
NOTE

NFIB v. SEBELIUS AND THE INDIVIDUALIZATION OF THE STATE ACTION DOCTRINE

On June 28, 2012, the Supreme Court handed down its decision in *National Federation of Independent Business v. Sebelius*¹ (*NFIB*), upholding President Barack Obama's signature legislative achievement, the Patient Protection and Affordable Care Act² (ACA or Act). For months, the public, jurists, and scholars alike had debated the constitutionality of the Act's "individual mandate," a provision requiring anyone who failed to purchase health insurance to make a payment to the federal government.³ *NFIB* ended that debate, holding that the mandate exceeded Congress's authority to regulate commerce but not its authority to tax. The Court held that the Commerce Clause authorized the regulation of only commercial activity and that, by assessing a payment on individuals' decisions not to purchase health insurance, the mandate regulated *inactivity*. By contrast, the Taxing Clause authorized the regulation of inactivity, and it was possible to construe the mandate as a tax. Thus, while the mandate fell outside of Congress's commerce power, it could survive as a valid exercise of the taxing power.

NFIB's distinction between activity and inactivity — what this Note calls the decision's "individual action doctrine"⁴ — mirrors one of the Court's most vexing doctrinal constructions: the state action doctrine. That doctrine holds that only governmental actors can violate the Constitution and, thus, that the state must act before a constitutional violation will lie.

Both the state action and individual action doctrines share an analogous analytic framework, and they serve analogous functions. The doctrines police a boundary between the citizen and the state by limiting federal power to contexts either in which the state has acted or in which individuals have acted. In doing so, the doctrines construct a realm of individual autonomy free from certain types of governmental intrusion. *NFIB* transposes and grafts onto the Commerce Clause

¹ 132 S. Ct. 2566 (2012).

² Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of the U.S. Code).

³ The Act's challengers also challenged the Act's conditional grant of Medicaid funds to state governments. *NFIB*, 132 S. Ct. at 2601 (opinion of Roberts, C.J.). The Medicaid issue is outside of the scope of this Note.

⁴ It is, perhaps, overstating the significance of one decision to say that *NFIB* established a "doctrine." The individual action principle appears in only *NFIB* and might never have occasion to appear again. Still, this Note refers to the individual action requirement as a "doctrine," both for the sake of symmetry with the state action analysis and because the requirement, like the state action requirement, exemplifies a deeper and more pervasive jurisprudential commitment.

many of the same commitments that drive the Court's state action jurisprudence, including limitations on the manner in which Congress can regulate nominally private decisionmaking.

Importantly, however, neither doctrine guards private activity from governmental regulation completely. *NFIB* permitted both state regulation and federal regulation under the Taxing Clause, limiting only the commerce power. By limiting federal power under the Fourteenth Amendment, the state action cases similarly displaced regulatory power to the states or to other sources of constitutional authority, most prominently the Commerce Clause.

The doctrines serve in this way to allocate decisionmaking power between various governmental institutions. They are a response to the "hydraulic pressure inherent within each of the separate Branches"⁵ to accomplish social and economic objectives. They manage this pressure by cutting off certain sources of power and reallocating their exercise elsewhere. This view of the doctrines, and of the reallocation of power that they produce, is reminiscent of a concept in physics that energy in a system is never created or destroyed but only changes form and location. This "first law of thermodynamics" is true of the American constitutional system as well: the power to govern individual behavior is never extinguished but only shifted between various actors in society — the courts, political branches, states, and individuals.

The individual action and state action doctrines are emblematic of this constitutional phenomenon. This Note seeks to connect the doctrines and to identify their function. Part I introduces the state action doctrine and its analytic structure. Two points inform the analysis of *NFIB*'s individual action requirement that follows: First, the state action doctrine assumes and asserts a distinction between private and public acts. Second, the doctrine responds to governmental efforts to regulate private acts, reallocating regulatory power by cutting off those efforts under certain sources of authority.

Part II describes *NFIB*, the individual action doctrine, and the doctrine's resemblance to the state action requirement. As in the state action cases, *NFIB*'s reallocation of regulatory power through an action requirement sought to preserve a margin for individual choice free of positive federal coercion. By locating power in the Taxing Clause, *NFIB* constructed a sphere of private decisionmaking based on individuals' ability to pay to be free of federal power. That is, so long as individuals could pay a tax to avoid the ACA's mandate, the Act would not intrude too far into private choice. *NFIB* reaffirms the Court's recent efforts to cabin the commerce power, and it extends into that power the state action doctrine's formalistic conception of the re-

⁵ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

lationship between citizen and state. The analogy begins with the state action requirement.

I. THE STATE ACTION DOCTRINE

With two exceptions,⁶ the Constitution does not speak to individuals. It addresses the powers and limitations only of government. Indeed, the state is everywhere the document's subject, in many of its rights provisions most explicitly. The Fourteenth Amendment, for example, declares that "[n]o state shall make or enforce any law"⁷ and the First Amendment that "Congress shall make no law"⁸ infringing the rights that the amendments guarantee. The state action doctrine derives from these commands: The state must act, in some relevant sense, before the amendments will apply.

By asserting a distinction between state and nonstate acts, the doctrine carves out a private sphere inside of which state action is deemed either absent or irrelevant. Section A describes how the Court has defined that sphere over the course of the doctrine's development. Section B describes how, by seeking to preserve the autonomy of private choice, the state action doctrine cut off certain sources of constitutional authority and shifted the regulation of that decisionmaking to other official actors and sources of authority.

A. Public and Private Spheres

The state action doctrine is founded on a distinction between public and private activity,⁹ and it assumes courts' ability to distinguish the two. The doctrine asserts a domain inside of which individuals act without the state's involvement or, at the least, with insufficient state involvement to constitute "state action." While the notion of a private world insulated from state action has waxed and waned over the years, its hold on American constitutional law persists, especially in the Court's state action cases and, as argued below, in *NFIB*.

The state action doctrine's earliest full articulation in the *Civil Rights Cases*¹⁰ drew a sharp line between public and private activity.¹¹

⁶ U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); *id.* amend. XXI, § 2 ("The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

⁷ *Id.* amend. XIV, § 1.

⁸ *Id.* amend. I.

⁹ See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (referring to the public-private distinction as an "essential dichotomy" underlying the Fourteenth Amendment).

¹⁰ 109 U.S. 3 (1883).

¹¹ See *id.* at 11–19; *Developments in the Law — State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1256 (2010) ("The first articulation of the state action doc-

The cases involved Congress's authority under section 5 of the Fourteenth Amendment, which empowers Congress "to enforce" the Amendment "by appropriate legislation."¹² With the Civil Rights Act of 1875, Congress sought to exercise its section 5 power, purportedly "enforcing" the Fourteenth Amendment's promise of equal protection through a prohibition on discrimination by nominally private actors serving the public in establishments known as "public accommodations."¹³ The *Civil Rights Cases* invalidated the Act — for a lack of state action. Because the Fourteenth Amendment did not empower the "regulation of private rights," the Court held, the amendment imposed no obligation on public accommodations for Congress to enforce.¹⁴ Discrimination in public accommodations involved only "[i]ndividual invasion of individual rights,"¹⁵ and thus constitutional obligations did not apply to it "until some State law has been passed, or some State action . . . has been taken."¹⁶ By asserting that "individual invasion of individual rights" occurred apart from state laws or state action, the decision preserved a sphere of private action free of federal power under the Fourteenth Amendment.

