



# THE MOST REVEALING WORD IN THE UNITED STATES REPORTS

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**I**T'S AT 567 U.S. 648, ABOUT A QUARTER of the way down the page. But let's lay some foundation first.

The most prominent issue in *NFIB v. Sebelius*<sup>1</sup> was whether Congress's regulatory power under the Commerce Clause stops at a point marked by a distinction between "activity" and "inactivity." According to the law's challengers, prior decisions about the scope of the commerce power already reflected the importance of the distinction between action and inaction. In all of the previous cases in which exercises of the commerce power had been sustained, the challengers argued, that power had been used to regulate activity. Never had Congress tried to regulate mere inactivity. In *NFIB*, four Justices rejected that contention, writing that such a distinction was previously unknown. Indeed, Justice Ginsburg described the idea of an activity/inactivity distinction as a limit on the commerce power as "a newly minted constitutional doctrine"<sup>2</sup> conveniently engineered to declare the Affordable Care Act's individual mandate unconstitutional.

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<sup>1</sup> 567 U.S. 519 (2012).

<sup>2</sup> *NFIB* at 605 (Opinion of Ginsburg, J.).

But five Justices – Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito – agreed with the challengers that commerce doctrine regarded the distinction between activity and inactivity as significant. Unlike the other four Justices, the Chief Justice did not think it followed that the ACA was unconstitutional, because, unlike the other four Justices, the Chief Justice concluded that Congress’s taxing power was sufficient authority for enacting the ACA. But on the Commerce Clause question, these five were in agreement: activity is one thing, and inactivity another. In his opinion announcing the judgment of the Court, Chief Justice Roberts duly adduced language from prior decisions to show that the Court had routinely spoken of “activity” when sustaining exercises of the commerce power. The Chief Justice wrote as follows:

As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching “activity.” It is nearly impossible to avoid the word when quoting them. See, e.g. [*United States v. Lopez*] (“Where economic *activity* substantially affects interstate commerce, legislation regulating that activity will be sustained”); [*United States v. Perez*] (“Where the class of *activities* is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class”); [*Wickard v. Filburn*] (“[E]ven if appellee’s *activity* be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce”); *NLRB v. Jones & Laughlin Steel Corp.* (“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”) . . . .<sup>3</sup>

The argument on offer is clear enough. By quoting the language of prior cases, Chief Justice Roberts could rebut Justice Ginsburg’s charge that the activity/inactivity distinction was “invented out of whole cloth[.]”<sup>4</sup> On the

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<sup>3</sup> *NFIB* at 551 (Opinion of Roberts, C.J.) (emphases altered).

<sup>4</sup> *NFIB* at 658 (Opinion of Scalia, Kennedy, Thomas, and Alito, JJ.) (describing Justice Ginsburg’s characterization).

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contrary, the prior cases' use of the language of "activity" showed that the distinction between activity and inactivity was a longstanding feature of constitutional doctrine.

Pointing to prior decisions that make use of a given distinction is an excellent way to show that the distinction is not novel. But to read the Supreme Court's pre-*NFIB* cases as giving force to (or even noticing) a distinction between the regulation of activity and the regulation of inactivity, one must think that the words "activity" and "activities" in the quoted cases were meant to be used in a limiting sense. One must think, that is, that when the *Lopez* Court wrote "Where economic activity substantially affects interstate commerce," it had in mind that the word "activity" narrowed the domain of the sentence by excluding anything properly described as "inactivity." Similarly, one must think that when the *Wickard* Court wrote "even if appellee's activity be local," it meant to say that its analysis applied only because Farmer Filburn was doing something "active," and that the Agricultural Adjustment Act could not have been validly written to reach Filburn had he been "inactive" instead.

I doubt that the language of "activity" in those cases was meant to carry those meanings. It seems to me more likely that that language in the quoted sentences was used in a less precise way: not to name a category of "activity" distinct from "inactivity" but as a general synonym for "stuff being regulated." I think, in other words, that when the *Perez* Court wrote "Where the class of activities is regulated," it meant the same thing that would be meant by "Where the subject matter at issue is regulated"; and when the *Wickard* Court wrote "even if appellee's activity be local," it meant the same thing that would be meant by "even if the subject matter in this case were local."

To support this view, I offer, as Exhibit A, the most revealing word in the United States Reports. That word, unsurprisingly at this point in the analysis, is "activity." In particular, it is that word as it appears at the end of a paragraph near the very beginning of *NFIB*'s joint dissent.

