2013

The Presumption of Constitutionality and the Individual Mandate

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INTRODUCTION

Every American law student learns that there is a difference between a statute's meaning and its constitutionality. A given case might well present both issues, but law students are taught that the questions are distinct and that their resolution requires separate analyses. This is all for good reason: the distinction between statutory meaning and constitutional validity is both real and important. But it is not complete. Any approach to statutory interpretation depends on a view about the appropriate role of the judiciary (or other institutional interpreter) in our constitutional system; "[a]ny theory of statutory interpretation is at base a theory about constitutional law."[1] Moreover, some specific rules of statutory interpretation can themselves be understood as modes of constitutional implementation.

National Federation of Independent Business v. Sebelius[2] *(NFIB)*—and, in particular, the constitutionality of the Affordable Care Act (ACA)'s "individual mandate" under the tax power—is a prime example of constitutional and statutory intertwining. The crux of the tax question in the case was whether Congress permissibly exercised its tax power when it enacted the individual mandate. This was a question of both statutory meaning and constitutional validity: Was the mandate permissibly understood to impose a tax, and did it represent a constitutional exercise of Congress's tax authority? According to some—including, critically, Chief Justice Roberts—the tax power cannot be used to command individuals.[3] In the Chief Justice's view, Congress can tax an otherwise lawful action or failure to act, but it cannot use its tax power to enforce a command that individuals act or not act in a particular way. Under that standard, the mandate could be upheld under the tax power only if it could be interpreted as taxing the decision not to purchase insurance without rendering that

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1. Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988).

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

3. For an academic defense of the view that a tax cannot impose requirements or coerce, as well as an argument that whether a measure constitutes a tax or a penalty should be determined with reference to its material effects and not the labels Congress used, see Robert D. Cooter & Neil S. Siegel, *Not the Power To Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

decision unlawful. Hence, whether the mandate could be upheld as a tax turned on whether it could be construed, as a matter of statutory meaning, to fit this constitutional definition of a tax.

The correct answer is not obvious from the text of the mandate or the ACA as a whole. On the one hand, under the ACA the sole legal consequence of a covered individual's failure to purchase insurance is that it triggers an additional fee, payable on the individual's annual tax return. That fact—combined with the ACA's multiple references to the tax code and Congress's reliance on estimates that the mandate would raise $4 billion annually—weighed in favor of viewing the mandate as a tax but not a command. On the other hand, and in contrast to the ACA's express references to taxes elsewhere in the legislation, the ACA refers to the mandate and its fee in terms of a "requirement" and a "penalty," not a tax. For those and other reasons, it could be argued that the mandate was most naturally viewed as an exercise of the commerce power, not the tax power.

Although the parties and the Justices did not acknowledge the point with any great clarity, resolving this statutory ambiguity required choosing between two constitutionally based rules of statutory construction: the principle that statutes should be construed, where possible, to avoid serious doubts about their unconstitutionality, and the requirement that Congress must clearly invoke its tax power before a court will review the challenged legislation as an exercise of that power. Chief Justice Roberts's controlling opinion embraced the first of these rules, commonly known as the canon of constitutional avoidance. By contrast, the joint dissent implicitly opted for the second, essentially imposing a clear statement rule on invocations of the tax power.

We think that the Chief Justice took the right approach, but that the choice of which of these rules to apply requires fuller justification than the Chief Justice supplied. In particular, we argue that adequately answering this question necessitates a more forthright engagement with statutory interpretation as a mode of constitutional implementation. That engagement should be framed around one of the bedrock principles governing judicial review of most legislation: the presumption of constitutionality. Ultimately, we show that analyzing the tax question in *NFIB* against the presumption of constitutionality not only supports the Chief Justice's application of the canon of constitutional avoidance, but also indicates that the proper clear statement rule to apply with respect to Congress's use of its tax power is the opposite of that suggested by the joint dissent. The Court should not conclude that Congress refused to exercise its tax power, or any other head of legislative authority, unless Congress expressly stated that refusal in the statute at issue.

I. CONSTITUTION-IMPLEMENTING RULES OF STATUTORY INTERPRETATION

We begin by describing two familiar interpretive approaches, the canon of constitutional avoidance and clear statement rules. As noted above, these principles were invoked, explicitly or implicitly, by the contending sides in

NFIB. Both approaches blend inquiries into statutory meaning with enforcement of constitutional norms. Yet in certain contexts they can have dramatically different consequences.

A. The Canon of Constitutional Avoidance

In its most common articulation, the canon of constitutional avoidance provides that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[4] Most famously associated with Justice Brandeis's concurrence in *Ashwander v. Tennessee Valley Authority*,[5] the avoidance canon has long been embraced by the Court as a "'cardinal principle' of statutory interpretation."[6]

Although it is common to speak of a single avoidance canon, in fact there are two different versions of the rule. The first, which Adrian Vermeule helpfully terms "classical avoidance,"[7] provides that, "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the Act."[8] The second, which Vermeule calls "modern avoidance,"[9] is the one quoted in the above paragraph and most frequently invoked by courts today. The key difference between the two is that classical avoidance applies only when the otherwise preferred reading of a statute is in fact unconstitutional, while modern avoidance applies whenever there is serious doubt about the constitutionality of that reading.[10]

The Supreme Court's early practice employed classical avoidance, which it justified on dual grounds: first, that due respect for a coordinate branch of government entails assuming that its work product was intended to pass constitutional muster; and second, that unelected federal courts should minimize, to the extent consistent with their *Marbury* duty, the occasions on which they invalidate the work of the political branches.[11] But in a 1909 case, *United States ex rel. Attorney General v. Delaware & Hudson Co.*, the Court expressed concern that classical avoidance entails providing what

4. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

5. 297 U.S. 288, 341 (1936) (Brandeis, J., joined by Stone, Roberts, and Cardozo, JJ., concurring).

6. Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). For a list of recent invocations of the avoidance canon by the Court, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1193 n.10 (2006) (collecting cases).

7. Adrian Vermeule , *Saving Constructions*, 85 GEO. L.J. 1945, 1949–50 (1997).

8. Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring in the judgment of an equally divided Court).

9. Vermeule, *supra* note 7, at 1949.

10. *See* John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1496–97 (1997).

