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Insert in Chapter 1 § D.1.a. at page 65:

HOLLINGSWORTH V. PERRY, 570 U.S. ___, 133 S. Ct. 2652 (2013)—In 2008, the California Supreme Court held unconstitutional a state statute limiting marriage to opposite-sex couples. Later that year, California voters, pursuant to an initiative (known as Proposition 8), amended the state's constitution to state, "Only marriage between a man and a woman is valid or recognized in California." Proposition 8 was challenged by two same-sex couples, and was held unconstitutional by a federal district court. The defendants, including the Governor, the Attorney General, and other state officials required to enforce California's marriage law, refused to appeal this decision. The official proponents of Proposition 8 were allowed to intervene as appellants. The Court held that, even though the California Supreme Court held that the official proponents possessed standing defend the validity of Proposition 8, those proponents lacked standing as a matter of constitutional law. The official proponents lacked standing because they possessed no direct stake in the outcome, but merely an interest in "vindicat[ing] the constitutional validity of a generally applicable California law." The Court also rejected the argument that the proponents possessed standing to assert the interest of the State of California.

The dissent, in an opinion by Justice Kennedy, noted:

> Under California law, a proponent has the authority to appear in court and assert the State's interest in defending an enacted initiative when the public officials charged with that duty refuse to do so. The State deems such an appearance essential to the integrity of its initiative process. Yet the Court today concludes that this state-defined status and this state-conferred right fall short of meeting federal requirements because the proponents cannot point to a formal delegation of authority that tracks the requirements of the Restatement of Agency. But the state's definition of proponents' powers is binding on this Court. And that definition is fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III of the United States Constitution.

The dissent also rejected the Court's conclusion that prior cases required a formal agency relationship to confer standing. It also found 'ironic" the conclusion, because a "prime purpose of justiciability is to ensure vigorous advocacy, yet the Court insists upon litigation conducted by state officials whose preference is to lose the case." Relatedly, "rather than honor the principle that justiciability exists to allow disputes of public policy to be resolved by the political process rather than the courts, see *Allen v. Wright*, here the Court refuses to allow a State's authorized representatives to defend the outcome of a democratic election."

Insert in Chapter 1 § D.1.b., following Powell v. McCormack at page 73:

ZIVOTOFSKY v. CLINTON, 566 U.S. ___, 132 S. Ct. 1421 (2012)—Menachem Binyamin Zivotofsky was born in Jerusalem of American parents in 2002, making him an American citizen. An Act of Congress allowed citizens born in Jerusalem to declare their nation of birth as Israel. Zivotofsky's mother requested the State Department issue an American passport for her son, listing his place of birth as Jerusalem, Israel. The State Department, referring to its policy prohibiting it from recording Israel, issued a passport indicating Zivotofsky's place of birth as Jerusalem. On his behalf, Zivotofsky's parents sued the Secretary of State seeking equitable relief in the form of identifying Menachem's place of birth as Jerusalem, Israel. The lower courts held the case not justiciable because the suit presented a political question. The United States Court of Appeals for the District of Columbia Circuit held the Executive possessed the sole authority to recognize foreign sovereigns, and its exercise of that power was unreviewable by the judiciary.

The Supreme Court, in an opinion by Chief Justice Roberts, reversed. It held the issue was not "whether Jerusalem is the capital of Israel," but whether Zivotofsky might "vindicate his statutory right ... to choose to have Israel recorded on his passport as his place of birth." This demand, to vindicate a statutory right, did not require the federal courts to "supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be." Quoting *Marbury v. Madison*, the Court noted that deciding whether the statutory provision was constitutional required "the judicial department to say what the law is." Determining the constitutionality of the statutory provision did not intrude on a "textually demonstrable constitutional commitment" accorded the President. A political question also arose, the *Baker v. Carr* Court stated, when a "lack of judicially discoverable and manageable standards for resolving" the legal question existed. The Court rejected the government's reliance on this strand of *Baker*, holding that although "[r]esolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward the by parties," such examination was quintessentially the work of the judiciary.

Concurring in part and concurring in the judgment, Justice Sotomayor concluded that "the inquiry required by the political question doctrine [is] more demanding than that suggested by the Court." In assessing the *Baker* factors, Justice Sotomayor interpreted its six factors as reflecting "three distinct justifications": (1) the absence of court authority to decide the matter because the text of the Constitution placed that authority in another branch; (2) "decisionmaking beyond the courts' competence,"; and (3) "circumstances in which prudence may counsel against a court's resolution of an issue presented."

Justice Breyer dissented. He concluded that, as a result of four prudential considerations, "*taken together*," the political question doctrine applied: (1) the matter involved foreign relations; (2) in deciding the constitutional issue, the courts "may well have to evaluate the foreign policy implications of foreign policy decisions"; (3) the interests in obtaining a judicial resolution to this constitutional dispute "are not particularly strong ones"; and (4) "insofar as the controversy reflects different foreign policy views among the political branches of Government, those branches have

nonjudicial methods of working out their differences."

Insert in Chapter 2 § A.1. after United States v. Comstock at page 102:

NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS
567 U.S. ___, 132 S. Ct. 2566 (2012)

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.

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 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 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.

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 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 (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.

The Federal Government "is acknowledged by all to be one of enumerated powers." 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. 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 (1824). The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it." *McCulloch*.

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 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. 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.

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 Court explains this case concerns Congress's power under the Commerce Clause and the Taxing and Spending Clause.]

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*.

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's 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 (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.

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*. 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 by striking down acts of Congress that transgress those limits. *Marbury*.

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 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. [F]or 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. 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. The Act provides that the penalty will be paid to the Internal Revenue Service with an individual's taxes. The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies.

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. In order to receive that funding, States must comply with federal criteria governing matters such as who 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. 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.

We granted certiorari to review both the individual mandate and the Medicaid expansion.

III

[After concluding the Act's individual mandate was insupportable under the Commerce Clause, the Court discussed the relevance of the Necessary and Proper Clause to the constitutionality of the individual mandate.]

A
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.

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*. 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. 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 (1960) (quoting VI Writings of James Madison 383 (G. Hunt ed. 1906)).

As our jurisprudence under the Necessary and Proper Clause has developed, we 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* (quoting *McCulloch*). 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*, 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 (1997) (quoting The Federalist No. 33 (A. Hamilton)).

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*; criminalizing bribes involving organizations *receiving federal funds*, *Sabri v. United States*, 541 U.S. 600 (2004); and tolling state statutes of limitations while cases are *pending in federal court*, *Jinks v. Richland County*, 538 U.S. 456 (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*, or "incidental" to the exercise of the commerce power, *McCulloch*. 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 to regulate the interstate market" in marijuana. 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. 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." *Raich* thus did not involve the exercise of any "great substantive and independent power," *McCulloch*, of the sort at issue here. Instead, it concerned only the constitutionality of "individual *applications* of a concededly valid statutory scheme." *Raich* (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.

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.

III

A

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* (Scalia, J., concurring in judgment).

Recall that one of Congress' goals in enacting the Affordable Care Act was to eliminate the insurance industry's practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. The commerce power allows Congress to ban this practice, a point no one disputes.

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. 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. 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*. 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.

[*Raich*] (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." 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* and *New York v. United States*. The statutes at issue in both cases, however, compelled state officials to act on the Federal Government's behalf.

The minimum coverage provision, in contrast, acts "directly upon individuals, without employing the States as intermediaries." *New York*. The provision is thus entirely consistent with the Constitution's design.

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 (citing *Comstock*; *Sabri v. United States*; *Jinks v. Richland County*). 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, is underwhelming.

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; the power to imprison, including civil imprisonment; and the power to create a national bank.

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," or merely a "derivative" one. Whether the power used is "substantive," or just "incidental"? 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." First, the Affordable Care Act does not operate "in [an] are[a] such as criminal law enforcement or education where States historically have been sovereign." *Lopez*. As evidenced by Medicare, Medicaid, the Employee Retirement Income Security Act of 1974 (ERISA), and the Health Insurance Portability and Accountability Act of 1996 (HIPAA),

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. 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.

Insert in Chapter 2 § A.1. at page 102:

UNITED STATES V. KEBODEAUX, 570 U.S. ___, 133 S. Ct. 2496 (2013)—While a member of the Air Force, Anthony Kebodeaux was convicted of a sex offense by a special court-martial. Several years after he had served his three month sentence, Congress adopted the Sex Offender Registration and Notification Act (SORNA), requiring all federal sex offenders to register as such in any state in which they lived, worked, or attended school, including persons such as Kebodeaux. Although Kebodeaux had earlier registered, after moving in Texas he failed to register and was convicted of violating SORNA. He appealed, claiming SORNA was beyond Congress's Necessary and Proper Clause power. The Court, in an opinion by Justice Breyer, held the law constitutional. The Court noted that a prior act, the Wetterling Act, applied to Kebodeaux, and "[a]s applied to an individual already subject to the Wetterling Act like Kebodeaux, SORNA makes few changes." Chief Justice Roberts wrote an opinion concurring in the judgment because "I worry that incautious readers will think they have found in the majority opinion something they would not find in either the Constitution or any prior decision of ours: a federal police power."

In dissent, Justice Thomas concluded SORNA was unconstitutional because it "usurps the general police power vested in the States." As He concluded in his dissent in *United States v. Comstock*, Justice Thomas declared SORNA was beyond Congress's power because it was not "carrying into Execution" a power delegated to Congress by the Constitution. Unlike the Court, he rejected the claim that Congress was effectuating its power "to make Rules for the Government and Regulations of the land and naval Forces," Art. I, § 8, cl. 14. Instead, SORNA was "aimed at protecting society from sex offenders and violent child predators," "an important and laudable endeavor," but one of the "general police power[s] that the Framers reserved to the States or the people."

Insert in Chapter 2 § B.2.f. after Gonzales v. Raich at page 169:

NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS
567 U.S. ___, 132 S. Ct. 2566 (2012)

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.

[The first question is whether Congress possesses the power under the Commerce Clause to impose an individual mandate to purchase health insurance.]

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." The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher shop. See *Wickard v. Filburn*, 317 U.S. 111 (1942); *Perez v. United States*, 402 U.S. 146 (1971).

III

The Government advances two theories for the proposition that Congress had constitutional authority to enact the individual 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.

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, 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.

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 commerce" by creating the cost-shifting problem. The path of our Commerce Clause decisions has not always run smooth, see *United States v. Lopez*, 514 U.S. 549 (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." *United States v. Darby*. 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*.

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. 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*.

The Constitution grants Congress the power to "*regulate* Commerce." (emphasis added). The

[3]The examples of other congressional mandates cited by Justice Ginsburg 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"); cl. 12 (to "raise and support Armies"); cl. 16 (to "provide for organizing, arming, and disciplining, the Militia"); cl. 5 (to "coin Money"); cl. 1 (to "lay and collect Taxes").

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." 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." 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* ("[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").

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* ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained"); *Perez* ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class" (emphasis in original)); *Wickard* ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"); *NLRB v. Jones & Laughlin Steel Corp.* ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control").

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. That amount of wheat caused the farmer to exceed his quota under a 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.

Wickard has long been regarded as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 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 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. 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. 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. Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. 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.

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. 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 (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 No. 48 (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.

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. 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 (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."

The Government repeats the phrase "active in the market for health care" throughout its brief, 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." Our precedents recognize Congress's power to regulate "class[es] of *activities*," *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (emphasis added), not classes of individuals, apart from any activity in which they are engaged, see, e.g., *Perez*.

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

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.

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. But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.

Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize 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 says that health insurance and health care financing are "inherently integrated." 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."

* * *

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.

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.

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

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* (overruling *Hammer v. Dagenhart*, 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. ("[The commerce] power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it." 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. 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. Within the next decade, it is anticipated, spending on health care will nearly double.

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. Most people will do so repeatedly.

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. Over a lifetime, costs mount to hundreds of thousands of dollars. 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. Treatments for many serious, though not uncommon, conditions similarly cost a substantial sum.

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.

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.

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. As a group, uninsured individuals annually consume more than $100 billion in healthcare services, nearly 5% of the Nation's total.

B

The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market. 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 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.

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.

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."

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 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 preventative care, they do not receive treatment for conditions—like hypertension and diabetes—that can be successfully and affordably treated if diagnosed early on. When sickness finally drives the uninsured to seek care, once treatable conditions have escalated into grave health problems, requiring more costly and extensive intervention. The extra time and resources providers spend serving the uninsured lessens the providers' ability to care for those who do have insurance.

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 to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose." *Helvering v. Davis*, 301 U.S. 619, 644 (1937). 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*. 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 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. 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. 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.

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. 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.

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. Second, Congress required insurers to use "community rating" to price their

insurance policies. 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.

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.

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.

Massachusetts, Congress was told, cracked the adverse selection problem. By requiring most residents to obtain insurance, 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. 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 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."

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*, 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. 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. See also *McCulloch* (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.*; *Wickard*; *Lopez* (Kennedy, J., concurring). We afford Congress the leeway "to undertake to solve national problems directly and realistically." *American Power & Light Co. v. SEC*, 329 U.S. 90, 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." *Raich*. This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. *Wickard*; *Jones & Laughlin Steel Corp*.

Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. *Raich*. 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." 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.

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. 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.

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. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to "doing nothing;" it is, instead, an economic decision Congress has the authority to address under the Commerce Clause. *Wickard* ("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)).

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. 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.

D

Rather than evaluating the constitutionality of the minimum coverage provision in the manner established by our 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." (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. 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," such a limitation would be inapplicable here. Everyone will, at some point, consume health-care products and services. 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. 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."

This argument has multiple flaws. First, more than 60% of those without insurance visit a hospital or doctor's office each year. Nearly 90% will within five years. An uninsured's consumption of health care is thus 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. 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*.

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, 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 may dictate the conduct of an individual today because of prophesied future activity." 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). He could not be penalized, the farmer argued, as he was growing the wheat for home consumption, not for sale on the open market. The Court rejected this argument. 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]."

Similar reasoning supported the Court's judgment in *Raich*, which upheld Congress' authority to regulate marijuana grown for personal use. 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."

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 in this case, 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. The analogy is inapt. The inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided 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 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. 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," or "suite of products," (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. 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 affecting interstate commerce is quintessential economic regulation well within Congress' domain.

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 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.

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."

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. *Wickard*.

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. 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 (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 (1890) (similar reliance on the commerce power regarding mandated sale of private property for railroad construction).

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*. 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." *E.C. Knight Co.* ("Commerce succeeds to manufacture, and is not a part of it."); *Carter v. Carter Coal Co.* ("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* ("[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." Failing to learn from this history, The Chief Justice plows ahead with his formalistic distinction between those who are "active in commerce," 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." An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance. The minimum coverage provision could therefore be described as regulating activists in the self-insurance market. *Wickard* is another example. Did the statute there at issue 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.

2

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. 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.

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. *Lopez*; *Morrison*. *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 local school zone. Possessing 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." 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."

An individual's decision to self-insure, I have explained, is an economic act with the requisite connection to interstate commerce. 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. 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.

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. Such "pil[ing of] inference 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. *Raich*; *Wickard*. As the controversy surrounding the passage of the Affordable Care Act attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators.

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. Yet no one would offer the "hypothetical and unreal possibilit[y]," of a vegetarian state as a credible 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.").

3

To bolster his argument that the minimum coverage provision is not valid Commerce Clause legislation, The Chief Justice emphasizes the provision's novelty. "[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 (1913). 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." Hindering Congress' ability to do so is shortsighted; if history is any guide, today's constriction of the Commerce Clause will not endure.

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 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. 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.

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*, which held that the economic activity of growing wheat, even for one's own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the failure to grow wheat (which is not an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.

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 them. In our view it must follow that the entire statute is inoperative.

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." 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*, 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). It can mean to direct the 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, or "direct[ing] according to rule," Ash; 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 [the individual mandate] is "integral to the Affordable Care Act's insurance reforms" and "necessary to make effective the Act's core reforms." Congress included a "finding" to similar effect in the Act itself.

[T]he Act contains numerous health insurance reforms, but most notable for present purposes are the "guaranteed issue" and "community rating" provisions. The former provides that, with a few exceptions, "each health insurance 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." 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.

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. 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.

