KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Raich v. Gonzales, 9th Cir.(Cal.), March 14, 2007

117 S.Ct. 2365
Supreme Court of the United States

898Jay PRINTZ, Sheriff/Coroner, Ravalli County, Montana, Petitioner,
v.
UNITED STATES.
Richard MACK, Petitioner,
v.
UNITED STATES.

Nos. 95–1478, 95–1503.
|
Argued Dec. 3, 1996.
|
Decided June 27, 1997.

County sheriff sought to enjoin enforcement of provisions of Brady Handgun Violence Prevention Act imposing requirements on chief law enforcement officers (CLEO). The United States District Court for the District of Montana, Charles C. Lovell, J., 854 F.Supp. 1503, held background check requirement to be unconstitutional. Another county sheriff brought separate action to declare Brady Act unconstitutional. The United States District Court for the District of Arizona, John M. Roll, J., 856 F.Supp. 1372, found that background search requirement was unconstitutional. Parties appealed, and cases were consolidated. The Court of Appeals for the Ninth Circuit, 66 F.3d 1025, reversed. Certiorari was granted. The Supreme Court, Justice Scalia, held that: (1) obligation to conduct background checks on prospective handgun purchasers imposed unconstitutional obligation on state officers to execute federal laws; (2) sheriffs were not in position to challenge Act's requirements that CLEOs destroy handgun-applicant statements and give would-be purchasers written statements of reasons for determining their ineligibility to receive handguns; and (3) there were no plaintiffs before Court who could challenge provisions requiring firearms dealers to forward to CLEO notice of contents of handgun-applicant statement, and to wait five business days before consummating sale.

Reversed.

Justices O'Connor and Thomas filed concurring opinions.

Justice Stevens filed a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined.

Justice Souter filed a dissenting opinion.

Justice Breyer filed a dissenting opinion in which Justice Stevens joined.

**West Codenotes**

**Held Unconstitutional**
18 U.S.C.A. § 922(s)(1)(A)(i)(III, IV), (s)(2)

**2366 *898 *Syllabus* [*]

Brady Handgun Violence Prevention Act provisions require the Attorney General to establish a national system for instantly checking prospective handgun purchasers' backgrounds, note following 18 U.S.C. § 922, and command the "chief law enforcement officer" (CLEO) of each local jurisdiction to conduct such checks and perform related tasks on an interim basis until the national system becomes operative, § 922(s). Petitioners, the CLEOs for counties in Montana and Arizona, filed separate actions challenging the interim provisions' constitutionality. In each case, the District Court held that the background-check provision was unconstitutional, but concluded that it was severable from the remainder of the Act, effectively leaving a voluntary background-check system in place. The Ninth Circuit reversed, finding none of the interim provisions unconstitutional.

*Held:*

1. The Brady Act's interim provision commanding CLEOs to conduct background checks, § 922(s)(2), is unconstitutional. Extinguished with it is the duty implicit in the background-check requirement that the CLEO accept completed handgun-applicant statements (Brady Forms) from firearms dealers, §§ 922(s)(1)(A)(i)(III) and (IV). Pp. 2369–2383.

(a) Because there is no constitutional text speaking to the precise question whether congressional action compelling state officers to execute federal laws is unconstitutional, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the Constitution's structure, and in this Court's jurisprudence. Pp. 2369–2370.

**2367 (b) Relevant constitutional practice tends to negate the existence of the congressional power asserted here, but is not conclusive. Enactments of the early Congresses seem to contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization. The early enactments establish, at most, that the Constitution 899 *899 was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions related to matters appropriate for the judicial power. The Government misplaces its reliance on portions of The Federalist suggesting that federal responsibilities could be imposed on state officers. None of these statements necessarily implies—what is the critical point here—that Congress could impose these responsibilities *without the States' consent*. They appear to rest on the natural assumption that the States would consent, see *FERC v. Mississippi*, 456 U.S. 742, 796, n. 35, 102 S.Ct. 2126, 2157, n. 35, 72 L.Ed.2d 532 (O'CONNOR, J., concurring in judgment and dissenting in part). Finally, there is an absence of executive-commandeering federal statutes in the country's later history, at least until very recent years. Even assuming that newer laws represent an assertion of the congressional power challenged here, they are of such recent vintage that they are not probative of a constitutional tradition. Pp. 2370–2376.

(c) The Constitution's structure reveals a principle that controls these cases: the system of "dual sovereignty." See, *e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410. Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty that is reflected throughout the Constitution's text. See, *e.g.*, *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101. The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people. The Federal Government's power would be augmented immeasurably and impermissibly if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States. Pp. 2376–2378.

(d) Federal control of state officers would also have an effect upon the separation and equilibration of powers between the three branches of the Federal Government itself. The Brady Act effectively transfers the President's responsibility to administer the laws enacted by Congress, Art. II, §§ 2 and 3, to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control. The Federal Executive's unity would be shattered, and the power of the President would be subject to reduction, if Congress could simply require state officers to execute its laws. P. 2378.

(e) Contrary to the contention of Justice STEVENS' dissent, the Brady Act's direction of the actions of state executive officials is not constitutionally valid under Art. I, § 8, as a law "necessary and proper" to the execution of Congress's Commerce Clause power to regulate handgun sales. Where, as here, a law violates the state sovereignty principle, it is not a law "proper for carrying into Execution" delegated 900 *900 powers within the Necessary and Proper Clause's meaning. Cf. *New York v. United States*, 505 U.S. 144, 166, 112 S.Ct. 2408, 2423, 120 L.Ed.2d 120. The Supremacy Clause does not help the dissent, since it makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]." Art. VI, cl. 2. Pp. 2378–2379.

(f) Finally, and most conclusively in these cases, the Court's jurisprudence makes clear that the Federal Government may not compel the States to enact or administer a federal regulatory program. See, *e.g.*, *New York*, *supra*, at 188, 112 S.Ct., at 2435. The attempts of the Government and Justice STEVENS' dissent to distinguish *New York*—on grounds that the Brady Act's background-check provision does not require state legislative or executive officials to make policy; that requiring state officers to perform discrete, ministerial federal tasks does not diminish the state or federal officials' accountability; and that the Brady Act is addressed to individual CLEOs

**2368 while the provisions invalidated in *New York* were directed to the State itself—are not persuasive. A "balancing" analysis is inappropriate here, since the whole *object* of the law is to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty; it is the very *principle* of separate state sovereignty that such a law offends. See, *e.g.*, *New York*, *supra*, at 187, 112 S.Ct., at 2434. Pp. 2379–2383.

2. With the Act's background-check and implicit receipt-of-forms requirements invalidated, the Brady Act requirements that CLEOs destroy all Brady Forms and related records, § 922(s)(6)(B)(i), and give would-be purchasers written statements of the reasons for determining their ineligibility to receive handguns, § 922(s)(6)(C), require no action whatsoever on the part of CLEOs such as petitioners, who are not voluntary participants in administration of the federal scheme. As to them, these provisions are not unconstitutional, but simply inoperative. Pp. 2383–2384.

3. The Court declines to address the severability question briefed and argued by the parties: whether firearms dealers remain obliged to forward Brady Forms to CLEOs, §§ 922(s)(1)(A)(i)(III) and (IV), and to wait five business days thereafter before consummating a firearms sale, § 922(s)(1)(A)(ii). These provisions burden only dealers and firearms purchasers, and no plaintiff in either of those categories is before the Court. P. 2384.

66 F.3d 1025 (C.A.9 1995), reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., *post*, p. 2385, and THOMAS, J., *post*, p. 2385, filed concurring opinions. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and 901 *901 BREYER, JJ., joined, *post*, p. 2386. SOUTER, J., filed a dissenting opinion, *post*, p. 2401. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 2404.

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**Opinion**

902 *902 Justice SCALIA delivered the opinion of the Court.

The question presented in these cases is whether certain interim provisions of the Brady Handgun Violence Prevention Act, Pub.L. 103–159, 107 Stat. 1536, commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate the Constitution.

I

The Gun Control Act of 1968(GCA), 18 U.S.C. § 921 *et seq.*, establishes a detailed federal scheme governing the distribution of firearms. It prohibits firearms dealers from transferring handguns to any person under 21, not resident in the dealer's State, or prohibited by state or local law from purchasing or possessing firearms, § 922(b). It also forbids possession of a firearm by, and transfer of a firearm to, convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, and persons who have been subjected to certain restraining orders or been convicted of a misdemeanor offense involving domestic violence. §§ 922(d) and (g).

In 1993, Congress amended the GCA by enacting the Brady Act. The Act requires the Attorney General to establish a national instant background-check system by November 30, 1998, Pub.L. 103–159, as amended, Pub.L. 103–322, 103 Stat. 2074, note following 18 U.S.C. § 922, and immediately puts in place certain interim provisions until that system becomes operative. Under the interim provisions, a firearms dealer who proposes to transfer a handgun 903 *903 must first: (1) receive from the transferee a statement (the **2369 Brady Form), § 922(s)(1)(A)(i)(I), containing the name, address, and date of birth of the proposed transferee along with a sworn

statement that the transferee is not among any of the classes of prohibited purchasers, § 922(s)(3); (2) verify the identity of the transferee by examining an identification document, § 922(s)(1)(A)(i)(II); and (3) provide the "chief law enforcement officer" (CLEO) of the transferee's residence with notice of the contents (and a copy) of the Brady Form, §§ 922(s)(1)(A)(i)(III) and (IV). With some exceptions, the dealer must then wait five business days before consummating the sale, unless the CLEO earlier notifies the dealer that he has no reason to believe the transfer would be illegal. § 922(s)(1)(A)(ii).

The Brady Act creates two significant alternatives to the foregoing scheme. A dealer may sell a handgun immediately if the purchaser possesses a state handgun permit issued after a background check, § 922(s)(1)(C), or if state law provides for an instant background check, § 922(s)(1)(D). In States that have not rendered one of these alternatives applicable to all gun purchasers, CLEOs are required to perform certain duties. When a CLEO receives the required notice of a proposed transfer from the firearms dealer, the CLEO must "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." § 922(s)(2). The Act does not require the CLEO to take any particular action if he determines that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but is not required to do so. If, however, the CLEO notifies a gun dealer that a prospective purchaser is ineligible to receive a handgun, he must, upon request, provide the would-be purchaser with a written statement of the reasons for that determination. § 922(s)(6)(C). Moreover, if the 904 *904 CLEO does not discover any basis for objecting to the sale, he must destroy any records in his possession relating to the transfer, including his copy of the Brady Form. § 922(s)(6)(B)(i). Under a separate provision of the GCA, any person who "knowingly violates [the section of the GCA amended by the Brady Act] shall be fined under this title, imprisoned for not more than 1 year, or both." § 924(a)(5).

Petitioners Jay Printz and Richard Mack, the CLEOs for Ravalli County, Montana, and Graham County, Arizona, respectively, filed separate actions challenging the constitutionality of the Brady Act's interim provisions. In each case, the District Court held that the provision requiring CLEOs to perform background checks was unconstitutional, but concluded that that provision was severable from the remainder of the Act, effectively leaving a voluntary background-check system in place. 856 F.Supp. 1372 (D.Ariz.1994); 854 F.Supp. 1503 (D.Mont.1994). A divided panel of the Court of Appeals for the Ninth Circuit reversed, finding none of the Brady Act's interim provisions to be unconstitutional. 66 F.3d 1025 (1995). We granted certiorari. 518 U.S. 1003, 116 S.Ct. 2521, 135 L.Ed.2d 1046 (1996).

## II

From the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme. Regulated firearms dealers are required to forward Brady Forms not to a federal officer or employee, but to the CLEOs, whose obligation to accept those forms is implicit in the duty imposed upon them to make "reasonable efforts" within five days to determine whether the sales reflected in the forms are lawful. While the CLEOs are subjected to no federal requirement that they prevent the sales determined to be unlawful (it is perhaps assumed that their state-law duties will require prevention or apprehension), they are empowered to grant, in effect, waivers of the federally prescribed 905 *905 5–day waiting period for handgun purchases by notifying the gun dealers that they have no reason to believe the transactions would be illegal.

Petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers **2370 to execute federal laws is unconstitutional. Because there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court. We treat those three sources, in that order, in this and the next two sections of this opinion.

[1] [2] Petitioners contend that compelled enlistment of state executive officers for the administration of federal programs is, until very recent years at least, unprecedented. The Government contends, to the contrary, that "the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws," Brief for United States 28. The Government's contention demands our careful consideration, since early congressional enactments "provid[e] 'contemporaneous and weighty evidence' of the Constitution's meaning," *Bowsher v. Synar*, 478 U.S. 714, 723–724, 106 S.Ct. 3181, 3186, 92 L.Ed.2d 583 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790, 103 S.Ct. 3330, 3335, 77 L.Ed.2d 1019 (1983)). Indeed, such "contemporaneous legislative exposition of the Constitution ..., acquiesced in for a long term of years, fixes the construction to be given its provisions." *Myers v. United States*, 272 U.S. 52, 175, 47 S.Ct. 21, 45, 71 L.Ed. 160 (1926) (citing numerous cases). Conversely if, as petitioners contend, earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.

The Government observes that statutes enacted by the first Congresses required state courts to record applications for citizenship, Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, Act of June 18, 906 *906 1798, ch. 54, § 2, 1 Stat. 567, and to register aliens seeking naturalization and issue certificates of registry, Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154–155. It may well be, however, that these requirements applied only in States that authorized their courts to conduct naturalization proceedings. See Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103; *Holmgren v. United States*, 217 U.S. 509, 516–517, 30 S.Ct. 588, 589, 54 L.Ed. 861 (1910) (explaining that the Act of March 26, 1790, "conferred authority upon state courts to admit aliens to citizenship" and refraining from addressing the question "whether the States can be required to enforce such naturalization laws against their consent"); *United States v. Jones*, 109 U.S. 513, 519–520, 3 S.Ct. 346, 351, 27 L.Ed. 1015 (1883) (stating that these obligations were imposed "with the consent of the States" and "could not be enforced against the consent of the States"). [1] Other statutes of that era apparently or at least arguably required state courts to perform functions unrelated to naturalization, such as resolving controversies between a captain and the crew of his ship concerning the seaworthiness of the vessel, Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132, hearing the claims of slave owners who had apprehended fugitive slaves and issuing certificates authorizing the slave's forced removal to the State from which he had fled, Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302–305, taking 907 *907 proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War, Act of Apr. 7, 1798, ch. 26, § 3, 1 Stat. 548, and ordering the deportation of alien enemies in times of war, Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577–578.

**2371 These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States. See C. Warren, The Making of the Constitution 325–327 (1928). And the Supremacy Clause, Art. VI, cl. 2, announced that "the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time. The principle underlying so-called "transitory" causes of action was that laws which operated elsewhere created obligations in justice that courts of the forum State would enforce. See, *e.g.*, *McKenna v. Fisk*, 1 How. 241, 247–249, 11 L.Ed. 117 (1843). The Constitution itself, in the Full Faith and Credit Clause, Art. IV, § 1, generally required such enforcement with respect to obligations arising in other States. See *Hughes v. Fetter*, 341 U.S. 609, 71 S.Ct. 980, 95 L.Ed. 1212 (1951).

For these reasons, we do not think the early statutes imposing obligations on state courts imply a power of

Congress to impress the state executive into its service. Indeed, it can be argued that the numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations 908 *908 on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power.[2] The only early federal law the Government has brought to our attention that imposed duties on state executive officers is the Extradition Act of 1793, which requiredthe *909 "executive authority" of a State to cause the arrest and delivery of a fugitive from justice upon the request of the executive authority of the State from which the fugitive had fled. See Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302. That was in direct implementation, **2372 however, of the Extradition Clause of the Constitution itself, see Art. IV, § 2.[3]

Not only do the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption. On September 23, 1789—the day before its proposal of the Bill of Rights, see 1 Annals of Congress 912–913—the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government's laws: the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States' executive, but a recommendation to their legislatures. Congress "recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States," and offered to pay 50 cents per month for each prisoner. Act of Sept. 23, 1789, 1 Stat. 96. Moreover, when Georgia refused 910 *910 to comply with the request, see L. White, The Federalists 402 (1948), Congress's only reaction was a law authorizing the marshal in any State that failed to comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made, see Resolution of Mar. 3, 1791, 1 Stat. 225.

In addition to early legislation, the Government also appeals to other sources we have usually regarded as indicative of the original understanding of the Constitution. It points to portions of The Federalist which reply to criticisms that Congress's power to tax will produce two sets of revenue officers—for example, "Brutus's" assertion in his letter to the New York Journal of December 13, 1787, that the Constitution "opens a door to the appointment of a swarm of revenue and excise officers to prey upon the honest and industrious part of the community, eat up their substance, and riot on the spoils of the country," reprinted in 1 Debate on the Constitution 502 (B. Bailyn ed.1993). "Publius" responded that Congress will probably "make use of the State officers and State regulations, for collecting" federal taxes, The Federalist No. 36, p. 221 (C. Rossiter ed. 1961) (A. Hamilton) (hereinafter The Federalist), and predicted that "the eventual collection [of internal revenue] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States," *id.*, No. 45, at 292 (J. Madison). The Government also invokes The Federalist's more general observations that the Constitution would "enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws," *id.*, No. 27, at 176 (A. Hamilton), and that it was "extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union," *id.*, No. 45, at 292 (J. Madison). But none of these statements necessarily implies—what is the critical point here—that Congress could impose these responsibilities *911 *without the consent of the States.* They appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government, see *FERC v. Mississippi*, 456 U.S. 742, 796, n. 35, 102 S.Ct. 2126, 2157, n. 35, 72 L.Ed.2d 532 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part), an assumption proved correct by the extensive mutual assistance the States and Federal **2373 Government voluntarily provided one another in the early days of the Republic, see generally White, *supra*, at 401–404, including voluntary *federal implementation of state law*, see, *e.g.*, Act of Apr. 2, 1790, ch. 5, § 1, 1 Stat. 106 (directing federal tax collectors and customs officers to assist in enforcing state inspection laws).

[3] Another passage of The Federalist reads as follows:

> "It merits particular attention ... that the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath. Thus, the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends;* and will be rendered auxiliary to the enforcement of its laws." The Federalist No. 27, at 177 (A. Hamilton) (emphasis in original).

The Government does not rely upon this passage, but Justice SOUTER (with whose conclusions on this point the dissent is in agreement, see *post,* at 2390 makes it the very foundation of his position; so we pause to examine it in some detail. Justice SOUTER finds "[t]he natural reading" of the phrases " 'will be incorporated into the operations of the national government' " and " 'will be rendered auxiliary to the enforcement of its laws' " to be that the National Government will have "authority ..., when exercising an otherwise ***912** legitimate power (the commerce power, say), to require state 'auxiliaries' to take appropriate action." *Post,* at 2402. There are several obstacles to such an interpretation. First, the consequences in question ("incorporated into the operations of the national government" and "rendered auxiliary to the enforcement of its laws") are said in the quoted passage to flow *automatically* from the officers' oath to observe "the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction."[4] Thus, if the passage means that state officers must take an active role in the implementation of federal law, it means that they must do so without the necessity for a congressional directive that they implement it. But no one has ever thought, and no one asserts in the present litigation, that that is the law. The second problem with Justice SOUTER's reading is that it makes state *legislatures* subject to federal direction. (The passage in question, after all, does not include legislatures merely incidentally, as by referring to "all state officers"; it refers to legislatures *specifically* and *first of all.*) We have held, however, that state legislatures are *not* subject to federal direction. *New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).[5]

****2374** 913 ***913** These problems are avoided, of course, if the calculatedly vague consequences the passage recites—"incorporated into the operations of the national government" and "rendered auxiliary to the enforcement of its laws"—are taken to refer to nothing more (or less) than the duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid.[6] See *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984) (federal pre-emption of conflicting state law). This meaning accords well with the context of the passage, which seeks to explain why the new system of federal law directed to individual citizens, unlike the old one of federal law directed to the States, will "bid much fairer to avoid the necessity of using force" against the States, The Federalist No. 27, at 176. It also reconciles the 914 ***914** passage with Hamilton's statement in The Federalist No. 36, at 222, that the Federal Government would in some circumstances do well "to employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments"—which surely suggests inducing state officers to come aboard by paying them, rather than merely commandeering their official services.[7]

Justice SOUTER contends that his interpretation of The Federalist No. 27 is "supported by No. 44," written by Madison, wherefore he claims that "Madison and Hamilton" together stand opposed to our view. *Post,* at 2402, 2404. In fact, The Federalist No. 44 quite clearly contradicts Justice SOUTER's reading. In that Number, Madison justifies the requirement that state officials take an oath to support the Federal Constitution on the ground that they "will have an essential agency in giving effect to the federal Constitution." If the dissent's reading of The Federalist No. 27 were correct (and if Madison agreed with it), one would surely have expected that "essential agency" of state executive officers (if described further) to be described as their responsibility to execute the laws enacted under the Constitution. Instead, however,

  

The Federalist No. 44 continues with the following description:

> "The election of the President and Senate will depend, in all cases, on the legislatures of the several States. And the election of the House of Representatives will equally depend on the same authority in the first instance; and will, probably, forever *be conducted by the officers* and according to the laws *of the States.*" *Id.*, at 287 (emphasis added).

915 ***915** It is most implausible that the person who labored for that example of state executive officers' assisting the Federal Government believed, but neglected to mention, that they had a responsibility to execute federal laws.[8] ****2375** If it was indeed Hamilton's view that the Federal Government could direct the officers of the States, that view has no clear support in Madison's writings, or as far as we are aware, in text, history, or early commentary elsewhere.[9]

916 ***916** To complete the historical record, we must note that there is not only an absence of executive-commandeering statutes in the early Congresses, but there is an absence of them in our later history as well, at least until very recent years. The Government points to the Act of August 3, 1882, ch. 376, §§ 2, 4, 22 Stat. 214, which enlisted state officials "to take charge of the local affairs of immigration in the ports within such State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need of public aid"; to inspect arriving immigrants and exclude any person found to be a "convict, lunatic, idiot," or indigent; and to send convicts back to their country of origin "without compensation." The statute did not, however, *mandate* those duties, but merely empowered the Secretary of the Treasury "to *enter into contracts* with such State ... officers as *may be designated* for that purpose *by the governor* of any State." (Emphasis added.)

The Government cites the World War I selective draft law that authorized the President "to utilize the service of any or all departments and any or all officers or agents of the United States *and of the several States,* Territories, and the District of Columbia, and subdivisions thereof, in the execution of this Act," and made any person who refused to comply 917 ***917** with the President's directions guilty of a misdemeanor. Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80–81 (emphasis added). However, it is far from clear that the authorization "to utilize the service" of state officers was an authorization to *compel* the service of state officers; and the misdemeanor provision surely applied only to refusal to comply with the President's *authorized* directions, which might not have included directions to officers of States whose Governors had not volunteered their services. It is interesting that in implementing the Act President Wilson did not commandeer the services of state officers, but instead requested the assistance of the States' Governors, see Proclamation of May 18, 1917, 40 Stat. 1665 ("call[ing] upon the Governor of each of the several States ... and all officers and agents of the several States ... to perform certain duties"); Registration Regulations Prescribed by the President Under the Act of Congress Approved May 18, 1917, pt. 1, § 7 ("[T]he governor [of each State] is *requested* to act under the ****2376** regulations and rules prescribed by the President or under his direction" (emphasis added)), obtained the consent of each of the Governors, see Note, The President, the Senate, the Constitution, and the Executive Order of May 8, 1926, 21 Ill. L.Rev. 142, 144 (1926), and left it to the Governors to issue orders to their subordinate state officers, see Selective Service Regulations Prescribed by the President Under the Act of May 18, 1917, § 27 (1918); J. Clark, The Rise of a New Federalism 91 (1965). See generally Note, 21 Ill. L.Rev., at 144. It is impressive that even with respect to a wartime measure the President should have been so solicitous of state independence.

The Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes. Some of these are connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than 918 ***918** as mandates to the States; others, which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program. We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case. For deciding the issue before us here, they are of little relevance. Even assuming

they represent assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice. Compare *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), in which the legislative veto, though enshrined in perhaps hundreds of federal statutes, most of which were enacted in the 1970's and the earliest of which was enacted in 1932, see *id.*, at 967–975, 103 S.Ct., at 2792–2796 (White, J., dissenting), was nonetheless held unconstitutional.

III

The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but is not conclusive. We turn next to consideration of the structure of the Constitution, to see if we can discern among its "essential postulate[s]," *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322, 54 S.Ct. 745, 748, 78 L.Ed. 1282 (1934), a principle that controls the present cases.

A

[4] It is incontestible that the Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990). Although the States surrendered many of their powers to 919 *919 the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869); *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and ... those means and instrumentalities which are the creation of their sovereign and reserved rights," *Helvering v. Gerhardt*, 304 U.S. 405, 414–415, 58 S.Ct. 969, 973, 82 L.Ed. 1427 (1938). Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's **2377 assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[5] The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. See The Federalist No. 15. Preservation of the States as independent political entities being the price of union, and "[t]he practicality of making laws, with coercive sanctions, for the States as political bodies" having been, in Madison's words, "exploded on all hands," 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed.1911), the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and 920 *920 Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, " the only proper objects of government," The Federalist No. 15, at 109. We have set forth the historical record in more detail elsewhere, see *New York v. United States*, 505 U.S., at 161–166, 112 S.Ct., at 2420–2423, and need not repeat it here. It suffices to repeat the conclusion: "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.*, at 166, 112 S.Ct., at 2423.[10] The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"—"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are

governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838, 115 S.Ct. 1842, 1872, 131 L.Ed.2d 881 (1995) (KENNEDY, J., concurring). The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. *See New York, supra*, at 168–169, 112 S.Ct., at 2424; *United States v. Lopez*, 514 U.S. 549, 576–577, 115 S.Ct. 1624, 1638–1639, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring). Cf. *Edgar v. MITE Corp.*, 457 U.S. 624, 644, 102 S.Ct. 2629, 2641, 73 L.Ed.2d 269 (1982) ("the State has no legitimate interest in protecting nonresident [s]"). As Madison expressed it: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority *921 than the general authority is subject to them, within its own sphere." The Federalist No. 39, at 245.[11]

**2378 This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." 501 U.S., *supra*, at 458, 111 S.Ct., at 2400. To quote Madison once again:

> 922 *922 "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, at 323.

See also The Federalist No. 28, at 180–181 (A.Hamilton). The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.

B

We have thus far discussed the effect that federal control of state officers would have upon the first element of the "double security" alluded to by Madison: the division of power between State and Federal Governments. It would also have an effect upon the second element: the separation and equilibration of powers between the three branches of the Federal Government itself. The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves Presidential appointees), Art. II, § 2. The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known. See The Federalist No. 70 (A.Hamilton); 2 Documentary History of the Ratification *923 of the Constitution 495 (M. Jensen ed.1976) (statement of James Wilson); see also Calabresi & Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541 (1994). That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.[12]

[6] [7] [8] The dissent of course resorts to the last, best hope of those who defend ultra vires congressional action, the Necessary and **2379 Proper Clause. It reasons, *post*, at 2387, that the power to regulate the sale of handguns under the Commerce Clause, coupled with the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," Art. I, § 8, conclusively establishes the Brady Act's constitutional validity, because the Tenth Amendment imposes no limitations on the exercise of *delegated* powers but merely prohibits the exercise of powers "*not* delegated to the United States." What destroys

the dissent's Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself.[13] When a "La [w] ... for carrying into Execution" *924 the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, *supra,* at 2376-2377, it is not a "La[w] ... *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such." The Federalist No. 33, at 204 (A. Hamilton). See Lawson & Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 297–326, 330–333 (1993). We in fact answered the dissent's Necessary and Proper Clause argument in *New York:* "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.... [T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." 505 U.S., at 166, 112 S.Ct., at 2423.

The dissent perceives a simple answer in that portion of Article VI which requires that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution," arguing that by virtue of the Supremacy Clause this makes "not only the Constitution, but every law enacted by Congress as well," binding on state officers, including laws requiring state-officer enforcement. *Post,* at 2389. The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]," Art. VI, cl. 2, so the Supremacy 925 *925 Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.

IV

Finally, and most conclusively in the present litigation, we turn to the prior jurisprudence of this Court. Federal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until the 1970's, when the Environmental Protection Agency promulgated regulations requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes. The Courts of Appeals for the Fourth and Ninth Circuits invalidated the regulations on statutory grounds in order to avoid what they perceived to be grave constitutional issues, see *Maryland v. EPA,* 530 F.2d 215, 226 (C.A.4 1975); *Brown v. EPA,* 521 F.2d 827, 838–842 (C.A.9 1975); and the District of Columbia Circuit invalidated the regulations on both constitutional and statutory grounds, see *District of Columbia v. Train,* 521 F.2d 971, 994 (1975). After we granted certiorari to review the statutory and constitutional validity of the regulations, the Government declined even to defend them, and instead rescinded some and conceded the invalidity **2380 of those that remained, leading us to vacate the opinions below and remand for consideration of mootness. *EPA v. Brown,* 431 U.S. 99, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977) (*per curiam*).

[9] Although we had no occasion to pass upon the subject in *Brown,* later opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs. In *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), and *FERC v. Mississippi,* 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), we sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law. In 926 *926 *Hodel* we cited the lower court cases in *EPA v. Brown, supra,* but concluded that the Surface Mining Control and Reclamation Act of 1977 did not present the problem they raised because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field, *Hodel, supra,* at 288, 101 S.Ct., at 2366. In *FERC,* we construed the most troubling provisions of the Public Utility Regulatory Policies Act of 1978 to contain only the "command" that state agencies "consider" federal standards, and again only as a precondition to continued state regulation of

an otherwise pre-empted field. 456 U.S., at 764–765, 102 S.Ct., at 2140–2141. We warned that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," *id.*, at 761–762, 102 S.Ct., at 2138–2139.

When we were at last confronted squarely with a federal statute that unambiguously required the States to enact or administer a federal regulatory program, our decision should have come as no surprise. At issue in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), were the so-called "take title" provisions of the Low–Level Radioactive Waste Policy Amendments Act of 1985, which required States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to, and possession of, the waste—effectively requiring the States either to legislate pursuant to Congress's directions, or to implement an administrative solution. *Id.*, at 175–176, 112 S.Ct., at 2428. We concluded that Congress could constitutionally require the States to do neither. *Id.*, at 176, 112 S.Ct., at 2428. "The Federal Government," we held, "may not compel the States to enact or administer a federal regulatory program." *Id.*, at 188, 112 S.Ct., at 2435.

The Government contends that *New York* is distinguishable on the following ground: Unlike the "take title" provisions invalidated there, the background-check provision of the Brady Act does not require state legislative or executive officials to make policy, but instead issues a final directive to state CLEOs. It is permissible, the Government asserts, 927 ***927** for Congress to command state or local officials to assist in the implementation of federal law so long as "Congress itself devises a clear legislative solution that regulates private conduct" and requires state or local officers to provide only "limited, non-policymaking help in enforcing that law." "[T]he constitutional line is crossed only when Congress compels the States to make law in their sovereign capacities." Brief for United States 16.

The Government's distinction between "making" law and merely "enforcing" it, between "policymaking" and mere "implementation," is an interesting one. It is perhaps not meant to be the same as, but it is surely reminiscent of, the line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority for federal separation-of-powers purposes. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530, 55 S.Ct. 837, 843, 79 L.Ed. 1570 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 428–429, 55 S.Ct. 241, 251–252, 79 L.Ed. 446 (1935). This Court has not been notably successful in describing the latter line; indeed, some think we have abandoned the effort to do so. See *FPC v. New England Power Co.*, 415 U.S. 345, 352–353, 94 S.Ct. 1151, 1156, 39 L.Ed.2d 383 (1974) (Marshall, J., concurring in result); Schoenbrod, The Delegation Doctrine: Could the Court Give it Substance?, 83 Mich. L.Rev. 1223, 1233 (1985). We are doubtful that the new line ****2381** the Government proposes would be any more distinct. Executive action that has utterly no policymaking component is rare, particularly at an executive level as high as a jurisdiction's chief law enforcement officer. Is it really true that there is no policymaking involved in deciding, for example, what "reasonable efforts" shall be expended to conduct a background check? It may well satisfy the Act for a CLEO to direct that (a) no background checks will be conducted that divert personnel time from pending felony investigations, and (b) no background check will be permitted to consume more than one-half hour of an officer's time. But nothing in the Act *requires* a CLEO to be so parsimonious; diverting at least 928 ***928** *some* felony-investigation time, and permitting at least *some* background checks beyond one-half hour would certainly not be *un* reasonable. Is this decision whether to devote maximum "reasonable efforts" or minimum "reasonable efforts" not preeminently a matter of policy? It is quite impossible, in short, to draw the Government's proposed line at "no policymaking," and we would have to fall back upon a line of "not too much policymaking." How much is too much is not likely to be answered precisely; and an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one.

Even assuming, moreover, that the Brady Act leaves no "policymaking" discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than (as Judge Sneed aptly described it over two decades ago) by "reduc[ing] [them]

to puppets of a ventriloquist Congress," *Brown v. EPA*, 521 F.2d, at 839. It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. See *Texas v. White*, 7 Wall., at 725. It is no more compatible with this independence and autonomy that their officers be "dragooned" (as Judge Fernandez put it in his dissent below, 66 F.3d, at 1035) into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

The Government purports to find support for its proffered distinction of *New York* in our decisions in *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947), and *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982). We find neither case relevant. *Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause ("the Judges in every State shall be bound [by federal 929 ***929** law]"). As we have suggested earlier, *supra*, at 2370, that says nothing about whether state executive officers must administer federal law. Accord, *New York*, 505 U.S., at 178–179, 112 S.Ct., at 2429–2430. As for *FERC*, it stated (as we have described earlier) that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," 456 U.S., at 761–762, 102 S.Ct., at 2138–2139, and upheld the statutory provisions at issue precisely because they did *not* commandeer state government, but merely imposed preconditions to continued state regulation of an otherwise pre-empted field, in accord with *Hodel*, 452 U.S., at 288, 101 S.Ct., at 2366, and required state administrative agencies to apply federal law while acting in a judicial capacity, in accord with *Testa*, see *FERC*, *supra*, at 759–771, and n. 24, 102 S.Ct., at 2137–2144, and n. 24. [14]

****2382** The Government also maintains that requiring state officers to perform discrete, ministerial tasks specified by Congress does not violate the principle of *New York* because it 930 ***930** does not diminish the accountability of state or federal officials. This argument fails even on its own terms. By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. See Merritt, Three Faces of Federalism: Finding a Formula for the Future, 47 Vand. L.Rev. 1563, 1580, n. 65 (1994). Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.

The dissent makes no attempt to defend the Government's basis for distinguishing *New York*, but instead advances what seems to us an even more implausible theory. The Brady Act, the dissent asserts, is different from the "take title" provisions invalidated in *New York* because the former is addressed to individuals—namely, CLEOs—while the latter were directed to the State itself. That is certainly a difference, but it cannot be a constitutionally significant one. While the Brady Act is directed to "individuals," it is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State. The distinction between judicial writs and other government action directed against individuals in their personal capacity, on the one hand, and in their official capacity, on the other hand, is an ancient one, principally because it is dictated by common sense. We have observed that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against 931 ***931** the official's office.... As such, it is no different from a suit against the State itself." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989). And the same must be said of a directive to an official in his or her official capacity. To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance. [15] Indeed, it merits the description "empty formalistic reasoning of the highest order," *post*, at 2392. By resorting to this, the dissent not so much distinguishes *New York* as disembowels it. [16]

**2383 Finally, the Government puts forward a cluster of arguments that can be grouped under the heading: "The Brady Act serves very important purposes, is most efficiently administered *932 by CLEOs during the interim period, and places a minimal and only temporary burden upon state officers." There is considerable disagreement over the extent of the burden, but we need not pause over that detail. Assuming *all* the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments. See, *e.g.*, *Fry v. United States*, 421 U.S. 542, 548, 95 S.Ct. 1792, 1796, 44 L.Ed.2d 363 (1975); *National League of Cities v. Usery*, 426 U.S. 833, 853, 96 S.Ct. 2465, 2475, 49 L.Ed.2d 245 (1976) (overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)); *South Carolina v. Baker*, 485 U.S. 505, 529, 108 S.Ct. 1355, 1370, 99 L.Ed.2d 592 (1988) (REHNQUIST, C.J., concurring in judgment). But where, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate.[17] It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect. Cf. *Bowsher*, 478 U.S., at 736, 106 S.Ct., at 3192–3193 (declining to subject principle of separation of powers to a balancing test); *Chadha*, 462 U.S., at 944–946, 103 S.Ct., at 2780–2782 (same); *933 *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 933211, 239–240, 115 S.Ct. 1447, 1462–1463, 131 L.Ed.2d 328 (1995) (holding legislated invalidation of final judgments to be categorically unconstitutional). We expressly rejected such an approach in *New York*, and what we said bears repeating:

> "Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." 505 U.S., at 187, 112 S.Ct., at 2434.
>
> We adhere to that principle today, and conclude categorically, as we concluded categorically in *New York:* "The Federal Government may not compel the States to enact or administer a federal regulatory program." *Id.*, at 188, 112 S.Ct., at 2435. The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule.

## V

[10] What we have said makes it clear enough that the central obligation imposed upon CLEOs by the interim provisions of the Brady Act—the obligation to "make a reasonable effort to ascertain within 5 business **2384 days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General," 18 U.S.C. § 922(s)(2)—is unconstitutional. Extinguished with it, of course, is the duty implicit in the background-check requirement that the CLEO accept notice of the contents of, and a copy of, the completed Brady 934 *934 Form, which the firearms dealer is required to provide to him, §§ 922(s)(1)(A)(i) (III) and (IV).

[11] Petitioners also challenge, however, two other provisions of the Act: (1) the requirement that any CLEO "to whom a [Brady Form] is transmitted" destroy the form and any record containing information derived from it, § 922(s)(6)(B)(i), and (2) the requirement that any CLEO who "determines that an individual is ineligible to receive a handgun" provide the would-be purchaser, upon request, a written statement of the reasons for that determination, § 922(s)(6)(C). With the background-check and implicit receipt-of-forms requirements invalidated, however, these provisions require no action whatsoever on the part of the CLEO. Quite obviously, the obligation to destroy all Brady Forms that he has received when he has received none, and the obligation to give reasons for a determination of ineligibility when he never makes a determination of ineligibility, are no obligations at all. These two provisions have conceivable application to a

CLEO, in other words, only if he has chosen, voluntarily, to participate in administration of the federal scheme. The present petitioners are not in that position.[18] As to them, these last two challenged provisions are not unconstitutional, but simply inoperative.

[12] 935 *935 There is involved in this Brady Act conundrum a severability question, which the parties have briefed and argued: whether firearms dealers in the jurisdictions at issue here, and in other jurisdictions, remain obliged to forward to the CLEO (even if he will not accept it) the requisite notice of the contents (and a copy) of the Brady Form, §§ 922(s)(1)(A)(i)(III) and (IV); and to wait five business days before consummating the sale, § 922(s)(1)(A)(ii). These are important questions, but we have no business answering them in these cases. These provisions burden only firearms dealers and purchasers, and no plaintiff in either of those categories is before us here. We decline to speculate regarding the rights and obligations of parties not before the Court. Cf., *e.g.*, *New York*, *supra*, at 186–187, 112 S.Ct., at 2434 (addressing severability where remaining provisions at issue affected the plaintiffs).

* * *

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

*It is so ordered.*

**2385 Justice O'CONNOR, concurring.

Our precedent and our Nation's historical practices support the Court's holding today. The Brady Act violates the 936 *936 Tenth Amendment to the extent it forces States and local law enforcement officers to perform background checks on prospective handgun owners and to accept Brady Forms from firearms dealers. See *ante*, at 2378. Our holding, of course, does not spell the end of the objectives of the Brady Act. States and chief law enforcement officers may voluntarily continue to participate in the federal program. Moreover, the directives to the States are merely interim provisions scheduled to terminate November 30, 1998. Note following 18 U.S.C. § 922. Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs. See, *e.g.*, 23 U.S.C. § 402 (conditioning States' receipt of federal funds for highway safety program on compliance with federal requirements).

In addition, the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid. See, *e.g.*, 42 U.S.C. § 5779(a) (requiring state and local law enforcement agencies to report cases of missing children to the Department of Justice). The provisions invalidated here, however, which directly compel state officials to administer a federal regulatory program, utterly fail to adhere to the design and structure of our constitutional scheme.

Justice THOMAS, concurring.

The Court today properly holds that the Brady Act violates the Tenth Amendment in that it compels state law enforcement officers to "administer or enforce a federal regulatory program." See *ante*, at 2384. Although I join the Court's opinion in full, I write separately to emphasize that the Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers. See, *e.g.*, *McCulloch v. 937* *937 *Maryland*, 4 Wheat. 316, 405,

4 L.Ed. 579 (1819) ("This government is acknowledged by all to be one of enumerated powers"). "[T]hat those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). Accordingly, the Federal Government may act only where the Constitution authorizes it to do so. Cf. *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

In my "revisionist" view, see *post*, at 2387, (STEVENS, J., dissenting), the Federal Government's authority under the Commerce Clause, which merely allocates to Congress the power "to regulate Commerce ... among the several States," does not extend to the regulation of wholly *intra* state, point-of-sale transactions. See *United States v. Lopez*, 514 U.S. 549, 584, 115 S.Ct. 1624, 1642, 131 L.Ed.2d 626 (1995) (concurring opinion). Absent the underlying authority to regulate the intrastate transfer of firearms, Congress surely lacks the corollary power to impress state law enforcement officers into administering and enforcing such regulations. Although this Court has long interpreted the Constitution as ceding Congress extensive authority to regulate commerce (interstate or otherwise), I continue to believe that we must "temper our Commerce Clause jurisprudence" and return to an interpretation better rooted in the Clause's original understanding. *Id.*, at 601, 115 S.Ct., at 1650 (concurring opinion); see also *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 620, 117 S.Ct. 1590, 1620, 137 L.Ed.2d 852 (1997) (THOMAS, J., dissenting).

Even if we construe Congress' authority to regulate interstate commerce to encompass those intrastate transactions that "substantially affect" interstate commerce, I question whether Congress can regulate the particular transactions at issue here. The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority. The First Amendment, for example, is fittingly celebrated for preventing Congress from "prohibiting the free exercise" of religion or "abridging the freedom of speech." The Second 938 ***938** Amendment similarly appears to contain an express limitation on ****2386** the Government's authority. That Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment.[1] If, however, the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections.[2] As the parties did 939 ***939** not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic." 3 J. Story, Commentaries § 1890, p. 746 (1833). In the meantime, I join the Court's opinion striking down the challenged provisions of the Brady Act as inconsistent with the Tenth Amendment.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

When Congress exercises the powers delegated to it by the Constitution, it may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens. This conclusion is firmly supported by the text of the Constitution, the early history of the Nation, decisions of this Court, and a correct understanding of the basic structure of the Federal Government.

These cases do not implicate the more difficult questions associated with congressional coercion of state legislatures addressed in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Nor need we consider the wisdom of relying on local officials rather than federal agents to carry out aspects of a federal program, or even the question whether such officials may be required to perform a federal function on a permanent basis. The question is whether Congress, acting on behalf of the people of the entire Nation, may require local law enforcement officers to perform certain duties during the interim needed for the development of a federal gun control program. It is remarkably similar to the question, heavily debated by the Framers of the Constitution, whether Congress could require state agents to collect

federal taxes. Or the question 940 *940 whether Congress could impress state judges into federal service to entertain and decide cases that they would prefer to ignore.

**2387 Indeed, since the ultimate issue is one of power, we must consider its implications in times of national emergency. Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment, "in historical understanding and practice, in the structure of the Constitution, [or] in the jurisprudence of this Court," *ante*, at 2370, that forbids the enlistment of state officers to make that response effective? More narrowly, what basis is there in any of those sources for concluding that it is the Members of this Court, rather than the elected representatives of the people, who should determine whether the Constitution contains the unwritten rule that the Court announces today?

Perhaps today's majority would suggest that no such emergency is presented by the facts of these cases. But such a suggestion is itself an expression of a policy judgment. And Congress' view of the matter is quite different from that implied by the Court today.

The Brady Act was passed in response to what Congress described as an "epidemic of gun violence." H.Rep. No. 103–344, 103rd Cong. 1st Sess. p. 8, 1993 U.S.Code Cong. & Admin. News pp. 1984, 1985. The Act's legislative history notes that 15,377 Americans were murdered with firearms in 1992, and that 12,489 of these deaths were caused by handguns. *Ibid.* Congress expressed special concern that "[t]he level of firearm violence in this country is, by far, the highest among developed nations." *Ibid.* The partial solution contained in the Brady Act, a mandatory background check before a 941 *941 handgun may be purchased, has met with remarkable success. Between 1994 and 1996, approximately 6,600 firearm sales each month to potentially dangerous persons were prevented by Brady Act checks; over 70% of the rejected purchasers were convicted or indicted felons. See U.S. Dept. of Justice, Bureau of Justice Statistics Bulletin, A National Estimate: Presale Firearm Checks 1 (Feb.1997). Whether or not the evaluation reflected in the enactment of the Brady Act is correct as to the extent of the danger and the efficacy of the legislation, the congressional decision surely warrants more respect than it is accorded in today's unprecedented decision.

I

The text of the Constitution provides a sufficient basis for a correct disposition of these cases.

Article I, § 8, grants Congress the power to regulate commerce among the States. Putting to one side the revisionist views expressed by Justice THOMAS in his concurring opinion in *United States v. Lopez*, 514 U.S. 549, 584, 115 S.Ct. 1624, 1642, 131 L.Ed.2d 626 (1995), there can be no question that that provision adequately supports the regulation of commerce in handguns effected by the Brady Act. Moreover, the additional grant of authority in that section of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" is surely adequate to support the temporary enlistment of local police officers in the process of identifying persons who should not be entrusted with the possession of handguns. In short, the affirmative delegation of power in Article I provides ample authority for the congressional enactment.

Unlike the First Amendment, which prohibits the enactment of a category of laws that would otherwise be authorized by Article I, the Tenth Amendment imposes no restriction on the exercise of delegated powers. Using language 942 *942 that plainly refers only to powers that are "*not* " delegated to Congress, it provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10.

The Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit **2388 the scope or the effectiveness of the exercise of powers that are delegated to Congress.[1] See *New*

*York v. United States*, 505 U.S., at 156, 112 S.Ct., at 2417 ("In a case ... involving the division of authority between federal and state governments, the two inquiries are mirror images of each other"). Thus, the Amendment provides no support for a rule that immunizes local officials from obligations that might be imposed on ordinary citizens. [2] Indeed, it would be more reasonable to infer 943 ***943** that federal law may impose greater duties on state officials than on private citizens because another provision of the Constitution requires that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." Art. VI, cl. 3.

It is appropriate for state officials to make an oath or affirmation to support the Federal Constitution because, as explained in The Federalist, they "have an essential agency in giving effect to the federal Constitution." The Federalist No. 44, p. 312 (E. Bourne ed. 1947) (J. Madison). [3] There can be no conflict between their duties to the State and those owed to the Federal Government because Article VI unambiguously provides that federal law "shall be the supreme Law of the Land," binding in every State. U.S. Const., Art. 944 ***944** VI, cl. 2. Thus, not only the Constitution, but every law enacted by Congress as well, establishes policy for the States just as firmly as do laws enacted by state legislatures.

The reasoning in our unanimous opinion explaining why state tribunals with ordinary jurisdiction over tort litigation can be required to hear cases arising under the Federal Employers' Liability Act applies equally to local law enforcement officers whose ordinary duties parallel the modest obligations imposed by the Brady Act:

> "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is ****2389** quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State. As was said by this court in *Claflin v. Houseman*, 93 U.S. 130, 136, 137 [23 L.Ed. 833 (1876)]:
>
> " 'The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty.' " *Second Employers' Liability Cases*, 223 U.S. 1, 57, 32 S.Ct. 169, 178, 56 L.Ed. 327 (1912).
>
> See also *Testa v. Katt*, 330 U.S. 386, 392, 67 S.Ct. 810, 813–814, 91 L.Ed. 967 (1947).

There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I. 945 ***945** II

Under the Articles of Confederation the National Government had the power to issue commands to the several sovereign States, but it had no authority to govern individuals directly. Thus, it raised an army and financed its operations by issuing requisitions to the constituent members of the Confederacy, rather than by creating federal agencies to draft soldiers or to impose taxes.

That method of governing proved to be unacceptable, not because it demeaned the sovereign character of the several States, but rather because it was cumbersome and inefficient. Indeed, a confederation that allows each of its members to determine the ways and means of complying with an overriding requisition is obviously more deferential to state sovereignty concerns than a National Government that uses its own agents to impose its will directly on the citizenry. The basic change in the character of the government that the Framers conceived was designed to enhance the power of the national government, not to provide some new, unmentioned immunity for state officers. Because indirect control over individual citizens ("the only proper objects of government") was ineffective under the Articles of Confederation, Alexander Hamilton explained that "we must *extend* the authority of the Union to the persons

of the citizens." The Federalist No. 15, at 101 (emphasis added).

Indeed, the historical materials strongly suggest that the founders intended to enhance the capacity of the Federal Government by empowering it—as a part of the new authority to make demands directly on individual citizens—to act through local officials. Hamilton made clear that the new Constitution, "by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each in the execution of its laws." The Federalist No. 27, at 180. Hamilton's meaning was unambiguous; the Federal Government was to have the power to demand that local officials 946 ***946** implement national policy programs. As he went on to explain: "It is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which [the State and Federal Governments] might proceed; and will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State." *Ibid.* [4]

****2390** More specifically, during the debates concerning the ratification of the Constitution, it was assumed that state agents would act as tax collectors for the Federal Government. Opponents of the Constitution had repeatedly expressed fears that the new Federal Government's ability to impose taxes directly on the citizenry would result in an overbearing presence of federal tax collectors in the States. [5] Federalists rejoined that this problem would not arise because, as Hamilton explained, "the United States ... will make use of the State officers and State regulations for collecting" certain 947 ***947** taxes. *Id.*, No. 36, at 235. Similarly, Madison made clear that the new central Government's power to raise taxes directly from the citizenry would "not be resorted to, except for supplemental purposes of revenue ... and that the eventual collection, under the immediate authority of the Union, will generally be made by the officers ... appointed by the several States." *Id.*,No. 45, at 318. [6]

The Court's response to this powerful historical evidence is weak. The majority suggests that "none of these statements necessarily implies ... Congress could impose these responsibilities without the consent of the States." *Ante,* at 2372 (emphasis deleted). No fair reading of these materials can justify such an interpretation. As Hamilton explained, the power of the Government to act on "individual citizens"—including "employ[ing] the ordinary magistracy" of the States—was an answer to the problems faced by a central Government that could act only directly "upon the States in their political or collective capacities." The Federalist, No. 27, at 179–180. The new Constitution would avoid this problem, resulting in "a regular and peaceable execution of the laws of the Union." *Ibid.*

This point is made especially clear in Hamilton's statement that "the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends;* and *will be rendered auxiliary to the enforcement of its laws.*" *Ibid.* (second emphasis added). It is hard to imagine a more unequivocal statement that state 948 ***948** judicial and executive branch officials may be required to implement federal law where the National Government acts within the scope of its affirmative powers. [7]

The Court makes two unpersuasive attempts to discount the force of this statement. First, according to the majority, because Hamilton mentioned the Supremacy Clause without specifically referring to any "congressional directive," the statement does not mean what it plainly says. *Ante,* at 2373. But the mere fact that the Supremacy Clause is the source of the obligation of state officials to implement congressional directives does not remotely suggest that they might be " 'incorporat[ed] into the operations of the national government,' " The Federalist No. 27, at 177 (A. Hamilton), before their obligations have been defined by Congress. Federal law establishes policy for the States just as firmly as laws enacted by state legislatures, ****2391** but that does not mean that state or federal officials must implement directives that have not been specified in any law. [8] Second, the majority suggests that interpreting this passage to mean what it says would conflict with our decision in *New York v. United States. Ante,* at 2373. But since the *New York* opinion did not mention The Federalist No. 27, it does not affect either the relevance or the weight of the historical evidence

provided by No. 27 insofar as it relates to state courts and magistrates.