11. *See* Morrison, *supra* note 6, at 1203–04.

amounts to an advisory opinion.[12] To address that concern, the Court reasoned that rather than finding a particular statutory reading unconstitutional only to reject it in favor of a saving construction, courts should instead construe statutes to avoid readings that raise serious constitutional concerns, without finally resolving those concerns.[13] Courts, in other words, should employ modern avoidance.

Like classical avoidance, modern avoidance is typically justified as an instrument of judicial restraint.[14] And although the Court did not initially put it this way, contemporary accounts of modern avoidance also suggest that the canon respects congressional intent.[15] On this account, Congress is presumed to intend to legislate within constitutional limits and to avoid legislating in a way that pushes the constitutional envelope.

More than classical avoidance, modern avoidance has been subject to substantial academic criticism. Two lines of criticism are dominant. The first targets the notion that Congress truly intends to avoid constitutional doubts, not just outright unconstitutionality. As Judge Friendly explained, a rational legislator would likely prefer a court to resolve decisively any constitutional doubts it has about the otherwise best reading of a statute: "[T]here is always the chance . . . that the doubts will be settled favorably, and if they are not, the conceded rule of construing to avoid unconstitutionality will come into operation and save the day. People in such a heads-I-win, tails-you-lose position do not readily sacrifice it."[16] There is also the fact that Congress is a "they," not an "it."[17] Attributing a collective belief in the constitutionality of its work product may assign to the full body something not actually present in the mind of each member who voted for a given bill.

On the other hand, given that the initial move from classical to modern avoidance was not justified on congressional intent grounds, but was instead aimed at avoiding the advisory opinion problem, this criticism of the canon as deviating from actual congressional intent may be something of a non sequitur. If classical avoidance tracks congressional intent, and if

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12. United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909).

13. *See id.*

14. *See* Morrison, *supra* note 6, at 1206–07 (describing the elements of the standard defense of the modern avoidance canon and calling it the "judicial restraint theory" of avoidance).

15. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 381 (2005) (describing modern avoidance as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"); INS v. St. Cyr, 533 U.S. 289, 336 (2001) (Scalia, J., dissenting) (describing the avoidance canon as "conform[ing] with Congress's presumed intent not to enact measures of dubious validity").

16. Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* FELIX FRANKFURTER: THE JUDGE 30, 44 (Wallace Mendelson ed., 1964), *reprinted in* HENRY J. FRIENDLY, BENCHMARKS 196, 210 (1967).

17. *Cf.* Kenneth A. Shepsle , *Congress Is a "They," Not an "It": Legislative Intent As Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

modern avoidance is the closest the courts can come to classical avoidance without creating advisory opinion concerns, modern avoidance's poor fit with congressional intent might be tolerable. Moreover, even if classical avoidance does not lead to truly impermissible advisory opinions,[18] it does generate fully elaborated constitutional analyses in a way that modern avoidance does not. Thus, following Justice Brandeis's desire to minimize the number of judicial pronouncements on the Constitution one way or the other, modern avoidance might again be justifiable despite not always closely tracking congressional intent.

The second main criticism of modern avoidance takes issue with the premise of the defense just offered: it asserts that modern avoidance does not, in fact, avoid the unnecessary making of constitutional law. In cases where the canon applies, the reviewing court engages the constitutional issue enough to discard its otherwise preferred reading of the statute. As Judge Posner puts it, even if such engagements do not yield definitive rulings on constitutional questions, they nevertheless create a "judge-made constitutional 'penumbra' that has much the same prohibitory effect as the . . . Constitution itself."[19] That might go a bit too far; there are important differences between modern avoidance's engagement with the Constitution and an analysis that reaches a definitive conclusion on a constitutional question. Still, Judge Posner and others leveling this criticism are clearly correct that modern avoidance does not avoid the Constitution altogether. In that sense, it arguably fails the task Justice Brandeis set for it in *Ashwander*.[20]

There is, however, an alternative account of the avoidance canon. As Ernest Young has described, modern avoidance can be viewed as "designed not to reflect what Congress might have wanted under particular conditions, but rather to give voice to [the] normative values" that are "embodied in the underlying constitutional provisions that create the constitutional 'doubt.'"[21] When implemented through the avoidance canon, those constitutional provisions operate as what Young calls "resistance norms"—constitutionally grounded "rules that raise obstacles to particular governmental actions without barring those actions entirely."[22] Put another way, the modern avoidance canon is a tool of both statutory construction and constitutional implementation. Indeed, it renders statutory construction a mode of constitutional implementation.

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18. One of us is on record saying that the application of classical avoidance does not entail the issuing of a truly unconstitutional advisory opinion. *See* Morrison, *supra* note 6, at 1205.

19. Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

20. *See* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 87.

21. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1551 (2000).

22. *Id.* at 1585.

This resistance norm account of avoidance is decidedly not how Justice Brandeis or other early proponents of modern avoidance understood it.[23] It is, however, largely immune to the two criticisms of modern avoidance described above. If the purpose of avoidance is to protect constitutional values by "rais[ing] the cost of *any* congressional encroachment within a particular area of constitutional sensitivity,"[24] then its divergence from congressional intent is not deeply troubling. The constitutional resistance norm simply trumps congressional intent. Meanwhile, Judge Posner's complaint that avoidance creates a penumbral Constitution becomes not so much an indictment of avoidance as a description of its purpose.[25]

B. Constitutional Clear Statement Rules

Clear statement rules represent yet another method of statutory construction with a deep connection to constitutional norms. In a number of contexts the Court requires Congress to speak clearly before a statute will be read as trenching on important constitutional values. Prominent among these "constitutionally inspired 'clear statement rules'" are requirements aimed at protecting federalism.[26] Examples include the rule that Congress must expressly state its intention to abrogate state sovereign immunity, the presumption against preemption, and *Gregory v. Ashcroft*'s insistence that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."[27] Some of these federalism clear statement rules apply more stringently than others. In particular, the Court often finds state law preempted on an implied basis, whereas it does not conclude Congress intended to abrogate state sovereign immunity absent fairly clear statutory language to that effect.[28] These variations notwithstanding, these rules are all techniques of using statutory construction, rather than direct constitutional adjudication, to protect a constitutionally based balance between federal and state authority. As John

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23. *See* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 676 (2012).