The Government presents the Individual Mandate as a unique feature of a complicated regulatory scheme governing many parties with countervailing incentives that must be 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.* (quoting *The Daniel Ball*, 10 Wall. 557 (1871)). Thus, Congress might protect the 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. If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, 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.

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*, 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. In *Printz v. United States*, 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. In *Lopez*, 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. And in *Morrison*, 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. 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 Proper Clause is *Raich*. 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. *Raich* is no precedent for what Congress has done here. That case's prohibition of growing (cf. *Wickard*), 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 constitution." *McCulloch*.

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. See also *Shreveport Rate Cases* (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 (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 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. 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. 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." 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." (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 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." 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. 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 [sic] health insurance coverage and [to] attempt to self-insure," since those decisions have "a substantial and deleterious effect on interstate commerce." 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*, 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 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 interstate commerce." (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, 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," 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." 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." 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.

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, 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 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," and more specifically "the problem of the uninsured." The Constitution is not that. It enumerates not federally soluble *problems*, but federally available *powers*. The Federal Government can address 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

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[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." 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)?

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. 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. 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.)

* * *

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 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.

We respectfully dissent.

Insert in Chapter 2 § D.1. at end of section at page 199:

NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS
567 U.S. ___, 132 S. Ct. 2566 (2012)

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.

[The Court held the individual mandate in the Affordable Care Act was beyond Congress's power to regulate commerce among the states. It then continued.] 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. *License Tax Cases*, 5 Wall. 462, 471 (1867). And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions. 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 (1987) (conditioning federal highway funds on States raising their drinking age to 21).

III
B

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, 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 (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 (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. 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 an additional payment to the IRS when he pays his taxes. 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 (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 (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

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. 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. 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. The requirement to pay is found in the Internal Revenue Code and enforced by the IRS. 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 (1953). Indeed, the payment is expected to raise about $4 billion per year by 2017.

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, 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 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 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.

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 can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the "prohibitory" financial punishment in *Drexel Furniture*. Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation.

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. 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.

Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. 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.

Our precedent demonstrates that Congress had the power to impose the exaction under the taxing power, and that [provision] need not be read to do more than impose a tax. That is sufficient to sustain it.

There may, however, be a more fundamental objection to a tax on those who lack health insurance. Even if only a tax, the payment 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, 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. 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.

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. 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.

Second, Congress's ability to use its taxing power to influence conduct is not without limits.

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.

By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more.

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.

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. There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage.

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. 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. The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering these newly eligible individuals through 2016. 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.

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." 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 characterized ... Spending Clause legislation as 'much in the nature of a contract.'" *Barnes v. Gorman*, 536 U.S. 181 (2002) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (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.'" *Pennhurst*. 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. 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." 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* (striking down federal legislation compelling state law enforcement officers to perform federally mandated background checks on handgun purchasers); *New York* [*v. United States*] (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 (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," the legislation runs contrary to our system of federalism. "[T]he Constitution simply does not give Congress the

authority to require the States to regulate." *New York*. 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. 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 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. We acknowledged the danger that the Federal Government might employ its taxing power to exert a "power akin to undue influence" upon the States. But we observed 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." We held that "[i]n such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power."

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." Indeed, the State itself did "not offer a suggestion that in passing the unemployment law she was affected by duress."

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 (1923). The States are separate and independent sovereigns. Sometimes they have to act like it.

The States, however, argue that Congress has "crossed the line distinguishing encouragement from coercion," 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 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 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." 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.'" (quoting *Steward Machine*). 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*.

In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head. [I]f 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." 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*. 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. 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. 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 a "prerogative" to reject Congress's desired policy, "not merely in theory but in fact." 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

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, the blind, the elderly, and needy families with dependent children. 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.

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. 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.

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 Court in *Steward Machine* did not attempt to "fix the outermost line" where persuasion gives way to coercion. 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 "conscript state [agencies] into the national bureaucratic army," *FERC v. Mississippi*, 456 U.S. 742 (1982) (O'Connor, J.), and that is what it is attempting to do with the Medicaid expansion.

* * *

The Affordable Care Act is constitutional in part and unconstitutional in part. [I]t 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.

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.

V

Through Medicaid, Congress has offered the States an opportunity to furnish health care to the poor with the aid of federal financing. 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. 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.

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 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. [F]rom 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," 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. 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

Expansion has been characteristic of the Medicaid program.

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. These amendments added millions to the Medicaid-eligible population.

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. And between 1990 and 2010, federal spending increased to $269.5 billion. 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.

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. Whatever the increase in state obligations after the ACA, it will pale in comparison to the increase in federal funding.

Finally, any fair appraisal of Medicaid would require acknowledgment of the considerable autonomy States enjoy under the Act.

The alternative to conditional federal spending, it bears emphasis, is not state autonomy but state marginalization. In 1965, Congress elected to nationalize health coverage for seniors through Medicare. 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.

B

The Spending Clause authorizes Congress "to pay the Debts and provide for the ... general Welfare of the United States." To ensure that federal funds granted to the States are spent "to 'provide for the ... general Welfare' in the manner Congress intended," 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. 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.

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.

Yes, there are federalism-based limits on the use of Congress' conditional spending power.

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, enacted in 1984. 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.

This case 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.

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 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

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 co-exist with the old.

The Medicaid expansion adds beneficiaries to the existing program and specifies the rate at

which States will be reimbursed for services provided to the added beneficiaries. 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.

Congress styled and clearly viewed the Medicaid expansion as an amendment to the Medicaid Act, not as a "new" health-care program.

Congress has broad authority to construct or adjust spending programs to meet its contemporary understanding of "the general Welfare." *Davis*. Courts owe a large measure of respect to Congress' characterization of the grant programs it establishes. See *Steward Machine*. 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?

2

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*.

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. We held that the State was not answerable in damages for violating conditions it did not "voluntarily and knowingly accep[t]." Inspecting the statutory language and legislative history, we found that the Act did not "unambiguously" impose the requirement on which the plaintiffs relied: that they receive appropriate treatment in the least restrictive environment. 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."

Pennhurst thus instructs that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." That requirement is met in this case. Section 2001 does not take effect until 2014. The ACA makes perfectly clear what will be required of States that accept Medicaid funding after that date: They must extend eligibility to adults with incomes no more than 133% of the federal poverty line.

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.

In *Bennett v. New Jersey*, 470 U.S. 632 (1985), the Secretary of Education sought to recoup Title I funds based on the State's noncompliance, from 1970 to 1972, with a 1978 amendment to Title I. Relying on *Pennhurst*, 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.

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 (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.

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.

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." 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."

Our decision in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), is guiding here. As enacted in 1935, the Social Security Act did not cover state employees. 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. The statutory provision giving States this option expressly permitted them to withdraw from the program.

Beginning in the late 1970's, States increasingly exercised the option to withdraw. 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. California objected, arguing that the change impermissibly deprived it of a right to withdraw from Social Security. We unanimously rejected California's argument. 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."

3

The Chief Justice ultimately asks whether "the financial inducement offered by Congress ...

pass[ed] the point at which pressure turns into compulsion." The financial inducement Congress employed here, he concludes, crosses that threshold.

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"? 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 case, 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? Or that the 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 (1962). Even commentators sympathetic to robust enforcement of *Dole's* limitations, have concluded that conceptions of "impermissible coercion" premised on States' perceived inability to decline federal funds "are just too amorphous to be judicially administrable."

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

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.

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 (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.

II

The Taxing Power

The Government contends that "THE MINIMUM COVERAGE PROVISION IS INDEPENDENTLY AUTHORIZED BY CONGRESS'S TAXING POWER." The phrase "independently authorized" suggests the existence of a creature never hitherto seen in the United States Reports: 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. 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 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 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. In this case, there is simply no way 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. 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" and then imposes a monetary penalty as the "principal consequence on those who transgress its standard," it creates a regulatory penalty, not a tax. *Child Labor Tax Case*.

So the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably is. It commands that every "applicable individual *shall* ... ensure that the individual ... is covered under minimum essential coverage." (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.

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*) or "surcharge" *(New York v. United States*). But we have never— never—treated as a tax an exaction which faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a "penalty." 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.

The last of the feeble arguments in favor of petitioners that we will address is the contention that what this statute 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." 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."

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. 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.

IV

The Medicaid Expansion

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

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 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*. 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] is not restricted in meaning by the grant of them."

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." 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." Instead, he wrote, the spending power's "confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress."

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*. "The discretion belongs to Congress," the Court wrote, "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." 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.

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*; *Dole*; *Steward Machine*.

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*.

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 (1999) (Kennedy, J., dissenting), 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* (O'Connor, J., dissenting) (quoting *Butler*).

Recognizing this potential for abuse, our cases have long held that the power to attach conditions to grants to the States has limits. *Dole*. For one thing, any such conditions must be unambiguous so that a State at least knows what it is getting into. See *Pennhurst*. [T]he conditional grant of federal funds may not "induce the States to engage in activities that would themselves be unconstitutional," *Dole*. 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*.

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. 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 the 'contract.'" (emphasis added). If a federal spending program coerces participation the States have not "exercise[d] their choice"—let alone made an "informed choice."

Coercing States to accept conditions risks the destruction of the "unique role of the States in our system." *Davis* (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*. 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." *New York*.

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*. 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." [*New York*.] 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*. And even state officials may favor such a "departure from the constitutional plan," since uncertainty concerning responsibility may also permit them to escape accountability. If a program is popular, state officials may claim credit; if it is unpopular, 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?

D

1

The answer to the first of these questions—the meaning of coercion in the present context—is straightforward. [T]he 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. 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 *Dole* makes clear, theoretical voluntariness is not enough.

In *Dole*, 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." 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. (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*, 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* (Kennedy, J., concurring).

2

The Federal Government's argument in this case at best pays lip service to the anticoercion principle. 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.

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 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.

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 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.

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. 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. 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.

Medicaid has long been the largest federal program of grants to the States. In 2010, the Federal Government directed more than $552 billion in federal funds to the States. Of this, more than $233 billion went to pre-expansion Medicaid. This amount equals nearly 22% of all state expenditures combined.

The States devote a larger percentage of their budgets to Medicaid than to any other item.Federal funds account for anywhere from 50% to 83% of each State's total Medicaid expenditures; most States receive more than $1 billion in federal Medicaid funding; and a quarter receive more than $5 billion. These federal dollars total nearly two thirds—64.6%—of all Medicaid expenditures nationwide.

[T]he 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. 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.

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, and equals only 6.6% of all state expenditures combined. 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 expenditures.

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.

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.

2

In crafting the ACA, Congress clearly expressed its informed view that no State could

possibly refuse the offer that the ACA extends.

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. 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. 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. As the Federal Government sees things, Congress is like the 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 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.

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.

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.

Insert in Chapter 2 § D.3. at end of section at page 200:

In *Coleman v. Court of Appeals of Maryland*, 566 U.S. ___, 132 S. Ct. 1327 (2012), the issue was whether petitioner Coleman could sue the Maryland Court of Appeals for violating the Family and Medical Leave Act (FMLA) by denying him leave to care for himself (self-care provision). In *Nevada v. Dept. of Human Resources*, 538 U.S. 721 (2003), the Court had held that the family-care provisions of the FMLA were applicable to an instrumentality of the state based on evidence of gender discrimination in family-leave policies of states. The FMLA thus abrogated the sovereign immunity claim of the states pursuant to § 5 of the Fourteenth Amendment. A plurality of the Court held that the self-care provision of the FMLA was unsupported by evidence of a pattern of gender discrimination, and thus the provision was not "congruent and proportional" under Congress's power to enforce the provisions of the Fourteenth Amendment "by appropriate legislation." The Court of Appeals of Maryland was thus constitutionally permitted to maintain its claim of sovereign immunity from suit by Coleman. The concurring opinion by Justice Scalia reiterated his view that the "congruence and proportionality" test made "no sense," and that he would abolish this "flabby test" outside of the field of racial discrimination.

The dissenting opinion by Justice Ginsburg, for four members of the Court, concluded the self-care provision was constitutionally applicable to governmental instrumentalities. The self-care provision protected the jobs of those women on leave for "recovery from delivery [of a child], a miscarriage, or the birth of stillborn baby," just as the family-care provisions protected a woman on leave from her job after childbirth, and the applicability of the provision to men as well as women was a congruent and proportional response by Congress to "challenge stereotypes of women as lone childrearers."

Insert in Chapter 3 § B. at the end of page 222:

NLRB V. NOEL CANNING
573 U.S. ___, 134 S. Ct. 2550 (2014)

Justice BREYER delivered the opinion of the Court.

Ordinarily the President must obtain "the Advice and Consent of the Senate" before appointing an "Office[r] of the United States." Art. II, § 2, cl. 2. But the Recess Appointments Clause creates an exception. It gives the President alone the power "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, cl. 3. We here consider three questions about the application of this Clause.

The first concerns the scope of the words "recess of the Senate." Does that phrase refer only to an inter-session recess (*i.e.*, a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session? We conclude that the Clause applies to both kinds of recess.

The second question concerns the scope of the words "vacancies that may happen." Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess? We conclude that the Clause applies to both kinds of vacancy.

The third question concerns calculation of the length of a "recess." The President made the appointments here at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by "*pro forma* session[s]," with "no business ... transacted," every Tuesday and Friday through January 20, 2012. In calculating the length of a recess are we to ignore the *pro forma* sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these *pro forma* sessions.

Our answer to the third question means that, when the appointments before us took place, the Senate was in the midst of a 3–day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue.

I

The case before us arises out of a labor dispute. The National Labor Relations Board (NLRB) found that a Pepsi–Cola distributor, Noel Canning, had unlawfully refused to reduce to writing and execute a collective-bargaining agreement with a labor union. The Board ordered the distributor to execute the agreement and to make employees whole for any losses.

The Pepsi–Cola distributor claimed that three of the five Board members had been invalidly appointed, leaving the Board without the three lawfully appointed members necessary for it to act.

The distributor argued that the Recess Appointments Clause did not authorize those appointments. It pointed out that on December 17, 2011, the Senate, by unanimous consent, had adopted a resolution providing that it would take a series of brief recesses beginning the following day. Pursuant to that resolution, the Senate held *pro forma* sessions every Tuesday and Friday until it returned for ordinary business on January 23, 2012. The President's January 4 appointments were made between the January 3 and January 6 *pro forma* sessions. In the distributor's view, each *pro forma* session terminated the immediately preceding recess. Accordingly, the appointments were made during a 3–day adjournment, which is not long enough to trigger the Recess Appointments Clause.

II

Before turning to the specific questions presented, we shall mention two background considerations that we find relevant to all three. First, *the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States*. The immediately preceding Clause—Article II, Section 2, Clause 2—provides the primary method of appointment. It says that the President "shall nominate, *and by and with the Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States" (emphasis added).

The Federalist Papers make clear that the Founders intended this method of appointment, requiring Senate approval, to be the norm (at least for principal officers). At the same time, the need to secure Senate approval provides "an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." [The Federalist No. 76.] Hamilton further explained that the

> "ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorise the President *singly* to make temporary appointments." The Federalist No. 67.

Thus the Recess Appointments Clause reflects the tension between, on the one hand, the President's continuous need for "the assistance of subordinates," *Myers v. United States*, 272 U.S. 52, 117 (1926), and, on the other, the Senate's practice, particularly during the Republic's early years, of meeting for a single brief session each year. We seek to interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority

routinely to avoid the need for Senate confirmation.

Second, *in interpreting the Clause, we put significant weight upon historical practice*. For one thing, the interpretive questions before us concern the allocation of power between two elected branches of Government. Long ago Chief Justice Marshall wrote that

> "a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice." *McCulloch v. Maryland*.

And we later confirmed that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions" regulating the relationship between Congress and the President. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

We recognize, of course, that the separation of powers can serve to safeguard individual liberty, and that it is the "duty of the judicial department"—in a separation-of-powers case as in any other—"to say what the law is," *Marbury v. Madison*. But it is equally true that the longstanding "practice of the government," *McCulloch*, can inform our determination of "what the law is."

That principle is neither new nor controversial. As James Madison wrote, it "was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter ... and that it might require a regular course of practice to liquidate & settle the meaning of some of them." And our cases have continually confirmed Madison's view. *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–611 (1952) (Frankfurter, J., concurring); *McCulloch*; *Stuart v. Laird*, 1 Cranch 299 (1803).

