powers of an agent. These understandings could, of course, be altered, abolished, or codified by the parties in the drafting of their instruments. If one wanted an instrument in which the agent had broader incidental powers than the background law would provide, one could draft an “implied powers” clause that would suggest broader-than-background authority. Or one could negate any inference of incidental powers by specifying that the agent had only those powers *expressly* granted. Or one could essentially codify the background norms by providing that agents may exercise all

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30. *Id.* at 405–11.

31. *Id.* at 411.

32. *Id.* at 421.

33. *Id.* at 411.

“necessary,” “proper,” or (most restrictively of all within the range of background conventions) “necessary and proper” powers to execute the granted powers.

Robert Natelson has demonstrated—beyond a reasonable doubt, I will unhesitatingly aver—that the Necessary and Proper Clause was precisely such an “implied powers” clause drawn from these principles of agency law.<sup>34</sup> Accordingly, Congress (the agent) has only those unexpressed, unenumerated powers that are *incident* to the specified, or *principal*, enumerated powers. Importantly, status as an incident is a precondition for a power’s inclusion under the Necessary and Proper Clause, which status must be established *before* one asks whether the power is somehow causally related to the execution of some enumerated power. If the exercised power is really a principal rather than incidental power, then it *cannot* come within the Necessary and Proper Clause no matter how causally efficacious it might be. That is why Chief Justice Marshall, after determining that the power of incorporation was incidental rather than principal, concluded that incorporation could “pass as incidental to those powers which are expressly given, *if it be a direct mode of executing them.*”<sup>35</sup> The requirement that the power be an incident was *in addition to* the requirement that it be a direct mode of (“necessary” for) effectuating the principal (“expressly given”) powers.

In the context of the individual mandate, this means that a threshold question, *before* one asks whether the law is “necessary and proper for carrying into Execution” some enumerated power, is whether the power represented by the mandate is incidental or principal. If it is the latter, then Congress cannot exercise such a power without a constitutional amendment adding it to the express, principal powers of Congress. The power to order people to buy products (and to buy them from government-approved monopolists in the bargain) is at worst arguably, and at most blindingly obviously, a principal power, of at least equal “dignity” (as eighteenth-century agency law described the principal/incident inquiry) to the express powers of the national government. Chief Justice Roberts accordingly concluded that the mandate could not be “‘incidental’ to the exercise of the commerce power. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority.”<sup>36</sup>

The short-term consequence of Chief Justice Roberts’s opinion is to bring to the forefront the agency-law origins of the Necessary and Proper Clause and the importance of determining, as a threshold matter, whether any claimed exercise of congressional authority under that Clause seeks to exercise a principal rather than incidental power. This is not a new idea; it

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34. See, e.g., Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 52 (2010); Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in LAWSON ET AL., *supra*, at 84.

35. *McCulloch*, 17 U.S. at 411 (emphasis added).

36. *NFIB*, 132 S. Ct. 2566, 2592 (2012) (citing *McCulloch*, 17 U.S. at 418)).

was the foundation for the opinion in *McCulloch*. But it is an incredibly important idea that was in danger of getting lost. The long-term consequence is to stimulate consideration of the many ways in which agency law can inform understanding of the Constitution, beyond the narrow confines of the PPACA. Time will tell if that turns out to be Chief Justice Roberts's most important contribution to American jurisprudence.

## II. THE BAD: MISSED IT BY THAT MUCH

Putting together Chief Justice Roberts's opinion and the four-Justice joint opinion, *NFIB* represents the high-water mark in modern jurisprudence<sup>37</sup> in recognizing the original meaning of the Necessary and Proper Clause. The decisions, alas, did not fare so well with respect to the Commerce Clause. It is true that Chief Justice Roberts and the four authors of the joint opinion rejected the claim that the Commerce Clause could authorize the mandate, and that is certainly correct as a matter of original meaning. But they missed an opportunity to clarify modern law in a conceptually important way, and it is unlikely that a better opportunity will arise in the near future. What failed to happen is, in the long run, probably more important than what happened.

The individual mandate compels virtually all Americans to purchase government-approved health insurance or pay a fine.<sup>38</sup> The Commerce Clause gives Congress power to "regulate Commerce . . . among the several States."<sup>39</sup> It took both Chief Justice Roberts and the joint opinion a fair amount of time and effort, and a discussion of a great many past decisions, to reach the conclusion that the Commerce Clause does not provide constitutional authority for the mandate. With all due respect, this is a conclusion that does not require much in the way of either effort or thought.