24. Young, *supra* note 21, at 1606.

25. *Id.* at 1598.

26. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406–07 (2010); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

27. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)) (internal quotation marks omitted); Manning, *supra* note 26, at 407–10 (discussing federalism clear statement rules).

28. *Compare* Altria Grp., Inc. v. Good, 555 U.S. 70, 76–77 (2008) (noting that preemption analysis begins with a presumption against preemption, but "Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose"), *with* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

Manning has put it, these "clear statement rules share the defining feature of trying to safeguard constitutional values without the more obviously countermajoritarian step of invalidating acts of Congress."[29]

Clear statement rules bear a close resemblance to the canon of constitutional avoidance in that both implement constitutional norms through statutory interpretation.[30] Indeed, they often operate in the same fashion, with courts interpreting statutes to avoid trenching on the constitutional values at stake. One notable difference, however, is that constitutional clear statement rules often apply in contexts in which no constitutional bar prevents Congress from undertaking the action at issue. As a result, Congress usually can respond to judicial decisions applying a clear statement requirement by expressly authorizing the action, and the Court will not hold Congress's action unconstitutional. By contrast, in constitutional avoidance contexts there is often a real risk that the alternative disfavored interpretation would be found unconstitutional, and thus Congress does not have the same room to respond with express authorization.[31] Yet the significant obstacles standing in the way of reenacting a statutory provision with requisite clarity minimize the import of this distinction in practice, and the constitutional avoidance canon is often characterized as one species of the wider genus of constitutional clear statement rules.[32]

Not surprisingly then, many of the complaints lodged against the avoidance canon are also raised against constitutional clear statement rules more generally. They are attacked for leading courts to deviate from likely congressional intent and for illegitimately increasing constitutional constraints on the legislature.[33] The latter criticism is even more applicable to constitutional clear statement rules than to the avoidance canon, since the former typically apply in circumstances where Congress undoubtedly has the authority to take the underlying legislative step at issue. Defenders of constitutional clear statement rules often respond that the constitutional norms served by such rules tend to be underenforced in direct litigation, due to limits on judicial competence and a doctrinal tendency to treat the

29. Manning, *supra* note 26, at 402.

30. *Cf.* Gonzales v. Oregon, 126 S. Ct. 904, 935 (2006) (Scalia, J., dissenting) (categorizing cases employing the avoidance canon as a "line of . . . clear-statement cases").

31. Manning, *supra* note 26, at 414.

32. *See* Eskridge & Frickey, *supra* note 26, at 599–600, 637–38; Manning, *supra* note 26, at 414; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000).

33. *See, e.g.*, Eskridge & Frickey, *supra* note 26, at 632–38 (critiquing clear statement rules for prioritizing judicial over legislative value choices and for entailing judicial enforcement of constitutional norms whose enforcement should be left to the legislature); Schauer, *supra* note 20, at 74, 83, 89 (arguing that the application of constitutional clear statement rules leads to statutory interpretations that Congress did not intend, has difficulty overcoming, and are insufficiently justified); *see also* Manning, *supra* note 26, at 418–19, 423–26 (detailing frequent criticisms and arguing that even if clear statement rules are not as intrusive as some argue, they produce interpretations at odds with the obvious reading of the text and represent unjustified judicial value balancing).

underlying norm as better suited to political enforcement. On this view, constitutional clear statement rules are a legitimate means of ensuring that constitutional norms are given their due weight by the legislature.[34] Thus, for example, some argue that requiring Congress to clearly state when it is burdening the states helps reinforce the political safeguards of federalism found in the Constitution—an approach often referred to as "process federalism."[35] Requiring such clear language from Congress engages these political safeguards by obliging Congress to confront the issue directly in order to achieve the federalism-implicating result.[36]

Whether justified or not, little debate exists over the effect of constitutional clear statement rules. They make it more difficult for Congress to legislate in certain ways and contexts or on certain issues. In addition, clear statement rules serve to make Congress's specific legislative language more constitutionally important than is usually the case. Although rooted in substantive normative concerns, clear statement rules put a premium on congressional choice of labels and other procedural legislative choices.[37] As a result, clear statement rules stand in some tension with the Court's general approach of not policing congressional procedures or requiring proof that Congress adequately considered the merits of enacted legislation unless the legislation implicates individual constitutional rights that trigger heightened scrutiny.[38] On the other hand, at least in the federalism context, constitutional clear statement rules find some support in recent decisions suggesting that Congress must identify the factual predicate for a statute in order for it to fall within certain heads of legislative authority.[39]

Despite their overlap and shared underpinnings, there is one area in which the avoidance canon and clear statement rules lead to diametrically opposed results. That area involves questions about the precise head of legislative authority pursuant to which Congress enacted the statute in

34. *See* Sunstein, *supra* note 32, at 316–17; Young, *supra* note 21, at 1552 (arguing that some constitutional principles take the form of resistance norms rather than absolute limitations on Congress). For doubts about this defense, see Eskridge & Frickey, *supra* note 26, at 633–34 (noting that arguments against judicial enforcement of structural federalism norms through direct constitutional review also apply to statutory interpretation).

35. *See* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001). For the canonical statement of the view that constitutional federalism is primarily politically enforced, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

36. *See* Young, *supra* note 35, at 1359.

37. *See, e.g.*, Arlington Cent. Sch. Dist. Bd. v. Murphy, 548 U.S. 291, 296–98 (2008) (noting that conditions on federal grants to the states must be "unambiguously" stated and holding that statutory reference to "attorneys' fees" did not unambiguously include expert fees).

38. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980).

39. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) (Congress's enforcement power under Section 5 of the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549, 562–63 (1995) (Congress's commerce power).

question. If the courts were to require Congress to expressly invoke particular sources of legislative authority each time it acts (and if they were to judge the constitutionality of the enactment only against the invoked heads of authority), the result could be a large increase in the number of measures found unconstitutional. Potential bases for upholding a statute that Congress did not explicitly invoke would be off the table. The avoidance canon in contrast, has the opposite effect. If a measure would be a constitutional exercise of a particular head of legislative power, and if it is plausible to read the measure as an exercise of that power, then under the avoidance canon, courts should adopt that interpretation whether or not Congress expressly embraced the power in question. Far from requiring Congress to state clearly the authority under which it acts, the avoidance canon suggests that congressional failure to invoke a particular authority should not matter if the measure nonetheless can be read as enacted on that basis.