Bereft of support in the history of the founding, the Court rests its conclusion on the claim that there is little evidence the National Government actually exercised such a power in 949 ***949** the early years of the Republic. See *ante,* at 2371. This reasoning is misguided in principle and in fact. While we have indicated that the express consideration and resolution of difficult constitutional issues by the First Congress in particular "provides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of [its] Members ... 'had taken part in framing that instrument,' " *Bowsher v. Synar,* 478 U.S. 714, 723–724, 106 S.Ct. 3181, 3186, 92 L.Ed.2d 583 (1986) (quoting *Marsh v. Chambers,* 463 U.S. 783, 790, 103 S.Ct. 3330, 3335, 77 L.Ed.2d 1019 (1983)), we have never suggested that the failure of the early Congresses to address the scope of federal power in a particular area or to exercise a particular authority was an argument against its existence. That position, if correct, would undermine most of our post-New Deal Commerce Clause jurisprudence. As Justice O'CONNOR quite properly noted in *New York,* "[t]he Federal Government undertakes activities today that would have been unimaginable to the Framers." 505 U.S., at 157, 112 S.Ct., at 2418.

More importantly, the fact that Congress did elect to rely on state judges and the clerks of state courts to perform a variety of executive functions, see *ante,* at 2369–2372, is surely evidence of a contemporary understanding that their status as state officials did not immunize them from federal service. The majority's description of these early statutes is both incomplete and at times misleading.

For example, statutes of the early Congresses required in mandatory terms that state judges and their clerks perform various executive duties with respect to applications for citizenship. The First Congress enacted a statute requiring that the state courts consider such applications, specifying that the state courts "*shall* administer" an oath of loyalty to the United States, and that "the clerk of such court *shall* record such application." Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (emphasis added). Early legislation passed by the Fifth Congress also imposed reporting requirements relating to naturalization on court clerks, specifying that failure to perform those duties would result in a fine. Act of June 18, 950 ***950** 1798, ch. 54, § 2, 1 Stat. 567 (specifying that these obligations "*shall* be the duty of the clerk" (emphasis added)). Not long thereafter, the Seventh Congress mandated that state courts maintain a registry of aliens seeking naturalization. Court clerks were required to receive certain information from aliens, record those data, and provide certificates to the aliens; the statute specified fees to be received by local officials in compensation. Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154–155 (specifying that these burdens "*shall* be the duty of such clerk" including clerks "of a ... state" (emphasis added)).[9]

****2392** Similarly, the First Congress enacted legislation requiring state courts to serve, functionally, like contemporary regulatory ***951** agencies in certifying the seaworthiness of vessels. Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132–133. The majority casts this as an adjudicative duty, *ante,* at 2371, but that characterization is misleading. The law provided that upon a complaint raised by a ship's crew members, the state courts were (if no federal court was proximately located) to appoint an investigative committee of three persons "most skilful in maritime affairs" to report back. On this basis, the judge was to determine whether the ship was fit for its intended voyage. The statute sets forth, in essence, procedures for an expert inquisitorial proceeding, supervised by a judge but otherwise more characteristic of executive activity.[10]

The Court assumes that the imposition of such essentially executive duties on state judges and their clerks sheds no light on the question whether executive officials might have an immunity from federal obligations. *Ibid.* Even assuming that the enlistment of state judges in their judicial role for federal purposes is irrelevant to the question whether executive officials may be asked to perform the same function—a claim disputed below, see *infra,* at 2400-2401 the majority's analysis is badly mistaken.

We are far truer to the historical record by applying a functional approach in assessing the role played by these early state officials. The use of state judges and their clerks to perform executive functions was, in historical context, hardly unusual. As one scholar has noted, "two

centuries ago, state and local judges and associated judicial personnel 952 *952 performed many of the functions today performed by executive officers, including such varied tasks as laying city streets and ensuring the seaworthiness of vessels." Caminker, State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?, 95 Colum. L.Rev. 1001, 1045, n. 176 (1995). And, of course, judges today continue to perform a variety of functions that may more properly be described as executive. See, *e.g.*, *Forrester v. White*, 484 U.S. 219, 227, 108 S.Ct. 538, 544, 98 L.Ed.2d 555 (1988) (noting "intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform"). The majority's insistence that this evidence of federal enlistment of state officials to serve executive functions is irrelevant simply because the assistance of "judges" was at issue rests on empty formalistic reasoning of the highest order. [11]

**2393 The Court's evaluation of the historical evidence, furthermore, fails to acknowledge the important difference between 953 *953 policy decisions that may have been influenced by respect for state sovereignty concerns, and decisions that are compelled by the Constitution. [12] Thus, for example, the decision by Congress to give President Wilson the authority to utilize the services of state officers in implementing the World War I draft, see Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80–81, surely indicates that the National Legislature saw no constitutional impediment to the enlistment of state assistance during a federal emergency. The fact that the President was able to implement the program by respectfully "request[ing]" state action, rather than bluntly commanding it, is evidence that he was an effective statesman, but surely does not indicate that he doubted either his or Congress' power to use mandatory language if necessary. [13] If there were merit to the Court's appraisal of this incident, one would assume that there would have been some contemporary comment on the supposed constitutional concern that hypothetically might have motivated the President's choice of language. [14]

954 *954 The Court concludes its review of the historical materials with a reference to the fact that our decision in *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), invalidated a large number of statutes enacted in the 1970's, implying that recent enactments by Congress that are similar to the Brady Act are not entitled to any presumption of validity. But in *Chadha*, unlike these cases, our decision rested on the Constitution's express bicameralism and presentment requirements, *id.*, at 946, 103 S.Ct., at 2781–2782, not on judicial inferences drawn from a silent text and a historical record that surely favors the congressional understanding. Indeed, the majority's opinion consists almost entirely of arguments *against* the substantial evidence weighing in opposition to its view; the Court's ruling is strikingly lacking in affirmative support. Absent even a modicum **2394 of textual foundation for its judicially crafted constitutional rule, there should be a presumption that if the Framers had actually intended such a rule, at least one of them would have mentioned it. [15]

955 *955 III

The Court's "structural" arguments are not sufficient to rebut that presumption. The fact that the Framers intended to preserve the sovereignty of the several States simply does not speak to the question whether individual state employees may be required to perform federal obligations, such as registering young adults for the draft, 40 Stat. 80–81, creating state emergency response commissions designed to manage the release of hazardous substances, 42 U.S.C. §§ 11001, 11003, collecting and reporting data on underground storage tanks that may pose an environmental hazard, § 6991a, and reporting traffic fatalities, 23 U.S.C. § 402(a), and missing children, 42 U.S.C. § 5779(a), to a federal agency. [16]

956 *956 As we explained in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985): "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." *Id.*, at 550–551, 105 S.Ct., at 1017. Given the fact that the Members of Congress are elected by the people of the several States, with each State receiving an

equivalent number of Senators in order to ensure that even the smallest States have a powerful voice in the Legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom.

**2395 Indeed, the presumption of validity that supports all congressional enactments [17] has added force with respect to policy *957 judgments concerning the impact of a federal statute upon the respective States. The majority points to nothing suggesting that the political safeguards of federalism identified in *Garcia* need be supplemented by a rule, grounded in neither constitutional history nor text, flatly prohibiting the National Government from enlisting state and local officials in the implementation of federal law.

Recent developments demonstrate that the political safeguards protecting Our Federalism are effective. The majority expresses special concern that were its rule not adopted the Federal Government would be able to avail itself of the services of state government officials "at no cost to itself." *Ante,* at 2378; see also *ante,* at 2382 (arguing that "Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes"). But this specific problem of federal actions that have the effect of imposing so-called "unfunded mandates" on the States has been identified and meaningfully addressed by Congress in recent legislation. [18] See Unfunded *958 Mandates Reform Act of 1995, Pub.L. 104–4, 109 Stat. 48.

The statute was designed "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State ... governments without adequate Federal funding, in a manner that may displace other essential State ... governmental priorities." 2 U.S.C. § 1501(2) (1994 ed., Supp. II). It functions, *inter alia,* by permitting Members of Congress to raise an objection by point of order to a pending bill that contains an "unfunded **2396 mandate," as defined by the statute, of over $50 million. [19] The mandate may not then be enacted unless the Members make an explicit decision to proceed anyway. See Recent Legislation, Unfunded Mandates Reform Act of 1995, 109 Harv. L.Rev. 1469 (1996) (describing functioning of statute). Whatever the ultimate impact of the new legislation, its passage demonstrates that 959 *959 un elected judges are better off leaving the protection of federalism to the political process in all but the most extraordinary circumstances. [20]

Perversely, the majority's rule seems more likely to damage than to preserve the safeguards against tyranny provided by the existence of vital state governments. By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State's rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies. This is exactly the sort of thing that the early Federalists promised would not occur, in part as a result of the National Government's ability to rely on the magistracy of the States. See, *e.g.,* The Federalist No. 36, at 234–235 (A. Hamilton); *id.,* No. 45, at 318 (J. Madison). [21]

With colorful hyperbole, the Court suggests that the unity in the Executive Branch of the Federal Government "would be shattered, and the power of the President would be subject *960 to reduction, if Congress could ... requir [e] state officers to execute its laws." *Ante,* at 2378. Putting to one side the obvious tension between the majority's claim that impressing state police officers will unduly tip the balance of power in favor of the federal sovereign and this suggestion that it will emasculate the Presidency, the Court's reasoning contradicts *New York v. United States.* [22]

That decision squarely approved of cooperative federalism programs, designed at the national level but implemented principally by state governments. *New York* disapproved of a particular *method* of putting such programs into place, not the *existence* of federal programs implemented locally. See 505 U.S., at 166, 112 S.Ct., at 2423 ("Our cases have identified a variety of methods ... by which Congress may urge a State to adopt a legislative program consistent with federal interests"). Indeed, nothing in the majority's holding calls into question the three mechanisms for constructing such

programs that *New York* expressly approved. Congress may require the States to implement its programs as a condition of federal spending,[23] in order to avoid the threat of **2397 unilateral federal action in the area,[24] or as a part of a program that affects States and private parties alike.[25] The majority's suggestion in response to this dissent that Congress' ability to create such programs is limited, *ante,* at 2378, n. 12, is belied by the importance and sweep of the federal statutes that meet this description, some of which we described in *961 *New York.* See 961505 U.S., at 167–168, 112 S.Ct., at 2424 (mentioning, *inter alia,* the Clean Water Act, the Occupational Safety and Health Act of 1970, and the Resource Conservation and Recovery Act of 1976).

Nor is there force to the assumption undergirding the Court's entire opinion that if this trivial burden on state sovereignty is permissible, the entire structure of federalism will soon collapse. These cases do not involve any mandate to state legislatures to enact new rules. When legislative action, or even administrative rulemaking, is at issue, it may be appropriate for Congress either to pre-empt the State's lawmaking power and fashion the federal rule itself, or to respect the State's power to fashion its own rules. But these cases, unlike any precedent in which the Court has held that Congress exceeded its powers, merely involve the imposition of modest duties on individual officers. The Court seems to accept the fact that Congress could require private persons, such as hospital executives or school administrators, to provide arms merchants with relevant information about a prospective purchaser's fitness to own a weapon; indeed, the Court does not disturb the conclusion that flows directly from our prior holdings that the burden on police officers would be permissible if a similar burden were also imposed on private parties with access to relevant data. See *New York,* 505 U.S., at 160, 112 S.Ct., at 2420; *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). A structural problem that vanishes when the statute affects private individuals as well as public officials is not much of a structural problem.

Far more important than the concerns that the Court musters in support of its new rule is the fact that the Framers entrusted Congress with the task of creating a working structure of intergovernmental relationships around the framework that the Constitution authorized. Neither explicitly nor implicitly did the Framers issue any command that forbids Congress from imposing federal duties on private citizens or on local officials. As a general matter, Congress *962 has followed the sound policy of authorizing federal agencies and federal agents to administer federal programs. That general practice, however, does not negate the existence of power to rely on state officials in occasional situations in which such reliance is in the national interest. Rather, the occasional exceptions confirm the wisdom of Justice Holmes' reminder that "the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson,* 282 U.S. 499, 501, 51 S.Ct. 228, 229, 75 L.Ed. 482 (1931).

## IV

Finally, the Court advises us that the "prior jurisprudence of this Court" is the most conclusive support for its position. *Ante,* at 2379. That "prior jurisprudence" is *New York v. United States.*[26] The case involved the validity of a federal statute that provided the States with three types of incentives to encourage them to dispose of radioactive wastes generated within their borders. The Court held that the first two sets of incentives were authorized by affirmative grants **2398 of power to Congress, and therefore "not inconsistent with the Tenth Amendment." 505 U.S., at 173, 174, 112 S.Ct., at 2427. That holding, of course, sheds no doubt on the validity of the Brady Act.

The third so-called "incentive" gave the States the option either of adopting regulations dictated by Congress or of taking title to and possession of the low level radioactive waste. The Court concluded that, because Congress had no power to compel the state governments to take title to the 963 *963 waste, the "option" really amounted to a simple command to the States to enact and enforce a federal regulatory program. *Id.,* at 176, 112 S.Ct., at 2428. The Court explained:

> "A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and

enforce a federal regulatory program,' *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., supra,* at 288 [101 S.Ct., at 2366], an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution." *Ibid.*

After noting that the "take title provision appears to be unique" because no other federal statute had offered "a state government no option other than that of implementing legislation enacted by Congress," the Court concluded that the provision was "inconsistent with the federal structure of our Government established by the Constitution." *Id.*, at 177, 112 S.Ct., at 2429.

Our statements, taken in context, clearly did not decide the question presented here, whether state executive officials —as opposed to state legislators—may in appropriate circumstances be enlisted to implement federal policy. The "take title" provision at issue in *New York* was beyond Congress' authority to enact because it was "in principle ... no different than a congressionally compelled subsidy from state governments to radioactive waste producers," *id.*, at 175, 112 S.Ct., at 2428, almost certainly a legislative Act.

The majority relies upon dictum in *New York* to the effect that "[t]he Federal Government may not compel the States to enact *or administer* a federal regulatory program." *Id.*, at 188, 112 S.Ct., at 2435 (emphasis added); see *ante,* at 2383. But that language was wholly unnecessary to the decision of the case. It is, of course, beyond dispute that we are not bound by the dicta of our prior opinions. See, *e.g., U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 24, 115 S.Ct. 386, 391, 130 L.Ed.2d 233 (1994) (SCALIA, J.) ("invoking our customary refusal to be bound by dicta"). To 964 ***964** the extent that it has any substance at all, *New York* ' s administration language may have referred to the possibility that the State might have been able to take title to and devise an elaborate scheme for the management of the radioactive waste through purely executive policymaking. But despite the majority's effort to suggest that similar activities are required by the Brady Act, see *ante,* at 2380–2381, it is hard to characterize the minimal requirement that CLEO's perform background checks as one involving the exercise of substantial policymaking discretion on that essentially legislative scale. [27]

****2399** Indeed, Justice KENNEDY's recent comment about another case that was distinguishable from *New York* applies to these cases as well:

> "This is not a case where the etiquette of federalism has been violated by a formal command from the National ***965** Government directing the State to enact a certain policy, cf. *New York v. United States,* 505 U.S. 144 [112 S.Ct. 2408, 120 L.Ed.2d 120] (1992), or to organize its governmental functions in a certain way, cf. *FERC v. Mississippi,* 456 U.S., at 781 [102 S.Ct., at 2149], (O'CONNOR, J., concurring in judgment in part and dissenting in part)." *Lopez,* 514 U.S., at 583, 115 S.Ct., at 1642 (concurring opinion).

In response to this dissent, the majority asserts that the difference between a federal command addressed to individuals and one addressed to the State itself "cannot be a constitutionally significant one." *Ante,* at 2382. But as I have already noted, n. 16, *supra,* there is abundant authority in our Eleventh Amendment jurisprudence recognizing a constitutional distinction between local government officials, such as the CLEO's who brought this action, and state entities that are entitled to sovereign immunity. To my knowledge, no one has previously thought that the distinction "disembowels," *ante,* at 2382, the Eleventh Amendment. [28]

Importantly, the majority either misconstrues or ignores three cases that are more directly on point. In *FERC v. Mississippi,* 546 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), we upheld a federal statute requiring state utilities commissions, *inter alia,* to take the affirmative step of considering federal energy standards in a manner complying with federally specified notice and comment procedures, and to report back to Congress periodically. The state commissions could avoid this obligation 966 ***966** only by ceasing regulation in the field, a "choice" that we recognized was realistically foreclosed, since Congress had put forward no alternative regulatory scheme to govern this very important area. *Id.*, at 764, 766, 770, 102 S.Ct., at 2140, 2141, 2143. The burden on state officials that we approved in *FERC* was far more

  

extensive than the minimal, temporary imposition posed by the Brady Act. [29]

Similarly, in *Puerto Rico v. Branstad,* 483 U.S. 219, 107 S.Ct. 2802, 97 L.Ed.2d 187 (1987), we overruled our earlier decision in *Kentucky v. Dennison,* 24 How. 66, 16 L.Ed. 717 (1861), and held that the Extradition Act of 1793 permitted the Commonwealth of Puerto Rico to seek extradition of a fugitive from its laws without constitutional barrier. The Extradition Act, as the majority properly concedes, plainly imposes duties on state executive officers. See *ante,* at 2371. The majority suggests that this statute is nevertheless of little importance because it simply constitutes an implementation of the authority granted the National Government by the Constitution's Extradition Clause, Art. IV, **2400 § 2. But in *Branstad* we noted ambiguity as to whether Puerto Rico benefits from that Clause, which applies on its face only to "States." Avoiding the question of the Clause's applicability, we held simply that under the Extradition Act Puerto Rico had the power to request that the State of Iowa deliver up the fugitive the Commonwealth sought. 483 U.S., at 229–230, 107 S.Ct., at 2808–2809. Although *Branstad* relied on the authority of the Act alone, without the benefit of the 967 *967 Extradition Clause, we noted no barrier to our decision in the principles of federalism—despite the fact that one Member of the Court brought the issue to our attention, see *id.,* at 231, 107 S.Ct., at 2809–2810(SCALIA, J., concurring in part and concurring in judgment). [30]

Finally, the majority provides an incomplete explanation of our decision in *Testa v. Katt,* 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947), and demeans its importance. In that case the Court unanimously held that state courts of appropriate jurisdiction must occupy themselves adjudicating claims brought by private litigants under the federal Emergency Price Control Act of 1942, regardless of how otherwise crowded their dockets might be with state-law matters. That is a much greater imposition on state sovereignty than the Court's characterization of the case as merely holding that "state courts cannot refuse to apply federal law," *ante,* at 2381. That characterization describes only the narrower duty to apply federal law in cases that the state courts have consented to entertain.

968 *968 The language drawn from the Supremacy Clause upon which the majority relies ("the Judges in every State shall be bound [by federal law], any Thing in the Constitution or Laws of any state to the Contrary notwithstanding"), expressly embraces that narrower conflict of laws principle. Art. VI, cl. 2. But the Supremacy Clause means far more. As *Testa* held, because the "Laws of the United States ... [are] the supreme Law of the Land," state courts of appropriate jurisdiction must hear federal claims whenever a federal statute, such as the Emergency Price Control Act, requires them to do so. Art. VI, cl. 2.

Hence, the Court's textual argument is quite misguided. The majority focuses on the Clause's specific attention to the point that "Judges in every State shall be bound." *Ibid.* That language commands state judges to "apply federal law" in cases that they entertain, but it is not the source of their duty to accept jurisdiction of federal claims that they would prefer to ignore. Our opinions in *Testa,* and earlier the *Second Employers' Liability Cases,* rested generally on the language of the Supremacy Clause, without any specific focus on the reference to judges. [31]

**2401 969 *969 The majority's reinterpretation of *Testa* also contradicts our decision in *FERC.* In addition to the holding mentioned earlier, see *supra,* at 2399, we also approved in that case provisions of federal law requiring a state utilities commission to "adjudicate disputes arising under [a federal] statute." *FERC,* 456 U.S., at 760, 102 S.Ct., at 2137. Because the state commission had "jurisdiction to entertain claims analogous to those" put before it under the federal statute, *ibid.,* we held that *Testa* required it to adjudicate the federal claims. Although the commission was serving an adjudicative function, the commissioners were unquestionably not "judges" within the meaning of Art. VI, cl. 2. It is impossible to reconcile the Court's present view that *Testa* rested entirely on the specific reference to state judges in the Supremacy Clause with our extension of that early case in *FERC.* [32]

Even if the Court were correct in its suggestion that it was the reference to judges in the Supremacy Clause, rather than the central message of the entire Clause, that dictated the result in *Testa,* the Court's implied *expressio unius* argument that the Framers therefore did *not* intend to

permit the enlistment of other state officials is implausible. Throughout our history judges, state as well as federal, have merited as much respect as executive agents. The notion that the Framers would have had no reluctance to "press 970 *970 state judges into federal service" against their will but would have regarded the imposition of a similar—indeed, far lesser—burden on town constables as an intolerable affront to principles of state sovereignty can only be considered perverse. If such a distinction had been contemplated by the learned and articulate men who fashioned the basic structure of our government, surely some of them would have said so. [33]

* * *

The provision of the Brady Act that crosses the Court's newly defined constitutional threshold is more comparable to a statute requiring local police officers to report the identity of missing children to the Crime Control Center of the Department of Justice than to an offensive federal command to a sovereign State. If Congress believes that such a statute will benefit the people of the Nation, and serve the interests of cooperative federalism better than an enlarged federal bureaucracy, we should respect both its policy judgment and its appraisal of its constitutional power.

Accordingly, I respectfully dissent.

Justice SOUTER, dissenting.

I join Justice STEVENS's dissenting opinion, but subject to the following qualifications. While I do not find anything dispositive in the paucity of early examples of federal employment of state officers for executive purposes, for the reason given by Justice STEVENS, *ante,* at 2390–2392, neither would I find myself in dissent with no more to go on than those few early instances in the administration of naturalization *971 laws, for example, or such later instances as state **2402 support for federal emergency action, see *ante,* at 2391–2392; *ante,* at 2369–2372, 2375–2376 (majority opinion). These illustrations of state action implementing congressional statutes are consistent with the Government's positions, but they do not speak to me with much force.

In deciding these cases, which I have found closer than I had anticipated, it is The Federalist that finally determines my position. I believe that the most straightforward reading of No. 27 is authority for the Government's position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45.

Hamilton in No. 27 first notes that because the new Constitution would authorize the National Government to bind individuals directly through national law, it could "employ the ordinary magistracy of each [State] in the execution of its laws." The Federalist No. 27, p. 174 (J. Cooke ed. 1961) (A.Hamilton). Were he to stop here, he would not necessarily be speaking of anything beyond the possibility of cooperative arrangements by agreement. But he then addresses the combined effect of the proposed Supremacy Clause, U.S. Const., Art. VI, cl. 2, and state officers' oath requirement, U.S. Const., Art. VI, cl. 3, and he states that "the Legislatures, Courts and Magistrates of the respective members will be incorporated into the operations of the national government, *as far as its just and constitutional authority extends;* and will be rendered auxiliary to the enforcement of its laws." The Federalist No. 27, at 174–175 (emphasis in original). The natural reading of this language is not merely that the officers of the various branches of state governments may be employed in the performance of national functions; Hamilton says that the state governmental machinery "will be incorporated" into the Nation's operation, and because the "auxiliary" status of the state officials will occur because they are "bound by the sanctity of an oath," *id.,* at 175, I take him to mean that their auxiliary functions 972 *972 will be the products of their obligations thus undertaken to support federal law, not of their own, or the States', unfettered choices. [1] **2403 Madison in No. 44 supports this reading in 973 *973 his commentary on the oath requirement. He asks why state magistrates should have to swear to support the National Constitution, when national officials will not be required to oblige themselves to support the state counterparts. His answer is that national officials "will have no agency in carrying the State Constitutions into effect. The members and officers of the State Governments, on the contrary, will have an essential agency in giving effect to the Federal Constitution." *Id.,* No. 44, at 307 (J. Madison). He then describes the state

legislative "agency" as action necessary for selecting the President, see U.S. Const., Art. II, § 1, and the choice of Senators, see U.S. Const., Art. I, § 3 (repealed by Amdt. 17). The Federalist No. 44, at 307. The Supremacy Clause itself, of course, expressly refers to the state judges' obligations under federal law, and other numbers of The Federalist give examples of state executive "agency" in the enforcement of national revenue laws. [2]

974 ***974** Two such examples of anticipated state collection of federal revenue are instructive, each of which is put forward to counter fears of a proliferation of tax collectors. In No. 45, Hamilton says that if a State is not given (or declines to exercise) an option to supply its citizens' share of a federal tax, the "eventual collection [of the federal tax] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States." *Id.*, No. 45, at 313. And in No. 36, he explains that the National Government would more readily "employ the State officers as much as possible, and to attach them to 975 ***975** the Union by an accumulation of their emoluments," *id.*, No. 36, at 228, than by appointing separate federal revenue collectors.

In the light of all these passages, I cannot persuade myself that the statements from ****2404** No. 27 speak of anything less than the authority of the National Government, when exercising an otherwise legitimate power (the commerce power, say), to require state "auxiliaries" to take appropriate action. To be sure, it does not follow that any conceivable requirement may be imposed on any state official. I continue to agree, for example, that Congress may not require a state legislature to enact a regulatory scheme and that *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), was rightly decided (even though I now believe its dicta went too far toward immunizing state administration as well as state enactment of such a scheme from congressional mandate); after all, the essence of legislative power, within the limits of legislative jurisdiction, is a discretion not subject to command. But insofar as national law would require nothing from a state officer inconsistent with the power proper to his branch of tripartite state government (say, by obligating a state judge to exercise law enforcement powers), I suppose that the reach of federal law as Hamilton described it would not be exceeded, cf. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554, 556–567, 105 S.Ct. 1005, 1020–1026, 83 L.Ed.2d 1016 (1985) (without precisely delineating the outer limits of Congress's Commerce Clause power, finding that the statute at issue was not "destructive of state sovereignty").

I should mention two other points. First, I recognize that my reading of The Federalist runs counter to the view of Justice Field, who stated explicitly in *United States v. Jones*, 109 U.S. 513, 519–520, 3 S.Ct. 346, 350–351, 27 L.Ed. 1015 (1883), that the early examples of state execution of federal law could not have been required against a State's will. But that statement, too, was dictum, and as against dictum even from Justice Field, Madison and Hamilton prevail. Second, I do not read any of The Federalist 976 ***976** material as requiring the conclusion that Congress could require administrative support without an obligation to pay fair value for it. The quotation from No. 36, for example, describes the United States as paying. If, therefore, my views were prevailing in these cases, I would remand for development and consideration of petitioners' points, that they have no budget provision for work required under the Act and are liable for unauthorized expenditures. Brief for Petitioner in No. 95–1478, pp. 4–5; Brief for Petitioner in No. 95–1503, pp. 6–7.

Justice BREYER, with whom Justice STEVENS joins, dissenting.

I would add to the reasons Justice STEVENS sets forth the fact that the United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body. Lenaerts, Constitutionalism and the Many Faces

of Federalism, 38 Am. J. Comp. L. 205, 237 (1990); D. Currie, The Constitution of the Federal Republic of Germany 66, 84 (1994); Mackenzie–Stuart, Foreword, Comparative Constitutional Federalism: Europe and America ix (M. Tushnet ed.1990); Kimber, A Comparison of Environmental Federalism in the United States and the European Union, 54 Md. L.Rev. 1658, 1675–1677 (1995). They do so in part because they believe that such a system interferes less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps 977 ***977** to safeguard individual liberty as well. See Council of European Communities, European Council in Edinburgh, 11–12 Dec. 1992, Conclusions of the Presidency 20–21 (1993); D. Lasok & K. Bridge, Law and Institutions of the European Union 114 (1994); Currie, *supra*, at 68, 81–84, 100–101; Frowein, Integration and the Federal Experience in Germany and Switzerland, in 1 Integration Through Law 573, 586–587 (M. Cappelletti, M. Seccombe, & J. ****2405** Weiler eds.1986); Lenaerts, *supra*, at 232, 263.

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. Cf. The Federalist No. 20, pp. 134–138 (C. Rossiter ed. 1961) (J. Madison and A. Hamilton) (rejecting certain aspects of European federalism). But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity. Cf. *id.*, No. 42, at 268 (J. Madison) (looking to experiences of European countries); *id.*, No. 43, at 275, 276 (J. Madison) (same). And that experience here offers empirical confirmation of the implied answer to a question Justice STEVENS asks: Why, or how, would what the majority sees as a constitutional alternative—the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy—better promote either state sovereignty or individual liberty? See *ante*, at 2389, 2396 (STEVENS, J., dissenting).

As comparative experience suggests, there is no need to interpret the Constitution as containing an absolute principle—forbidding the assignment of virtually any federal duty to any state official. Nor is there a need to read the Brady Act as permitting the Federal Government to overwhelm a state civil service. The statute uses the words "reasonable effort," 18 U.S.C. § 922(s)(2)—words that easily can encompass ***978** the considerations of, say, time or cost, necessary to avoid any such result.

Regardless, as Justice STEVENS points out, the Constitution itself is silent on the matter. *Ante*, at 2389, 2393-2394, 2397-2401 (dissenting opinion). Precedent supports the Government's position here. *Ante*, at 2394, 2396–2397, 2398–2401 (STEVENS, J., dissenting). And the fact that there is not more precedent—that direct federal assignment of duties to state officers is not common—likely reflects, not a widely shared belief that any such assignment is incompatible with basic principles of federalism, but rather a widely shared practice of assigning such duties in other ways. See, *e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (spending power); *Garcia v. United States*, 469 U.S. 70, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984); *New York v. United States*, 505 U.S. 144, 160, 112 S.Ct. 2408, 2420, 120 L.Ed.2d 120 (1992) (general statutory duty); *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (pre-emption). See also *ante*, at 2404 (SOUTER, J., dissenting). Thus, there is neither need nor reason to find in the Constitution an absolute principle, the inflexibility of which poses a surprising and technical obstacle to the enactment of a law that Congress believed necessary to solve an important national problem.

For these reasons and those set forth in Justice STEVENS' opinion, I join his dissent.

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Footnotes

  

**Printz v. U.S., 521 U.S. 898 (1997)**



* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The dissent is wrong in suggesting, *post*, at 2391, n. 9, that the *Second Employers' Liability Cases*, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327 (1912), eliminate the possibility that the duties imposed on state courts and their clerks in connection with naturalization proceedings were contingent on the State's voluntary assumption of the task of adjudicating citizenship applications. The *Second Employers' Liability Cases* stand for the proposition that a state court must entertain a claim arising under federal law "when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws." *Id.*, at 56–57, 32 S.Ct., at 178. This does not necessarily conflict with *Holmgren* and *Jones*, as the States obviously regulate the "ordinary jurisdiction" of their courts. (Our references throughout this opinion to "the dissent" are to the dissenting opinion of Justice STEVENS, joined by Justice SOUTER, Justice GINSBURG and Justice BREYER. The separate dissenting opinions of Justice SOUTER and Justice BREYER will be referred to as such.)

2 Bereft of even a single early, or indeed even pre–20th–century, statute compelling state executive officers to administer federal laws, the dissent is driven to claim that early federal statutes compelled state judges to perform executive functions, which implies a power to compel state executive officers to do so as well. Assuming that this implication would follow (which is doubtful), the premise of the argument is in any case wrong. None of the early statutes directed to state judges or court clerks required the performance of functions more appropriately characterized as executive than judicial (bearing in mind that the line between the two for present purposes is not necessarily identical with the line established by the Constitution for federal separation-of-powers purposes, see *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 77 S.Ct. 1203, 1214, 1 L.Ed.2d 1311 (1957)). Given that state courts were entrusted with the quintessentially adjudicative task of determining whether applicants for citizenship met the requisite qualifications, see Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, it is unreasonable to maintain that the ancillary functions of recording, registering, and certifying the citizenship applications were unalterably executive rather than judicial in nature.

The dissent's assertion that the Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132–133, which required state courts to resolve controversies between captain and crew regarding seaworthiness of a vessel, caused state courts to act "like contemporary regulatory agencies," *post*, at 2392, is cleverly true—because contemporary regulatory agencies have been allowed to perform adjudicative ("quasi-judicial") functions. See 5 U.S.C. § 554; *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935). It is foolish, however, to mistake the copy for the original, and to believe that 18th-century courts were imitating agencies, rather than 20th-century agencies imitating courts. The Act's requirement that the court appoint "three persons in the neighbourhood ... most skilful in maritime affairs" to examine the ship and report on its condition certainly does not change the proceeding into one "supervised by a judge but otherwise more characteristic of executive activity," *post*, at 2392; that requirement is not significantly different from the contemporary judicial practice of appointing expert witnesses, see, *e.g.*, Fed. Rule Evid. 706. The ultimate function of the judge under the Act was purely adjudicative; he was, after receiving the report, to "adjudge and determine ... whether the said ship or vessel is fit to proceed on the intended voyage...." 1 Stat. 132.

3 Article IV, § 2, cl. 2, provides:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

To the extent the legislation went beyond the substantive requirement of this provision and specified procedures to be followed in complying with the constitutional obligation, we have found that that was an exercise of the congressional power to "prescribe the Manner in which such Acts, Records and Proceedings, shall be proved, and the Effect thereof," Art. IV, § 1. See *California v. Superior Court of Cal., San Bernardino Cty.*, 482 U.S. 400, 407, 107 S.Ct. 2433, 2438, 96 L.Ed.2d 332 (1987).

4 Both the dissent and Justice SOUTER dispute that the consequences are said to flow automatically. They are wrong. The passage says that (1) federal laws will be supreme, and (2) all state officers will be oath-bound to observe those laws, and *thus* (3) state officers will be "incorporated" and "rendered auxiliary." The reason the progression is automatic is that there is *not* included between (2) and (3): "(2a) those laws will include laws compelling action by state officers." It is the mere existence of *all* federal laws that is said to make state officers "incorporated" and "auxiliary."

  

5 Justice SOUTER seeks to avoid incompatibility with *New York* (a decision which he joined and purports to adhere to), by saying, *post,* at 2403–2404, that the passage does not mean "any conceivable requirement may be imposed on any state official," and that "the essence of legislative power ... is a discretion not subject to command," so that legislatures, at least, cannot be commanded. But then why were legislatures mentioned in the passage? It seems to us assuredly *not* a "natural reading" that being "rendered auxiliary to the enforcement of [the National Government's] laws" means impressibility into federal service for "courts and magistrates" but something quite different for "legislatures." Moreover, the novel principle of political science that Justice SOUTER invokes in order to bring forth disparity of outcome from parity of language—namely, that "the essence of legislative power ... is a discretion not subject to command," *ibid.*—seems to us untrue. Perhaps legislatures are inherently uncommandable as to the outcome of their legislation, but they are commanded all the time as to what subjects they shall legislate upon—commanded, that is, by the people, in constitutional provisions that require, for example, the enactment of annual budgets or forbid the enactment of laws permitting gambling. We do not think that state legislatures would be betraying their very "essence" as legislatures (as opposed to their nature as sovereigns, a nature they share with the other two branches of Government) if they obeyed a federal command to enact laws, for example, criminalizing the sale of marijuana.

6 If Justice SOUTER finds these obligations too insignificant, see *post,* at 2402, n. 1, then perhaps he should subscribe to the interpretations of "essential agency" given by Madison, see *infra,* at 2374, and n. 8, or by Story, see n. 8, *infra.* The point is that there is *no* necessity to give the phrase the problematic meaning which alone enables him to use it as a basis for deciding this case.

7 Justice SOUTER deduces from this passage in No. 36 that although the Federal Government *may* commandeer state officers, it *must* compensate them for their services. This is a mighty leap, which would create a constitutional jurisprudence (for determining when the compensation was adequate) that would make takings cases appear clear and simple.

8 Justice SOUTER's discussion of this passage omits to mention that it *contains an example* of state executives' "essential agency"—and indeed implies the opposite by observing that "*other* numbers of The *Federalist* give examples" of the "essential agency" of state executive officers. *Post,* at 2403 (emphasis added). In seeking to explain the curiousness of Madison's *not mentioning* the state executives' obligation to administer federal law, Justice SOUTER says that in speaking of "an essential agency in giving effect to the federal Constitution," The Federalist No. 44, Madison "was not talking about executing congressional statutes; he was talking about putting the National Constitution into effect," *post,* at 2403, n. 2. Quite so, which is our very point.

> It is interesting to observe that Story's Commentaries on the Constitution, commenting upon the same issue of why state officials are required by oath to support the Constitution, uses the same "essential agency" language as Madison did in The Federalist No. 44, and goes on to give more numerous examples of state executive agency than Madison did; all of them, however, involve not state administration of federal law, but merely the implementation of duties imposed on state officers by the Constitution itself: "The executive authority of the several states may be often called upon to exert Powers or allow Rights given by the Constitution, as in filling vacancies in the senate during the recess of the legislature; in issuing writs of election to fill vacancies in the house of representatives; in officering the militia, and giving effect to laws for calling them; and in the surrender of fugitives from justice." 2 Story, Commentaries on the Constitution of the United States 577 (1851).

9 Even if we agreed with Justice SOUTER's reading of The Federalist No. 27, it would still seem to us most peculiar to give the view expressed in that one piece, not clearly confirmed by any other writer, the determinative weight he does. That would be crediting the most expansive view of federal authority ever expressed, and from the pen of the most expansive expositor of federal power. Hamilton was "from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution." C. Rossiter, Alexander Hamilton and the Constitution 199 (1964). More specifically, it is widely recognized that "The Federalist reads with a split personality" on matters of federalism. See D. Braveman, W. Banks, & R. Smolla, Constitutional Law: Structure and Rights in Our Federal System 198–199 (3d ed.1996). While overall The Federalist reflects a "large area of agreement between Hamilton and Madison," Rossiter, *supra,* at 58, that is not the case with respect to the subject at hand, see Braveman, *supra,* at 198–199. To choose Hamilton's view, as Justice SOUTER would, is to turn a blind eye to the fact that it was Madison's—not Hamilton's—that prevailed, not only at the Constitutional Convention and in popular sentiment, see Rossiter, *supra,* at 44–47, 194, 196; 1 Records of the

Federal Convention 366 (M. Farrand ed.1911), but in the subsequent struggle to fix the meaning of the Constitution by early congressional practice, see *supra,* at 2369–2372.

10 The dissent, reiterating Justice STEVENS's dissent in *New York,* 505 U.S., at 210–213, 112 S.Ct., at 2446–2447, maintains that the Constitution merely *augmented* the pre-existing power under the Articles to issue commands to the States with the additional power to make demands directly on individuals. See *post,* at 2389. That argument, however, was squarely rejected by the Court in *New York, supra,* at 161–166, 112 S.Ct., at 2420–2423, and with good reason. Many of Congress's powers under Art. I, § 8, were copied almost verbatim from the Articles of Confederation, indicating quite clearly that "[w]here the Constitution intends that our Congress enjoy a power once vested in the Continental Congress, it specifically grants it." Prakash, Field Office Federalism, 79 Va. L.Rev.1957, 1972 (1993).

11 Justice BREYER's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one. The Framers were familiar with many federal systems, from classical antiquity down to their own time; they are discussed in Nos. 18–20 of The Federalist. Some were (for the purpose here under discussion) quite similar to the modern "federal" systems that Justice BREYER favors. Madison's and Hamilton's opinion of such systems could not be clearer. The Federalist No. 20, after an extended critique of the system of government established by the Union of Utrecht for the United Netherlands, concludes:

> "I make no apology for having dwelt so long on the contemplation of these federal precedents. Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth, which it unequivocally pronounces in the present case, is that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity...." *Id.,* at 138.

Antifederalists, on the other hand, pointed specifically to Switzerland—and its then–400 years of success as a "confederate republic"—as proof that the proposed Constitution and its federal structure was unnecessary. See Patrick Henry, Speeches given before the Virginia Ratifying Convention, 4 and 5 June, 1788, reprinted in The Essential Antifederalist 123, 135–136 (W. Allen & G. Lloyd ed.1985). The fact is that our federalism is not Europe's. It is "the unique contribution of the Framers to political science and political theory." *United States v. Lopez,* 514 U.S. 549, 575, 115 S.Ct. 1624, 1638, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring) (citing Friendly, Federalism: A Forward, 86 Yale L.J. 1019 (1977)).

12 There is not, as the dissent believes, *post,* at 2396, "tension" between the proposition that impressing state police officers into federal service will massively augment *federal* power, and the proposition that it will also sap the power of the Federal *Presidency.* It is quite possible to have a more powerful Federal Government that is, by reason of the destruction of its Executive unity, a less efficient one. The dissent is correct, *post,* at 2396, that control by the unitary Federal Executive is also sacrificed when States voluntarily administer federal programs, but the condition of voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency.

13 This argument also falsely presumes that the Tenth Amendment is the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions, see *supra,* at 2376, and not only those, like the Tenth Amendment, that speak to the point explicitly. It is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications. See, *e.g., Myers v. United States,* 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926) (finding by implication from Art. II, 1, 2, that the President has the exclusive power to remove executive officers); *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995) (finding that Article III implies a lack of congressional power to set aside final judgments).

14 The dissent points out that *FERC* cannot be construed as merely following the principle recognized in *Testa* that state courts must apply relevant federal law because "[a]lthough the commission was serving an adjudicative function, the commissioners were unquestionably not 'judges' within the meaning of [the Supremacy Clause]." *Post,* at 2401. That is true enough. But the answer to the question of which state officers *must* apply federal law (only " 'judges' within the meaning of [the Supremacy Clause]") is different from the answer to the question of which state officers *may be required by statute* to apply federal law (officers who conduct adjudications similar to those traditionally performed by judges). It is within the power of the States, as it is within the power of the Federal Government, see *Crowell v. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932), to transfer some adjudicatory functions to administrative agencies, with opportunity

for subsequent judicial review. But it is also within the power of Congress to prescribe, explicitly or by implication (as in the legislation at issue in *FERC* ), that those adjudications must take account of federal law. The existence of this latter power should not be unacceptable to a dissent that believes distinguishing among officers on the basis of their title rather than the function they perform is "empty formalistic reasoning of the highest order," *post,* at 2392. We have no doubt that *FERC* would not have been decided the way it was if *non* adjudicative responsibilities of the state agency were at issue.

15 Contrary to the dissent's suggestion, *post,* at 2394–2395, n. 16, and 2399, the distinction in our Eleventh Amendment jurisprudence between States and municipalities is of no relevance here. We long ago made clear that the distinction is peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity, see *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978); we have refused to apply it to the question of whether a governmental entity is protected by the Constitution's guarantees of federalism, including the Tenth Amendment, see *National League of Cities v. Usery,* 426 U.S. 833, 855–856, n. 20, 96 S.Ct. 2465, 2476, n. 20, 49 L.Ed.2d 245 (1976) (overruled on other grounds by *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)); see also *Garcia, supra* (resolving Tenth Amendment issues in suit brought by local transit authority).

16 The dissent's suggestion, *post,* at 2398–2399, n. 27, that *New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), itself embraced the distinction between congressional control of States (impermissible) and congressional control of state officers (permissible) is based upon the most egregious wrenching of statements out of context. It would take too much to reconstruct the context here, but by examining the entire passage cited, *id.,* at 178–179, 112 S.Ct., at 2429–2430, the reader will readily perceive the distortion. The passage includes, for example, the following:

> "Additional cases cited by the United States discuss the power of federal *courts* to order state officials to comply with federal law.... Again, however, the text of the Constitution plainly confers this authority on the federal courts.... The Constitution contains no analogous grant of authority to Congress." *Id.,* at 179, 112 S.Ct., at 2430.

17 The dissent observes that "Congress could require private persons, such as hospital executives or school administrators, to provide arms merchants with relevant information about a prospective purchaser's fitness to own a weapon," and that "the burden on police officers [imposed by the Brady Act] would be permissible if a similar burden were also imposed on private parties with access to relevant data." *Post,* at 2397. That is undoubtedly true, but it does not advance the dissent's case. The Brady Act does not merely require CLEOs to report information in their private possession. It requires them to provide information that belongs to the State and is available to them only in their official capacity; and to conduct investigation in their official capacity, by examining databases and records that only state officials have access to. In other words, the suggestion that extension of this statute to private citizens would eliminate the constitutional problem posits the impossible.

18 We note, in this regard, that both CLEOs before us here assert that they are prohibited from taking on these federal responsibilities under state law. That assertion is clearly correct with regard to Montana law, which expressly enjoins any "county ... or other local government unit" from "prohibit[ing] ... or regulat[ing] the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, [or] possession ... of any ... handgun," Mont.Code Ann. § 45–8–351(1) (1995). It is arguably correct with regard to Arizona law as well, which states that "[a] political subdivision of this state shall not ... prohibit the ownership, purchase, sale or transfer of firearms," Ariz.Rev.Stat.Ann. § 13–3108(B) (1989). We need not resolve that question today; it is at least clear that Montana and Arizona do not require their CLEOs to implement the Brady Act, and CLEOs Printz and Mack have chosen not to do so.

1 Our most recent treatment of the Second Amendment occurred in *United States v. Miller,* 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939), in which we reversed the District Court's invalidation of the National Firearms Act, enacted in 1934. In *Miller,* we determined that the Second Amendment did not guarantee a citizen's right to possess a sawed-off shotgun because that weapon had not been shown to be "ordinary military equipment" that could "contribute to the common defense." *Id.,* at 178, 59 S.Ct., at 818. The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment.

2 Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the "right to keep and bear arms" is, as the Amendment's text suggests, a personal right. See, *e.g.,* J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo–American Right 162 (1994); S. Halbrook, That Every Man Be Armed, The Evolution of a Constitutional Right (1984); Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 Duke L.J. 1236 (1994); Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992); Cottrol &

Diamond, The Second Amendment: Toward an Afro–Americanist Reconsideration, 80 Geo. L.J. 309 (1991); Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989); Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L.Rev. 204 (1983). Other scholars, however, argue that the Second Amendment does not secure a personal right to keep or to bear arms. See, *e.g.*, Bogus, Race, Riots, and Guns, 66 S. Cal. L.Rev. 1365 (1993); Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L.J. 551 (1991); Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment, 99 Yale L.J. 661 (1989); Cress, An Armed Community: The Origins and Meaning of the Right to Bear Arms, 71 J. Am. Hist. 22 (1984). Although somewhat overlooked in our jurisprudence, the Amendment has certainly engendered considerable academic, as well as public, debate.

1 Indeed, the Framers repeatedly rejected proposed changes to the Tenth Amendment that would have altered the text to refer to "powers not *expressly* delegated to the United States." 3 W. Crosskey & W. Jeffrey, Politics and the Constitution in the History of the United States 36 (1980). This was done, as Madison explained, because "it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the constitution descended to recount every minutia." 1 Annals of Cong. 790 (Aug. 18, 1789); see *McCulloch v. Maryland*, 4 Wheat. 316, 406–407, 4 L.Ed. 579 (1819).

2 Recognizing the force of the argument, the Court suggests that this reasoning is in error because—even if it is responsive to the submission that the Tenth Amendment roots the principle set forth by the majority today—it does not answer the possibility that the Court's holding can be rooted in a "principle of state sovereignty" mentioned nowhere in the constitutional text. See *ante*, at 2378-2379. As a ground for invalidating important federal legislation, this argument is remarkably weak. The majority's further claim that, while the Brady Act may be legislation "necessary" to Congress' execution of its undisputed Commerce Clause authority to regulate firearms sales, it is nevertheless not "proper" because it violates state sovereignty, see *ibid.*, is wholly circular, and provides no traction for its argument. Moreover, this reading of the term "proper" gives it a meaning directly contradicted by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819). As the Chief Justice explained, the Necessary and Proper Clause by "[i]ts terms purport[s] to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted." *Id.*, at 420; see also *id.*, at 418–419(explaining that "the only possible effect" of the use of the term "proper" was "to present to the mind the idea of some choice of means of legislation not straitened and compressed within ... narrow limits").

Our ruling in *New York* that the Commerce Clause does not provide Congress the authority to require States to enact legislation—a power that affects States far closer to the core of their sovereign authority—does nothing to support the majority's unwarranted extension of that reasoning today.

3 "It has been asked why it was thought necessary, that the State magistracy should be bound to support the federal Constitution, and unnecessary that a like oath should be imposed on the officers of the United States, in favor of the State constitutions.

"Several reasons might be assigned for the distinction. I content myself with one, which is obvious and conclusive. The members of the federal government will have no agency in carrying the State constitutions into effect. The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the federal Constitution." The Federalist No. 44, at 312 (J. Madison).

4 The notion that central government would rule by directing the actions of local magistrates was scarcely a novel conception at the time of the founding. Indeed, as an eminent scholar recently observed: "At the time the Constitution was being framed ... Massachusetts had virtually no administrative apparatus of its own but used the towns for such purposes as tax gathering. In the 1830s Tocqueville observed this feature of government in New England and praised it for its ideal combination of centralized legislation and decentralized administration." S. Beer, To Make a Nation: The Rediscovery of American Federalism 252 (1993). This may have provided a model for the expectation of "Madison himself ... [that] the new federal government [would] govern through the state governments, rather in the manner of the New England states in relation to their local governments." *Ibid.*

5 See, *e.g.*, 1 Debate on the Constitution 502 (B. Bailyn ed.1993) (statement of "Brutus" that the new Constitution would "ope[n] a door to the appointment of a swarm of revenue and excise officers to prey upon the honest and industrious part of the community"); 2 *id.*, at 633 (statement of Patrick Henry at the Virginia Convention that "the salaries and fees of the

swarm of officers and dependants on the Government will cost this Continent immense sums" and noting that "[d]ouble sets of [tax] collectors will double the expence").

6 Antifederalists acknowledged this response, and recognized the likelihood that the Federal Government would rely on state officials to collect its taxes. See, *e.g.*, 3 J. Elliot, Debates on the Federal Constitution 167–168 (2d ed. 1891) (statement of Patrick Henry). The wide acceptance of this point by all participants in the framing casts serious doubt on the majority's efforts, see *ante*, at 2375, n. 9, to suggest that the view that state officials could be called upon to implement federal programs was somehow an unusual or peculiar position.

7 Hamilton recognized the force of his comments, acknowledging but rejecting opponents' "sophist[ic]" arguments to the effect that this position would "tend to the destruction of the State governments." The Federalist No. 27, at 180, n.