These precedents show that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era. See *Mistretta* ("While these [practices] spawned spirited discussion and frequent criticism, ... 'traditional ways of conducting government ... give meaning' to the Constitution" (quoting *Youngstown*) (Frankfurter, J., concurring)); *Regan* ("[E]ven if the pre–1952 [practice] should be disregarded, congressional acquiescence in [a practice] since that time supports the President's power to act here").

There is a great deal of history to consider here. Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances. We have not previously interpreted the Clause, and, when doing so for the first time in more than

200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.

III

The first question concerns the scope of the phrase "*the recess* of the Senate."(emphasis added). The Constitution provides for congressional elections every two years. And the 2–year life of each elected Congress typically consists of two formal 1–year sessions, each separated from the next by an "inter-session recess."

The Senate and the House also take breaks in the midst of a session. The Senate or the House announces any such "intra-session recess" by adopting a resolution stating that it will "adjourn" to a fixed date, a few days or weeks or even months later. All agree that the phrase "the recess of the Senate" covers inter-session recesses. The question is whether it includes intra-session recesses as well.

In our view, the phrase "the recess" includes an intra-session recess of substantial length. Its words taken literally can refer to both types of recess. Founding-era dictionaries define the word "recess," much as we do today, simply as "a period of cessation from usual work." 13 The Oxford English Dictionary 322–323 (2d ed. 1989) (hereinafter OED) (citing 18th- and 19th-century sources for that definition of "recess"); 2 N. Webster, An American Dictionary of the English Language (1828) ("[r]emission or suspension of business or procedure"); 2 S. Johnson, A Dictionary of the English Language 1602–1603 (4th ed. 1773) (hereinafter Johnson) (same). The Founders themselves used the word to refer to intra-session, as well as to inter-session, breaks. See, e.g., 3 Records of the Federal Convention of 1787, p. 76 (M. Farrand rev. 1966) (hereinafter Farrand) (letter from George Washington to John Jay using "the recess" to refer to an intra-session break of the Constitutional Convention); *id.*, at 191 (speech of Luther Martin with a similar usage); 1 T. Jefferson, A Manual of Parliamentary Practice § LI, p. 165 (2d ed. 1812) (describing a "recess by adjournment" which did not end a session).

We recognize that the word "the" in "*the* recess" might suggest that the phrase refers to the single break separating formal sessions of Congress. That is because the word "the" frequently (but not always) indicates "a particular thing." 2 Johnson 2003. But the word can also refer "to a term used generically or universally." 17 OED 879. The Constitution, for example, directs the Senate to choose a President *pro tempore* "in *the* Absence of the Vice–President." Art. I, § 3, cl. 5 (emphasis added). And the Federalist Papers refer to the chief magistrate of an ancient Achaean league who "administered the government in *the* recess of the Senate." Federalist No. 18 (Madison) (emphasis added). Reading "the" generically in this way, there is no linguistic problem applying the Clause's phrase to both kinds of recess. And, in fact, the phrase "the recess" was used to refer to intra-session recesses at the time of the founding. See, *e.g.*, 3 Farrand 76 (letter from Washington to Jay); New Jersey Legislative–Council Journal, 5th Sess., 1st Sitting 70, 2d Sitting 9 (1781) (twice referring to a 4–month, intra-session break as "the Recess").

The constitutional text is thus ambiguous. And we believe the Clause's purpose demands the broader interpretation. The Clause gives the President authority to make appointments during "the recess of the Senate" so that the President can ensure the continued functioning of the Federal Government when the Senate is away. The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.

History also offers strong support for the broad interpretation. We concede that pre-Civil War history is not helpful. But it shows only that Congress generally took long breaks between sessions, while taking no significant intra-session breaks at all (five times it took a break of a week or so at Christmas). Obviously, if there are no significant intra-session recesses, there will be no intra-session recess appointments. In 1867 and 1868, Congress for the first time took substantial, nonholiday intra-session breaks, and President Andrew Johnson made dozens of recess appointments. The Federal Court of Claims upheld one of those specific appointments. Attorney General Evarts also issued three opinions concerning the constitutionality of President Johnson's appointments, and it apparently did not occur to him that the distinction between intra-session and inter-session recesses was significant. Similarly, though the 40th Congress impeached President Johnson on charges relating to his appointment power, he was not accused of violating the Constitution by making intra-session recess appointments.

In all, between the founding and the Great Depression, Congress took substantial intra-session breaks (other than holiday breaks) in four years: 1867, 1868, 1921, and 1929. And in each of those years the President made intra-session recess appointments.

Since 1929, and particularly since the end of World War II, Congress has shortened its inter-session breaks as it has taken longer and more frequent intra-session breaks; Presidents have correspondingly made more intra-session recess appointments. Indeed, if we include military appointments, Presidents have made thousands of intra-session recess appointments.

Not surprisingly, the publicly available opinions of Presidential legal advisers that we have found are nearly unanimous in determining that the Clause authorizes these appointments.

We must note one contrary opinion authored by President Theodore Roosevelt's Attorney General Philander Knox. Knox advised the President that the Clause did not cover a 19–day intra-session Christmas recess. But in doing so he relied heavily upon the use of the word "the," a linguistic point that we do not find determinative. And Knox all but confessed that his interpretation ran contrary to the basic purpose of the Clause. Moreover, only three days before Knox gave his opinion, the Solicitor of the Treasury came to the opposite conclusion. We therefore do not think Knox's isolated opinion can disturb the consensus advice within the Executive Branch taking the opposite position.

What about the Senate? Since Presidents began making intra-session recess appointments, individual Senators have taken differing views about the proper definition of "the recess." But

neither the Senate considered as a body nor its committees, despite opportunities to express opposition to the practice of intra-session recess appointments, has done so.

The upshot is that restricting the Clause to inter-session recesses would frustrate its purpose. It would make the President's recess-appointment power dependent on a formalistic distinction of Senate procedure. Moreover, the President has consistently and frequently interpreted the word "recess" to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done nothing to deny the validity of this practice for at least three-quarters of a century. And three-quarters of a century of settled practice is long enough to entitle a practice to "great weight in a proper interpretation" of the constitutional provision. *The Pocket Veto Case*.

[S]ome argue that the Founders would likely have intended the Clause to apply only to inter-session recesses, for they hardly knew any other. The problem with this argument, however, is that it does not fully describe the relevant founding intent. The question is not: Did the Founders at the time think about intra-session recesses? Perhaps they did not. The question is: Did the Founders intend to restrict the scope of the Clause to the form of congressional recess then prevalent, or did they intend a broader scope permitting the Clause to apply, where appropriate, to somewhat changed circumstances? The Founders knew they were writing a document designed to apply to ever-changing circumstances over centuries. After all, a Constitution is "intended to endure for ages to come," and must adapt itself to a future that can only be "seen dimly," if at all. *McCulloch*. We therefore think the Framers likely did intend the Clause to apply to a new circumstance that so clearly falls within its essential purposes, where doing so is consistent with the Clause's language.

Second, some argue that the intra-session interpretation permits the President to make "illogic[ally]" long recess appointments. A recess appointment made between Congress' annual sessions would permit the appointee to serve for about a year, *i.e*., until the "end" of the "next" Senate "session." But an intra-session appointment made at the beginning or in the middle of a formal session could permit the appointee to serve for 1 ½; or almost 2 years (until the end of the following formal session).

We agree that the intra-session interpretation permits somewhat longer recess appointments, but we do not agree that this consequence is "illogical." A President who makes a recess appointment will often also seek to make a regular appointment, nominating the appointee and securing ordinary Senate confirmation. And the Clause ensures that the President and Senate always have at least a full session to go through the nomination and confirmation process. A recess appointment that lasts somewhat longer than a year will ensure the President the continued assistance of subordinates that the Clause permits him to obtain while he and the Senate select a regular appointee.

Third, the Court of Appeals believed that application of the Clause to intra-session recesses would introduce "vagueness" into a Clause that was otherwise clear. One can find problems of uncertainty, however, either way. In 1867, for example, President Andrew Johnson called a special session of Congress, which took place during a lengthy intra-session recess. Consider the period of

time that fell just after the conclusion of that special session. Did that period remain an intra-session recess, or did it become an inter-session recess? Historians disagree.

Or suppose that Congress adjourns *sine die*, but it does so conditionally, so that the leadership can call the members back into session when "the public interest shall warrant it." If the Senate Majority Leader were to reconvene the Senate, how would we characterize the preceding recess? Is it still inter-session? On the narrower interpretation the label matters; on the broader it does not.

The greater interpretive problem is determining how long a recess must be in order to fall within the Clause. Is a break of a week, or a day, or an hour too short to count as a "recess"? The Clause itself does not say.

[W]e think it most consistent with our constitutional structure to presume that the Framers would have allowed intra-session recess appointments where there was a long history of such practice.

Moreover, the lack of a textual floor raises a problem that plagues both interpretations—Justice Scalia's and ours. Today a brief inter-session recess is just as possible as a brief intra-session recess.

The Recess Appointments Clause seeks to permit the Executive Branch to function smoothly when Congress is unavailable. And though Congress has taken short breaks for almost 200 years, and there have been many thousands of recess appointments in that time, we have not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days. The lack of examples suggests that the recess-appointment power is not needed in that context.

There are a few historical examples of recess appointments made during inter-session recesses shorter than 10 days. But when considered against 200 years of settled practice, we regard these few scattered examples as anomalies. We therefore conclude, in light of historical practice, that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. We add the word "presumptively" to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break.

[T]he phrase "the recess" applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. And a recess lasting less than 10 days is presumptively too short as well.

IV

The second question concerns the scope of the phrase "vacancies *that may happen* during the recess of the Senate." Art. II, § 2, cl. 3 (emphasis added). All agree that the phrase applies to

vacancies that initially occur during a recess. But does it also apply to vacancies that initially occur before a recess and continue to exist during the recess? In our view the phrase applies to both kinds of vacancy.

We believe that the Clause's language, read literally, permits, though it does not naturally favor, our broader interpretation. We concede that the most natural meaning of "happens" as applied to a "vacancy" (at least to a modern ear) is that the vacancy "happens" when it initially occurs. See 1 Johnson 913 (defining "happen" in relevant part as meaning "[t]o fall out; to chance; to come to pass"). But that is not the only possible way to use the word.

[T]he linguistic question here is not whether the phrase can be, but whether it must be, read more narrowly. The question is whether the Clause is ambiguous. *The Pocket Veto Case*. We consequently go on to consider the Clause's purpose and historical practice.

The Clause's purpose strongly supports the broader interpretation. That purpose is to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them.

Examples are not difficult to imagine: An ambassadorial post falls vacant too soon before the recess begins for the President to appoint a replacement; the Senate rejects a President's nominee just before a recess, too late to select another. Thus the broader construction, encompassing vacancies that initially occur before the beginning of a recess, is the "only construction of the constitution which is compatible with its spirit, reason, and purposes; while, at the same time, it offers no violence to its language." [quoting opinion of Attorney General William Wirt]

We do not agree with Justice Scalia's suggestion that the Framers would have accepted the catastrophe envisioned by Wirt because Congress can always provide for acting officers, and the President can always convene a special session of Congress. Acting officers may have less authority than Presidential appointments. Moreover, to rely on acting officers would lessen the President's ability to staff the Executive Branch with people of his own choosing, and thereby limit the President's control and political accountability. Special sessions are burdensome (and would have been especially so at the time of the founding). The point of the Recess Appointments Clause was to avoid reliance on these inadequate expedients.

At the same time, we recognize one important purpose-related consideration that argues in the opposite direction. A broad interpretation might permit a President to avoid Senate confirmations as a matter of course. If the Clause gives the President the power to "fill up all vacancies" that occur before, and continue to exist during, the Senate's recess, a President might not submit any nominations to the Senate. He might simply wait for a recess and then provide all potential nominees with recess appointments. He might thereby routinely avoid the constitutional need to obtain the Senate's "advice and consent."

Wirt thought considerations of character and politics would prevent Presidents from abusing

the Clause in this way. He might have added that such temptations should not often arise. It is often less desirable for a President to make a recess appointment. A recess appointee only serves a limited term. That, combined with the lack of Senate approval, may diminish the recess appointee's ability, as a practical matter, to get a controversial job done. And even where the President and Senate are at odds over politically sensitive appointments, compromise is normally possible. Moreover, the Senate, like the President, has institutional "resources," including political resources, "available to protect and assert its interests." In an unusual instance, where a matter is important enough to the Senate, that body can remain in session, preventing recess appointments by refusing to take a recess. In any event, the Executive Branch has adhered to the broader interpretation for two centuries, and Senate confirmation has always remained the norm for officers that require it.

[W]e believe the narrower interpretation risks undermining constitutionally conferred powers more seriously and more often. It would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant. Overall, like Attorney General Wirt, we believe the broader interpretation more consistent with the Constitution's "reason and spirit."

Historical practice over the past 200 years strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison. There is no undisputed record of Presidents George Washington, John Adams, or Thomas Jefferson making such an appointment, though the Solicitor General believes he has found records showing that Presidents Washington and Jefferson did so. We know that Edmund Randolph, Washington's Attorney General, favored a narrow reading of the Clause. Randolph believed that the "Spirit of the Constitution favors the participation of the Senate in all appointments," though he did not address—let alone answer—the powerful purposive and structural arguments subsequently made by Attorney General Wirt.

President Adams seemed to endorse the broader view of the Clause in writing, though we are not aware of any appointments he made in keeping with that view. His Attorney General, Charles Lee, later informed Jefferson that, in the Adams administration, "whenever an office became vacant so short a time before Congress rose, as not to give an opportunity of enquiring for a proper character, they let it lie always till recess." We know that President Jefferson thought that the broad interpretation was linguistically supportable, though his actual practice is not clear. But the evidence suggests that James Madison—as familiar as anyone with the workings of the Constitutional Convention—appointed Theodore Gaillard to replace a district judge who had left office before a recess began. It also appears that in 1815 Madison signed a bill that created two new offices prior to a recess which he then filled later during the recess. He also made recess appointments to "territorial" United States attorney and marshal positions, both of which had been created when the Senate was in session more than two years before. Justice Scalia refers to "written evidence of Madison's own beliefs," but in fact we have no direct evidence of what President Madison believed. We only know that he declined to make one appointment to a pre-recess vacancy after his Secretary of War advised him that he lacked the power. On the other hand, he did apparently make at least five

other appointments to pre-recess vacancies.

The next President, James Monroe, received and presumably acted upon Attorney General Wirt's advice, namely that "all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President." Nearly every subsequent Attorney General to consider the question throughout the Nation's history has thought the same. Indeed, as early as 1862, Attorney General Bates advised President Lincoln that his power to fill pre-recess vacancies was "settled ... as far ... as a constitutional question can be settled," and a century later Acting Attorney General Walsh gave President Eisenhower the same advice "without any doubt."

This power is important. No one disputes that every President since James Buchanan has made recess appointments to pre-existing vacancies.

Common sense also suggests that many recess appointees filled vacancies that arose before the recess began.

Did the Senate object? Early on, there was some sporadic disagreement with the broad interpretation. In 1814 Senator Gore said that if "the vacancy happen at another time, it is not the case described by the Constitution." In 1822 a Senate committee, while focusing on the President's power to fill a new vacancy created by statute, used language to the same effect. And early Congresses enacted statutes authorizing certain recess appointments, a fact that may or may not suggest they accepted the narrower interpretation of the Clause. Most of those statutes—including the one passed by the First Congress—authorized appointments to newly created offices, and may have been addressed to the separate question of whether new offices are vacancies within the meaning of the Clause.

[I]n 1863 the Senate Judiciary Committee disagreed with the broad interpretation. It issued a report concluding that a vacancy "must have its inceptive point after one session has closed and before another session has begun." And the Senate then passed the Pay Act, which provided that "no money shall be paid ... as a salary, to any person appointed during the recess of the Senate, to fill a vacancy ... which ... existed while the Senate was in session." Relying upon the floor statement of a single Senator, Justice Scalia suggests that the passage of the Pay Act indicates that the Senate as a whole endorsed the position in the 1863 Report. But the circumstances are more equivocal. During the floor debate on the bill, not a single Senator referred to the Report. Indeed, Senator Trumbull, who introduced the Pay Act, acknowledged that there was disagreement about the underlying constitutional question.