Despite its growing affection for clear statement rules in recent decades, the Court has not adopted a rule of the sort just described—that is, it has not required Congress to state expressly the head of legislative authority pursuant to which it acts. Interestingly, there has recently been some support in Congress for a self-imposed rule along these lines. Following the 2010 congressional elections, the House of Representatives adopted a rule requiring each introduced bill or joint resolution to be accompanied by a statement of the constitutional power granted to Congress to enact the legislation.[40] Whether or not this new House rule ultimately has any meaningful impact on congressional behavior, for its part the Court has continued to adhere to its longstanding view that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."[41] Indeed, at times the Court has analyzed whether federal legislation falls within the scope of powers that Congress plainly did not invoke.[42] Thus, for example, although over the last fifteen years the Court has imposed greater limits on Congress's power under Section 5 of

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40. The rule provides:

> A bill or joint resolution may not be introduced unless the sponsor submits for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution. The statement shall appear in a portion of the Record designated for that purpose and be made publicly available in electronic form by the Clerk.

RULES OF THE HOUSE OF REPRESENTATIVES, 112th Cong., R. XII(7)(c)(1) (Jan. 5, 2011), *available at* http://clerk.house.gov/legislative/house-rules.pdf. For an announcement and description of the rule change, see *New Constitutional Authority Requirement for Introduced Legislation*, HOUSE COMM. ON RULES (Jan. 5, 2011), http://www.rules.house.gov/about/PolicyDetail.aspx?NewsID=72.

41. Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948); *see* EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983); *see also* Lopez, 514 U.S. at 562 ("Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.").

42. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000).

the Fourteenth Amendment, it has not demanded that Congress expressly invoke Section 5 before assessing whether the statute in question satisfies its substantive standards. In short, clear statement rules have been applied to determine a statute's substantive scope, but generally not to determine whether it is an exercise of a particular head of legislative authority.[43]

II. THE ACA LITIGATION AND THE TAX POWER QUESTION

The canon of constitutional avoidance, clear statement rules, and the choice of which to apply when determining whether Congress acted under a particular head of authority all took center stage in *NFIB*. A number of lower courts refused to address the constitutionality of the individual mandate under the tax power on the ground that Congress had not signaled its intent to invoke that power with adequate clarity. In so holding, those courts emphasized several textual features of the ACA, in particular that Congress denominated the financial imposition for failing to purchase insurance a "penalty," despite describing it as a tax in earlier drafts of the legislation and despite calling other ACA impositions taxes. They also noted that Congress had included numerous findings to demonstrate that the mandate fell under the commerce power but none to support invocation of the tax power, such as findings on the amount of revenue the measure was expected to generate from those who paid the penalty instead of purchasing insurance.[44]

The opinion that devoted the most attention to Congress's purported refusal to invoke the tax power may have been that of the district court in *Health & Human Services v. Florida*. There, Judge Vinson argued that, "regardless of whether the exaction could otherwise qualify as a tax . . . , it cannot be regarded as one if it clearly appears that Congress did not intend it to be," and "it is inarguably clear that Congress did not intend for the exaction to be regarded as a tax."[45] He relied on the Supreme Court's early twentieth-century opinion in *Helwig v. United States* for the proposition that congressional intent controls, and that "in the absence of any declaration by Congress affecting the manner in which the provision shall be treated, courts must decide the matter in accordance with their views of the nature of the act."[46] Although acknowledging that current doctrine does not require Congress to identify a particular source of power in order for it to

43. *See* Goshtasby v. Bd. of Trs. of the Univ. of Ill., 141 F.3d 761, 768 (7th Cir. 1998), *abrogated on other grounds by Kimel*, 528 U.S. 62; *see also* Mills v. Maine, 118 F.3d 37, 43–44 (1st Cir. 1997).

44. *See* Florida v. Dep't of Health & Human Servs., 648 F.3d 1235, 1314–20 (11th Cir. 2011); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 550–54 (6th Cir. 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part).

45. Florida v. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1133 (N.D. Fla. 2010) (internal quotations marks omitted).

46. *Id.* at 1133 (quoting Hedwig v. United States, 188 U.S. 605, 613 (1903)) (emphasis omitted).

apply, Judge Vinson nonetheless stressed Congress's failure to invoke the tax power explicitly:

> Congress should not be permitted to secure and cast politically difficult votes on controversial legislation by deliberately calling something one thing, after which defenders of that legislation take an "Alice-in-Wonderland" tack and argue in court that Congress really meant something else entirely, thereby circumventing the safeguard that exists to keep their broad power in check. If Congress intended for the penalty to be a tax, it should go back and make that intent clear (for example, by calling it a tax, relying on Congress's Constitutional taxing power, allowing it to be collected and enforced as a tax, or identifying revenue to be raised) . . . .[47]

This was tantamount to imposing a clear statement rule requiring Congress to invoke a particular power expressly in order for it to apply. Judge Vinson's embrace of that approach does not appear to have been deterred by the fact that it would lead to finding a federal statute unconstitutional. That is, Judge Vinson neither acknowledged the novelty of imposing a clear statement rule for the purposes of identifying the source of legislative authority pursuant to which Congress legislates, nor justified the dramatically different consequence of applying such a rule in that context as compared to the contexts in which clear statement rules are typically imposed.

The joint dissent at the Supreme Court acknowledged that under the canon of constitutional avoidance, the Court "must, 'if fairly possible,' construe the provision to be a tax rather than a mandate-with-penalty, since that would render it constitutional rather than unconstitutional."[48] Nonetheless, in practice the dissenters' approach was similar to Judge Vinson's, emphasizing statutory evidence that, they thought, precluded reading the mandate as a tax. According to the joint dissent, "to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it."[49] Moreover, such rewriting in the tax context raised constitutional accountability concerns: "Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry."[50] Its acknowledgment of the avoidance canon notwithstanding, the joint dissent's analysis thus seems more in line with a clear statement approach, especially in its insistence that the Court had "never—*never*—treated as a tax an exaction which faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a 'penalty.'"[51]

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47. *Id.* at 1136–37 & n.7, 1143.