No sooner, though, than the *Civil Rights Cases* had distinguished private from public action, the distinction began to unravel.¹⁷ With the rise of legal realism and the passage of sweeping social and economic legislation during and after the New Deal,¹⁸ the existence of "private wrong[s]" unsupported by state authority became harder to assert.¹⁹

trine . . . was premised on the classical conception of powers that are autonomous within their spheres."). The Court's state action cases of that period shared a similar conception of public and private power. See, e.g., *United States v. Harris*, 106 U.S. 629, 639 (1883); *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875).

¹² U.S. CONST. amend. XIV, § 5.

¹³ Such public accommodations included "inns, public conveyances on land or water, theatres, and other places of public amusement." *The Civil Rights Cases*, 109 U.S. at 9.

¹⁴ *Id.* at 11.

¹⁵ *Id.*; see also *id.* at 14 (referring to this domain as the world of "the conduct of individuals in society towards each other").

¹⁶ *Id.* at 13.

¹⁷ In the Court's words, despite the "elementary proposition" that there are distinct categories of private and public action, "truisms are not always unexceptionably true." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); see also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349–50 (1974) (observing that the state action question, while "easily stated," "frequently admits of no easy answer").

¹⁸ See LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF* 66 (1996); David J. Barron, *Privatizing the Constitution: State Action and Beyond*, in *THE REHNQUIST LEGACY* 345, 350 (Craig M. Bradley ed., 2006) ("[The] generous state action holdings [of the 1940s and 1950s] reflect the influence of the legal realists."); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 *GEO. L.J.* 779, 788–89, 817 (2004).

¹⁹ *The Civil Rights Cases*, 109 U.S. at 17; see SEIDMAN & TUSHNET, *supra* note 18, at 66–67 ("[T]he growth of government regulation [during and after the New Deal] threatened the very concept of a private sphere. Where government regulation was the norm rather than the exception, virtually all conduct came to be seen as, in some sense, resting on an entitlement created by government.").

Decisions like *Ex parte Young*²⁰ began deploying the Constitution “as a sword as well as a shield,”²¹ and plaintiffs soon began to claim the state’s involvement in a widening variety of nominally private activity. From 1927 to 1972, the state action requirement was at its least restrictive.²² The Court found state action in privately administered electoral primaries, covenants on private property, privately owned company towns, private bus services, and private coffee shops leased on government property.²³ These decisions blurred the line between private and public power. The First, Fourteenth, and Fifteenth Amendments applied, where relevant, to prohibit these nominally private entities from discriminating.

These precedents exposed two primary ambiguities inherent in the state action concept.²⁴ First, “the government, by definition, fails to prohibit whatever it allows.”²⁵ The state must decide in every moment whether to regulate individual conduct or to leave it unregulated.²⁶ Thus, the government can be said to act whenever it permits private conduct by failing to regulate that conduct.²⁷ If so, the state’s decision

²⁰ 209 U.S. 123 (1908) (upholding an injunction against a state officer directly under the Constitution without congressional legislation creating a cause of action).

²¹ *Judice v. Vail*, 430 U.S. 327, 335 (1977) (characterizing *Ex parte Young* as “the watershed case which sanctioned the use of the Fourteenth Amendment . . . as a sword as well as a shield against unconstitutional conduct of state officers”); see also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 521–25, 524 n.124 (1954).

²² See Charles L. Black, Jr., *The Supreme Court, 1966 Term — Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 84–85 (1967) (referring to a 1906 case as the last case, as of the writing of the article, in which the Court explicitly rejected an equal protection claim on state action grounds).

²³ See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961) (coffee shop); *Terry v. Adams*, 345 U.S. 461, 484 (1953) (primary); *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 461–63 (1952) (private bus service); *Shelley v. Kraemer*, 334 U.S. 1, 19–20 (1948) (covenant); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town); *Smith v. Allwright*, 321 U.S. 649, 663–64 (1944) (primary); *Nixon v. Condon*, 286 U.S. 73, 88–89 (1932) (same); *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927) (same).

²⁴ See Barron, *supra* note 18, at 346–47.

²⁵ *Id.* at 346; see also *id.* at 360 (“Inaction can always be restated as action.”).

²⁶ See SEIDMAN & TUSHNET, *supra* note 18, at 66 (“The Court came to understand [after the New Deal] that inaction was a kind of action: The government was always confronted with the option of reallocating burdens and benefits or leaving them undisturbed. . . . Because both decisions were ‘public,’ there was no refuge from public responsibility for the outcomes.”).

²⁷ See Barron, *supra* note 18, at 346 (“[T]he government ‘acts’ — if only by failing to act — whenever a private party does.”). One early case put the point sharply. In *Miller v. Schoene*, 276 U.S. 272 (1928), “rust” on certain individuals’ cedar trees had threatened to infect their neighbors’ apple trees. *Id.* at 277. Virginia ordered the individuals to cut down their cedar trees, presenting the Court with the question of whether the Constitution required Virginia to compensate the individuals. *Id.* Stating that “[i]t would have been none the less a choice if, instead of [ordering the trees’ destruction], the state, by doing nothing, had permitted serious injury to the apple orchards,” *id.* at 279, the Court upheld Virginia’s order. *Id.* at 281. Either way, Virginia would destroy one type of tree. “It could either destroy the cedar trees by its action or the apple trees by its inaction.” SEIDMAN & TUSHNET, *supra* note 18, at 66.

not to include an antidiscrimination provision in its lease to a coffee shop could appear as action.²⁸ Or the state's failure to protect a child from his father after repeated complaints of abuse could be argued to be "every bit as abusive of power as action."²⁹

Second, the state often places its power behind or enables nominally private parties' behavior. It employs them, licenses their businesses, and enforces their contracts. Especially where private actors perform traditionally public functions or the state significantly supports private activity, the dividing line between private action and public action becomes harder to define.³⁰ In the most famous and far-reaching expression of this argument, the Court held that the Equal Protection Clause forbade enforcement of a racially restrictive covenant between private parties because enforcement required state courts' participation.³¹ These two ambiguities are varieties of the same basic point: "state action is always present,"³² whether through omission or through construction of the landscape against which private action has meaning.

Notwithstanding these ambiguities' erosion of the state action limitation, 1972 witnessed a renewal. With *Moose Lodge No. 107 v. Irvis*,³³ the Court, through a newly confirmed Justice Rehnquist, reinvigorated the state action requirement and, with it, a more robust conception of private action.³⁴ In *Moose Lodge*, a black plaintiff challenged the Lodge's refusal to serve him, arguing that the state's granting the Lodge a liquor license was state action to which the Fourteenth Amendment applied.³⁵ For the first time in nearly fifty years, the Court declined to find state action. *Moose Lodge* held that the state

²⁸ *Burton*, 365 U.S. at 726. The Court's modern state action cases sought to distance themselves from the strong form of this view. See *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978) ("This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State.").