8 Indeed, the majority's suggestion that this consequence flows "automatically" from the officers' oath, *ante*, at 2373 (emphasis deleted), is entirely without foundation in the quoted text. Although the fact that the Court has italicized the word "automatically" may give the reader the impression that it is a word Hamilton used, that is not so.

9 The majority asserts that these statutes relating to the administration of the federal naturalization scheme are not proper evidence of the original understanding because over a century later, in *Holmgren v. United States*, 217 U.S. 509, 30 S.Ct. 588, 54 L.Ed. 861 (1910), this Court observed that that case did not present the question whether the States can be required to enforce federal laws "against their consent," *id.*, at 517, 30 S.Ct., at 589. The majority points to similar comments in *United States v. Jones*, 109 U.S. 513, 519–520, 3 S.Ct. 346, 350–351, 27 L.Ed. 1015 (1883). See *ante*, at 2370.

Those cases are unpersuasive authority. First, whatever their statements in dicta, the naturalization statutes at issue there, as made clear in the text, were framed in quite mandatory terms. Even the majority only goes so far as to say that "[i]t may well be" that these facially mandatory statutes in fact rested on voluntary state participation. *Ibid.* Any suggestion to the contrary is belied by the language of the statutes themselves.

Second, both of the cases relied upon by the majority rest on now-rejected doctrine. In *Jones*, the Court indicated that various duties, including the requirement that state courts of appropriate jurisdiction hear federal questions, "could not be enforced against the consent of the States." 109 U.S., at 520, 3 S.Ct., at 351. That view was unanimously resolved to the contrary thereafter in the *Second Employers' Liability Cases*, 223 U.S. 1, 57, 32 S.Ct. 169, 178, 56 L.Ed. 327 (1912), and in *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947).

Finally, the Court suggests that the obligation set forth in the latter two cases that state courts hear federal claims is "voluntary" in that States need not create courts of ordinary jurisdiction. That is true, but unhelpful to the majority. If a State chooses to have no local law enforcement officials it may avoid the Brady Act's requirements, and if it chooses to have no courts it may avoid *Testa*. But neither seems likely.

10 Other statutes mentioned by the majority are also wrongly miscategorized as involving essentially judicial matters. For example, the Fifth Congress enacted legislation requiring state courts to serve as repositories for reporting what amounted to administrative claims against the United States Government, under a statute providing compensation in land to Canadian refugees who had supported the United States during the Revolutionary War. Contrary to the majority's suggestion, that statute did not amount to a requirement that state courts adjudicate claims, see *ante*, at 2371, n. 2; final decisions as to appropriate compensation were made by federal authorities, see Act of Apr. 7, 1798, ch. 26, § 3, 1 Stat. 548.

11 Able to muster little response other than the bald claim that this argument strikes the majority as "doubtful," *ante*, at 2371, n. 2, the Court proceeds to attack the basic point that the statutes discussed above called state judges to serve what were substantially executive functions. The argument has little force. The majority's view that none of the statutes referred to in the text required judges to perform anything other than "quintessentially adjudicative tasks[s]," *ibid.*, is quite wrong. The evaluation of applications for citizenship and the acceptance of Revolutionary War claims, for example, both discussed above, are hard to characterize as the sort of adversarial proceedings to which common-law courts are accustomed. As for the majority's suggestion that the substantial administrative requirements imposed on state-court clerks under the naturalization statutes are merely "ancillary" and therefore irrelevant, this conclusion is in considerable tension with the Court's holding that the minor burden imposed by the Brady Act violates the Constitution. Finally, the majority's suggestion that the early statute requiring state courts to assess the seaworthiness of vessels is essentially adjudicative in nature is not compelling. Activities of this sort, although they may bear some resemblance to traditional common-law adjudication, are far afield from the classical model of adversarial litigation.

12 Indeed, an entirely appropriate concern for the prerogatives of state government readily explains Congress' sparing use of this otherwise "highly attractive," *ante,* at 2370, 2371, power. Congress' discretion, contrary to the majority's suggestion, indicates not that the power does not exist, but rather that the interests of the States are more than sufficiently protected by their participation in the National Government. See *infra,* at 2394–2395.

13 Indeed, the very commentator upon whom the majority relies noted that the "President *might,* under the act, have issued orders directly to every state officer, and this would have been, for war purposes, a justifiable Congressional grant of all state powers into the President's hands." Note, The President, The Senate, The Constitution, and the Executive Order of May 8, 1926, 21 U. Ill. L.Rev. 142, 144 (1926).

14 Even less probative is the Court's reliance on the decision by Congress to authorize federal marshals to rent temporary jail facilities instead of insisting that state jailkeepers house federal prisoners at federal expense. See *ante,* at 2372. The majority finds constitutional significance in the fact that the First Congress (apparently following practice appropriate under the Articles of Confederation) had issued a request to state legislatures rather than a command to state jailkeepers, see Resolution of Sept. 29, 1789, 1 Stat. 96, and the further fact that it chose not to change that request to a command 18 months later, see Resolution of Mar. 3, 1791, 1 Stat. 225. The Court does not point us to a single comment by any Member of Congress suggesting that either decision was motivated in the slightest by constitutional doubts. If this sort of unexplained congressional action provides sufficient historical evidence to support the fashioning of judge-made rules of constitutional law, the doctrine of judicial restraint has a brief, though probably colorful, life expectancy.

15 Indeed, despite the exhaustive character of the Court's response to this dissent, it has failed to find even an iota of evidence that any of the Framers of the Constitution or any Member of Congress who supported or opposed the statutes discussed in the text ever expressed doubt as to the power of Congress to impose federal responsibilities on local judges or police officers. Even plausible rebuttals of evidence consistently pointing in the other direction are no substitute for affirmative evidence. In short, a neutral historian would have to conclude that the Court's discussion of history does not even begin to establish a prima facie case.

16 The majority's argument is particularly peculiar because these cases do not involve the enlistment of *state* officials at all, but only an effort to have federal policy implemented by officials of *local* government. Both Sheriffs Printz and Mack are county officials. Given that the Brady Act places its interim obligations on chief law enforcement officers (CLEO's), who are defined as "the chief of police, the sheriff, or an equivalent officer," 18 U.S.C. § 922(s)(8), it seems likely that most cases would similarly involve local government officials.

This Court has not had cause in its recent federalism jurisprudence to address the constitutional implications of enlisting nonstate officials for federal purposes. (We did pass briefly on the issue in a footnote in *National League of Cities v. Usery,* 426 U.S. 833, 855, n. 20, 96 S.Ct. 2465, 2476, n. 20, 49 L.Ed.2d 245 (1976), but that case was overruled in its entirety by *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). The question was not called to our attention in *Garcia* itself.) It is therefore worth noting that the majority's decision is in considerable tension with our Eleventh Amendment sovereign immunity cases. Those decisions were designed to "accor[d] the States the respect owed them as members of the federation." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 146, 113 S.Ct. 684, 689, 121 L.Ed.2d 605 (1993). But despite the fact that "political subdivisions exist solely at the whim and behest of their State," *Port Authority Trans–Hudson Corp. v. Feeney,* 495 U.S. 299, 313, 110 S.Ct. 1868, 1877, 109 L.Ed.2d 264 (1990) (Brennan, J., concurring in part and concurring in judgment), we have "consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 401, 99 S.Ct. 1171, 1177, 59 L.Ed.2d 401 (1979); see also *Hess v. Port Authority Trans–Hudson Corporation,* 513 U.S. 30, 47, 115 S.Ct. 394, 404, 130 L.Ed.2d 245 (1994). Even if the protections that the majority describes as rooted in the Tenth Amendment ought to benefit state officials, it is difficult to reconcile the decision to extend these principles to local officials with our refusal to do so in the Eleventh Amendment context. If the federal judicial power may be exercised over local government officials, it is hard to see why they are not subject to the legislative power as well.

17 "Whenever called upon to judge the constitutionality of an Act of Congress—'the gravest and most delicate duty that this Court is called upon to perform,' *Blodgett v. Holden,* 275 U.S. 142, 148 [48 S.Ct. 105, 107, 72 L.Ed. 206] (1927) (Holmes, J.)—the Court accords 'great weight to the decisions of Congress.' *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 102 [93 S.Ct. 2080, 2086, 36 L.Ed.2d 772] (1973). The Congress is a coequal branch of Government whose Members take the same oath we do to uphold the Constitution of the United

States. As Justice Frankfurter noted in *Joint Anti–Fascist Refugee Committee v.McGrath*, 341 U.S. 123, 164 [71 S.Ct. 624, 644, 95 L.Ed. 817] (1951) (concurring opinion), we must have 'due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.' " *Rostker v. Goldberg*, 453 U.S. 57, 64, 101 S.Ct. 2646, 2651, 69 L.Ed.2d 478 (1981).

18 The majority also makes the more general claim that requiring state officials to carry out federal policy causes States to "tak[e] the blame" for failed programs. *Ante*, at 2382. The Court cites no empirical authority to support the proposition, relying entirely on the speculations of a law review article. This concern is vastly overstated.

Unlike state legislators, local government executive officials routinely take action in response to a variety of sources of authority: local ordinance, state law, and federal law. It doubtless may therefore require some sophistication to discern under which authority an executive official is acting, just as it may not always be immediately obvious what legal source of authority underlies a judicial decision. In both cases, affected citizens must look past the official before them to find the true cause of their grievance. See *FERC v. Mississippi*, 456 U.S. 742, 785, 102 S.Ct. 2126, 2151, 72 L.Ed.2d 532 (1982) (O'CONNOR, J., concurring in part and dissenting in part) (legislators differ from judges because legislators have "the power to choose subjects for legislation"). But the majority's rule neither creates nor alters this basic truth.

The problem is of little real consequence in any event, because to the extent that a particular action proves politically unpopular, we may be confident that elected officials charged with implementing it will be quite clear to their constituents where the source of the misfortune lies. These cases demonstrate the point. Sheriffs Printz and Mack have made public statements, including their decisions to serve as plaintiffs in these actions, denouncing the Brady Act. See, *e.g.*, Shaffer, Gun Suit Shoots Sheriff into Spotlight, Arizona Republic, July 5, 1994, p. B1; Downs, Most Gun Dealers Shrug off Proposal to Raise License Fee, Missoulian, Jan. 5, 1994. Indeed, Sheriff Mack has written a book discussing his views on the issue. See R. Mack & T. Walters, From My Cold Dead Fingers: Why America Needs Guns (1994). Moreover, we can be sure that CLEO's will inform disgruntled constituents who have been denied permission to purchase a handgun about the origins of the Brady Act requirements. The Court's suggestion that voters will be confused over who is to "blame" for the statute reflects a gross lack of confidence in the electorate that is at war with the basic assumptions underlying any democratic government.

19 Unlike the majority's judicially crafted rule, the statute excludes from its coverage bills in certain subject areas, such as emergency matters, legislation prohibiting discrimination, and national security measures. See 2 U.S.C. § 1503 (1994 ed., Supp. II).

20 The initial signs are that the Act will play an important role in curbing the behavior about which the majority expresses concern. In the law's first year, the Congressional Budget Office identified only five bills containing unfunded mandates over the statutory threshold. Of these, one was not enacted into law, and three were modified to limit their effect on the States. The fifth, which was enacted, was scarcely a program of the sort described by the majority at all; it was a generally applicable increase in the minimum wage. See Congressional Budget Office, The Experience of the Congressional Budget Office During the First Year of the Unfunded Mandates Reform Act 13–15 (Jan.1997).

21 The Court raises the specter that the National Government seeks the authority "to impress into its service ... the police officers of the 50 States." *Ante*, at 2378. But it is difficult to see how state sovereignty and individual liberty are more seriously threatened by federal reliance on state police officers to fulfill this minimal request than by the aggrandizement of a national police force. The Court's alarmist hypothetical is no more persuasive than the likelihood that Congress would actually enact any such program.

22 Moreover, with respect to programs that directly enlist the local government officials, the majority's position rests on nothing more than a fanciful hypothetical. The enactment of statutes that merely involve the gathering of information, or the use of state officials on an interim basis, do not raise even arguable separation-of-powers concerns.

23 See *New York*, 505 U.S., at 167, 112 S.Ct., at 2423–2424; see, *e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987); see also *ante*, at 2385 (O'CONNOR, J., concurring).

24 *New York*, 505 U.S., at 167, 112 S.Ct., at 2423–2424; see, *e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

25 *New York*, 505 U.S., at 160, 112 S.Ct., at 2420; see, *e.g.*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

26 The majority also cites to *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), and *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). See *ante*, at 2379–2380. Neither case addressed the issue presented here. *Hodel* simply reserved the question. See 452 U.S., at 288, 101 S.Ct., at 2366. The Court's subsequent opinion in *FERC* did the same, see 456 U.S., at 764–765, 102 S.Ct., at 2140–2141; and, both its holding and reasoning cut against the majority's view in these cases.

27 Indeed, this distinction is made in the *New York* opinion itself. In that case, the Court rejected the Government's argument that earlier decisions supported the proposition that "the Constitution does, in some circumstances, permit federal directives to state governments." *New York*, 505 U.S., at 178, 112 S.Ct., at 2429. But in doing so, it distinguished those cases on a ground that applies to the federal directive in the Brady Act:

> "[A]ll involve congressional regulation of individuals, not congressional requirements that States regulate. ...
>
> . . . . .
>
> "[T]he cases relied upon by the United States hold only that federal law is enforceable in state courts and that federal courts may in proper circumstances order state officials to comply with federal law, propositions that by no means imply any authority on the part of Congress to mandate state regulation." *Id.*, at 178–179, 112 S.Ct., at 2429–2430.

The Brady Act contains no command directed to a sovereign State or to a state legislature. It does not require any state entity to promulgate any federal rule. In these cases, the federal statute is not even being applied to any state official. See n. 16, *supra*. It is a "congressional regulation of individuals," *New York*, 505 U.S., at 178, 112 S.Ct., at 2430, including gun retailers and local police officials. Those officials, like the judges referred to in the *New York* opinion, are bound by the Supremacy Clause to comply with federal law. Thus if we accept the distinction identified in the *New York* opinion itself, that decision does not control the disposition of these cases.

28 Ironically, the distinction that the Court now finds so preposterous can be traced to the majority opinion in *National League of Cities*. See 426 U.S., at 854, 96 S.Ct., at 2475 ("[T]he States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce"). The fact that the distinction did not provide an adequate basis for curtailing the power of Congress to extend the coverage of the Fair Labor Standards Act to state employees does not speak to the question whether it may identify a legitimate difference between a directive to local officers to provide information or assistance to the Federal Government and a directive to a State to enact legislation.

29 The majority correctly notes the opinion's statement that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations...." *FERC*, 456 U.S., at 761–762, 102 S.Ct., at 2138–2139. But the Court truncates this quotation in a grossly misleading fashion. We continued by noting *in that very sentence* that "there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." *Ibid.* Indeed, the Court expressly rejected as "rigid and isolated," *id.*, at 761, 102 S.Ct., at 2138, our suggestion long ago in *Kentucky v. Dennison*, 24 How. 66, 107, 16 L.Ed. 717 (1861), that Congress "has no power to impose on a State officer, as such, any duty whatever."

30 Moreover, *Branstad* unequivocally rejected an important premise that resonates throughout the majority opinion: namely, that because the States retain their sovereignty in areas that are unregulated by federal law, notions of comity rather than constitutional power govern any direction by the National Government to state executive or judicial officers. That construct was the product of the ill-starred opinion of Chief Justice Taney in *Kentucky v. Dennison*, 24 How. 66, 16 L.Ed. 717 (1861), announced at a time when "the practical power of the Federal Government [was] at its lowest ebb," *Branstad*, 483 U.S., at 225, 107 S.Ct., at 2806. As we explained:

> "If it seemed clear to the Court in 1861, facing the looming shadow of a Civil War, that 'the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,' 24 How., at 107, basic constitutional principles now point as clearly the other way." *Id.*, at 227, 107 S.Ct., at 2808.
>
> "*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development. Yet this decision has stood while the world of which it was a part has passed away. We conclude that it may stand no longer." *Id.*, at 230, 107 S.Ct., at 2809.

31 As the discussion above suggests, the Clause's mention of judges was almost certainly meant as nothing more than a choice-of-law rule, informing the state courts that they were to apply federal law in the event of a *conflict* with state

authority. The majority's quotation of this language, *ante*, at 2381, is quite misleading because it omits a crucial phrase that follows the mention of state judges. In its entirety, the Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.*" Art. VI, cl. 2 (emphasis added). The omitted language, in my view, makes clear that the specific reference to judges was designed to do nothing more than state a choice-of-law principle. The fact that our earliest opinions in this area, see *Testa; Second Employers' Liability Cases*, written at a time when the question was far more hotly contested than it is today, did not rely upon that language lends considerable support to this reading.

32 The Court's suggestion that these officials ought to be treated as "judges" for constitutional purposes because that is, functionally, what they are, is divorced from the constitutional text upon which the majority relies, which refers quite explicitly to "Judges" and not administrative officials. In addition, it directly contradicts the majority's position that early statutes requiring state courts to perform executive functions are irrelevant to our assessment of the original understanding because "Judges" were at issue. In short, the majority's adoption of a proper functional analysis gives away important ground elsewhere without shoring up its argument here.

33 Indeed, presuming that the majority has correctly read the Supremacy Clause, it is far more likely that the founders had a special respect for the independence of judges, and so thought it particularly important to emphasize that state judges were bound to apply federal law. The Framers would hardly have felt any equivalent need to state the then well-accepted point, see *supra*, at 2389–2391, that the enlistment of state executive officials was entirely proper.

1 The Court offers two criticisms of this analysis. First, as the Court puts it, the consequences set forth in this passage (that is, rendering state officials "auxiliary" and "incorporat[ing]" them into the operations of the Federal Government) "are said ... to flow *automatically* from the officers' oath," *ante*, at 2373; from this, the Court infers that on my reading, state officers' obligations to execute federal law must follow "without the necessity for a congressional directive that they implement it," *ibid.* But neither Hamilton nor I use the word "automatically"; consequently, there is no reason on Hamilton's view to infer a state officer's affirmative obligation without a textual indication to that effect. This is just what Justice STEVENS says, *ante* at 2391, and n. 8.

Second, the Court reads The Federalist No. 27 as incompatible with our decision in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), and credits me with the imagination to devise a "novel principle of political science," *ante*, at 2373, n. 5, "in order to bring forth disparity of outcome from parity of language," *ibid.*; in order, that is, to salvage *New York*, by concluding that Congress can tell state executive officers what to execute without at the same time having the power to tell state legislators what to legislate. But the Court is too generous. I simply realize that "parity of language" (*i.e.*, all state officials who take the oath are "incorporated" or are "auxiliar[ies]") operates on officers of the three branches in accordance with the quite different powers of their respective branches. The core power of an executive officer is to enforce a law in accordance with its terms; that is why a state executive "auxiliary" may be told what result to bring about. The core power of a legislator acting within the legislature's subject-matter jurisdiction is to make a discretionary decision on what the law should be; that is why a legislator may not be legally ordered to exercise discretion a particular way without damaging the legislative power as such. The discretionary nature of the authorized legislative Act is probably why Madison's two examples of legislative "auxiliary" obligation address the elections of the President and Senators, see *infra*, at 2403 (discussing The Federalist No. 44, p. 307 (J. Cooke ed. 1961) (J. Madison)), not the passage of legislation to please Congress).

The Court reads Hamilton's description of state officers' role in carrying out federal law as nothing more than a way of describing the duty of state officials "not to obstruct the operation of federal law," with the consequence that any obstruction is invalid. *Ante*, at 2374. But I doubt that Hamilton's English was quite as bad as all that. Someone whose virtue consists of not obstructing administration of the law is not described as "incorporated into the operations" of a government or as an "auxiliary" to its law enforcement. One simply cannot escape from Hamilton by reducing his prose to inapposite figures of speech.

2 The Court reads Madison's No. 44 as supporting its view that Hamilton meant "auxiliaries" to mean merely "nonobstructors." It defends its position in what seems like a very sensible argument, so long as one does not go beyond the terms set by the Court: if Madison really thought state executive officials could be required to enforce federal law, one would have expected him to say so, instead of giving examples of how state officials (legislative and executive, the

**Printz v. U.S., 521 U.S. 898 (1997)**

117 S.Ct. 2365, 138 L.Ed.2d 914, 65 USLW 4731, 97 Cal. Daily Op. Serv. 5096...

Court points out) have roles in the election of national officials. See *ante,* at 2374–2375, and n. 8. One might indeed have expected that, save for one remark of Madison's, and a detail of his language, that the Court ignores. When he asked why state officers should have to take an oath to support the National Constitution, he said that "several reasons might be assigned," but that he would "content [himself] with one which is obvious & conclusive." The Federalist No. 44, at 307. The one example he gives describes how state officials will have "an essential agency in giving effect to the federal Constitution." He was not talking about executing congressional statutes; he was talking about putting the National Constitution into effect by selecting the executive and legislative members who would exercise its powers. The answer to the Court's question (and objection), then, is that Madison was expressly choosing one example of state officer agency, not purporting to exhaust the examples possible.

There is, therefore, support in Madison's No. 44 for the straightforward reading of Hamilton's No. 27 and, so, no occasion to discount the authority of Hamilton's views as expressed in The Federalist as somehow reflecting the weaker side of a split constitutional personality. *Ante,* at 2375, n. 9. This, indeed, should not surprise us, for one of the Court's own authorities rejects the "split personality" notion of Hamilton and Madison as being at odds in The Federalist, in favor of a view of all three Federalist writers as constituting a single personality notable for its integration:

"In recent years it has been popular to describe Publius [the nominal author of The Federalist] as a 'split personality' who spoke through Madison as a federalist and an exponent of limited government, [but] through Hamilton as a nationalist and an admirer of energetic government.... Neither the diagnosis of tension between Hamilton and Madison nor the indictment of each man for self-contradiction strikes me as a useful or perhaps even fair-minded exercise. Publius was, on any large view—the only correct view to take of an effort so sprawling in size and concentrated in time—a remarkably 'whole personality,' and I am far more impressed by the large area of agreement between Hamilton and Madison than by the differences in emphasis that have been read *into* rather than *in* their papers.... The intellectual tensions of *The Federalist* and its creators are in fact an honest reflection of those built into the Constitution it expounds and the polity it celebrates." C. Rossiter, Alexander Hamilton and the Constitution 58 (1964).

While Hamilton and Madison went their separate ways in later years, see *id.,* at 78, and may have had differing personal views, the passages from The Federalist discussed here show no sign of strain.

**End of Document**

**South Dakota v. Dole, 483 U.S. 203 (1987)**

107 S.Ct. 2793, 97 L.Ed.2d 171, 55 USLW 4971

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by State of Nev. v. Skinner, 9th Cir.(Nev.), August 31, 1989

107 S.Ct. 2793
Supreme Court of the United States

SOUTH DAKOTA, Petitioner,
v.
Elizabeth H. DOLE, Secretary, United States Department of Transportation.

No. 86–260.
|
Argued April 28, 1987.
|
Decided June 23, 1987.

State of South Dakota brought action challenging constitutionality of federal statute conditioning states' receipt of portion of federal highway funds on adoption of minimum drinking age of 21. The United States District Court for the District of South Dakota, Andrew W. Bogue, J., dismissed complaint, and state appealed. The Court of Appeals for the Eighth Circuit, 791 F.2d 628, affirmed, and state petitioned for writ of certiorari. The Supreme Court, Chief Justice Rehnquist, held that statute conditioning receipt of highway funds on adoption of minimum drinking age is valid use of Congress' spending power.

Affirmed.

Justices Brennan and O'Connor, filed dissenting opinions.

**2794 *203 *Syllabus* *

Title 23 U.S.C. § 158 (1982 ed., Supp. III) directs the Secretary of Transportation to withhold a percentage of otherwise allocable federal highway funds from States "in which the purchase or public possession ... of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." South Dakota, which permits persons 19 years old or older to purchase beer containing up to 3.2% alcohol, sued in Federal District Court for a declaratory judgment that § 158 violates the constitutional limitations on congressional exercise of the spending power under Art. I, § 8, cl. 1, of the Constitution and violates the Twenty-first Amendment. The District Court rejected the State's claims, and the Court of Appeals affirmed.

*Held:* Even if Congress, in view of the Twenty-first Amendment, might lack the power to impose directly a national minimum drinking age (a question not decided here), § 158's indirect encouragement of state action to obtain uniformity in the States' drinking ages is a valid use of the spending power. Pp. 2795–2799.

(a) Incident to the spending power, Congress may attach conditions on the receipt of federal funds. However, exercise of the power is subject to certain restrictions, including that it must be in pursuit of "the general welfare." Section 158 is consistent with such restriction, since the means chosen by Congress to address a dangerous situation—the interstate problem resulting from the incentive, created by differing state drinking ages, for young persons to combine drinking and driving—were reasonably calculated to advance the general welfare. Section 158 also is consistent with the spending power restrictions that, if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation; and that conditions on federal grants must be related to a national concern (safe interstate travel here). Pp. 2795–2797.

(b) Nor is § 158 invalidated by the spending power limitation that the conditional grant of federal funds must not be independently barred by other constitutional provisions (the Twenty-first Amendment here). Such limitation is not a prohibition on the indirect achievement of objectives *204 which Congress is not empowered to achieve directly, but, instead, means that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Here, if South Dakota were to succumb to Congress' blandishments and raise its drinking age to 21, its action would not violate anyone's constitutional rights. Moreover, the relatively small financial inducement offered by Congress here—resulting from the State's loss of only 5% of federal funds otherwise obtainable under certain highway grant

programs—is not so coercive as to pass the point at which pressure turns into compulsion. Pp. 2797–2799.

791 F.2d 628 (CA 8 1986), affirmed.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, **2795 STEVENS, and SCALIA, JJ., joined. BRENNAN, J., *post*, p. ——, and O'CONNOR, J., *post*, p. ——, filed dissenting opinions.

**Attorneys and Law Firms**

*Roger A. Tellinghuisen*, Attorney General of South Dakota, argued the cause for petitioner. With him on the briefs was *Craig M. Eichstadt*, Assistant Attorney General.

*Deputy Solicitor General Cohen* argued the cause for respondent. With him on the brief were *Solicitor General Fried, Assistant Attorney General Willard, Andrew J. Pincus, Leonard Schaitman*, and *Robert V. Zener*.*

* Briefs of *amici curiae* urging reversal were filed for the State of Colorado et al. by *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *William Damsel* and *Shawn H. Nau*, Assistant Attorneys General, *Joel S. Taylor*, and *Nancy J. Miller*, joined by the Attorneys General for their respective States as follows: *Duane Woodard* of Colorado, *Warren Price III* of Hawaii, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *Mike Greely* of Montana, *T. Travis Medlock* of South Carolina, *W.J. Michael Cody* of Tennessee, *Jeffrey L. Amestoy* of Vermont, and *Joseph B. Meyer* of Wyoming; for the Mountain States Legal Foundation et al. by *Hal Stratton*, Attorney General of New Mexico, *Constance E. Brooks*, and *Casey Shpall*; for the National Conference of State Legislatures et al. by *Benna Ruth Solomon, Beate Bloch*, and *Larry L. Simms*; for the National Beer Wholesalers' Association et al. by *E. Barrett Prettyman, Jr., John G. Roberts, Jr.*, and *John F. Stasiowski*; and for Phillip J. MacDonnell et al. by *Morton Siegel, Michael A. Moses, Richard G. Schoenstadt*, and *James L. Webster*.

Briefs of *amici curiae* urging affirmance were filed for the Insurance Institute for Highway Safety et al. by *Andrew R. Hricko, Michele McDowell Fields*, and *Ronald G. Precup*; for the National Council on Alcoholism et al. by *Charles R. Walker III*; for the National Safety Council by *Harry N. Rosenfield*; and for United States Senator Frank R. Lautenberg et al. by *Thomas F. Campion* and *Michael J. Faigen*.

**Opinion**

*205 Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner South Dakota permits persons 19 years of age or older to purchase beer containing up to 3.2% alcohol. S.D.Codified Laws § 35–6–27 (1986). In 1984 Congress enacted 23 U.S.C. § 158 (1982 ed., Supp. III), which directs the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from States "in which the purchase or public possession ... of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." The State sued in United States District Court seeking a declaratory judgment that § 158 violates the constitutional limitations on congressional exercise of the spending power and violates the Twenty-first Amendment to the United States Constitution. The District Court rejected the State's claims, and the Court of Appeals for the Eighth Circuit affirmed. 791 F.2d 628 (1986).

In this Court, the parties direct most of their efforts to defining the proper scope of the Twenty-first Amendment. Relying on our statement in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 946, 63 L.Ed.2d 233 (1980), that the "Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system," South Dakota asserts that the setting of minimum drinking ages is clearly within the "core powers" reserved to the States under § 2 of the Amendment.[1] Brief for Petitioner 43–44. Section 158, petitioner claims, usurps *206 that core power. The Secretary in response asserts that the Twenty-first Amendment is simply not implicated by § 158; the plain language of § 2 confirms the States' broad power to impose restrictions on the sale and distribution of alcoholic beverages but does not confer on them any power to *permit* sales that Congress seeks to *prohibit*. Brief for Respondent 25–26. That Amendment,

under this reasoning, would not prevent Congress from affirmatively enacting a national minimum drinking age more restrictive than that provided by the various state laws; and it would follow *a fortiori* that the indirect inducement involved here is compatible with the Twenty-first Amendment.

These arguments present questions of the meaning of the Twenty-first Amendment, the bounds of which have escaped precise definition. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274–276, 104 S.Ct. 3049, 3056–3058, 82 L.Ed.2d 200 (1984); *Craig v. Boren*, 429 U.S. 190, 206, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976). Despite the extended treatment of the question by the parties, however, we need not decide in this case whether that Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age. Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly.

[1] The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of **2796 federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S.Ct. 2758, 2772, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.). See *Lau v. Nichols*, 414 U.S. 563, 569, 94 S.Ct. 786, 789, 39 L.Ed.2d 1 (1974); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295, 78 S.Ct. 1174, 1185, 2 L.Ed.2d 1313 (1958); *Oklahoma* *207 *v. Civil Service Comm'n*, 330 U.S. 127, 143–144, 67 S.Ct. 544, 553–554, 91 L.Ed. 794 (1947); *Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937). The breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1, 66, 56 S.Ct. 312, 319, 80 L.Ed. 477 (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's "enumerated legislative fields," *id.*, at 65, 56 S.Ct., at 319, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

[2] [3] [4] The spending power is of course not unlimited, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, and n. 13, 101 S.Ct. 1531, 1540 n. 13, 67 L.Ed.2d 694 (1981), but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare." See *Helvering v. Davis*, 301 U.S. 619, 640–641, 57 S.Ct. 904, 908–909, 81 L.Ed. 1307 (1937); *United States v. Butler*, *supra*, at 65, 56 S.Ct., at 319. In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. *Helvering v. Davis*, *supra*, at 640, 645, 57 S.Ct., at 908–909.[2] Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously ..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State School and Hospital v. Halderman*, *supra*, at 17, 101 S.Ct., at 1540. Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *208 *Massachusetts v. United States*, 435 U.S. 444, 461, 98 S.Ct. 1153, 1164, 55 L.Ed.2d 403 1978) (plurality opinion). See also *Ivanhoe Irrigation Dist. v. McCracken*, *supra*, 357 U.S., at 295, 78 S.Ct., at 1185, ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof"). Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds. *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 269–270, 105 S.Ct. 695, 703–704, 83 L.Ed.2d 635 (1985); *Buckley v. Valeo*, 424 U.S. 1, 91, 96 S.Ct. 612, 669, 46 L.Ed.2d 659 (1976) *(per curiam)*; *King v. Smith*, 392 U.S. 309, 333, n. 34, 88 S.Ct. 2128, 2141, n. 34, 20 L.Ed.2d 1118 (1968).

[5] [6] South Dakota does not seriously claim that § 158 is inconsistent with any of the first three restrictions mentioned above. We can readily conclude that the provision is designed to serve the general welfare, especially in light of the fact that "the concept of welfare or the opposite is shaped by Congress...." *Helvering v. Davis, supra,* at 645, 57 S.Ct., at 910. Congress found that the differing drinking **2797 ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. See 23 U.S.C. § 158 (1982 ed., Supp. III). And the State itself, rather than challenging the germaneness of the condition to federal purposes, admits that it "has never contended that the congressional action was ... unrelated to a national concern in the absence of the Twenty-first Amendment." Brief for Petitioner 52. Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel. See 23 U.S.C. § 101(b). [3]

*209 This goal of the interstate highway system had been frustrated by varying drinking ages among the States. A Presidential commission appointed to study alcohol-related accidents and fatalities on the Nation's highways concluded that the lack of uniformity in the States' drinking ages created "an incentive to drink and drive" because "young persons commut[e] to border States where the drinking age is lower." Presidential Commission on Drunk Driving, Final Report 11 (1983). By enacting § 158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.

The remaining question about the validity of § 158—and the basic point of disagreement between the parties—is whether the Twenty-first Amendment constitutes an "independent constitutional bar" to the conditional grant of federal funds. *Lawrence County v. Lead-Deadwood School Dist., supra,* at 269–270, 105 S.Ct., at 702–703. Petitioner, relying on its view that the Twenty-first Amendment prohibits *direct* regulation of drinking ages by Congress, asserts that "Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment." Brief for Petitioner 52–53. But our cases show that this "independent constitutional bar" limitation on the spending power is not of the kind petitioner suggests. *United States v. Butler, supra,* 297 U.S., at 66, 56 S.Ct., at 319, for example, established that the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.

*210 We have also held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants. In *Oklahoma v. Civil Service Comm'n,* 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947), the Court considered the validity of the Hatch Act insofar as it was applied to political activities of state officials whose employment was financed in whole or in part with federal funds. The State contended that an order under this provision to withhold certain federal funds unless a state official was removed invaded its sovereignty in violation of the Tenth Amendment. Though finding that "the United States is not concerned with, and has no power to regulate, local political activities as such of state officials," the Court nevertheless held that the Federal Government "does have power to fix the terms upon **2798 which its money allotments to states shall be disbursed." *Id.,* at 143, 67 S.Ct., at 553. The Court found no violation of the State's sovereignty because the State could, and did, adopt "the 'simple expedient' of not yielding to what she urges is federal coercion. The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." *Id.,* at 143–144, 67 S.Ct., at 553–554 (citation omitted). See also *Steward Machine Co. v. Davis,* 301 U.S., at 595, 57 S.Ct., at 894 ("There is only a condition which the state is free at pleasure to disregard or to fulfill"); *Massachusetts v. Mellon,* 262 U.S. 447, 482, 43 S.Ct. 597, 599, 67 L.Ed. 1078 (1923).

[7] [8] These cases establish that the "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is

not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' ***211** broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion." *Steward Machine Co. v. Davis, supra,* 301 U.S., at 590, 57 S.Ct., at 892. Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. As we said a half century ago in *Steward Machine Co. v. Davis:*

> "[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems." 301 U.S., at 589–590, 57 S.Ct., at 891–892.

Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory ***212** but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power. Accordingly, the judgment of the Court of Appeals is

*Affirmed.*

Justice BRENNAN, dissenting.
I agree with Justice O'CONNOR that regulation of the minimum age of purchasers of liquor falls squarely within the ambit ****2799** of those powers reserved to the States by the Twenty-first Amendment. See *post,* at 2802. Since States possess this constitutional power, Congress cannot condition a federal grant in a manner that abridges this right. The Amendment, itself, strikes the proper balance between federal and state authority. I therefore dissent.

Justice O'CONNOR, dissenting.
The Court today upholds the National Minimum Drinking Age Amendment, 23 U.S.C. § 158 (1982 ed., Supp. III), as a valid exercise of the spending power conferred by Article I, § 8. But § 158 is not a condition on spending reasonably related to the expenditure of federal funds and cannot be justified on that ground. Rather, it is an attempt to regulate the sale of liquor, an attempt that lies outside Congress' power to regulate commerce because it falls within the ambit of § 2 of the Twenty-first Amendment.

My disagreement with the Court is relatively narrow on the spending power issue: it is a disagreement about the application of a principle rather than a disagreement on the principle itself. I agree with the Court that Congress may attach conditions on the receipt of federal funds to further "the federal interest in particular national projects or programs." *Massachusetts v. United States,* 435 U.S. 444, 461, 98 S.Ct. 1153, 1164, 55 L.Ed.2d 403 (1978); see *Oklahoma v. Civil Service Comm'n,* 330 U.S. 127, 143–

144, 67 S.Ct. 544, 553–554, 91 L.Ed. 794 (1947); *Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937). I also subscribe to the established proposition *213 that the reach of the spending power "is not limited by the direct grants of legislative power found in the Constitution." *United States v. Butler*, 297 U.S. 1, 66, 56 S.Ct. 312, 319, 80 L.Ed. 477 (1936). Finally, I agree that there are four separate types of limitations on the spending power: the expenditure must be for the general welfare, *Helvering v. Davis*, 301 U.S. 619, 640–641, 57 S.Ct. 904, 908–909, 81 L.Ed. 1307 (1937), the conditions imposed must be unambiguous, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531 (1981), they must be reasonably related to the purpose of the expenditure, *Massachusetts v. United States, supra*, 435 U.S., at 461, 98 S.Ct., at 1164, and the legislation may not violate any independent constitutional prohibition, *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 269–270, 105 S.Ct. 695, 703–704, 83 L.Ed.2d 635 (1985). *Ante*, at 2796–2797. Insofar as two of those limitations are concerned, the Court is clearly correct that § 158 is wholly unobjectionable. Establishment of a national minimum drinking age certainly fits within the broad concept of the general welfare and the statute is entirely unambiguous. I am also willing to assume, *arguendo*, that the Twenty-first Amendment does not constitute an "independent constitutional bar" to a spending condition. See *ante*, at 2797–2798.

But the Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing. We have repeatedly said that Congress may condition grants under the spending power only in ways reasonably related to the purpose of the federal program. *Massachusetts v. United States, supra*, 435 U.S., at 461, 98 S.Ct., at 1164; *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295, 78 S.Ct. 1174, 1185, 2 L.Ed.2d 313 (1958) (the United States may impose "reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof"); *Steward Machine Co. v. Davis, supra*, 301 U.S. at 590, 57 S.Ct., at 892 ("We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power"). In my view, establishment of a minimum drinking *214 age of 21 is not sufficiently related to interstate highway construction to justify **2800 so conditioning funds appropriated for that purpose.

In support of its contrary conclusion, the Court relies on a supposed concession by counsel for South Dakota that the State "has never contended that the congressional action was ... unrelated to a national concern in the absence of the Twenty-first Amendment." Brief for Petitioner 52. In the absence of the Twenty-first Amendment, however, there is a strong argument that the Congress might regulate the conditions under which liquor is sold under the commerce power, just as it regulates the sale of many other commodities that are in or affect interstate commerce. The fact that the Twenty-first Amendment is crucial to the State's argument does not, therefore, amount to a concession that the condition imposed by § 158 is reasonably related to highway construction. The Court also relies on a portion of the argument transcript in support of its claim that South Dakota conceded the reasonable relationship point. *Ante*, at 2797, n. 3, citing Tr. of Oral Arg. 19–21. But counsel's statements there are at best ambiguous. Counsel essentially said no more than that he was not prepared to argue the reasonable relationship question discussed at length in the Brief for the National Conference of State Legislatures et al. as *Amici Curiae*.

Aside from these "concessions" by counsel, the Court asserts the reasonableness of the relationship between the supposed purpose of the expenditure—"safe interstate travel"—and the drinking age condition. *Ante*, at 2797. The Court reasons that Congress wishes that the roads it builds may be used safely, that drunken drivers threaten highway safety, and that young people are more likely to drive while under the influence of alcohol under existing law than would be the case if there were a uniform national drinking age of 21. It hardly needs saying, however, that if the purpose of § 158 is to deter drunken driving, it is far too over and under-inclusive. It is over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate *215 highways. It is under-inclusive because teenagers pose only a small part of the drunken driving problem in this Nation. See, *e.g.*, 130 Cong.Rec. 18648 (1984) (remarks of Sen. Humphrey) ("Eighty-four percent of all highway fatalities involving alcohol occur among those whose ages exceed 21"); *id.*, at

18651 (remarks of Sen. McClure) ("Certainly, statistically, if you use that one set of statistics, then the mandatory drinking age ought to be raised at least to 30"); *ibid.* (remarks of Sen. Symms) ("[M]ost of the studies point out that the drivers of age 21–24 are the worst offenders").

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced. If, for example, the United States were to condition highway moneys upon moving the state capital, I suppose it might argue that interstate transportation is facilitated by locating local governments in places easily accessible to interstate highways—or, conversely, that highways might become overburdened if they had to carry traffic to and from the state capital. In my mind, such a relationship is hardly more attenuated than the one which the Court finds supports § 158. Cf. Tr. of Oral Arg. 39 (counsel for the United States conceding that to condition a grant upon adoption of a unicameral legislature would violate the "germaneness" requirement).

There is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants. It is the line identified in the Brief for the **2801 National Conference of State Legislatures et al. as *Amici Curiae:*

> *216 "Congress has the power to *spend* for the general welfare, it has the power to *legislate* only for delegated purposes....
>
> "The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers." *Id.*, at 19–20.

This approach harks back to *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477 (1936), the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause. There the Court wrote that "[t]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced." *Id.*, at 73, 56 S.Ct., at 322. The *Butler* Court saw the Agricultural Adjustment Act for what it was—an exercise of regulatory, not spending, power. The error in *Butler* was not the Court's conclusion that the Act was essentially regulatory, but rather its crabbed view of the extent of Congress' regulatory power under the Commerce Clause. The Agricultural Adjustment Act was regulatory but it was regulation that today would likely be considered within Congress' commerce power. See, *e.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

While *Butler's* authority is questionable insofar as it assumes that Congress has no regulatory power over farm production, *217 its discussion of the spending power and its description of both the power's breadth and its limitations remain sound. The Court's decision in *Butler* also properly recognizes the gravity of the task of appropriately limiting the spending power. If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." *United States v. Butler, supra*, 297 U.S., at 78, 56 S.Ct., at 324. This, of course, as *Butler* held, was not the Framers' plan and it is not the meaning of the Spending Clause.

Our later cases are consistent with the notion that, under the spending power, the Congress may only condition

grants in ways that can fairly be said to be related to the expenditure of federal funds. For example, in *Oklahoma v. CSC*, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947), the Court upheld application of the Hatch Act to a member of the Oklahoma State Highway Commission who was employed in connection with an activity financed in part by loans and grants from a federal agency. This condition is appropriately viewed as a condition relating to how federal moneys were to be expended. Other conditions that have been upheld by the Court may be viewed as independently justified under some regulatory power of the Congress. Thus, in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Court upheld a condition on federal grants that 10% of the money be "set aside" for contracts with minority business enterprises. But the Court found that the condition could be justified as a valid regulation **2802 under the commerce power and § 5 of the Fourteenth Amendment. *Id.*, at 476, 478, 100 S.Ct., at 2775. See also *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 787, 39 L.Ed.2d 1 (1974) (upholding nondiscrimination provisions applied to local schools receiving federal funds).

*218 This case, however, falls into neither class. As discussed above, a condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction. The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power.

Of the other possible sources of congressional authority for regulating the sale of liquor only the commerce power comes to mind. But in my view, the regulation of the age of the purchasers of liquor, just as the regulation of the price at which liquor may be sold, falls squarely within the scope of those powers reserved to the States by the Twenty-first Amendment. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716, 104 S.Ct. 2694, 2709, 81 L.Ed.2d 580 (1984). As I emphasized in *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 356, 107 S.Ct. 720, 732, 93 L.Ed.2d 667 (1987) (dissenting opinion):

> "The history of the Amendment strongly supports Justice Black's view that the Twenty-first Amendment was intended to return absolute control of the liquor trade to the States, and that the Federal Government could not use its Commerce Clause powers to interfere in any manner with the States' exercise of the power conferred by the Amendment."

Accordingly, Congress simply lacks power under the Commerce Clause to displace state regulation of this kind. *Ibid.*

The immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers. *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819). Because 23 U.S.C. § 158 (1982 ed., Supp. III) cannot be justified as an exercise of any power delegated to the Congress, it is not authorized by the Constitution. The Court errs in holding it to be the law of the land, and I respectfully dissent.

**All Citations**

483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171, 55 USLW 4971

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499 (1906).

**South Dakota v. Dole, 483 U.S. 203 (1987)**

107 S.Ct. 2793, 97 L.Ed.2d 171, 55 USLW 4971

1 Section 2 of the Twenty-first Amendment provides: "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."

2 The level of deference to the congressional decision is such that the Court has more recently questioned whether "general welfare" is a judicially enforceable restriction at all. See *Buckley v. Valeo*, 424 U.S. 1, 90–91, 96 S.Ct. 612, 668–669, 46 L.Ed.2d 659 (1976) *(per curiam)*.

3 Our cases have not required that we define the outer bounds of the "germaneness" or "relatedness" limitation on the imposition of conditions under the spending power. *Amici* urge that we take this occasion to establish that a condition on federal funds is legitimate only if it relates directly to the purpose of the expenditure to which it is attached. See Brief for National Conference of State Legislatures et al. as *Amici Curiae* 10. Because petitioner has not sought such a restriction, see Tr. of Oral Arg. 19–21, and because we find any such limitation on conditional federal grants satisfied in this case in any event, we do not address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power.

**End of Document**

132 S.Ct. 2566
Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS et al., Petitioners,
v.
Kathleen SEBELIUS, Secretary of Health and Human Services, et al.
Department of Health and Human Services, et al., Petitioners,
v.
Florida, et al.
Florida, et al., Petitioners,
v.
Department of Health and Human Services et al.

Nos. 11–393, 11–398, 11–400.
|
Argued March 26, 27, 28, 2012.
|
Decided June 28, 2012.

**Synopsis**

**Background:** Twenty-six states, as well as private individuals and organization of independent businesses, brought action against federal Health and Human Services (HHS), Treasury, and Labor Departments and their Secretaries, challenging constitutionality of Patient Protection and Affordable Care Act (PPACA). The United States District Court for the Northern District of Florida, No. 3:10–CV–00091–RV–EMT, Roger Vinson, Senior District Judge, 780 F.Supp.2d 1256, granted summary judgment to defendants on state plaintiffs' claim that Act's expansion of Medicaid was unconstitutional, concluded that Act's individual mandate provision exceeded congressional authority and was not severable, and declared entire Act invalid. The District Court further clarified its order and entered a stay pending appeal, 780 F.Supp.2d 1307. Defendants appealed, and state plaintiffs cross-appealed as to Medicaid expansion. The United States Court of Appeals for the Eleventh Circuit, Dubina, Chief Judge, and Hull, Circuit Judge, 648 F.3d 1235, affirmed as to unconstitutionality of individual mandate, reversed determination of nonseverability, and affirmed as to constitutionality of Medicaid expansion. Certiorari was granted.

**Holdings:** The Supreme Court, Chief Justice Roberts, held that:

[1] Anti–Injunction Act did not bar pre-enforcement suit, abrogating *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391;

[2] individual mandate, imposing minimum essential coverage requirement under which certain individuals must purchase and maintain health insurance coverage, exceeded Congress's power under Commerce Clause, abrogating *Thomas More Law Center v. Obama*, 651 F.3d 529, and *Seven–Sky v. Holder*, 661 F.3d 1;

[3] the individual mandate was a "tax" that was within Congress's taxing powers;

[4] statutory provision giving Secretary of Health and Human Services (HHS) the authority to penalize States that chose not to participate in Act's expansion of Medicaid program exceeded Congress's power under the Spending Clause; and

[5] the penalization provision was severable.

Affirmed in part and reversed in part.

Justice Ginsburg filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Justice Sotomayor joined, and in which Justices Breyer and Kagan joined in part.

Justices Scalia, Kennedy, Thomas, and Alito filed a dissenting opinion.

Justice Thomas filed a dissenting opinion.

**West Codenotes**

**Unconstitutional as Applied**

42 U.S.C.A. § 1396c

**Negative Treatment Reconsidered**
26 U.S.C.A. § 5000A

**2571 *Syllabus* *

In 2010, Congress enacted the Patient Protection and Affordable Care Act in order to increase the number of Americans covered by health insurance and decrease the cost of health care. One key provision is the individual mandate, which requires most Americans to maintain "minimum essential" health insurance coverage. 26 U.S.C. § 5000A. For individuals who are not exempt, and who do not receive health insurance through an employer or government program, the means of satisfying the requirement is to purchase insurance from a private company. Beginning in 2014, **2572 those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. § 5000A(b)(1). The Act provides that this "penalty" will be paid to the Internal Revenue Service (IRS) with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties. §§ 5000A(c), (g)(1).

Another key provision of the Act is the Medicaid expansion. The current Medicaid program offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. 42 U.S.C. § 1396d(a). The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage by 2014 to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. § 1396a(a)(10)(A)(i)(VIII). The Act increases federal funding to cover the States' costs in expanding Medicaid coverage. § 1396d(y)(1). But if a State does not comply with the Act's new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds. § 1396c.

Twenty-six States, several individuals, and the National Federation of Independent Business brought suit in Federal District Court, challenging the constitutionality of the individual mandate and the Medicaid expansion. The Court of Appeals for the Eleventh Circuit upheld the Medicaid expansion as a valid exercise of Congress's spending power, but concluded that Congress lacked authority to enact the individual mandate. Finding the mandate severable from the Act's other provisions, the Eleventh Circuit left the rest of the Act intact.

*Held:* The judgment is affirmed in part and reversed in part.

648 F.3d 1235, affirmed in part and reversed in part.

1. Chief Justice ROBERTS delivered the opinion of the Court with respect to Part II, concluding that the Anti–Injunction Act does not bar this suit.

The Anti–Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person," 26 U.S.C. § 7421(a), so that those subject to a tax must first pay it and then sue for a refund. The present challenge seeks to restrain the collection of the shared responsibility payment from those who do not comply with the individual mandate. But Congress did not intend the payment to be treated as a "tax" for purposes of the Anti–Injunction Act. The Affordable Care Act describes the payment as a "penalty," not a "tax." That label cannot control whether the payment is a tax for purposes of the Constitution, but it does determine the application of the Anti–Injunction Act. The Anti–Injunction Act therefore does not bar this suit. Pp. 2582 – 2584.

2. Chief Justice ROBERTS concluded in Part III–A that the individual mandate is not a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. Pp. 2585 – 2593.

(a) The Constitution grants Congress the power to "*regulate* Commerce." Art. I, § 8, cl. 3 (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. This Court's precedent reflects this understanding: As expansive as this Court's cases construing the scope of

the commerce power have been, they uniformly describe the power as reaching "activity." **2573 *E.g.*, *United States v. Lopez*, 514 U.S. 549, 560, 115 S.Ct. 1624, 131 L.Ed.2d 626. The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.

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. Congress already possesses expansive power to regulate what people do. Upholding the Affordable Care Act under the Commerce Clause would give Congress the same license to regulate what people do not do. The Framers knew the difference between doing something and doing nothing. They gave Congress the power to *regulate* commerce, not to *compel* it. Ignoring that distinction would undermine the principle that the Federal Government is a government of limited and enumerated powers. The individual mandate thus cannot be sustained under Congress's power to "regulate Commerce." Pp. 2585 – 2591.