48. *NFIB*, 132 S. Ct. 2566, 2651 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

49. *Id.* at 2655.

50. *Id.*

51. *Id.* at 2653.

Chief Justice Roberts saw the statutory text and the governing constitutional considerations quite differently. He criticized the joint dissent for treating the labels Congress used as determinative of the constitutional inquiry, and emphasized instead the broad scope of Congress's taxing authority, together with the avoidance canon. In his view, it was sufficient under the Court's precedents that "Congress had the power to impose the exaction in [the mandate] under the taxing power, and that [the mandate] need not be read to do more than impose a tax."[52] On the latter point, the Chief Justice agreed that "[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance," which he deemed to be beyond Congress's authority under the Commerce and Necessary and Proper Clauses.[53] But he maintained that determining "the most natural interpretation of the mandate" was not the proper inquiry. [54] In light of the avoidance canon, the question instead was whether it was "fairly possible" or "reasonable" to read the mandate as imposing a tax on the decision not to purchase insurance. Finding that the mandate could reasonably be so characterized, Roberts sustained it under the tax power.[55]

Some have criticized the Chief Justice for applying the canon of constitutional avoidance to the tax power question at all. According to Nicholas Rosenkranz, it was fundamentally misguided to apply avoidance in this case because avoidance applies only to questions of statutory interpretation and not to matters of what Rozenkranz calls "constitutional characterization." In Rosenkranz's view, by construing the mandate to afford a choice between purchasing insurance and paying a tax, "[t]he Chief is not interpreting the meaning of a statute to avoid a constitutional problem. Instead he is characterizing a statute—whose meaning is not in doubt—to be a tax for purposes of the Constitution."[56] And that, Rosenkranz maintains, was a kind of category mistake: it applied the avoidance canon where it does not belong.

The problem with this argument is its premise—that the "meaning" of the mandate and its accompanying exaction is "not in doubt." Rosenkranz sees no doubt on the matter because he sees no operative difference between a provision that makes it unlawful not to purchase insurance and then sanctions offenders by requiring them to pay a penalty, and a provision that allows individuals to choose between purchasing insurance and paying a tax equal in size to the penalty in the first scenario. In making this argument, Rosenkranz endorses a view (commonly associated with Holmes's "bad

52. *Id.* at 2598 (majority opinion).

53. *Id.* at 2573.

54. *Id.* at 2594.

55. *Id.* at 2573, 2600.

56. Nicholas Quinn Rosenkranz, *Roberts Was Wrong To Apply the Canon of Constitutional Avoidance to the Mandate*, SCOTUSREPORT (July 11, 2012 8:36 A.M.), http://www.scotusreport.com/2012/07/11/roberts-was-wrong-to-apply-the-canon-of-constitutional-avoidance-to-the-mandate/.

man"), that all that matters in determining legal meaning is the law's material consequences.[57] But that is not the only way to view the law, and clearly the Chief Justice did not adopt that view in *NFIB*. Instead, he saw a difference in legal meaning (as well as constitutional permissibility, for purposes of the tax power) between (1) a command to purchase insurance that renders nonpurchases unlawful and (2) a choice between the equally lawful alternatives of purchasing insurance and paying a tax. In a sense, the difference is largely expressive: it has to do with whether the law expresses a view that the failure to purchase insurance is unlawful.[58] But because the Chief Justice saw that difference as significant as a matter of statutory meaning, and because that same difference also tracked his view of the contours of Congress's legislative authority under the tax power, it was not a category mistake for him to invoke avoidance.

The Chief Justice's use of avoidance is vulnerable to other criticisms, however. First, he construed the mandate as a tax only after considering and definitively rejecting the constitutionality of a command-based reading of the mandate under the Commerce Clause. The Chief Justice claimed that he had to structure his analysis that way:

> [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.[59]

By claiming he needed to resolve the Commerce Clause question and not simply note the existence of a serious doubt as to the mandate's constitutionality under that head of authority, the Chief Justice embraced classical, not modern, avoidance. In that respect, his approach is at odds with the dominant way the Court has employed the avoidance canon for the last century. And for that reason, he was simply wrong, doctrinally and logically, to say that he would have no basis to adopt the saving construction of the mandate without first deciding the Commerce Clause question. Applying modern avoidance, he needed only to note a serious question as to the mandate's constitutionality under the Commerce Clause before proceeding directly to the tax question.

The Chief Justice's analysis is open to a second criticism as well. In contrast to having said too much about the commerce issue, he did too little

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57. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict.").

58. On expressive accounts of the law generally, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

59. *NFIB*, 132 S. Ct. at 2600–01.

to justify the sharp contrast he drew between statutory and constitutional questions. When determining the constitutionality of the mandate under the tax power, the Chief Justice treated the ACA's key statutory language very differently than when he addressed the threshold question whether the Anti-Injunction Act (AIA) barred the courts from hearing any constitutional challenges to the mandate until it went into effect. In addressing the latter issue, he placed great weight on the particular label Congress used in the ACA. Because Congress denominated the imposition a "penalty" instead of a "tax," he reasoned, the AIA's prohibition of suits "for the purpose of restraining the assessment or collection of any tax" did not apply.[60] Yet the term "penalty" did not stop the Chief Justice from construing the mandate as a "tax" for constitutional purposes. He justified the divergence on the ground that one issue is purely statutory while the latter is constitutional:

> It is of course true that the Act describes the payment as a "penalty," not a "tax." But while that label is fatal to the application of the [AIA], it does not determine whether the payment may be viewed as an exercise of Congress's taxing power. It is up to Congress whether to apply the [AIA] to any particular statute, so it makes sense to be guided by Congress's choice of label on that question. That choice does not, however, control whether an exaction is within Congress's constitutional power to tax.[61]

Simply invoking the difference between the statutory and constitutional domains is not enough, however. The avoidance canon and clear statement rules are both examples of techniques that blend statutory interpretation and constitutional implementation. Yet in insisting that "Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other,"[62] the Chief Justice failed to acknowledge that many clear statement rules accord great weight to the particular terms Congress uses, or fails to use, in a statute. At the same time, the Chief Justice himself allowed Congress's choice of language to affect his constitutional analysis, in that his deployment of the avoidance canon depended on his determination that the saving construction (i.e., that the mandate is a tax, not a command) was "fairly possible" as a matter of the statutory text.