In any event, the Senate subsequently abandoned its hostility. In the debate preceding the 1905 Senate Report regarding President Roosevelt's "constructive" recess appointments, Senator Tillman—who chaired the Committee that authored the 1905 Report—brought up the 1863 Report, and another Senator responded: "Whatever that report may have said in 1863, I do not think that has been the view the Senate has taken" of the issue. Senator Tillman then agreed. And Senator

Tillman's 1905 Report described the Clause's purpose in terms closely echoing Attorney General Wirt.

In 1916 the Senate debated whether to pay a recess appointee who had filled a pre-recess vacancy and had not subsequently been confirmed. Both Senators to address the question—one on each side of the payment debate—agreed that the President had the constitutional power to make the appointment, and the Senate voted to pay the appointee for his service. In 1927 the Comptroller General, a legislative officer, wrote that "there is no question but that the President has authority to make a recess appointment to fill *any* vacancy," including those that "existed while the Senate was in session." (emphasis added). Meanwhile, Presidents continued to make appointments to pre-recess vacancies.

The upshot is that the President has consistently and frequently interpreted the Recess Appointments Clause to apply to vacancies that initially occur before, but continue to exist during, a recess of the Senate. The Senate as a body has not countered this practice for nearly three-quarters of a century, perhaps longer. The tradition is long enough to entitle the practice "to great regard in determining the true construction" of the constitutional provision. *The Pocket Veto Case*. And we are reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.

In light of some linguistic ambiguity, the basic purpose of the Clause, and the historical practice we have described, we conclude that the phrase "all vacancies" includes vacancies that come into existence while the Senate is in session.

V

The third question concerns the calculation of the length of the Senate's "recess."

The President made the recess appointments before us on January 4, 2012, in between the January 3 and the January 6 *pro forma* sessions. We must determine the significance of these sessions—that is, whether, for purposes of the Clause, we should treat them as periods when the Senate was in session or as periods when it was in recess. If the former, the period between January 3 and January 6 was a 3–day recess, which is too short to trigger the President's recess-appointment power. If the latter, however, then the 3–day period was part of a much longer recess during which the President did have the power to make recess appointments.

In our view, the *pro forma* sessions count as sessions, not as periods of recess. We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here.

The standard we apply is consistent with the Constitution's broad delegation of authority to the Senate to determine how and when to conduct its business. The Constitution explicitly empowers

the Senate to "determine the Rules of its Proceedings." Art. I, § 5, cl. 2.

In addition, the Constitution provides the Senate with extensive control over its schedule. There are only limited exceptions. See Amdt. 20, § 2 (Congress must meet once a year on January 3, unless it specifies another day by law); Art. II, § 3 (Senate must meet if the President calls it into special session); Art. I, § 5, cl. 4 (neither House may adjourn for more than three days without consent of the other). See also Art. II, § 3 ("[I]n Case of Disagreement between [the Houses], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper"). The Constitution thus gives the Senate wide latitude to determine whether and when to have a session, as well as how to conduct the session. This suggests that the Senate's determination about what constitutes a session should merit great respect.

Furthermore, this Court's precedents reflect the breadth of the power constitutionally delegated to the Senate. We generally take at face value the Senate's own report of its actions. When, for example, "the presiding officers" of the House and Senate sign an enrolled bill (and the President "approve[s]" it), "its authentication as a bill that has passed Congress should be deemed complete and unimpeachable." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892).

For these reasons, we conclude that we must give great weight to the Senate's own determination of when it is and when it is not in session. But our deference to the Senate cannot be absolute. When the Senate is without the capacity to act, under its own rules, it is not in session even if it so declares. In that circumstance, the Senate is not simply unlikely or unwilling to act upon nominations of the President. It is unable to do so. The purpose of the Clause is to ensure the continued functioning of the Federal Government while the Senate is unavailable. This purpose would count for little were we to treat the Senate as though it were in session even when it lacks the ability to provide its "advice and consent." Art. II, § 2, cl. 2. Accordingly, we conclude that when the Senate declares that it is in session and possesses the capacity, under its own rules, to conduct business, it is in session for purposes of the Clause.

Applying this standard, we find that the *pro forma* sessions were sessions for purposes of the Clause. First, the Senate said it was in session. The Journal of the Senate and the Congressional Record indicate that the Senate convened for a series of twice-weekly "sessions" from December 20 through January 20. And these reports of the Senate "must be assumed to speak the truth."

Second, the Senate's rules make clear that during its *pro forma* sessions, despite its resolution that it would conduct no business, the Senate retained the power to conduct business. During *any pro forma* session, the Senate could have conducted business simply by passing a unanimous consent agreement. 'The Senate in fact conducts much of its business through unanimous consent. Senate rules presume that a quorum is present unless a present Senator questions it. And when the Senate has a quorum, an agreement is unanimously passed if, upon its proposal, no present Senator objects. It is consequently unsurprising that the Senate has enacted legislation during *pro forma* sessions even when it has said that no business will be transacted. Indeed, the Senate passed a bill by unanimous consent during the second *pro forma* session after its December 17 adjournment. And that bill

quickly became law.

By way of contrast, we do not see how the Senate could conduct business during a recess. It could terminate the recess and then, when in session, pass a bill. But in that case, of course, the Senate would no longer be in recess. It would be in session. And that is the crucial point. Senate rules make clear that, once in session, the Senate can act even if it has earlier said that it would not.

The Solicitor General asks us to engage in a more realistic appraisal of what the Senate actually did. He argues that, during the relevant *pro forma* sessions, business was not in fact conducted; messages from the President could not be received in any meaningful way because they could not be placed before the Senate; the Senate Chamber was, according to C–SPAN coverage, almost empty; and in practice attendance was not required.

We do not believe, however, that engaging in the kind of factual appraisal that the Solicitor General suggests is either legally or practically appropriate. From a legal perspective, this approach would run contrary to precedent instructing us to "respect ... coequal and independent departments" by, for example, taking the Senate's report of its official action at its word. From a practical perspective, judges cannot easily determine such matters as who is, and who is not, in fact present on the floor during a particular Senate session. Judicial efforts to engage in these kinds of inquiries would risk undue judicial interference with the functioning of the Legislative Branch.

Finally, the Solicitor General warns that our holding may "'disrup[t] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.'" We do not see, however, how our holding could significantly alter the constitutional balance. Most appointments are not controversial and do not produce friction between the branches. Where political controversy is serious, the Senate unquestionably has other methods of preventing recess appointments. [T]he Senate could preclude the President from making recess appointments by holding a series of twice-a-week ordinary (not *pro forma*) sessions. And the nature of the business conducted at those ordinary sessions—whether, for example, Senators must vote on nominations, or may return to their home States to meet with their constituents—is a matter for the Senate to decide. The Constitution also gives the President (if he has enough allies in Congress) a way to force a recess. Art. II, § 3 ("[I]n Case of Disagreement between [the Houses], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper"). Moreover, the President and Senators engage with each other in many different ways and have a variety of methods of encouraging each other to accept their points of view.

[T]he Recess Appointments Clause is not designed to overcome serious institutional friction. It simply provides a subsidiary method for appointing officials when the Senate is away during a recess. Here, as in other contexts, friction between the branches is an inevitable consequence of our constitutional structure. That structure foresees resolution not only through judicial interpretation and compromise among the branches but also by the ballot box.

VI

The Recess Appointments Clause responds to a structural difference between the Executive and Legislative Branches: The Executive Branch is perpetually in operation, while the Legislature only acts in intervals separated by recesses. The purpose of the Clause is to allow the Executive to continue operating while the Senate is unavailable.

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO join, concurring in the judgment.

This case requires us to decide whether the Recess Appointments Clause authorized three appointments made by President Obama to the National Labor Relations Board in January 2012 without the Senate's consent.

To prevent the President's recess-appointment power from nullifying the Senate's role in the appointment process, the Constitution cabins that power in two significant ways. First, it may be exercised only in "the Recess of the Senate," that is, the intermission between two formal legislative sessions. Second, it may be used to fill only those vacancies that "happen during the Recess," that is, offices that become vacant during that intermission. Both conditions are clear from the Constitution's text and structure, and both were well understood at the founding.

Today's Court agrees that the appointments were invalid, but for the far narrower reason that they were made during a 3–day break in the Senate's session. [T]he majority holds, first, that the President can make appointments without the Senate's participation even during short breaks in the middle of the Senate's session, and second, that those appointments can fill offices that became vacant long before the break in which they were filled. The majority justifies those atextual results on an adverse-possession theory of executive authority: Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor.

The Court's decision transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates. To reach that result, the majority casts aside the plain, original meaning of the constitutional text in deference to late-arising historical practices that are ambiguous at best. The majority's insistence on deferring to the Executive's untenably broad interpretation of the power is in clear conflict with our precedent and forebodes a diminution of this Court's role in controversies involving the separation of powers and the structure of government. I concur in the judgment only.

I. Our Responsibility

Today's majority disregards two overarching principles that ought to guide our consideration of the questions presented here.

First, the Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights.

Second and relatedly, when questions involving the Constitution's government-structuring provisions are presented in a justiciable case, it is the solemn responsibility of the Judicial Branch "'to say what the law is.'"

Of course, where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision. But "'[p]ast practice does not, by itself, create power.'" *Medellín v. Texas* (quoting *Dames & Moore v. Regan*). That is a necessary corollary of the principle that the political branches cannot by agreement alter the constitutional structure. Plainly, then, a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court—in other words, the sort of practice on which the majority relies in this case—does not relieve us of our duty to interpret the Constitution in light of its text, structure, and original understanding.

Ignoring our more recent precedent in this area, which is extensive, the majority relies on *The Pocket Veto Case* for the proposition that when interpreting a constitutional provision "regulating the relationship between Congress and the President," we must defer to the settled practice of the political branches if the provision is "'"in any respect of doubtful meaning."'" The language the majority quotes from that case was pure dictum. The *Pocket Veto* Court had to decide whether a bill passed by the House and Senate and presented to the President less than 10 days before the adjournment of the first session of a particular Congress, but neither signed nor vetoed by the President, became a law. Most of the opinion analyzed that issue like any other legal question and concluded that treating the bill as a law would have been inconsistent with the text and structure of the Constitution. Only near the end of the opinion did the Court add that its conclusion was "confirmed" by longstanding Presidential practice in which Congress appeared to have acquiesced. We did not suggest that the case would have come out differently had the longstanding practice been otherwise.

II. Intra–Session Breaks

I would hold that "the Recess" is the gap between sessions and that the appointments at issue here are invalid because they undisputedly were made *during* the Senate's session. The Court's contrary conclusion is inconsistent with the Constitution's text and structure, and it requires judicial fabrication of vague, unadministrable limits on the recess-appointment power (thus defined) that overstep the judicial role.

A. Plain Meaning

A sensible interpretation of the Recess Appointments Clause should start by recognizing that the Clause uses the term "Recess" in contradistinction to the term "Session." As Alexander Hamilton wrote: "The time within which the power is to operate 'during the recess of the Senate' and the duration of the appointments 'to the end of the next session' of that body, conspire to elucidate the sense of the provision." The Federalist No. 67.

In the founding era, the terms "recess" and "session" had well-understood meanings in the marking-out of legislative time. The life of each elected Congress typically consisted (as it still does) of two or more formal sessions separated by adjournments "*sine die*," that is, without a specified return date. By contrast, other provisions of the Constitution use the verb "adjourn" rather than "recess" to refer to the commencement of breaks during a formal legislative session. See, *e.g.*, Art. I, § 5, cl. 1; *id.*, § 5, cl. 4.

As every commentator on the Clause until the 20th century seems to have understood, the "Recess" and the "Session" to which the Clause refers are mutually exclusive, alternating states. See, *e.g.*, The Federalist No. 67 (explaining that appointments would require Senatorial consent "during the session of the Senate" and would be made by the President alone "in their recess"). It is linguistically implausible to suppose—as the majority does—that the Clause uses one of those terms ("Recess") informally and the other ("Session") formally in a single sentence, with the result that an event can occur during both the "Recess" and the "Session."

Besides being linguistically unsound, the majority's reading yields the strange result that an appointment made during a short break near the beginning of one official session will not terminate until the end of the *following* official session, enabling the appointment to last for up to two years.

One way to avoid the linguistic incongruity of the majority's reading would be to read both "the Recess" and "the next Session" colloquially, so that the recess-appointment power would be activated during any temporary suspension of Senate proceedings, but appointments made pursuant to that power would last only until the beginning of the next suspension (which would end the next colloquial session). That approach would be more linguistically defensible than the majority's. But it would not cure the most fundamental problem with giving "Recess" its colloquial, rather than its formal, meaning: Doing so leaves the recess-appointment power without a textually grounded principle limiting the time of its exercise.

The majority disregards another self-evident purpose of the Clause: to preserve the Senate's role in the appointment process—which the founding generation regarded as a critical protection against "'despotism,'"—by clearly delineating the times when the President can appoint officers without the Senate's consent. Today's decision seriously undercuts that purpose. In doing so, it demonstrates the folly of interpreting constitutional provisions designed to establish "a structure of government that would protect liberty," on the narrow-minded assumption that their only purpose is to make the government run as efficiently as possible.

To avoid the absurd results that follow from its colloquial reading of "the Recess," the majority is forced to declare that some intra-session breaks—though undisputedly within the phrase's colloquial meaning—are simply "too short to trigger the Recess Appointments Clause." But it identifies no textual basis whatsoever for limiting the length of "the Recess," nor does it point to any clear standard for determining how short is too short. It is inconceivable that the Framers would have left the circumstances in which the President could exercise such a significant and potentially dangerous power so utterly indeterminate. Other structural provisions of the Constitution that turn

on duration are quite specific: Neither House can adjourn "for more than three days" without the other's consent. Art. I, § 5, cl. 4. The President must return a passed bill to Congress "within ten Days (Sundays excepted)," lest it become a law. *Id.*, § 7, cl. 2.

Fumbling for some textually grounded standard, the majority seizes on the Adjournments Clause. According to the majority, that clause establishes that a 3–day break is always "too short" to trigger the Recess Appointments Clause. [T]he fact that the Constitution includes a 3–day limit in one clause but omits it from the other weighs strongly against finding such a limit to be implicit in the clause in which it does not appear.

B. Historical Practice

For the foregoing reasons, the Constitution's text and structure unambiguously refute the majority's freewheeling interpretation of "the Recess." The majority, however, insists that history "offers strong support" for its interpretation. The historical practice of the political branches is, of course, irrelevant when the Constitution is clear. But even if the Constitution were thought ambiguous on this point, history does not support the majority's interpretation.

[The opinion then assesses the history of "intra-session breaks."]

Intra-session recess appointments were virtually unheard of for the first 130 years of the Republic, were deemed unconstitutional by the first Attorney General to address them, were not openly defended by the Executive until 1921, were not made in significant numbers until after World War II, and have been repeatedly criticized as unconstitutional by Senators of both parties. It is astonishing for the majority to assert that this history lends "strong support" to its interpretation of the Recess Appointments Clause. And the majority's contention that recent executive practice in this area merits deference because the Senate has not done more to oppose it is utterly divorced from our precedent.

Moreover, the majority's insistence that the Senate gainsay an executive practice "as a body" in order to prevent the Executive from acquiring power by adverse possession will systematically favor the expansion of executive power at the expense of Congress. In any controversy between the political branches over a separation-of-powers question, staking out a position and defending it over time is far easier for the Executive Branch than for the Legislative Branch. All Presidents have a high interest in expanding the powers of their office, since the more power the President can wield, the more effectively he can implement his political agenda. The majority's methodology thus all but guarantees the continuing aggrandizement of the Executive Branch.

III. Pre–Recess Vacancies

I would hold that the recess-appointment power is limited to vacancies that arise during the recess in which they are filled, and I would hold that the appointments at issue here—which undisputedly filled pre-recess vacancies—are invalid for that reason as well as for the reason that

they were made during the session. The Court's contrary conclusion is inconsistent with the Constitution's text and structure, and it further undermines the balance the Framers struck between Presidential and Senatorial power. Historical practice also fails to support the majority's conclusion on this issue.