(b) Nor can the individual mandate be sustained under the Necessary and Proper Clause as an integral part of the Affordable Care Act's other reforms. Each of this Court's prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. *E.g.*, *United States v. Comstock*, 560 U.S. 126, 130 S.Ct. 1949, 176 L.Ed.2d 878. The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power and draw within its regulatory scope those who would otherwise be outside of it. Even if the individual mandate is "necessary" to the Affordable Care Act's other reforms, such an expansion of federal power is not a "proper" means for making those reforms effective. Pp. 2591 – 2593.

3. Chief Justice ROBERTS concluded in Part III–B that the individual mandate must be construed as imposing a tax on those who do not have health insurance, if such a construction is reasonable.

The most straightforward reading of the individual mandate is that it commands individuals to purchase insurance. But, for the reasons explained, the Commerce Clause does not give Congress that power. It is therefore necessary to turn to the Government's alternative argument: that the mandate may be upheld as within Congress's power to "lay and collect Taxes." Art. I, § 8, cl. 1. In pressing its taxing power argument, the Government asks the Court to view the mandate as imposing a tax on those who do not buy that product. Because "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," *Hooper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297, the question is whether it is "fairly possible" to interpret the mandate as imposing such a tax, *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598. Pp. 2593 – 2594.

4. Chief Justice ROBERTS delivered the opinion of the Court with respect to Part III–C, concluding that the individual mandate may be upheld as within Congress's power under the Taxing Clause. Pp. 2594 – 2595.

(a) The Affordable Care Act describes the "[s]hared responsibility payment" as a "penalty," not a "tax." That label is fatal to the application of the Anti–Injunction Act. It does not, however, control whether an exaction is within Congress's power to tax. In answering that constitutional question, this Court follows a functional approach, "[d]isregarding the designation of the exaction, and viewing its substance and application." *United States v. Constantine*, **2574 296 U.S. 287, 294, 56 S.Ct. 223, 80 L.Ed. 233. Pp. 2594 – 2596.

(b) Such an analysis suggests that the shared responsibility payment may for constitutional purposes be considered a tax. The payment is not so high that there is really no choice but to buy health insurance; the payment is not limited to willful violations, as penalties for unlawful acts often are; and the payment is collected solely by the IRS through the normal means of taxation. Cf. *Child Labor Tax Case (Bailey v. Drexel Furniture Co.)*, 259 U.S. 20, 36–37, 42 S.Ct. 449, 66 L.Ed. 817. None of this is to say that payment is not intended to induce the purchase of health insurance. But the mandate need not be read to declare that failing to do so is unlawful. Neither the Affordable Care Act nor any other law attaches negative legal consequences to not buying health

  

insurance, beyond requiring a payment to the IRS. And Congress's choice of language—stating that individuals "shall" obtain insurance or pay a "penalty"—does not require reading § 5000A as punishing unlawful conduct. It may also be read as imposing a tax on those who go without insurance. See *New York v. United States*, 505 U.S. 144, 169–174, 112 S.Ct. 2408, 120 L.Ed.2d 120. Pp. 2595 – 2598.

(c) Even if the mandate may reasonably be characterized as a tax, it must still comply with the Direct Tax Clause, which provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." Art. I, § 9, cl. 4. A tax on going without health insurance is not like a capitation or other direct tax under this Court's precedents. It therefore need not be apportioned so that each State pays in proportion to its population. Pp. 2598 – 2599.

5. Chief Justice ROBERTS, joined by Justice BREYER and Justice KAGAN, concluded in Part IV that the Medicaid expansion violates the Constitution by threatening States with the loss of their existing Medicaid funding if they decline to comply with the expansion. Pp. 2633 – 2640.

(a) The Spending Clause grants Congress the power "to pay the Debts and provide for the ... general Welfare of the United States." Art. I, § 8, cl. 1. Congress may use this power to establish cooperative state-federal Spending Clause programs. The legitimacy of Spending Clause legislation, however, depends on whether a State voluntarily and knowingly accepts the terms of such programs. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." *New York*, *supra*, at 178, 112 S.Ct. 2408, 120 L.Ed.2d 120. When Congress threatens to terminate other grants as a means of pressuring the States to accept a Spending Clause program, the legislation runs counter to this Nation's system of federalism. Cf. *South Dakota v. Dole*, 483 U.S. 203, 211, 107 S.Ct. 2793, 97 L.Ed.2d 171. Pp. 2633 – 2637.

(b) Section 1396c gives the Secretary of Health and Human Services the authority to penalize States that choose not to participate in the Medicaid expansion by taking away their existing Medicaid funding. 42 U.S.C. § 1396c. The threatened loss of over 10 percent of a State's overall budget is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion. The Government claims that the expansion is properly viewed as only a modification of the existing program, and that this modification is permissible because Congress reserved the "right to alter, amend, or repeal any provision" of Medicaid. § 1304. But **2575 the expansion accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for particular categories of vulnerable individuals. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. A State could hardly anticipate that Congress's reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically. The Medicaid expansion thus violates the Constitution by threatening States with the loss of their existing Medicaid funding if they decline to comply with the expansion. Pp. 2636 – 2639.

(c) The constitutional violation is fully remedied by precluding the Secretary from applying § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion. See § 1303. The other provisions of the Affordable Care Act are not affected. Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the Medicaid expansion. Pp. 2638 – 2640.

6. Justice GINSBURG, joined by Justice SOTOMAYOR, is of the view that the Spending Clause does not preclude the Secretary from withholding Medicaid funds based on a State's refusal to comply with the expanded Medicaid program. But given the majority view, she agrees with THE CHIEF JUSTICE's conclusion in Part IV–B that the Medicaid Act's severability clause, 42 U.S.C. § 1303, determines the appropriate remedy. Because THE CHIEF JUSTICE finds the withholding—not the granting—of federal funds incompatible with the Spending Clause, Congress' extension of Medicaid remains available to any State that affirms its willingness to participate. Even absent § 1303's command, the Court would have

no warrant to invalidate the funding offered by the Medicaid expansion, and surely no basis to tear down the Affordable Care Act in its entirety. When a court confronts an unconstitutional statute, its endeavor must be to conserve, not destroy, the legislation. See, *e.g.*, *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328–330, 126 S.Ct. 961, 163 L.Ed.2d 812. Pp. 2641 – 2642.

ROBERTS, C.J., *529 announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined; an opinion with respect to Part IV, in which BREYER and KAGAN, JJ., joined; and an opinion with respect to Parts III–A, III–B, and III–D. GINSBURG, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which SOTOMAYOR, J., joined, and in which BREYER and KAGAN, JJ., joined as to Parts I, II, III, and IV. SCALIA, KENNEDY, THOMAS, and ALITO, JJ., filed a dissenting opinion. THOMAS, J., filed a dissenting opinion.

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**Opinion**

**2577 Chief Justice ROBERTS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, an opinion with respect to Part IV, in which Justice BREYER and Justice KAGAN join, and an opinion with respect to Parts III–A, III–B, and III–D.

*530 Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum *531 level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies *532 sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.

[1] *533 In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that "the question respecting the extent of *534 the powers actually granted" to the Federal Government " is perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819). In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries.

[2] [3] [4] The Federal Government "is acknowledged by all to be one of enumerated powers." *Ibid.* That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. Congress may, for example, "coin Money," "establish Post Offices," and "raise and support Armies." Art. I, § 8, cls. 5, 7, 12. The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824). The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise *535 only the powers granted to it." *McCulloch, supra,* at 405.

[5] Today, the restrictions on government power foremost in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

Indeed, the Constitution did not initially include a Bill of Rights at least partly **2578 because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." The Federalist No. 84, p. 515 (C. Rossiter ed. 1961). And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: "The powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The Federal Government has expanded dramatically over the past two centuries, but

it still must show that a constitutional grant of power authorizes each of its actions. See, *e.g.*, *United States v. Comstock*, 560 U.S. 126, 130 S.Ct. 1949, 176 L.Ed.2d 878 (2010).

[6] [7] The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does ***536** not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power." See, *e.g.*, *United States v. Morrison*, 529 U.S. 598, 618–619, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

[8] [9] "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011).

[10] This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Our precedents read that to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *Morrison*, *supra*, at 609, 120 S.Ct. 1740 (internal quotation marks omitted). The power over activities that substantially affect interstate commerce can be expansive. That power has been held to ***537** authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his ****2579** livestock, and a loan shark's extortionate collections from a neighborhood butcher shop. See *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *Perez v. United States*, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971).

[11] [12] Congress may also "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1. Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control. See, *e.g.*, *License Tax Cases*, 5 Wall. 462, 471, 18 L.Ed. 497 (1867). And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions. See, *e.g.*, *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). These offers may well induce the States to adopt policies that the Federal Government itself could not impose. See, *e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 205–206, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (conditioning federal highway funds on States raising their drinking age to 21).

The reach of the Federal Government's enumerated powers is broader still because the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art. I, § 8, cl. 18. We have long read this provision to give Congress great latitude in exercising its powers: "Let the end be legitimate, let it be within the scope of the

  

constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch,* 4 Wheat., at 421.

[13] [14] Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's *538 elected leaders. "Proper respect for a coordinate branch of the government" requires that we strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." *United States v. Harris,* 106 U.S. 629, 635, 1 S.Ct. 601, 27 L.Ed. 290 (1883). Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.

[15] [16] Our deference in matters of policy cannot, however, become abdication in matters of law. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 1 Cranch 137, 176, 2 L.Ed. 60 (1803). Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." Chief Justice John Marshall, A Friend of the Constitution No. V, Alexandria Gazette, July 5, 1819, in John Marshall's Defense of *McCulloch v. Maryland* 190–191 (G. Gunther ed. 1969). And there can be no question that it is the responsibility of this Court to enforce the limits on federal power **2580 by striking down acts of Congress that transgress those limits. *Marbury v. Madison, supra,* at 175–176.

The questions before us must be considered against the background of these basic principles.

I

In 2010, Congress enacted the Patient Protection and Affordable Care Act, 124 Stat. 119. The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care. The Act's 10 titles stretch *539 over 900 pages and contain hundreds of provisions. This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate and the Medicaid expansion.

The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage. 26 U.S.C. § 5000A. The mandate does not apply to some individuals, such as prisoners and undocumented aliens. § 5000A(d). Many individuals will receive the required coverage through their employer, or from a government program such as Medicaid or Medicare. See § 5000A(f). But for individuals who are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company.

Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. § 5000A(b)(1). That payment, which the Act describes as a "penalty," is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. § 5000A(c). In 2016, for example, the penalty will be 2.5 percent of an individual's household income, but no less than $695 and no more than the average yearly premium for insurance that covers 60 percent of the cost of 10 specified services (*e.g.,* prescription drugs and hospitalization). *Ibid.*; 42 U.S.C. § 18022. The Act provides that the penalty will be paid to the Internal Revenue Service with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties, such as the penalty for claiming too large an income tax refund. 26 U.S.C. § 5000A(g)(1). The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. § 5000A(g)(2). And some individuals who are subject to the mandate are nonetheless exempt *540

from the penalty—for example, those with income below a certain threshold and members of Indian tribes. § 5000A(e).

On the day the President signed the Act into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida. Those plaintiffs—who are both respondents and petitioners here, depending on the issue—were subsequently joined by 13 more States, several individuals, and the National Federation of Independent Business. The plaintiffs alleged, among other things, that the individual mandate provisions of the Act exceeded Congress's powers under Article I of the Constitution. The District Court agreed, holding that Congress lacked constitutional power to enact the individual mandate. 780 F.Supp.2d 1256 (N.D.Fla.2011). The District Court determined that the individual mandate could not be severed from the remainder of the Act, and therefore struck down the Act in its entirety. *Id.*, at 1305–1306.

The Court of Appeals for the Eleventh Circuit affirmed in part and reversed in **2581 part. The court affirmed the District Court's holding that the individual mandate exceeds Congress's power. 648 F.3d 1235 (2011). The panel unanimously agreed that the individual mandate did not impose a tax, and thus could not be authorized by Congress's power to "lay and collect Taxes." U.S. Const., Art. I, § 8, cl. 1. A majority also held that the individual mandate was not supported by Congress's power to "regulate Commerce ... among the several States." *Id.*, cl. 3. According to the majority, the Commerce Clause does not empower the Federal Government to order individuals to engage in commerce, and the Government's efforts to cast the individual mandate in a different light were unpersuasive. Judge Marcus dissented, reasoning that the individual mandate regulates economic activity that has a clear effect on interstate commerce.

Having held the individual mandate to be unconstitutional, the majority examined whether that provision could be severed from the remainder of the Act. The majority determined *541 that, contrary to the District Court's view, it could. The court thus struck down only the individual mandate, leaving the Act's other provisions intact. 648 F.3d, at 1328.

Other Courts of Appeals have also heard challenges to the individual mandate. The Sixth Circuit and the D.C. Circuit upheld the mandate as a valid exercise of Congress's commerce power. See *Thomas More Law Center v. Obama*, 651 F.3d 529 (C.A.6 2011); *Seven-Sky v. Holder*, 661 F.3d 1 (C.A.D.C.2011). The Fourth Circuit determined that the Anti–Injunction Act prevents courts from considering the merits of that question. See *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391 (2011). That statute bars suits "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). A majority of the Fourth Circuit panel reasoned that the individual mandate's penalty is a tax within the meaning of the Anti–Injunction Act, because it is a financial assessment collected by the IRS through the normal means of taxation. The majority therefore determined that the plaintiffs could not challenge the individual mandate until after they paid the penalty. [1]

The second provision of the Affordable Care Act directly challenged here is the Medicaid expansion. Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. See 42 U.S.C. § 1396a(a)(10). In order to receive that funding, States must comply with federal criteria governing matters such as who *542 receives care and what services are provided at what cost. By 1982 every State had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States' total revenue.

The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act **2582 requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. See § 1396a(a)(10)(A)(i)(VIII). The Act increases federal funding to cover the States' costs in expanding Medicaid coverage, although States will bear a portion of the costs on their own. § 1396d(y)(1). If a State does not comply with the Act's new coverage requirements, it may lose not

only the federal funding for those requirements, but all of its federal Medicaid funds. See § 1396c.

Along with their challenge to the individual mandate, the state plaintiffs in the Eleventh Circuit argued that the Medicaid expansion exceeds Congress's constitutional powers. The Court of Appeals unanimously held that the Medicaid expansion is a valid exercise of Congress's power under the Spending Clause. U.S. Const., Art. I, § 8, cl. 1. And the court rejected the States' claim that the threatened loss of all federal Medicaid funding violates the Tenth Amendment by coercing them into complying with the Medicaid expansion. 648 F.3d, at 1264, 1268.

We granted certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit with respect to both the individual mandate and the Medicaid expansion. 565 U.S. 1033–1034, 132 S.Ct. 603, 181 L.Ed.2d 420 (2011). Because no party supports the Eleventh Circuit's holding that the individual mandate can be completely severed from the remainder of the Affordable Care Act, we appointed an *amicus curiae* to defend that aspect of the judgment below. And because there is a reasonable *543 argument that the Anti–Injunction Act deprives us of jurisdiction to hear challenges to the individual mandate, but no party supports that proposition, we appointed an *amicus curiae* to advance it. [2]

## II

[17] Before turning to the merits, we need to be sure we have the authority to do so. The Anti–Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes. Because of the Anti–Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund. See *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7–8, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962).

[18] The penalty for not complying with the Affordable Care Act's individual mandate first becomes enforceable in 2014. The present challenge to the mandate thus seeks to restrain the penalty's future collection. *Amicus* contends that the Internal Revenue Code treats the penalty as a tax, and that the Anti–Injunction Act therefore bars this suit.

The text of the pertinent statutes suggests otherwise. The Anti–Injunction Act applies to suits "for the purpose of restraining the assessment or collection of any *tax*." § 7421(a) (emphasis added). **2583 Congress, however, chose to describe the "[s]hared responsibility payment" imposed on those who forgo health insurance not as a "tax," but as a "penalty." §§ 5000A(b), (g)(2). There is no immediate reason to think that a statute applying to "any tax" would apply to a "penalty."

[19] *544 Congress's decision to label this exaction a "penalty" rather than a "tax" is significant because the Affordable Care Act describes many other exactions it creates as "taxes." See *Thomas More*, 651 F.3d, at 551. Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally. See *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983).

[20] [21] *Amicus* argues that even though Congress did not label the shared responsibility payment a tax, we should treat it as such under the Anti–Injunction Act because it functions like a tax. It is true 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. Congress may not, for example, expand its power under the Taxing Clause, or escape the Double Jeopardy Clause's constraint on criminal sanctions, by labeling a severe financial punishment a "tax." See *Child Labor Tax Case (Bailey v. Drexel Furniture Co.)*, 259 U.S. 20, 36–37, 42 S.Ct. 449, 66 L.Ed. 817 (1922); *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994).

The Anti–Injunction Act and the Affordable Care Act, however, are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text. We have thus applied the Anti–Injunction Act to statutorily

described "taxes" even where that label was inaccurate. See *Bailey v. George*, 259 U.S. 16, 42 S.Ct. 419, 66 L.Ed. 816 (1922) (Anti–Injunction Act applies to "Child Labor Tax" struck down as exceeding Congress's taxing power in *Drexel Furniture* ).

[22] Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the Anti–Injunction Act. For example, 26 U.S.C. § 6671(a) provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by" Subchapter 68B of the Internal Revenue Code. Penalties in Subchapter 68B are thus treated as taxes under Title 26, which includes the Anti–Injunction ***545** Act. The individual mandate, however, is not in Subchapter 68B of the Code. Nor does any other provision state that references to taxes in Title 26 shall also be "deemed" to apply to the individual mandate.

*Amicus* attempts to show that Congress did render the Anti–Injunction Act applicable to the individual mandate, albeit by a more circuitous route. Section 5000A(g)(1) specifies that the penalty for not complying with the mandate "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." Assessable penalties in Subchapter 68B, in turn, "shall be assessed and collected in the same manner as taxes." § 6671(a). According to *amicus*, by directing that the penalty be "assessed and collected in the same manner as taxes," § 5000A(g)(1) made the Anti–Injunction Act applicable to this penalty.

The Government disagrees. It argues that § 5000A(g)(1) does not direct courts to apply the Anti–Injunction Act, because § 5000A(g) is a directive only to the Secretary of the Treasury to use the same " 'methodology and procedures' " to collect the penalty that he uses to collect taxes. ****2584** Brief for United States 32–33 (quoting *Seven–Sky*, 661 F.3d, at 11).

We think the Government has the better reading. As it observes, "Assessment" and "Collection" are chapters of the Internal Revenue Code providing the Secretary authority to assess and collect taxes, and generally specifying the means by which he shall do so. See § 6201 (assessment authority); § 6301 (collection authority). Section 5000A(g)(1)'s command that the penalty be "assessed and collected in the same manner" as taxes is best read as referring to those chapters and giving the Secretary the same authority and guidance with respect to the penalty. That interpretation is consistent with the remainder of § 5000A(g), which instructs the Secretary on the tools he may use to collect the penalty. See § 5000A(g)(2)(A) (barring criminal prosecutions); § 5000A(g)(2)(B) (prohibiting the Secretary from using notices of lien and levies). The Anti–Injunction Act, by contrast ***546** , says nothing about the procedures to be used in assessing and collecting taxes.

*Amicus* argues in the alternative that a different section of the Internal Revenue Code requires courts to treat the penalty as a tax under the Anti–Injunction Act. Section 6201(a) authorizes the Secretary to make "assessments of all taxes (including interest, additional amounts, additions to the tax, and *assessable penalties*)." (Emphasis added.) *Amicus* contends that the penalty must be a tax, because it is an assessable penalty and § 6201(a) says that taxes include assessable penalties.

That argument has force only if § 6201(a) is read in isolation. The Code contains many provisions treating taxes and assessable penalties as distinct terms. See, *e.g.*, §§ 860(h)(1), 6324A(a), 6601(e)(1)-(2), 6602, 7122(b). There would, for example, be no need for § 6671(a) to deem "tax" to refer to certain assessable penalties if the Code already included all such penalties in the term "tax." Indeed, *amicus* 's earlier observation that the Code requires assessable penalties to be assessed and collected "in the same manner as taxes" makes little sense if assessable penalties are themselves taxes. In light of the Code's consistent distinction between the terms "tax" and "assessable penalty," we must accept the Government's interpretation: Section 6201(a) instructs the Secretary that his authority to assess taxes includes the authority to assess penalties, but it does not equate assessable penalties to taxes for other purposes.

The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti–Injunction Act. The Anti–Injunction Act therefore does not apply to this suit, and we may proceed to the merits.

III

The Government advances two theories for the proposition that Congress had constitutional authority to enact the individual *547 mandate. First, the Government argues that Congress had the power to enact the mandate under the Commerce Clause. Under that theory, Congress may order individuals to buy health insurance because the failure to do so affects interstate commerce, and could undercut the Affordable Care Act's other reforms. Second, the Government argues that if the commerce power does not support the mandate, we should nonetheless uphold it as an exercise of Congress's power to tax. According to the Government, even if Congress lacks the power to direct individuals to buy insurance, the only effect of the individual mandate is to raise taxes on those who do not do so, and thus the law may be upheld as a tax.

**2585 A

The Government's first argument is that the individual mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, see, *e.g.*, 42 U.S.C. § 1395dd; Fla. Stat. § 395.1041 (2010), hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over $1,000 per year. 42 U.S.C. § 18091(2)(F).

In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues. It did *548 so through the Act's "guaranteed-issue" and "community-rating" provisions. These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals. See §§ 300gg, 300gg–1, 300gg–3, 300gg–4.

The guaranteed-issue and community-rating reforms do not, however, address the issue of healthy individuals who choose not to purchase insurance to cover potential health care needs. In fact, the reforms sharply exacerbate that problem, by providing an incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage. The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage. This will lead insurers to significantly increase premiums on everyone. See Brief for America's Health Insurance Plans et al. as *Amici Curiae* in No. 11–393 etc. 8–9.

The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept. The Government claims that Congress has power under the Commerce and Necessary and Proper Clauses to enact this solution.

1

The Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on interstate *549 commerce" by creating the cost-shifting problem. Brief for United States 34. The path of our Commerce Clause decisions has not always run smooth, see *United States v. Lopez*, 514 U.S. 549, 552–559, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), but it is now well

established that Congress has broad authority under the Clause. We have recognized, for example, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," but extends to activities that "have a substantial effect on interstate commerce." **2586 *United States v. Darby*, 312 U.S. 100, 118–119, 61 S.Ct. 451, 85 L.Ed. 609 (1941). Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others. See *Wickard*, 317 U.S., at 127–128, 63 S.Ct. 82.

Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.[3] Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes "the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent" for Congress's action. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505, 130 S.Ct. 3138, 3159, 177 L.Ed.2d 706 (2010) (internal quotation marks omitted *550 ). At the very least, we should "pause to consider the implications of the Government's arguments" when confronted with such new conceptions of federal power. *Lopez, supra*, at 564, 115 S.Ct. 1624.

The Constitution grants Congress the power to "*regulate* Commerce." Art. I, § 8, cl. 3 (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof." *Id.*, cl. 5. And it gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy," in addition to the power to "make Rules for the Government and Regulation of the land and naval Forces." *Id.*, cls. 12–14. If the power to regulate the Armed Forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. See *Gibbons*, 9 Wheat., at 188 ("[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said").[4]

**2587 *551 Our precedent also reflects this understanding. 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.*, *Lopez, supra*, at 560, 115 S.Ct. 1624 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained"); *Perez*, 402 U.S., at 154, 91 S.Ct. 1357 ("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" (emphasis in original; internal quotation marks omitted)); *Wickard, supra*, at 125, 63 S.Ct. 82 ("[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.*, 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (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 *post*, at 2616, 2621 – 2623, 2623, 2625 (GINSBURG, J., concurring in part, concurring in judgment in part, and dissenting in part).[5]

[23] *552 The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. 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. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.

Applying the Government's logic to the familiar case of *Wickard v. Filburn* shows how far that logic would carry us from the notion of a government of limited powers. In *Wickard*, the Court famously upheld a federal penalty imposed on a farmer for growing wheat for consumption on his own farm. 317 U.S., at 114–115, 128–129, 63 S.Ct. 82. That amount of wheat caused the farmer to exceed his quota under a **2588 program designed to support the price of wheat by limiting supply. The Court rejected the farmer's argument that growing wheat for home consumption was beyond the reach of the commerce power. It did so on the ground that the farmer's decision to grow wheat for his own use allowed him to avoid purchasing wheat in the market. That decision, when considered in the aggregate along with similar decisions of others, would have had a substantial effect on the interstate market for wheat. *Id.*, at 127–129, 63 S.Ct. 82.

*Wickard* has long been regarded as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S., at 560, 115 S.Ct. 1624, but the Government's theory in this case would go much further. Under *Wickard* it is within Congress's power to regulate the market for *553 wheat by supporting its price. But price can be supported by increasing demand as well as by decreasing supply. The aggregated decisions of some consumers not to purchase wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of insurance. Congress can therefore command that those not buying wheat do so, just as it argues here that it may command that those not buying health insurance do so. The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.

Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem. See *Seven-Sky*, 661 F.3d, at 14–15 (noting the Government's inability to "identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional" under its theory of the commerce power). To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. See, *e.g.*, Dept. of Agriculture and Dept. of Health and Human Services, Dietary Guidelines for Americans 1 (2010). The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. See, *e.g.*, Finkelstein, Trogdon, Cohen, & Dietz, Annual Medical Spending Attributable to Obesity: Payer– and Service–Specific Estimates, 28 Health Affairs w822 (2009) (detailing the "undeniable link between rising rates of obesity and rising medical spending," and estimating that "the annual medical burden of obesity has risen to almost 10 percent of all medical spending and could amount to $147 billion per year in 2008"). Those increased *554 costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. See Center for Applied Ethics, Voluntary Health Risks: Who Should Pay? 6 Issues in Ethics 6 (1993) (noting "overwhelming evidence that individuals with unhealthy habits pay only a fraction of the costs associated with their behaviors; most of the expense is borne by the rest of society in the form of higher insurance premiums, government expenditures for health care, and disability benefits"). Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables. See Dietary Guidelines, *supra*, at 19 ("Improved nutrition, appropriate eating behaviors, and increased **2589 physical activity have tremendous potential to ... reduce health care costs").

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can

readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was "an addition which few oppose and from which no apprehensions are entertained." The Federalist No. 45, at 293. While Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have "always recognized that the power to regulate commerce, though broad indeed, has limits." *Maryland v. Wirtz*, 392 U.S. 183, 196, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968). The Government's theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist *555 No. 48, at 309 (J. Madison). Congress already enjoys vast power to regulate much of what we do. 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. [6]

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. *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U.S. 607, 673, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980) (Rehnquist, J., concurring in judgment). As we have explained, "the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take." *South Carolina v. United States*, 199 U.S. 437, 449, 26 S.Ct. 110, 50 L.Ed. 261 (1905). The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now.

The Government sees things differently. It argues that because sickness and injury are unpredictable but unavoidable, "the uninsured as a class are active in the market for health care, which they regularly seek and obtain." Brief *556 for United States 50. The individual mandate "merely regulates how individuals finance and pay for that active participation—requiring that they do so through insurance, rather than through attempted self-insurance with the **2590 back-stop of shifting costs to others." *Ibid.*

The Government repeats the phrase "active in the market for health care" throughout its brief, see *id.*, at 7, 18, 34, 50, but that concept has no constitutional significance. An individual who bought a car two years ago and may buy another in the future is not "active in the car market" in any pertinent sense. The phrase "active in the market" cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care, and that fact is fatal to the Government's effort to "regulate the uninsured as a class." *Id.*, at 42. Our precedents recognize Congress's power to regulate "class [es] of *activities*," *Gonzales v. Raich*, 545 U.S. 1, 17, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (emphasis added), not classes of *individuals*, apart from any activity in which they are engaged, see, *e.g.*, *Perez*, 402 U.S., at 153, 91 S.Ct. 1357 ("Petitioner is clearly a member of the class which engages in 'extortionate credit transactions' ..." (emphasis deleted)).

The individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity. The mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money. It is precisely because these individuals, as an actuarial class, incur relatively low health care costs that the mandate helps counter the effect of forcing insurance companies to cover others who impose greater costs than their premiums are allowed to reflect. See 42 U.S.C. § 18091(2)(I) (recognizing that the mandate would "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums"). If the individual mandate is

  

targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature.

*557 The Government, however, claims that this does not matter. The Government regards it as sufficient to trigger Congress's authority that almost all those who are uninsured will, at some unknown point in the future, engage in a health care transaction. Asserting that "[t]here is no temporal limitation in the Commerce Clause," the Government argues that because " [e]veryone subject to this regulation is in or will be in the health care market," they can be "regulated in advance." Tr. of Oral Arg. 111 (Mar. 27, 2012).

The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. We have said that Congress can anticipate the *effects* on commerce of an economic activity. See, *e.g.*, *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1938) (regulating the labor practices of utility companies); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (prohibiting discrimination by hotel operators); *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964) (prohibiting discrimination by restaurant owners). But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce. Each one of our cases, including those cited by Justice GINSBURG, *post*, at 2619 – 2620, involved preexisting economic activity. See, *e.g.*, *Wickard*, 317 U.S., at 127–129, 63 S.Ct. 82 (producing wheat); *Raich*, *supra*, at 25, 125 S.Ct. 2195 (growing marijuana).

Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize **2591 Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.

The Government argues that the individual mandate can be sustained as a sort of exception to this rule, because *558 health insurance is a unique product. According to the Government, upholding the individual mandate would not justify mandatory purchases of items such as cars or broccoli because, as the Government puts it, "[h]ealth insurance is not purchased for its own sake like a car or broccoli; it is a means of financing health-care consumption and covering universal risks." Reply Brief for United States 19. But cars and broccoli are no more purchased for their "own sake" than health insurance. They are purchased to cover the need for transportation and food.

The Government says that health insurance and health care financing are "inherently integrated." Brief for United States 41. But that does not mean the compelled purchase of the first is properly regarded as a regulation of the second. No matter how "inherently integrated" health insurance and health care consumption may be, they are not the same thing: They involve different transactions, entered into at different times, with different providers. And for most of those targeted by the mandate, significant health care needs will be years, or even decades, away. The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception of the sort urged by the Government. The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to "regulate Commerce."

2

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an "integral part of a comprehensive scheme of economic regulation"—the guaranteed-issue and community-rating insurance reforms. Brief for United States 24. Under this argument, it is not necessary to consider the effect that an individual's inactivity may have on interstate commerce; it is enough that Congress *559 regulate commercial activity in a way that requires regulation of inactivity to be effective.

  

The power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers enumerated in the Constitution, Art. I, § 8, cl. 18, vests Congress with authority to enact provisions "incidental to the [enumerated] power, and conducive to its beneficial exercise," *McCulloch*, 4 Wheat., at 418. Although the Clause gives Congress authority to "legislate on that vast mass of incidental powers which must be involved in the constitution," it does not license the exercise of any "great substantive and independent power[s]" beyond those specifically enumerated. *Id.*, at 411, 421. Instead, the Clause is " 'merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.' " *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960) (quoting VI Writings of James Madison 383 (G. Hunt ed. 1906)).

As our jurisprudence under the Necessary and Proper Clause has developed, we **2592 have been very deferential to Congress's determination that a regulation is "necessary." We have thus upheld laws that are " 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.' " *Comstock*, 560 U.S., at 133–134, 130 S.Ct., at 1965 (quoting *McCulloch*, *supra*, at 413, 418). But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not "consist[ent] with the letter and spirit of the constitution," *McCulloch*, *supra*, at 421, are not "*proper* [means] for carrying into Execution" Congress's enumerated powers. Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.' " *Printz v. United States*, 521 U.S. 898, 924, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (quoting The Federalist No. 33, at 204 (A. Hamilton); alterations omitted); see also *New York*, 505 U.S., at 177, 112 S.Ct. 2408; *Comstock*, *supra*, at 153, 130 S.Ct., at 1967–1968 (KENNEDY, J., concurring in judgment *560 ) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause ... ").

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. For example, we have upheld provisions permitting continued confinement of those *already in federal custody* when they could not be safely released, *Comstock*, *supra*, at 129, 130 S.Ct., at 1954–1955; criminalizing bribes involving organizations *receiving federal funds*, *Sabri v. United States*, 541 U.S. 600, 602, 605, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004); and tolling state statutes of limitations while cases are *pending in federal court*, *Jinks v. Richland County*, 538 U.S. 456, 459, 462, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003). The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.

This is in no way an authority that is "narrow in scope," *Comstock*, *supra*, at 148, 130 S.Ct., at 1964, or "incidental" to the exercise of the commerce power, *McCulloch*, *supra*, at 418. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective.

The Government relies primarily on our decision in *Gonzales v. Raich*. In *Raich*, we considered "comprehensive legislation *561 to regulate the interstate market" in marijuana. 545 U.S., at 22, 125 S.Ct. 2195. Certain individuals sought an exemption from that regulation on the ground that they engaged in only intrastate possession and consumption. We denied any exemption, on the ground that marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market. Congress's attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could not also regulate intrastate possession and consumption. **2593 *Id.*, at 19, 125 S.Ct. 2195. Accordingly, we recognized that "Congress was acting well within its

  

authority" under the Necessary and Proper Clause even though its "regulation ensnare[d] some purely intrastate activity." *Id.*, at 22, 125 S.Ct. 2195; see also *Perez*, 402 U.S., at 154, 91 S.Ct. 1357. *Raich* thus did not involve the exercise of any "great substantive and independent power," *McCulloch*, *supra*, at 411, of the sort at issue here. Instead, it concerned only the constitutionality of "individual *applications* of a concededly valid statutory scheme." *Raich*, *supra*, at 23, 125 S.Ct. 2195 (emphasis added).

Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a "necessary and proper" component of the insurance reforms. The commerce power thus does not authorize the mandate. Accord, *post*, at 2644 – 2650 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting).

B

That is not the end of the matter. Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government's second argument: that the mandate may be upheld as within Congress's enumerated power to "lay and collect Taxes." Art. I, § 8, cl. 1.

The Government's tax power argument asks us to view the statute differently than we did in considering its commerce power theory. In making its Commerce Clause argument ***562** , the Government defended the mandate as a regulation requiring individuals to purchase health insurance. The Government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product.

The text of a statute can sometimes have more than one possible meaning. To take a familiar example, a law that reads "no vehicles in the park" might, or might not, ban bicycles in the park. And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so. Justice Story said that 180 years ago: "No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Parsons v. Bedford*, 3 Pet. 433, 448–449, 7 L.Ed. 732 (1830). Justice Holmes made the same point a century later: "[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (concurring opinion).

The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals "shall" maintain health insurance. 26 U.S.C. § 5000A(a). Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis. But, for the reasons explained above, the Commerce Clause does not give Congress that power. Under our precedent, it is therefore necessary to ask whether the Government's alternative reading of the statute—that it only imposes a tax on those without insurance—is a reasonable one.

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make ***563** an additional payment to the IRS when he ****2594** pays his taxes. See § 5000A(b). That, according to the Government, means the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.

The question is not whether that is the most natural interpretation of the mandate, but only whether it is a "fairly possible" one. *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932). As we have explained, "every reasonable construction must be resorted to, in

  

order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895). The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read, for the reasons set forth below.

C

[24] [25] The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The "[s]hared responsibility payment," as the statute entitles it, is paid into the Treasury by "taxpayer[s]" when they file their tax returns. 26 U.S.C. § 5000A(b). It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. § 5000A(e)(2). For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. §§ 5000A(b)(3), (c)(2), (c)(4). The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must ***564** assess and collect it "in the same manner as taxes." *Supra*, at 2583 – 2584. This process yields the essential feature of any tax: It produces at least some revenue for the Government. *United States v. Kahriger*, 345 U.S. 22, 28, n. 4, 73 S.Ct. 510, 97 L.Ed. 754 (1953). Indeed, the payment is expected to raise about $4 billion per year by 2017. Congressional Budget Office, Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act (rev. Apr. 30, 2010), in Selected CBO Publications Related to Health Care Legislation, 2009–2010, p. 71 (2010).

[26] 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 Anti–Injunction Act, *supra*, at 2582 – 2583, 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 Anti–Injunction Act 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.

Our precedent reflects this: In 1922, we decided two challenges to the "Child Labor Tax" on the same day. In the first, we held that a suit to enjoin collection of the so-called tax was barred by the Anti–Injunction Act. *George*, 259 U.S., at 20, 42 S.Ct. 419. Congress knew that suits to obstruct taxes had to await payment under the Anti–Injunction Act; Congress called the child labor tax a tax; Congress therefore ****2595** intended the Anti–Injunction Act to apply. In the second case, however, we held that the same exaction, although labeled a tax, was not in fact authorized by Congress's taxing power. *Drexel Furniture*, 259 U.S., at 38, 42 S.Ct. 449. That constitutional question was not controlled by Congress's choice of label.

[27] We have similarly held that exactions not labeled taxes nonetheless were authorized by Congress's power to tax. In the *License Tax Cases*, for example, we held that federal licenses to sell liquor and lottery tickets —for which the licensee ***565** had to pay a fee— could be sustained as exercises of the taxing power. 5 Wall., at 471. And in *New York v. United States* we upheld as a tax a "surcharge" on out-of-state nuclear waste shipments, a portion of which was paid to the Federal Treasury. 505 U.S., at 171, 112 S.Ct. 2408. We thus ask whether the shared responsibility payment falls within Congress's taxing power, "[d]isregarding the designation of the exaction, and viewing its substance and application." *United States v. Constantine*, 296 U.S. 287, 294, 56 S.Ct. 223, 80 L.Ed. 233 (1935); cf. *Quill Corp. v. North Dakota*, 504 U.S. 298, 310, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) ("[M]agic words or labels" should not "disable an otherwise constitutional levy" (internal quotation marks omitted)); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363, 61 S.Ct. 586, 85 L.Ed. 888 (1941) ("In passing on the constitutionality of a tax law, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it" (internal quotation marks omitted)); *United States v. Sotelo*, 436 U.S. 268, 275, 98 S.Ct. 1795, 56 L.Ed.2d 275 (1978) ("That the funds due are referred to as a 'penalty' ... does not alter their essential character as taxes"). [7]

Our cases confirm this functional approach. For example, in *Drexel Furniture*, we focused on three practical

characteristics of the so-called tax on employing child laborers that convinced us the "tax" was actually a penalty. First, the tax imposed an exceedingly heavy burden—10 percent of a company's net income—on those who employed children, no matter how small their infraction. Second, it imposed that exaction only on those who knowingly employed underage *566 laborers. Such scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law. Third, this "tax" was enforced in part by the Department of Labor, an agency responsible for punishing violations of labor laws, not collecting revenue. 259 U.S., at 36–37, 42 S.Ct. 449; see also, *e.g.*, *Kurth Ranch*, 511 U.S., at 780–782, 114 S.Ct. 1937 (considering, *inter alia*, the amount of the exaction, and the fact that it was imposed for violation of a separate criminal law); *Constantine*, *supra*, at 295, 56 S.Ct. 223 (same).

The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it **2596 can never be more.[8] It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the "prohibitory" financial punishment in *Drexel Furniture*. 259 U.S., at 37, 42 S.Ct. 449. Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation—except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution. See § 5000A(g)(2). The reasons the Court in *Drexel Furniture* held that what was called a "tax" there was a penalty support the conclusion that what is called a "penalty" here may be viewed as a tax.[9]

[28] *567 None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. See W. Brownlee, Federal Taxation in America 22 (2d ed. 2004); cf. 2 J. Story, Commentaries on the Constitution of the United States § 962, p. 434 (1833) ("the taxing power is often, very often, applied for other purposes, than revenue"). Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns. See *United States v. Sanchez*, 340 U.S. 42, 44–45, 71 S.Ct. 108, 95 L.Ed. 47 (1950); *Sonzinsky v. United States*, 300 U.S. 506, 513, 57 S.Ct. 554, 81 L.Ed. 772 (1937). Indeed, "[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." *Ibid.*, at 513, 57 S.Ct. 554. That § 5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.

[29] In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996); see also *United States v. La Franca*, 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (1931) ("[A] penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act"). While the individual mandate clearly aims to induce the purchase of health **2597 insurance, it need not be *568 read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law. Brief for United States 60–61; Tr. of Oral Arg. 49–50 (Mar. 26, 2012).

Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. See Congressional Budget Office, Payments of Penalties, at 71. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests

instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.

The plaintiffs contend that Congress's choice of language —stating that individuals "shall" obtain insurance or pay a "penalty"—requires reading § 5000A as punishing unlawful conduct, even if that interpretation would render the law unconstitutional. We have rejected a similar argument before. In *New York v. United States* we examined a statute providing that " '[e]ach State shall be responsible for providing ... for the disposal of ... low-level radioactive waste.' " 505 U.S., at 169, 112 S.Ct. 2408 (quoting 42 U.S.C. § 2021c(a)(1)(A)). A State that shipped its waste to another State was exposed to surcharges by the receiving State, a portion of which would be paid over to the Federal Government. And a State that did not adhere to the statutory scheme faced "[p]enalties for failure to comply," including increases in the surcharge. § 2021e(e)(2); *New York*, 505 U.S., at 152–153, 112 S.Ct. 2408. New York urged us to read the statute as a federal command that the state legislature enact legislation to dispose of its waste, which would have violated the Constitution. To ***569** avoid that outcome, we interpreted the statute to impose only "a series of incentives" for the State to take responsibility for its waste. *Id.*, at 170, 112 S.Ct. 2408. We then sustained the charge paid to the Federal Government as an exercise of the taxing power. *Id.*, at 169–174, 112 S.Ct. 2408. We see no insurmountable obstacle to a similar approach here. [10]

The joint dissenters argue that we cannot uphold § 5000A as a tax because Congress did not "frame" it as such. *Post*, at 2650 – 2651. In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels. An example may help illustrate why labels should not control here. Suppose Congress enacted a statute providing that every taxpayer who owns a house without ****2598** energy efficient windows must pay $50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. Those whose income is below the filing threshold need not pay. The required payment is not called a "tax," a "penalty," or anything else. No one would doubt that this law imposed a tax, and was within Congress's power to tax. That conclusion should not change simply because Congress used the word "penalty" to describe the payment. Interpreting such a law to be a tax ***570** would hardly "[i]mpos[e] a tax through judicial legislation." *Post*, at 2655. Rather, it would give practical effect to the Legislature's enactment.

**[30]** Our precedent demonstrates that Congress had the power to impose the exaction in § 5000A under the taxing power, and that § 5000A need not be read to do more than impose a tax. That is sufficient to sustain it. The "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S.Ct. 421, 92 L.Ed. 596 (1948).

Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution. Plaintiffs argue that the shared responsibility payment does not do so, citing Article I, § 9, clause 4. That clause provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." This requirement means that any "direct Tax" must be apportioned so that each State pays in proportion to its population. According to the plaintiffs, if the individual mandate imposes a tax, it is a direct tax, and it is unconstitutional because Congress made no effort to apportion it among the States.

Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a "head tax" or a "poll tax"), might be a direct tax. See *Springer v. United States*, 102 U.S. 586, 596–598, 26 L.Ed. 253 (1881). Soon after the framing, Congress passed a tax on ownership of carriages, over James Madison's objection that it was an unapportioned direct tax. *Id.*, at 597. This Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State. See *Hylton v. United States*, 3 Dall. 171, 174, 1 L.Ed. 556 (1796) (opinion of Chase, J.). ***571** The Court was unanimous, and those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were

direct: capitations and land taxes. See *id.*, at 175; *id.*, at 177 (opinion of Paterson, J.); *id.*, at 183 (opinion of Iredell, J.).

That narrow view of what a direct tax might be persisted for a century. In 1880, for example, we explained that "*direct taxes,* within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." *Springer, supra,* at 602. In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618, 15 S.Ct. 912, 39 L.Ed. 1108 (1895). That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes. See *Eisner v. Macomber*, 252 U.S. 189, 218–219, 40 S.Ct. 189, 64 L.Ed. 521 (1920).

**2599 [31] [32] A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, "without regard to property, profession, or *any other circumstance*." *Hylton, supra,* at 175 (opinion of Chase, J.) (emphasis altered). The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance. The payment is also plainly not a tax on the ownership of land or personal property. The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.

There may, however, be a more fundamental objection to a tax on those who lack health insurance. Even if only a tax, the payment under § 5000A(b) remains a burden that the Federal Government imposes for an omission, not an act. If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, *572 perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.

Three considerations allay this concern. First, and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity. A capitation, after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution. The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity. But from its creation, the Constitution has made no such promise with respect to taxes. See Letter from Benjamin Franklin to M. Le Roy (Nov. 13, 1789), in 10 Works of Benjamin Franklin 410 (1944) ("Our new Constitution is now established ... but in this world nothing can be said to be certain, except death and taxes").

Whether the mandate can be upheld under the Commerce Clause is a question about the scope of federal authority. Its answer depends on whether Congress can exercise what all acknowledge to be the novel course of directing individuals to purchase insurance. Congress's use of the Taxing Clause to encourage buying something is, by contrast, not new. Tax incentives already promote, for example, purchasing homes and professional educations. See 26 U.S.C. §§ 163(h), 25A. Sustaining the mandate as a tax depends only on whether Congress *has* properly exercised its taxing power to encourage purchasing health insurance, not whether it *can*. Upholding the individual mandate under the Taxing Clause thus does not recognize any new federal power. It determines that Congress has used an existing one.

[33] Second, Congress's ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority. See, *e.g.*, *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477 (1936); *Drexel Furniture*, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817. *573 More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures. See *Kahriger*, 345 U.S., at 27–31, 73 S.Ct. 510 (collecting cases). We have nonetheless maintained that " 'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.' " **2600 *Kurth Ranch*, 511 U.S., at 779, 114 S.Ct. 1937 (quoting *Drexel Furniture, supra,* at 38, 42 S.Ct. 449).

We have already explained that the shared responsibility payment's practical characteristics pass muster as a tax under our narrowest interpretations of the taxing power. *Supra,* at 2595 – 2596. Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it. It remains true, however, that the " 'power to tax is not the power to destroy while this Court sits.' " *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 364, 69 S.Ct. 561, 93 L.Ed. 721 (1949) (quoting *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223, 48 S.Ct. 451, 72 L.Ed. 857 (1928) (Holmes, J., dissenting)).

[34] Third, although the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions. Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes.

*574 By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. We do not make light of the severe burden that taxation—especially taxation motivated by a regulatory purpose—can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice. [11]

The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.

D

Justice GINSBURG questions the necessity of rejecting the Government's commerce power argument, given that § 5000A can be upheld under the taxing power. *Post,* at 2627. But the 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 **2601 § 5000A can be interpreted as a tax. *575 Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.

The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.

IV

A

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program." *New York,* 505 U.S., at 188, 112 S.Ct. 2408.

There is no doubt that the Act dramatically increases state obligations under Medicaid. The current Medicaid

program requires States to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled. 42 U.S.C. § 1396a(a)(10). There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage. The States also enjoy considerable flexibility with respect to the coverage levels for parents of needy families. § 1396a(a)(10)(A)(ii). On average States cover only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty line. Kaiser Comm'n on Medicaid and the Uninsured, Performing Under Pressure 11, and fig. 11 (2012).

***576** The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line. § 1396a(a)(10)(A)(i)(VIII). The Act also establishes a new " [e]ssential health benefits" package, which States must provide to all new Medicaid recipients—a level sufficient to satisfy a recipient's obligations under the individual mandate. §§ 1396a(k)(1), 1396u–7(b)(5), 18022(b). The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering these newly eligible individuals through 2016. § 1396d(y)(1). In the following years, the federal payment level gradually decreases, to a minimum of 90 percent. *Ibid.* In light of the expansion in coverage mandated by the Act, the Federal Government estimates that its Medicaid spending will increase by approximately $100 billion per year, nearly 40 percent above current levels. Statement of Douglas W. Elmendorf, CBO's Analysis of the Major Health Care Legislation Enacted in March 2010, p. 14 (Mar. 30, 2011) (Table 2).

The Spending Clause grants Congress the power "to pay the Debts and provide for the ... general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1. We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' "taking certain actions that Congress could not require them to take." *College Savings Bank*, 527 U.S., at 686, 119 S.Ct. 2219. Such measures "encourage ****2602** a State to regulate in a particular way, [and] influenc[e] a State's policy choices." *New York*, *supra*, at 166, 112 S.Ct. 2408. The conditions imposed by Congress ensure that the funds are used by the States to "provide for the ... general Welfare" in the manner Congress intended.

At the same time, our cases have recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives. "We have repeatedly ***577** characterized ... Spending Clause legislation as 'much in the nature of a *contract.*' " *Barnes v. Gorman*, 536 U.S. 181, 186, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981)). The legitimacy of Congress's exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Id.*, at 17, 101 S.Ct. 1531. Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system "rests on what might at first seem a counter-intuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' " *Bond*, 564 U.S., at 220–221, 131 S.Ct., at 2364 (quoting *Alden v. Maine*, 527 U.S. 706, 758, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)). For this reason, " the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, *supra*, at 162, 112 S.Ct. 2408. Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.

That insight has led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes. See, *e.g.*, *Printz*, 521 U.S., at 933, 117 S.Ct. 2365 (striking down federal legislation compelling state law enforcement officers to perform federally mandated background checks on handgun purchasers); *New York*, *supra*, at 174–175, 112 S.Ct. 2408 (invalidating provisions of an Act that would compel a State to either take title to nuclear waste or enact particular state waste regulations). It has also led us to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a "power akin to undue influence." *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 81 L.Ed. 1279 (1937). Congress may use its spending power to create

incentives for States to act in accordance with federal policies. But when "pressure turns into compulsion," *ibid.*, the legislation runs contrary to our *578 system of federalism. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." *New York*, 505 U.S., at 178, 112 S.Ct. 2408. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.*, at 169, 112 S.Ct. 2408. Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal **2603 funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*. Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.

We addressed such concerns in *Steward Machine*. That case involved a federal tax on employers that was abated if the businesses paid into a state unemployment plan that met certain federally specified conditions. An employer sued, alleging that the tax was impermissibly "driv[ing] the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government." 301 U.S., at 587, 57 S.Ct. 883. We acknowledged the danger that the Federal Government might employ its taxing power to exert a "power akin to undue influence" upon the States. *Id.*, at 590, 57 S.Ct. 883. But we observed *579 that Congress adopted the challenged tax and abatement program to channel money to the States that would otherwise have gone into the Federal Treasury for use in providing national unemployment services. Congress was willing to direct businesses to instead pay the money into state programs only on the condition that the money be used for the same purposes. Predicating tax abatement on a State's adoption of a particular type of unemployment legislation was therefore a means to "safeguard [the Federal Government's] own treasury." *Id.*, at 591, 57 S.Ct. 883. We held that "[i]n such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power." *Ibid.*

In rejecting the argument that the federal law was a "weapon[ ] of coercion, destroying or impairing the autonomy of the states," the Court noted that there was no reason to suppose that the State in that case acted other than through "her unfettered will." *Id.*, at 586, 590, 57 S.Ct. 883. Indeed, the State itself did "not offer a suggestion that in passing the unemployment law she was affected by duress." *Id.*, at 589, 57 S.Ct. 883.