The Chief Justice thus did not come fully to terms with the critical analytical questions at the heart both of this case, and, more broadly, of a range of related issues linking statutory meaning and constitutional validity. When and how should Congress's choice of particular statutory language affect whether a statute is properly understood as an exercise of a particular head of legislative power? To what extent can Congress reject a particular head of power as the basis for sustaining an enactment against constitutional challenge? And why is the constitutional avoidance canon the appropriate device here, rather than a clear statement approach? To be

60. *Id.* at 2581, 2583–84.
61. *Id.* at 2594.
62. *Id.* at 2583.

sure, the joint dissent itself fares no better. It never squarely addresses the critical questions. To make matters worse, it obscures the key interpretive decisions by applying a clear statement requirement while invoking the avoidance canon.

III. STATUTORY INTERPRETATION AND CONGRESSIONAL POWER: IMPLICATIONS FROM THE PRESUMPTION OF CONSTITUTIONALITY

These questions about the proper relationship between statutory interpretation and underlying congressional authority admit no easy answers. A logical place to start, however, is with the basic posture courts adopt when reviewing most constitutional challenges, including to tax legislation: the presumption of constitutionality. In the areas where it applies, the presumption of constitutionality is a fundamental premise of judicial review. By attending to it, we can establish a fuller justification for the constitutional avoidance-based approach favored by the Chief Justice and also isolate the key shortcomings in the joint dissent's preference for a clear statement requirement.

A. The Presumption of Constitutionality

The presumption of constitutionality states that, except where fundamental rights are implicated, courts should not hold legislation unconstitutional unless the unconstitutionality is clear.[63] In its most aggressive form, articulated famously by James Bradley Thayer, the presumption of constitutionality regards Congress as the institution with primary responsibility for interpreting the Constitution.[64] As Thayer put it, "the constitution often admits of different interpretations; . . . there is often a range of choice and judgment; . . . in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and . . . whatever choice is rational is constitutional."[65] Thayer did not shy away from the implications of this standard:

> [O]ne who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his

63. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) (Marshall, C.J.) (stating that courts should not pronounce a law unconstitutional "on slight implication and vague conjecture," but instead that "[t]he opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other"); THE FEDERALIST NO. 78, at 393–94 (Alexander Hamilton) (Ian Shapiro ed., 2009) (stating that courts should hold unconstitutional only those laws that are "contrary to the manifest tenor of the Constitution" such that they create an "irreconcilable variance").

64. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136 (1893).

65. *Id.* at 144.

> duty, although he has in no degree changed his opinion, to declare it constitutional.[66]

Although influential and "attractive to great judges,"[67] Thayer's particular approach sits uneasily with how the Supreme Court has come to understand its role. Invoking *Marbury v. Madison*[68] for the proposition that it is the judiciary's special role to "say what the law is," the modern Court has insisted that the power of judicial review is the power to exercise independent judgment about a law's constitutionality.[69] Yet at the same time, the Court has emphasized repeatedly that "[r]espect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality."[70] Put another way, although the Court's determination of constitutional invalidity always trumps the contrary judgment of a coordinate branch, the Court should not lightly arrive at such a determination.

In this form, the presumption of constitutionality represents the standard approach courts take to questions of legislative constitutionality. To be sure, the Court has pulled a number of constitutional challenges outside of the presumption's ambit. In particular, laws implicating fundamental individual rights are typically viewed with judicial suspicion and will be upheld only after searching judicial scrutiny. But legislation merely "adjusting the burdens and benefits of economic life come[s] to the Court with a presumption of constitutionality,"[71] with courts presuming that facts exist to demonstrate the reasonableness of such legislative judgments.[72] Although not immune from scholarly criticism, the presumption of constitutionality is firmly rooted as a matter of judicial practice.

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66. *Id.*

67. Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 7 n.35 (1983).

68. 5 U.S. (1 Cranch) 137 (1803).

69. *See* Monaghan, *supra* note 23, at 675 ("In *City of Boerne v. Flores*, to take a prominent example, the Court, invoking *Marbury*, admonished Congress for attempting to define the substantive content of the rights secured by the Fourteenth Amendment. That task was part of the judicial duty, not part of Congress's legislative responsibility.").

70. Salazar v. Buono, 130 S. Ct. 1803, 1820 (2010); *see* Mistretta v. United States, 488 U.S. 361, 384 (1989) ("'When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President . . . , it should only do so for the most compelling constitutional reasons.'" (quoting Bowsher v. Synar, 478 U.S. 714, 736 (1956))).

71. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)) (internal quotation marks omitted); *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (noting that courts should generally assume an adequate basis for legislating unless "facts made known or generally assumed . . . preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislator").

72. F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1452–55 (2010) (describing well-entrenched deference to legislative factual judgments).

Admittedly, the presumption of constitutionality is, by its terms, a principle of constitutional adjudication, not statutory interpretation. But it would be a mistake to assume the presumption has no impact on how courts assign statutory meaning. If the presumption of constitutionality leads courts to uphold enactments in the absence of evidence of clear unconstitutionality, then ambiguity in statutory meaning can be one reason why a statute might not be clearly unconstitutional.

B. The Presumption, the AIA, and the Tax Power

Like the avoidance canon and clear statement requirements, the presumption of constitutionality also surfaced in *NFIB*. The Chief Justice included it in his introductory statement of background constitutional principles,[73] and he referred to it obliquely at the outset of his tax power analysis by emphasizing the importance of "[g]ranting the [ACA] the full measure of deference owed to federal statutes."[74] But when it came to interpreting the ACA's terms, the Chief Justice turned more directly to the avoidance canon. This was not a huge leap, since both the avoidance canon and the presumption tilt in favor of upholding legislation against constitutional attack. Yet had he devoted greater attention to the basis and operation of the presumption, the Chief Justice might have been in a position to offer a more complete defense of his interpretive approach.