²⁹ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 212 (1989) (Brennan, J., dissenting) (buttressing the claim further by arguing "that oppression can result when a State undertakes a vital duty," such as child services, "and then ignores it"). But see *id.* at 203 (majority opinion) (refusing to attribute the boy's injuries to the state).

³⁰ See Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1301 (1982) ("[S]ince any private action acquiesced in by the state can be seen to derive its power from the state, . . . positivism potentially implicates the state in every 'private' action not prohibited by law.").

³¹ See *Shelley v. Kraemer*, 334 U.S. 1, 19–20 (1948).

³² Cass R. Sunstein, Essay, *State Action Is Always Present*, 3 CHI. J. INT'L L. 465, 465 (2002); see also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 160–61 (1993); Barron, *supra* note 18, at 352 (stating "the realist point" that there is "no private domain that, a priori, [is] unaffected by or free from law").

³³ 407 U.S. 163 (1972).

³⁴ See Barron, *supra* note 18, at 353–54.

³⁵ 407 U.S. at 171–72.

had not acted in any constitutionally relevant sense and that the Lodge remained a private actor, free of constitutional obligation.³⁶

For the next thirty years, the Court's state action cases carved a jagged line between instances of state "involvement" or "entanglement" that amounted to state action (only a few³⁷) and those which fell short (most³⁸). These precedents did little to clarify the contours of the private realm that they revived the state action doctrine to protect.³⁹ Still, by the time of *United States v. Morrison*⁴⁰ in 2000, the Court's determination to protect that realm was clear. It is fitting that *Morrison*, the most recent case to find a lack of state action, returned to the doctrine of the *Civil Rights Cases* — as a limit on congressional authority to enforce the Fourteenth Amendment.⁴¹ The decision struck down the Violence Against Women Act of 1994⁴² (VAWA), which Congress enacted under the Commerce Clause and the Fourteenth Amendment to provide a civil cause of action against perpetrators of gender violence.⁴³ While the decision is better known for its limitation of the commerce power, *Morrison* also reasserted state action as a limit on Congress's Fourteenth Amendment enforcement authority.⁴⁴ The Court, again through Chief Justice Rehnquist, held that private acts of gender violence insufficiently implicated the state to constitute state action.⁴⁵ As in the *Civil Rights Cases* 117 years before, Congress could not employ the Fourteenth Amendment to regulate such acts.⁴⁶

Thus, *Morrison* and the other post-1972 precedents made at least one thing clear: no matter how crooked, or how lacking in "rigid simplicity,"⁴⁷ a line divided public acts attributable to the state (and thus

³⁶ *Id.* at 176–79.

³⁷ See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939–42 (1982).

³⁸ See, e.g., *NCAA v. Tarkanian*, 488 U.S. 179, 181–82, 199 (1988); *Flagg Bros. v. Brooks*, 436 U.S. 149, 164–66 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349–52, 358–59 (1974).

³⁹ "Amidst such variety," the Court observed in its most recent survey of state action cases, "examples may be the best teachers." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001).

⁴⁰ 529 U.S. 598 (2000).

⁴¹ Before *Morrison*, the Court had not invalidated congressional action for a lack of state action since 1906. See *Hodges v. United States*, 203 U.S. 1 (1906). This unbroken streak can be attributed in large part to the shift toward justifying social legislation under the Commerce Clause. See *infra* section II.A, pp. 1183–85.

⁴² Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of the U.S. Code).

⁴³ See *id.* § 40302(a)–(c), 108 Stat. at 1941; *Morrison*, 529 U.S. at 607.

⁴⁴ 529 U.S. at 625–26.

⁴⁵ *Id.*

⁴⁶ *Id.* at 627.

⁴⁷ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (concluding, 5–4, that a statewide secondary school athletic association was a state actor, see *id.* 290–91); see also Barron, *supra* note 18, at 358 ("[T]he fact that the *Brentwood Academy* Court found state action by only a one-vote majority — in a case that involved a statewide intercollegiate athletic

amenable to federal regulation) from private acts into whose sphere the federal government could only in certain ways intrude. Federal power under most of the Constitution's rights provisions — those requiring state action — extended only so far as that which could be deemed public, wherever that line happened to fall.

B. Power Shifting

By seeking to preserve a private realm from governmental power, though, the state action doctrine did not in fact cut off that power completely. Rather, it channeled the power into certain institutions and sources of authority. Wherever governmental actors sought to use the Fourteenth Amendment or other rights provisions to achieve social objectives, the state action doctrine applied. Where the doctrine cut off the source of that power, it did not erase the power but reallocated it elsewhere.

The Fourteenth Amendment cases again illustrate the point most vividly. That amendment, in effect, provides two wells of authority: one to the courts to apply the amendment's provisions directly and another to Congress to enforce the provisions by appropriate legislation. The *Civil Rights Cases* and *Morrison* involved the latter authority. Those cases cut off Congress's enforcement authority under the Fourteenth Amendment by determining that the object of Congress's regulation — discrimination in public accommodations and gender violence — did not sufficiently implicate the state's action. The decisions did not, however, cordon off inviolable private spheres; the states could still regulate what the Fourteenth Amendment did not authorize the federal government to reach. As such, the state action doctrine in the *Civil Rights Cases* and *Morrison* cut off only one type of federal power, reserving the power to regulate private conduct to sources of constitutional authority other than the Fourteenth Amendment, or to the states.⁴⁸

The state action cases between the *Civil Rights Cases* and *Morrison*, by contrast, involved *courts'* authority to enforce the Fourteenth Amendment directly, as a "sword." The Court's solicitude for constitutional claims before 1972 significantly enhanced judicial power to regulate nominally private behavior by interpreting constitutional obliga-

association, comprised overwhelmingly of public school officials, that meets during official school hours, pursuant to a statutory charge to regulate on the state's behalf — suggests the extent of Rehnquist's success [in reinvigorating the state action doctrine]. Even the easy state action cases now are hard.").

⁴⁸ See Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383, 397 & n.74 (1988).

tions to apply more liberally to that behavior.⁴⁹ *Moose Lodge*'s reinvigoration of the state action doctrine responded precisely to this trend. The post-1972 precedents reimagined the doctrine not as a restriction on Congress but as a restriction on the courts.⁵⁰ By reasserting limits on the Fourteenth Amendment's application to a widening class of private actors — Moose Lodge, malls, utility companies, and others⁵¹ — the doctrine limited courts' authority to provide redress to the then-steady stream of plaintiffs seeking to enforce the amendment's protections. As before, the decisions did not carve out an inviolable private realm. They asserted a domain of private action free of federal courts but not of the states or, again, of Congress acting under other sources of constitutional authority to which the state action doctrine did not apply. With the Commerce Clause's expansion into a robust source of regulatory authority, as the following Part describes, the state action doctrine in these cases served primarily to limit the courts. The post-1972 precedents transformed the doctrine from "a federalism doctrine" into "a tool for judicial restraint."⁵²

In each of these two sets of cases, the state action doctrine responded to a shift in power that the Court perceived to intrude too far into a realm of private behavior. In each, the Court deployed the state action doctrine to cut off the source of that power, effectively allocating it to another official institution or source of authority. Professor Charles Fried has written that there exists "a plenum of power in the society, that is the sum total of all powers and discretions residing anywhere in that society for the resolution of conflicts and for the taking of action in the furtherance of the various goods which the society seeks."⁵³ The recognition of liberties vests power and discretion in individuals, "and only in them," because the state cannot intrude on those liberties.⁵⁴ The recognition of liberties also vests power in courts to recognize and

⁴⁹ See Barron, *supra* note 18, at 351; John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211, 1222 (1998) ("Beginning with *Shelley v. Kraemer*, the Court began to stretch the requirement of state action to reach what had previously been considered purely private discrimination." (footnote omitted)).