The mandate makes it unlawful to sit in your living room (perhaps contemplating your navel or watching paint dry) while uninsured. There is no linguistically defensible way to describe this as a regulation of "Commerce . . . among the several States." Sitting in your living room is not commerce—not among states, with foreign nations, with Indian tribes, or even with your bridge club. If someone honestly, truly believes that sitting in your living room is actually "Commerce" as that word is used in the Constitution,<sup>40</sup> I genuinely do not know what to say to them—just as I

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37. To be sure, that is somewhat like talking about the high-water mark in the Gobi Desert, but one takes what one can get.

38. It is a fine. It does not become a tax instead of a fine simply because the Supreme Court calls it one, no more than the word "proper" imposes a jurisdictional limitation on Congress simply because the Supreme Court says that it does. Reality is objective; its existence does not depend on some Berkeleyan perception by the Supreme Court.

39. U.S. CONST. art. I, § 8, cl. 3.

40. The qualifying phrase "as that word is used in the Constitution" is vital. It is possible to come up with meanings for the word "commerce" that encompass all human activity, and even all human inactivity. It is much harder to say that those meanings found their way into Article I, Section 8, Clause 3 of a late-eighteenth-century legal document. See Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to*

would not know what to say to someone who honestly, truly believes that growing plants in your kitchen window is commerce. There are times when argument is not worth the effort.

To be sure, sitting in your living room uninsured (or growing plants in your kitchen window) might well *affect* commerce among the several states (or with foreign nations, or with the Indian tribes) in some fashion, however remote. But the Commerce Clause does not give Congress power to regulate matters that affect commerce (remotely or otherwise); it gives Congress power to regulate (some forms of) commerce. If the subject matter being regulated is not commerce, it does not come within the Clause. Activities that are not commerce but that affect commerce are not commerce; they are activities that affect commerce but are not commerce. At the risk of offending someone, and perhaps a great many someones: this is so simple a point that it requires a willful act to miss it.

That is not to say that the Constitution does not authorize Congress to regulate activities that are not themselves commerce but that affect commerce. It is only to say that the Commerce Clause cannot, with a straight face, be put forward as the source of that authority. As it happens, there is a clause in the Constitution that seems well suited to addressing the things-that-are-not-commerce-but-which-might-affect-commerce situation. Congress is given power to make “all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,”<sup>41</sup> including the power to regulate commerce among the several states. If a power to regulate something other than interstate commerce is (1) incidental to that power and (2) necessary and proper for carrying that power into execution, then the Necessary and Proper Clause authorizes Congress to regulate that noninterstate-commerce-but-interstate-commerce-affecting activity. But the constitutional analysis must center on the Necessary and Proper Clause, not the Commerce Clause.

Modern law, of course, has lost this elementary understanding. Cases routinely describe *as part of the commerce power itself* the ability to regulate matters that have a “substantial effect”<sup>42</sup> on interstate commerce.<sup>43</sup> This is just sloppy thinking (and writing) that skips an essential step in the analysis: Congress may well be able to regulate noninterstate-commerce activities that substantially affect interstate commerce, but only under the Necessary and Proper Clause (and consistent with all of the limitations on the scope of the power granted by that Clause), not under the Commerce

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Jack Balkin, 109 MICH. L. REV. FIRST IMPRESSIONS 55 (2010), <http://www.michiganlawreview.org/assets/fi/109/natelsonkopel.pdf>; see also Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006).

41. U.S. CONST. art. I, § 8, cl. 18.

42. *United States v. Darby*, 312 U.S. 100, 119 (1941). This is not to say that the decision in *Darby* committed this error. It committed many other errors, but not this one.

43. See, e.g., *United States v. Lopez*, 514 U.S. 549, 559 (1995).

Clause itself. I have made this point at length elsewhere<sup>44</sup> and will not belabor it here.

This confusion is certainly not new to *NFIB*, but the individual mandate presented such a clear illustration of the absurdity of trying to treat as “commerce . . . among the several States” activities (and I am treating sitting in your living room watching paint dry as an activity) that simply cannot be jackhammered into that conceptual category. It is hard to imagine a more appropriate case in which to clear up this particular confusion. It is a bit depressing that no one, not even Justice Scalia,<sup>45</sup> thought to mention it.