One place where Chief Justice Roberts could have put the presumption to good use was in explaining why Congress's choice of the "penalty" label was determinative of the AIA jurisdiction question but not of whether the mandate could be upheld under the tax power. As noted above, the Chief Justice's insistence that the statutory and constitutional domains are simply separate is unsatisfying, given the obvious connections between the two in some contexts (including in his own opinion, when he turned to the avoidance canon). The presumption of constitutionality, however, offers a more convincing justification.

Whether or not a statutorily denominated "penalty" triggers the AIA jurisdictional bar does not implicate the presumption, because neither answer to that question places the challenged statute in constitutional jeopardy. In contrast, allowing Congress's choice of label to take the tax power completely off the table would have run headlong into the presumption of constitutionality. It would have resulted in the mandate being held unconstitutional even if the substantive operation of the provision fell entirely within Congress's legislative authority. As the Chief Justice explained, it would mean that, "even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be

73. *NFIB*, 132 S. Ct. 2566, 2579 (2012) ("'Proper respect for a coordinate branch of the government' requires that [the Court] strike down an Act of Congress only if 'the lack of constitutional authority . . . is clearly demonstrated.'" (quoting United States v. Harris, 106 U.S. 629, 635 (1883))).

74. *Id.* at 2594.

struck down because Congress used the wrong labels."[75] Such an unforgiving stance is very difficult to square with the idea at the heart of the presumption—that Congress should be presumed to intend to legislate within constitutional bounds. The presumption of constitutionality thus offers a more robust basis for treating the ACA's text quite differently when determining the AIA's application than when assessing the tax power's applicability.

C. The Presumption, Avoidance, Clear Statement Rules, and Congressional Power

It should be clear by now that the presumption of constitutionality and the avoidance canon are closely aligned. Both lead the Court to construe statutes to preserve their constitutionality, where possible. The Court has defended both on similar grounds—respect for Congress's own duty of constitutional fidelity and mindfulness of the countermajoritarian character of judicial review, in addition to Congress's superior institutional ability to make the factual determinations upon which an enactment's constitutionality might depend.[76] The Chief Justice's reliance on the avoidance canon in *NFIB* is thus defensible as consistent with those basic reasons.

What of a clear statement approach? It, too, provides an analytical method for determining whether, in a given case, a particular source of constitutional power is in play. And it at least arguably does so in service of some venerable underlying values. As Judge Vinson suggested in the Florida ACA litigation, process concerns provide the strongest argument for requiring Congress to invoke the tax power clearly before the mandate is upheld as a tax. In recognizing the constitutional breadth of the tax power, the Court has emphasized that "[t]he remedy for excessive taxation is in the hands of Congress, not the courts."[77] A clear statement rule for invoking the tax power could reinforce that political constraint by ensuring that members of Congress were aware that a measure constituted a tax and were on record supporting it as such. As noted above, other constitutional clear statement rules are frequently justified on similar process grounds.[78]

There are a number of problems, however, with adopting a clear statement approach to resolving questions like the tax power issue in *NFIB*. First, even on its own terms, a process-based defense of a tax power clear statement rule is open to question. To begin with, it simply assumes that additional clarity is needed in order to ensure political accountability for

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75. *Id.* at 2597.

76. Hessick, *supra* note 72, at 1449 ("Courts have based the presumption of constitutionality on three reasons: to show due respect to the judgments of legislators . . . ; to promote democracy by preventing courts from interfering with decisions rendered by the elected legislature; and to take advantage of the legislature's superior institutional design" when it comes to making factual determinations.).

77. United States v. Kahriger, 345 U.S. 22, 28 (1953).

78. *See, e.g.*, Young, *supra* note 35.

exercises of the tax power. But that assumption could be wrong. It seems especially questionable in the context of legislation like the ACA, which was passed after one of the most politically contentious and closely watched legislative battles in recent years, with the ACA's opponents frequently attacking the mandate as a tax.[79] At a minimum, if the assumption about the need for additional clarity is meant to reflect how clear statement rules actually operate on Congress, then further empirical investigation is warranted. In a legislative system like ours that is so replete with "vetogates," any requirement of specific text makes legislation harder to enact.[80] Clear statement rules might simply make certain types of legislative enactments more difficult to pass, without necessarily increasing political accountability in the form of greater congressional or public awareness.

In fact, a clear statement rule might actually undermine democratic values by transferring power from legislative majorities to legislative minorities.[81] True, the process constraints imposed by the constitutional requirements of bicameralism and presentment already inhibit the power of simple majorities in either the House or Senate. But those rules are expressly provided in the Constitution. The mere fact of their existence does not justify heightening minorities' control over legislation still further through the crafting of a new clear statement rule.[82] Indeed, a clear statement requirement for the invocation of the tax power would stand in substantial tension with the breadth of the constitutional grant of the tax power and the lenient standard by which tax legislation is generally reviewed.[83] This marks a stark contrast with other clear statement rules, which aim to protect well-established constitutional norms such as sovereign immunity.

More fundamentally, subjecting the tax power to a clear statement requirement would not just break new doctrinal ground, it would also have a very different effect than the various federalism-enforcing and other clear statement rules contained in existing doctrine. The existing rules generally narrow the *substantive scope* of the laws to which they apply, not the *source of legislative authority* pursuant to which Congress may be deemed to have acted. The difference is significant. Whereas clear statement rules focusing on the former generally lead courts to confine statutes to

79. *See* DAN BALZ, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 1, 7 (2010).

80. William N. Eskridge, Jr., *Vetogates,* Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008).

81. *See* Eskridge & Frickey, *supra* note 26, at 637–40 (underscoring the countermajoritarian concerns raised by clear statement rules).

82. *See* Manning, *supra* note 26, at 427–39 (challenging the legitimacy of clear statements rules that seek to enforce general constitutional values beyond the specific embodiment of such values in the Constitution).

83. *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 547 (1983); Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 89–91 (2012).

constitutionally safe terrain and then uphold them on those grounds, a clear statement rule operating on the latter would lead courts to invalidate a statute when it is not sufficiently clear that Congress intended to exercise a head of legislative authority that would be sufficient to uphold the law.