⁵⁰ See SEIDMAN & TUSHNET, *supra* note 18, at 67 ("At the moment when the [public-private] distinction collapsed as a limitation on governmental power, it replicated itself as a limitation on federal judicial power.").

⁵¹ See *supra* notes 33, 38 and accompanying text.

⁵² Mark Tushnet, *State Action in 2020*, in *THE CONSTITUTION IN 2020*, at 69, 73 (Jack M. Balkin & Reva B. Siegel eds., 2009); see also Barron, *supra* note 18, at 359–60; SEIDMAN & TUSHNET, *supra* note 18, at 64–65; Tushnet, *supra* note 48, at 397 n.74.

⁵³ Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 768 (1963); see also Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 389 (1993) ("[R]ecognition of rights reflects allocations of decision-making competence.").

⁵⁴ Fried, *supra* note 53, at 768.

arbitrate them.⁵⁵ Unlike the liberties that Fried describes, the state action doctrine did not vest power in individuals alone, because the decisions still permitted state government regulation and, in places, congressional regulation. But the doctrine did, like the recognition of liberties, shift decisionmaking powers and discretion between actors in society or sources of authority. This phenomenon of shifting power — which the state action doctrine responds to and produces — now leads to *NFIB*.

II. THE “INDIVIDUAL ACTION” DOCTRINE

The discussion thus far has made two primary points. First, the state action doctrine divided the world into public and private spheres, and it limited certain types of federal power to that behavior that could be deemed public. Second, despite identifying an activity as a private activity, the state action cases did not insulate the activity from governmental power completely. They shifted that power elsewhere. These points inform an understanding of *NFIB* because the decision occasioned an analogous displacement of power from one source of congressional regulatory authority to another. Like the state action cases, *NFIB* caused that displacement through an action requirement, which did not cut off the power but reallocated it.

A. *The Commerce Clause and State Action Doctrine’s Interlinked Evolution*

The most prominent shift in federal regulatory authority that the state action doctrine provoked involved a shift from the Fourteenth Amendment to the Commerce Clause. Indeed, the expansion of Congress’s commerce power paralleled the decline in Congress’s enforcement authority under that amendment. Following the *Civil Rights Cases*, Congress turned to alternative sources of constitutional authority to enact legislation regulating individuals’ social and economic behavior.⁵⁶ The modern Commerce Clause provided just this authority. With the New Deal’s “recogni[tion of] government’s deep implication in the definition of rights and acknowledg[ment of] redistribution as an often permissible policy goal,”⁵⁷ Congress could argue that the private decisions protected under the *Civil Rights Cases* were of concern to commerce. Beginning in 1937, the Court upheld social legislation un-

⁵⁵ See Fallon, *supra* note 53, at 376 (“Where a right exists, the capacity of legislative and executive decision makers to make all-things-considered decisions is thereby diminished. The courts assume the ultimate interest-balancing capacity.”).

⁵⁶ See SEIDMAN & TUSHNET, *supra* note 18, at 66–67; George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551, 1559, 1566–67 (2012).

⁵⁷ Fallon, *supra* note 53, at 349.

der the Commerce Clause with only the loosest limits on its exercise.⁵⁸ So long as the activity to be regulated “substantially affect[ed] interstate commerce,” Congress could regulate it.⁵⁹

Congress’s efforts to combat race discrimination illustrate the hydraulic interaction between the Court’s Commerce Clause and state action jurisprudence. With the Civil Rights Act of 1964,⁶⁰ Congress sought to pick up where the Court’s Fourteenth Amendment state action cases left off — at private actors’ doors.⁶¹ Although the pre-1972 state action precedents read the Constitution to prohibit race discrimination by nominally private actors under certain conditions,⁶² the state action doctrine barred the amendment’s application to hotels, motels, restaurants, theaters, and the like.⁶³ Congress enacted the Civil Rights Act of 1964 to target these “public accommodations.” But in order not to run afoul of the *Civil Rights Cases*, Congress defended the Act under the Commerce Clause. In *Heart of Atlanta Motel, Inc. v. United States*⁶⁴ and *Katzenbach v. McClung*,⁶⁵ the Court ratified Congress’s shift. The Court held that discrimination in public accommodations and restaurants sufficiently affected commerce to be subject to commercial regulation. With these decisions, the Commerce Clause became an alternative channel for Congress to exercise the power that the *Civil Rights Cases* foreclosed.

The commerce power as expressed in these precedents was far reaching and remained far reaching despite limitations on it that *Morrison* and its ideological predecessor, *United States v. Lopez*,⁶⁶ later articulated.⁶⁷ Furthermore, the Commerce Clause contains no state

⁵⁸ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (“Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”); see also David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 1–2.

⁵⁹ *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (citing *Jones & Laughlin*, 301 U.S. at 37).

⁶⁰ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

⁶¹ Rutherglen, *supra* note 56, at 1559–60.

⁶² See *supra* note 23 and accompanying text.

⁶³ Again, the Civil Rights Act of 1875 targeted such “public accommodations,” but the *Civil Rights Cases* invalidated it. Indeed, the persistence of race discrimination — and the *Civil Rights Cases*’ limitation on the Fourteenth Amendment as a tool to combat it — principally motivated the most influential criticism of the doctrine. See Black, *supra* note 22, at 101.

⁶⁴ 379 U.S. 241 (1964) (upholding the Act’s “public accommodations” provisions under the Commerce Clause).

⁶⁵ 379 U.S. 294 (1964) (same, as to restaurants).

⁶⁶ 514 U.S. 549 (1995).

⁶⁷ See *NFIB*, 132 S. Ct. 2566, 2585 (2012) (opinion of Roberts, C.J.) (“[I]t is now well established that Congress has broad authority under the [Commerce] Clause.”); Martha Minow, *The Supreme Court, 2012 Term — Comment: Affordable Convergence: “Reasonable Interpretation” and the Affordable Care Act*, 126 HARV. L. REV. 117, 143 (2012). To use Justice Ginsburg’s words,

action requirement, arguably making it a more significant and invasive power than the powers provided under the Fourteenth Amendment. The Commerce Clause precedents thus eroded the limit imposed by the state action requirement. The Clause authorized the federal government to reach into the “private” world and to regulate individual behavior,⁶⁸ so long as that behavior could be characterized as economic activity sufficiently affecting commerce.