As our decision in *Steward Machine* confirms, Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting "the simple expedient of not yielding" to federal blandishments when they do not want to embrace the federal policies as their own. *Massachusetts v. Mellon*, 262 U.S. 447, 482, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). The States are separate and independent sovereigns. Sometimes they have to act like it.

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has "crossed the line distinguishing encouragement from coercion," *New York*, *supra*, at 175, 112 S.Ct. 2408, in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing *580 Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. We have upheld Congress's authority to condition the receipt of funds on the **2604 States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures

that the funds are spent according to its view of the "general Welfare." Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.

In *South Dakota v. Dole*, we considered a challenge to a federal law that threatened to withhold five percent of a State's federal highway funds if the State did not raise its drinking age to 21. The Court found that the condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel." 483 U.S., at 208, 107 S.Ct. 2793. At the same time, the condition was not a restriction on how the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used.

We accordingly asked whether "the financial inducement offered by Congress" was "so coercive as to pass the point at which 'pressure turns into compulsion.' " *Id.*, at 211, 107 S.Ct. 2793 (quoting *Steward Machine, supra*, at 590, 57 S.Ct. 883). By "financial inducement" the Court meant the threat of losing five percent of highway funds; no new money was offered to the States to raise their drinking ages. We found that the inducement was not impermissibly coercive, because Congress was offering only "relatively mild encouragement to the States." *Dole*, 483 U.S., at 211, 107 S.Ct. 2793. We observed that "all South Dakota would lose if she adheres to her chosen course as to a suitable ***581** minimum drinking age is 5%" of her highway funds. *Ibid.* In fact, the federal funds at stake constituted less than half of one percent of South Dakota's budget at the time. See Nat. Assn. of State Budget Officers, The State Expenditure Report 59 (1987); *South Dakota v. Dole*, 791 F.2d 628, 630 (C.A.8 1986). In consequence, "we conclude[d] that [the] encouragement to state action [was] a valid use of the spending power." *Dole*, 483 U.S., at 212, 107 S.Ct. 2793. Whether to accept the drinking age change "remain[ed] the prerogative of the States not merely in theory but in fact." *Id.*, at 211–212, 107 S.Ct. 2793.

In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that "further payments will not be made to the State." 42 U.S.C. § 1396c. A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but *all* of it. *Dole, supra*, at 211, 107 S.Ct. 2793. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. See Nat. Assn. of State Budget Officers, Fiscal Year 2010 State Expenditure Report, p. 11 (2011) (Table 5); 42 U.S.C. § 1396d(b). The Federal Government estimates that it will pay out approximately $3.3 trillion between 2010 and 2019 in order to cover the costs of *pre*-expansion Medicaid. Brief for United States 10, n. 6. In addition, the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid. It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with ****2605** a "prerogative" to reject Congress's desired policy, "not merely in theory but in fact." 483 U.S., at 211–212, 107 S.Ct. 2793. ***582** The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion. [12]

Justice GINSBURG claims that *Dole* is distinguishable because here "Congress has not threatened to withhold funds earmarked for any other program." *Post*, at 2634. But that begs the question: The States contend that the expansion is in reality a new program and that Congress is forcing them to accept it by threatening the funds for the existing Medicaid program. We cannot agree that existing Medicaid and the expansion dictated by the Affordable Care Act are all one program simply because "Congress styled" them as such. *Post*, at 2635. If the expansion is not properly viewed as a modification of the existing Medicaid program, Congress's decision to so title it is irrelevant. [13]

Here, the Government claims that the Medicaid expansion is properly viewed merely as a modification of the existing ***583** program because the States agreed that

Congress could change the terms of Medicaid when they signed on in the first place. The Government observes that the Social Security Act, which includes the original Medicaid provisions, contains a clause expressly reserving "[t]he right to alter, amend, or repeal any provision" of that statute. 42 U.S.C. § 1304. So it does. But "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S., at 17, 101 S.Ct. 1531. A State confronted with statutory language reserving the right to "alter" or "amend" the pertinent provisions of the Social Security Act might reasonably assume that Congress was entitled to make adjustments to the Medicaid program as it developed. Congress has in fact done so, sometimes conditioning only the new funding, other times both old and new. See, *e.g.*, Social Security Amendments of 1972, 86 Stat. 1381–1382, 1465 (extending Medicaid eligibility, but partly conditioning only the new funding); Omnibus Budget Reconciliation Act of 1990, § 4601, 104 Stat. 1388–166 (extending eligibility, and conditioning old and new funds).

The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, **2606 the blind, the elderly, and needy families with dependent children. See 42 U.S.C. § 1396a(a)(10). Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage. [14]

*584 Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program. Congress created a separate funding provision to cover the costs of providing services to any person made newly eligible by the expansion. While Congress pays 50 to 83 percent of the costs of covering individuals currently enrolled in Medicaid, § 1396d(b), once the expansion is fully implemented Congress will pay 90 percent of the costs for newly eligible persons, § 1396d(y)(1). The conditions on use of the different funds are also distinct. Congress mandated that newly eligible persons receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package. § 1396a(k)(1); see Brief for United States 9.

As we have explained, "[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or 'retroactive' conditions." *Pennhurst, supra*, at 25, 101 S.Ct. 1531. A State could hardly anticipate that Congress's reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically.

Justice GINSBURG claims that in fact this expansion is no different from the previous changes to Medicaid, such that "a State would be hard put to complain that it lacked fair notice." *Post*, at 2639. But the prior change she discusses—presumably the most dramatic alteration she could find—does not come close to working the transformation the *585 expansion accomplishes. She highlights an amendment requiring States to cover pregnant women and increasing the number of eligible children. *Ibid.* But this modification can hardly be described as a major change in a program that—from its inception—provided health care for "families with dependent children." Previous Medicaid amendments simply do not fall into the same category as the one at stake here.

The Court in *Steward Machine* did not attempt to "fix the outermost line" where persuasion gives way to coercion. 301 U.S., at 591, 57 S.Ct. 883. The Court found it "[e]nough for present purposes that wherever the line may be, this statute is within it." *Ibid.* We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply **2607 "conscript state [agencies] into the national bureaucratic army," *FERC v. Mississippi*, 456 U.S. 742, 775, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part), and that is what it is attempting to do with the Medicaid expansion.

  

B

[35] [36] [37] Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that. It allows her to withhold *all* "further [Medicaid] payments ... to the State" if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion. 42 U.S.C. § 1396c. In light of the Court's holding, the Secretary cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.

***586** That fully remedies the constitutional violation we have identified. The chapter of the United States Code that contains § 1396c includes a severability clause confirming that we need go no further. That clause specifies that "[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." § 1303. Today's holding does not affect the continued application of § 1396c to the existing Medicaid program. Nor does it affect the Secretary's ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act.

This is not to say, as the joint dissent suggests, that we are "rewriting the Medicaid Expansion." *Post,* at 2667. Instead, we determine, first, that § 1396c is unconstitutional when applied to withdraw existing Medicaid funds from States that decline to comply with the expansion. We then follow Congress's explicit textual instruction to leave unaffected "the remainder of the chapter, and the application of [the challenged] provision to other persons or circumstances." § 1303. When we invalidate an application of a statute because that application is unconstitutional, we are not "rewriting" the statute; we are merely enforcing the Constitution.

The question remains whether today's holding affects other provisions of the Affordable Care Act. In considering that question, "[w]e seek to determine what Congress would have intended in light of the Court's constitutional holding." *United States v. Booker,* 543 U.S. 220, 246, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (internal quotation marks omitted). Our "touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." *Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 330, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (internal quotation marks omitted). ***587** The question here is whether Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the new Medicaid expansion. Unless it is "evident" that the answer is no, we must leave the rest of the Act intact. *Champlin Refining Co. v. Corporation Comm'n of Okla.,* 286 U.S. 210, 234, 52 S.Ct. 559, 76 L.Ed. 1062 (1932).

****2608** We are confident that Congress would have wanted to preserve the rest of the Act. It is fair to say that Congress assumed that every State would participate in the Medicaid expansion, given that States had no real choice but to do so. The States contend that Congress enacted the rest of the Act with such full participation in mind; they point out that Congress made Medicaid a means for satisfying the mandate, 26 U.S.C. § 5000A(f)(1)(A)(ii), and enacted no other plan for providing coverage to many low-income individuals. According to the States, this means that the entire Act must fall.

We disagree. The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. As a practical matter, that means States may now choose to reject the expansion; that is the whole point. But that does not mean all or even any will. Some States may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion. Other States, however, may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly

given the level of federal funding the Act offers at the outset.

We have no way of knowing how many States will accept the terms of the expansion, but we do not believe Congress would have wanted the whole Act to fall, simply because some may choose not to participate. The other reforms Congress enacted, after all, will remain "fully operative as a law," *Champlin, supra,* at 234, 52 S.Ct. 559, and will still function in a ***588** way "consistent with Congress' basic objectives in enacting the statute," *Booker, supra,* at 259, 125 S.Ct. 738. Confident that Congress would not have intended anything different, we conclude that the rest of the Act need not fall in light of our constitutional holding.

* * *

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.

The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.

****2609** ***589** The judgment of the Court of Appeals for the Eleventh Circuit is affirmed in part and reversed in part.

*It is so ordered.*

Justice GINSBURG, with whom Justice SOTOMAYOR joins, and with whom Justice BREYER and Justice KAGAN join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part.

I agree with THE CHIEF JUSTICE that the Anti–Injunction Act does not bar the Court's consideration of these cases, and that the minimum coverage provision is a proper exercise of Congress' taxing power. I therefore join Parts I, II, and III–C of THE CHIEF JUSTICE's opinion. Unlike THE CHIEF JUSTICE, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision. I would also hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.

I

The provision of health care is today a concern of national dimension, just as the provision of old-age and survivors' benefits was in the 1930's. In the Social Security Act, Congress installed a federal system to provide monthly benefits to retired wage earners and, eventually, to their survivors. Beyond question, Congress could have adopted a similar scheme for health care. Congress chose, instead, to preserve a central role for private insurers and state governments. According to THE CHIEF JUSTICE, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive.

Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm. See *United States v. Darby,* 312 U.S.

100, 115, 61 S.Ct. 451, 85 L.Ed. 609 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918), ***590** and recognizing that "regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937) ("[The commerce] power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it." (internal quotation marks omitted)). THE CHIEF JUSTICE's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it. See, *e.g.*, *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362, 368, 55 S.Ct. 758, 79 L.Ed. 1468 (1935) (invalidating compulsory retirement and pension plan for employees of carriers subject to the Interstate Commerce Act; Court found law related essentially "to the social welfare of the worker, and therefore remote from any regulation of commerce as such"). It is a reading that should not have staying power.

A

In enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for health-care products and services. By any measure, that market is immense. Collectively, Americans spent $2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy. 42 U.S.C. § 18091(2)(B) (2006 ed., Supp. IV). Within the next decade, it is anticipated, spending on health care will nearly double. *Ibid.*

****2610** The health-care market's size is not its only distinctive feature. Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional. See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for U.S. Adults: National Health Interview ***591** Survey 2009, Ser. 10, No. 249, p. 124 (Dec. 2010) (Table 37) (Over 99.5% of adults above 65 have visited a health-care professional.). Most people will do so repeatedly. See *id.*, at 115 (Table 34) (In 2009 alone, 64% of adults made two or more visits to a doctor's office.).

When individuals make those visits, they face another reality of the current market for medical care: its high cost. In 2010, on average, an individual in the United States incurred over $7,000 in health-care expenses. Dept. of Health and Human Services, Centers for Medicare and Medicaid Services, Historic National Health Expenditure Data, National Health Expenditures: Selected Calendar Years 1960–2010 (Table 1). Over a lifetime, costs mount to hundreds of thousands of dollars. See Alemayehu & Warner, The Lifetime Distribution of Health Care Costs, in 39 Health Services Research 627, 635 (June 2004). When a person requires nonroutine care, the cost will generally exceed what he or she can afford to pay. A single hospital stay, for instance, typically costs upwards of $10,000. See Dept. of Health and Human Services, Office of Health Policy, ASPE Research Brief: The Value of Health Insurance 5 (May 2011). Treatments for many serious, though not uncommon, conditions similarly cost a substantial sum. Brief for Economic Scholars as *Amici Curiae* in No. 11–398, p. 10 (citing a study indicating that, in 1998, the cost of treating a heart attack for the first 90 days exceeded $20,000, while the annual cost of treating certain cancers was more than $50,000).

Although every U.S. domiciliary will incur significant medical expenses during his or her lifetime, the time when care will be needed is often unpredictable. An accident, a heart attack, or a cancer diagnosis commonly occurs without warning. Inescapably, we are all at peril of needing medical care without a moment's notice. See, *e.g.*, Campbell, Down the Insurance Rabbit Hole, N.Y. Times, Apr. 5, 2012, p. A23 (telling of an uninsured 32–year–old woman who, healthy one day, became a quadriplegic the next due to an auto accident).

***592** To manage the risks associated with medical care —its high cost, its unpredictability, and its inevitability —most people in the United States obtain health insurance. Many (approximately 170 million in 2009) are insured by private insurance companies. Others, including those over 65 and certain poor and disabled persons, rely on government-funded insurance programs,

  

notably Medicare and Medicaid. Combined, private health insurers and State and Federal Governments finance almost 85% of the medical care administered to U.S. residents. See Congressional Budget Office, CBO's 2011 Long–Term Budget Outlook 37 (June 2011).

Not all U.S. residents, however, have health insurance. In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid. See Dept. of Commerce, Census Bureau, C. DeNavas–Walt, B. Proctor, & J. Smith, Income, Poverty, and Health Insurance Coverage in the United States: 2009, p. 23, (Sept. 2010) (Table 8). As a group, uninsured individuals **2611 annually consume more than $100 billion in healthcare services, nearly 5% of the Nation's total. Hidden Health Tax: Americans Pay a Premium 2 (2009), available at http://www.familiesusa.org (all Internet materials as visited June 25, 2012, and included in Clerk of Court's case file). Over 60% of those without insurance visit a doctor's office or emergency room in a given year. See Dept. of Health and Human Services, National Center for Health Statistics, Health—United States—2010, p. 282, (Feb. 2011) (Table 79).

B

The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market. See 42 U.S.C. § 18091(2). As just noted, the cost of emergency care or treatment for a serious illness generally exceeds what an individual can afford to pay on her own. Unlike markets for most products, however, the inability to *593 pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient's ability to pay. See, *e.g.*, 42 U.S.C. § 1395dd; Fla. Stat. § 395.1041(3)(f) (2010); Tex. Health & Safety Code Ann. §§ 311.022(a) and (b) (West 2010); American Medical Association, Council on Ethical and Judicial Affairs, Code of Medical Ethics, Current Opinions: Opinion 8.11—Neglect of Patient, p. 70 (1998–1999 ed.).

As a consequence, medical-care providers deliver significant amounts of care to the uninsured for which the providers receive no payment. In 2008, for example, hospitals, physicians, and other health-care professionals received no compensation for $43 billion worth of the $116 billion in care they administered to those without insurance. 42 U.S.C. § 18091(2)(F) (2006 ed., Supp. IV).

Health-care providers do not absorb these bad debts. Instead, they raise their prices, passing along the cost of uncompensated care to those who do pay reliably: the government and private insurance companies. In response, private insurers increase their premiums, shifting the cost of the elevated bills from providers onto those who carry insurance. The net result: Those with health insurance subsidize the medical care of those without it. As economists would describe what happens, the uninsured "free ride" on those who pay for health insurance.

The size of this subsidy is considerable. Congress found that the cost-shifting just described "increases family [insurance] premiums by on average over $1,000 a year." *Ibid.* Higher premiums, in turn, render health insurance less affordable, forcing more people to go without insurance and leading to further cost-shifting.

And it is hardly just the currently sick or injured among the uninsured who prompt elevation of the price of health care and health insurance. Insurance companies and health-care *594 providers know that some percentage of healthy, uninsured people will suffer sickness or injury each year and will receive medical care despite their inability to pay. In anticipation of this uncompensated care, health-care companies raise their prices, and insurers their premiums. In other words, because any uninsured person may need medical care at any moment and because health-care companies must account for that risk, every uninsured person impacts the market price of medical care and medical insurance.

The failure of individuals to acquire insurance has other deleterious effects on the health-care market. Because those without insurance generally lack access to **2612 preventative care, they do not receive treatment for conditions—like hypertension and diabetes—that can be successfully and affordably treated if diagnosed early on.

  

See Institute of Medicine, National Academies, Insuring America's Health: Principles and Recommendations 43 (2004). When sickness finally drives the uninsured to seek care, once treatable conditions have escalated into grave health problems, requiring more costly and extensive intervention. *Id.*, at 43–44. The extra time and resources providers spend serving the uninsured lessens the providers' ability to care for those who do have insurance. See Kliff, High Uninsured Rates Can Kill You—Even if You Have Coverage, Washington Post (May 7, 2012) (describing a study of California's health-care market which found that, when hospitals divert time and resources to provide uncompensated care, the quality of care the hospitals deliver to those with insurance drops significantly), available at http://www.washingtonpost.com/blogs/ezra-klein/post/high-uninsured-rates-can-kill-you-even-if-you-have-coverage/2012/05/07/gIQALNHN8T_print.html.

C

States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be "bait ***595** to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose." *Helvering v. Davis*, 301 U.S. 619, 644, 57 S.Ct. 904, 81 L.Ed. 1307 (1937). See also Brief for Commonwealth of Massachusetts as *Amicus Curiae* in No. 11–398, p. 15 (noting that, in 2009, Massachusetts' emergency rooms served thousands of uninsured, out-of-state residents). An influx of unhealthy individuals into a State with universal health care would result in increased spending on medical services. To cover the increased costs, a State would have to raise taxes, and private health-insurance companies would have to increase premiums. Higher taxes and increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the State.

States that undertake health-care reforms on their own thus risk "placing themselves in a position of economic disadvantage as compared with neighbors or competitors." *Davis*, 301 U.S., at 644, 57 S.Ct. 904. See also Brief for Health Care for All, Inc., et al. as *Amici Curiae* in No. 11–398, p. 4 ("[O]ut-of-state residents continue to seek and receive millions of dollars in uncompensated care in Massachusetts hospitals, limiting the State's efforts to improve its health care system through the elimination of uncompensated care."). Facing that risk, individual States are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that problem is in all States' best interests. Congress' intervention was needed to overcome this collective-action impasse.

D

Aware that a national solution was required, Congress could have taken over the health-insurance market by establishing a tax-and-spend federal program like Social Security. Such a program, commonly referred to as a single-payer system (where the sole payer is the Federal Government), would have left little, if any, room for private enterprise or the States. Instead of going this route, Congress enacted the ACA, a solution that retains a robust role for private insurers ***596** and state governments. To make its chosen approach work, however, Congress had to use some new tools, including a requirement that most individuals obtain private health insurance coverage. See ****2613** 26 U.S.C.§ 5000A (2006 ed., Supp. IV) (the minimum coverage provision). As explained below, by employing these tools, Congress was able to achieve a practical, altogether reasonable, solution.

A central aim of the ACA is to reduce the number of uninsured U.S. residents. See 42 U.S.C. § 18091(2)(C) and (I) (2006 ed., Supp. IV). The minimum coverage provision advances this objective by giving potential recipients of health care a financial incentive to acquire insurance. Per the minimum coverage provision, an individual must either obtain insurance or pay a toll constructed as a tax penalty. See 26 U.S.C. § 5000A.

The minimum coverage provision serves a further purpose vital to Congress' plan to reduce the number of uninsured. Congress knew that encouraging individuals to purchase insurance would not suffice to solve the problem, because most of the uninsured are not uninsured by choice.[1] Of particular concern to Congress were people who, though

desperately in need of insurance, often cannot acquire it: persons who suffer from preexisting medical conditions.

Before the ACA's enactment, private insurance companies took an applicant's medical history into account when setting insurance rates or deciding whether to insure an individual. Because individuals with preexisting medical conditions cost *597 insurance companies significantly more than those without such conditions, insurers routinely refused to insure these individuals, charged them substantially higher premiums, or offered only limited coverage that did not include the preexisting illness. See Dept. of Health and Human Services, Coverage Denied: How the Current Health Insurance System Leaves Millions Behind 1 (2009) (Over the past three years, 12.6 million nonelderly adults were denied insurance coverage or charged higher premiums due to a preexisting condition.).

To ensure that individuals with medical histories have access to affordable insurance, Congress devised a three-part solution. First, Congress imposed a "guaranteed issue" requirement, which bars insurers from denying coverage to any person on account of that person's medical condition or history. See 42 U.S.C. §§ 300gg–1, 300gg–3, 300gg–4(a) (2006 ed., Supp. IV). Second, Congress required insurers to use "community rating" to price their insurance policies. See § 300gg. Community rating, in effect, bars insurance companies from charging higher premiums to those with preexisting conditions.

But these two provisions, Congress comprehended, could not work effectively unless individuals were given a powerful incentive to obtain insurance. See Hearings before the House Ways and Means Committee, 111th Cong., 1st Sess., 10, 13 (2009) (statement of Uwe Reinhardt) ("[I]mposition of *community-rated premiums* and *guaranteed* issue on a market of competing private health insurers will inexorably drive that market into extinction, unless these two features are coupled with ... a **2614 *mandate on individual[s] to be insured*." (emphasis in original)).

In the 1990's, several States—including New York, New Jersey, Washington, Kentucky, Maine, New Hampshire, and Vermont—enacted guaranteed-issue and community-rating laws without requiring universal acquisition of insurance coverage. The results were disastrous. "All seven states *598 suffered from skyrocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers." Brief for American Association of People with Disabilities et al. as *Amici Curiae* in No. 11–398, p. 9 (hereinafter AAPD Brief). See also Brief for Governor of Washington Christine Gregoire as *Amicus Curiae* in No. 11–398, pp. 11–14 (describing the "death spiral" in the insurance market Washington experienced when the State passed a law requiring coverage for preexisting conditions).

Congress comprehended that guaranteed-issue and community-rating laws alone will not work. When insurance companies are required to insure the sick at affordable prices, individuals can wait until they become ill to buy insurance. Pretty soon, those in need of immediate medical care—*i.e.*, those who cost insurers the most—become the insurance companies' main customers. This "adverse selection" problem leaves insurers with two choices: They can either raise premiums dramatically to cover their ever-increasing costs or they can exit the market. In the seven States that tried guaranteed-issue and community-rating requirements without a minimum coverage provision, that is precisely what insurance companies did. See, *e.g.*, AAPD Brief 10 ("[In Maine,] [m]any insurance providers doubled their premiums in just three years or less."); *id.*, at 12 ("Like New York, Vermont saw substantial increases in premiums after its ... insurance reform measures took effect in 1993."); Hall, An Evaluation of New York's Reform Law, 25 J. Health Pol. Pol'y & L. 71, 91–92 (2000) (Guaranteed-issue and community-rating laws resulted in a "dramatic exodus of indemnity insurers from New York's individual [insurance] market."); Brief for Barry Friedman et al. as *Amici Curiae* in No. 11–398, p. 17 ("In Kentucky, all but two insurers (one State-run) abandoned the State.").

Massachusetts, Congress was told, cracked the adverse selection problem. By requiring most residents to obtain insurance, see Mass. Gen. Laws, ch. 111M, § 2 (West 2011), *599 the Commonwealth ensured that insurers would not be left with only the sick as customers. As a result, federal lawmakers observed, Massachusetts succeeded where other States had failed. See Brief for Commonwealth of Massachusetts as *Amicus Curiae* in No. 11–398, at 3 (noting that the Commonwealth's

reforms reduced the number of uninsured residents to less than 2%, the lowest rate in the Nation, and cut the amount of uncompensated care by a third); 42 U.S.C. § 18091(2)(D) (2006 ed., Supp. IV) (noting the success of Massachusetts' reforms).[2] In coupling the minimum coverage provision with guaranteed-issue and community-rating prescriptions, Congress followed Massachusetts' lead.

In sum, Congress passed the minimum coverage provision as a key component of the ACA to address an economic and social problem that has plagued the Nation for decades: the large number of U.S. residents **2615 who are unable or unwilling to obtain health insurance. Whatever one thinks of the policy decision Congress made, it was Congress' prerogative to make it. Reviewed with appropriate deference, the minimum coverage provision, allied to the guaranteed-issue and community-rating prescriptions, should survive measurement under the Commerce and Necessary and Proper Clauses.

II

A

The Commerce Clause, it is widely acknowledged, "was the Framers' response to the central problem that gave rise to the Constitution itself." *EEOC v. Wyoming*, 460 U.S. 226, 244, 245, n. 1, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) (Stevens, J., concurring) (citing sources). Under the Articles of Confederation, the Constitution's *600 precursor, the regulation of commerce was left to the States. This scheme proved unworkable, because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole. See Vices of the Political System of the United States, in James Madison: Writings 69, 71, ¶ 5 (J. Rakove ed. 1999) (As a result of the "want of concert in matters where common interest requires it," the "national dignity, interest, and revenue [have] suffered.").[3]

What was needed was a "national Government ... armed with a positive & compleat authority in all cases where uniform measures are necessary." See Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 Papers of James Madison 368, 370 (R. Rutland ed. 1975). See also Letter from George Washington to James Madison (Nov. 30, 1785), in 8 *id.*, at 428, 429 ("We are either a United people, or we are not. If the former, let us, in all matters of general concern act as a nation, which ha[s] national objects to promote, and a national character to support."). The Framers' solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation "in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent." 2 Records of the Federal Convention of 1787, pp. 131–132, ¶ 8 (M. Farrand rev. 1966). See also *North American Co. v. SEC*, 327 U.S. 686, 705, 66 S.Ct. 785, 90 L.Ed. 945 (1946) ("[The commerce power] is an affirmative power commensurate with the national needs.").

*601 The Framers understood that the "general Interests of the Union" would change over time, in ways they could not anticipate. Accordingly, they recognized that the Constitution was of necessity a "great outlin[e]," not a detailed blueprint, see *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L.Ed. 579 (1819), and that its provisions included broad concepts, to be "explained by the context or by the facts of the case," Letter from James Madison to N.P. Trist (Dec. 1831), in 9 Writings of James Madison 471, 475 (G. Hunt ed. 1910). "Nothing ... can be more fallacious," Alexander Hamilton emphasized, " than to infer the extent of any power, proper to be lodged in the national government, from ... its immediate necessities. **2616 There ought to be a CAPACITY to provide for future contingencies[,] as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity." The Federalist No. 34, pp. 205, 206 (John Harvard Library ed. 2009). See also *McCulloch*, 4 Wheat., at 415 (The Necessary and Proper Clause is lodged "in a constitution[,] intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.").

B

Consistent with the Framers' intent, we have repeatedly emphasized that Congress' authority under the Commerce Clause is dependent upon "practical" considerations, including "actual experience." *Jones & Laughlin Steel Corp.*, 301 U.S., at 41–42, 57 S.Ct. 615; see *Wickard v. Filburn*, 317 U.S. 111, 122, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *United States v. Lopez*, 514 U.S. 549, 573, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring) (emphasizing "the Court's definitive commitment to the practical conception of the commerce power"). See also *North American Co.*, 327 U.S., at 705, 66 S.Ct. 785 ("Commerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities." (citation omitted)). We afford Congress the leeway "to undertake to solve national *602 problems directly and realistically." *American Power & Light Co. v. SEC*, 329 U.S. 90, 103, 67 S.Ct. 133, 91 L.Ed. 103 (1946).

Until today, this Court's pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities "that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. See *ibid.* See also *Wickard*, 317 U.S., at 125, 63 S.Ct. 82 ("[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." (emphasis added)); *Jones & Laughlin Steel Corp.*, 301 U.S., at 37, 57 S.Ct. 615.

Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. See *Raich*, 545 U.S., at 17, 125 S.Ct. 2195. See also *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) ("[S]trong deference [is] accorded legislation in the field of national economic policy."); *Hodel v. Indiana*, 452 U.S. 314, 326, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981) ("This [C]ourt will certainly not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent." (internal quotation marks omitted)). When appraising such legislation, we ask only (1) whether Congress had a "rational basis" for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a "reasonable connection between the regulatory means selected and the asserted ends." *Id.*, at 323–324, 101 S.Ct. 2376. See also *Raich*, 545 U.S., at 22, 125 S.Ct. 2195; *Lopez*, 514 U.S., at 557, 115 S.Ct. 1624; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 277, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Katzenbach v. McClung*, 379 U.S. 294, 303, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); **2617 *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *United States v.* *603 *Carolene Products Co.*, 304 U.S. 144, 152–153, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). In answering these questions, we presume the statute under review is constitutional and may strike it down only on a "plain showing" that Congress acted irrationally. *United States v. Morrison*, 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

C

Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. See *supra*, at 2610. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care. See *supra*, at 2611 – 2612.

Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. See *supra*, at 2610 – 2612. Given these far-

  

reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to "doing nothing," *ante,* at 2587; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause. See *supra,* at 2615 – 2617. See also *Wickard,* 317 U.S., at 128, 63 S.Ct. 82 ("It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and *practices affecting such prices.*" (emphasis added)).

***604** The minimum coverage provision, furthermore, bears a "reasonable connection" to Congress' goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum coverage provision gives individuals a strong incentive to insure. This incentive, Congress had good reason to believe, would reduce the number of uninsured and, correspondingly, mitigate the adverse impact the uninsured have on the national health-care market.

Congress also acted reasonably in requiring uninsured individuals, whether sick or healthy, either to obtain insurance or to pay the specified penalty. As earlier observed, because every person is at risk of needing care at any moment, all those who lack insurance, regardless of their current health status, adversely affect the price of health care and health insurance. See *supra,* at 2611 – 2612. Moreover, an insurance-purchase requirement limited to those in need of immediate care simply could not work. Insurance companies would either charge these individuals prohibitively expensive premiums, or, if community-rating regulations were in place, close up shop. See *supra,* at 2612 – 2614. See also Brief for State of Maryland et al. as *Amici Curiae* in No. 11–398, p. 28 (hereinafter Maryland Brief) ("No insurance regime can survive if people can opt out when the risk insured against is only a risk, but opt in when the risk materializes.").

****2618** "[W]here we find that the legislators ... have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Katzenbach,* 379 U.S., at 303–304, 85 S.Ct. 377. Congress' enactment of the minimum coverage provision, which addresses a specific interstate problem in a practical, experience-informed manner, easily meets this criterion.

D

Rather than evaluating the constitutionality of the minimum coverage provision in the manner established by our ***605** precedents, THE CHIEF JUSTICE relies on a newly minted constitutional doctrine. The commerce power does not, THE CHIEF JUSTICE announces, permit Congress to "compe[l] individuals to become active in commerce by purchasing a product." *Ante,* at 2587 (emphasis deleted).

1

a

THE CHIEF JUSTICE's novel constraint on Congress' commerce power gains no force from our precedent and for that reason alone warrants disapprobation. See *infra,* at 2620 – 2623. But even assuming, for the moment, that Congress lacks authority under the Commerce Clause to "compel individuals not engaged in commerce to purchase an unwanted product," *ante,* at 2586, such a limitation would be inapplicable here. Everyone will, at some point, consume health-care products and services. See *supra,* at 2609. Thus, if THE CHIEF JUSTICE is correct that an insurance-purchase requirement can be applied only to those who "actively" consume health care, the minimum coverage provision fits the bill.

THE CHIEF JUSTICE does not dispute that all U.S. residents participate in the market for health services over the course of their lives. See *ante,* at 2585 ("Everyone will eventually need health care at a time and to an extent they cannot predict."). But, THE CHIEF JUSTICE insists, the uninsured cannot be considered active in the market for health care, because "[t]he proximity and degree of connection between the [uninsured today] and [their] subsequent commercial activity is too lacking." *Ante,* at 2591.

This argument has multiple flaws. First, more than 60% of those without insurance visit a hospital or doctor's office each year. See *supra,* at 2610. Nearly 90% will within five years. [4] An uninsured's consumption of health care is thus ***606** quite proximate: It is virtually certain to occur in the next five years and more likely than not to occur this year.

Equally evident, Congress has no way of separating those uninsured individuals who will need emergency medical care today (surely their consumption of medical care is sufficiently imminent) from those who will not need medical services for years to come. No one knows when an emergency will occur, yet emergencies involving the uninsured arise daily. To capture individuals who unexpectedly will obtain medical care in the very near future, then, Congress needed to include individuals who will not go to a doctor anytime soon. Congress, our decisions instruct, has authority to cast its net that wide. See *Perez v. United States,* 402 U.S. 146, 154, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971) ("[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise ****2619** thing to be prevented it may do so." (internal quotation marks omitted)). [5]

Second, it is Congress' role, not the Court's, to delineate the boundaries of the market the Legislature seeks to regulate. THE CHIEF JUSTICE defines the health-care market as including only those transactions that will occur either in the next instant or within some (unspecified) proximity to the next instant. But Congress could reasonably have viewed the market from a long-term perspective, encompassing all transactions virtually certain to occur over the next decade, see *supra,* at 2618, not just those occurring here and now.

Third, contrary to THE CHIEF JUSTICE's contention, our precedent does indeed support "[t]he proposition that Congress ***607** may dictate the conduct of an individual today because of prophesied future activity." *Ante,* at 2590. In *Wickard,* the Court upheld a penalty the Federal Government imposed on a farmer who grew more wheat than he was permitted to grow under the Agricultural Adjustment Act of 1938(AAA). 317 U.S., at 114–115, 63 S.Ct. 82. He could not be penalized, the farmer argued, as he was growing the wheat for home consumption, not for sale on the open market. *Id.,* at 119, 63 S.Ct. 82. The Court rejected this argument. *Id.,* at 127–129, 63 S.Ct. 82. Wheat intended for home consumption, the Court noted, "overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases [intended by the AAA]." *Id.,* at 128, 63 S.Ct. 82.

Similar reasoning supported the Court's judgment in *Raich,* which upheld Congress' authority to regulate marijuana grown for personal use. 545 U.S., at 19, 125 S.Ct. 2195. Homegrown marijuana substantially affects the interstate market for marijuana, we observed, for "the high demand in the interstate market will [likely] draw such marijuana into that market." *Ibid.*

Our decisions thus acknowledge Congress' authority, under the Commerce Clause, to direct the conduct of an individual today (the farmer in *Wickard,* stopped from growing excess wheat; the plaintiff in *Raich,* ordered to cease cultivating marijuana) because of a prophesied future transaction (the eventual sale of that wheat or marijuana in the interstate market). Congress' actions are even more rational here, where the future activity (the consumption of medical care) is certain to occur, the sole uncertainty being the time the activity will take place.

Maintaining that the uninsured are not active in the health-care market, THE CHIEF JUSTICE draws an analogy to the car market. An individual "is not 'active in the car market,' " THE CHIEF JUSTICE observes, simply because he or she may someday buy a car. *Ante,* at 2589 – 2590. The analogy is inapt. The inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided ***608** when required are conditions nonexistent in other markets. That is so of the market for cars, and of the market for broccoli as well. Although an individual *might* buy a car or a crown of broccoli one day, there is no certainty she ****2620** will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price. See *Thomas More Law Center v. Obama,* 651 F.3d 529, 565 (C.A.6 2011) (Sutton, J., concurring in part) ("Regulating how citizens pay for what they already receive (health care), never quite know when they will

need, and in the case of severe illnesses or emergencies generally will not be able to afford, has few (if any) parallels in modern life."). Upholding the minimum coverage provision on the ground that all are participants or will be participants in the health-care market would therefore carry no implication that Congress may justify under the Commerce Clause a mandate to buy other products and services.

Nor is it accurate to say that the minimum coverage provision "compel[s] individuals ... to purchase an unwanted product," *ante,* at 2586, or "suite of products," *post,* at 2648, n. 2 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.). If unwanted today, medical service secured by insurance may be desperately needed tomorrow. Virtually everyone, I reiterate, consumes health care at some point in his or her life. See *supra,* at 2612. Health insurance is a means of paying for this care, nothing more. In requiring individuals to obtain insurance, Congress is therefore not mandating the purchase of a discrete, unwanted product. Rather, Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket). Establishing payment terms for goods in or ***609** affecting interstate commerce is quintessential economic regulation well within Congress' domain. See, *e.g.,* *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 118, 62 S.Ct. 523, 86 L.Ed. 726 (1942). Cf. *post,* at 2648 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.) (recognizing that "the Federal Government can prescribe [a commodity's] quality ... and even [its price]").

THE CHIEF JUSTICE also calls the minimum coverage provision an illegitimate effort to make young, healthy individuals subsidize insurance premiums paid by the less hale and hardy. See *ante,* at 2585, 2589 – 2591. This complaint, too, is spurious. Under the current health-care system, healthy persons who lack insurance receive a benefit for which they do not pay: They are assured that, if they need it, emergency medical care will be available, although they cannot afford it. See *supra,* at 2610 – 2611. Those who have insurance bear the cost of this guarantee. See *ibid.* By requiring the healthy uninsured to obtain insurance or pay a penalty structured as a tax, the minimum coverage provision ends the free ride these individuals currently enjoy.

In the fullness of time, moreover, today's young and healthy will become society's old and infirm. Viewed over a lifespan, the costs and benefits even out: The young who pay more than their fair share currently will pay less than their fair share when they become senior citizens. And even if, as undoubtedly will be the case, some individuals, over their lifespans, will pay more for health insurance than they receive in health services, they have little to complain about, for that is how insurance works. Every insured person receives protection against a catastrophic loss, even though only a subset of the covered class will ultimately need that protection.

****2621 b**

In any event, THE CHIEF JUSTICE's limitation of the commerce power to the regulation of those actively engaged in commerce finds no home in the text of the Constitution or ***610** our decisions. Article I, § 8, of the Constitution grants Congress the power "[t]o regulate Commerce ... among the several States." Nothing in this language implies that Congress' commerce power is limited to regulating those actively engaged in commercial transactions. Indeed, as the D.C. Circuit observed, "[a]t the time the Constitution was [framed], to 'regulate' meant," among other things, "to require action." See *Seven–Sky v. Holder,* 661 F.3d 1, 16 (2011).

Arguing to the contrary, THE CHIEF JUSTICE notes that "the Constitution gives Congress the power to 'coin Money,' in addition to the power to 'regulate the Value thereof,' " and similarly "gives Congress the power to 'raise and support Armies' and to 'provide and maintain a Navy,' in addition to the power to 'make Rules for the Government and Regulation of the land and naval Forces.' " *Ante,* at 2586 (citing Art. I, § 8, cls. 5, 12–14). In separating the power to regulate from the power to bring the subject of the regulation into existence, THE CHIEF JUSTICE asserts, "[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated." *Ante,* at 2586.

This argument is difficult to fathom. Requiring individuals to obtain insurance unquestionably regulates the interstate health-insurance and health-care markets, both of them in existence well before the enactment of the ACA. See *Wickard*, 317 U.S., at 128, 63 S.Ct. 82 ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."). Thus, the "something to be regulated" was surely there when Congress created the minimum coverage provision.[6]

***611** Nor does our case law toe the activity versus inactivity line. In *Wickard*, for example, we upheld the penalty imposed on a farmer who grew too much wheat, even though the regulation had the effect of compelling farmers to purchase wheat in the open market. *Id.*, at 127–129, 63 S.Ct. 82. "[F]orcing some farmers into the market to buy what they could provide for themselves" was, the Court held, a valid means of regulating commerce. *Id.*, at 128–129, 63 S.Ct. 82. In another context, this Court similarly upheld Congress' authority under the commerce power to compel an " inactive" landholder to submit to an unwanted sale. See *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 335–337, 13 S.Ct. 622, 37 L.Ed. 463 (1893) ("[U]pon *the [great] power to regulate commerce* [,]" Congress has the authority to mandate the sale of real property to the Government, where the sale is essential to the improvement of a navigable waterway (emphasis added)); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 657–659, 10 S.Ct. 965, 34 L.Ed. 295 (1890) (similar reliance on the commerce power regarding mandated sale of private property for railroad construction).

****2622** In concluding that the Commerce Clause does not permit Congress to regulate commercial "inactivity," and therefore does not allow Congress to adopt the practical solution it devised for the health-care problem, THE CHIEF JUSTICE views the Clause as a "technical legal conception," precisely what our case law tells us not to do. *Wickard*, 317 U.S., at 122, 63 S.Ct. 82 (internal quotation marks omitted). See also *supra*, at 2615 – 2617. This Court's former endeavors to impose categorical limits on the commerce power have not fared well. In several pre-New Deal cases, the Court attempted to cabin Congress' Commerce Clause authority by distinguishing "commerce" from activity once conceived to be noncommercial, notably, "production," "mining," and "manufacturing." See, *e.g.*, ***612** *United States v. E.C. Knight Co.*, 156 U.S. 1, 12, 15 S.Ct. 249, 39 L.Ed. 325 (1895) ("Commerce succeeds to manufacture, and is not a part of it."); *Carter v. Carter Coal Co.*, 298 U.S. 238, 304, 56 S.Ct. 855, 80 L.Ed. 1160 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it."). The Court also sought to distinguish activities having a "direct" effect on interstate commerce, and for that reason, subject to federal regulation, from those having only an "indirect" effect, and therefore not amenable to federal control. See, *e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548, 55 S.Ct. 837, 79 L.Ed. 1570 (1935) ("[T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one.").

These line-drawing exercises were untenable, and the Court long ago abandoned them. "[Q]uestions of the power of Congress [under the Commerce Clause]," we held in *Wickard*, "are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." 317 U.S., at 120, 63 S.Ct. 82. See also *Morrison*, 529 U.S., at 641–644, 120 S.Ct. 1740 (Souter, J., dissenting) (recounting the Court's "nearly disastrous experiment" with formalistic limits on Congress' commerce power). Failing to learn from this history, THE CHIEF JUSTICE plows ahead with his formalistic distinction between those who are "active in commerce," *ante*, at 2587, and those who are not.

It is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate "activity" from those that regulate "inactivity." As Judge Easterbrook noted, "it is possible to restate most actions as corresponding inactions with the same effect." *Archie v. Racine*, 847 F.2d 1211, 1213 (C.A.7 1988) (en banc). Take the instant litigation as an example. An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance. See *Thomas More Law Center*, 651 F.3d, at 561 (Sutton, J., ***613** 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."). The minimum coverage provision could therefore be described as regulating activists in the self-insurance market.[7] *Wickard* is another example. Did the statute there at issue **2623 target activity (the growing of too much wheat) or inactivity (the farmer's failure to purchase wheat in the marketplace)? If anything, the Court's analysis suggested the latter. See 317 U.S., at 127–129, 63 S.Ct. 82.

At bottom, THE CHIEF JUSTICE's and the joint dissenters' "view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts that enter him or her into, or affect, the interstate market expresses a concern for individual liberty that [is] more redolent of Due Process Clause arguments." *Seven–Sky*, 661 F.3d, at 19. See also *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion) ("The [Due Process] Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." (internal quotation marks omitted)). Plaintiffs have abandoned any argument pinned to substantive due process, however, see 648 F.3d 1235, 1291, n. 93 (C.A.11 2011), and now concede that the provisions here at issue do not offend the Due Process Clause.[8]

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*614 Underlying THE CHIEF JUSTICE's view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits. See, *e.g.*, *ante*, at 2589 (Allowing Congress to compel an individual not engaged in commerce to purchase a product would "permi[t] Congress to reach beyond the natural extent of its authority, everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." (internal quotation marks omitted)). The joint dissenters express a similar apprehension. See *post*, at 2646 (If the minimum coverage provision is upheld under the commerce power then "the Commerce Clause becomes a font of unlimited power, ... the hideous monster whose devouring jaws ... spare neither sex nor age, nor high nor low, nor sacred nor profane." (internal quotation marks omitted)). This concern is unfounded.

First, THE CHIEF JUSTICE could certainly uphold the individual mandate without giving Congress *carte blanche* to enact any and all purchase mandates. As several times noted, the unique attributes of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets. See *supra*, at 2609 – 2612, 2616 – 2618, 2619.

Nor would the commerce power be unbridled, absent THE CHIEF JUSTICE's "activity" limitation. Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law. See *Lopez*, 514 U.S., at 567, 115 S.Ct. 1624; *Morrison*, 529 U.S., at 617–619, 120 S.Ct. 1740. In *Lopez*, for example, the Court held that the Federal Government lacked power, under the Commerce Clause, to criminalize the possession of a gun in a *615 local school zone. Possessing **2624 a gun near a school, the Court reasoned, " is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." 514 U.S., at 567, 115 S.Ct. 1624; *ibid.* (noting that the Court would have "to pile inference upon inference" to conclude that gun possession has a substantial effect on commerce). Relying on similar logic, the Court concluded in *Morrison* that Congress could not regulate gender-motivated violence, which the Court deemed to have too "attenuated [an] effect upon interstate commerce." 529 U.S., at 615, 120 S.Ct. 1740.

An individual's decision to self-insure, I have explained, is an economic act with the requisite connection to interstate commerce. See *supra*, at 2616 – 2618. Other choices individuals make are unlikely to fit the same or similar description. As an example of the type of regulation he fears, THE CHIEF JUSTICE cites a Government mandate to purchase green vegetables. *Ante*, at 2588 – 2589. One could call this concern "the broccoli horrible." Congress, THE CHIEF JUSTICE posits, might adopt such a mandate, reasoning that an individual's failure to eat a healthy diet, like the failure to purchase health insurance, imposes costs on others. See *ibid.*

Consider the chain of inferences the Court would have to accept to conclude that a vegetable-purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans. The Court would have to believe that individuals forced to buy vegetables would then eat them (instead of throwing or giving them away), would prepare the vegetables in a healthy way (steamed or raw, not deep fried), would cut back on unhealthy foods, and would not allow other factors (such as lack of exercise or little sleep) to trump the improved diet.[9] Such "pil[ing of] inference ***616** upon inference" is just what the Court refused to do in *Lopez* and *Morrison*.

Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause.

Supplementing these legal restraints is a formidable check on congressional power: the democratic process. See *Raich*, 545 U.S., at 33, 125 S.Ct. 2195; *Wickard*, 317 U.S., at 120, 63 S.Ct. 82 (repeating Chief Justice Marshall's "warning that effective restraints on [the commerce power's] exercise must proceed from political rather than judicial processes") (citing *Gibbons v. Ogden*, 9 Wheat. 1, 197, 6 L.Ed. 23 (1824)). As the controversy surrounding the passage of the ACA attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so. See Hall, ****2625** Commerce Clause Challenges to Health Care Reform, 159 U. Pa. L. Rev. 1825, 1838 (2011).

When contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables. Cf. *Raich*, 545 U.S., at 9, 125 S.Ct. 2195; *Wickard*, 317 U.S., at 127–129, 63 S.Ct. 82. Yet no one would offer the "hypothetical and unreal possibilit[y]," *Pullman Co. v. Knott*, 235 U.S. 23, 26, 35 S.Ct. 2, 59 L.Ed. 105 (1914), of a vegetarian state as a credible ***617** reason to deny Congress the authority ever to ban the possession and sale of goods. THE CHIEF JUSTICE accepts just such specious logic when he cites the broccoli horrible as a reason to deny Congress the power to pass the individual mandate. Cf. R. Bork, The Tempting of America 169 (1990) ("Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom."). But see, *e.g.*, *post*, at 2586 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.) (asserting, outlandishly, that if the minimum coverage provision is sustained, then Congress could make "breathing in and out the basis for federal prescription").

3

To bolster his argument that the minimum coverage provision is not valid Commerce Clause legislation, THE CHIEF JUSTICE emphasizes the provision's novelty. See *ante*, at 2586 (asserting that "sometimes the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent for Congress's action" (internal quotation marks omitted)). While an insurance-purchase mandate may be novel, THE CHIEF JUSTICE's argument certainly is not. "[I]n almost every instance of the exercise of the [commerce] power differences are asserted from previous exercises of it and made a ground of attack." *Hoke v. United States*, 227 U.S. 308, 320, 33 S.Ct. 281, 57 L.Ed. 523 (1913). See, *e.g.*, Brief for Petitioner in *Perez v. United States*, O.T. 1970, No. 600, p. 5 ("unprecedented exercise of power"); Supplemental Brief for Appellees in *Katzenbach v. McClung*, O.T. 1964, No. 543, p. 40 ("novel assertion of federal power"); Brief for Appellee in *Wickard v. Filburn*, O.T. 1941, No. 59, p. 6 ("complete departure"). For decades, the Court has declined to override legislation because of its novelty, and for good reason. As our national economy grows and changes, we have recognized, Congress must adapt to the changing "economic and financial realities." See *supra*, at 2616. Hindering Congress' ability to do so is shortsighted; if history is any guide, today's constriction ***618** of the Commerce Clause will not endure. See *supra*, at 2621 – 2623.

III

A

For the reasons explained above, the minimum coverage provision is valid Commerce Clause legislation. See Part II, *supra*. When viewed as a component of the entire ACA, the provision's constitutionality becomes even plainer.

The Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its [commerce] powe[r] that are not within its authority to enact in isolation." *Raich*, 545 U.S., at 39, 125 S.Ct. 2195 (SCALIA, J., concurring in judgment). Hence, "[a] complex regulatory program ... can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal." **2626 *Indiana*, 452 U.S., at 329, n. 17, 101 S.Ct. 2376. "It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." *Ibid.* (collecting cases). See also *Raich*, 545 U.S., at 24–25, 125 S.Ct. 2195 (A challenged statutory provision fits within Congress' commerce authority if it is an "essential par[t] of a larger regulation of economic activity," such that, in the absence of the provision, "the regulatory scheme could be undercut." (quoting *Lopez*, 514 U.S., at 561, 115 S.Ct. 1624)); *Raich*, 545 U.S., at 37, 125 S.Ct. 2195 (SCALIA, J., concurring in judgment) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." (citation omitted)).

Recall that one of Congress' goals in enacting the ACA was to eliminate the insurance industry's practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. See *supra*, at 2612 – 2614. *619 The commerce power allows Congress to ban this practice, a point no one disputes. See *United States v. South–Eastern Underwriters Assn.*, 322 U.S. 533, 545, 552–553, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944) (Congress may regulate "the methods by which interstate insurance companies do business.").

Congress knew, however, that simply barring insurance companies from relying on an applicant's medical history would not work in practice. Without the individual mandate, Congress learned, guaranteed-issue and community-rating requirements would trigger an adverse-selection death spiral in the health-insurance market: Insurance premiums would skyrocket, the number of uninsured would increase, and insurance companies would exit the market. See *supra*, at 2613 – 2614. When complemented by an insurance mandate, on the other hand, guaranteed issue and community rating would work as intended, increasing access to insurance and reducing uncompensated care. See *supra*, at 2614 – 2615. The minimum coverage provision is thus an "essential par[t] of a larger regulation of economic activity"; without the provision, "the regulatory scheme [w]ould be undercut." *Raich*, 545 U.S., at 24–25, 125 S.Ct. 2195 (internal quotation marks omitted). Put differently, the minimum coverage provision, together with the guaranteed-issue and community-rating requirements, is " 'reasonably adapted' to the attainment of a legitimate end under the commerce power": the elimination of pricing and sales practices that take an applicant's medical history into account. See *id.*, at 37, 125 S.Ct. 2195 (SCALIA, J., concurring in judgment).