In addition to departing dramatically from existing clear statement rules, a clear statement rule that narrows the available sources of legislative authority would conflict sharply with the presumption of constitutionality. By directing that legislation be upheld except where clearly unconstitutional, the presumption gives Congress the benefit of the constitutional doubt. But a rule requiring Congress to clearly invoke its tax authority before an enactment is upheld on that ground would have precisely the opposite effect, as the *NFIB* joint dissent and lower court decisions like Judge Vinson's so vividly illustrate.

Respecting the presumption of constitutionality thus entails rejecting any requirement that Congress expressly identify the head of legislative authority under which it acts. To be sure, Congress may need to demonstrate that the substantive predicates for invoking a particular authority are met. Thus, for example, the Court has stated that Congress must establish an ongoing pattern of unconstitutional state action in order to pass legislation enforcing the relevant constitutional norm pursuant to Section 5 of the Fourteenth Amendment.[84] But imposing such evidentiary requirements is quite different from invalidating legislation because Congress did not invoke its Section 5 power with adequate clarity. These substantive constitutional requirements must be satisfied regardless of whether Congress invokes the Section 5 power as the basis for legislation, and if they are met then a legislative measure can fall within the Section 5 power even though Congress was silent about its intent to exercise its Section 5 power.[85]

D. A More Difficult Question About a Different Kind of Clear Statement

Although not raised in *NFIB* itself, a related question involves whether and to what extent Congress can prevent the courts from upholding the constitutionality of challenged legislation based on a particular head of legislative authority. That is, even if the courts should not impose a clear

84. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356, 368 (2001) (holding that Title I of the ADA exceeded Congress's Fourteenth Amendment enforcement power because "[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled"). The Court has sometimes sustained measures based on evidence of unconstitutional state actions not expressly invoked by Congress, raising questions about the extent to which Congress itself must give voice to this evidence for the enforcement power to apply. *See* Tennessee v. Lane, 541 U.S. 509, 524 (2004) (upholding Title II of the ADA based in part on evidence of discrimination against the disabled "documented in this Court's cases").

85. *See* Varner v. Ill. State Univ., 226 F.3d 927, 930 n.2, 936 (7th Cir. 2000) (sustaining the Equal Pay Act under the Section 5 power as applied to the states, even though Congress only expressly invoked the commerce power).

statement requirement on Congress's use of the tax (or any other) power, what should courts do if Congress clearly states an intent *not* to use a particular power when enacting a particular provision?

We regard this as a difficult question. On the one hand, respecting Congress might seem to entail crediting its decisions about which sources of legislative authority to invoke. A judicial refusal to honor such congressional choices could undermine the political checks against Congress's abuse of its powers. On the other, some political checks would still remain even if Congress were not able to preclude judicial consideration of a given head of authority. Legislation would still need to be actually enacted before courts could consider any challenges to its constitutionality, and so the constraints of bicameralism and presentment would continue to apply.

In addition, congressional efforts to preclude courts from sustaining legislation on a particular constitutional basis could risk unwarranted legislative intrusion into the core judicial function of constitutional adjudication. On this view, in rejecting certain heads of authority, Congress is not simply exercising its own independent interpretive authority but is also seeking to dictate the terms of constitutional adjudication by the courts. Requiring courts to defer to such maneuvers could thus threaten basic separation of powers principles. Yet at the same time, judicial refusal to credit Congress's announcement about which powers it is exercising in a given context might also be thought to risk serious damage to other separation of powers principles that reserve the discretion inherent in legislating to Congress, not the courts.

The presumption of constitutionality cannot solve this puzzle, but it can limit the problem's scope. To honor the presumption, we think courts should at least require clear evidence before concluding that Congress has in fact rejected a particular power. And interestingly, this suggests that the appropriate clear statement rule in this context is the opposite of the one suggested by the *NFIB* joint dissent and Judge Vinson's opinion below. Instead of requiring Congress to expressly invoke a given head of legislative power before examining the constitutionality of a given enactment under that power, courts should require Congress to expressly renounce a head of power before taking it off the table. Put another way, courts should err on the side of keeping any available source of legislative authority on the table unless Congress clearly and expressly disavows it.

Applied to legislation enacted pursuant to the new House rule described above,[86] we think that even express invocation of fewer than all available heads of legislative power should not be enough to disregard the heads of power not invoked. That is, if a particular bill could arguably be upheld under either or both of the commerce and tax powers, and if the House expressly identifies only the commerce power as the source of authority for the bill without saying anything about the tax power, we think that silence

86. *See supra* note 40 and accompanying text.

should probably not be enough to take the tax power off the table. Instead, the presumption of constitutionality should keep the tax power on the table unless and until Congress explicitly disavows it, not just omits mention of it.

CONCLUSION

In relying on the presumption of constitutionality to sort out the choice between the avoidance canon and a clear statement rule in a case like *NFIB*, our analysis has largely accepted the legitimacy of the presumption. Our project has been to explore the presumption's implications, as well as its relationship to the other interpretive principles discussed here. Some commentators—including, tellingly, one of the architects of the constitutional challenge to the ACA's individual mandate—have urged courts to abandon the presumption of constitutionality altogether, and instead to approach all or most legislation with much greater constitutional skepticism.[87] Similarly, in the *NFIB* oral argument, Justice Kennedy expressed skepticism about the presumption's applicability to assessing the constitutionality of the individual mandate: "I understand that we must presume laws are constitutional, but, even so, when you are changing the relation of the individual to the government in . . . what we can stipulate is, I think, a unique way, do you not have a heavy burden of justification to show authorization under the Constitution?"[88]

For those inclined to limit or abandon the presumption of constitutionality, our argument is unlikely to persuade. But the presumption is a well-established, longstanding tenet of the American constitutional tradition.[89] Abandoning it would be a radical departure from established judicial practice. The Court did not take such a step in *NFIB*, and thus the presumption of constitutionality continues to be a foundational principle of judicial review. It provides robust justification of Chief Justice Roberts's reliance on the avoidance canon to uphold the individual mandate under the tax power, and it counts powerfully against the sort of clear statement rule favored by the joint dissent.

87. *See* RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 259 (2004) (urging "shifting the background interpretive presumption of constitutionality whenever legislation restricts the liberties of the people" and adopting instead a "Presumption of Liberty").

88. Transcript of Oral Argument at 12, Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf.

89. Hessick, *supra* note 72, at 1455.