B. *NFIB* and the “Individual Action” Doctrine

Until *NFIB*, the Court had articulated only these two limits on Congress’s post–New Deal commerce authority. Congress could regulate under the Commerce Clause so long as its regulation targeted (a) economic behavior that (b) sufficiently affected commerce.

NFIB, however, articulated an additional prerequisite, which it found implicit in the Court’s decisions and the grant of commerce power itself: activity. Five Justices provided a majority against upholding the Affordable Care Act under the Commerce Clause.⁶⁹ Writing for himself in the Court’s controlling opinion, Chief Justice Roberts indicated that commerce derived from commercial activity, without which it could not exist. Asserting a distinction between activity and inactivity, the Chief Justice concluded that inactivity could not create commerce. For the Chief Justice, choosing to forego health insurance did not constitute activity.⁷⁰ Rather, the decision not to buy health insurance was a decision not to act. Because “[t]he power to regulate commerce presupposes the existence of commercial activity to be regulated,” Congress could not regulate the decision not to buy health insurance under the umbrella of regulating commerce.⁷¹ So too the joint dissenters — Justices Scalia, Kennedy, Thomas, and Alito — claimed that the ACA targeted inactivity and that the Commerce Clause could therefore not authorize it.⁷²

The Court had not previously articulated this activity requirement, although its precedents had used the word “activity” when referring to

Lopez and *Morrison* prohibited regulation of only “noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law.” *NFIB*, 132 S. Ct. at 2623 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁶⁸ Cf. Gillian E. Metzger, *The Supreme Court, 2012 Term — Comment: To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 84 (2012) (noting that even after *Lopez* and *Morrison* asserted some “limits on congressional power,” “little doubt existed that the federal government generally had constitutional authority to regulate private activity if it chose to do so”).

⁶⁹ *NFIB*, 132 S. Ct. at 2585–94 (opinion of Roberts, C.J.); *id.* at 2644–50 (joint dissent).

⁷⁰ *Id.* at 2587 (opinion of Roberts, C.J.) (“The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce . . .”).

⁷¹ *Id.* at 2586 (citing U.S. CONST. art. I, § 8, cl. 3); *see also id.* at 2591.

⁷² *Id.* at 2647–50 (joint dissent). The joint dissent parted ways with the Chief Justice on his tax power analysis. They would not have upheld the individual mandate as a tax. *Id.* at 2650–55.

commerce.⁷³ The Chief Justice's opinion identified in the Commerce Clause an "individual action" requirement: the Clause required an individual's action in commerce to make the target conduct fit for regulation. By inscribing this limit on the commerce power, *NFIB* both reaffirmed *Morrison* and *Lopez* — which sought to prevent congressional power from reaching private, noneconomic behavior — and extended them. By further limiting the commerce power to the regulation of *activity*, the decision articulated an additional boundary between the citizen and the state analogous to that of the state action requirement.

The analogy of course extends further than the doctrines' structural similarity; both doctrines suffer from an equivalent analytic instability. As with state inaction, individual inaction can be easily reformulated as action.⁷⁴ Indeed, the *NFIB* Court divided primarily on this basis. Like the state action critics, who argued that the government acts by failing to act, Justice Ginsburg argued in dissent that individuals act by failing to purchase health insurance. Put simply, "[a]n individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance."⁷⁵ The basic criticism of the state action doctrine — that "state action is always present" — applied with force in *NFIB*: individual health care decisions are always present. Pressing on the line between action and inaction again revealed its instability.

Still, in spite of that instability, the individual action requirement was perceived to serve an important purpose. As in the state action context, collapsing the distinction between action and inaction risked erasing a separation between the citizen and the state entirely. In the words of the joint dissenters, "[i]f all inactivity affecting commerce is commerce, commerce is everything."⁷⁶ So too Chief Justice Roberts criticized Justice Ginsburg's recharacterization of inaction as essential-

⁷³ *Id.* at 2587 (opinion of Roberts, C.J.) ("It is nearly impossible to avoid the word ['activity'] when quoting them.").

⁷⁴ See *supra* pp. 1178–79; see also Strauss, *supra* note 58, at 20.

⁷⁵ *NFIB*, 132 S. Ct. at 2622 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 561 (6th Cir. 2011) (Sutton, J., concurring in part) ("No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk.")).

⁷⁶ *Id.* at 2649 (joint dissent) ("[The mandate] threatens [the constitutional] order because it gives such an expansive meaning to the Commerce Clause that *all* private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers."). The Court has rejected broad state action rulings for similar reasons. See *Flagg Bros. v. Brooks*, 436 U.S. 149, 165 (1978) (refusing to find state action where the requested rule would require that "all private deprivations of property . . . be converted into public acts").

ly semantic,⁷⁷ because it erased a distinction that the Chief Justice concluded existed in reality, no matter the “metaphysical”⁷⁸ possibility of its erasure.

For the Chief Justice and the joint dissenters in *NFIB*, the distinction between action and inaction existed as a matter of “common sense,”⁷⁹ original understanding, and principle. The distinction not only appealed to common conceptual and linguistic understandings of “commerce,” but it also maintained an essential limit on the federal government.⁸⁰ In a passage carrying significant analytical weight for his argument, Chief Justice Roberts articulated the point most clearly: “To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were ‘practical statesmen,’ not metaphysical philosophers.”⁸¹ Here, notably, the Chief Justice quoted then-Justice Rehnquist,⁸² who more than any other Justice reinvigorated the state action doctrine and the distinction between action and inaction that it asserted.⁸³ To elide the distinction — that is, not to assert a difference between activity and inactivity and guard against Congress’s regulation of the latter — would “fundamentally chang[e] the relation between the citizen and the Federal Government.”⁸⁴

Viewed in this light, the terms “state action” and “commerce” are not only factual descriptions of primary conduct (a state’s action or an individual’s engagement in commerce) but labels that the Court attaches to forms of activity that the Constitution considers properly within the federal government’s purview. Indeed, the Chief Justice and Justice Ginsburg implicitly, if not explicitly, diverged on these

⁷⁷ See *NFIB*, 132 S. Ct. at 2589 n.6 (opinion of Roberts, C.J.) (“‘[S]elf-insurance’ is, in this context, nothing more than a description of the failure to purchase insurance. Individuals are no more ‘activ[e] in the self-insurance market’ when they fail to purchase insurance than they are active in the ‘rest’ market when doing nothing.” (second alteration in original) (citation omitted) (quoting *id.* at 2622 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part))).

⁷⁸ *Id.* at 2589.

⁷⁹ *Id.* at 2649 (joint dissent).

⁸⁰ See *id.* at 2587 (opinion of Roberts, C.J.) (“Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.”); *id.* at 2589 (“Accepting the Government’s theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.”).

⁸¹ *Id.* at 2589 (quoting *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in the judgment)).

⁸² *Id.*; see also Minow, *supra* note 67, at 136–37, 136 n.40.

⁸³ See Barron, *supra* note 18, at 353.