In their joint opinion, Justices Scalia, Kennedy, Thomas, and Alito adopted the view that the individual mandate of the ACA was beyond the commerce power because that power authorizes Congress only to regulate activity as opposed to inactivity. In a short introduction to their opinion, they identified the stakes of the question. It is a fundamental principle, they

insisted, that the Commerce Clause cannot reach “all private conduct.”<sup>5</sup> They continued as follows:

That clear principle carries the day here. The striking case of *Wickard v. Filburn*, which held that the economic activity of growing wheat, even for one’s own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the *failure* to grow wheat (which is *not* an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.<sup>6</sup>

Again, the argument is clear. If the Commerce Clause authorizes Congress to regulate inactivity as well as activity, then the federal government can regulate everything. And that cannot be right.<sup>7</sup>

But read the paragraph carefully. When you get to the last three words, slow down, and ask yourself what the word “activity” means in the phrase “all human activity” here. It cannot possibly mean something distinct from “inactivity.” It can only mean something like “all of human existence, including not just activity but also inactivity.” The point of the sentence, after all, is that the individual mandate extended congressional regulation beyond “activity” (in the limiting sense) and into the domain of

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<sup>5</sup> *NFIB* at 647 (Opinion of Scalia, Kennedy, Thomas, and Alito, JJ.).

<sup>6</sup> *NFIB* at 647-48 (Opinion of Scalia, Kennedy, Thomas, and Alito, JJ.).

<sup>7</sup> Presumably, the Joint Dissenters did not mean to suggest that congressional power to regulate inactivity would mean congressional power to pass any law whatsoever, because the Constitution contains many affirmative prohibitions on what Congress can do. Even if Congress possessed general legislative jurisdiction, it could not pass a law establishing a religion or enacting a bill of attainder. What the joint dissenters should actually be understood to be arguing, therefore, is that congressional power to regulate inactivity would mean congressional power to regulate anything except as prohibited by affirmative constitutional prohibitions. And it cannot be the case that Congress is limited only by affirmative prohibitions, in their view, because it is a fundamental principle that Congress is limited by the enumeration of its powers, even without respect to affirmative prohibitions. I think that the proposition that Congress must be limited by its enumerated powers is wrong. See Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014). But for present purposes, what is important is understanding what the joint dissenters were saying, not whether that statement was the best view of the relevant constitutional law.

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something that was *not* activity. So “activity” here cannot mean the limiting thing that the Chief Justice and the joint dissenters claim it meant in prior cases. It has to name something that does not distinguish between activity and inactivity.

Four Justices of the Supreme Court signed the joint dissent. Those four Justices employed sixteen law clerks. Apparently not one of those twenty talented lawyers read this paragraph and said “Actually, wait – the word ‘activity’ is used here in too broad a sense.” Instead, every one of them seems to have regarded this use of the word “activity” – which encompasses “inactivity” – as normal and appropriate.

The joint dissent in *NFIB* was not some little-noticed document to which its signatories gave scant attention. The case was an era-defining blockbuster, and everybody knew it. Whether commerce doctrine affords significance to a distinction between activity and inactivity lay at the center of the case. If ever there were a case in which Justices and law clerks should have been finely attuned to that distinction, it was *NFIB*. No opinion ever written has been more insistent than *NFIB*’s joint dissent about the importance of that distinction. Yet even that opinion, in the paragraph introducing the “clear principle” on which it insists, uses the word “activity” in a way that fails to respect the distinction. It is the most revealing word in the United States Reports.<sup>8</sup>

What it reveals should be obvious. If even the *NFIB* joint dissent used “activity” to name something that does not distinguish between “activity” and “inactivity,” there is little reason to think that Justices in earlier cases where the activity/inactivity question was not relevant or discussed were using the word in a more precise and limiting way. It makes much more sense to think that they used it in the more general, nonlimiting way that even the *NFIB* joint dissenters sometimes deployed. If so, the various uses of the word “activity” in prior decisions do not suggest that prior commerce doctrine contemplated a difference between the regulation of activity and the regulation of inactivity. The attempt to present those prior uses of lan-

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<sup>8</sup> Truth to tell, I am not invested in its being the *most* revealing word in all of the *United States Reports*. If someone has a candidate for a word that is yet more revealing, I see no need to enter pitched battle on the question of who is entitled to claim the superlative. The important point, which I hope is sufficiently established, is just that this one is pretty revealing.

guage as proof of the significance of that distinction thus stands revealed as a distorting piece of revisionism.