### III. THE UGLY: RESIDENT EVIL

The individual mandate is actually a rather modest piece of the larger PPACA. Indeed, the mandate is a means for implementing some of the statute’s broader provisions; no one, to my knowledge, views the mandate as a desirable end in itself. Rather, the mandate is a response to some consequences of the PPACA’s regulation of the insurance market, which in its most basic form specifies the minimum content of health insurance policies, forbids insurers from denying coverage to persons with pre-existing conditions, and forbids most price differentiation among persons who present varying risk profiles.<sup>46</sup> Another major chunk of the PPACA involves spending large amounts of money, either as grants to states for Medicaid services or to private individuals to subsidize their purchase of health insurance.

No one in *NFIB* challenged the constitutional authority of Congress to regulate the terms and content of private insurance contracts. Nor did anyone challenge the basic constitutional propriety of Medicaid as a spending program or the federal subsidization of private purchases of health insurance—though of course there were (successful) challenges to some provisions compelling states to expand their Medicaid programs or lose all federal funding. Congress’s powers to regulate insurance and to transfer wealth from some citizens to others as an end in itself unconnected to the implementation of some enumerated federal power were simply taken for granted. Those matters have been deemed settled since the New Deal,<sup>47</sup>

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44. See Gary Lawson & David B. Kopel, *The PPACA in Wonderland*, 38 AM J. L. & MED. 269, 281–84 (2012).

45. At other times, Justice Scalia has recognized the appropriate role of the Necessary and Proper Clause in this kind of analysis. See *Gonzales v. Raich*, 545 U.S. 1, 33–35 (2005) (Scalia, J., concurring in the judgment).

46. In other words, it essentially forbids insurance from functioning as insurance and instead turns it into a privately administered welfare program. A detailed account of the PPACA’s insurance regulations, and a detailed defense of my characterization of those provisions, would require a separate article, which I am quite sure will never get written.

47. On congressional power to regulate insurance, see *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944). On congressional power to spend without reference to the implementation of enumerated powers, see *United States v. Butler*, 297 U.S. 77–78 (1936), and *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

and they were the foundation upon which all of the opinions and arguments in *NFIB* were fashioned.

Of course, Congress has no such powers under the Constitution. The formation and terms of an insurance contract are not remotely matters within the reach of the Commerce Clause, as the Supreme Court recognized for a century and a half before the New Deal.<sup>48</sup> Nor does Congress have an unlimited power to spend money, without reference to whether the spending carries into execution some enumerated power. The Constitution's only "spending clause" is in fact the Necessary and Proper Clause, which requires that any appropriation law be "necessary and proper for carrying into Execution" some enumerated federal power.<sup>49</sup> The vast bulk of the PPACA is, if anything, more flagrantly unconstitutional than the individual mandate. But the debate over the mandate took place in a legal world in which a taxing clause becomes a spending clause and the formation of a contract is interstate commerce. This is not a legal world governed by the U.S. Constitution.

The point is simple but profound: when the Supreme Court was deciding on the meaning of the Necessary and Proper Clause, the Commerce Clause, and the Taxing Clause in *NFIB*, it was not actually interpreting the U.S. Constitution. It was interpreting a document that bears some facial resemblance to the U.S. Constitution but that functions as a completely different instrument. The specific clauses at issue in *NFIB* do not have meanings in the abstract. They have meanings in the context of a particular document. If one put the text of the Necessary and Proper Clause in an Olive Garden menu, it would not necessarily bear the same meaning that it has in Article I, Section 8, Clause 18 of the Constitution of 1788; in the former case, for example, it would not be obvious that the clause was drawing its meaning from background principles of agency law. Once one has abandoned the Constitution on such fundamental matters as the federal spending power and the scope of interstate commerce (and these are just two of the countless matters on which modern law deviates so far from original meaning that it makes no sense to describe the relevant ascription

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48. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868). For detailed accounts of why *South-Eastern Underwriters* is egregiously wrong as a matter of original meaning, see Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 585–86 (2010); Robert G. Natelson & David B. Kopel, "Health Laws of Every Description": *John Marshall's Ruling on a Federal Health Care Law*, 12 ENGAGE 49, 50–51 (2011); Rob Natelson & David Kopel, *Health Insurance Is Not "Commerce,"* NAT'L L.J. (Mar. 28, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202487886015>.

49. For detailed accounts of why the federal spending power is located in the Necessary and Proper Clause rather than (as modern law would have it) in a clause that grants only the power to tax, see GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY* 24–32 (2004), and Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81 (1999).

of meaning to the resulting instrument as “constitutional interpretation”), one might as well be “interpreting” the Olive Garden menu.