B

Asserting that the Necessary and Proper Clause does not authorize the minimum coverage provision, THE CHIEF JUSTICE focuses on the word "proper." A mandate to purchase health insurance is not "proper" legislation, THE CHIEF JUSTICE urges, because the command "undermine[s] the structure of government established by the Constitution *620 ." *Ante*, at 2592. If long on rhetoric, THE CHIEF JUSTICE's argument is short on substance.

THE CHIEF JUSTICE cites only two cases in which this Court concluded that a federal statute impermissibly transgressed the Constitution's boundary between state and federal authority: *Printz v. United States*, 521 U.S.

898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), and **2627 *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). See *ante*, at 2592. The statutes at issue in both cases, however, compelled *state officials* to act on the Federal Government's behalf. 521 U.S., at 925–933, 117 S.Ct. 2365 (holding unconstitutional a statute obligating state law enforcement officers to implement a federal gun-control law); *New York*, 505 U.S., at 176–177, 112 S.Ct. 2408 (striking down a statute requiring state legislators to pass regulations pursuant to Congress' instructions). "[Federal] laws conscripting state officers," the Court reasoned, "violate state sovereignty and are thus not in accord with the Constitution." *Printz*, 521 U.S., at 925, 935, 117 S.Ct. 2365; *New York*, 505 U.S., at 176, 112 S.Ct. 2408.

The minimum coverage provision, in contrast, acts "directly upon individuals, without employing the States as intermediaries." *New York*, 505 U.S., at 164, 112 S.Ct. 2408. The provision is thus entirely consistent with the Constitution's design. See *Printz*, 521 U.S., at 920, 117 S.Ct. 2365 ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." (internal quotation marks omitted)).

Lacking case law support for his holding, THE CHIEF JUSTICE nevertheless declares the minimum coverage provision not "proper" because it is less "narrow in scope" than other laws this Court has upheld under the Necessary and Proper Clause. *Ante*, at 2592 (citing *United States v. Comstock*, 560 U.S. 126, 130 S.Ct. 1949, 176 L.Ed.2d 878 (2010); *Sabri v. United States*, 541 U.S. 600, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004); *Jinks v. Richland County*, 538 U.S. 456, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003)). THE CHIEF JUSTICE's reliance on cases in which this Court has *affirmed* Congress' "broad authority to enact federal legislation" under the Necessary and Proper Clause, *Comstock*, 560 U.S., at 133, 130 S.Ct., at 1956, is underwhelming.

*621 Nor does THE CHIEF JUSTICE pause to explain *why* the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause. These powers include the power to enact criminal laws, see, *e.g.*, *United States v. Fox*, 95 U.S. 670, 672, 24 L.Ed. 538 (1878); the power to imprison, including civil imprisonment, see, *e.g.*, *Comstock*, 560 U.S., at 129–130, 130 S.Ct., at 1954; and the power to create a national bank, see *McCulloch*, 4 Wheat., at 425. See also *Jinks*, 538 U.S., at 463, 123 S.Ct. 1667 (affirming Congress' power to alter the way a state law is applied in state court, where the alteration "promotes fair and efficient operation of the federal courts"). [10]

In failing to explain why the individual mandate threatens our constitutional order, THE CHIEF JUSTICE disserves future courts. How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an "independent power," *ante*, at 2591, or merely a "derivative" one, *ante*, at 2592. Whether the power used is "substantive," *ante*, at 2592, or just "incidental," **2628 *ante*, at 2592? The instruction THE CHIEF JUSTICE, in effect, provides lower courts: You will know it when you see it.

It is more than exaggeration to suggest that the minimum coverage provision improperly intrudes on "essential attributes of state sovereignty." *Ibid.* (internal quotation marks omitted). First, the ACA does not operate "in [an] are[a] such as criminal law enforcement or education where States historically have been sovereign." *Lopez*, 514 U.S., at 564, 115 S.Ct. 1624. *622 As evidenced by Medicare, Medicaid, the Employee Retirement Income Security Act of 1974, and the Health Insurance Portability and Accountability Act of 1996, the Federal Government plays a lead role in the health-care sector, both as a direct payer and as a regulator.

Second, and perhaps most important, the minimum coverage provision, along with other provisions of the ACA, addresses the very sort of interstate problem that made the commerce power essential in our federal system. See *supra*, at 2614 – 2616. The crisis created by the large number of U.S. residents who lack health insurance is one of national dimension that States are "separately incompetent" to handle. See *supra*, at 2611 – 2612, 2615. See also Maryland Brief 15–26 (describing "the impediments to effective state policymaking that flow from the interconnectedness of each state's healthcare economy" and emphasizing that "state-level reforms

cannot fully address the problems associated with uncompensated care"). Far from trampling on States' sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need. Notably, the ACA serves the general welfare of the people of the United States while retaining a prominent role for the States. See *id.*, at 31–36 (explaining and illustrating how the ACA affords States wide latitude in implementing key elements of the Act's reforms). [11]

IV

***623** In the early 20th century, this Court regularly struck down economic regulation enacted by the peoples' representatives in both the States and the Federal Government. See, *e.g.*, *Carter Coal Co.*, 298 U.S., at 303–304, 309–310, 56 S.Ct. 855; *Dagenhart*, 247 U.S., at 276–277, 38 S.Ct. 529; ****2629** *Lochner v. New York*, 198 U.S. 45, 64, 25 S.Ct. 539, 49 L.Ed. 937 (1905). THE CHIEF JUSTICE's Commerce Clause opinion, and even more so the joint dissenters' reasoning, see *post*, at 2644 – 2650, bear a disquieting resemblance to those long-overruled decisions.

Ultimately, the Court upholds the individual mandate as a proper exercise of Congress' power to tax and spend "for the ... general Welfare of the United States." Art. I, § 8, cl. 1; *ante*, at 2600 – 2601. I concur in that determination, which makes THE CHIEF JUSTICE's Commerce Clause essay all the more puzzling. Why should THE CHIEF JUSTICE strive so mightily to hem in Congress' capacity to meet the new problems arising constantly in our ever-developing modern economy? I find no satisfying response to that question in his opinion. [12]

V

***624** Through Medicaid, Congress has offered the States an opportunity to furnish health care to the poor with the aid of federal financing. To receive federal Medicaid funds, States must provide health benefits to specified categories of needy persons, including pregnant women, children, parents, and adults with disabilities. Guaranteed eligibility varies by category: for some it is tied to the federal poverty level (incomes up to 100% or 133%); for others it depends on criteria such as eligibility for designated state or federal assistance programs. The ACA enlarges the population of needy people States must cover to include adults under age 65 with incomes up to 133% of the federal poverty level. The spending power conferred by the Constitution, the Court has never doubted, permits Congress to define the contours of programs financed with federal funds. See, *e.g.*, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). And to expand coverage, Congress could have recalled the existing legislation, and replaced it with a new law making Medicaid as embracive of the poor as Congress chose.

The question posed by the 2010 Medicaid expansion, then, is essentially this: To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing law? The answer should be that Congress may expand by amendment the classes of needy persons entitled to Medicaid benefits. A ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism. To the contrary, such a requirement would rigidify Congress' efforts to empower States by partnering with them in the implementation of federal programs.

***625** Medicaid is a prototypical example of federal-state cooperation in serving the Nation's general welfare. Rather than authorizing a federal agency to administer a uniform national health-care system for the poor, Congress offered States the opportunity to tailor Medicaid grants to their particular needs, so long as they remain within bounds set by federal law. In shaping ****2630** Medicaid, Congress did not endeavor to fix permanently the terms participating States must meet; instead, Congress reserved the "right to alter, amend, or repeal" any provision of the Medicaid Act. 42 U.S.C. § 1304. States, for their part, agreed to amend their own Medicaid plans consistent with changes from time to time made in the federal law. See 42 CFR § 430.12(c)(i) (2011). And from 1965 to the present, States have regularly conformed to Congress' alterations of the Medicaid Act.

  

THE CHIEF JUSTICE acknowledges that Congress may "condition the receipt of [federal] funds on the States' complying with restrictions on the use of those funds," *ante,* at 2603 – 2604, but nevertheless concludes that the 2010 expansion is unduly coercive. His conclusion rests on three premises, each of them essential to his theory. First, the Medicaid expansion is, in THE CHIEF JUSTICE's view, a new grant program, not an addition to the Medicaid program existing before the ACA's enactment. Congress, THE CHIEF JUSTICE maintains, has threatened States with the loss of funds from an old program in an effort to get them to adopt a new one. Second, the expansion was unforeseeable by the States when they first signed on to Medicaid. Third, the threatened loss of funding is so large that the States have no real choice but to participate in the Medicaid expansion. THE CHIEF JUSTICE therefore—*for the first time ever*—finds an exercise of Congress' spending power unconstitutionally coercive.

Medicaid, as amended by the ACA, however, is not two spending programs; it is a single program with a constant aim—to enable poor persons to receive basic health care when they need it. Given past expansions, plus express ***626** statutory warning that Congress may change the requirements participating States must meet, there can be no tenable claim that the ACA fails for lack of notice. Moreover, States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress' terms. Future Congresses are not bound by their predecessors' dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as THE CHIEF JUSTICE charges, threatening States with the loss of "existing" funds from one spending program in order to induce them to opt into another program. Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation.

A majority of the Court, however, buys the argument that prospective withholding of funds formerly available exceeds Congress' spending power. Given that holding, I entirely agree with THE CHIEF JUSTICE as to the appropriate remedy. It is to bar the withholding found impermissible—not, as the joint dissenters would have it, to scrap the expansion altogether, see *post,* at 2666 – 2668. The dissenters' view that the ACA must fall in its entirety is a radical departure from the Court's normal course. When a constitutional infirmity mars a statute, the Court ordinarily removes the infirmity. It undertakes a salvage operation; it does not demolish the legislation. See, *e.g., Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) (Court's normal course is to declare a statute invalid "to the extent that it reaches too far, but otherwise [to leave the statute] intact"). That course is plainly in order where, here, Congress has expressly instructed courts to leave untouched every provision not found invalid. See 42 U.S.C. § 1303. Because THE CHIEF JUSTICE finds the withholding— ****2631** not the granting—of federal funds incompatible with the Spending Clause, Congress' extension of Medicaid remains available to any State that affirms its willingness to participate.

A

***627** Expansion has been characteristic of the Medicaid program. Akin to the ACA in 2010, the Medicaid Act as passed in 1965 augmented existing federal grant programs jointly administered with the States.[13] States were not required to participate in Medicaid. But if they did, the Federal Government paid at least half the costs. To qualify for these grants, States had to offer a minimum level of health coverage to beneficiaries of four federally funded, state-administered welfare programs: Aid to Families with Dependent Children; Old Age Assistance; Aid to the Blind; and Aid to the Permanently and Totally Disabled. See Social Security Amendments of 1965, § 121(a), 79 Stat. 343; *Schweiker v. Gray Panthers,* 453 U.S. 34, 37, 101 S.Ct. 2633, 69 L.Ed.2d 460 (1981). At their option, States could enroll additional "medically needy" individuals; these costs, too, were partially borne by the Federal Government at the same, at least 50%, rate. *Ibid.*

Since 1965, Congress has amended the Medicaid program on more than 50 occasions, sometimes quite sizably. Most relevant here, between 1988 and 1990, Congress required participating States to include among their beneficiaries pregnant women with family incomes up to 133% of the federal poverty level, children up to age 6 at the same income levels, and children ages 6 to 18 with

family incomes up to 100% of the poverty level. See 42 U.S.C. §§ 1396a(a)(10)(A)(i), 1396a(*l*); ***628** Medicare Catastrophic Coverage Act of 1988, § 302, 102 Stat. 750; Omnibus Budget Reconciliation Act of 1989, § 6401, 103 Stat. 2258; Omnibus Budget Reconciliation Act of 1990, § 4601, 104 Stat. 1388–166. These amendments added millions to the Medicaid-eligible population. Dubay & Kenney, Lessons From the Medicaid Expansions for Children and Pregnant Women 5 (Apr. 1997).

Between 1966 and 1990, annual federal Medicaid spending grew from $631.6 million to $42.6 billion; state spending rose to $31 billion over the same period. See Dept. of Health and Human Services, National Health Expenditures by Type of Service and Source of Funds: Calendar Years 1960 to 2010 (Table).[14] And between 1990 and 2010, federal spending increased to $269.5 billion. *Ibid.* Enlargement of the population and services covered by Medicaid, in short, has been the trend.

Compared to past alterations, the ACA is notable for the extent to which the Federal Government will pick up the tab. Medicaid's 2010 expansion is financed ****2632** largely by federal outlays. In 2014, federal funds will cover 100% of the costs for newly eligible beneficiaries; that rate will gradually decrease before settling at 90% in 2020. 42 U.S.C. § 1396d(y) (2006 ed., Supp. IV). By comparison, federal contributions toward the care of beneficiaries eligible pre-ACA range from 50% to 83%, and averaged 57% between 2005 and 2008. § 1396d(b) (2006 ed., Supp. IV); Dept. of Health and Human Services, Centers for Medicare and Medicaid Services, C. Truffer et al., 2010 Actuarial Report on the Financial Outlook for Medicaid, p. 20.

Nor will the expansion exorbitantly increase state Medicaid spending. The Congressional Budget Office (CBO) projects that States will spend 0.8% more than they would have, absent the ACA. See CBO, Spending & Enrollment Detail for CBO's March 2009 Baseline. But see *ante*, at 2601 ***629** ("[T]he Act dramatically increases state obligations under Medicaid."); *post*, at 2666 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.) ("[A]cceptance of the [ACA expansion] will impose very substantial costs on participating States."). Whatever the increase in state obligations after the ACA, it will pale in comparison to the increase in federal funding.[15]

Finally, any fair appraisal of Medicaid would require acknowledgment of the considerable autonomy States enjoy under the Act. Far from "conscript[ing] state agencies into the national bureaucratic army," *ante*, at 2607 (citing *FERC v. Mississippi*, 456 U.S. 742, 775, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part); some brackets and internal quotation marks omitted), Medicaid "is designed to advance cooperative federalism." *Wisconsin Dept. of Health and Family Servs. v. Blumer*, 534 U.S. 473, 495, 122 S.Ct. 962, 151 L.Ed.2d 935 (2002) (citing *Harris v. McRae*, 448 U.S. 297, 308, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980)). Subject to its basic requirements, the Medicaid Act empowers States to "select dramatically different levels of funding and coverage, alter and experiment with different financing and delivery modes, and opt to cover (or not to cover) a range of particular procedures and therapies. States have leveraged this policy discretion to generate a myriad of dramatically different Medicaid programs over the past several decades." Ruger, Of Icebergs and Glaciers, 75 Law & Contemp. Prob. 215, 233 (2012) (footnote omitted). The ACA does not jettison this approach. States, as first-line administrators, will continue to guide the distribution of substantial resources among their needy populations.

***630** The alternative to conditional federal spending, it bears emphasis, is not state autonomy but state marginalization.[16] In 1965, Congress elected to nationalize health coverage for seniors through Medicare. ****2633** It could similarly have established Medicaid as an exclusively federal program. Instead, Congress gave the States the opportunity to partner in the program's administration and development. Absent from the nationalized model, of course, is the state-level policy discretion and experimentation that is Medicaid's hallmark; undoubtedly the interests of federalism are better served when States retain a meaningful role in the implementation of a program of such importance. See Caminker, State Sovereignty and Subordinacy, 95 Colum. L. Rev. 1001, 1002–1003 (1995) (cooperative federalism can preserve "a significant role for state discretion in achieving specified federal goals, where the alternative

  

is complete federal preemption of any state regulatory role"); Rose–Ackerman, Cooperative Federalism and Co-optation, 92 Yale L.J. 1344, 1346 (1983) ("If the federal government begins to take full responsibility for social welfare spending and preempts the states, the result is likely to be weaker ... state governments."). [17]

Although Congress "has no obligation to use its Spending Clause power to disburse funds to the States," *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999), ***631** it has provided Medicaid grants notable for their generosity and flexibility. "[S]uch funds," we once observed, "are gifts," *id.*, at 686–687, 119 S.Ct. 2219, and so they have remained through decades of expansion in their size and scope.

B

The Spending Clause authorizes Congress "to pay the Debts and provide for the ... general Welfare of the United States." Art. I, § 8, cl. 1. To ensure that federal funds granted to the States are spent "to 'provide for the ... general Welfare' in the manner Congress intended," *ante*, at 2602, Congress must of course have authority to impose limitations on the States' use of the federal dollars. This Court, time and again, has respected Congress' prescription of spending conditions, and has required States to abide by them. See, *e.g.*, *Pennhurst*, 451 U.S., at 17, 101 S.Ct. 1531 ("[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States."). In particular, we have recognized Congress' prerogative to condition a State's receipt of Medicaid funding on compliance with the terms Congress set for participation in the program. See, *e.g.*, *Harris*, 448 U.S., at 301, 100 S.Ct. 2671 ("[O]nce a State elects to participate [in Medicaid], it must comply with the requirements of [the Medicaid Act]."); *Arkansas Dept. of Health and Human Servs. v. Ahlborn*, 547 U.S. 268, 275, 126 S.Ct. 1752, 164 L.Ed.2d 459 (2006); *Frew v. Hawkins*, 540 U.S. 431, 433, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004); *Atkins v. Rivera*, 477 U.S. 154, 156–157, 106 S.Ct. 2456, 91 L.Ed.2d 131 (1986).

Congress' authority to condition the use of federal funds is not confined to spending programs as first launched. The Legislature may, and often does, amend the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds. See *infra*, at 2638 (describing ****2634** *Bennett v. Kentucky Dept. of Ed.*, 470 U.S. 656, 659–660, 105 S.Ct. 1544, 84 L.Ed.2d 590 (1985) (enforcing restriction added five years after adoption of educational program)).

Yes, there are federalism-based limits on the use of Congress' conditional spending power. In the leading decision ***632** in this area, *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987), the Court identified four criteria. The conditions placed on federal grants to States must (1) promote the "general welfare," (2) "unambiguously" inform States what is demanded of them, (3) be germane "to the federal interest in particular national projects or programs," and (4) not "induce the States to engage in activities that would themselves be unconstitutional." *Id.*, at 207–208, 210, 107 S.Ct. 2793 (internal quotation marks omitted). [18]

The Court in *Dole* mentioned, but did not adopt, a further limitation, one hypothetically raised a half-century earlier: In "some circumstances," Congress might be prohibited from offering a "financial inducement ... so coercive as to pass the point at which 'pressure turns into compulsion.' " *Id.*, at 211, 107 S.Ct. 2793 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 81 L.Ed. 1279 (1937)). Prior to today's decision, however, the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.

*Dole* involved the National Minimum Drinking Age Act, 23 U.S.C. § 158, enacted in 1984. That Act directed the Secretary of Transportation to withhold 5% of the federal highway funds otherwise payable to a State if the State permitted purchase of alcoholic beverages by persons less than 21 years old. Drinking age was not within the authority of Congress to regulate, South Dakota argued, because the Twenty–First Amendment gave the States exclusive power to control the manufacture, transportation, and consumption of alcoholic beverages. The small percentage of highway-construction funds South Dakota stood to lose by adhering to 19 as the age of

eligibility to purchase 3.2% beer, however, was not enough to qualify as coercion, the Court concluded.

*633 This litigation does not present the concerns that led the Court in *Dole* even to consider the prospect of coercion. In *Dole*, the condition—set 21 as the minimum drinking age—did not tell the States how to use funds Congress provided for highway construction. Further, in view of the Twenty–First Amendment, it was an open question whether Congress could directly impose a national minimum drinking age.

The ACA, in contrast, relates solely to the federally funded Medicaid program; if States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the ACA use Medicaid funding to induce States to take action Congress itself could not undertake. The Federal Government undoubtedly could operate its own health-care program for poor persons, just as it operates Medicare for seniors' health care. See *supra*, at 2632.

That is what makes this such a simple case, and the Court's decision so unsettling. Congress, aiming to assist the needy, has appropriated federal money to subsidize state health-insurance programs that meet federal standards. The principal standard the ACA sets is that the state program cover adults earning no more **2635 than 133% of the federal poverty line. Enforcing that prescription ensures that federal funds will be spent on health care for the poor in furtherance of Congress' present perception of the general welfare.

C

THE CHIEF JUSTICE asserts that the Medicaid expansion creates a "new health care program." *Ante*, at 2606. Moreover, States could "hardly anticipate" that Congress would "transform [the program] so dramatically." *Ibid.*. Therefore, THE CHIEF JUSTICE maintains, Congress' threat to withhold "old" Medicaid funds based on a State's refusal to participate in the "new" program is a "threa[t] to terminate [an]other ... independent gran[t]." *Ante*, at 2604, 2605 – 2606. And because the threat to withhold a large amount of funds *634 from one program "leaves the States with no real option but to acquiesce [in a newly created program]," THE CHIEF JUSTICE concludes, the Medicaid expansion is unconstitutionally coercive. *Ante*, at 2605.

1

The starting premise on which THE CHIEF JUSTICE's coercion analysis rests is that the ACA did not really "extend" Medicaid; instead, Congress created an entirely new program to coexist with the old. THE CHIEF JUSTICE calls the ACA new, but in truth, it simply reaches more of America's poor than Congress originally covered.

Medicaid was created to enable States to provide medical assistance to "needy persons." See S.Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 9 (1965). See also § 121(a), 79 Stat. 343 (The purpose of Medicaid is to enable States "to furnish ... medical assistance on behalf of [certain persons] whose income and resources are insufficient to meet the costs of necessary medical services."). By bringing health care within the reach of a larger population of Americans unable to afford it, the Medicaid expansion is an extension of that basic aim.

The Medicaid Act contains hundreds of provisions governing operation of the program, setting conditions ranging from "Limitation on payments to States for expenditures attributable to taxes," 42 U.S.C. § 1396a(t) (2006 ed.), to "Medical assistance to aliens not lawfully admitted for permanent residence," § 1396b(v) (2006 ed. and Supp. IV). The Medicaid expansion leaves unchanged the vast majority of these provisions; it adds beneficiaries to the existing program and specifies the rate at which States will be reimbursed for services provided to the added beneficiaries. See ACA §§ 2001(a)(1), (3), 124 Stat. 271–272. The ACA does not describe operational aspects of the program for these newly eligible persons; for that information, one must read the existing Medicaid Act. See 42 U.S.C. §§ 1396–1396v(b) (2006 ed. and Supp. IV).

*635 Congress styled and clearly viewed the Medicaid expansion as an amendment to the Medicaid Act, not as

a "new" health-care program. To the four categories of beneficiaries for whom coverage became mandatory in 1965, and the three mandatory classes added in the late 1980's, see *supra,* at 2631 – 2632, the ACA adds an eighth: individuals under 65 with incomes not exceeding 133% of the federal poverty level. The expansion is effectuated by § 2001 of the ACA, aptly titled: "Medicaid Coverage for the Lowest Income Populations." 124 Stat. 271. That section amends Title 42, Chapter 7, Subchapter XIX: Grants to States for Medical Assistance Programs. Commonly known as the Medicaid Act, Subchapter XIX filled some 278 pages in 2006. Section 2001 of the **2636 ACA would add approximately three pages. [19]

Congress has broad authority to construct or adjust spending programs to meet its contemporary understanding of "the general Welfare." *Helvering v. Davis,* 301 U.S. 619, 640–641, 57 S.Ct. 904, 81 L.Ed. 1307 (1937). Courts owe a large measure of respect to Congress' characterization of the grant programs it establishes. See *Steward Machine,* 301 U.S., at 594, 57 S.Ct. 883. Even if courts were inclined to second-guess Congress' conception of the character of its legislation, how would reviewing judges divine whether an Act of Congress, purporting to amend a law, is in reality not an amendment, but a new creation? At what point does an extension become so large that it "transforms" the basic law?

Endeavoring to show that Congress created a new program, THE CHIEF JUSTICE cites three aspects of the expansion. First, he asserts that, in covering those earning no more than 133% of the federal poverty line, the Medicaid expansion, unlike pre-ACA Medicaid, does not "care for the neediest among us." *Ante,* at 2606. What makes that so? *636 Single adults earning no more than $14,856 per year—133% of the current federal poverty level—surely rank among the Nation's poor.

Second, according to THE CHIEF JUSTICE, "Congress mandated that newly eligible persons receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package." *Ante,* at 2606. That less comprehensive benefit package, however, is not an innovation introduced by the ACA; since 2006, States have been free to use it for many of their Medicaid beneficiaries. [20] The level of benefits offered therefore does not set apart post-ACA Medicaid recipients from all those entitled to benefits pre-ACA.

Third, THE CHIEF JUSTICE correctly notes that the reimbursement rate for participating States is different regarding individuals who became Medicaid-eligible through the ACA. *Ibid.* But the rate differs only in its generosity to participating States. Under pre-ACA Medicaid, the Federal Government pays up to 83% of the costs of coverage for current enrollees, § 1396d(b) (2006 ed. and Supp. IV); under the ACA, the federal contribution starts at 100% and will eventually settle at 90%, § 1396d(y). Even if one agreed that a change of as little as 7 percentage points carries constitutional significance, is it not passing strange to suggest that the purported incursion on state sovereignty might have been averted, or at least mitigated, had Congress offered States *less* money to carry out the same obligations?

Consider also that Congress could have repealed Medicaid. See *supra,* at 2629 – 2630 (citing 42 U.S.C. § 1304); Brief for Petitioners in No. 11–400, p. 41. Thereafter, Congress could have enacted Medicaid II, a new program combining the pre–2010 coverage with the expanded coverage required by the *637 ACA. By what right does a court stop Congress from building up without first tearing down?

2

THE CHIEF JUSTICE finds the Medicaid expansion vulnerable because it took **2637 participating States by surprise. *Ante,* at 2606. "A State could hardly anticipate that Congres[s]" would endeavor to "transform [the Medicaid program] so dramatically," he states. *Ibid.* For the notion that States must be able to foresee, when they sign up, alterations Congress might make later on, THE CHIEF JUSTICE cites only one case: *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694.

In *Pennhurst,* residents of a state-run, federally funded institution for the mentally disabled complained of abusive treatment and inhumane conditions in alleged violation of the Developmentally Disabled Assistance

and Bill of Rights Act. 451 U.S., at 5–6, 101 S.Ct. 1531. We held that the State was not answerable in damages for violating conditions it did not "voluntarily and knowingly accep[t]." *Id.*, at 17, 27, 101 S.Ct. 1531. Inspecting the statutory language and legislative history, we found that the Act did not "unambiguously" impose the requirement on which plaintiffs relied: that they receive appropriate treatment in the least restrictive environment. *Id.*, at 17–18, 101 S.Ct. 1531. Satisfied that Congress had not clearly conditioned the States' receipt of federal funds on the States' provision of such treatment, we declined to read such a requirement into the Act. Congress' spending power, we concluded, "does not include surprising participating States with post-acceptance or 'retroactive' conditions." *Id.*, at 24–25, 101 S.Ct. 1531.

*Pennhurst* thus instructs that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Ante*, at 2605 (quoting *Pennhurst*, 451 U.S., at 17, 101 S.Ct. 1531). That requirement is met here. Section 2001 does not take effect until 2014. The ACA makes perfectly clear what will be required of States that accept Medicaid funding after ***638** that date: They must extend eligibility to adults with incomes no more than 133% of the federal poverty line. See 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2006 ed. and Supp. IV).

THE CHIEF JUSTICE appears to find in *Pennhurst* a requirement that, when spending legislation is first passed, or when States first enlist in the federal program, Congress must provide clear notice of conditions it might later impose. If I understand his point correctly, it was incumbent on Congress, in 1965, to warn the States clearly of the size and shape potential changes to Medicaid might take. And absent such notice, sizable changes could not be made mandatory. Our decisions do not support such a requirement.[21]

In *Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985), the Secretary of Education sought to recoup Title I funds[22] based on the State's noncompliance, from 1970 to 1972, with a 1978 amendment to Title I. Relying on *Pennhurst*, ****2638** we rejected the Secretary's attempt to recover funds based on the States' alleged violation of a rule that did not exist when the State accepted and spent the funds. See 470 U.S., at 640, 105 S.Ct. 1555 ("New Jersey[,] when it applied for and received Title I funds for the years 1970–1972[,] had no basis to believe that the propriety of the expenditures would be judged by any standards other than the ones in effect *at the time*." (citing *Pennhurst*, 451 U.S., at 17, 24–25, 101 S.Ct. 1531; emphasis added)).

***639** When amendment of an existing grant program has no such retroactive effect, however, we have upheld Congress' instruction. In *Bennett v. Kentucky Dept. of Ed.*, 470 U.S. 656, 105 S.Ct. 1544, 84 L.Ed.2d 590 (1985), the Secretary sued to recapture Title I funds based on the Commonwealth's 1974 violation of a spending condition Congress added to Title I in 1970. Rejecting Kentucky's argument pinned to *Pennhurst*, we held that the Commonwealth suffered no surprise after accepting the federal funds. Kentucky was therefore obliged to return the money. 470 U.S., at 665–666, 673–674, 105 S.Ct. 1544. The conditions imposed were to be assessed as of 1974, in light of "the legal requirements in place when the grants were made," *id.*, at 670, 105 S.Ct. 1544, not as of 1965, when Title I was originally enacted.

As these decisions show, *Pennhurst* 's rule demands that conditions on federal funds be unambiguously clear at the time a State receives and uses the money—not at the time, perhaps years earlier, when Congress passed the law establishing the program. See also *Dole*, 483 U.S., at 208, 107 S.Ct. 2793 (finding *Pennhurst* satisfied based on the clarity of the Federal Aid Highway Act as amended in 1984, without looking back to 1956, the year of the Act's adoption).

In any event, from the start, the Medicaid Act put States on notice that the program could be changed: "The right to alter, amend, or repeal any provision of [Medicaid]," the statute has read since 1965, "is hereby reserved to the Congress." 42 U.S.C. § 1304. The "effect of these few simple words" has long been settled. See *National Railroad Passenger Corporation v. Atchison, T. & S.F.R. Co.*, 470 U.S. 451, 467–468, n. 22, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985) (citing *Sinking Fund Cases*, 99 U.S. 700, 720, 25 L.Ed. 496 (1879)). By reserving the right to "alter, amend, [or] repeal" a spending program, Congress "has given special notice of its intention to retain ... full and complete power to make such alterations and amendments ... as

  

come within the just scope of legislative power." *Id.*, at 720.

Our decision in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 51–52, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986), is ***640** guiding here. As enacted in 1935, the Social Security Act did not cover state employees. *Id.*, at 44, 106 S.Ct. 2390. In response to pressure from States that wanted coverage for their employees, Congress, in 1950, amended the Act to allow States to opt into the program. *Id.*, at 45, 106 S.Ct. 2390. The statutory provision giving States this option expressly permitted them to withdraw from the program. *Ibid.*

Beginning in the late 1970's, States increasingly exercised the option to withdraw. *Id.*, at 46, 106 S.Ct. 2390. Concerned that withdrawals were threatening the integrity of Social Security, Congress repealed the termination provision. Congress thereby changed Social Security from a program voluntary for the States to one from which they could not escape. *Id.*, at 48, 106 S.Ct. 2390. California objected, arguing that the change impermissibly deprived it of a right to withdraw ****2639** from Social Security. *Id.*, at 49–50, 106 S.Ct. 2390. We unanimously rejected California's argument. *Id.*, at 51–53, 106 S.Ct. 2390. By including in the Act "a clause expressly reserving to it '[t]he right to alter, amend, or repeal any provision' of the Act," we held, Congress put States on notice that the Act "created no contractual rights." *Id.*, at 51–52, 106 S.Ct. 2390 (some internal quotation marks imitted). The States therefore had no law-based ground on which to complain about the amendment, despite the significant character of the change.

THE CHIEF JUSTICE nevertheless would rewrite § 1304 to countenance only the "right to alter *somewhat*," or "amend, *but not too much*." Congress, however, did not so qualify § 1304. Indeed, Congress retained discretion to "repeal" Medicaid, wiping it out entirely. Cf. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 368, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981) (Rehnquist, J., dissenting) (invoking "the common-sense maxim that the greater includes the lesser"). As *Bowen* indicates, no State could reasonably have read § 1304 as reserving to Congress authority to make adjustments only if modestly sized.

In fact, no State proceeded on that understanding. In compliance with Medicaid regulations, each State expressly ***641** undertook to abide by future Medicaid changes. See 42 CFR § 430.12(c)(1) (2011) ("The [state Medicaid] plan must provide that it will be amended whenever necessary to reflect ... [c]hanges in Federal law, regulations, policy interpretations, or court decisions."). Whenever a State notifies the Federal Government of a change in its own Medicaid program, the State certifies both that it knows the federally set terms of participation may change, and that it will abide by those changes as a condition of continued participation. See, *e.g.*, Florida Agency for Health Care Admin., State Plan Under Title XIX of the Social Security Act Medical Assistance Program § 7.1, p. 86 (Oct. 6, 1992).

THE CHIEF JUSTICE insists that the most recent expansion, in contrast to its predecessors, "accomplishes a shift in kind, not merely degree." *Ante*, at 2605. But why was Medicaid altered only in degree, not in kind, when Congress required States to cover millions of children and pregnant women? See *supra*, at 2631 – 2632. Congress did not "merely alte[r] and expan[d] the boundaries of" the Aid to Families with Dependent Children program. But see *ante*, at 2605 – 2607. Rather, Congress required participating States to provide coverage tied to the federal poverty level (as it later did in the ACA), rather than to the AFDC program. See Brief for National Health Law Program et al. as *Amici Curiae* 16–18. In short, given § 1304, this Court's construction of § 1304's language in *Bowen*, and the enlargement of Medicaid in the years since 1965,[23] a State would be hard put to complain that it lacked fair notice when, in 2010, Congress altered Medicaid to embrace a larger portion of the Nation's poor.

3

***642** THE CHIEF JUSTICE ultimately asks whether "the financial inducement offered by Congress ... pass[ed] the point at which pressure turns into compulsion." *Ante*, at 2604 (internal quotation marks omitted). The financial inducement Congress employed here, he concludes, crosses ****2640** that threshold: The threatened withholding of "existing Medicaid funds" is "a gun to the

head" that forces States to acquiesce. *Ante,* at 2604 (citing 42 U.S.C. § 1396c). [24]

THE CHIEF JUSTICE sees no need to "fix the outermost line," *Steward Machine,* 301 U.S., at 591, 57 S.Ct. 883, "where persuasion gives way to coercion," *ante,* at 2606. Neither do the joint dissenters. See *post,* at 2661, 2662. [25] Notably, the decision on *643 which they rely, *Steward Machine,* found the statute at issue inside the line, "wherever the line may be." 301 U.S., at 591, 57 S.Ct. 883.

When future Spending Clause challenges arrive, as they likely will in the wake of today's decision, how will litigants and judges assess whether "a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds"? *Ante,* at 2602. Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State's budget at stake? And which State's—or States'—budget is determinative: the lead plaintiff, all challenging States (26 in this litigation, many with quite different fiscal situations), or some national median? Does it matter that Florida, unlike most States, imposes no state income tax, and therefore might be able to replace foregone federal funds with new state revenue? [26] *644 Or that the **2641 coercion state officials in fact fear is punishment at the ballot box for turning down a politically popular federal grant?

The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation. See *Baker v. Carr,* 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Even commentators sympathetic to robust enforcement of *Dole* 's limitations, see *supra,* at 2633, have concluded that conceptions of "impermissible coercion" premised on States' perceived inability to decline federal funds "are just too amorphous to be judicially administrable." Baker & Berman, Getting Off the *Dole,* 78 Ind. L.J. 459, 521, 522, n. 307 (2003) (citing, *e.g.,* Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989)).

At bottom, my colleagues' position is that the States' reliance on federal funds limits Congress' authority to alter its spending programs. This gets things backwards: Congress, not the States, is tasked with spending federal money in service of the general welfare. And each successive Congress is empowered to appropriate funds as it sees fit. When the 110th Congress reached a conclusion about Medicaid funds that differed from its predecessors' view, it abridged no State's right to "existing," or "pre-existing," funds. But see *ante,* at 2604 – 2605; *post,* at 2667 – 2668 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.). For, in fact, there are no such funds. There is only money States *anticipate* receiving from future Congresses.

D

*645 Congress has delegated to the Secretary of Health and Human Services the authority to withhold, in whole or in part, federal Medicaid funds from States that fail to comply with the Medicaid Act as originally composed and as subsequently amended. 42 U.S.C. § 1396c. [27] THE CHIEF JUSTICE, however, holds that the Constitution precludes the Secretary from withholding "existing" Medicaid funds based on **2642 States' refusal to comply with the expanded Medicaid program. *Ante,* at 2606. For the foregoing reasons, I disagree that any such withholding would violate the Spending Clause. Accordingly, I would affirm the decision of the Court of Appeals for the Eleventh Circuit in this regard.

But in view of THE CHIEF JUSTICE's disposition, I agree with him that the Medicaid Act's severability clause determines the appropriate remedy. That clause provides that "[i]f any provision of [the Medicaid Act], or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." 42 U.S.C. § 1303.

The Court does not strike down any provision of the ACA. It prohibits only the "application" of the Secretary's authority to withhold Medicaid funds from States that decline to conform their Medicaid plans to the ACA's requirements. Thus the ACA's authorization of funds to finance the expansion *646 remains intact, and the Secretary's authority to withhold funds for reasons other than noncompliance with the expansion remains unaffected.

Even absent § 1303's command, we would have no warrant to invalidate the Medicaid expansion, contra *post,* at 2666 – 2668 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.), not to mention the entire ACA, *post,* at 2668 – 2676 (same). For when a court confronts an unconstitutional statute, its endeavor must be to conserve, not destroy, the legislature's dominant objective. See, *e.g., Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328–330, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006). In this instance, that objective was to increase access to health care for the poor by increasing the States' access to federal funds. THE CHIEF JUSTICE is undoubtedly right to conclude that Congress may offer States funds "to expand the availability of health care, and requir[e] that States accepting such funds comply with the conditions on their use." *Ante,* at 2607. I therefore concur in the judgment with respect to Part IV–B of THE CHIEF JUSTICE's opinion.

* * *

For the reasons stated, I agree with THE CHIEF JUSTICE that, as to the validity of the minimum coverage provision, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed. In my view, the provision encounters no constitutional obstruction. Further, I would uphold the Eleventh Circuit's decision that the Medicaid expansion is within Congress' spending power.

Justice SCALIA, Justice KENNEDY, Justice THOMAS, and Justice ALITO, dissenting.

Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and ***647** provisions of the Patient Protection and Affordable Care Act (Affordable Care Act, or ACA) go beyond those powers. We conclude that they do.

This case is in one respect difficult: It presents two questions of first impression. The first of those is whether failure to engage in economic activity (the purchase of health insurance) is subject to regulation under the Commerce Clause. Failure to act does result in an effect on commerce, and hence might be said to come under this Court's "affecting commerce" criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far. ****2643** The second question is whether the congressional power to tax and spend, U.S. Const., Art. I, § 8, cl. 1, permits the conditioning of a State's continued receipt of all funds under a massive state-administered federal welfare program upon its acceptance of an expansion to that program. Several of our opinions have suggested that the power to tax and spend cannot be used to coerce state administration of a federal program, but we have never found a law enacted under the spending power to be coercive. Those questions are difficult.

The case is easy and straightforward, however, in another respect. What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.

That clear principle carries the day here. The striking case of *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), which held that the economic activity of growing wheat, even for one's ***648** 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.

As for the constitutional power to tax and spend for the general welfare: The Court has long since expanded

that beyond (what Madison thought it meant) taxing and spending for those aspects of the general welfare that were within the Federal Government's enumerated powers, see *United States v. Butler*, 297 U.S. 1, 65–66, 56 S.Ct. 312, 80 L.Ed. 477 (1936). Thus, we now have sizable federal Departments devoted to subjects not mentioned among Congress' enumerated powers, and only marginally related to commerce: the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development. The principal practical obstacle that prevents Congress from using the tax-and-spend power to assume all the general-welfare responsibilities traditionally exercised by the States is the sheer impossibility of managing a Federal Government large enough to administer such a system. That obstacle can be overcome by granting funds to the States, allowing them to administer the program. That is fair and constitutional enough when the States freely agree to have their powers employed and their employees enlisted in the federal scheme. But it is a blatant violation of the constitutional structure when the States have no choice.

The Act before us here exceeds federal power both in mandating the purchase of health insurance and in denying nonconsenting States all Medicaid funding. These parts of the Act are central to its design and operation, and all the Act's other provisions would not have been enacted without ***649** them. In our view it must follow that the entire statute is inoperative.

****2644** I

**The Individual Mandate**

Article I, § 8, of the Constitution gives Congress the power to "regulate Commerce ... among the several States." The Individual Mandate in the Act commands that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage." 26 U.S.C. § 5000A(a) (2006 ed., Supp. IV). If this provision "regulates" anything, it is the *failure* to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure—that abstention from commerce—is not "Commerce." To be sure, *purchasing* insurance *is* "Commerce"; but one does not regulate commerce that does not exist by compelling its existence.

In *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L.Ed. 23 (1824), Chief Justice Marshall wrote that the power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed." That understanding is consistent with the original meaning of "regulate" at the time of the Constitution's ratification, when "to regulate" meant "[t]o adjust by rule, method or established mode," 2 N. Webster, An American Dictionary of the English Language (1828); "[t]o adjust by rule or method," 2 S. Johnson, A Dictionary of the English Language (7th ed. 1785); "[t]o adjust, to direct according to rule," 2 J. Ash, New and Complete Dictionary of the English Language (1775); "to put in order, set to rights, govern or keep in order," T. Dyche & W. Pardon, A New General English Dictionary (16th ed. 1777). [1] It can mean to direct the ***650** manner of something but not to direct that something come into being. There is no instance in which this Court or Congress (or anyone else, to our knowledge) has used "regulate" in that peculiar fashion. If the word bore that meaning, Congress' authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const., Art. I, § 8, cl. 14, would have made superfluous the later provision for authority "[t]o raise and support Armies," *id.*, § 8, cl. 12, and "[t]o provide and maintain a Navy," *id.*, § 8, cl. 13.

We do not doubt that the buying and selling of health insurance contracts is commerce generally subject to federal regulation. But when Congress provides that (nearly) all citizens must buy an insurance contract, it goes beyond "adjust[ing] by rule or method," Johnson, *supra*, or "direct[ing] according to rule," Ash, *supra;* it directs the creation of commerce.

In response, the Government offers two theories as to why the Individual Mandate is nevertheless constitutional. Neither theory suffices to sustain its validity.

  

A

First, the Government submits that § 5000A is "integral to the Affordable Care Act's insurance reforms" and "necessary to make effective the Act's core reforms." Brief for Petitioners in No. 11–398 (Minimum Coverage Provision) 24 (hereinafter Petitioners' Minimum Coverage Brief). Congress included a "finding" to similar effect in the Act itself. See 42 U.S.C. § 18091(2)(H) (2006 ed., Supp. IV).

**2645 As discussed in more detail in Part V, *infra*, the Act contains numerous health insurance reforms, but most notable for present purposes are the "guaranteed issue" and "community rating" provisions, §§ 300gg to 300gg–4. The former provides that, with a few exceptions, "each health insurance *651 issuer that offers health insurance coverage in the individual or group market in a State must accept every employer and individual in the State that applies for such coverage." § 300gg–1(a). That is, an insurer may not deny coverage on the basis of, among other things, any pre-existing medical condition that the applicant may have, and the resulting insurance must cover that condition. See § 300gg–3.

Under ordinary circumstances, of course, insurers would respond by charging high premiums to individuals with pre-existing conditions. The Act seeks to prevent this through the community-rating provision. Simply put, the community-rating provision requires insurers to calculate an individual's insurance premium based on only four factors: (i) whether the individual's plan covers just the individual or his family also, (ii) the "rating area" in which the individual lives, (iii) the individual's age, and (iv) whether the individual uses tobacco. § 300gg(a)(1)(A). Aside from the rough proxies of age and tobacco use (and possibly rating area), the Act does not allow an insurer to factor the individual's health characteristics into the price of his insurance premium. This creates a new incentive for young and healthy individuals without pre-existing conditions. The insurance premiums for those in this group will not reflect their own low actuarial risks but will subsidize insurance for others in the pool. Many of them may decide that purchasing health insurance is not an economically sound decision—especially since the guaranteed-issue provision will enable them to purchase it at the same cost in later years and even if they have developed a pre-existing condition. But without the contribution of above-risk premiums from the young and healthy, the community-rating provision will not enable insurers to take on high-risk individuals without a massive increase in premiums.

The Government presents the Individual Mandate as a unique feature of a complicated regulatory scheme governing many parties with countervailing incentives that must be *652 carefully balanced. Congress has imposed an extensive set of regulations on the health insurance industry, and compliance with those regulations will likely cost the industry a great deal. If the industry does not respond by increasing premiums, it is not likely to survive. And if the industry does increase premiums, then there is a serious risk that its products—insurance plans—will become economically undesirable for many and prohibitively expensive for the rest.

This is not a dilemma unique to regulation of the health insurance industry. Government regulation typically imposes costs on the regulated industry—especially regulation that prohibits economic behavior in which most market participants are already engaging, such as "piecing out" the market by selling the product to different classes of people at different prices (in the present context, providing much lower insurance rates to young and healthy buyers). And many industries so regulated face the reality that, without an artificial increase in demand, they cannot continue on. When Congress is regulating these industries directly, it enjoys the broad power to enact " 'all appropriate legislation' " to " 'protec[t]' " and " 'advanc[e]' " commerce, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37, 57 S.Ct. 615, 81 L.Ed. 893 (1937) (quoting *The Daniel Ball*, 10 Wall. 557, 564, 19 L.Ed. 999 (1871)). Thus, Congress might protect the **2646 imperiled industry by prohibiting low-cost competition, or by according it preferential tax treatment, or even by granting it a direct subsidy.

Here, however, Congress has impressed into service third parties, healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences of the regulation. Congress' desire to force these individuals to purchase insurance

  

is motivated by the fact that they are further removed from the market than unhealthy individuals with pre-existing conditions, because they are less likely to need extensive care in the near future. If Congress can reach out and command even those furthest removed from an interstate market to participate in the market *653 , then the Commerce Clause becomes a font of unlimited power, or in Hamilton's words, "the hideous monster whose devouring jaws ... spare neither sex nor age, nor high nor low, nor sacred nor profane." The Federalist No. 33, p. 202 (C. Rossiter ed. 1961).

At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants. In *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), we held that Congress could not, in an effort to regulate the disposal of radioactive waste produced in several different industries, order the States to take title to that waste. *Id.*, at 174–177, 112 S.Ct. 2408. In *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), we held that Congress could not, in an effort to regulate the distribution of firearms in the interstate market, compel state law enforcement officials to perform background checks. *Id.*, at 933–935, 117 S.Ct. 2365. In *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), we held that Congress could not, as a means of fostering an educated interstate labor market through the protection of schools, ban the possession of a firearm within a school zone. *Id.*, at 559–563, 115 S.Ct. 1624. And in *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), we held that Congress could not, in an effort to ensure the full participation of women in the interstate economy, subject private individuals and companies to suit for gender-motivated violent torts. *Id.*, at 609–619, 120 S.Ct. 1740. The lesson of these cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. And the last two of these cases show that the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.

The case upon which the Government principally relies to sustain the Individual Mandate under the Necessary and *654 Proper Clause is *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). That case held that Congress could, in an effort to restrain the interstate market in marijuana, ban the local cultivation and possession of that drug. *iD.*, at 15–22, 125 S.CT. 2195. *rAich* is no precedent for what cOngress has done here. That case's prohibition of growing (cf. *Wickard*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122), and of possession (cf. innumerable federal statutes) did not represent the expansion of the federal power to direct into a broad new field. The mandating of economic activity does, and since it is a field so limitless that it converts the Commerce Clause into a general authority to direct the economy, that mandating is not "consist[ent] with the letter and spirit of the **2647 constitution." *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819).

Moreover, *Raich* is far different from the Individual Mandate in another respect. The Court's opinion in *Raich* pointed out that the growing and possession prohibitions were the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced. 545 U.S., at 22, 125 S.Ct. 2195. See also *Shreveport Rate Cases*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914) (Necessary and Proper Clause allows regulations of intrastate transactions if necessary to the regulation of an interstate market). Intrastate marijuana could no more be distinguished from interstate marijuana than, for example, endangered-species trophies obtained before the species was federally protected can be distinguished from trophies obtained afterwards—which made it necessary and proper to prohibit the sale of all such trophies, see *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979).

With the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved. For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied *655 a full income tax credit given to those who do purchase the insurance.

  

The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional controls) could *not* be justified as necessary and proper for the carrying out of a general regulatory scheme. See Tr. of Oral Arg. 27–30, 43–45 (Mar. 27, 2012). It was unable to name any. As we said at the outset, whereas the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government cannot do everything is a fundamental precept. See *Lopez*, 514 U.S., at 564, 115 S.Ct. 1624 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate"). Section 5000A is defeated by that proposition.

B

The Government's second theory in support of the Individual Mandate is that § 5000A is valid because it is actually a "regulat[ion of] activities having a substantial relation to interstate commerce, ... *i.e.*, ... activities that substantially affect interstate commerce." *Id.*, at 558–559, 115 S.Ct. 1624. See also *Shreveport Rate Cases*, *supra*. This argument takes a few different forms, but the basic idea is that § 5000A regulates "the way in which individuals finance their participation in the health-*care* market." Petitioners' Minimum Coverage Brief 33 (emphasis added). That is, the provision directs the manner in which individuals purchase health care services and related goods (directing that they be purchased through insurance) and is therefore a straightforward exercise of the commerce power.

The primary problem with this argument is that § 5000A does not apply only to persons who purchase all, or most, or even any, of the health care services or goods that the mandated insurance covers. Indeed, the main objection many ***656** have to the Mandate is that they have no intention of purchasing most or even any of such goods or services and thus no need to buy insurance for those purchases. The Government responds that the health-care market involves "essentially universal participation," ****2648** *id.*, at 35. The principal difficulty with this response is that it is, in the only relevant sense, not true. It is true enough that everyone consumes "health care," if the term is taken to include the purchase of a bottle of aspirin. But the health care "market" that is the object of the Individual Mandate not only includes but principally consists of goods and services that the young people primarily affected by the Mandate *do not purchase*. They are quite simply not participants in that market, and cannot be made so (and thereby subjected to regulation) by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance.[2] Such a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits.

In a variation on this attempted exercise of federal power, the Government points out that Congress in this Act has purported to regulate "economic and financial decision[s] to forego health insurance coverage and [to] attempt to self-insure," 42 U.S.C. § 18091(2)(A), since those decisions have ***657** "a substantial and deleterious effect on interstate commerce," Petitioners' Minimum Coverage Brief 34. But as the discussion above makes clear, the decision to forgo participation in an interstate market is not itself commercial activity (or indeed any activity at all) within Congress' power to regulate. It is true that, at the end of the day, it is inevitable that each American will affect commerce and become a part of it, even if not by choice. But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.

*Wickard v. Filburn* has been regarded as the most expansive assertion of the commerce power in our history. A close second is *Perez v. United States*, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971), which upheld a statute criminalizing the eminently local activity of loan-sharking. Both of those cases, however, involved commercial *activity*. To go beyond that, and to say that the failure to grow wheat or the refusal to make loans affects commerce, so that growing and lending can be federally compelled, is to extend federal power to virtually everything. All of us consume food, and when we do so the Federal Government can prescribe what its quality must be and even how much we must pay. But the mere fact

  

that we all consume food and are thus, sooner or later, participants in the "market" for food, does not empower the Government to say when and what we will buy. That is essentially what this Act seeks to do with respect to the purchase of health care. It exceeds federal power.