A. Plain Meaning

[N]o reasonable reader would have understood the Recess Appointments Clause to empower the President to fill all vacancies that might exist during a recess, regardless of when they arose. For one thing, the Clause's language would have been a surpassingly odd way of giving the President that power.

For another thing, the majority's reading not only strains the Clause's language but distorts its constitutional role, which was meant to be subordinate. As Hamilton explained, appointment with the advice and consent of the Senate was to be "the general mode of appointing officers of the United States." The Federalist No. 67. The unilateral power conferred on the President by the Recess Appointments Clause was therefore understood to be "nothing more than a supplement" to the "general method" of advice and consent. [*Id*.]

On the majority's reading, the President would have had no need *ever* to seek the Senate's advice and consent for his appointments: Whenever there was a fair prospect of the Senate's rejecting his preferred nominee, the President could have appointed that individual unilaterally during the recess, allowed the appointment to expire at the end of the next session, renewed the appointment the following day, and so on *ad infinitum*.

B. Historical Practice

[I]t is clear that the Constitution authorizes the President to fill unilaterally only those vacancies that arise during a recess, not every vacancy that happens to exist during a recess. Again, however, the majority says "[h]istorical practice" requires the broader interpretation. And again the majority is mistaken. Even if the Constitution were wrongly thought to be ambiguous on this point, a fair recounting of the relevant history does not support the majority's interpretation.

[The opinion then assesses the history of "using a recess appointment to fill a pre-recess vacancy."]

In sum: Washington's and Adams' Attorneys General read the Constitution to restrict recess appointments to vacancies arising during the recess, and there is no evidence that any of the first four Presidents consciously departed from that reading. The contrary reading was first defended by an executive official in 1823, was vehemently rejected by the Senate in 1863, was vigorously resisted by legislation in place from 1863 until 1940, and is arguably inconsistent with legislation in place from 1940 to the present. The Solicitor General has identified only about 100 appointments that have ever been made under the broader reading, and while it seems likely that a good deal more have been

made in the last few decades, there is good reason to doubt that many were made before 1940 (since the appointees could not have been compensated). I can conceive of no sane constitutional theory under which this evidence of "historical practice"—which is actually evidence of a long-simmering inter-branch conflict—would require us to defer to the views of the Executive Branch.

IV. Conclusion

What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice. Even if the Executive could accumulate power through adverse possession by engaging in a consistent and unchallenged practice over a long period of time, the oft-disputed practices at issue here would not meet that standard. Nor have those practices created any justifiable expectations that could be disappointed by enforcing the Constitution's original meaning. There is thus no ground for the majority's deference to the unconstitutional recess-appointment practices of the Executive Branch.

The real tragedy of today's decision is not simply the abolition of the Constitution's limits on the recess-appointment power and the substitution of a novel framework invented by this Court. It is the damage done to our separation-of-powers jurisprudence more generally. It is not every day that we encounter a proper case or controversy requiring interpretation of the Constitution's structural provisions. Most of the time, the interpretation of those provisions is left to the political branches—which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. We should therefore take every opportunity to affirm the primacy of the Constitution's enduring principles over the politics of the moment. Our failure to do so today will resonate well beyond the particular dispute at hand.

Insert in Chapter 3 § E.1. at page 248:

ZIVOTOFSKY V. KERRY, 576 U.S. ___, 132 S. Ct. 1421 (2015)—Zivotofsky was born in Jerusalem to American parents. They requested officials of the American embassy in Israel list his birth on his passport not as "Jerusalem," but as "Jerusalem, Israel," pursuant to a 2003 act of Congress. These executive officials refused to do so, and Zivotofsky sued, through his parents. The Court held the President possesses the sole power to accord formal recognition of a foreign sovereign. The Act was thus unconstitutional. The Court noted that no President had recognized the sovereign authority of Israel over Jerusalem. Using Justice Jackson's "familiar tripartite framework from *Youngstown Sheet & Tube Co.*," the Court upheld the President's decision even though he was acting in Justice Jackson's third category, in which he must "rely solely on powers the Constitution grants to him alone." The Court held that the Reception Clause of Art. II, § 3, which declares that the President "shall receive Ambassadors and other public Ministers," the power to make treaties and to appoint ambassadors, meant "the Constitution thus assigns the President means to effect recognition [of foreign sovereigns] on his own initiative." That text and the structure of the Constitution meant the President's power to recognize foreign nations was exclusive. Though the power of recognition was exclusive, "many of the policy determinations that precede and follow the act of recognition itself" were subject to Congress's "substantial authority." Thus, [i]n practice, then, the President's recognition determination is just one part of a political process that may require Congress to make laws."

The dissent by Chief Justice Roberts began, "Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs." His opinion argued the Reception Clause was of little help because it was made a part of the President's duties rather than powers, and the other textual provisions, to make treaties and appoint ambassadors were "even more tenuous" because those are shared powers that "hardly support an inference that the recognition power is *exclusive*."

The dissent by Justice Scalia concluded that the difficulties of the issue whether the President possessed exclusive power to recognize a foreign sovereign were not implicated by the congressional act, for it "does not require the Secretary [of State] to make a formal declaration about Israel's sovereignty over Jerusalem."

Insert in Chapter 4 § B.2.b. at page 276 after Chart 4-3:

McBURNEY V. YOUNG, 569 U.S. ___, 133 S. Ct. 1709 (2013)—A unanimous Court held constitutional a provision in Virginia's Freedom of Information Act (FOIA) that makes public records available to any Virginia citizen, but not to citizens of other states. Roger Hurlbert, a Californian and one of the petitioners, operated an information services business, and claimed the refusal of Virginia to grant his FOIA request violated the Privileges and Immunities Clause of Article IV, § 2 and the dormant commerce clause. After holding Virginia did not violate any privilege and immunity of the out-of-state citizens (see § C.2. below), it concluded, in § III of its opinion, that the FOIA did not violate the dormant commerce clause because "Virginia's FOIA law neither 'regulates' nor 'burdens' interstate commerce; rather, it merely provides a service to local citizens that would not otherwise be available at all." In dictum, the Court declared that, even if the FOIA law was "shoehorned" into the doctrinal framework of the dormant commerce clause, the claim failed. It failed because the "market" for public information was created by the Commonwealth of Virginia, and thus those benefits could be limited by the "sole manufacturer" of the "product." The Court then cited in support its market participation decision in *Reeves, Inc. v. Stake* (see § B.3.d., below).

Insert in Chapter 4 § C.2. after Toomer v. Witsell at page 310:

McBURNEY V. YOUNG, 569 U.S. ___, 133 S. Ct. 1709 (2013)—A unanimous Court held constitutional a provision in Virginia's Freedom of Information Act (FOIA) that makes public records available to any Virginia citizen, but not to citizens of other states. Mark McBurney and Roger Hurlbert, citizens of Rhode Island and California, made FOIA requests, which Virginia denied because they were not citizens of the state. McBurney claimed Virginia's Child Support Enforcement division contributed to a delay in child support payments owed him, and requested documents to understand the reason for the delay. Hurlbert operates an information services business. He was asked to obtain some real estate tax records from a county in Virginia, and like McBurney, his request was denied.

McBurney and Hurlbert argued that Virginia's decision violated four privileges and immunities: "[T]he opportunity to pursue a common calling, the ability to own and transfer property, access to the Virginia courts, and access to public information." The Court held that though the first three items were privileges and immunities, none was "abridged by the Virginia FOIA, and the fourth—framed broadly—is not protected by the Privileges and Immunities Clause." Hurlbert was not denied the opportunity to engage in a common calling, the Court concluded, because the FOIA was not adopted "for the protectionist purpose of burdening out-of-state citizens." The claimed access to public information was not a privilege and immunity because the "Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws." As a historical matter, "[i]t certainly cannot be said that such a broad right has 'at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.'" (Quoting *Corfield v. Coryell*) Additionally, access to public information was not recognized at common law.

Insert in Chapter 6 § C.5.c. after Zablocki v. Redhail at page 455:

UNITED STATES V. WINDSOR, 570 U.S. ___, 133 S. Ct. 2675 (2013)—The Court held unconstitutional the federal Defense of Marriage Act (DOMA) as violative of the liberty interest of the Fifth Amendment's Due Process Clause, which includes an equal protection component. Noting that DOMA applied to "over 1,000 federal statutes and a whole realm of federal regulations," and concluding that "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage," the Court declared that "DOMA seeks to injure the very class New York [by recognizing as valid marriage between two persons of the same gender] seeks to protect." This "violates basic due process and equal protection principles." DOMA "deprives same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriage, ... [which] is strong evidence of a law having the purpose and effect of disapproval of that class." This approach impermissibly stigmatizes and demeans persons who have lawfully entered into marriage and invades the liberty granted to persons by the Constitution.

The Court's decision in Windsor left open the issue of the constitutionality of state bans on same-sex marriages. The Court decided this issue in 2015 in *Obergefell v. Hodges*, which follows.

OBERGEFELL v. HODGES
576 U.S. ___, 2015 WL 2473451 (2015)

Justice KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

II
A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that

marriage lies at the foundation of government. This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians.

Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*. There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans,* the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers,* holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas*.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 852 P.2d 44.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge v. Department of Public Health*. After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. Two Terms ago, in *United States v. Windsor*, this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed.

III

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected

by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e.g., Eisenstadt v. Baird*; *Griswold v. Connecticut*.

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe v. Ullman*, (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protection by the Constitution. In *Loving v. Virginia*, which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki v. Redhail*. The Court again applied this principle in *Turner v. Safley*, which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause.

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson,* a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected.

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is

fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.

Choices about marriage shape an individual's destiny.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold*.

The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. [W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*. Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*. Marriage also affords the permanency and stability important to children's best interests.

Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and

many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago: "There is certainly no country in the world where the tie of marriage is so much respected as in America."

In *Maynard v. Hill,* 125 U.S. 190 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." This idea has been reiterated even as the institution has evolved in substantial ways over time. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. Valid marriage under state law is also a significant status for over a thousand provisions of federal law.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just,

but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

[R]espondents assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." *Washington v. Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.

In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The reasons why marriage is a fundamental right

became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law. It was the essential nature of the marriage right, discussed at length in *Zablocki* that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, invidious sex-based classifications in marriage remained common through the mid-20th century. These classifications denied the equal dignity of men and women.

In *Eisenstadt v. Baird,* the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. And in *Skinner v. Oklahoma ex rel. Williamson,* the Court invalidated under both principles a law that allowed sterilization of habitual criminals.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. *Lawrence* drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime."

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be drprived of that right and that liberty The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.

IV

There may be an initial inclination in these cases to proceed with caution–to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Indeed, it is most often through democracy that liberty is preserved and protected in our lives.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers,* a bare majority upheld a law criminalizing same-sex intimacy. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. That is why *Lawrence* held *Bowers* was "not correct when it was decided." Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers,* would be unjustified under the Fourteenth Amendment.

Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's

decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilizations's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Chief Justice ROBERTS, with whom Justice SCALIA and Justice THOMAS join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78 (A. Hamilton).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Many people will rejoice at this decision, and I begrudge none their celebration. But for those

who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." *Lochner v. New York* (Holmes, J., dissenting). The majority seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question.

I

[T]he Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"?

The majority largely ignores these questions.

A

Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and

material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without.

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way.

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant's separate status. Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy," were repealed by many States and ultimately struck down by this Court.

[T]hese developments did not work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured.

B

Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

II

Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

A

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington v. Glucksberg*; see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford*. There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so.

Dred Scott's holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner v. New York,* this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract."

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." The majority's contrary conclusion required adopting as constitutional law "an economic theory which a large part of the country does not entertain." (Holmes, J.). As Justice Holmes memorably put it, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism.

In the decades after *Lochner,* the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." *Adkins* (Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected "liberty," the *Lochner* line of cases left "no alternative to regarding the court as a ... legislative chamber." L. Hand, The Bill of Rights 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Okla., Inc*.

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for "judicial self-restraint." Our precedents have required that implied fundamental rights be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*.

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach.

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identifying fundamental rights does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." *Griswold* (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner*; *Zablocki*; *Loving*. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, *where neither party owes child support or is in prison*." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman *of the same race*." Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental "right of privacy." *Griswold*.

The Court also invoked the right to privacy in *Lawrence*. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior ... in the most private of places, the home."

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneliness" by the laws challenged in these cases—no one. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in *Poe v. Ullman*. As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." Justice Harlan's opinion makes clear that courts implying fundamental rights are not "free to roam where unguided speculation might take them." They must instead have "regard to what history teaches" and exercise not only "judgment" but "restraint." Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up ... form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."

In sum, the privacy cases provide no support for the majority's position, because petitioners

do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State.

3

[T]he majority goes out of its way to jettison the "careful" approach to implied fundamental rights taken by this Court in *Glucksberg*. It is revealing that the majority's position requires it to effectively overrule *Glucksberg.* At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: *Lochner*. The majority opens its opinion by announcing petitioners' right to "define and express their identity." The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor." *Lochner* (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*.

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their

children would otherwise "suffer the stigma of knowing their families are somehow lesser," why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

4

Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." This argument again echoes *Lochner*.

Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due the people on issues of this sort—the democratic process.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now.

III

[T]he marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence* (O'Connor, J., concurring in judgment).

IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments."

That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making "new dimensions of freedom ... apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary."

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" *amicus* briefs in these cases alone. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will.

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly reexamining their positions, and either reversing course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate.

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends

to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

3

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not.

When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect.

This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003. They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry

Friendly—could not.

The opinion is couched in a style that is as pretentious as its content is egotistic. Rights, we are told, can "rise ... from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. Yet the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic.

I

I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. Worse, it invites judges to do exactly what the majority has done here—"'roa[m] at large in the constitutional field' guided only by their personal views" as to the "'fundamental rights'" protected by that document. *Planned Parenthood of Southeastern Pa. v. Casey* (Rehnquist, C.J., concurring in judgment in part and dissenting in part) (quoting *Griswold* (Harlan, J., concurring in judgment)).

II

The majority claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

A

1

As used in the Due Process Clauses, "liberty" most likely refers to "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." Blackstone. That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Both of the Constitution's Due Process Clauses reach back to Magna Carta.

After Magna Carta became subject to renewed interest in the 17th century, William Blackstone referred to this provision as protecting the "absolute rights of every Englishman."

The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property." State decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word "liberty" to refer only to freedom from physical restraint. Even one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding classically associated with obtaining freedom from physical restraint.

When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when "liberty" was paired with "life" and "property." And that usage avoids rendering superfluous those protections for "life" and "property."

If the Fifth Amendment uses "liberty" in this narrow sense, then the Fourteenth Amendment likely does as well. [T]his Court's earliest Fourteenth Amendment decisions appear to interpret the Clause as using "liberty" to mean freedom from physical restraint. In *Munn v. Illinois*, for example, the Court recognized the relationship between the two Due Process Clauses and Magna Carta, and implicitly rejected the dissent's argument that " 'liberty' " encompassed "something more ... than mere freedom from physical restraint or the bounds of a prison."

2

Even assuming that the "liberty" in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke. Locke described men as existing in a state of nature, possessed of the "perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their

natural liberty for an increase in their security. Upon consenting to that order, men obtained civil liberty, or the freedom "to be under no other legislative power but that established by consent in the commonwealth."

This philosophy permeated the 18th-century political scene in America.

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. [A]s one scholar put it in 1776, "[T]he common idea of liberty is merely negative, and is only the *absence of restraint*."

B

Whether we define "liberty" as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it.

Petitioners' misconception of liberty carries over into their discussion of our precedents identifying a right to marry. Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving*, for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia. *Zablocki* involved a man who was prohibited, on pain of criminal penalty, from "marry[ing] in Wisconsin or elsewhere" because of his outstanding child-support obligations. And *Turner* involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons. In *none* of those cases were individuals denied solely governmental recognition and benefits associated with marriage.

III

A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, "give up all the power necessary to the ends for which they unite into society, to the majority of the community," Locke, they reserve the authority to exercise natural liberty within the bounds of laws established by that society. To protect that liberty from arbitrary interference, they establish a process by which that society can adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal Constitution serving as a backstop for that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine *any* law on which all residents of a State would agree. What matters is that the process established by those who created the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage.

IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples. The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal" and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State. Today's decision casts that truth aside. Its decision will have inestimable consequences for our Constitution and our society.

Justice ALITO, with whom Justice SCALIA and Justice THOMAS join, dissenting.

I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term "liberty" in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today's majority, it has a distinctively postmodern meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'" *Glucksberg*. And it is beyond dispute that the right to same-sex marriage is not among those rights.

For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by

benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

[T]he States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women. This development undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes of marriage in 21st-century America have changed, those States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in *Windsor* :

> "The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.
> "We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are those who think that allowing same-sex

marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.

"At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment."

III

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African–Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Insert in Chapter 6 § D.1. at page 519:

A unanimous Court held in *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. ___, 133 S. Ct. 511 (2012), that a taking may occur "when government-induced flood invasions, although repetitive, are temporary." The Court noted that its takings jurisprudence "has recognized few invariable rules in this area," and indicated that its rejection of "a categorical bar to temporary-flooding takings claims, however, is scarcely to credit all, or even many, such claims. It is of course incumbent on courts to weigh carefully the relevant factors and circumstances in each case."

In *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. ___, 133 S. Ct. 2586 (2013), the Court held that the actions of the St. Johns River Water Management District in denying a land-use permit violated the Takings Clause. The Court noted that the Water Management District declined to issue a land-use permit to develop a part of the owner's property after the District and the owner could not agree on how to offset the environmental harm to wetlands on the property arising from construction. A Florida trial court found the District's requests for mitigation of environmental harm "lacked both a nexus and rough proportionality to the environmental impact of the proposed construction," the standards set forth by the Supreme Court in *Nollan* and *Dolan*, and held unlawful the actions of the District. The Florida Supreme Court held that the *Nollan/Dolan* standards do not apply when a state entity denies a land-use application "because [the landowner] refused to make concessions" rather than deciding to refuse to approve the application on condition that the landowner accept the entity's demands. It also distinguished *Nollan* and *Dolan* on the ground that in those two cases the government demanded an interest in real property, and here the District demanded the plaintiff spend money to mitigate any environmental impact. The Supreme Court held that the nexus and rough proportionality standards applied to a denial of an application, not just a conditional approval. Regarding the Florida Supreme Court's second conclusion, the Court held that "'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*."

The Court also declared that because the application was denied and the land was never taken (because the condition was never enforced), the particular remedy available to the landowner depends on state law, because the claim was made pursuant to state law.

Justice Kagan, writing for the four dissenters, agreed that *Nollan-Dolan* applied to a denial of a permit application, not just conditional approvals, and further agreed that in such cases, the remedy available to the plaintiff depends on law other than the just compensation provision of the Takings Clause. The dissenters disagreed on the second issue, whether a government's demand for "monetary exactions" triggers the *Nollan-Dolan* standard. The dissent noted that the Court had already held that, independent of the permitting process, if the government required a landowner to pay money to I, or expend funds on behalf of the government, such action was not a taking. Consequently, "a requirement that a person pay money to repair public wetlands is not a taking." And, the dissenting opinion concluded, the fact that the demand arose out of the permitting process was insufficient by itself "to trigger heightened scrutiny."

HORNE V. DEPARTMENT OF AGRICULTURE, 576 U.S. ___, 2015 WL 2473384 (2015)—The Department of Agriculture, under the Agriculture Marketing Agreement Act of 1937, issued marketing orders to reduce to stabilize the market for food commodities, in this case, raisins. One of those orders created a committee that required raisin growers to set aside some of their crop for the federal government, which was called a reserve requirement. Horne refused to set aside any raisins for the government, and was fined. The Court held the Takings Clause applied to personal property as well as real property, and that the reserve requirement constituted a physical taking, making the reserve requirement a *per se* taking.

In dissent, Justice Sotomayor noted that the Horne's retained a property interest in the raisins subject to the reserve requirement, "the right to receive some money for their disposition." The existence of "one property right that is not destroyed is sufficient to defeat a claim of a *per se* taking" under the Court's jurisprudence.

Insert in Chapter 7 § B.1. after New York City Transit Auth. v. Beazer at page 546:

The Court's deference to governmental decisions challenged as lacking a rational basis under the Equal Protection Clause is again demonstrated in *Armour v. City of Indianapolis*, 566 U.S. ___, 132 S. Ct. 2073 (2012). Indiana law allowed cities to impose upon landowners the cost of sewer improvement projects. Landowners could either pay a lump sum or pay the assessment over time. When the city of Indianapolis adopted a new assessment and payment system, it forgave the existing debts owed by landowners who were paying on an installment plan. It did not provide an equivalent refund to those landowners who had paid a lump sum, and those landowners sued.

The Court held the decision of the City to forgive the debts of some landowners and refuse to provide refunds to other landowners possessed a rational basis. First, "administrative considerations can justify a tax-related distinction." The Court concluded that continuing to assess those paying under the old assessment system by installment payments "could have proved complex and expensive." Second, to "have added refunds to forgiveness would have meant adding yet further administrative costs," providing another rational basis for its decision. Third, the decision to forgive some debts and not refund equivalent amounts paid by others drew a line "well known to the law," found, for example, in tax amnesty programs.

The dissent by Chief Justice Roberts noted that some landowners had paid the $9,278 in a lump sum, while "identically situated neighbors paid" "as little as $309.27." A disparity in payments of "*30 times more*" between landowners when the state promised equal treatment did not meet the rational basis test. The dissent noted that administrative convenience was a sufficient rationale for differential treatment when the government created different classes of taxable entities, but had never been held sufficient when the state had created a group (here, the abutting landowners) "within the same class." Further, as a factual matter, the City knew exactly how much each landowner had overpaid, "to the penny," leaving the City's administrative convenience argument without merit.

Insert in Chapter 7 § B.1. at page 557:

UNITED STATES V. WINDSOR, 570 U.S. ___, 133 S. Ct. 2675 (2013)—The Court held unconstitutional the federal Defense of Marriage Act (DOMA) as violative of the liberty interest of the Fifth Amendment's Due Process Clause, which includes an equal protection component. Noting that DOMA applied to "over 1,000 federal statutes and a whole realm of federal regulations," and concluding that "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage," the Court declared that "DOMA seeks to injure the very class New York [by recognizing as valid marriage between two persons of the same gender] seeks to protect." This "violates basic due process and equal protection principles." DOMA "deprives same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriage, ... [which] is strong evidence of a law having the purpose and effect of disapproval of that class." This approach impermissibly stigmatizes and demeans persons who have lawfully entered into marriage and invades the liberty granted to persons by the Constitution.

Insert in Chapter 7 § D. at page 614:

In *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. ___, 134 S. Ct. 1623 (2014), the Supreme Court held constitutional Proposal 2, adopted in a 2006 referendum by a majority of Michigan voters after the Court's 2003 decision in *Grutter* upheld race-based affirmative action in law school admissions. Proposal 2 declared in pertinent part that state colleges and universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Plaintiffs alleged Proposal 2 was unconstitutional, and an *en banc* Sixth Circuit agreed in an 8-7 vote. The Court reversed. It noted that the case was "not about the constitutionality, or the merits, of race-conscious admissions policies in higher education." It limited the issue to "whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions." The Court held "simply that the courts may not disempower the voters from choosing" whether to adopt race-conscious affirmative action admissions programs.

Insert in Chapter 7 § D. at page 615:

FISHER V. UNIVERSITY OF TEXAS AT AUSTIN, 570 U.S. ___, 133 S. Ct. 2411 (2013)—The Court, in an opinion by Justice Kennedy, held that the Fifth Circuit failed properly to analyze the affirmative action admissions program of the University of Texas at Austin under the strict scrutiny test. Using the standards set forth in *Bakke v. University of California*, *Grutter* and *Gratz*, the Court held that, even when the University's goal of racial diversity is a compelling interest, "[t]he University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal." And, unlike the goal of diversity, "[o]n this point, the University receives no deference." In determining whether the state actor used narrowly tailored means, the "reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity." The Court concluded, "Strict scrutiny must not be 'strict in theory, but fatal in fact,' ... but the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact." It reversed and remanded.

On remand, the Fifth Circuit, in a 2-1 vote, held constitutional UT's affirmative action program using strict scrutiny. *See Fisher v. University of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014), *pet. for rehearing den*., 771 F.3d 274 (5th Cir. 2014). The Supreme Court granted plaintiff-petitioner Fisher's petition for a writ of certiorari on June 29, 2015.

Insert in Chapter 8 § A.3. at page 656:

McCULLEN V. COAKLEY, 573 U.S. ___, 134 S. Ct. 2518 (2014)—A Massachusetts law made it a crime to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance to a reproductive health care facility, defined as a place other than a hospital that, among other services, performed abortions. McCullen and others engaged in "sidewalk counseling," attempting to persuade women approaching the entrance of a reproductive health care facilities in Massachusetts. The Court held the statute unconstitutional, though it concluded the statute was content-neutral because the sidewalk counselors "can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word." It accepted that the law inevitably affected "abortion-related speech more than speech on other subjects," but concluded the purposes of the statute, to allowed unobstructed use of public sidewalks, to protect public safety and patient access to healthcare, were content neutral purposes. The Court refused to assume that the limited scope of the Act (*i.e.*, it applied only to public sidewalks near reproductive health care facilities, and not at other public buildings) made the law content-based. Because the statute substantially burdened more speech than necessary to serve the significant interest of the government, it was not narrowly tailored, and was thus unconstitutional.

REED V. TOWN OF GILBERT, 576 U.S. ___, 135 S. Ct. 2218 (2015)—The town of Gilbert adopted an ordinance regulating the display of outdoor signs. The general rule in the ordinance banned the display of outdoor signs. The ordinance then exempted 23 different categories of signs from the general prohibition. One of those categories was titled "Temporary Directional Signs Relating to a Qualifying Event." A qualifying event included an assembly or meeting of a religious, charitable, educational, "or other similar non-profit organization." Such signs were limited in size and location, and displayed for no more than12 hours before the qualifying event, nor more than 1 hour after its conclusion. Reed was the pastor of a church that holds its services at different locations, in part because it owns no building. It posted temporary signs at locations and during hours that violated the ordinance. The Court held the ordinance was "content based on its face," because it categorized the type of speech restriction on the basis of message related to a qualifying event. The Court compared the exemptions for "Political Signs" and "Ideological Signs," and noted that each of the three categories of signs was subject to different restrictions on location, size, and length of time it was posted. The ordinance was thus subject to the standard of strict scrutiny. The town's interests of aesthetic appeal and traffic safety were insufficient to meet this standard.

WALKER V. TEXAS DIV., SONS OF CONFEDERATE VETERANS, 576 U.S. ___, 135 S. Ct. 2239 (2015)—Texas offered its automobile owners the option of purchasing a specialty license plate. The Sons of Confederate Veterans proposed a license plate that included the Confederate battle flag. The Texas Department of Motor Vehicles Board rejected the proposal of the Sons, who sued on the ground that the Board's action violated the Free Speech Clause by engaging in viewpoint discrimination. The Court held the Board's decision whether to issue any particular specialty license plate was a form of government, not private, speech. It concluded in part that a motorist displaying a specialty license plate "likely intends to convey to the public that the State has endorsed the message." Further, this was not a "traditional public forum" case, in which the state provides a forum for private speech. Thus, "Texas is not simply managing government property, but instead is

engaging in expressive conduct."

In dissent, Justice Alito, writing for four justices, concluded, "The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing." He argued by analogy that the Court's conclusion was wrong: "If a care with a plate that says 'Rather Be Golfing' passed by at 8:30 a.m. on a Monday morning, would you think: 'This is the official policy of the State—better to golf than to work?'" The dissent also argued the slippery slope possibilities of the Court's decision. After concluding that the Board's decision was "blatant viewpoint discrimination" and acknowledging that "[s]pecialty plates may seem innocuous," it argued: "If the State can do this with little mobile billboards, could it do the same with big stationary billboards?" If the State decided to rent space on such billboards to some, but not all, interested private parties, "[c]an there be any doubt that these examples of viewpoint discrimination would violate the First Amendment?"

Insert in Chapter 8 § A.5.a. at page 657:

FCC v. FOX TELEVISION STATIONS, INC., 567 U.S. ___, 132 S. Ct. 2307 (2012)—The Court unanimously held the Federal Communication Commission's (FCC) decision to alter its regulations concerning "fleeting expletives" and brief nudity was unconstitutionally vague as applied to three instances of expletives and nudity shown on the Fox and ABC television networks. The three instances included (1) the singer Cher saying "So fuck 'em", and (2) Nicole Richie saying, "Have you ever tried to get cow shit out of a Prada bag? It's not so fucking simple," at the 2002 and 2003 Billboard Music Awards shows broadcast by Fox; and (3) the showing for seven seconds of the nude buttocks of a female character on the show *NYPD Blue* in 2003. After these events but before taking any action on the indecency complaints filed with it for each event, the FCC issued a decision sanctioning NBC for broadcasting expletives on its broadcast of the 2003 Golden Globes awards. Viewers of the Golden Globes heard Bono's comment, "This is really, really, fucking brilliant. Really, really great." The FCC found the broadcast by NBC of the word "fuck" (which the Court avoids spelling out in its opinion) was actionably indecent. The FCC's *Golden Globes* decision reversed a prior view of the FCC that fleeting expletives were not indecent.

The FCC's application of this new policy to the broadcasts by Fox and ABC failed to give the companies fair notice that such expletives and nudity violated FCC regulations. This failure to provide notice "would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon 'sensitive areas of basic First Amendment freedoms.'"

Insert in Chapter 8 § B. at page 658:

UNITED STATES v. ALVAREZ, 567 U.S. ___, 132 S. Ct. 2537 (2012)—The Court held unconstitutional the Stolen Valor Act, which made it a crime for a person falsely to claim receipt of a military medal for valor or honor (*e.g.*, the Congressional Medal of Honor). A plurality held the Act was an impermissible content-based regulation of speech.

The members of the Court reached different paths to this result. A plurality of the Court, in an opinion by Justice Kennedy, begins, "Lying was his habit." Xavier Alvarez falsely stated, at his first meeting as a member of the Three Valley Water District Board, a governmental entity in California, "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy." None of those statements was true. The plurality framed the issue in categorical terms: "Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements." Because Alvarez's false statements could not be categorized as inciting imminent lawlessness, or as defamatory speech, or classified as speech in any of the other judicially approved content-based exceptions to the rule of free speech, the Stolen Valor Act unconstitutionally infringed Alvarez's right to speak. Relatedly, upholding the Act would "endorse government authority to compile a list of subjects about which false statements are punishable," authority with "no clear limiting principle." The plurality rejected the broad argument that false statements lack constitutional protection, concluding that false statements lacked free speech protection only if accompanying some "legally cognizable harm," such as defamation or fraud. Alvarez's statements did not accompany a fraud, or defame another. They were false statements that accomplished nothing other than to ruin (eventually) Alvarez's own reputation.

Although the plurality held the government possessed a compelling interest in protecting the integrity of the military honors system, the Act was not "actually necessary to achieve the Government's stated interest." This was so because no causal link was shown between the Act and the government's interest, and because the government had not shown "why counterspeech would not suffice to achieve its interest."

Justice Breyer concurred in the judgment, joined by Justice Kagan. He rejected the plurality's categorical analysis, but concurred because the government could achieve its interests through less restrictive ways. He applied "intermediate scrutiny" because the law did not restrict false statements about valuable ideas but only "false statements about easily verifiable facts that do not concern such subject matter." He noted that some false factual statements "can serve useful human objectives," such as preventing embarrassment, protecting privacy, or sheltering someone from harm. Consequently, the Court needed to protect some false statements. Because the Stolen Valor Act lacked any limiting features in criminalizing the "telling of a lie," its breadth "means that it creates a significant risk of First Amendment harm." The breadth of the Act also created the risk of selective prosecution of those liars who found themselves in disfavor with the government. Further, the government's objective could be obtained in a less burdensome way, making the Act unconstitutional under intermediate scrutiny. Moreover, the concurrence concluded that a more

"finely tailored statute," would likely survive constitutional attack.