It does not follow that Chief Justice Roberts and the joint dissenters were wrong to think that the commerce power stops at the activity/inactivity line. The refinement and modification of doctrine is a normal aspect of decisionmaking in a common-law system, so the fact that a doctrinal distinction was unknown before a certain date does not suffice to prove that that distinction could not be validly introduced thereafter. In my view, the most important reason why the Chief Justice and the joint dissenters were wrong on the commerce question in *NFIB*, as I believe they were, is not that the activity/inactivity distinction was novel but that it makes little sense as a tool for the rational shaping of the commerce power.<sup>9</sup> But a great deal of ink has been spilled on that question, and I do not propose to treat it comprehensively here. The present subject is specifically the pedigree of the action/inaction distinction, not its ultimate merits. That said, though the pedigree issue does not exhaust the ultimate question, it is an important piece of the picture – important enough that the ACA’s defenders thought it worthwhile to press the claim that the distinction was newly minted and that the distinction’s promoters thought it worthwhile to insist that it had long been visible in the Court’s prior cases.

The willingness of five Justices to adopt the action/inaction distinction in *NFIB* was not solely a function of their reading of caselaw, nor of their reading of caselaw combined with their readings of constitutional text. It was also partly a matter of the context in which the issue was presented. Some and perhaps all of those Justices had a background sense that preexisting doctrine construed the commerce power too broadly, such that opportunities to pare it back would be welcome. It also seems safe to assume that some and likely all of those Justices regarded the Affordable Care Act as a

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<sup>9</sup> Limiting that power on the basis of an action/inaction distinction has no tendency to facilitate anything valuable about federalism, nor about any other aspect of the constitutional system, because it does not map anything about how the system should allocate decisionmaking among its various decisionmaking institutions. Some readers may be tempted by the thought that this limit does promote something valuable because *any* obstacle to federal lawmaking is valuable. I do not share that view. But if that view were correct, it would still not be clear why an action/inaction distinction would be superior to any other limitation that might be arbitrarily imposed.

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Seriously Bad Thing, whether for reasons of federalism<sup>10</sup> or otherwise<sup>11</sup> and probably both. But those background factors, important as they were, would probably not have sufficed to prompt five Justices to say that an act of Congress was beyond the commerce power unless they could articulate that conclusion by reference to some rule. And not just any rule would do. It would need to be a rule that seemed like the sort of thing that makes a difference in legal analysis. One can distinguish laws signed by Presidents in the morning from laws signed in the afternoon, but it is hard to imagine that anything of legal significance could turn on the distinction. So no matter how negatively a judge felt toward a particular federal statute, it would be hard to get that judge to say that the statute exceeded Congress's commerce power because the bill was signed into law at 10:15 a.m.

The distinction between activity and inactivity is part of the lawyer's standard set of moves. It isn't always the right distinction to draw, but every judge recognizes it as the kind of thing that might matter. So when that distinction was offered to five Justices who were keen to articulate limits on Congress and would not have been sorry to see the ACA disappear, the conditions were favorable for getting those Justices to construe prior caselaw as favorable to their applying an action/inaction limit in the case

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<sup>10</sup> The ACA was the most ambitious federal regulatory scheme in more than a generation, so it could easily trigger concerns about federal overreach. This is so even if the relevant intuition about federalism was not articulable in terms of doctrinal categories. It could also be rooted in a more inchoate sense of what should be done nationally and what locally.

<sup>11</sup> Different kinds of factors are in play here. Within the register of small-c constitutionalism – fundamental questions about structure and ethos, whether or not attached to specific parts of the written Constitution – the ACA may have unsettled a general expectation that in the American system, one makes one's living in the capitalist market, subject to a set of exemptions for people unable to do so like the elderly and the disabled. Less exaltedly, one should not dismiss the fact that the ACA provoked strong opposition for non-constitutional reasons sounding in policy and partisanship and that all five Justices who accepted the action/inaction distinction were appointed by presidents from a political party that maintained unanimous opposition to the ACA in both Houses of Congress. Non-constitutional factors shouldn't shape judicial attitudes on constitutional questions, but sometimes they do. This is not to say that the Justices deliberately acted on the basis of policy or partisan preferences; it is merely to note that decisionmakers (of all political orientations) often engage in motivated reasoning, such that they are more willing to accept arguments whose conclusions strike them as congenial than arguments running in other directions.

before them. And so they did. But in that endeavor, they needed to impute to their predecessors a specialized use of language – specialized enough that they themselves could not maintain it, even when they should most have done so. Using the phrase “all human activity” in their moment of peroration was a tell-tale blunder: Even if the joint dissenters believed in perfectly good faith that their argument was correct, the marker they left behind tells a different story.