C

A few respectful responses to Justice GINSBURG's dissent on the issue of the Mandate are in order. That dissent duly **2649 recites the test of Commerce Clause power that our opinions have applied, but disregards the premise the test contains. It is true enough that Congress needs only a " 'rational basis' for concluding that the *regulated activity* substantially affects *658 interstate commerce," *ante,* at 2616 (emphasis added). But it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce. And one is not now purchasing the health care covered by the insurance mandate simply because one is likely to be purchasing it in the future. Our test's premise of regulated activity is not invented out of whole cloth, but rests upon the Constitution's requirement that it be commerce which is regulated. If all inactivity affecting commerce is commerce, commerce is everything. Ultimately the dissent is driven to saying that there is really no difference between action and inaction, *ante,* at 2622, a proposition that has never recommended itself, neither to the law nor to common sense. To say, for example, that the inaction here consists of activity in "the self-insurance market," *ibid.*, seems to us wordplay. By parity of reasoning the failure to buy a car can be called participation in the non-private-car-transportation market. Commerce becomes everything.

The dissent claims that we "fai[l] to explain why the individual mandate threatens our constitutional order." *Ante,* at 2627. But we have done so. It threatens that 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. Thus the dissent, on the theories proposed for the validity of the Mandate, would alter the accepted constitutional relation between the individual and the National Government. The dissent protests that the Necessary and Proper Clause has been held to include "the power to enact criminal laws, ... the power to imprison, ... and the power to create a national bank," *ibid,*. Is not the power to compel purchase of health insurance much lesser? No, not if (unlike those other dispositions) its application rests upon a theory that everything is within federal control simply because it exists.

*659 The dissent's exposition of the wonderful things the Federal Government has achieved through exercise of its assigned powers, such as "the provision of old-age and survivors' benefits" in the Social Security Act, *ante,* at 2609, is quite beside the point. The issue here is whether the Federal Government can impose the Individual Mandate through the Commerce Clause. And the relevant history is not that Congress has achieved wide and wonderful results through the proper exercise of its assigned powers in the past, but that it has never before used the Commerce Clause to compel entry into commerce.[3] The dissent **2650 treats the Constitution as though it is an enumeration of those problems that the Federal Government can address—among which, it finds, is "the Nation's course in the economic and social welfare realm," *ibid.*, and more specifically "the problem of the uninsured," *ante,* at 2612. The Constitution is not that. It enumerates not federally soluble *problems,* but federally available *powers.* The Federal Government can address *660 whatever problems it wants but can bring to their solution only those powers that the Constitution confers, among which is the power to regulate commerce. None of our cases say anything else. Article I contains no whatever-it-takes-to-solve-a-national-problem power.

The dissent dismisses the conclusion that the power to compel entry into the health-insurance market would include the power to compel entry into the new-car or broccoli markets. The latter purchasers, it says, "will be obliged to pay at the counter before receiving the vehicle or nourishment," whereas those refusing to purchase health-insurance will ultimately get treated anyway, at others' expense. *Ante,* at 2619. "[T]he unique attributes of the health-care market ... give rise to a significant free-riding problem that does not occur in other markets." *Ante,* at 2623. And "a vegetable-purchase mandate" (or a

car-purchase mandate) is not "likely to have a substantial effect on the health-care costs" borne by other Americans. *Ante,* at 2624. Those differences make a very good argument by the dissent's own lights, since they show that the failure to purchase health insurance, unlike the failure to purchase cars or broccoli, creates a national, social-welfare problem that is (in the dissent's view) included among the unenumerated "problems" that the Constitution authorizes the Federal Government to solve. But those differences do not show that the failure to enter the health-insurance market, unlike the failure to buy cars and broccoli, is an *activity* that Congress can "regulate." (Of course one day the failure of some of the public to purchase American cars may endanger the existence of domestic automobile manufacturers; or the failure of some to eat broccoli may be found to deprive them of a newly discovered cancer-fighting chemical which only that food contains, producing health-care costs that are a burden on the rest of us—in which case, under the theory of Justice GINSBURG's dissent, moving against those inactivities will also come within the Federal Government's unenumerated problem-solving powers.)

II

***661 The Taxing Power**

As far as § 5000A is concerned, we would stop there. Congress has attempted to regulate beyond the scope of its Commerce Clause authority,[4] and § 5000A is therefore invalid. The Government contends, however, as expressed in the caption to Part II of its brief, that "THE MINIMUM COVERAGE PROVISION IS INDEPENDENTLY AUTHORIZED BY CONGRESS'S TAXING POWER." Petitioners' Minimum Coverage Brief 52. The phrase "independently authorized" suggests the existence of a creature never hitherto seen in the United States Reports: ****2651** a penalty for constitutional purposes that is *also* a tax for constitutional purposes. In all our cases the two are mutually exclusive. The provision challenged under the Constitution is either a penalty or else a tax. Of course in many cases what was a regulatory mandate enforced by a penalty *could have been* imposed as a tax upon permissible action; or what was imposed as a tax upon permissible action *could have been* a regulatory mandate enforced by a penalty. But we know of no case, and the Government cites none, in which the imposition was, for constitutional purposes, both.[5] The two are mutually exclusive. Thus, what the Government's caption should have read was "ALTERNATIVELY, THE MINIMUM COVERAGE PROVISION IS NOT A MANDATE-WITH-PENALTY BUT A TAX." It is important to bear this in mind in evaluating the tax argument of the Government and of ***662** those who support it: The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so.

In answering that question we must, if "fairly possible," *Crowell v. Benson,* 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932), construe the provision to be a tax rather than a mandate-with-penalty, since that would render it constitutional rather than unconstitutional *(ut res magis valeat quam pereat).* But we cannot rewrite the statute to be what it is not. " ' "[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute ..." or judicially rewriting it.' " *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 841, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) (quoting *Aptheker v. Secretary of State,* 378 U.S. 500, 515, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964), in turn quoting *Scales v. United States,* 367 U.S. 203, 211, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961)). In this case, there is simply no way, "without doing violence to the fair meaning of the words used," *Grenada County Supervisors v. Brogden,* 112 U.S. 261, 269, 5 S.Ct. 125, 28 L.Ed. 704 (1884), to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty.

Our cases establish a clear line between a tax and a penalty: " '[A] tax is an enforced contribution to provide for the support of government; a penalty ... is an exaction imposed by statute as punishment for an unlawful act.' " *United States v. Reorganized CF & I Fabricators of Utah, Inc.,* 518 U.S. 213, 224, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996) (quoting *United States v. La Franca,* 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (1931)). In a few cases, this Court has held that a "tax" imposed upon private conduct

was so onerous as to be in effect a penalty. But we have never held—*never*—that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that *any* exaction imposed for violation of the law is an exercise of Congress' taxing power—even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an Act "adopt[s] the criteria of wrongdoing ***663** " and then imposes a monetary penalty as the "principal consequence on those who transgress ****2652** its standard," it creates a regulatory penalty, not a tax. *Child Labor Tax Case*, 259 U.S. 20, 38, 42 S.Ct. 449, 66 L.Ed. 817 (1922).

So the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably is. The minimum-coverage provision is found in 26 U.S.C. § 5000A, entitled "*Requirement* to maintain minimum essential coverage." (Emphasis added.) It commands that every "applicable individual *shall* ... ensure that the individual ... is covered under minimum essential coverage." *Ibid.* (emphasis added). And the immediately following provision states that, "[i]f ... an applicable individual ... fails to meet the *requirement* of subsection (a) ... there is hereby imposed ... a *penalty*." § 5000A(b) (emphasis added). And several of Congress' legislative "findings" with regard to § 5000A confirm that it sets forth a legal requirement and constitutes the assertion of regulatory power, not mere taxing power. See 42 U.S.C. § 18091(2)(A) ("The requirement regulates activity ..."); § 18091(2)(C) ("The requirement ... will add millions of new consumers to the health insurance market ..."); § 18091(2)(D) ("The requirement achieves near-universal coverage"); § 18091(2)(H) ("The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market"); § 18091(3) ("[T]he Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation").

The Government and those who support its view on the tax point rely on *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120, to justify reading "shall" to mean "may." The "shall" in that case was contained in an introductory provision—a recital that provided for no legal consequences—which said that "[e]ach State shall be responsible for providing ... for the disposal of ... low-level radioactive waste." 42 U.S.C. § 2021c(a)(1)(A). The Court did not hold that "shall" could ***664** be construed to mean "may," but rather that this preliminary provision could not impose upon the operative provisions of the Act a mandate that they did not contain: "We ... decline petitioners' invitation to construe § 2021c(a)(1)(A), alone and in isolation, as a command to the States independent of the remainder of the Act." *New York*, 505 U.S., at 170, 112 S.Ct. 2408. Our opinion then proceeded to "consider each [of the three operative provisions] in turn." *Ibid.* Here the mandate—the "shall"—is contained not in an inoperative preliminary recital, but in the dispositive operative provision itself. *New York* provides no support for reading it to be permissive.

Quite separately, the fact that Congress (in its own words) "imposed ... a penalty," 26 U.S.C. § 5000A(b)(1), for failure to buy insurance is alone sufficient to render that failure unlawful. It is one of the canons of interpretation that a statute that penalizes an act makes it unlawful: "[W]here the statute inflicts a penalty for doing an act, although the act itself is not expressly prohibited, yet to do the act is unlawful, because it cannot be supposed that the Legislature intended that a penalty should be inflicted for a lawful act." *Powhatan Steamboat Co. v. Appomattox R. Co.*, 24 How. 247, 252, 16 L.Ed. 682 (1861). Or in the words of Chancellor Kent: "If a statute inflicts a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful, though there be no prohibitory words in the statute." 1 J. Kent, Commentaries on American Law 436 (1826).

****2653** We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty. To be sure, we have sometimes treated as a tax a statutory exaction (imposed for something other than a violation of law) which bore an agnostic label that does not entail the significant constitutional consequences of a penalty—such as "license" (*License Tax Cases*, 5 Wall. 462, 18 L.Ed. 497 (1867)) or "surcharge" (*New York v. United States*, *supra.*). But we have never—*never*—treated as a tax an exaction which faces up ***665** to the critical difference between a tax and a penalty, and explicitly denominates the exaction a "penalty." Eighteen times in § 5000A itself and elsewhere throughout the Act, Congress called the exaction in § 5000A(b) a "penalty."

That § 5000A imposes not a simple tax but a mandate to which a penalty is attached is demonstrated by the fact that some are exempt from the tax who are not exempt from the mandate—a distinction that would make no sense if the mandate were not a mandate. Section 5000A(d) exempts three classes of people from the definition of "applicable individual" subject to the minimum coverage requirement: those with religious objections or who participate in a "health care sharing ministry," § 5000A(d)(2); those who are "not lawfully present" in the United States, § 5000A(d)(3); and those who are incarcerated, § 5000A(d)(4). Section 5000A(e) then creates a separate set of exemptions, excusing from liability for the penalty certain individuals who are subject to the minimum coverage requirement: those who cannot afford coverage, § 5000A(e)(1); who earn too little income to require filing a tax return, § 5000A(e)(2); who are members of an Indian tribe, § 5000A(e)(3); who experience only short gaps in coverage, § 5000A(e)(4); and who, in the judgment of the Secretary of Health and Human Services, "have suffered a hardship with respect to the capability to obtain coverage," § 5000A(e)(5). If § 5000A were a tax, these two classes of exemption would make no sense; there being no requirement, *all* the exemptions would attach to the penalty (renamed tax) alone.

In the face of all these indications of a regulatory requirement accompanied by a penalty, the Solicitor General assures us that "neither the Treasury Department nor the Department of Health and Human Services interprets Section 5000A as imposing a legal obligation," Petitioners' Minimum Coverage Brief 61, and that "[i]f [those subject to the Act] pay the tax penalty, they're in compliance with the law," Tr. of Oral Arg. 50 (Mar. 26, 2012). These self-serving litigating ***666** positions are entitled to no weight. What counts is what the statute says, and that is entirely clear. It is worth noting, moreover, that these assurances contradict the Government's position in related litigation. Shortly before the Affordable Care Act was passed, the Commonwealth of Virginia enacted Va.Code Ann. § 38.2–3430.1:1 (Lexis Supp. 2011), which states, "No resident of [the] Commonwealth ... shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services...." In opposing Virginia's assertion of standing to challenge § 5000A based on this statute, the Government said that "if the minimum coverage provision is unconstitutional, the [Virginia] statute is unnecessary, and if the minimum coverage provision is upheld, the state statute is void under the Supremacy Clause." Brief for Appellant in No. 11–1057 etc. (CA4), p. 29. But it would be void under the Supremacy Clause only if it was contradicted by a federal "require[ment] ****2654** to obtain or maintain a policy of individual insurance coverage."

Against the mountain of evidence that the minimum coverage requirement is what the statute calls it—a requirement—and that the penalty for its violation is what the statute calls it—a penalty—the Government brings forward the flimsiest of indications to the contrary. It notes that "[t]he minimum coverage provision amends the Internal Revenue Code to provide that a non-exempted individual ... will owe a monetary penalty, in addition to the income tax itself," and that "[t]he [Internal Revenue Service (IRS) ] will assess and collect the penalty in the same manner as assessable penalties under the Internal Revenue Code." Petitioners' Minimum Coverage Brief 53. The manner of collection could perhaps suggest a tax if IRS penalty-collection were unheard-of or rare. It is not. See, *e.g.*, 26 U.S.C. § 527(j) (IRS-collectible penalty for failure to make campaign-finance disclosures); § 5761(c) (IRS-collectible penalty for domestic sales of tobacco products labeled for export); § 9707 (IRS-collectible ***667** penalty for failure to make required health-insurance premium payments on behalf of mining employees). In *Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 116 S.Ct. 2106, 135 L.Ed.2d 506, we held that an exaction not only *enforced* by the Commissioner of Internal Revenue but even *called* a "tax" was in fact a penalty. "[I]f the concept of penalty means anything," we said, "it means punishment for an unlawful act or omission." *Id.*, at 224, 116 S.Ct. 2106. See also *Lipke v. Lederer*, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061 (1922) (same). Moreover, while the penalty is assessed and collected by the IRS, § 5000A is administered both by that agency and by the Department of Health and Human Services (and also the Secretary of Veterans Affairs), see §§ 5000A(e)(1)(D), (e)(5), (f)(1)(A)(v), (f)(1)(E) (2006 ed., Supp. IV), which is responsible for defining its substantive scope—a feature that would be quite extraordinary for taxes.

  

The Government points out that "[t]he amount of the penalty will be calculated as a percentage of household income for federal income tax purposes, subject to a floor and [a] ca[p]," and that individuals who earn so little money that they "are not required to file income tax returns for the taxable year are not subject to the penalty" (though they are, as we discussed earlier, subject to the mandate). Petitioners' Minimum Coverage Brief 12, 53. But varying a penalty according to ability to pay is an utterly familiar practice. See, *e.g.*, 33 U.S.C. § 1319(d) (2006 ed.) ("In determining the amount of a civil penalty the court shall consider ... the economic impact of the penalty on the violator"); see also 6 U.S.C. § 488e(c) (2006 ed., Supp. IV); 7 U.S.C. §§ 7734(b)(2), 8313(b)(2) (2006 ed.); 12 U.S.C. §§ 1701q–1(d)(3), 1723i(c)(3), 1735f–14(c)(3), 1735f–15(d)(3), 4585(c)(2); 15 U.S.C. §§ 45(m)(1)(C), 77h–1(g)(3), 78u–2(d), 80a–9(d)(4), 80b–3(i)(4), 1681s(a)(2)(B), 1717a(b)(3), 1825(b)(1), 2615(a)(2)(B), 5408(b)(2) (2006 ed. and Supp. IV); 33 U.S.C. § 2716a(a) (2006 ed.).

The last of the feeble arguments in favor of petitioners that we will address is the contention that what this statute ***668** repeatedly calls a penalty is in fact a tax because it contains no scienter requirement. The *presence* of such a requirement suggests a penalty—though one can imagine a tax imposed only on willful action; but the *absence* of such a requirement does not suggest a tax. Penalties for absolute-liability offenses are commonplace. And where a statute is silent as to scienter, we traditionally presume a *mens rea* requirement if the statute imposes a "severe penalty." ****2655** *Staples v. United States*, 511 U.S. 600, 618, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). Since we have an entire jurisprudence addressing when it is that a scienter requirement should be inferred from a penalty, it is quite illogical to suggest that a penalty is not a penalty for want of an express scienter requirement.

And the nail in the coffin is that the mandate and penalty are located in Title I of the Act, its operative core, rather than where a tax would be found—in Title IX, containing the Act's "Revenue Provisions." In sum, "the terms of [the] act rende[r] it unavoidable," *Parsons v. Bedford*, 3 Pet. 433, 448, 7 L.Ed. 732 (1830), that Congress imposed a regulatory penalty, not a tax.

For all these reasons, to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, see, *e.g.*, Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. See Art. I, § 7, cl. 1. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The Federalist No. 58 "defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue." *United States v. Munoz–Flores*, 495 U.S. 385, 395, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990). We have no doubt that Congress knew precisely what it was ***669** doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. See Affordable Health Care for America Act, H.R. 3962, 111th Cong., 1st Sess., § 501 (2009); America's Healthy Future Act of 2009, S. 1796, 111th Cong., 1st Sess., § 1301. 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.

Finally, we must observe that rewriting § 5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Art. I, § 9, cl. 4. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. The Government's opening brief did not even address the question—perhaps because, until today, no federal court has accepted the implausible argument that § 5000A is an exercise of the tax power. And once respondents raised the issue, the Government devoted a mere 21 lines of its reply brief to the issue. Petitioners' Minimum Coverage Reply Brief 25. At oral argument, the most prolonged statement about the issue was just over 50 words. Tr. of Oral Arg. 79 (Mar. 27, 2012). One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression.

III

**The Anti–Injunction Act**

There is another point related to the Individual Mandate that we must discuss—a point that logically should have been discussed first: whether jurisdiction over the challenges to the minimum-coverage provision is precluded by the Anti–Injunction *670 Act, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be **2656 maintained in any court by any person," 26 U.S.C. § 7421(a) (2006 ed.).

We have left the question to this point because it seemed to us that the dispositive question whether the minimum-coverage provision is a tax is more appropriately addressed in the significant constitutional context of whether it is an exercise of Congress' taxing power. Having found that it is not, we have no difficulty in deciding that these suits do not have "the purpose of restraining the assessment or collection of any tax."[6]

The Government and those who support its position on this point make the remarkable argument that § 5000A is not *671 a tax for purposes of the Anti–Injunction Act, see Brief for Petitioners in No. 11–398 (Anti–Injunction Act), but is a tax for constitutional purposes, see Petitioners' Minimum Coverage Brief 52–62. The rhetorical device that tries to cloak this argument in superficial plausibility is the same device employed in arguing that for constitutional purposes the minimum-coverage provision is a tax: confusing the question of what Congress *did* with the question of what Congress *could have done.* What qualifies as a tax for purposes of the Anti–Injunction Act, unlike what qualifies as a tax for purposes of the Constitution, is entirely within the control of Congress. Compare *Bailey v. George,* 259 U.S. 16, 20, 42 S.Ct. 419, 66 L.Ed. 816 (1922) (Anti–Injunction Act barred suit to restrain collections under the Child Labor Tax Law), with *Child Labor Tax Case,* 259 U.S., at 36–41, 42 S.Ct. 449 (holding the same law unconstitutional as exceeding Congress' taxing power). Congress could have defined "tax" for purposes of that statute in such fashion as to exclude some exactions that in fact are "taxes." It might have prescribed, for example, that a particular exercise of the taxing power "shall not be regarded as a tax for purposes of the Anti–Injunction Act." But there is no such prescription here. What the Government would have us believe in these cases is that the very same textual indications that show this is *not* a tax under the Anti–Injunction Act show that it *is* a tax under the Constitution. That carries verbal wizardry too far, deep into the forbidden land of the sophists.

IV

**The Medicaid Expansion**

We now consider respondents' second challenge to the constitutionality of the **2657 ACA, namely, that the Act's dramatic expansion of the Medicaid program exceeds Congress' power to attach conditions to federal grants to the States.

The ACA does not legally compel the States to participate in the expanded Medicaid program, but the Act authorizes a severe sanction for any State that refuses to go along: termination *672 of all the State's Medicaid funding. For the average State, the annual federal Medicaid subsidy is equal to more than one-fifth of the State's expenditures.[7] A State forced out of the program would not only lose this huge sum but would almost certainly find it necessary to increase its own health care expenditures substantially, requiring either a drastic reduction in funding for other programs or a large increase in state taxes. And these new taxes would come on top of the federal taxes already paid by the State's citizens to fund the Medicaid program in other States.

The States challenging the constitutionality of the ACA's Medicaid Expansion contend that, for these practical reasons, the Act really does not give them any choice at all. As proof of this, they point to the goal and the structure of the ACA. The goal of the Act is to provide near-universal medical coverage, 42 U.S.C. § 18091(2)(D), and without 100% state participation in the Medicaid program, attainment of this goal would be thwarted. Even if States could elect to remain in the old Medicaid program, while declining to participate in the Expansion,

there would be a gaping hole in coverage. And if a substantial number of States were entirely expelled from the program, the number of persons without coverage would be even higher.

In light of the ACA's goal of near-universal coverage, petitioners argue, if Congress had thought that anything less than 100% state participation was a realistic possibility, Congress would have provided a backup scheme. But no such scheme is to be found anywhere in the more than 900 pages of the Act. This shows, they maintain, that Congress was certain that the ACA's Medicaid offer was one that no State could refuse.

In response to this argument, the Government contends that any congressional assumption about uniform state participation ***673** was based on the simple fact that the offer of federal funds associated with the expanded coverage is such a generous gift that no State would want to turn it down.

To evaluate these arguments, we consider the extent of the Federal Government's power to spend money and to attach conditions to money granted to the States.

A

No one has ever doubted that the Constitution authorizes the Federal Government to spend money, but for many years the scope of this power was unsettled. The Constitution grants Congress the power to collect taxes "to ... provide for the ... general Welfare of the United States," Art. I, § 8, cl. 1, and from "the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase" "the general welfare." *Butler*, 297 U.S., at 65, 56 S.Ct. 312. Madison, it has been said, thought that the phrase "amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section," while Hamilton "maintained the clause confers a power separate and distinct from those later enumerated [and] ****2658** is not restricted in meaning by the grant of them." *Ibid.*

The Court resolved this dispute in *Butler*. Writing for the Court, Justice Roberts opined that the Madisonian view would make Article I's grant of the spending power a "mere tautology." *Ibid.* To avoid that, he adopted Hamilton's approach and found that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *Id.*, at 66, 56 S.Ct. 312. Instead, he wrote, the spending power's "confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress." *Ibid.*; see also *Steward Machine Co. v. Davis*, 301 U.S. 548, 586–587, 57 S.Ct. 883, 81 L.Ed. 1279 (1937); *Helvering v. Davis*, 301 U.S. 619, 640, 57 S.Ct. 904, 81 L.Ed. 1307 (1937).

***674** The power to make any expenditure that furthers "the general welfare" is obviously very broad, and shortly after *Butler* was decided the Court gave Congress wide leeway to decide whether an expenditure qualifies. See *Helvering*, 301 U.S., at 640–641, 57 S.Ct. 904. "The discretion belongs to Congress," the Court wrote, "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.*, at 640, 57 S.Ct. 904. Since that time, the Court has never held that a federal expenditure was not for "the general welfare."

B

One way in which Congress may spend to promote the general welfare is by making grants to the States. Monetary grants, so-called grants-in-aid, became more frequent during the 1930's, G. Stephens & N. Wikstrom, American Intergovernmental Relations—A Fragmented Federal Polity 83 (2007), and by 1950 they had reached $20 billion[8] or 11.6% of state and local government expenditures from their own sources.[9] By 1970 this number had grown to $123.7 billion[10] or 29.1% of state and local government expenditures from their own sources.[11] As of 2010, federal outlays to state and local governments came to over $608 billion or 37.5% of state and local government expenditures.[12]

***675** When Congress makes grants to the States, it customarily attaches conditions, and this Court has long held that the Constitution generally permits Congress

to do this. See *Pennhurst State School and Hospital v. haldeRman*, 451 u.s. 1, 17, 101 S.CT. 1531, 67 l.ed.2d 694 (1981); *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.); *Steward Machine*, *supra*, at 593, 57 S.Ct. 883.

**2659 C

This practice of attaching conditions to federal funds greatly increases federal power. "[O]bjectives not thought to be within Article I's enumerated legislative fields, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Dole*, *supra*, at 207, 107 S.Ct. 2793 (internal quotation marks and citation omitted); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (by attaching conditions to federal funds, Congress may induce the States to "tak[e] certain actions that Congress could not require them to take").

This formidable power, if not checked in any way, would present a grave threat to the system of federalism created by our Constitution. If Congress' "Spending Clause power to pursue objectives outside of Article I's enumerated legislative fields," *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 654, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (KENNEDY, J., dissenting) (internal quotation marks omitted), is "limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed,' " *Dole*, *supra*, at 217, 107 S.Ct. 2793 (O'Connor, J., dissenting) (quoting *Butler*,*supra*, at 78, 56 S.Ct. 312). "[T]he Spending Clause power, if wielded without concern for the federal balance *676 , has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis*, *supra*, at 654–655, 57 S.Ct. 883 (KENNEDY, J., dissenting).

Recognizing this potential for abuse, our cases have long held that the power to attach conditions to grants to the States has limits. See, *e.g.*, *Dole*, 483 U.S., at 207–208, 107 S.Ct. 2793; *id.*, at 207, 107 S.Ct. 2793 (spending power is "subject to several general restrictions articulated in our cases"). For one thing, any such conditions must be unambiguous so that a State at least knows what it is getting into. See *Pennhurst*, *supra*, at 17, 101 S.Ct. 1531. Conditions must also be related "to the federal interest in particular national projects or programs," *Massachusetts v. United States*, 435 U.S. 444, 461, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978) (plurality opinion), and the conditional grant of federal funds may not "induce the States to engage in activities that would themselves be unconstitutional," *Dole*, *supra*, at 210, 107 S.Ct. 2793; see *Lawrence County v. Lead–Deadwood School Dist. No. 40–1*, 469 U.S. 256, 269–270, 105 S.Ct. 695, 83 L.Ed.2d 635 (1985). Finally, while Congress may seek to induce States to accept conditional grants, Congress may not cross the "point at which pressure turns into compulsion, and ceases to be inducement." *Steward Machine*, 301 U.S., at 590, 57 S.Ct. 883. Accord, *College Savings Bank*, *supra*, at 687, 119 S.Ct. 2219; *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 285, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991) (White, J., dissenting); *Dole*, *supra*, at 211, 107 S.Ct. 2793.

When federal legislation gives the States a real choice whether to accept or decline a federal aid package, the federal-state relationship is in the nature of a contractual relationship. See **2660 *Barnes v. Gorman*, 536 U.S. 181, 186, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002); *Pennhurst*, 451 U.S., at 17, 101 S.Ct. 1531. And just as a contract is voidable if coerced, "[t]he legitimacy of Congress' power to legislate under the spending power ... rests on whether the State *voluntarily* and knowingly accepts the terms of *677 the 'contract.' " *Ibid.* (emphasis added). If a federal spending program coerces participation the States have not "exercise[d] their choice"—let alone made an "informed choice." *Id.*, at 17, 25, 101 S.Ct. 1531.

Coercing States to accept conditions risks the destruction of the "unique role of the States in our system." *Davis*, *supra*, at 685, 57 S.Ct. 883 (KENNEDY, J., dissenting).

"[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S., at 162, 112 S.Ct. 2408. Congress may not "simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.*, at 161, 112 S.Ct. 2408 (internal quotation marks and brackets omitted). Congress effectively engages in this impermissible compulsion when state participation in a federal spending program is coerced, so that the States' choice whether to enact or administer a federal regulatory program is rendered illusory.

Where all Congress has done is to "encourag[e] state regulation rather than compe[l] it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people. [But] where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *Id.*, at 168, 112 S.Ct. 2408.

*Amici* who support the Government argue that forcing state employees to implement a federal program is more respectful of federalism than using federal workers to implement that program. See, *e.g.*, Brief for Service Employees International Union et al. as *Amici Curiae* in No. 11–398, pp. 25–26. They note that Congress, instead of expanding Medicaid, could have established an entirely federal program to provide coverage for the same group of people. By choosing to structure Medicaid as a cooperative federal-state program, they contend, Congress allows for more state control. *Ibid.*

***678** This argument reflects a view of federalism that our cases have rejected—and with good reason. When Congress compels the States to do its bidding, it blurs the lines of political accountability. If the Federal Government makes a controversial decision while acting on its own, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 505 U.S., at 168, 112 S.Ct. 2408. But when the Federal Government compels the States to take unpopular actions, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *iD.*, at 169, 112 s.CT. 2408; see *pRintz*, 521 u.S., at 930, 117 s.CT. 2365. For this reason, federal officeholders may view this "departur[e] from the federal structure to be in their personal interests ... as a means of shifting responsibility for the eventual decision." *New York*, 505 U.S., at 182–183, 112 S.Ct. 2408. And even state officials may favor such a " departure from the constitutional plan," since uncertainty concerning responsibility may also permit them to escape accountability. *Id.*, at 182, 112 S.Ct. 2408. If a program is popular, state officials may claim credit; if it is unpopular, ****2661** they may protest that they were merely responding to a federal directive.

Once it is recognized that spending-power legislation cannot coerce state participation, two questions remain: (1) What is the meaning of coercion in this context? (2) Is the ACA's expanded Medicaid coverage coercive? We now turn to those questions.

D

1

The answer to the first of these questions—the meaning of coercion in the present context—is straightforward. As we have explained, the legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States' choice to accept or decline the offered package. ***679** Therefore, if States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power. And as our decision in *South Dakota v. Dole* makes clear, theoretical voluntariness is not enough.

In *South Dakota v. Dole*, we considered whether the spending power permitted Congress to condition 5% of the State's federal highway funds on the State's adoption of a minimum drinking age of 21 years. South Dakota argued that the program was impermissibly coercive, but we disagreed, reasoning that "Congress ha[d] directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds." 483 U.S., at 211, 107

S.Ct. 2793. Because "all South Dakota would lose if she adhere[d] to her chosen course as to a suitable minimum drinking age [was] 5% of the funds otherwise obtainable under specified highway grant programs," we found that "Congress ha[d] offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose." *Ibid.* Thus, the decision whether to comply with the federal condition "remain[ed] the prerogative of the States *not merely in theory but in fact*," and so the program at issue did not exceed Congress' power. *Id.*, at 211–212, 107 S.Ct. 2793 (emphasis added).

The question whether a law enacted under the spending power is coercive in fact will sometimes be difficult, but where Congress has plainly "crossed the line distinguishing encouragement from coercion," *New York, supra,* at 175, 112 S.Ct. 2408, a federal program that coopts the States' political processes must be declared unconstitutional. "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene." *Lopez,* 514 U.S., at 578, 115 S.Ct. 1624 (KENNEDY, J., concurring).

2

The Federal Government's argument in this case at best pays lipservice to the anticoercion principle. The Federal ***680** Government suggests that it is sufficient if States are "free, *as a matter of law,* to turn down" federal funds. Brief for Respondents in No. 11–400, p. 17 (emphasis added); see also *id.*, at 25. According to the Federal Government, neither the amount of the offered federal funds nor the amount of the federal taxes extracted from the taxpayers of a State to pay for the program in question is relevant in determining whether there is impermissible coercion. *Id.*, at 41–46.

This argument ignores reality. When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative. Even if a State believes that the federal program is ineffective and ****2662** inefficient, withdrawal would likely force the State to impose a huge tax increase on its residents, and this new state tax would come on top of the federal taxes already paid by residents to support subsidies to participating States. [13]

Acceptance of the Federal Government's interpretation of the anticoercion rule would permit Congress to dictate policy in areas traditionally governed primarily at the state or local level. Suppose, for example, that Congress enacted legislation offering each State a grant equal to the State's entire annual expenditures for primary and secondary education. Suppose also that this funding came with conditions governing such things as school curriculum, the hiring and tenure of teachers, the drawing of school districts, the length and ***681** hours of the school day, the school calendar, a dress code for students, and rules for student discipline. *As a matter of law,* a State could turn down that offer, but if it did so, its residents would not only be required to pay the federal taxes needed to support this expensive new program, but they would also be forced to pay an equivalent amount in state taxes. And if the State gave in to the federal law, the State and its subdivisions would surrender their traditional authority in the field of education. Asked at oral argument whether such a law would be allowed under the spending power, the Solicitor General responded that it would. Tr. of Oral Arg. in No. 11–400, pp. 44–45 (Mar. 28, 2012).

E

Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear. In this case, however, there can be no doubt. In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the anticoercion rule does not apply in this case, then there is no such rule.

1

The dimensions of the Medicaid program lend strong support to the petitioner States' argument that refusing

to accede to the conditions set out in the ACA is not a realistic option. Before the ACA's enactment, Medicaid funded medical care for pregnant women, families with dependents, children, the blind, the elderly, and the disabled. See 42 U.S.C. § 1396a(a)(10) (2006 ed. and Supp. IV). The ACA greatly expands the program's reach, making new funds available to States that agree to extend coverage to all individuals who are under age 65 and have incomes below 133% of the federal poverty line. See § 1396a(a)(10)(A)(i)(VIII) (2006 ed., Supp. IV). *682 Any State that refuses to expand its Medicaid programs in this way is threatened with a severe sanction: the loss of all its federal Medicaid funds. See § 1396c (2006 ed.).

Medicaid has long been the largest federal program of grants to the States. See Brief for Respondents in No. 11–400, at 37. In 2010, the Federal Government directed **2663 more than $552 billion in federal funds to the States. See Nat. Assn. of State Budget Officers, 2010 State Expenditure Report: Examining Fiscal 2009–2011 State Spending, p. 7 (2011) (NASBO Report). Of this, more than $233 billion went to pre-expansion Medicaid. See *id.*, at 47.[14] *This amount equals nearly 22% of all state expenditures combined.* See *id.*, at 7.

The States devote a larger percentage of their budgets to Medicaid than to any other item. *Id.*, at 5. Federal funds account for anywhere from 50% to 83% of each State's total Medicaid expenditures, see § 1396d(b) (2006 ed., Supp. IV); most States receive more than $1 billion in federal Medicaid funding; and a quarter receive more than $5 billion, NASBO Report 47. These federal dollars total nearly two thirds—64.6%—of all Medicaid expenditures nationwide.[15] *Id.*, at 46.

*683 The Court of Appeals concluded that the States failed to establish coercion in this case in part because the "states have the power to tax and raise revenue, and therefore can create and fund programs of their own if they do not like Congress's terms." 648 F.3d 1235, 1268 (C.A.11 2011); see Brief for Sen. Harry Reid et al. as *Amici Curiae* in No. 11–400, p. 21 ("States may always choose to decrease expenditures on other programs or to raise revenues"). But the sheer size of this federal spending program in relation to state expenditures means that a State would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue. Arizona, for example, commits 12% of its state expenditures to Medicaid, and relies on the Federal Government to provide the rest: $5.6 billion, equaling roughly one-third of Arizona's annual state expenditures of $17 billion. See NASBO Report 7, 47. Therefore, if Arizona lost federal Medicaid funding, the State would have to commit an additional 33% of all its state expenditures to fund an equivalent state program along the lines of pre-expansion Medicaid. This means that the State would have to allocate 45% of its annual expenditures for that one purpose. See *ibid.*

The States are far less reliant on federal funding for any other program. After Medicaid, the next biggest federal funding item is aid to support elementary and secondary education, which amounts to 12.8% of total federal outlays to the States, see *id.*, at 7, 16, and equals only 6.6% of all state expenditures combined. See *ibid.* In Arizona, for example, although federal Medicaid expenditures are equal to 33% of all state expenditures, federal education funds amount to only 9.8% of all state **2664 expenditures. See *ibid.* And even in States with less than average federal Medicaid funding, that funding is at least twice the size of federal education *684 funding as a percentage of state expenditures. *Id.*, at 7, 16, 47.

A State forced out of the Medicaid program would face burdens in addition to the loss of federal Medicaid funding. For example, a nonparticipating State might be found to be ineligible for other major federal funding sources, such as Temporary Assistance for Needy Families (TANF), which is premised on the expectation that States will participate in Medicaid. See 42 U.S.C. § 602(a)(3) (requiring that certain beneficiaries of TANF funds be "eligible for medical assistance under the State['s Medicaid] plan"). And withdrawal or expulsion from the Medicaid program would not relieve a State's hospitals of their obligation under federal law to provide care for patients who are unable to pay for medical services. The Emergency Medical Treatment and Active Labor Act, § 1395dd, requires hospitals that receive any federal funding to provide stabilization care for indigent patients but does not offer federal funding to assist facilities in carrying out its mandate. Many of these patients are now covered by Medicaid. If providers could not look to the Medicaid program to pay for this care, they would find

it exceedingly difficult to comply with federal law unless they were given substantial state support. See, *e.g.*, Brief for Economists as *Amici Curiae* in No. 11–400, p. 11.

For these reasons, the offer that the ACA makes to the States—go along with a dramatic expansion of Medicaid or potentially lose all federal Medicaid funding—is quite unlike anything that we have seen in a prior spending-power case. In *South Dakota v. Dole*, the total amount that the States would have lost if every single State had refused to comply with the 21–year–old drinking age was approximately $614.7 million—or about 0.19% of all state expenditures combined. See Nat. Assn. of State Budget Officers, 1989 (Fiscal Years 1987–1989 Data) State Expenditure Report 10, 84 (1989), http://www.nasbo. org/publications-data/state-expenditure-report/archives. South Dakota stood to lose, at most, funding that amounted to less than 1% of its annual state expenditures. See *ibid.* Under the ACA, by contrast, the Federal Government has threatened to withhold 42.3% of all federal outlays to the States, or approximately $233 billion. See NASBO Report 7, 10, 47. South Dakota stands to lose federal funding *685 equaling 28.9% of its annual state expenditures. See *id.*, at 7, 47. Withholding $614.7 million, equaling only 0.19% of all state expenditures combined, is aptly characterized as "relatively mild encouragement," but threatening to withhold $233 billion, equaling 21.86% of all state expenditures combined, is a different matter.

2

What the statistics suggest is confirmed by the goal and structure of the ACA. In crafting the ACA, Congress clearly expressed its informed view that no State could possibly refuse the offer that the ACA extends.

The stated goal of the ACA is near-universal health care coverage. To achieve this goal, the ACA mandates that every person obtain a minimum level of coverage. It attempts to reach this goal in several different ways. The guaranteed issue and community-rating provisions are designed to make qualifying insurance available and affordable for persons with medical conditions that may require expensive care. Other ACA provisions seek to make such policies more affordable for people of modest means. Finally, for low-income individuals who are simply not able **2665 to obtain insurance, Congress expanded Medicaid, transforming it from a program covering only members of a limited list of vulnerable groups into a program that provides at least the requisite minimum level of coverage for the poor. See 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VIII) (2006 ed. and Supp. IV), 1396u–7(a), (b)(5), 18022(a). This design was intended to provide at least a specified minimum level of coverage for all Americans, but the achievement of that goal obviously depends on participation by every single State. If any State—not to *686 mention all of the 26 States that brought this suit—chose to decline the federal offer, there would be a gaping hole in the ACA's coverage.

It is true that some persons who are eligible for Medicaid coverage under the ACA may be able to secure private insurance, either through their employers or by obtaining subsidized insurance through an exchange. See 26 U.S.C. § 36B(a) (2006 ed., Supp. IV); Brief for Respondents in No. 11–400, at 12. But the new federal subsidies are not available to those whose income is below the federal poverty level, and the ACA provides no means, other than Medicaid, for these individuals to obtain coverage and comply with the Mandate. The Government counters that these people will not have to pay the penalty, see, *e.g.*, Tr. of Oral Arg. 68 (Mar. 28, 2012); Brief for Respondents in No. 11–400, at 49–50, but that argument misses the point: Without Medicaid, these individuals will not have coverage and the ACA's goal of near-universal coverage will be severely frustrated.

If Congress had thought that States might actually refuse to go along with the expansion of Medicaid, Congress would surely have devised a backup scheme so that the most vulnerable groups in our society, those previously eligible for Medicaid, would not be left out in the cold. But nowhere in the over 900–page Act is such a scheme to be found. By contrast, because Congress thought that some States might decline federal funding for the operation of a "health benefit exchange," Congress provided a backup scheme; if a State declines to participate in the operation of an exchange, the Federal Government will step in and operate an exchange in that State. See 42 U.S.C. § 18041(c)(1) (2006. ed., Supp. IV). Likewise, knowing that States would not necessarily provide affordable health

insurance for aliens lawfully present in the United States —because Medicaid does not require States to provide such coverage—Congress extended the availability of the new federal insurance subsidies to all aliens. See *687 26 U.S.C. § 36B(c)(1)(B)(ii) (excepting from the income limit individuals who are "not eligible for the medicaid program ... by reason of [their] alien status"). Congress did not make these subsidies available for citizens with incomes below the poverty level because Congress obviously assumed that they would be covered by Medicaid. If Congress had contemplated that some of these citizens would be left without Medicaid coverage as a result of a State's withdrawal or expulsion from the program, Congress surely would have made them eligible for the tax subsidies provided for low-income aliens.

These features of the ACA convey an unmistakable message: Congress never dreamed that any State would refuse to go along with the expansion of Medicaid. Congress well understood that refusal was not a practical option.

The Federal Government does not dispute the inference that Congress anticipated 100% state participation, but it argues that this assumption was based on the fact that ACA's offer was an "exceedingly generous" gift. Brief for Respondents in No. 11–400, at 50. As the Federal Government sees things, Congress is like the **2666 generous benefactor who offers $1 million with few strings attached to 50 randomly selected individuals. Just as this benefactor might assume that all of these 50 individuals would snap up his offer, so Congress assumed that every State would gratefully accept the federal funds (and conditions) to go with the expansion of Medicaid.

This characterization of the ACA's offer raises obvious questions. If that offer is "exceedingly generous," as the Federal Government maintains, why have more than half the States brought this lawsuit, contending that the offer is coercive? And why did Congress find it necessary to threaten that any State refusing to accept this "exceedingly generous" gift would risk losing all Medicaid funds? Congress could have made just the *new* funding provided under the ACA contingent on acceptance of the terms of the Medicaid *688 Expansion. Congress took such an approach in some earlier amendments to Medicaid, separating new coverage requirements and funding from the rest of the program so that only new funding was conditioned on new eligibility extensions. See, *e.g.*, Social Security Amendments of 1972, 86 Stat. 1465.

Congress' decision to do otherwise here reflects its understanding that the ACA offer is not an "exceedingly generous" gift that no State in its right mind would decline. Instead, acceptance of the offer will impose very substantial costs on participating States. It is true that the Federal Government will bear most of the initial costs associated with the Medicaid Expansion, first paying 100% of the costs of covering newly eligible individuals between 2014 and 2016. 42 U.S.C. § 1396d(y). But that is just part of the picture. Participating States will be forced to shoulder substantial costs as well, because after 2019 the Federal Government will cover only 90% of the costs associated with the Expansion, see *ibid.*, with state spending projected to increase by at least $20 billion by 2020 as a consequence. Statement of Douglas W. Elmendorf, CBO's Analysis of the Major Health Care Legislation Enacted in March 2010, p. 24 (Mar. 30, 2011); see also R. Bovbjerg, B. Ormond, & V. Chen, Kaiser Commission on Medicaid and the Uninsured, State Budgets Under Federal Health Reform: The Extent and Causes of Variations in Estimated Impacts 4, n. 27 (Feb. 2011) (estimating new state spending at $43.2 billion through 2019). After 2019, state spending is expected to increase at a faster rate; the Congressional Budget Office estimates new state spending at $60 billion through 2021. Statement of Douglas W. Elmendorf, *supra*, at 24. And these costs may increase in the future because of the very real possibility that the Federal Government will change funding terms and reduce the percentage of funds it will cover. This would leave the States to bear an increasingly large percentage of the bill. See Tr. of Oral Arg. in No. 11–400, pp. 74–76 (Mar. 28, 2012). Finally, after 2015, the States will have to pick up the tab *689 for 50% of all administrative costs associated with implementing the new program, see §§ 1396b(a)(2)-(5), (7) (2006 ed., Supp. IV), costs that could approach $12 billion between fiscal years 2014 and 2020, see Dept. of Health and Human Services, Centers for Medicare and Medicaid Services, 2010 Actuarial Report on the Financial Outlook for Medicaid 30.

In sum, it is perfectly clear from the goal and structure of the ACA that the offer of the Medicaid Expansion

was one that Congress understood no State could refuse. The Medicaid Expansion therefore exceeds Congress' spending power and cannot be implemented.

F

Seven Members of the Court agree that the Medicaid Expansion, as enacted by **2667 Congress, is unconstitutional. See Parts IV–A to IV–E, *supra*, ; Part IV–A, *ante*, at 2598 – 2607 (opinion of ROBERTS, C.J., joined by BREYER and KAGAN, JJ.). Because the Medicaid Expansion is unconstitutional, the question of remedy arises. The most natural remedy would be to invalidate the Medicaid Expansion. However, the Government proposes—in two cursory sentences at the very end of its brief—preserving the Expansion. Under its proposal, States would receive the additional Medicaid funds if they expand eligibility, but States would keep their pre-existing Medicaid funds if they do not expand eligibility. We cannot accept the Government's suggestion.

The reality that States were given no real choice but to expand Medicaid was not an accident. Congress assumed States would have no choice, and the ACA depends on States' having no choice, because its Mandate requires low-income individuals to obtain insurance many of them can afford only through the Medicaid Expansion. Furthermore, a State's withdrawal might subject everyone in the State to much higher insurance premiums. That is because the Medicaid Expansion will no longer offset the cost to the insurance *690 industry imposed by the ACA's insurance regulations and taxes, a point that is explained in more detail in the severability section below. To make the Medicaid Expansion optional despite the ACA's structure and design " 'would be to make a new law, not to enforce an old one. This is no part of our duty.' " *Trade–Mark Cases*, 100 U.S. 82, 99, 25 L.Ed. 550 (1879).

Worse, the Government's proposed remedy introduces a new dynamic: States must choose between expanding Medicaid or paying huge tax sums to the federal fisc for the sole benefit of expanding Medicaid in other States. If this divisive dynamic between and among States can be introduced at all, it should be by conscious congressional choice, not by Court-invented interpretation. We do not doubt that States are capable of making decisions when put in a tight spot. We do doubt the authority of this Court to put them there.

The Government cites a severability clause codified with Medicaid in Chapter 7 of the United States Code stating that if "any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." 42 U.S.C. § 1303. But that clause tells us only that other provisions in Chapter 7 should not be invalidated if § 1396c, the authorization for the cut-off of all Medicaid funds, is unconstitutional. It does not tell us that § 1396c can be judicially revised, to say what it does not say. Such a judicial power would not be called the doctrine of severability but perhaps the doctrine of amendatory invalidation—similar to the amendatory veto that permits the Governors of some States to reduce the amounts appropriated in legislation. The proof that such a power does not exist is the fact that it would not preserve other congressional dispositions, but would leave it up to the Court what the "validated" legislation will contain. The Court today opts for permitting the cut-off of only incremental Medicaid funding, but it might just as well have permitted, say, the cut-off of funds that represent *691 no more than $x$ percent of the State's budget. The Court severs nothing, but simply revises § 1396c to read as the Court would desire.

We should not accept the Government's invitation to attempt to solve a constitutional problem by rewriting the Medicaid Expansion so as to allow States that reject it to retain their pre-existing Medicaid funds. Worse, the Government's remedy, **2668 now adopted by the Court, takes the ACA and this Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen; but under the Constitution, that power and authority do not rest with this Court.

V

**Severability**

The Affordable Care Act seeks to achieve "near-universal" health insurance coverage. § 18091(2)(D) (2006 ed., Supp. IV). The two pillars of the Act are the Individual Mandate and the expansion of coverage under Medicaid. In our view, both these central provisions of the Act —the Individual Mandate and Medicaid Expansion— are invalid. It follows, as some of the parties urge, that all other provisions of the Act must fall as well. The following section explains the severability principles that require this conclusion. This analysis also shows how closely interrelated the Act is, and this is all the more reason why it is judicial usurpation to impose an entirely new mechanism for withdrawal of Medicaid funding, see Part IV–F, *supra*, which is one of many examples of how rewriting the Act alters its dynamics.

A

When an unconstitutional provision is but a part of a more comprehensive statute, the question arises as to the validity of the remaining provisions. The Court's authority to declare a statute partially unconstitutional has been well established since *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), when the Court severed an unconstitutional provision from the Judiciary *692 Act of 1789. And while the Court has sometimes applied "at least a modest presumption in favor of ... severability," C. Nelson, Statutory Interpretation 144 (2011), it has not always done so, see, *e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 190–195, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999).

An automatic or too cursory severance of statutory provisions risks "rewrit [ing] a statute and giv[ing] it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362, 55 S.Ct. 758, 79 L.Ed. 1468 (1935). The Judiciary, if it orders uncritical severance, then assumes the legislative function; for it imposes on the Nation, by the Court's decree, its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact. That can be a more extreme exercise of the judicial power than striking the whole statute and allowing Congress to address the conditions that pertained when the statute was considered at the outset.

The Court has applied a two-part guide as the framework for severability analysis. The test has been deemed "well established." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987). First, if the Court holds a statutory provision unconstitutional, it then determines whether the now truncated statute will operate in the manner Congress intended. If not, the remaining provisions must be invalidated. See *id.*, at 685, 107 S.Ct. 1476. In *Alaska Airlines*, the Court clarified that this first inquiry requires more than asking whether "the balance of the legislation is incapable of functioning independently." *Id.*, at 684, 107 S.Ct. 1476. Even if the remaining provisions will operate in some coherent way, that alone does not save the statute. The question is whether the provisions will work as Congress intended. The "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." *Id.*, at 685, 107 S.Ct. 1476 (emphasis **2669 in original). See also *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 509, 130 S.Ct. 3138, 3161, 177 L.Ed.2d 706 (2010) (the Act "remains fully operative as a law with these tenure *693 restrictions excised" (internal quotation marks omitted)); *United States v. Booker*, 543 U.S. 220, 227, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) ("[T]wo provisions ... must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent"); *Mille Lacs*, *supra*, at 194, 119 S.Ct. 1187 ("[E]mbodying as it did one coherent policy, [the entire order] is inseverable").

Second, even if the remaining provisions can operate as Congress designed them to operate, the Court must determine if Congress would have enacted them standing alone and without the unconstitutional portion. If Congress would not, those provisions, too, must be invalidated. See *Alaska Airlines*, *supra*, at 685, 107 S.Ct. 1476 ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted"); see also *Free Enterprise Fund*, *supra*, at 509, 130 S.Ct., at 3162 ("[N]othing in the statute's text or historical context makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable

at will"); *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 330, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) ("Would the legislature have preferred what is left of its statute to no statute at all"); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 767, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (plurality opinion) ("Would Congress still have passed § 10(a) had it known that the remaining provisions were invalid" (internal quotation marks and brackets omitted)).