The dissent by Justice Alito concluded that prior cases had declared that "the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest." In response to Justice Breyer's listing of justifications for false statements of fact, he noted that Alvarez's statements "did not fall into any of these categories." Justice Alito turned on its head the approach taken by the plurality, taking as his starting point the fact that Alvarez's statements "served no valid purpose." Instead of assessing whether Alvarez's statements could properly be located in one or more of the low-value speech categories, the dissent opening proposition is that Alvarez's statement lack any speech value. The dissent then concluded that criminalizing Alvarez's speech did not "chill other expression that falls within the [First] Amendment's scope."

Congress responded to the invitation of the concurring opinion by amending the Act, which was signed into law by President Obama in 2013. The revised act stated, in part, "Whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described in subsection (c)(2) or (d) shall be fined under this title, imprisoned not more than one year, or both."

Insert in Chapter 8 § B.5. at page 744:

The Court's holding in *FCC v. Fox Television Stations, Inc.*, 567 U.S. ___, 132 S. Ct. 2307 (2012), that the FCC failed to give Fox and ABC fair notice meant it did not decide whether (a) the Court's ruling in *Pacifica* remained good law, nor (b) whether the FCC's current indecency policy is constitutional.

Insert in Chapter 8 § D.1. at page 804:

WILLIAMS-YULEE V. FLORIDA BAR
575 U.S. ___, 135 S. Ct. 1656 (2015)

Chief Justice ROBERTS delivered the opinion of the Court, except as to Part II.

In 39 States, voters elect trial or appellate judges at the polls. In an effort to preserve public confidence in the integrity of their judiciaries, many of those States prohibit judges and judicial candidates from personally soliciting funds for their campaigns. We must decide whether the First Amendment permits such restrictions on speech.

We hold that it does. Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money. We affirm the judgment of the Florida Supreme Court.

I
A

In the early 1970s, four Florida Supreme Court justices resigned from office following corruption scandals. Florida voters responded by amending their Constitution again. Under the system now in place, appellate judges are appointed by the Governor from a list of candidates proposed by a nominating committee—a process known as "merit selection." Then, every six years, voters decide whether to retain incumbent appellate judges for another term. Trial judges are still elected by popular vote, unless the local jurisdiction opts instead for merit selection.

Amid the corruption scandals of the 1970s, the Florida Supreme Court adopted a new Code of Judicial Conduct. In its present form, the first sentence of Canon 1 reads, "An independent and honorable judiciary is indispensable to justice in our society." Canon 1 instructs judges to observe "high standards of conduct" so that "the integrity and independence of the judiciary may be preserved." Canon 2 directs that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Canon 7C(1) governs fundraising in judicial elections. The Canon, which is based on a provision in the American Bar Association's Model Code of Judicial Conduct, provides:

> "A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her

> candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law."

Florida statutes impose additional restrictions on campaign fundraising in judicial elections. Contributors may not donate more than $1,000 per election to a trial court candidate or more than $3,000 per retention election to a Supreme Court justice.

Like Florida, most other States prohibit judicial candidates from soliciting campaign funds personally, but allow them to raise money through committees. According to the American Bar Association, 30 of the 39 States that elect trial or appellate judges have adopted restrictions similar to Canon 7C(1).

B

Lanell Williams–Yulee has practiced law in Florida since 1991. In September 2009, she decided to run for a seat on the county court for Hillsborough County. Shortly after filing paperwork to enter the race, Yulee drafted a letter announcing her candidacy. The letter described her experience and desire to "bring fresh ideas and positive solutions to the Judicial bench." The letter then stated:

> "An early contribution of $25, $50, $100, $250, or $500, made payable to 'Lanell Williams–Yulee Campaign for County Judge', will help raise the initial funds needed to launch the campaign and get our message out to the public. I ask for your support [i]n meeting the primary election fund raiser goals. Thank you in advance for your support."

Yulee signed the letter and mailed it to local voters. She also posted the letter on her campaign Web site.

She lost the primary to the incumbent judge. Then the Florida Bar filed a complaint against her. [T]he Bar charged her with violating applicable provisions of Florida's Code of Judicial Conduct, including the ban on personal solicitation of campaign funds in Canon 7C(1).

Yulee admitted that she had signed and sent the fundraising letter. But she argued that the Bar could not discipline her for that conduct because the First Amendment protects a judicial candidate's right to solicit campaign funds in an election.

The Florida Supreme Court acknowledged that some Federal Courts of Appeals—"whose judges have lifetime appointments and thus do not have to engage in fundraising"—had invalidated restrictions similar to Canon 7C(1). But the court found it persuasive that every State Supreme Court that had considered similar fundraising provisions—along with several Federal Courts of Appeals—had upheld the laws against First Amendment challenges. We granted certiorari.

II

The parties agree that Canon 7C(1) restricts Yulee's speech on the basis of its content by prohibiting her from soliciting contributions to her election campaign. The parties disagree, however, about the level of scrutiny that should govern our review.

We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest.

The principles underlying these charitable solicitation cases apply with even greater force here. Before asking for money in her fundraising letter, Yulee explained her fitness for the bench and expressed her vision for the judiciary. Her stated purpose for the solicitation was to get her "message out to the public." As we have long recognized, speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection. Indeed, in our only prior case concerning speech restrictions on a candidate for judicial office, this Court and both parties assumed that strict scrutiny applied. *Republican Party of Minn. v. White*.

[T]he Florida Bar and several *amici* contend that we should subject the Canon to a more permissive standard: that it be "closely drawn" to match a "sufficiently important interest." *Buckley v. Valeo*. The "closely drawn" standard is a poor fit for this case. The Court adopted that test in *Buckley* to address a claim that campaign contribution limits violated a contributor's "freedom of political association." Here, Yulee does not claim that Canon 7C(1) violates her right to free association; she argues that it violates her right to free speech. And the Florida Bar can hardly dispute that the Canon infringes Yulee's freedom to discuss candidates and public issues—namely, herself and her qualifications to be a judge.

In sum, we hold today what we assumed in *White*: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.

III

We have emphasized that "it is the rare cae" in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. But those cases do arise. Here, Canon 7C(1) advances the State's compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech. This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny.

A

The Florida Supreme Court adopted Canon 7C(1) to promote the State's interests in "protecting the integrity of the judiciary" and "maintaining the public's confidence in an impartial judiciary." The way the Canon advances those interests is intuitive: Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public

confidence in judicial integrity. This principle dates back at least eight centuries to Magna Carta, which proclaimed, "To no one will we sell, to no one will we refuse or delay, right or justice." Cl. 40 (1215). The same concept underlies the common law judicial oath, which binds a judge to "do right to all manner of people ... without fear or favour, affection or ill-will," and the oath that each of us took to "administer justice without respect to persons, and do equal right to the poor and to the rich." Simply put, Florida and most other States have concluded that the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors.

The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary "has no influence over either the sword or the purse; ... neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, "justice must satisfy the appearance of justice." It follows that public perception of judicial integrity is "a state interest of the highest order."

The parties devote considerable attention to our cases analyzing campaign finance restrictions in political elections. But a State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections. As we explained in *White*, States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians. Politicians are expected to be appropriately responsive to the preferences of their supporters. The same is not true of judges. In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. A judge instead must "observe the utmost fairness," striving to be "perfectly and completely independent, with nothing to influence or controul him but God and his conscience." Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829–1830, p. 616 (1830).

In the eyes of the public, a judge's personal solicitation could result (even unknowingly) in "a possible temptation ... which might lead him not to hold the balance nice, clear and true." *Tumey v. Ohio,* 273 U.S. 510, 532 (1927). That risk is especially pronounced because most donors are lawyers and litigants who may appear before the judge they are supporting.

The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling. In short, it is the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity that prompted the Supreme Court of Florida and most other States to sever the direct link between judicial candidates and campaign contributors. Moreover, personal solicitation by a judicial candidate "inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate." Potential litigants then fear that "the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory

contributions." A State's decision to elect its judges does not require it to tolerate these risks. The Florida Bar's interest is compelling.

B

Yulee argues that the Canon's failure to restrict other speech equally damaging to judicial integrity and its appearance undercuts the Bar's position. In particular, she notes that Canon 7C(1) allows a judge's campaign committee to solicit money, which arguably reduces public confidence in the integrity of the judiciary just as much as a judge's personal solicitation. Yulee also points out that Florida permits judicial candidates to write thank you notes to campaign donors, which ensures that candidates know who contributes and who does not.

It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech. We have recognized, however, that underinclusiveness can raise "doubts about whether the government is in fact pursuing the interest it invokes."

Although a law's underinclusivity raises a rede flag, the First Amendment imposes no freestanding "underinclusiveness limitation." A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests.

Viewed in light of these principles, Canon 7C(1) raises no fatal underinclusivity concerns. The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates. The Canon applies evenhandedly to all judges and judicial candidates, regardless of their viewpoint or chosen means of solicitation. And unlike some laws that we have found impermissibly underinclusive, Canon 7C(1) is not riddled with exceptions. Indeed, the Canon contains zero exceptions to its ban on personal solicitation.

Yulee relies heavily on the provision of Canon 7C(1) that allows solicitation by a candidate's campaign committee. But Florida, along with most other States, has reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee. The identity of the solicitor matters, as anyone who has encountered a Girl Scout selling cookies outside a grocery store can attest. When the judicial candidate himself asks for money, the stakes are higher for all involved. The candidate has personally invested his time and effort in the fundraising appeal; he has placed his name and reputation behind the request. The solicited individual knows that, and also knows that the solicitor might be in a position to singlehandedly make decisions of great weight: The same person who signed the fundraising letter might one day sign the judgment. This dynamic inevitably creates pressure for the recipient to comply, and it does so in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no.

In short, personal solicitation by judicial candidates implicates a different problem than solicitation by campaign committees.

Likewise, allowing judicial candidates to write thank you notes to campaign donors does not detract from the State's interest in preserving public confidence in the integrity of the judiciary. Yulee argues that permitting thank you notes heightens the likelihood of actual bias by ensuring that judicial candidates know who supported their campaigns, and ensuring that the supporter knows that the candidate knows. Maybe so. But the State's compelling interest is implicated most directly by the candidate's personal solicitation itself. A failure to ban thank you notes for contributions not solicited by the candidate does not undercut the Bar's rationale.

In addition, the State has a good reason for allowing candidates to write thank you notes and raise money through committees. These accommodations reflect Florida's effort to respect the First Amendment interests of candidates and their contributors—to resolve the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics."

Taken to its logical conclusion, the position advanced by Yulee and the principal dissent is that Florida may ban the solicitation of funds by judicial candidates only if the State bans *all* solicitation of funds in judicial elections. The First Amendment does not put a State to that all-or-nothing choice. We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive.

C

Yulee argues the Canon is not narrowly tailored to advance the State's compelling interest through the least restrictive means.

By any measure, Canon 7C(1) restricts a narrow slice of speech. Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, "Please give me money." They can, however, direct their campaign committees to do so.

Yulee acknowledges that Florida can prohibit judges from soliciting money from lawyers and litigants appearing before them. In addition, she says the State "might" be able to ban "direct one-to-one solicitation of lawyers and individuals or businesses that could reasonably appear in the court for which the individual is a candidate." She also suggests that the Bar could forbid "in person" solicitation by judicial candidates. But Yulee argues that the Canon cannot constitutionally be applied to her chosen form of solicitation: a letter posted online and distributed via mass mailing. No one, she contends, will lose confidence in the integrity of the judiciary based on personal solicitation to such a broad audience.

This argument misperceives the breadth of the compelling interest that underlies Canon 7C(1). Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the interest remains whenever the public perceives the judge personally asking for money.

Moreover, the lines Yulee asks us to draw are unworkable. Even under her theory of the case, a mass mailing would create an appearance of impropriety if addressed to a list of all lawyers and litigants with pending cases. So would a speech soliciting contributions from the 100 most frequently appearing attorneys in the jurisdiction. Yulee says she might accept a ban on one-to-one solicitation, but is the public impression really any different if a judicial candidate tries to buttonhole not one prospective donor but two at a time? Ten? Yulee also agrees that in person solicitation creates a problem. But would the public's concern recede if the request for money came in a phone call or a text message?

We decline to wade into this swamp. The First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be "perfectly tailored." The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary. Florida has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern.

Finally, Yulee contends that Florida can accomplish its compelling interest through the less restrictive means of recusal rules and campaign contribution limits. We disagree. A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. And a flood of postelection recusal motions could "erode public confidence in judicial impartiality" and thereby exacerbate the very appearance problem the State is trying to solve. Moreover, the rule that Yulee envisions could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal—a form of peremptory strike against a judge that would enable transparent forum shopping.

In sum, because Canon 7C(1) is narrowly tailored to serve a compelling government interest, the First Amendment poses no obstacle to its enforcement in this case.

Justice GINSBURG, with whom Justice BREYER joins as to Part II, concurring in part and concurring in the judgment.

I

I join the Court's opinion save for Part II. I would not apply exacting scrutiny to a State's endeavor sensibly to "differentiate elections for political offices ..., from elections designed to select those whose office it is to administer justice without respect to persons." [*White*, Ginsburg, J., dissenting.]

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Faithful application of our precedents would have made short work of this wildly disproportionate restriction upon speech. Intent upon upholding the Canon, however, the Court flattens one settled First Amendment principle after another.

I

The first axiom of the First Amendment is this: As a general rule, the state has no power to ban speech on the basis of its content. One need not equate judges with politicians to see that this principle does not grow weaker merely because the censored speech is a judicial candidate's request for a campaign contribution. Our cases hold that speech enjoys the full protection of the First Amendment unless a widespread and longstanding tradition ratifies its regulation. No such tradition looms here. [T]here appears to have been no regulation of judicial candidates' speech throughout the 19th and early 20th centuries. The American Bar Association first proposed ethics rules concerning speech of judicial candidates in 1924, but these rules did not achieve widespread adoption until after the Second World War.

Even now, 9 of the 39 States that elect judges allow judicial candidates to ask for campaign contributions. In the absence of any long-settled custom about judicial candidates' speech in general or their solicitations in particular, we have no basis for relaxing the rules that normally apply to laws that suppress speech because of content.

When a candidate asks someone for a campaign contribution, he tends (as the principal opinion acknowledges) also to talk about his qualifications for office and his views on public issues. This expression lies at the heart of what the First Amendment is meant to protect. In addition, banning candidates from asking for money personally "favors some candidates over others—incumbent judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders." This danger of legislated (or judicially imposed) favoritism is the very reason the First Amendment exists.

Canon 7C(1) does not narrowly target concerns about impartiality or its appearance; it applies even when the person asked for a financial contribution has no chance of ever appearing in the candidate's court. And Florida does not invoke concerns about coercion, presumably because the Canon bans solicitations regardless of whether their object is a lawyer, litigant, or other person vulnerable to judicial pressure. So Canon 7C(1) fails exacting scrutiny and infringes the First Amendment.

II

A

The first sign that mischief is afoot comes when the Court describes Florida's compelling

interest. The State must first identify its objective with precision before one can tell whether that interest is compelling and whether the speech restriction narrowly targets it.

[T]he Court today relies on Florida's invocation of an ill-defined interest in "public confidence in judicial integrity." The Court at first suggests that "judicial integrity" involves the "ability to administer justice without fear or favor." As its opinion unfolds, however, today's concept of judicial integrity turns out to be "a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please." 12 The Works of Thomas Jefferson 137 (P. Ford ed. 1905). When the Court explains how solicitation undermines confidence in judicial integrity, integrity starts to sound like saintliness. When the Court turns to distinguishing in-person solicitation from solicitation by proxy, the any-possible-temptation standard no longer helps and thus drops out. The critical factors instead become the "pressure" a listener feels during a solicitation and the "appearance that the candidate will remember who says yes, and who says no." But when it comes time to explain Florida's decision to allow candidates to write thank-you notes, the "appearance that the candidate ... remember[s] who says yes" gets nary a mention. And when the Court confronts Florida's decision to prohibit mass-mailed solicitations, concern about pressure fades away. More outrageous still, the Court at times molds the interest in the perception that judges have integrity into an interest in the perception that judges do not solicit—for example when it says, "all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern." This is not strict scrutiny; it is sleight of hand.