⁸⁴ *NFIB*, 132 S. Ct. at 2589 (opinion of Roberts, C.J.); see also *id.* at 2649 (joint dissent) (“[T]he theories proposed for the validity of the Mandate . . . would alter the accepted constitutional relation between the individual and the National Government.”).

terms. Justice Ginsburg sought to portray the decision not to buy health insurance as a social choice. In the words of the joint dissenters, Justice Ginsburg viewed the “failure to purchase health insurance . . . [as] a national, social-welfare problem . . . included among the unenumerated ‘problems’ that the Constitution authorizes the Federal Government to solve.”⁸⁵ But the Chief Justice and joint dissent rejected this view. By viewing the failure as private inactivity, they characterized the choice as failing to satisfy a precondition necessary to vault the choice into a sphere of the Commerce Clause’s concern, namely commercial activity.

In this way, *NFIB* drew out from the Commerce Clause a distinction between public and private activity similar to that of the state action cases. The decision limited congressional power by cordoning off a realm of private (in)activity into which the federal government could not intrude so that some perceived balance of power between the citizen and the state would not be breached.⁸⁶

C. Power Shifting

Yet again, the Court’s limitation of one power tells only part of the story. Despite his rejection of the individual mandate as an exercise of Congress’s commerce power, Chief Justice Roberts upheld the mandate under the Taxing Clause.⁸⁷ Because the mandate required only an additional payment to the IRS, it was at least “fairly possible” to construe the mandate as a tax.⁸⁸ Thus, like the state action doctrine before it, the individual action doctrine did not insulate private conduct completely. Rather, it redirected the power to regulate health care decisions to Congress’s taxing authority.

This shift, like that of the state action cases, had immediate power-allocative consequences. *NFIB* limited Congress’s power to recognize health insurance decisions as social choices⁸⁹ — just as the state action cases limited federal power to define private race discrimination as a public problem. For this reason, Justice Ginsburg criticized the Chief

⁸⁵ *Id.* at 2650 (joint dissent). Ironically, the ACA “downplays” “a national and collective commitment to meeting certain basic needs . . . by funneling the substantial financial resources involved through a market-based, individualized framework and through programs run by the states.” Metzger, *supra* note 68, at 108.

⁸⁶ *Cf.* Metzger, *supra* note 68, at 104 (calling the inactivity argument “libertarian at [its] core”); Black, *supra* note 22, at 100 (“[E]xpansion of the ‘state action’ concept to include every form of state fostering, enforcement, and even toleration does not have to mean that the fourteenth amendment is to regulate the genuinely private concerns of man. . . . I think this is what people are really afraid of.”).

⁸⁷ See *NFIB*, 132 S. Ct. at 2594–2600 (majority opinion); U.S. CONST. art. I, § 8, cl. 1 (granting Congress the power to “lay and collect Taxes”).

⁸⁸ *NFIB*, 132 S. Ct. at 2600.

⁸⁹ *Cf.* Metzger, *supra* note 68, at 108 (“The Chief Justice’s opinion erased the national and collective underpinnings of the ACA . . .”).

Justice for failing to recognize that “it is Congress’ role, not the Court’s, to delineate the boundaries of the market the Legislature seeks to regulate.”⁹⁰ For Justice Ginsburg, Congress had defined the failure to purchase health insurance as a social choice by “reasonably” defining the health insurance market broadly and across time as co-extensive with the health care market.⁹¹ But for Chief Justice Roberts and the joint dissent, Congress did not possess such a power.⁹² As in the *Civil Rights Cases* and *Morrison*, the Court held that the Constitution took this power out of Congress’s hands, limiting Congress’s ability to define a problem as a social problem and thereby preserving a sphere of individual decisionmaking defined by individual action under one power and state action under the other.

But by extinguishing one source of regulatory power, the individual action requirement did not, as in the state action context, eliminate federal regulatory authority entirely. The Chief Justice’s opinion permitted its exercise under the Taxing Clause. This allocation of course raises the question of how the taxing and commerce powers differ, lest the Chief Justice’s invocation of an action requirement amount to no more than a distinction without a difference. The Chief Justice’s opinion addressed the question explicitly, but his list of distinctions only grazed the surface.

First, the Chief Justice pointed to the Constitution’s “express[] contemplat[ion]” and the country’s long history of taxing inactivity.⁹³ Although, as the Chief Justice held earlier, “our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity,” it “made no such promise with re-

⁹⁰ *NFIB*, 132 S. Ct. at 2619 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); cf. Minow, *supra* note 67, at 143 n.186 (“Justice Robert Jackson, the author of the Court’s opinion in *Wickard*, later explained that the opinion’s reasoning was intended to defer to Congress on judgments about what has an effect on interstate commerce.” (citing Letter from Justice Robert Jackson to Judge Sherman Minton (Dec. 21, 1942), *quoted in* John Q. Barrett, *Wickard v. Filburn* (1942), THE JACKSON LIST 4–6 (June 27, 2012), <http://www.stjohns.edu/media/3/638cd994e8484fd3bdb841f31b11952f.pdf?d=20120626>)).

⁹¹ See *NFIB*, 132 S. Ct. at 2619 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Congress could reasonably have viewed the market from a long-term perspective, encompassing all transactions virtually certain to occur over the next decade, not just those occurring here and now.” (citation omitted)).

⁹² See Metzger, *supra* note 68, at 108 (claiming that “[t]he Chief Justice’s opinion erased the national and collective underpinnings of the ACA” by construing the mandate not as “an obligation to obtain insurance so as to help subsidize access to health insurance for all, or even so as to avoid potentially imposing costs on the national health care system” but as “a choice to simply pay a tax . . . based on financial self-interest”); Strauss, *supra* note 58, at 16 (discussing Congress’s power to define the relevant market).

⁹³ *NFIB*, 132 S. Ct. at 2599 (“[T]he Constitution does not guarantee that individuals may avoid taxation through inactivity.”); *id.* (“Congress’s use of the Taxing Clause to encourage buying something is . . . not new.”).

spect to taxes.”⁹⁴ Second, “use [of the] taxing power to influence conduct is not without limits.”⁹⁵ Although in modern times the Court has “declined to closely examine” tax measures’ “regulatory motive or effect,” an outer limit at least exists beyond which the Court will invalidate taxing measures that too closely resemble regulation or punishment.⁹⁶ Third, the federal government cannot “bring its full weight to bear” on taxed conduct.⁹⁷ Continued engagement in taxed conduct requires only payment into the Treasury.⁹⁸ Mandates, by contrast, can carry criminal sanctions that “include not only fines and imprisonment, but all the attendant consequences of being branded a criminal.”⁹⁹

These distinctions do not fully justify the Chief Justice’s shift to the taxing power, because each is either circular or inapplicable. The first distinction asserts that taxes are a more appropriate means of regulating decisions not to buy health insurance because taxing inactivity is “not new.”¹⁰⁰ But the distinction has little explanatory power to one who does not share the Chief Justice’s starting premises that decisions not to buy health insurance are, in fact, inactivity or that regulating inactivity as commerce is “new.”¹⁰¹ The second distinction posits that the taxing power “is not without limits,” implying that the commerce power would be without limits if it could be used to regulate inactivity.¹⁰² The Chief Justice acknowledges, though, that the taxing power limits are loose, if even that, and he musters citations to only two *Lochner*-era cases¹⁰³ and a unique case involving a tax that violated the Double Jeopardy Clause.¹⁰⁴ These citations do not explain why such loose limits on the taxing power protect individual autonomy any more or differently than the limits imposed on the commerce power.¹⁰⁵ The question is not whether one or the other power “is not without limits,” because both powers have limits. The critical point is the effi-

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 2599–2600.