Indeed, such interpretation would be far less prone to the fallacy of equivocation, in which one surreptitiously (and perhaps unthinkingly) substitutes the real Constitution for the instrument actually being interpreted in the premise or conclusion of an argument. This is a serious risk because, as noted above, the instrument that is the object of interpretation bears some vague, cursory resemblance to the actual Constitution. But in reality, it is a shadow, or zombie form, of the actual Constitution. It takes the external appearance, or body, of the Constitution, but with the Constitution’s actual meaning drained from that body. Like a zombie, this faux Constitution shambles onward, eating people’s brains whenever it can get past their defenses, while utterly lacking the soul (that is, the meaning) that defines the actual Constitution.

This is not something unique to *NFIB*. The entirety of modern constitutional jurisprudence consists of treating a zombie constitution as though it were the real deal. Nor is it a new point; I made the same observation two decades ago.<sup>50</sup> At the time, I had nothing much to offer beyond the observation, and I have nothing better today. But the shared premises of all of the parties and all of the Justices in *NFIB* bring home with clarity that almost no one today engages in real constitutional interpretation. That does not mean that the vast bulk of academics, and the entire legal profession and judiciary, are not engaged in important and interesting activities. From the standpoint of political theory, either normative or descriptive, those activities are far more interesting and important than interpreting the Constitution. It does not even mean that those persons are not engaged in some kind of interpretation of some kind of “constitution”; the interpretation of a zombie constitution is most assuredly a species of constitutional interpretation. It just means that they are not interpreting the Constitution.

#### CONCLUSION

One final note while we are on the subject of “ugly.” Chief Justice Roberts upheld the mandate only because he construed it to be a tax (specifically an indirect tax that required no apportionment among the states) and was therefore authorized by the taxing power. That

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50. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1253 (1994):

It makes no sense to agonize over the correct application of, for example, the Appointments Clause, the Exceptions Clause, or even the First Amendment when principles as basic to the Constitution as enumerated powers and nondelegation are no longer considered part of the interpretative order. What is left of the Constitution after excision of its structural provisions, however interesting it may be as a matter of normative political theory, simply is not the Constitution.

*Id.*

construction, in turn, was driven by his belief that only such a construction of the law could save its constitutionality. He explained:

. . . [T]he statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that [the mandate] can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.<sup>51</sup>

The point of this discussion was to make it clear why he felt it necessary to address the Commerce Clause (and the Necessary and Proper Clause) even though he was ultimately upholding the mandate on the basis of the taxing power.

As I read this passage, Chief Justice Roberts looked at the statute and saw a command and a penalty for violating that command—as did the four Justices in the joint opinion<sup>52</sup> and as did I.<sup>53</sup> He concluded that such a command/penalty was unconstitutional—as did the four Justices in the joint opinion and as did I. He therefore re-read the statute, in a fashion that by his own lights does not represent its most plausible reading, as a tax, which he could then uphold.

Let us assume that Chief Justice Roberts was right about the mandate being constitutional if it was construed as a tax.<sup>54</sup> Is there any escape from the conclusion that Chief Justice Roberts just “upheld” a statute that, by his own lights, Congress did not enact? To be sure, there is nothing unusual or unprecedented about the interpretative move made by Chief Justice Roberts. To the contrary, the avoidance canon, even in this statute-altering guise,<sup>55</sup> is a well-recognized principle of interpretation.<sup>56</sup> But that does not change its effect, which is to “uphold” a law that was not actually enacted. So framed, application of this canon blatantly violates the Constitution’s lawmaking provisions<sup>57</sup> and exceeds the scope of the “judicial Power.”<sup>58</sup>

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51. *NFIB*, 132 S. Ct. 2566, 2600–01 (2012).

52. *See id.* at 2650–55.

53. *See* Lawson & Kopel, *supra* note 44, at 278–79.

54. I do not think he was right about that, *see id.* at 279–80, but it is a hard question about which I am far less certain than I am about the other matters discussed in this Essay. I certainly would not say mean things about someone who maintains that the mandate, if properly considered a tax, is constitutional—especially if they have thought about the matter more carefully than I have.

55. Alternative versions of the avoidance canon would say to prefer an interpretation that does not raise constitutional questions to a comparably plausible interpretation that does raise such questions, *see* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 247–51 (2012), or to resolve cases on nonconstitutional grounds where possible. *See id.* at 251.

56. Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, 81 *FORDHAM L. REV.* 1715, 1717–20 (2013).

57. U.S. CONST. art. I, § 7, cls. 1–2.

58. *Id.* art. III, § 1.

Perhaps there is a way to understand the application of this particular interpretative device that does not involve the substitution of a new statute for the one that was actually enacted. It is no proof against that possibility that I do not see it. But I do not see it.