B

The Court's twistifications have not come to an end; indeed, they are just beginning. In order to uphold Canon 7C(1) under strict scrutiny, Florida must also meet a difficult burden of demonstrating that the speech restriction substantially advances the claimed objective.

[T]his case is not about whether Yulee has the right to receive campaign contributions. It is about whether she has the right to *ask* for campaign contributions that Florida's statutory law already allows her to receive. Florida bears the burden of showing that banning *requests* for lawful contributions will improve public confidence in judges—not just a little bit, but significantly, because "the Government does not have a compelling interest in each marginal percentage point by which its goals are advanced."

Neither the Court nor the State identifies the slightest evidence that banning requests for contributions will substantially improve public trust in judges. Nor does common sense make this happy forecast obvious. The concept of judicial integrity "dates back at least eight centuries," and judicial elections in America date back more than two centuries—but rules against personal solicitations date back only to 1972. The peaceful coexistence of judicial elections and personal solicitations for most of our history calls into doubt any claim that allowing personal solicitations would imperil public faith in judges. Many States allow judicial candidates to ask for contributions even today, but nobody suggests that public confidence in judges fares worse in these jurisdictions

than elsewhere.

C

Florida must show that the ban restricts no more speech than necessary to achieve the objective.

Canon 7C(1) falls miles short of satisfying this requirement. The Court seems to accept Florida's claim that solicitations erode public confidence by creating the perception that judges are selling justice to lawyers and litigants. Yet the Canon prohibits candidates from asking for money from *anybody*. Yulee thus may not call up an old friend, a cousin, or even her parents to ask for a donation to her campaign. The State has not come up with a plausible explanation of how soliciting someone who has no chance of appearing in the candidate's court will diminish public confidence in judges.

Canon 7C(1) bans candidates from asking for contributions even in messages that do not target any listener in particular—mass-mailed letters, flyers posted on telephone poles, speeches to large gatherings, and Web sites addressed to the general public. Messages like these do not share the features that lead the Court to pronounce personal solicitations a menace to public confidence in the judiciary. Consider online solicitations. People who come across online solicitations do not feel "pressure" to comply with the request. Yet Canon 7C(1) prohibits these and similar solicitations anyway. This tailoring is as narrow as the Court's scrutiny is strict.

[The Court] could have held that States may regulate no more than solicitation of participants in pending cases, or solicitation of people who are likely to appear in the candidate's court, or even solicitation of any lawyer or litigant. And it could have ruled that candidates have the right to make fundraising appeals that are not directed to any particular listener (like requests in mass-mailed letters), or at least fundraising appeals plainly directed to the general public (like requests placed online). The Supreme Court of Florida has made similar accommodations in other settings. It is not too much to ask that the State show election speech similar consideration.

Consider the many real-world questions left open by today's decision. Does the First Amendment permit restricting a candidate's appearing at an event where somebody *else* asks for campaign funds on his behalf? Does it permit prohibiting the candidate's *family* from making personal solicitations? Does it allow prohibiting the candidate from participating in the creation of a Web site that solicits funds, even if the candidate's name does not appear next to the request? More broadly, could Florida ban thank-you notes to donors? Cap a candidate's campaign spending? Restrict independent spending by people other than the candidate? Ban independent spending by corporations? And how, by the way, are judges supposed to decide whether these measures promote public confidence in judicial integrity, when the Court does not even have a consistent theory about what it means by "judicial integrity"?

D

Among its other functions, the First Amendment is a kind of Equal Protection Clause for ideas. The state ordinarily may not regulate one message because it harms a government interest yet refuse to regulate other messages that impair the interest in a comparable way. Applying this principle, we invalidated a law that prohibited picketing dwellings but made an exception for picketing about labor issues. In another case, we set aside a ban on showing movies containing nudity in drive-in theaters, because the government did not demonstrate that movies with nude scenes would distract passing drivers any more than, say, movies with violent scenes.

The Court tells us that "all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary." But Canon 7C(1) does not restrict *all* personal solicitations; it restricts only personal solicitations related to campaigns. The part of the Canon challenged here prohibits personal pleas for "campaign funds," and the Canon elsewhere prohibits personal appeals to attorneys for "publicly stated support." So although Canon 7C(1) prevents Yulee from asking a lawyer for a few dollars to help her buy campaign pamphlets, it does not prevent her asking the same lawyer for a personal loan, access to his law firm's luxury suite at the local football stadium, or even a donation to help her fight the Florida Bar's charges. What could possibly justify these distinctions? Surely the Court does not believe that requests for campaign favors erode public confidence in a way that requests for favors unrelated to elections do not.

Fumbling around for a fig-leaf, the Court says that "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" This analysis elides the distinction between selectivity on the basis of content and selectivity on other grounds. Because the First Amendment does not prohibit underinclusiveness as such, lawmakers may target a problem only at certain times or in certain places. Because the First Amendment *does* prohibit content discrimination as such, lawmakers may *not* target a problem only in certain messages. Explaining this distinction, we have said that the First Amendment would allow banning obscenity "only in certain media or markets" but would preclude banning "only that obscenity which includes offensive political messages." This case involves selectivity on the basis of content. The Florida Supreme Court has decided to eliminate the appearances associated with "personal appeals for money," when the appeals seek money for a campaign but not when the appeals seek money for other purposes. That distinction violates the First Amendment.

Canon 7C(1)'s scope suggests that it has nothing to do with the appearances created by judges' asking for money, and everything to do with hostility toward judicial campaigning. How else to explain the Florida Supreme Court's decision to ban *all* personal appeals for campaign funds (even when the solicitee could never appear before the candidate), but to tolerate appeals for other kinds of funds (even when the solicitee will surely appear before the candidate)? It should come as no surprise that the ABA, whose model rules the Florida Supreme Court followed when framing Canon 7C(1), opposes judicial elections—preferring instead a system in which (surprise!) a committee of lawyers proposes candidates from among whom the Governor must make his selection.

A Court that sees impropriety in a candidate's request for *any* contributions to his election campaign does not much like judicial selection by the people. One cannot have judicial elections without judicial campaigns, and judicial campaigns without funds for campaigning, and funds for campaigning without asking for them. When a society decides that its judges should be elected, it necessarily decides that selection by the people is more important than the oracular sanctity of judges, their immunity from the (shudder!) indignity of begging for funds, and their exemption from those shadows of impropriety that fall over the proletarian public officials who must run for office. A free society, accustomed to electing its rulers, does not much care whether the rulers operate through statute and executive order, or through judicial distortion of statute, executive order, and constitution. The prescription that judges be elected probably springs from the people's realization that their judges can become their rulers—and (it must be said) from just a deep-down feeling that members of the Third Branch will profit from a hearty helping of humble pie, and from a severe reduction of their great remove from the (ugh!) People. (It should not be thought that I myself harbor such irreverent and revolutionary feelings; but I think it likely—and year by year more likely—that those who favor the election of judges do so.)

* * *

The First Amendment is not abridged for the benefit of the Brotherhood of the Robe.

Justice KENNEDY, dissenting.

The individual speech here is political speech. The process is a fair election. These realms ought to be the last place, not the first, for the Court to allow unprecedented content-based restrictions on speech. The Court's decision in this case imperils the content neutrality essential both for individual speech and the election process.

[The Court's] decision rests on two premises, neither one correct. One premise is that in certain elections—here an election to choose the best qualified judge—the public lacks the necessary judgment to make an informed choice. Instead, the State must protect voters by altering the usual dynamics of free speech. The other premise is that since judges should be accorded special respect and dignity, their election can be subject to certain content-based rules that would be unacceptable in other elections. In my respectful view neither premise can justify the speech restriction at issue here. Although States have a compelling interest in seeking to ensure the appearance and the reality of an impartial judiciary, it does not follow that the State may alter basic First Amendment principles in pursuing that goal.

While any number of troubling consequences will follow from the Court's ruling, a simple example can suffice to illustrate the dead weight its decision now ties to public debate. Assume a judge retires, and two honest lawyers, Doe and Roe, seek the vacant position. Doe is a respected, prominent lawyer who has been active in the community and is well known to business and civic leaders. Roe, a lawyer of extraordinary ability and high ethical standards, keeps a low profile. As soon as Doe announces his or her candidacy, a campaign committee organizes of its own accord and

begins raising funds. But few know or hear about Roe's potential candidacy, and no one with resources or connections is available to assist in raising the funds necessary for even a modest plan to speak to the electorate. Today the Court says the State can censor Roe's speech, imposing a gag on his or her request for funds, no matter how close Roe is to the potential benefactor or donor. The result is that Roe's personal freedom, the right of speech, is cut off by the State.

The First Amendment consequences of the Court's ruling do not end with its denial of the individual's right to speak. For the very purpose of the candidate's fundraising was to facilitate a larger speech process: an election campaign. By cutting off one candidate's personal freedom to speak, the broader campaign debate that might have followed—a debate that might have been informed by new ideas and insights from both candidates—now is silenced.

In addition to narrowing the First Amendment's reach, there is another flaw in the Court's analysis. That is its error in the application of strict scrutiny. The Court's evisceration of that judicial standard now risks long-term harm to what was once the Court's own preferred First Amendment test. The candidate who is not wealthy or well connected cannot ask even a close friend or relative for a bit of financial help, despite the lack of any increased risk of partiality and despite the fact that disclosure laws might be enacted to make the solicitation and support public. This law comes nowhere close to being narrowly tailored. And by saying that it survives that vital First Amendment requirement, the Court now writes what is literally a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes.

Justice ALITO, dissenting.

[T]he Florida rule is .. about as narrowly tailored as a burlap bag. It applies to all solicitations made in the name of a candidate for judicial office—including, as was the case here, a mass mailing. It even applies to an ad in a newspaper. It applies to requests for contributions in any amount, and it applies even if the person solicited is not a lawyer, has never had any interest at stake in any case in the court in question, and has no prospect of ever having any interest at stake in any litigation in that court. If this rule can be characterized as narrowly tailored, then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired.

Insert in Chapter 8 § D.2. at page 805:

In *McCutcheon v. Federal Election Comm'n*, 572 U.S. ___, 134 S. Ct. 1434 (2014), the Court held unconstitutional a provision of the Federal Election Campaign Act of 1971, as amended in the Bipartisan Campaign Reform Act of 2002, that limited campaign contributions. The challenged provision limited "how much money a donor may contribute to in total to all candidates or committees," and was known as the aggregate limits. The statute allowed a person to contribute an aggregate amount of "up to $123,200 to candidate and noncandidate committees during each two-year election cycle." McCutcheon claimed he wanted to contribute money to additional candidates but was barred by the aggregate limits provision. The Court did not revisit the distinction between contributions and expenditures evoked in *Buckley*, concluding that "[b]ecause we find a substantial mismatch between the Government's stated objective and the means selected to achieve it, the aggregate limits fail even under the 'closely drawn' test." After declaring inapposite "three sentences" on the subject in *Buckley*, the Court held "the aggregate limits prohibit an individual from fully contributing to the primary or general election campaigns of ten or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption." The government's interest in the "prevention of corruption or the appearance of corruption" was insufficient. The Court first noted that this governmental interest was more specifically the interest in preventing "a specific type of corruption—'*quid pro quo*' corruption." Gaining influence or greater access to public officials was not a constitutionally sufficient interest, nor was the prevention of "[s]pending large sums of money in connection with elections, [which was not] an effort to control the exercise of an officeholder's official duties."

Insert in Chapter 8 § E.3. at page 817:

HARRIS V. QUINN, 573 U.S. ___, 134 S. Ct. 2618 (2014)—The issue, according to the Court, was "whether the First Amendment permits a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support." It concluded that the First Amendment did not so permit. The federal Medicaid program permits states that operate programs that provide in-home services to those unable to live at home without assistance to receive reimbursement for the costs associated with the home personal care. Illinois (like most other states) created such a program, called a Rehabilitation Program. Under this program, the person in need of personal care, called the "customer," may hire a personal assistant, often a family member. The personal assistant is paid by the state, which is reimbursed through Medicaid. Even if the personal assistant who provides personal care is a family member, Illinois law declares that the customer and the personal assistant are employer and employee. In 2003, Illinois adopted a law making personal assistants public employees, but only for the purpose of organizing collectively to bargain on wages and benefits. Illinois law authorizes public employees to join labor unions which engage in collective bargaining for its members. After it made personal assistants public employees for this bargaining purpose, SEIU Healthcare Illinois & Indiana (SEIU-HII), pursuant to a vote of personal assistants, was made the exclusive agent of personal assistants for the purpose of collective bargaining. A public employee who does not want to join the union is required to pay an agency fee to the union that reflects the employee's share of the costs of collective bargaining. This fee is deducted from the employee's paycheck and paid to the union. Illinoios and SEIU-HII agreed that all personal assistants who were not members of SEIU-HII were required to pay an agency fee.

Several personal assistants sued for an injunction prohibiting enforcement of the agency fee agreement and for an order declaring the law violates the First Amendment by compelling them to pay a fee to a union they do not want to join. In holding the Illinois law unconstitutional on First Amendment grounds, the Court looked at both its 2012 decision in *Knox v. Service Employees* and *Aboud v. Detroit Bd. of Educ*. After strongly criticizing the Court's reasoning in *Abood*, it held Abood inapplicable to the personal assistants who were public employees solely for the purpose of collective bargaining. It then relied on the conclusion in *Knox* that an agency fee requirement creates "'a significant impingement on First Amendment rights,' and this cannot be tolerated unless it passes 'exacting First Amendment scrutiny.'" The Court then held that the agency fee requirement imposed on personal assistants did not pass the *Knox* standard.

The Court concluded by declaring its decision was consonant with both *Keller v. State Bar of California* and the following primary case, *Board of Regents of the University of Wisconsin System v. Southworth*.

Insert in Chapter 8 § E.3. at page 821:

KNOX v. SERVICE EMPLOYEES INT'L UNION, 567 U.S. ___, 132 S. Ct. 2277 (2012)—Knox was not a member of the Service Employees International Union (SEIU). She was, however, part of a bargaining unit in a public-sector job in which the SEIU represented all employees. She was thus required to pay an "agency fee" for chargeable expenses, which excluded expenses for "political and ideological projects" of the SEIU to which she objected. After sending out its annual notice concerning the amount of the agency fee, and shortly after the end of the period nonmembers had to object, the SEIU proposed a temporary increase in fees to "achieve the union's political objectives." Nonmembers were not given an additional notice allowing them to object to this special assessment for political activities. The Court noted that "compelled funding of the speech of other private speakers or groups" was "subject to exacting First Amendment scrutiny." Such compelled funding was constitutional only if (1) compelled funding was through a comprehensive regulatory scheme for a mandatory association, a situation the Court noted was "exceedingly rare"; and (2) compulsory fees were to be imposed as a "necessary incident" of a larger regulatory purpose justifying the association's existence.

The Court held the SEIU's failure to allow nonmembers to opt out before billing all employees of the special assessment, and the requirement that nonmembers pay more than half the special assessment even though the assessment was for the expenditure of funds for political purposes, violated the First Amendment rights of the nonmembers. In addition, as noted in Justice Sotomayor's opinion concurring in the judgment, the Court decided that "the First Amendment *does* require an opt-in system in some circumstances: the levying of a special assessment or dues increase."

Insert in Chapter 9 § B. at page 864:

In *Town of Greece v. Galloway*, 572 U.S. ___, 134 S. Ct. 1811 (2014), the Court held constitutional legislative prayer at town council meetings in Greece, New York, as consonant with the rule it adopted in *Marsh v. Chambers*. It stated that *Marsh* should "not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation," but rather as standing "for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."

Insert in Chapter 9 § C. at page 906:

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL v. EEOC, 565 U.S. ___, 132 S. Ct. 694 (2012)—The Court held that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. ... By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." In addition, "[a]ccording the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." The Court also rejected the government's assertion that *Employment Division v. Smith* forbade the Court from recognizing this ministerial exception to federal employment discrimination laws: "[A] church's selection of its ministers is unlike an individual's ingestion of peyote," for the former involved an internal decision affecting the mission of the church, not a "physical act." Finally, the Court rejected the "parade of horribles" argument of the government and the individual plaintiff, in part by noting the acknowledged limits of the exception (*i.e.*, it did not bar criminal prosecution of a minister for acts made arguably in ministerial service), and in part by leaving for another day the extent of the exception.