⁹⁷ *Id.* at 2600.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2599.

¹⁰¹ Thus, the ACA’s defenders argued that the Act did not claim a new power but merely directed an old power into a new field. See *id.* at 2621 & n.6, 2625 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); Strauss, *supra* note 58, at 14–15.

¹⁰² *NFIB*, 132 S. Ct. at 2599.

¹⁰³ *Id.* (citing *United States v. Butler*, 297 U.S. 1 (1936); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922)); see also Metzger, *supra* note 68, at 90 (referring to the *Lochner* era as the Court’s “most constrained approach to the tax power”).

¹⁰⁴ *NFIB*, 132 S. Ct. at 2599 (citing *Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994)). One could cite a handful of *Lochner*-era cases limiting the commerce power, and presumably double-jeopardy principles equally limit regulation under the Commerce Clause.

¹⁰⁵ See *id.* at 2623–25 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

cacy or effect of those limits, which simple citation to their existence fails to address. Finally, the Chief Justice's distinction of mandate regimes and tax regimes cannot alone explain the outcome in *NFIB*, because the ACA required only a payment into the Treasury for the failure to purchase health insurance. Even if the tax were a mandate, then, it would not carry the characteristics of mandates, like criminal sanction, that concern the Chief Justice. If anything, the mandate coerced individuals to a much less significant extent than, for example, the Civil Rights Act of 1964 — upheld under the Commerce Clause — which required individuals either to engage in commercial transactions with racial minorities with whom they would not otherwise engage or to go out of business.¹⁰⁶

These arguments, however, point to a deeper purpose that both the state action and individual action requirements serve. Professor Cass Sunstein has written that “the state action inquiry is not a search for whether the state has ‘acted,’ but is instead an examination of whether it has deviated from functions that are perceived as normal and desirable under the relevant constitutional provision.”¹⁰⁷ The Chief Justice's distinctions — between action and inaction and between the commerce power and taxing power — whatever their purchase (or lack of purchase) in *NFIB*, aimed at something similar to what Sunstein wrote of the state action cases. The distinctions intended to carve out a private realm from certain types of governmental power perceived as abnormal and undesirable and to shift that power to more normal and desirable forms. Recognizing that the state action and individual action doctrines seek fundamentally to limit government to normal and desirable functions does not, of course, say anything about what the nature of those functions might be. But reverse engineering can help. Tracing the contours of the private realms that the doctrines preserve helps illuminate the principle guiding their use.

D. The Private Realm that the State Action Doctrine Preserves

The state action doctrine constructs a private realm defined by individuals' choices in the political process. The doctrine limits the Constitution's role in matters of social and economic policy by requiring the government's action — motivated by individuals' choices in the political process — before the document's rights provisions will

¹⁰⁶ See Strauss, *supra* note 58, at 14–15.

¹⁰⁷ SUNSTEIN, *supra* note 32, at 74; see also Fallon, *supra* note 53, at 344 (arguing that the choice whether to recognize a right depends on “what powers it would be prudent or desirable for government to have”); Fried, *supra* note 53, at 769 (“[A] litigant's reference to freedom of speech or conscience is not simply a claim for immediate satisfaction, it is the assertion of an interest which can be understood only as a reference to systematic ways of doing things, to roles, institutions and practices.”).

apply.¹⁰⁸ So long as individuals do not act through the political branches, they remain free of constitutional obligation.

Recall that in the period after 1972 the state action doctrine operated as a restraint on judicial power. By narrowing the scope of courts' authority to enforce the Constitution's rights provisions against nominally private conduct, the cases left the regulation of that behavior to the political branches. Congress (or the states) could choose to regulate individual choices, but the courts could not interpret the Constitution's rights provisions to apply to those choices in the absence of clear state action. Instead, those provisions applied only after a state government had acted or Congress had acted under an alternative source of authority, such as the Commerce Clause.¹⁰⁹ Constitutional rights inquiries became limited to cases of "state action." As such, the state action cases "prevent[ed] certain individual decisions from being understood as social choices until politics itself cho[se] to so recognize them."¹¹⁰ A legislature's decision to regulate a behavior placed that behavior within the public domain. But the courts could not "render contestable what politics ha[d] chosen, if only implicitly, to accept as natural" by not regulating.¹¹¹ The post-1972 state action precedents preserved a sphere of private decisionmaking to which the Constitution's rights provisions did not apply without some antecedent political choice to regulate the decisionmaking.

The *Civil Rights Cases* and *Morrison* went still further by limiting the ability to make such political choices to the states. With the Civil Rights Act of 1875, for example, Congress sought to define private discrimination as a public problem. The *Civil Rights Cases* limited the federal government's ability to do so under the Fourteenth Amendment, although inadvertently shifting the pressure to regulate that discrimination to the Commerce Clause. VAWA also implicitly defined gender violence as a social problem, not merely private behavior, by seeking to recognize state governments' inadequate protection against gender violence as a deprivation of equal protection.¹¹² But *Morrison* denied Congress this authority, under both the Fourteenth Amendment

¹⁰⁸ Again, the Thirteenth Amendment, which does not require state action, is an exception to this rule. See sources cited *supra* note 6 and accompanying text.

¹⁰⁹ So too, the affirmative grants of power in Article I are not limited by a state action requirement. See U.S. CONST. art. I.

¹¹⁰ Barron, *supra* note 18, at 367 (emphasis omitted); see also *id.* ("[U]ntil politics chooses to recognize [individual decisions] as societal ones fit for regulation, Rehnquist might believe, the Constitution does not authorize courts to review the reasonableness of the governmental inaction and thereby highlight the politics that permitted those private choices to be made.").

¹¹¹ *Id.*

¹¹² The Commerce Clause defense of VAWA has a similar cast. Congress sought to recognize gender violence as sufficiently affecting commerce to be of public concern. Like the idea of state action, "commerce" designates a state of affairs in which individual activity has combined in such a way as to become of public concern, or fit for regulation.

and the commerce power. “In asserting the independence of private choice”¹¹³ from federal regulatory authority, these cases left the decision to regulate this private sphere to the states.

By constructing a realm of private conduct that could be regulated only through state political processes or federal political processes empowered by something other than the Constitution’s rights provisions, the state action doctrine prevented every “existing pattern[] of social behavior”¹¹⁴ from being constitutionalized. That is, by limiting the Constitution’s application to cases of state action, the doctrine spared all other cases from constitutional scrutiny.¹¹⁵ A jurisprudence without the doctrine “collapse[s]” every question “into substantive constitutional law,”¹¹⁶ because courts would have to decide in every instance whether or not the Constitution permitted the practice in question. Courts would be forced “to choose between doing everything and doing nothing” if the Constitution applied,¹¹⁷ robbing both politics and individuals of that choice in the first instance. The state action doctrine relieves this pressure by limiting constitutional scrutiny to the state. The doctrine allows courts to leave to politics what the Constitution might otherwise take away were the document’s rights provisions to apply more broadly.¹¹⁸ Thus, the doctrine “re-create[s] a margin for action” by the political process and by individuals so long as politics chooses not to regulate them.¹¹⁹

¹¹³ Barron, *supra* note 18, at 367.