The two inquiries—whether the remaining provisions will operate as Congress designed them, and whether Congress would have enacted the remaining provisions standing alone—often are interrelated. In the ordinary course, if the remaining provisions cannot operate according to the congressional design (the first inquiry), it almost necessarily follows that Congress would not have enacted them (the second inquiry). This close interaction may explain why the Court has not always been precise in distinguishing between the *694 two. There are, however, occasions in which the severability standard's first inquiry (statutory functionality) is not a proxy for the second inquiry (whether the Legislature intended the remaining provisions to stand alone).

B

The Act was passed to enable affordable, "near-universal" health insurance coverage. 42 U.S.C. § 18091(2)(D). The resulting, complex statute consists of mandates and other requirements; comprehensive regulation and penalties; some undoubted taxes; and increases in some governmental expenditures, decreases in others. Under the severability test set out above, it must be determined if those provisions function in a coherent way and as Congress would have intended, even when the major provisions establishing the Individual Mandate and Medicaid Expansion are themselves invalid.

Congress did not intend to establish the goal of near-universal coverage without regard to fiscal consequences. See, *e.g.*, ACA § 1563, 124 Stat. 270 ("[T]his Act will reduce the Federal deficit between 2010 and 2019"). And it did not intend to impose the inevitable costs on any one industry or group of individuals. The whole design of the Act is to balance the costs and benefits affecting each set of regulated **2670 parties. Thus, individuals are required to obtain health insurance. See 26 U.S.C. § 5000A(a). Insurance companies are required to sell them insurance regardless of patients' pre-existing conditions and to comply with a host of other regulations. And the companies must pay new taxes. See § 4980I (high-cost insurance plans); 42 U.S.C. §§ 300gg(a)(1), 300gg–4(b) (community rating); §§ 300gg–1, 300gg–3, 300gg–4(a) (guaranteed issue); § 300gg–11 (elimination of coverage limits); § 300gg–14(a) (dependent children up to age 26); ACA §§ 9010, 10905, 124 Stat. 865, 1017 (excise tax); Health Care and Education Reconciliation Act of 2010 (HCERA) § 1401, 124 Stat. 1059 (excise tax). States are expected to expand Medicaid eligibility and to create regulated marketplaces *695 called exchanges where individuals can purchase insurance. See 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VIII) (2006 ed., Supp. IV) (Medicaid Expansion), 18031 (exchanges). Some persons who cannot afford insurance are provided it through the Medicaid Expansion, and others are aided in their purchase of insurance through federal subsidies available on health-insurance exchanges. See 26 U.S.C. § 36B (2006 ed., Supp. IV), 42 U.S.C. § 18071 (2006 ed., Supp. IV) (federal subsidies). The Federal Government's increased spending is offset by new taxes and cuts in other federal expenditures, including reductions in Medicare and in federal payments to hospitals. See, *e.g.*, § 1395ww(r) (Medicare cuts); ACA Title IX, Subtitle A, 124 Stat. 847 ("Revenue Offset Provisions"). Employers with at least 50 employees must either provide employees with adequate health benefits or pay a financial exaction if an employee who qualifies for federal subsidies purchases insurance through an exchange. See 26 U.S.C. § 4980H (2006 ed., Supp. IV).

In short, the Act attempts to achieve near-universal health insurance coverage by spreading its costs to individuals, insurers, governments, hospitals, and employers—while, at the same time, offsetting significant portions of those costs with new benefits to each group. For example, the Federal Government bears the burden of paying billions for the new entitlements mandated by the Medicaid Expansion and federal subsidies for insurance purchases on the exchanges; but it benefits from reductions in the reimbursements it pays to hospitals. Hospitals lose those

reimbursements; but they benefit from the decrease in uncompensated care, for under the insurance regulations it is easier for individuals with pre-existing conditions to purchase coverage that increases payments to hospitals. Insurance companies bear new costs imposed by a collection of insurance regulations and taxes, including "guaranteed issue" and "community rating" requirements to give coverage regardless of the insured's pre-existing conditions; but the insurers benefit from the ***696** new, healthy purchasers who are forced by the Individual Mandate to buy the insurers' product and from the new low-income Medicaid recipients who will enroll in insurance companies' Medicaid-funded managed care programs. In summary, the Individual Mandate and Medicaid Expansion offset insurance regulations and taxes, which offset reduced reimbursements to hospitals, which offset increases in federal spending. So, the Act's major provisions are interdependent.

The Act then refers to these interdependencies as "shared responsibility." See ACA Subtitle F, Part I, 124 Stat. 242 ("Shared Responsibility"); ACA § 1501, *ibid.* (same); ACA § 1513, *id.*, at 253 (same); ACA § 4980H, *ibid.* (same). In at least six places, the Act describes the Individual Mandate as working "together with the other provisions of this Act." 42 U.S.C. § 18091(2)(C) (2006 ed., Supp. IV) ****2671** (working "together" to "add millions of new consumers to the health insurance market"); § 18091(2)(E) (working "together" to "significantly reduce" the economic cost of the poorer health and shorter lifespan of the uninsured); § 18091(2)(F) (working "together" to "lower health insurance premiums"); § 18091(2)(G) (working "together" to "improve financial security for families"); § 18091(2)(I) (working "together" to minimize "adverse selection and broaden the health insurance risk pool to include healthy individuals"); § 18091(2)(J) (working "together" to "significantly reduce administrative costs and lower health insurance premiums"). The Act calls the Individual Mandate "an essential part" of federal regulation of health insurance and warns that "the absence of the requirement would undercut Federal regulation of the health insurance market." § 18091(2)(H).

C

One preliminary point should be noted before applying severability principles to the Act. To be sure, an argument can be made that those portions of the Act that none of the ***697** parties has standing to challenge cannot be held nonseverable. The response to this argument is that our cases do not support it. See, *e.g.*, *Williams v. Standard Oil Co. of La.*, 278 U.S. 235, 242–244, 49 S.Ct. 115, 73 L.Ed. 287 (1929) (holding nonseverable statutory provisions that did not burden the parties). It would be particularly destructive of sound government to apply such a rule with regard to a multifaceted piece of legislation like the ACA. It would take years, perhaps decades, for each of its provisions to be adjudicated separately—and for some of them (those simply expending federal funds) no one may have separate standing. The Federal Government, the States, and private parties ought to know at once whether the entire legislation fails.

The opinion now explains in Part V–C–1, *infra,* why the Act's major provisions are not severable from the Mandate and Medicaid Expansion. It proceeds from the insurance regulations and taxes (C–1–a), to the reductions in reimbursements to hospitals and other Medicare reductions (C–1–b), the exchanges and their federal subsidies (C–1–c), and the employer responsibility assessment (C–1–d). Part V–C–2, *infra,* explains why the Act's minor provisions also are not severable.

1

**The Act's Major Provisions**

Major provisions of the Affordable Care Act—*i.e.*, the insurance regulations and taxes, the reductions in federal reimbursements to hospitals and other Medicare spending reductions, the exchanges and their federal subsidies, and the employer responsibility assessment—cannot remain once the Individual Mandate and Medicaid Expansion are invalid. That result follows from the undoubted inability of the other major provisions to operate as Congress intended without the Individual Mandate and Medicaid Expansion. Absent the invalid portions, the other major

provisions could impose enormous risks of unexpected burdens on patients, the *698 health-care community, and the federal budget. That consequence would be in absolute conflict with the ACA's design of "shared responsibility," and would pose a threat to the Nation that Congress did not intend.

a

*Insurance Regulations and Taxes*

Without the Individual Mandate and Medicaid Expansion, the Affordable Care Act's insurance regulations and insurance taxes impose risks on insurance companies and their customers that this Court cannot measure. Those risks would undermine Congress' scheme of "shared responsibility." **2672 See 26 U.S.C. § 4980I (2006 ed., Supp. IV) (high-cost insurance plans); 42 U.S.C. §§ 300gg(a)(1) (2006 ed., Supp. IV), 300gg–4(b) (community rating); §§ 300gg–1, 300gg–3, 300gg–4(a) (guaranteed issue); § 300gg–11 (elimination of coverage limits); § 300gg–14(a) (dependent children up to age 26); ACA §§ 9010, 10905, 124 Stat. 865, 1017 (excise tax); HCERA § 1401, 124 Stat. 1059 (excise tax).

The Court has been informed by distinguished economists that the Act's Individual Mandate and Medicaid Expansion would each increase revenues to the insurance industry by about $350 billion over 10 years; that this combined figure of $700 billion is necessary to offset the approximately $700 billion in new costs to the insurance industry imposed by the Act's insurance regulations and taxes; and that the new $700–billion burden would otherwise dwarf the industry's current profit margin. See Brief for Economists as *Amici Curiae* in No. 11–393 etc. (Severability), pp. 9–16, 10a.

If that analysis is correct, the regulations and taxes will mean higher costs for insurance companies. Higher costs may mean higher premiums for consumers, despite the Act's goal of "lower[ing] health insurance premiums." 42 U.S.C. § 18091(2)(F) (2006 ed., Supp. IV). Higher costs also could threaten the survival of health-insurance companies, despite *699 the Act's goal of " effective health insurance markets." § 18091(2)(J).

The actual cost of the regulations and taxes may be more or less than predicted. What is known, however, is that severing other provisions from the Individual Mandate and Medicaid Expansion necessarily would impose significant risks and real uncertainties on insurance companies, their customers, all other major actors in the system, and the government treasury. And what also is known is this: Unnecessary risks and avoidable uncertainties are hostile to economic progress and fiscal stability and thus to the safety and welfare of the Nation and the Nation's freedom. If those risks and uncertainties are to be imposed, it must not be by the Judiciary.

b

*Reductions in Reimbursements to Hospitals and Other Reductions in Medicare Expenditures*

The Affordable Care Act reduces payments by the Federal Government to hospitals by more than $200 billion over 10 years. See 42 U.S.C. §§ 1395ww(b)(3)(B)(xi)-(xii) (2006 ed., Supp. IV); § 1395ww(q); § 1395ww(r); § 1396r–4(f)(7).

The concept is straightforward: Near-universal coverage will reduce uncompensated care, which will increase hospitals' revenues, which will offset the government's reductions in Medicare and Medicaid reimbursements to hospitals. Responsibility will be shared, as burdens and benefits balance each other. This is typical of the whole dynamic of the Act.

Invalidating the key mechanisms for expanding insurance coverage, such as community rating and the Medicaid Expansion, without invalidating the reductions in Medicare and Medicaid, distorts the ACA's design of "shared responsibility." Some hospitals may be forced to raise the cost of care in order to offset the reductions in reimbursements, which could raise the cost of insurance premiums, in contravention of the Act's goal of "lower[ing] health insurance premiums." *700 42 U.S.C. § 18091(2)(F) (2006 ed., Supp. IV). See also § 18091(2)(I) (goal of "lower[ing] health insurance premiums"); § 18091(2)(J) (same). Other hospitals, particularly safety-net hospitals that serve a large number of uninsured

patients, may be forced to shut down. Cf. Nat. Assn. of Public **2673 Hospitals, 2009 Annual Survey: Safety Net Hospitals and Health Systems Fulfill Mission in Uncertain Times 5–6 (Feb. 2011). Like the effect of preserving the insurance regulations and taxes, the precise degree of risk to hospitals is unknowable. It is not the proper role of the Court, by severing part of a statute and allowing the rest to stand, to impose unknowable risks that Congress could neither measure nor predict. And Congress could not have intended that result in any event.

There is a second, independent reason why the reductions in reimbursements to hospitals and the ACA's other Medicare cuts must be invalidated. The ACA's $455 billion in Medicare and Medicaid savings offset the $434–billion cost of the Medicaid Expansion. See CBO Estimate, Table 2 (Mar. 20, 2010). The reductions allowed Congress to find that the ACA "will reduce the Federal deficit between 2010 and 2019" and "will continue to reduce budget deficits after 2019." ACA §§ 1563(a)(1), (2), 124 Stat. 270.

That finding was critical to the ACA. The Act's "shared responsibility" concept extends to the federal budget. Congress chose to offset new federal expenditures with budget cuts and tax increases. That is why the United States has explained in the course of this litigation that "[w]hen Congress passed the ACA, it was careful to ensure that any increased spending, including on Medicaid, was offset by other revenue-raising and cost-saving provisions." Memorandum in Support of Government's Motion for Summary Judgment in No. 3–10–cv–91 (DC ND Fla.), p. 41.

If the Medicare and Medicaid reductions would no longer be needed to offset the costs of the Medicaid Expansion, the reductions would no longer operate in the manner Congress *701 intended. They would lose their justification and foundation. In addition, to preserve them would be "to eliminate a significant *quid pro quo* of the legislative compromise" and create a statute Congress did not enact. *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 561, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) (SCALIA, J., dissenting). It is no secret that cutting Medicare is unpopular; and it is most improbable Congress would have done so without at least the assurance that it would render the ACA deficit-neutral. See ACA §§ 1563(a)(1), (2), 124 Stat. 270.

c

***Health Insurance Exchanges and Their Federal Subsidies***

The ACA requires each State to establish a health-insurance "exchange." Each exchange is a one-stop marketplace for individuals and small businesses to compare community-rated health insurance and purchase the policy of their choice. The exchanges cannot operate in the manner Congress intended if the Individual Mandate, Medicaid Expansion, and insurance regulations cannot remain in force.

The Act's design is to allocate billions of federal dollars to subsidize individuals' purchases on the exchanges. Individuals with incomes between 100% and 400% of the poverty level receive tax credits to offset the cost of insurance to the individual purchaser. 26 U.S.C. § 36B (2006 ed., Supp. IV); 42 U.S.C. § 18071 (2006 ed., Supp. IV). By 2019, 20 million of the 24 million people who will obtain insurance through an exchange are expected to receive an average federal subsidy of $6,460 per person. See CBO, Analysis of the Major Health Care Legislation Enacted in March 2010, pp. 18–19 (Mar. 30, 2011). Without the community-rating insurance regulation, however, the average federal subsidy could be much higher; for community rating greatly lowers the enormous **2674 premiums unhealthy individuals would otherwise pay. Federal subsidies would make up much of the difference.

*702 The result would be an unintended boon to insurance companies, an unintended harm to the federal fisc, and a corresponding breakdown of the " shared responsibility" between the industry and the federal budget that Congress intended. Thus, the federal subsidies must be invalidated.

In the absence of federal subsidies to purchasers, insurance companies will have little incentive to sell insurance on the exchanges. Under the ACA's scheme, few, if any, individuals would want to buy individual insurance

policies outside of an exchange, because federal subsidies would be unavailable outside of an exchange. Difficulty in attracting individuals outside of the exchange would in turn motivate insurers to enter exchanges, despite the exchanges' onerous regulations. See 42 U.S.C. § 18031. That system of incentives collapses if the federal subsidies are invalidated. Without the federal subsidies, individuals would lose the main incentive to purchase insurance inside the exchanges, and some insurers may be unwilling to offer insurance inside of exchanges. With fewer buyers and even fewer sellers, the exchanges would not operate as Congress intended and may not operate at all.

There is a second reason why, if community rating is invalidated by the Mandate and Medicaid Expansion's invalidity, exchanges cannot be implemented in a manner consistent with the Act's design. A key purpose of an exchange is to provide a marketplace of insurance options where prices are standardized regardless of the buyer's pre-existing conditions. See *ibid.* An individual who shops for insurance through an exchange will evaluate different insurance products. The products will offer different benefits and prices. Congress designed the exchanges so the shopper can compare benefits and prices. But the comparison cannot be made in the way Congress designed if the prices depend on the shopper's pre-existing health conditions. The prices would vary from person to person. So without community rating—which prohibits insurers from basing the price of insurance *703 on pre-existing conditions—the exchanges cannot operate in the manner Congress intended.

d

***Employer–Responsibility Assessment***

The employer responsibility assessment provides an incentive for employers with at least 50 employees to provide their employees with health insurance options that meet minimum criteria. See 26 U.S.C. § 4980H (2006 ed., Supp. IV). Unlike the Individual Mandate, the employer-responsibility assessment does not require employers to provide an insurance option. Instead, it requires them to make a payment to the Federal Government if they do not offer insurance to employees and if insurance is bought on an exchange by an employee who qualifies for the exchange's federal subsidies. See *ibid.*

For two reasons, the employer-responsibility assessment must be invalidated. First, the ACA makes a direct link between the employer-responsibility assessment and the exchanges. The financial assessment against employers occurs only under certain conditions. One of them is the purchase of insurance by an employee on an exchange. With no exchanges, there are no purchases on the exchanges; and with no purchases on the exchanges, there is nothing to trigger the employer-responsibility assessment.

Second, after the invalidation of burdens on individuals (the Individual Mandate), insurers (the insurance regulations and taxes), States (the Medicaid Expansion), the Federal Government (the federal subsidies **2675 for exchanges and for the Medicaid Expansion), and hospitals (the reductions in reimbursements), the preservation of the employer-responsibility assessment would upset the ACA's design of "shared responsibility." It would leave employers as the only parties bearing any significant responsibility. That was not the congressional intent.

2

***704 The Act's Minor Provisions**

The next question is whether the invalidation of the ACA's major provisions requires the Court to invalidate the ACA's other provisions. It does.

The ACA is over 900 pages long. Its regulations include requirements ranging from a break time and secluded place at work for nursing mothers, see 29 U.S.C. § 207(r)(1) (2006 ed., Supp. IV), to displays of nutritional content at chain restaurants, see 21 U.S.C. § 343(q)(5)(H) (2006 ed., Supp. IV). The Act raises billions of dollars in taxes and fees, including exactions imposed on high-income taxpayers, see ACA §§ 9015, 10906, 124 Stat. 870, 1020; HCERA § 1402, medical devices, see 26 U.S.C. § 4191 (2006 ed., Supp. IV), and tanning booths, see § 5000B. It spends government money on, among other things,

the study of how to spend less government money. 42 U.S.C. § 1315a (2006 ed., Supp. IV). And it includes a number of provisions that provide benefits to the State of a particular legislator. For example, § 10323, 124 Stat. 954, extends Medicare coverage to individuals exposed to asbestos from a mine in Libby, Montana. Another provision, § 2006, *id.*, at 284, increases Medicaid payments only in Louisiana.

Such provisions validate the Senate Majority Leader's statement, " 'I don't know if there is a senator that doesn't have something in this bill that was important to them.... [And] if they don't have something in it important to them, then it doesn't speak well of them. That's what this legislation is all about: It's the art of compromise.' " Pear, In Health Bill for Everyone, Provisions for a Few, N.Y. Times, Jan. 4, 2010, p. A10 (quoting Sen. Reid). Often, a minor provision will be the price paid for support of a major provision. So, if the major provision were unconstitutional, Congress would not have passed the minor one.

***705** Without the ACA's major provisions, many of these minor provisions will not operate in the manner Congress intended. For example, the tax increases are "Revenue Offset Provisions" designed to help offset the cost to the Federal Government of programs like the Medicaid Expansion and the exchanges' federal subsidies. See Title IX, Subtitle A—Revenue Offset Provisions, 124 Stat. 847. With the Medicaid Expansion and the exchanges invalidated, the tax increases no longer operate to offset costs, and they no longer serve the purpose in the Act's scheme of "shared responsibility" that Congress intended.

Some provisions, such as requiring chain restaurants to display nutritional content, appear likely to operate as Congress intended, but they fail the second test for severability. There is no reason to believe that Congress would have enacted them independently. The Court has not previously had occasion to consider severability in the context of an omnibus enactment like the ACA, which includes not only many provisions that are ancillary to its central provisions but also many that are entirely unrelated—hitched on because it was a quick way to get them passed despite opposition, or because their proponents could exact their enactment as the *quid pro quo* for their needed support. When we are confronted with such a so-called "Christmas tree," a law to which many nongermane ornaments have been attached, we think the proper rule must be ****2676** that when the tree no longer exists the ornaments are superfluous. We have no reliable basis for knowing which pieces of the Act would have passed on their own. It is certain that many of them would not have, and it is not a proper function of this Court to guess which. To sever the statute in that manner " 'would be to make a new law, not to enforce an old one. This is not part of our duty.' " *Trade–Mark Cases*, 100 U.S., at 99.

This Court must not impose risks unintended by Congress or produce legislation Congress may have lacked the support ***706** to enact. For those reasons, the unconstitutionality of both the Individual Mandate and the Medicaid Expansion requires the invalidation of the Affordable Care Act's other provisions.

* * *

The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. And it changes the intentionally coercive sanction of a total cut-off of Medicaid funds to a supposedly noncoercive cut-off of only the incremental funds that the Act makes available.

The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect. It makes enactment of sensible health-care regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions, provisions that certain interests favored under the Court's new design will struggle to retain. And it leaves the public and the States to expend vast sums of money on requirements that may or may not survive the necessary congressional revision.

The Court's disposition, invented and atextual as it is, does not even have the merit of avoiding constitutional difficulties. It creates them. The holding that the Individual Mandate is a tax raises a difficult constitutional question (what is a direct tax?) that the Court resolves

  

with inadequate deliberation. And the judgment on the Medicaid Expansion issue ushers in new federalism concerns and places an unaccustomed strain upon the Union. Those States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion. If that destabilizing political dynamic, so antagonistic to a harmonious Union, is *707 to be introduced at all, it should be by Congress, not by the Judiciary.

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.

The Constitution, though it dates from the founding of the Republic, has powerful meaning and vital relevance to our own times. The constitutional protections that this case involves are protections of structure. Structural protections—notably, the restraints imposed by federalism and separation of powers—are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections **2677 of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril. Today's decision should have vindicated, should have taught, this truth; instead, our judgment today has disregarded it.

For the reasons here stated, we would find the Act invalid in its entirety. We respectfully dissent.

Justice THOMAS, dissenting.

I dissent for the reasons stated in our joint opinion, but I write separately to say a word about the Commerce Clause. The joint dissent and THE CHIEF JUSTICE correctly apply *708 our precedents to conclude that the Individual Mandate is beyond the power granted to Congress under the Commerce Clause and the Necessary and Proper Clause. Under those precedents, Congress may regulate "economic activity [that] substantially affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, 560, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). I adhere to my view that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." *United States v. Morrison*, 529 U.S. 598, 627, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (THOMAS, J., concurring); see also *Lopez*, *supra*, at 584–602, 115 S.Ct. 1624 (same); *Gonzales v. Raich*, 545 U.S. 1, 67–69, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (THOMAS, J.,dissenting). As I have explained, the Court's continued use of that test "has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits." *Morrison*, *supra*, at 627, 120 S.Ct. 1740. The Government's unprecedented claim in this suit that it may regulate not only economic activity but also *inactivity* that substantially affects interstate commerce is a case in point.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The Eleventh Circuit did not consider whether the Anti–Injunction Act bars challenges to the individual mandate. The District Court had determined that it did not, and neither side challenged that holding on appeal. The same was true in the Fourth Circuit, but that court examined the question *sua sponte* because it viewed the Anti–Injunction Act as a limit on its subject matter jurisdiction. See *Liberty Univ.*, 671 F.3d, at 400–401. The Sixth Circuit and the D.C. Circuit considered the question but determined that the Anti–Injunction Act did not apply. See *Thomas More*, 651 F.3d, at 539–540 (C.A.6); *Seven–Sky*, 661 F.3d, at 5–14 (C.A.D.C.).

2 We appointed H. Bartow Farr III to brief and argue in support of the Eleventh Circuit's judgment with respect to severability, and Robert A. Long to brief and argue the proposition that the Anti–Injunction Act bars the current challenges to the individual mandate. 565 U.S. 1048, 132 S.Ct. 603, 181 L.Ed.2d 420 (2011). Both *amici* have ably discharged their assigned responsibilities.

3 The examples of other congressional mandates cited by Justice GINSBURG, *post*, at 2627, n. 10 (opinion concurring in part, concurring in judgment in part, and dissenting in part), are not to the contrary. Each of those mandates—to report for jury duty, to register for the draft, to purchase firearms in anticipation of militia service, to exchange gold currency for paper currency, and to file a tax return—are based on constitutional provisions other than the Commerce Clause. See Art. I, § 8, cl. 9 (to "constitute Tribunals inferior to the supreme Court"); *id.*, cl. 12 (to "raise and support Armies"); *id.*, cl. 16 (to "provide for organizing, arming, and disciplining, the Militia"); *id.*, cl. 5 (to "coin Money"); *id.*, cl. 1 (to "lay and collect Taxes").

4 Justice GINSBURG suggests that "at the time the Constitution was framed, to 'regulate' meant, among other things, to require action." *Post*, at 2621 (citing *Seven–Sky v. Holder*, 661 F.3d 1, 16 (C.A.D.C.2011); brackets and some internal quotation marks omitted). But to reach this conclusion, the case cited by Justice GINSBURG relied on a dictionary in which "[t]o order; to command" was the fifth-alternative definition of "to direct," which was itself the second-alternative definition of "to regulate." See *id.*, at 16 (citing S. Johnson, Dictionary of the English Language (4th ed. 1773) (reprinted 1978)). It is unlikely that the Framers had such an obscure meaning in mind when they used the word "regulate." Far more commonly, "[t]o regulate" meant "[t]o adjust by rule or method," which presupposes something to adjust. 2 *id.*, at 1619; see also *Gibbons*, 9 Wheat., at 196 (defining the commerce power as the power "to prescribe the rule by which commerce is to be governed").

5 Justice GINSBURG cites two eminent domain cases from the 1890s to support the proposition that our case law does not "toe the activity versus inactivity line." *Post*, at 2621 (citing *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 335–337, 13 S.Ct. 622, 37 L.Ed. 463 (1893), and *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 657–659, 10 S.Ct. 965, 34 L.Ed. 295 (1890)). The fact that the Fifth Amendment requires the payment of just compensation when the Government exercises its power of eminent domain does not turn the taking into a commercial transaction between the landowner and the Government, let alone a government-compelled transaction between the landowner and a third party.

6 In an attempt to recast the individual mandate as a regulation of commercial activity, Justice GINSBURG suggests that "[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." *Post*, at 2622. But "self-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, *ibid.*, than they are active in the "rest" market when doing nothing.

7 *Sotelo*, in particular, would seem to refute the joint dissent's contention that we have "never" treated an exaction as a tax if it was denominated a penalty. *Post*, at 2652. We are not persuaded by the dissent's attempt to distinguish *Sotelo* as a statutory construction case from the bankruptcy context. *Post*, at 2651, n. 5. The dissent itself treats the question here as one of statutory interpretation, and indeed also relies on a statutory interpretation case from the bankruptcy context. *Post*, at 2654 – 2655 (citing *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996)).

8 In 2016, for example, individuals making $35,000 a year are expected to owe the IRS about $60 for any month in which they do not have health insurance. Someone with an annual income of $100,000 a year would likely owe about $200. The price of a qualifying insurance policy is projected to be around $400 per month. See D. Newman, CRS Report for Congress, Individual Mandate and Related Information Requirements Under PPACA 7, and n. 25 (2011).

9 We do not suggest that any exaction lacking a scienter requirement and enforced by the IRS is within the taxing power. See *post*, at 2654 – 2655 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting). Congress could not, for example, expand its authority to impose criminal fines by creating strict liability offenses enforced by the IRS

rather than the FBI. But the fact the exaction here is paid like a tax, to the agency that collects taxes—rather than, for example, exacted by Department of Labor inspectors after ferreting out willful malfeasance—suggests that this exaction may be viewed as a tax.

10 The joint dissent attempts to distinguish *New York v. United States* on the ground that the seemingly imperative language in that case was in an "introductory provision" that had "no legal consequences." *Post,* at 2652. We did not rely on that reasoning in *New York*. See 505 U.S., at 169–170, 112 S.Ct. 2408. Nor could we have. While the Court quoted only the broad statement that "[e]ach State shall be responsible" for its waste, that language was implemented through operative provisions that also use the words on which the dissent relies. See 42 U.S.C. § 2021e(e)(1) (entitled "Requirements for non-sited compact regions and non-member States" and directing that those entities "shall comply with the following requirements"); § 2021e(e)(2) (describing "Penalties for failure to comply"). The Court upheld those provisions not as lawful commands, but as "incentives." See 505 U.S., at 152–153, 171–173, 112 S.Ct. 2408.

11 Of course, individuals do not have a lawful choice not to pay a tax due, and may sometimes face prosecution for failing to do so (although not for declining to make the shared responsibility payment, see 26 U.S.C. § 5000A(g)(2)). But that does not show that the tax restricts the lawful choice whether to undertake or forgo the activity on which the tax is predicated. Those subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.

12 Justice GINSBURG observes that state Medicaid spending will increase by only 0.8 percent after the expansion. *Post,* at 2632. That not only ignores increased state administrative expenses, but also assumes that the Federal Government will continue to fund the expansion at the current statutorily specified levels. It is not unheard of, however, for the Federal Government to increase requirements in such a manner as to impose unfunded mandates on the States. More importantly, the size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. "Your money or your life" is a coercive proposition, whether you have a single dollar in your pocket or $500.

13 Nor, of course, can the number of pages the amendment occupies, or the extent to which the change preserves and works within the existing program, be dispositive. Cf. *post,* at 2635 – 2636 (opinion of GINSBURG, J.). Take, for example, the following hypothetical amendment: "All of a State's citizens are now eligible for Medicaid." That change would take up a single line and would not alter any "operational aspect[ ] of the program" beyond the eligibility requirements. *Post,* at 2635. Yet it could hardly be argued that such an amendment was a permissible modification of Medicaid, rather than an attempt to foist an entirely new health care system upon the States.

14 Justice GINSBURG suggests that the States can have no objection to the Medicaid expansion, because "Congress could have repealed Medicaid [and,] [t]hereafter, ... could have enacted Medicaid II, a new program combining the pre–2010 coverage with the expanded coverage required by the ACA." *Post,* at 2636; see also *post,* at 2629. But it would certainly not be that easy. Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration. Such a massive undertaking would hardly be "ritualistic." *Ibid.* The same is true of Justice GINSBURG's suggestion that Congress could establish Medicaid as an exclusively federal program. *Post,* at 2632.

1 According to one study conducted by the National Center for Health Statistics, the high cost of insurance is the most common reason why individuals lack coverage, followed by loss of one's job, an employer's unwillingness to offer insurance or an insurers' unwillingness to cover those with preexisting medical conditions, and loss of Medicaid coverage. See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for the U.S. Population: National Health Interview Survey—2009, Ser. 10, No. 248, p. 71, (Dec. 2010) (Table 25). "[D]id not want or need coverage" received too few responses to warrant its own category. See *ibid.*, n. 2.

2 Despite its success, Massachusetts' medical-care providers still administer substantial amounts of uncompensated care, much of that to uninsured patients from out-of-state. See *supra,* at 2611 – 2612.

* * *

3 Alexander Hamilton described the problem this way: "[Often] it would be beneficial to all the states to encourage, or suppress[,] a particular branch of trade, while it would be detrimental ... to attempt it without the concurrence of the rest." The Continentalist No. V, in 3 Papers of Alexander Hamilton 75, 78 (H. Syrett ed. 1962). Because the concurrence of all States was exceedingly difficult to obtain, Hamilton observed, "the experiment would probably be left untried." *Ibid.*

4 See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for U.S. Adults: National Health Interview Survey 2009, Ser. 10, No. 249, p. 124 (Dec. 2010) (Table 37).

5 Echoing THE CHIEF JUSTICE, the joint dissenters urge that the minimum coverage provision impermissibly regulates young people who "have no intention of purchasing [medical care]" and are too far "removed from the [health-care] market." See *post*, at 2646, 2647. This criticism ignores the reality that a healthy young person may be a day away from needing health care. See *supra*, at 2610. A victim of an accident or unforeseen illness will consume extensive medical care immediately, though scarcely expecting to do so.

6 THE CHIEF JUSTICE's reliance on the quoted passages of the Constitution, see *ante*, at 2586 – 2587, is also dubious on other grounds. The power to "regulate the Value" of the national currency presumably includes the power to increase the currency's worth—*i.e.*, to create value where none previously existed. And if the power to "[r]egulat [e] ... the land and naval Forces" presupposes "there is already [in existence] something to be regulated," *i.e.*, an Army and a Navy, does Congress lack authority to create an Air Force?

7 THE CHIEF JUSTICE's characterization of individuals who choose not to purchase private insurance as "doing nothing," *ante*, at ——, is similarly questionable. A person who self-insures opts against prepayment for a product the person will in time consume. When aggregated, exercise of that option has a substantial impact on the health-care market. See *supra*, at 2610 – 2612, 2616 – 2618.

8 Some adherents to the joint dissent have questioned the existence of substantive due process rights. See *McDonald v. Chicago*, 561 U.S. 742, 811, 130 S.Ct. 3020, 3062, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring) (The notion that the Due Process Clause "could define the substance of th[e] righ[t to liberty] strains credulity."); *Albright v. Oliver*, 510 U.S. 266, 275, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (SCALIA, J., concurring) ("I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties[.]"). Given these Justices' reluctance to interpret the Due Process Clause as guaranteeing liberty interests, their willingness to plant such protections in the Commerce Clause is striking.

9 The failure to purchase vegetables in THE CHIEF JUSTICE's hypothetical, then, is *not* what leads to higher health-care costs for others; rather, it is the failure of individuals to maintain a healthy diet, and the resulting obesity, that creates the cost-shifting problem. See *ante*, at 2588 – 2589. Requiring individuals to purchase vegetables is thus several steps removed from solving the problem. The failure to obtain health insurance, by contrast, is the *immediate cause* of the cost-shifting Congress sought to address through the ACA. See *supra*, at 2610 – 2612. Requiring individuals to obtain insurance attacks the source of the problem directly, in a single step.

10 Indeed, Congress regularly and uncontroversially requires individuals who are "doing nothing," see *ante*, at 2587, to take action. Examples include federal requirements to report for jury duty, 28 U.S.C. § 1866(g) (2006 ed., Supp. IV); to register for selective service, 50 U.S.C.App. § 453; to purchase firearms and gear in anticipation of service in the Militia, 1 Stat. 271 (Uniform Militia Act of 1792); to turn gold currency over to the Federal Government in exchange for paper currency, see *Nortz v. United States*, 294 U.S. 317, 328, 55 S.Ct. 428, 79 L.Ed. 907 (1935); and to file a tax return, 26 U.S.C. § 6012 (2006 ed., Supp. IV).

11 In a separate argument, the joint dissenters contend that the minimum coverage provision is not necessary and proper because it was not the "only ... way" Congress could have made the guaranteed-issue and community-rating reforms work. *Post*, at 2646 – 2647. Congress could also have avoided an insurance-market death spiral, the dissenters maintain, by imposing a surcharge on those who did not previously purchase insurance when those individuals eventually enter the health-insurance system. *Ibid.*. Or Congress could "den[y] a full income tax credit" to those who do not purchase insurance. *Ibid.*

Neither a surcharge on those who purchase insurance nor the denial of a tax credit to those who do not would solve the problem created by guaranteed-issue and community-rating requirements. Neither would prompt the purchase of insurance before sickness or injury occurred.

But even assuming there were "practicable" alternatives to the minimum coverage provision, "we long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power." *Jinks v. Richland County*, 538 U.S. 456, 462, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 414–415, 4 L.Ed. 579 (1819)). Rather, the statutory provision at issue need only be "conducive" and "[reasonably] adapted" to the goal Congress seeks to achieve. *Jinks*, 538 U.S.,

at 462, 123 S.Ct. 1667 (internal quotation marks omitted). The minimum coverage provision meets this requirement. See *supra*, at 2625 – 2626.

12 THE CHIEF JUSTICE states that he must evaluate the constitutionality of the minimum coverage provision under the Commerce Clause because the provision "reads more naturally as a command to buy insurance than as a tax." *Ante*, at 2600. THE CHIEF JUSTICE ultimately concludes, however, that interpreting the provision as a tax is a "fairly possible" construction. *Ante*, at 2594 (internal quotation marks omitted). That being so, I see no reason to undertake a Commerce Clause analysis that is not outcome determinative.

13 Medicaid was "plainly an extension of the existing Kerr–Mills" grant program. Huberfeld, Federalizing Medicaid, 14 U. Pa. J. Const. L. 431, 444–445 (2011). Indeed, the "section of the Senate report dealing with Title XIX"—the title establishing Medicaid—"was entitled, 'Improvement and Extension of Kerr–Mills Medical Assistance Program.' " R. Stevens & R. Stevens, Welfare Medicine in America 51 (1974) (quoting S.Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 9 (1965)). Setting the pattern for Medicaid, Kerr–Mills reimbursed States for a portion of the cost of health care provided to welfare recipients if States met conditions specified in the federal law, *e.g.*, participating States were obliged to offer minimum coverage for hospitalization and physician services. See Huberfeld, *supra*, at 443–444.

14 Available online at http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpend Data/NationalHealthAccountsHistorical.html.

15 Even the study on which plaintiffs rely, see Brief for Petitioners in No. 11–400, p. 10, concludes that "[w]hile most states will experience some increase in spending, this is quite small relative to the federal matching payments and low relative to the costs of uncompensated care that [the States] would bear if the[re] were no health reform." See Kaiser Commission on Medicaid & the Uninsured, Medicaid Coverage & Spending in Health Reform 16 (May 2010). Thus there can be no objection to the ACA's expansion of Medicaid as an "unfunded mandate." Quite the contrary, the program is impressively well funded.

16 In 1972, for example, Congress ended the federal cash-assistance program for the aged, blind, and disabled. That program previously had been operated jointly by the Federal and State Governments, as is the case with Medicaid today. Congress replaced the cooperative federal program with the nationalized Supplemental Security Income program. See *Schweiker v. Gray Panthers*, 453 U.S. 34, 38, 101 S.Ct. 2633, 69 L.Ed.2d 460 (1981).

17 THE CHIEF JUSTICE and the joint dissenters perceive in cooperative federalism a "threa[t]" to "political accountability." *Ante*, at 2602; see *post*, at 2660 – 2661. By that, they mean voter confusion: Citizens upset by unpopular government action, they posit, may ascribe to state officials blame more appropriately laid at Congress' door. But no such confusion is apparent in this case: Medicaid's status as a federally funded, state-administered program is hardly hidden from view.

18 Although plaintiffs, in the proceedings below, did not contest the ACA's satisfaction of these criteria, see 648 F.3d 1235, 1263 (C.A.11 2011), THE CHIEF JUSTICE appears to rely heavily on the second criterion. Compare *ante*, at 2605, 2606, with *infra*, at 2637 – 2638.

19 Compare Subchapter XIX, 42 U.S.C. §§ 1396–1396v(b) (2006 ed. and Supp. IV), with §§ 1396a(a),(10)(A)(i)(VIII) (2006 ed. and Supp. IV), 1396a(a)(10)(A)(ii)(XX), 1396a(a)(75), 1396a(k), 1396a(gg) to (hh), 1396d(y), 1396r–1(e), 1396u–7(b)(5) to (6).

20 The Deficit Reduction Act of 2005 authorized States to provide "benchmark coverage" or "benchmark equivalent coverage" to certain Medicaid populations. See § 6044, 120 Stat. 88, 42 U.S.C. § 1396u–7 (2006 ed. and Supp. IV). States may offer the same level of coverage to persons newly eligible under the ACA. See § 1396a(k).

21 THE CHIEF JUSTICE observes that "Spending Clause legislation [i]s much in the nature of a *contract*." *Ante*, at 2602 (internal quotation marks omitted). See also *post*, at 2659 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.) (same). But the Court previously has recognized that "[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Bennett v. Kentucky Dept. of Ed.*, 470 U.S. 656, 669, 105 S.Ct. 1544, 84 L.Ed.2d 590 (1985).

22 Title I of the Elementary and Secondary Education Act of 1965 provided federal grants to finance supplemental educational programs in school districts with high concentrations of children from low-income families. See *Bennett v. New Jersey*, 470 U.S. 632, 634–635, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985) (citing Pub. L. 89–10, 79 Stat. 27).

23 Note, in this regard, the extension of Social Security, which began in 1935 as an old-age pension program, then expanded to include survivor benefits in 1939 and disability benefits in 1956. See Social Security Act, ch. 531, 49 Stat. 622–625;

Social Security Act Amendments of 1939, 53 Stat. 1364–1365; Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815–816.

24 The joint dissenters, for their part, would make this the entire inquiry. "[I]f States really have no choice other than to accept the package," they assert, "the offer is coercive." *Post,* at 2661. THE CHIEF JUSTICE recognizes Congress' authority to construct a single federal program and "condition the receipt of funds on the States' complying with restrictions on the use of those funds." *Ante,* at 2603 – 2604. For the joint dissenters, however, all that matters, it appears, is whether States can resist the temptation of a given federal grant. *Post,* at 2660. On this logic, any federal spending program, sufficiently large and well-funded, would be unconstitutional. The joint dissenters point to smaller programs States might have the will to refuse. See *post,* at 2663 – 2664 (elementary and secondary education). But how is a court to judge whether "only 6.6% of all state expenditures," *post,* at 2663, is an amount States could or would do without?

Speculations of this genre are characteristic of the joint dissent. See, *e.g., post,* at 2660 ("it *may* be state officials who will bear the brunt of public disapproval" for joint federal-state endeavors); *ibid.* ("federal officials ... *may* remain insulated from the electoral ramifications of their decision"); *post,* at 2661 ("a heavy federal tax ... levied to support a federal program that offers large grants to the States ... *may,* as a practical matter, [leave States] unable to refuse to participate"); *ibid.* (withdrawal from a federal program "would *likely* force the State to impose a huge tax increase"); *post,* at 2666 (state share of ACA expansion costs "*may* increase in the future" (all emphasis added; some internal quotation marks omitted)). The joint dissenters are long on conjecture and short on real-world examples.

25 The joint dissenters also rely heavily on Congress' perceived intent to coerce the States. *Post,* at 2664 – 2666; see, *e.g., post,* at 2664 ("In crafting the ACA, Congress clearly expressed its informed view that no State could possibly refuse the offer that the ACA extends."). We should not lightly ascribe to Congress an intent to violate the Constitution (at least as my colleagues read it). This is particularly true when the ACA could just as well be comprehended as demonstrating Congress' mere expectation, in light of the uniformity of past participation and the generosity of the federal contribution, that States would not withdraw. Cf. *South Dakota v. Dole,* 483 U.S. 203, 211, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) ("We cannot conclude ... that a conditional grant of federal money ... is unconstitutional simply by reason of its success in achieving the congressional objective.").

26 Federal taxation of a State's citizens, according to the joint dissenters, may diminish a State's ability to raise new revenue. This, in turn, could limit a State's capacity to replace a federal program with an "equivalent" state-funded analog. *Post,* at 2663. But it cannot be true that "the amount of the federal taxes extracted from the taxpayers of a State to pay for the program in question is relevant in determining whether there is impermissible coercion." *Post,* at 2661. When the United States Government taxes United States citizens, it taxes them "in their individual capacities" as "the people of America"—not as residents of a particular State. See *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 839, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (KENNEDY, J., concurring). That is because the "Framers split the atom of sovereignty[,] ... establishing two orders of government"—"one state and one federal"—"each with its own direct relationship" to the people. *Id.,* at 838, 115 S.Ct. 1842.

A State therefore has no claim on the money its residents pay in federal taxes, and federal "spending programs need not help people in all states in the same measure." See Brief for David Satcher et al. as *Amici Curiae* 19. In 2004, for example, New Jersey received 55 cents in federal spending for every dollar its residents paid to the Federal Government in taxes, while Mississippi received $1.77 per tax dollar paid. C. Dubay, Tax Foundation, Federal Tax Burdens and Expenditures by State: Which States Gain Most From Federal Fiscal Operations? 2 (Mar. 2006). Thus no constitutional problem was created when Arizona declined for 16 years to participate in Medicaid, even though its residents' tax dollars financed Medicaid programs in every other State.

27 As THE CHIEF JUSTICE observes, the Secretary is authorized to withhold all of a State's Medicaid funding. See *ante,* at 2604. But total withdrawal is what the Secretary *may,* not must, do. She has discretion to withhold only a portion of the Medicaid funds otherwise due a noncompliant State. See § 1396c; cf. 45 CFR § 80.10(f) (2011) (The Secretary may enforce Title VI's nondiscrimination requirement through "refusal to grant or continue Federal financial assistance, *in whole or in part.*" (emphasis added)). The Secretary, it is worth noting, may herself experience political pressures, which would make her all the more reluctant to cut off funds Congress has appropriated for a State's needy citizens.

1 The most authoritative legal dictionaries of the founding era lack any definition for "regulate" or "regulation," suggesting that the term bears its ordinary meaning (rather than some specialized legal meaning) in the constitutional text. See 2

R. Burn, A New Law Dictionary 281 (1792); G. Jacob, A New Law Dictionary (10th ed. 1782); 2 T. Cunningham, A New and Complete Law Dictionary (2d ed. 1771).

2 Justice GINSBURG is therefore right to note that Congress is "not mandating the purchase of a discrete, unwanted product." *Ante,* at 2620 (opinion concurring in part, concurring in judgment in part, and dissenting in part). Instead, it is mandating the purchase of an unwanted suite of products—*e.g.,* physician office visits, emergency room visits, hospital room and board, physical therapy, durable medical equipment, mental health care, and substance abuse detoxification. See Selected Medical Benefits: A Report From the Dept. of Labor to the Dept. of Health and Human Services (April 15, 2011) (reporting that over two-thirds of private industry health plans cover these goods and services), online at http://www.bls.gov/ncs/ebs/sp/selmedbensreport.pdf (all Internet materials as visited June 26, 2012, and available in Clerk of Court's case file).

3 In its effort to show the contrary, Justice GINSBURG's dissent comes up with nothing more than two condemnation cases, which it says demonstrate "Congress' authority under the commerce power to compel an 'inactive' landholder to submit to an unwanted sale." *Ante,* at 2621. Wrong on both scores. As its name suggests, the condemnation power does not "compel" anyone to do anything. It acts *in rem,* against the property that is condemned, and is effective with or without a transfer of title from the former owner. More important, the power to condemn for public use is a separate sovereign power, explicitly acknowledged in the Fifth Amendment, which provides that "private property [shall not] be taken for public use, without just compensation."

Thus, the power to condemn tends to refute rather than support the power to compel purchase of unwanted goods at a prescribed price: The latter is rather like the power to condemn cash for public use. If it existed, why would it not (like the condemnation power) be accompanied by a requirement of fair compensation for the portion of the exacted price that exceeds the goods' fair market value (here, the difference between what the free market would charge for a health-insurance policy on a young, healthy person with no pre-existing conditions, and the government-exacted community-rated premium)?

4 No one seriously contends that any of Congress' other enumerated powers gives it the authority to enact § 5000A *as a regulation*.

5 Of course it can be both for statutory purposes, since Congress can define "tax" and "penalty" in its enactments any way it wishes. That is why *United States v. Sotelo,* 436 U.S. 268, 98 S.Ct. 1795, 56 L.Ed.2d 275 (1978), does not disprove our statement. That case held that a "penalty" for willful failure to pay one's taxes was included among the "taxes" made nondischargeable under the Bankruptcy Code. *Id.,* at 273–275, 98 S.Ct. 1795. Whether the "penalty" was a "tax" within the meaning of the Bankruptcy Code had absolutely no bearing on whether it escaped the constitutional limitations on penalties.

6 The *amicus* appointed to defend the proposition that the Anti–Injunction Act deprives us of jurisdiction stresses that the penalty for failing to comply with the mandate "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68," 26 U.S.C. § 5000A(g)(1) (2006 ed., Supp. IV), and that such penalties "shall be assessed and collected in the same manner as taxes," § 6671(a) (2006 ed.). But that point seems to us to confirm the *inapplicability* of the Anti–Injunction Act. That the penalty is to be "assessed and collected *in the same manner as* taxes" refutes the proposition that it *is* a tax for all statutory purposes, including with respect to the Anti–Injunction Act. Moreover, elsewhere in the Internal Revenue Code, Congress has provided *both* that a particular payment shall be "assessed and collected" in the same manner as a tax *and* that no suit shall be maintained to restrain the assessment or collection of the payment. See, *e.g.,* §§ 7421(b)(1), § 6901(a); §§ 6305(a), (b). The latter directive would be superfluous if the former invoked the Anti–Injunction Act.

*Amicus* also suggests that the penalty should be treated as a tax because it is an assessable penalty, and the Code's assessment provision authorizes the Secretary of the Treasury to assess "all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title." § 6201(a) (2006 ed., Supp. IV). But the fact that such items are included as "taxes" for purposes of assessment does not establish that they are included as "taxes" for purposes of other sections of the Code, such as the Anti–Injunction Act, that do not contain similar "including" language.

7 "State expenditures" is used here to mean annual expenditures from the States' own funding sources, and it excludes federal grants unless otherwise noted.

8 This number is expressed in billions of Fiscal Year 2005 dollars.

  

9 See Office of Management and Budget, Historical Tables, Budget of the U.S. Government, Fiscal Year 2013, Table 12.1 —Summary Comparison of Total Outlays for Grants to State and Local Governments: 1940–2017 (hereinafter Table 12.1), http://www.whitehouse. gov/omb/budget/Historicals; *id.*, Table 15.2—Total Government Expenditures: 1948–2011 (hereinafter Table 15.2).

10 This number is expressed in billions of Fiscal Year 2005 dollars.

11 See Table 12.1; Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2001, p. 262 (Table 419, Federal Grants–in–Aid Summary: 1970 to 2001).

12 See Statistical Abstract of the United States: 2012, p. 268 (Table 431, Federal Grants–in–Aid to State and Local Governments: 1990 to 2011).

13 Justice GINSBURG argues that "[a] State ... has no claim on the money its residents pay in federal taxes." *Ante*, at 2641, n. 26. This is true as a formal matter. "When the United States Government taxes United States citizens, it taxes them 'in their individual capacities' as 'the people of America'—not as residents of a particular State." *Ibid.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 839, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (KENNEDY, J., concurring); some internal quotation marks omitted). But unless Justice GINSBURG thinks that there is no limit to the amount of money that can be squeezed out of taxpayers, heavy federal taxation diminishes the practical ability of States to collect their own taxes.

14 The Federal Government has a higher number for federal spending on Medicaid. According to the Office of Management and Budget, federal grants to the States for Medicaid amounted to nearly $273 billion in Fiscal Year 2010. See Office of Management and Budget, Historical Tables, Budget of the U.S. Government, Fiscal Year 2013, Table 12.3—Total Outlays for Grants to State and Local Governments by Function, Agency, and Program: 1940–2013, http://www.whitehouse.gov/omb/budget/Historicals. In that fiscal year, total federal outlays for grants to state and local governments amounted to over $608 billion, see Table 12.1, and state and local government expenditures from their own sources amounted to $1.6 trillion, see Table 15.2. Using these numbers, 44.8% of all federal outlays to both state and local governments was allocated to Medicaid, amounting to 16.8% of all state and local expenditures from their own sources.

15 The Federal Government reports a higher percentage. According to Medicaid.gov, in Fiscal Year 2010, the Federal Government made Medicaid payments in the amount of nearly $260 billion, representing 67.79% of total Medicaid payments of $383 billion. See www.medicaid.gov/Medicaid-CHIP-Program-Information/By-State/By-State.html.

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