¹¹⁴ Tushnet, *supra* note 48, at 405.

¹¹⁵ Peller & Tushnet, *supra* note 18, at 796–97 (“[W]ithout the state action limitation, constitutional scrutiny would include the entire social field” *Id.* at 796.).

¹¹⁶ Tushnet, *supra* note 48, at 406.

¹¹⁷ *Id.*

¹¹⁸ See SEIDMAN & TUSHNET, *supra* note 18, at 68 (“The [state action] requirement is essential to prevent every policy question from becoming an issue for constitutional interpretation.”); Tushnet, *supra* note 48, at 403 (concluding that eliminating the state action doctrine would require courts to justify every “state of affairs . . . under the Constitution”).

¹¹⁹ Tushnet, *supra* note 48, at 406. One can also find in related doctrines a similar resistance to constitutionalizing existing patterns of social behavior. *Washington v. Davis*, 426 U.S. 229 (1976), which required proof of discriminatory intent to make out an equal protection violation, rejected a rule that would have found impermissible discrimination based on disparate effects on protected groups. *Id.* at 242; see also Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 897–99 (1999); Tushnet, *supra* note 48, at 389. In effect, the intent rule held the government responsible only for effects that it immediately intended, not for the existing social structures that caused facially neutral laws to have racially disparate effects. *Davis*, as Professor Daryl Levinson has written, “grounded equal protection on a baseline that equates government inaction and racial neutrality.” Levinson, *supra*, at 897. The decision held that the world absent racially motivated government action is race-neutral, because an effects-based rule would have demanded that the Court “decide whether every law with a racially disparate impact is permissible, and if not, what to do about it.” *Id.* at 898. Levinson concludes that the Court shied away from such a rule in recognition of its own “institutional limitations.” *Id.* at 899 (“Once existing racial inequality becomes a matter of equal protection concern, it is hard to imagine any non-arbitrary stopping point for remedies short of the wholesale restructuring of the basic institutions

E. The Private Realm that the Individual Action Doctrine Preserves

The individual action doctrine, as expressed in *NFIB*, also constructed a private realm. That realm, though, was structured not around political processes but rather around the opportunity to avoid a federal mandate through payment. So long as individuals could pay a tax to be free of federal regulation, that exercise of regulatory power did not deviate from the normal and desirable powers of government.

The Chief Justice's final distinction between the taxing and commerce powers involved the difference between tax and mandate regimes. Although taxes might impose a significant burden on those taxed and failure to pay taxes can result in criminal prosecution,¹²⁰ the Chief Justice concluded that the choice left to taxed individuals differed relevantly from that left by a mandate. If an individual chooses to engage in taxed behavior, he must pay the resultant tax.¹²¹ But he retains the "lawful choice to do or not do [the taxed] act, so long as he is willing to pay a tax levied on that choice."¹²²

The existence of that choice is the touchstone of the Chief Justice's argument. As the Chief Justice acknowledged, individuals cannot choose both to engage in taxed behavior and to refuse to pay the tax, or criminal sanctions will apply.¹²³ Thus, the only additional choice between a tax and a mandate is the choice under a tax regime of whether to pay for the regulated behavior; otherwise, the regimes yield the same choice — either enduring criminal sanction or terminating the behavior. Putting aside the point that the choice to pay might in some cases be illusory,¹²⁴ the Chief Justice's argument implies that the federal government's capacity to invade certain spheres of individual autonomy — here, the domain of individuals who, he claims, have not engaged in commercial activity — depends on whether the mode of intrusion leaves individuals a choice of paying to engage in the regulated behavior. If so, the regulation "does not give Congress the same degree of control over individual behavior."¹²⁵

of society to redistribute resources and power more fairly among racial groups."). *Davis* implicitly held that courts should not decide such social issues, and so the Constitution could have nothing to say about them.

¹²⁰ *NFIB*, 132 S. Ct. at 2600 & n.11.

¹²¹ *Id.* at 2600 n.11.

¹²² *Id.* at 2600.

¹²³ *Id.* at 2600 n.11.

¹²⁴ It might not be a realistic possibility to pay the cost of engaging in taxed behavior, whether because of income capacity or the level of taxation. See Metzger, *supra* note 68, at 111 ("Although previous tax power decisions have emphasized disproportionate size as a factor, the Court has found financial impositions to be taxes even though payment was surely not a realistic choice and even though failure to pay the tax was expressly deemed 'unlawful.'").

¹²⁵ *NFIB*, 132 S. Ct. at 2600; see also Minow, *supra* note 67, at 138 (concluding that the Chief Justice found in the taxing power "sufficient latitude of individual freedom").

NFIB thus demonstrated the Court's continued interest in the consequences of the various powers that the federal government seeks to exercise and the availability of action requirements to manage it. As in the state action context, *NFIB*'s distinction of action and inaction remained analytically unstable. But the distinction placed an added boundary between the citizen and the state. While the requirement made no functional difference in *NFIB* — the ACA required a payment and only a payment, whether construed as a tax or a mandate — the decision delineated the contours of the private world that at least five members of the Court saw fit to protect. By deploying an individual action requirement, however unstable, the decision cut off federal power at the Commerce Clause and shifted it to the Taxing Clause, thereby preserving a space between the citizen and the state in which individuals could pay to be free of federal power.

III. CONCLUSION

NFIB's individual action requirement functions similarly to the state action requirement. The requirements respond to the "hydraulic" movement of power between official institutions and sources of authority by cutting off that power in places and displacing it elsewhere. In spite of the requirements' analytic instability, they serve a clear purpose: not to determine whether the state or an individual has acted but to confine governmental power to "functions that are perceived as normal and desirable under the relevant constitutional provision."¹²⁶ Thus, indeed, "[h]ow the government regulates is as important as whether it regulates."¹²⁷

Both the state action and individual action doctrines serve as tools to police how the government regulates, to contain that regulation in certain provisions, and to limit its exercise to certain forms. In allocating federal power in this way, the doctrines seek to preserve an appropriate "relation between the citizen and the Federal Government"¹²⁸ by carving out space for private action — defined not by individuals' complete autonomy but by the specific mode of governmental power that may intrude on it. *NFIB*'s analytic structure is not, then, new. The decision individualizes the state action doctrine and applies its logic to the Commerce Clause, signaling the doctrine's continuing vitality and the readiness of action requirements to police the exercise of federal power, wherever it might appear.

¹²⁶ SUNSTEIN, *supra* note 32, at 74.

¹²⁷ Metzger, *supra* note 68, at 85–86 (seeking to reconcile the Chief Justice's commerce and tax analyses).

¹²⁸ *NFIB*, 132 S. Ct. at 2589 (opinion of Roberts, C.J.).